

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes¹, and the adoption of rules to promote responsiveness, such as “silence is consent”.² Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment

Data on compliance with regulations is not collected on an aggregate basis, however the compliance record is assessed to be good. Sweden, like most other European countries, does not monitor compliance rates, yet this could be important in order to evaluate the effectiveness of the current regulatory system in this regard, and to guide next steps in enforcement policy. The issue could also be built into to the

impact assessment process, via a requirement to review *ex post* the actual effectiveness of adopted regulations compared with expectations, as well as an emphasis in *ex ante* impact assessment to consider likely compliance and enforcement issues downstream.

Recommendation 6.1. Consider a review of compliance rates, based as far as possible on data that is already available, in order to guide further steps for enforcement policy, and to feed back into the framework for *ex ante* impact analysis (paying more attention to issues of compliance and enforcement when a new regulation is under development).

The current approach to enforcement is complex and widely acknowledged to be in need of reform. Enforcement responsibilities are spread across a range of bodies, and regulated in different ways through more than 230 laws. This makes it hard to identify the best from the “not so good” performers and to promote new, more efficient and streamlined approaches to enforcement. The issue has also been highlighted in the 2007 Parliamentary Committee on Public Sector Responsibilities. The government has started to take steps to rationalise and clarify responsibilities, through organisational changes in some specific sectors. The general direction of further reforms has been expressed in a report by the Government to Parliament in December 2009. Reform would, in particular, lay the groundwork for encouraging the further deployment of approaches such as the use of risk analysis to determine the optimum frequency of inspections.

Recommendation 6.2. Continue the efforts at reform in order to streamline the system and improve efficiency. As part of this, consider how to encourage the spread of risk based approaches to inspection, as a means of minimising burdens on companies and improving public sector efficiency, using the experience of other European countries such as the Netherlands as a guide.

The Swedish appeal system is strongly rooted in a culture that protects citizens’ rights, and an issue with appeal delays is being tackled with noticeable effects. Swedish appeal processes for contesting administrative decisions are well established and well structured. The government is aware that there is an issue of delays in reaching decisions on appeals, partly due to a rise in the number of cases, and it is taking action.

Background

Compliance and enforcement

Compliance

There are no aggregate statistics on the level of compliance with regulations, and compliance rates are not monitored on an aggregate level. However, “the general level of compliance with regulations must be assessed as good”.³ The lack of appropriate sanctions for non-compliance with regulations was raised with the OECD peer review

team. The *NNR* underlines that efficient regulations must be easy to understand and comply with, and that this needs attention when regulations are developed.

Enforcement (supervision)

The task of enforcement (supervision) is currently shared between more than 90 government agencies (including the 21 County Administrative Boards) and the 290 municipalities. The county councils have no supervisory responsibilities. There are also, in few cases, private bodies with a delegated responsibility for enforcement/supervision.⁴ Enforcement is regulated and organised, in different ways, through more than 230 laws issued by the *Riksdag*, along with ordinances issued by the central government and regulations issued by the government agencies. The different models of organisation has so far developed *ad hoc*, with recent changes mostly towards greater clarity, centralisation and rationalisation, *i.e.* moving responsibility for supervision in a sector from municipalities to County Administrative boards or from County Administrative Boards to an agency covering the whole country. Some important changes have been made, for example, in the transport, nuclear safety and discrimination sectors, where government agencies have been merged, and animal safety, where responsibility has been moved from 290 municipalities to 21 County Administrative Boards.

The current system is widely acknowledged to require further reform. Until recently a generally applicable definition of what is meant by “inspection” in the legal system did not exist (although in some areas of legislation there has been a definition for some time). The report 2009/10:79 now includes a general definition. The problem was a lack of distinction between the drafting of a regulation, and its execution through information activities and inspection. This can cause problems both for “inspectors” and the “inspected”. It can also complicate the evaluation of the results and efficiency of supervisory authorities. Another issue is the cumulative effect for companies of inspections which may be required by a range of government agencies relating to the same activity.

The government has initiated an analysis of inspection and supervision activities in order to make inspections more distinct and efficient as an instrument for better compliance. A new framework has been put in place for the execution of inspections which also addresses financing principles and the role of the municipalities in inspection. The general direction of further reforms has been expressed in a report by the Government to Parliament in December 2009 (skr. 2009/10:79). This report notes that municipalities’ role in supervision has many positive aspects, but also some drawbacks. The municipalities are numerous and some are small. The state will in future need to take a greater part in guidance and follow-up of the supervision carried out by municipalities. In future decisions on the organisational model of supervision in a sector, the Government notes that the advantages of municipalities’ proximity to citizens and businesses should be assessed against the risks of spreading responsibility to 290 separate actors.

A report issued in 2007 by a committee of the *Riksdag* also proposed change. It recommended that supervisory activities be rationalised (Box 6.1).

Box 6.1. Parliamentary Committee on Public Sector Responsibilities: enforcement/supervision proposals

The Parliamentary Committee on Public Sector Responsibilities released a report in February 2007 which recommended (among other issues) a new approach to enforcement (supervision), moving responsibilities to the level of central government. Currently municipalities are responsible for the enforcement of regulations in a number of areas. However, it is not always easy to isolate the enforcement responsibility, as some supervisory activities are linked to other activities of the municipalities, and the current system is complex (3 levels where distribution of responsibilities is not always easy to understand). The Committee recommends promoting co-ordination through the County Administrative Boards, for greater coherence and transparency (21 regional levels instead of 300 municipalities). See also Box 8.2 Chapter 8.

External stakeholders have also raised issues. The *NNR* records that many companies testify to variations in the approach to enforcement and the cost of compliance, which may vary considerably depending on the municipality to which a company is attached. Problems also arise where responsibilities are shared between government agencies and municipalities. The *NNR* suggests that enforcement should become more uniform, more cost effective (albeit with adequate resources), and less arbitrary. Inspectors should receive more support and training.

As in most other EU countries, there is no regular collection of statistics on the aggregate resources devoted to enforcement. In 2000, the total cost of inspection activities was roughly estimated at SEK 4.2 million. The cost is shared in approximately equal parts between government agencies and municipalities. Inspections by government agencies were financed 75% by charges and 25% by taxes (through appropriations). In the municipalities 30% is financed by charges and 70% by taxes. Municipalities usually make their own decisions on how to finance their activities. The trend is towards more supervision. The Parliamentary Commission did not comment on this, but proposed a wider use of financing through fees.

Enforcement and risk based approaches

Regulations are usually enforced via inspections and administrative sanctions. A risk based approach is not yet used to a large extent, but the trend is “upwards”. Enforcement authorities generally have some flexibility to decide whether they want to adopt a more risk based approach. That said, there are concerns about sustaining high standards, which could be jeopardised if inspections were risk based. Consumer representatives told the OECD peer review team that they consider that there is not in fact enough market surveillance, due to a reduction in resources for inspections over the past decade, and that municipalities are less active.

There are some effective examples of the deployment of a risk based approach to enforcement (Box 6.2).

Box 6.2. Risk based approaches to enforcement

The Agriculture Board use risk analysis for inspections, based on a minimum frequency. The Board is active in providing information and guidance to help farmers comply with the rules, including the development of “self control” procedures (though these will not eliminate the need for inspections). The Tax Authority said that it was going in the same direction.

Another example where a risk based approach was a part of a project, is the review of the provisions regarding the necessity of a permit application or a notification for environmentally hazardous activities. The aim was to ensure that the rules and regulations are not more demanding and complicated than what is motivated in order to achieve a sufficient protection of the environment and people's health. Environmentally hazardous activities are in Swedish law divided into A, B, and C - activities, where an A - activity requires a permit by an Environmental Court, B requires a permit by a County Administrative Board and C only requires a notification to the municipality where the activity are to be carried out.

The grounds on how different activities should be categorised has now been reviewed and changed. The Swedish Environmental Protection Agency initiated the review, which was conducted in close co-operation with Environmental Authorities (such as County Administrative Boards and municipalities), business organisations and other relevant stakeholders. A report with suggestions for new grounds of categorisation and new descriptions of the hazardous activities was then submitted to the Swedish Ministry of Environment. After a referral of an initial proposal for public hearing, the work continued for more than a year at the Ministry and within the Swedish Government Offices, and it involved many fruitful contacts with representatives from business organisations and Environmental Authorities when trying to find the best possible solutions. (The contacts with and feedback from business organisations were also very useful for Sweden/the Ministry of Environment in the spring negotiations of the IPPC Directive.) The result is that approx. 50 environmentally hazardous activities have now been categorised as B-activities instead of A-activities and 1 000-1 200 activities have been categorised as C-activities instead of B-activities. A few activities have been "upgraded" from C to B or from B to A, with the aim to better protect the environment and peoples health. The overall effect on businesses is less burdensome administrative work, resulting in a reduction of the administrative costs estimated to approx. 6.4 million euro per year.

Appeals

The overall Swedish approach is guided by a clear and strong statement of citizens' rights. It is a fundamental right of all persons to have their case considered by an impartial and independent court. Similarly a person who has been accused of an offence is to be regarded as innocent "until her/his guilt has been legally determined". Foreign persons have the same right to access to court as Swedish nationals. The Administrative Procedure Act sets the general context. Part of its aim is to safeguard citizens' legal rights in their dealings with public authorities and to improve service to the public (see also Chapter 4). According to the Administrative Procedure Act, "a person whom the decision concerns may appeal against it, provided that the decision affects him/her and is subject to appeal".

There are a number of processes for appeals against administrative decisions: administrative courts; judicial review by the regular courts; and ombudsmen. Sanctions against public authorities can consist of damages decided by a court or by the Chancellor of Justice. It may also consist of criticism from the Ombudsman of Justice or the Chancellor of Justice.

The administrative court system

Decisions that flow from the application of a statute may be appealed to the administrative courts. Courts may agree a stay of execution on a decision, pending the result of the appeal. Such cases cover a large part of the activities of the public administration, but not all of them.

There are three levels of administrative court:

- The county administrative court (*länsrätten*) was previously the court of first instance. There were 23 county administrative courts, at least one in each

county. Like the district courts, they varied substantially in size. From 15 February 2010 the 23 county administrative courts have merged into 12 courts, which are named *Förvaltningsrätter*. The purpose of the reorganisation is to ensure high judicial quality and efficiency. Most cases are adjudicated by a legally trained judge with three lay judges.

- The administrative court of appeal (*kammarrätten*) is the court of second instance. There are four of these. In most cases a leave to appeal is required for a full review by an administrative court of appeal. These courts may hear appeals as a court of first instance, but they mainly deal with appeals against the rulings of the county administrative courts. Cases before the administrative court of appeal are generally adjudicated by three legally trained judges.
- The Supreme Administrative Court (*Regeringsrätten*) is the court of last resort. It consists, currently, of 19 justices. Its primary task is to create precedents. Leave to appeal is required in most cases. It consists of 17 members, at least two-thirds of whom must be legally trained. The rules governing its work are substantially the same as those applicable to the Supreme Court. Leave to appeal is granted if it is important to guide the application of law, or if there are serious problems with the decision handed down by the lower court.

Judicial review

Judicial review is governed by Chapter 11, Paragraph/Article 14 of the Instrument of Government. This states that if a court or another public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the *Riksdag* or by the government, however, it shall be waived only if the error is “manifest”. A court can thus strike down a law on grounds of manifest incompatibility with higher order statutes, although this seldom happens. A Working Committee on Constitutional Reform⁵ has carried out a review of Chapter 11, Paragraph/Article 14 as part of a broader review of the use of the Instrument of Government from 1974. The Committee reported its findings at the end of December 2008.

According to the 2006 Act on Judicial Review of certain Governmental Decisions, citizens are entitled to apply for judicial review of a decision made by the government, if this decision contains a determination against a citizen’s civil rights and obligations within the meaning of Article 6:1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. An application for judicial review is made to the Supreme Administrative Court, which examines whether the decision infringes any legal rule as adduced by the applicant. If so, the decision is repealed. Otherwise, the decision stands.

Ombudsmen

The Ombudsmen of Justice (also called the Parliamentary Ombudsmen), established under the Instrument of Government, are elected by the *Riksdag* to ensure that public authorities comply with the laws and other statutes governing their actions. The Ombudsmen exercise this supervision by evaluating and investigating complaints

from the general public, by making inspections of authorities and by conducting other forms of inquiry that they initiate themselves. The Parliamentary Ombudsmen report annually to the *Riksdag*.⁶

A complaint to the Parliamentary Ombudsmen can be made by anybody who feels that s/he or someone else has been treated wrongly or unjustly by a public authority or an official employed by central or local government.⁷ They have no jurisdiction, however, over the actions of members of the *Riksdag*, the government or individual members of the cabinet, the Chancellor of Justice or members of county or municipal councils. Nor do newspapers, radio and television broadcasts, trade unions, banks, insurance companies, doctors in private practice, lawyers etc. come within their ambit. Other supervisory agencies exist for these areas, such as the Press Council, the Financial Supervisory Authority, the National Board of Health and Welfare and the Swedish Bar Association.

The Chancellor of Justice

The Chancellor of Justice is a non-political civil servant appointed by the government. His/her duties can be classified in six main groups:

- state representative in trials and other legal disputes;
- receive complaints and claims for damages directed to the State and decide on financial compensation for such damages;
- government counsellor in legal matters;
- government Ombudsman in the supervision of the authorities and the civil servants, and to take action in cases of abuse;
- ensure that the limits of the freedom of the press and other media are not transgressed and to act as the only public prosecutor in cases regarding offences against the freedom of the press and other media; and
- guardian for the protection of privacy in different fields.

Neither the Parliamentary Ombudsmen nor the Chancellor of Justice can review or modify the decisions of another authority or court.

Issues with the appeal system

The number of appeal cases has risen in recent years, both in the ordinary courts and the administrative courts, with average delays of eleven months in the latter in 2007.⁸ The average delay for reaching decisions on appeals in most cases in the Supreme Administrative Court was between 15 and 18 months in 2007. Measures have been taken to address the issue of delays through changes in organisation and work processes. Delays have been significantly reduced over the past year. In 2008 the aggregate number of pending cases in the courts was reduced by 20 000 despite an increase of 11 000 in the number of filed cases. In 2008 the number of pending cases was reduced by 25% in the county administrative courts (*länsrätterna*) and by 5 percent in the Administrative Court of Appeals (*kammarrätterna*). The number of pending cases in the Supreme Administrative Court (*Regeringsrätten*) was reduced

from 8 000 cases in 2006 to 5 000 cases in 2008. Currently, the number of pending cases in the Supreme Administrative Court is below 4 000.

The OECD peer review team were told that sanctions are also an issue needing attention, and that it is hard to appeal a municipal decision. Public procurement is a particular issue at this level.

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. One example of data collected on this issue relates to taxes. In the annual Budget Bill, the Government reports on “the missing taxes”. The Taxation Board estimated in 2007 that missing taxes account for around 10% of total taxes.
4. For example, the Swedish Bar Association and the Swedish Motor Vehicle Inspection Company.
5. Ju 2004:11.
6. See the website of the Parliamentary Ombudsmen:
www.jo.se/Page.aspx?Language=en, where the annual reports are available,
www.jo.se/Page.aspx?MenuId=17&ObjectClass=DynamX_Links&Language=en.
7. There are therefore no restrictions related to age or nationality: anyone can complain, not just adult Swedes.
8. 2007, excluding migration cases and other cases dealt with as a priority.