

## Chapter 7

### The interface between member states and the European Union

An increasing proportion of national regulations originate at EU level. Whilst EU regulations<sup>1</sup> have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU legislation are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market and avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU law. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

#### Assessment

*The EU dimension is a prominent aspect of Swedish preoccupations over Better Regulation.* The EU was a prominent topic of discussion with the OECD peer review team at most of its meetings with Swedish stakeholders. In Sweden, as in other EU countries, and a high and rising proportion of regulation is of EU origin, and is estimated to account for at least half of administrative burdens. The EU dimension is perceived to be growing in importance, with a corresponding need to manage issues more effectively at all stages of the process.

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**Recommendation 7.1. Consider a White Paper on management of the EU dimension in Better Regulation, to capture both the detailed and strategic issues which need attention at this stage.**

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*There are clear formal processes for setting strategic decisions in the negotiation of EU directives, but capacities for effective negotiation in practice may need reinforcement.* There are clear formal processes for allocating and managing

responsibilities for negotiation, and for setting negotiating positions (which also engage the parliament). But the framework appears less strong once a specific negotiation has started, and external stakeholders raised a number of concerns. Public consultation by the government is not systematic. Adopted directives may raise a range of problems. These include the level of detail and specificity of many directives, leaving little room for adaptation to the Swedish context, unclear language, and the frequent requirements in directives for the provision of reports, which adds to bureaucracy. Although these are issues which are beyond the capacity of one member state to resolve, they do suggest that more could be done in negotiation to minimise the problems. A requirement for the *ex ante* impact assessment of draft EU directives (at least the key ones) would also help to identify important issues for the attention of negotiators.

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**Recommendation 7.2. Carry out a wide ranging consultation of both internal and external stakeholders over the issues raised by draft EU directives, as part of the White Paper proposed above. Consider how current mechanisms, such as the role of the Prime Minister's Office and its guidance on negotiations, might be strengthened to provide more active support to negotiating ministries and agencies. Consider whether key ministries and agencies have adequate capacities for effective negotiation. Prioritise efforts on key issues for Sweden, and make impact assessments a requirement for draft directives that fall within these priority areas (the Better Regulation Council could play a prominent role here). Develop contacts with like minded member states to address issues such as potentially excessive reporting requirements.**

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*The transposition of EU directives also raises some issues.* Transposition deadlines are monitored by the Prime Minister's Office but there are no formal or systematic mechanisms for requiring timely and effective transposition by responsible ministries. An issue raised by a number of stakeholders concerns gold plating (going further in transposition than is strictly required by a directive). It was difficult to form a clear view of why, or whether, goldplating does occur. Factors which obscure the picture include the fact that transposition may be used as an opportunity to review a range of related national regulations, efforts to maintain Swedish standards, and a clash between EU and Swedish legal frameworks.

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**Recommendation 7.3. Include, as part of the proposed White Paper, a review of transposition, including oversight provisions to ensure that transposition is timely, and potential issues arising in the transposition of directives.**

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*Local governments, through their responsibilities for implementing EU origin regulations in a range of important policy areas, are important actors.* The EU regulatory influence on local governments is significant due to their role in the enforcement and execution of regulations in key policy areas such as the environment, food policy, public procurement and regional development. Although there are formal processes for involving them in the development and transposition of EU regulations, there appears to be a deficit of resources and capacities for effective participation by this level of government.

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**Recommendation 7.4. This too could be part of a White Paper. Establish whether there is an issue of effective input by local governments to the negotiation and transposition of EU directives, and if so, consider what action could be taken to facilitate their input, perhaps by targeting the key areas for this level. Encourage SALAR, the local government representative association, to include EU issues in its annual list of priority areas.**

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*Sweden attaches importance to the interface with EU Better Regulation processes, and puts significant effort into supporting the development of these processes. Some Swedish ministries and agencies are very active in their own policy areas. Efforts have been made to support the EU administrative burden reduction programme with Swedish measurement inputs, and significant progress on the EU's impact assessments is acknowledged. The NNR (Board of Swedish Industry and Commerce for Better Regulation) which advocates for a large part of the business community, has been especially active in developing and presenting proposals, both strategic and detailed, for improvement. The general consensus is that there is important further work to be done at EU level, for example ensuring that all significant draft directives are the subject of an impact assessment and that this is updated to capture the effects of major amendments on the way to adoption.*

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**Recommendation 7.5. Continue the efforts to support and influence the development of EU level Better Regulation processes.**

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## Background

### *General context*

As in other EU countries, a significant proportion of regulations are of EU origin. They are estimated to account for some 50% of the administrative burdens on business, according to estimates carried out by responsible ministries and government agencies.<sup>2</sup> The NNR has come up with a higher figure of 59%. It was noted that the current EU regulatory agenda implies new burdens (the new accounting directive was cited, for example). The *Riksdag* suggested that the rise in regulations could largely be traced to the EU level, and that the solution required EU level action as well as joint working by the government and the parliament. Other stakeholders confirmed the growing importance of EU legislation and told the OECD peer review team that EU management is becoming more complex, with the need to manage issues more effectively at all stages of the process.

The government is collectively responsible for all policy decisions, including EU policy decisions. Government ministers have the lead in drafting decisions for their respective policy areas in EU work, but decisions are confirmed collectively by the government as a whole. The EU Secretariat in the Prime Minister's Office is responsible for the management and co-ordination of EU-related activities at the government offices. It "oils the machine" and (like the PMOs of some other European countries) plays a procedural rather than a substantive role. It will not give a strong lead on a given issue, but provides an independent view. It checks the negotiating position and proposals for transposition of EU directives, monitors transposition deadlines, and provides guidance to ministries on EU legislative matters. The Prime

Minister's Office is also the strategic think tank and co-ordinator for long term and "big picture" EU issues, for example as regards the long term development of the EU, Treaty issues, the Lisbon process and the EU budget.

The PMO role is relatively recent, and the unit for the EU is growing (it currently comprises some 35 staff). Responsibility was with the Ministry for Foreign Affairs until 2006, and was moved because EU matters are no longer "foreign affairs", together with the perception that the importance of the EU merited a central place in government. However internal market issues have remained with the Ministry for Foreign Affairs. Court proceedings and the final stages of infringement proceedings also lie with the Ministry for Foreign Affairs.

### *Local governments and the EU*

The EU regulatory influence on local governments, as in other EU countries, is significant. Local authorities have an important implementing role for EU origin regulations, through their responsibilities for the delivery of public services, and their enforcement and supervisory responsibilities for environmental and food policy regulations, public procurement and regional development. The impact of EU issues on local service delivery, notably through transposition of the EU services directive and the requirement for one-stop shops, is significant. The government agencies are responsible for supporting them in this task, *e.g.* through education and training, information about regulations, development of methodology or through guidelines. For example, the Swedish Board of Agriculture has a central co-ordinating role among the central and regional authorities involved in the EU's Common Agricultural Policy. The Board's main activities are concerned with administering and implementing EU legislation and support measures.

*SALAR* has a small office in Brussels and has been particularly involved in the services directive and public procurement discussions. The largest municipalities also have their own EU office. The processes for debating EU matters stipulate that relevant stakeholders must be consulted, and this includes the local authorities. Input from local government can be either direct (from a specific municipality or council) or via *SALAR*. It usually participates in the reference groups set up by the central government for this purpose, which is supplemented by informal contacts. The Committees of Inquiry which are often set up to advise on the transposition of EU directives into Swedish law may include *SALAR* and other local government experts or representatives. The latter are also invited to comment on the Committee's report. Direct discussions between elected members at both local and national levels and through political party linkages are another channel of input. The overall framework is fairly complete. The main challenge, from what the OECD peer review team heard, is one of resources and capacities of local government to participate effectively.

### *Negotiating EU regulations*

Responsible ministries prepare the government position, prior to negotiation in the EU Council of Ministers, and they follow up on EU decisions. The process is set out in official (publicly available) guidelines (*cirkulär*). It normally involves prior consultation with relevant stakeholders, and co-ordination with other interested ministries. Draft EU regulations are circulated to stakeholders. The process is normally carried out in writing, but hearings can also be arranged. If there is a conflict, the issue is solved politically. Consensus can be difficult to reach. Before a ministry presents its

view to the *Riksdag*, and subsequently to the EU, it must first consult with the Prime Minister's Office, the Department for Internal Market Matters of the Ministry for Foreign Affairs, and the Budget Department of the Ministry of Finance. Before each Working Party at EU level, the responsible division at a certain ministry within the Government Offices sends out to all relevant divisions at different ministries in a joint draft procedure an instruction on how Sweden should act during the negotiation in the Working Party, which gives the other ministries the possibility to make changes or amendments to the instruction. The responsible division at a ministry may also work closely with one or more government agencies and consult with other stakeholders (business organisations etc) to obtain information of importance for the negotiations.

The OECD peer review team heard that the framework for managing EU negotiations is reasonably effective, but raised some issues. The government should pay particular attention to the importance of early stage informal consultation with stakeholders; once a draft directive goes into the formal and political process, lobbying is less effective. It was noted that the government's invitations to stakeholders to give their views on EU drafts was not systematic and seems to have become more limited in recent years, perhaps because of the complications of coalition politics. Some ministries, however, pointed out despite their best efforts to engage effective consultation, the EU's own short deadlines for consultation imposed constraints on the national room for manoeuvre. It was suggested that prioritisation – focusing efforts on the most important proposals – would help.

The need for effective and timely consultation may have some link with concerns that EU directives, when they emerge, are often very detailed (contradicting the principle that they should set the framework for actions that need to be fleshed out at the national level): “We are used to the framework style – setting the goals and leaving agencies to work out how to meet them”. They are also often hard to understand: “In many cases EU directives are impossible to understand. We have to translate them into understandable language. But we can have problems doing so”. Another issue raised was the requirement embedded in many directives to provide reports: “Many directives require a lot of reports which take a lot of time from ministries and agencies. What are they doing with these reports? It is difficult to reduce burdens as a result”. It was pointed out that this contradicts efforts to reduce bureaucracy.

### *Role of Parliament*

The parliament's EU Committee meets weekly, informed by the government, so that it can give its views on the proposed negotiating position. If the majority of the committee disagrees with the position, the government must amend its position accordingly. The EU Committee consults the other relevant sector parliamentary committees. There can be extended consultation/hearings if an issue is important. The relevant ministry is responsible for assembling the necessary material for the parliament to consider. It collects information from ministries and prepares a fact sheet. It also provides updates on the negotiations through weekly meetings with the parliament. The OECD peer review team heard that the parliament is increasingly active on EU issues, partly because of the network of contacts between the EU committee and the other committees, which spreads awareness. The *Riksdag* itself notes that EU issues can be difficult to follow as they often take years to come to closure, and that it is a challenge to keep up with the details.

### *Ex ante impact assessment*

There is no formal requirement to carry out *ex ante* impact assessments of draft EU regulations. The new impact assessment arrangements merely include an obligation to consider whether a proposed EU regulation is in line with the obligations that flow from being a member of the EU.

### *Transposition of EU regulations*

A Committee of Inquiry is often appointed to transpose an EU directive into Swedish law (see Chapter 3). A proposal for transposition is circulated to stakeholders and interested parties for a period of some three months, and their views on the proposal will be reflected in the further development of the draft.

### *Institutional framework*

The ministry responsible for the policy area handles transposition. A lead ministry is designated when an issue cuts across different ministries. This is generally the one whose responsibilities are the most affected and normally the ministry responsible for negotiating the directive. Transposition planning takes account of actions needed at regional or municipal level as well as at central level.

The PMO checks compatibility with EU rules in general and the Unit for the Internal Market in the Ministry for Foreign Affairs advises and helps other ministries on matters regarding EU internal market principles in particular. The checks are procedural rather than substantive. The PMO's EU Co-ordination Secretariat provides general guidance on transposition, such as the avoidance of gold plating. Gold plating may be raised in the inter-ministerial dialogue on transposition.

### *Legal provisions and the role of Parliament*

Proposed legislation for transposition goes through the relevant parliamentary committees. There are no special legal instruments for the transposition of EU regulations. EU law is given effect by laws, ordinances and agency regulations. Government agency regulations are an important vehicle for the transposition of EU legislation into the Swedish regulatory framework.

### *Ex ante impact assessment*

Bills containing legislative proposals and submitted by the Government Offices to the Parliament traditionally contains a special section with impact analysis. Furthermore, when implementing legal acts originating from the EU, the same requirements apply as with respect to purely 'domestic' proposals.

### *Monitoring transposition*

#### Monitoring and correlation tables

The PMO monitors transposition deadlines. There are no official transposition rates for each ministry, but lists of directives are broken down at ministry level, which can be used to draw conclusions on transposition performance. Correlation tables are

drawn up to the extent required in the legal instrument that gives effect to transposition, and are publicly available if requested through the National Board of Trade (*Kommerskollegium*),<sup>3</sup> the Swedish government agency for foreign trade and trade policy. The National Board of Trade also provides Internet-based information on transposition into Swedish law of EU legislative acts. There are no statistics on the overall speed of transposition.

The speed of transposition depends on the legal instrument used. It takes longer if a primary law is required. The lead ministry determines the instrument to be used. Delays may be linked to resource issues in some ministries. It may also be linked to the fact that the opportunity is taken to review the whole area of relevant legislation.

The Swedish government underlines the importance of a correct and timely transposition and implementation of Community directives in terms of “[...] creating equal conditions and healthy competition in the internal market”.<sup>4</sup>

### Box 7.1. Sweden’s performance in the transposition of EU Directives

#### Internal Market Directives transposition deficit

In the July 2009 Internal Market Scoreboard, Sweden performs comparatively well being ranked 3<sup>rd</sup> together with the Netherlands. Its transposition deficit here only amounts to 0.6%. After the initiation of the Scoreboard procedure, Sweden was comparatively fast able to obtain a low transposition deficit rate of for instance only 2% in May 1998. Showing minor increases of the deficit at times Sweden was rather consistently found in the leading part of the ranking.

#### Performance in specific policy areas

Most recently, the policy areas with a comparatively high transposition deficit rate have been Justice, Freedom and Security, Environment and Taxation and Customs unions.

**Table 8.1. Sweden’s performance in transposition of Internal Market Directives over time**

SE	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02	Nov-02
Transposition deficit as % in terms of Internal Market Directives	6.2	2	1.5	2.1	2.1	1.5	1.2	0.5	0.9	0.7	0.4
	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08	Nov-08	Jul-09
	1	1.8	1.4	0.9	1.4	1.3	1.4	1	0.8	0.9	0.6

Source: European Commission, Internal Market Scoreboard.<sup>5</sup>

Goldplating (going further in transposition than is strictly required by a directive) was raised by a number of stakeholders, including the parliament and business organisations. Business appears to be concerned that goldplating takes place at all levels down the line (from the initial transposition into a higher level statute, to the further development of transposition through agency regulations, down to execution and enforcement by local authorities). The *NMR*’s 2008 evaluation of impact assessments of new regulations (which shows that 41% of proposals were based on

new or amended EU regulations), noted that 13% of these go further than the EU directive, introducing special Swedish requirements. It notes that this contradicts the principle of a harmonised EU internal market.

The real extent of goldplating appears hard to pin down. It may be complicated by the fact that a law may seek to address both the transposition of an EU directive and a review of existing national regulations. The problem may also be linked with efforts to maintain “high Swedish standards”. Another factor is that Sweden refuses exceptions for SMEs, and there are no specific laws for SMEs. A number of stakeholders drew attention to the fact that EU regulations do not always fit Swedish legal traditions.<sup>6</sup> At the same time, the OECD peer review team also heard that Sweden was sometimes required to implement directives, *i.e.* re-regulate, on issues where they had previously deregulated. The concerns about goldplating may be exaggerated. For example, the Ministry of Environment reviewed several of its EU-related regulations in autumn 2007. The result of this review showed that more far reaching requirements than those of the directive were imposed only in exceptional cases.

### *Interface with EU Better Regulation*

Sweden is active at the EU level in the promotion of Better Regulation. This includes active participation in the High Level Group on Better regulation as well as taking part in the fora and networks relating to administrative burden reduction. During its Presidency of the EU in the second half of 2009, it vigorously promoted the Better Regulation agenda.

A number of issues were raised by stakeholders in discussion with the OECD peer review team. There is considerable interest in the interface between national and EU initiatives, and in the need to build an EU wide Better Regulation vision for the coming years. Some concern was raised about future Better Regulation strategy and the EU Commission’s capacity to sustain momentum beyond 2010, the endpoint of the Lisbon Strategy.

Issues were raised about the interface of national efforts with the EU’s own programme for the reduction of administrative burdens. As with other EU countries, the Swedish burden reduction process is not fully co-ordinated with the EU programme. However synergies are exploited where possible. The best example is the use of the Swedish measurement results as a contribution to the EU measurement exercise. Several ministries and agencies emphasised that simplification proposals require the active input of the EU level, if they are to work. The impact of the EU burden reduction programme is not yet clear and it was suggested that it should be extended beyond the current 13 focus areas.

The issue of the EU’s own impact assessments was also raised. There has been significant progress both in quality and the number of directives covered. However, not all significant EU directives are yet the subject of an impact assessment. Many of the “big fish” seem to escape. The performance of Directorates-General is variable. An impact assessment board, more at arm’s length from the Commission, would exert stronger leverage for improvement. Last but not least, it was important to try and update impact assessments as a draft directive is developed and amended. Amendments to EU directives can be quite drastic when a directive goes to the European Parliament and the Council, but the consequences are not captured.

Consultation was also raised as an issue. The OECD peer review team heard that the EU is becoming much better at consultation. But there is room for improvement. Issues cited included consultation questions set to justify the text, rather than to invite more open comments, and the need to provide enough time for responses.

Some parts of the Swedish government are very active in the EU debates. For example the Swedish Environmental Protection Agency and the Swedish Board of Agriculture play an active part in shaping EU discussions, alongside their parent ministries (see Box 2.5, Chapter 2).

There is also significant Swedish business input to the EU agenda. For example, the *NNR* is very active. In May 2008 it published 27 proposals from Swedish business for the simplification of EU legislation, following a call from European Commission. These were presented to the Secretariat General. They included concrete suggestions for how the existing Community stock of regulations could be made more business friendly, together with suggestions on how aspects of the EU legislative process could be improved to ensure that new legislation is efficient from the start.

### Box 7.2. *NNR* proposals for more effective EU Better Regulation, May 2008

#### General aspects

Difficulties experienced by business when complying with EU legislation are often symptoms of the complex EU legislative process. Impact assessments should be a natural part of the policy development process, helping to provide a good evidence base for policy decisions. To deal with a problem, it is important to identify its source. EU legislative process must be improved to secure business friendly legislation from the start. Some positive changes in the last few years – improved consultation, better use of impact assessments and the establishment of the Impact Assessment Board. But more is needed. “The private sector is, above all, looking for clarity, consistency and stability in the regulatory environment and thus, lower compliance costs”.

The *NNR* also notes that the European Parliament has a role to play.

#### Impact assessment

An impact assessment should be carried out for each policy option considered, involving stakeholders in their development. The following aspects should always be discussed: the need for action in a particular area; the rationale for action being taken at EU level; the basis for the choice of a particular legislative instrument; what would happen if no action were taken, or the “do nothing option”; how new legislation might be enforced; and the potential impact of a policy option on business, including the total compliance cost.

An impact assessment should take into account how a new policy might affect companies of different sizes and sectors. The “think small first” principle should guide all decisions about new legislation.

Impact assessments should inform the development of new policies. They should be an integral part of Green and White papers and therefore of consultation documents presented to stakeholders. Too often they are developed as separate documents once decisions have been made on a proposal.

Consultation, formal and informal, should take place when officials in the Directorate-Generals are formulating proposals and before proposals go to the Commissioners and their cabinets. A draft policy should not mean a prior commitment to legislate.

### Administrative burden reduction

The Commission's Administrative Burden reduction programme should be extended to include measurement of all legislation that imposes administrative costs on business, not only the 13 priority areas. It should look beyond the administrative costs that are linked to information obligations, at full compliance costs. So called policy and financial costs are substantially higher than administrative costs.

Simplification proposals should set out very clearly in the form of "fact sheets" for each proposal, including the relevant EU legislation, the responsible directorate-general, a short summary para explaining the proposal, and a contact point for further information. Including areas such as agriculture, employment, SME exemptions, environment, consumers, food safety, accounting requirements (very diverse).

*Source: NNR- Proposals from Swedish Business for Simplification of EU Legislation, May 2008.*

Finally, the Swedish government drew attention to an important interface with the EU regarding technical regulations. Draft national technical regulations must be notified to the EU and the WTO in accordance with the 98/34 EC procedure and the SPS- and TBT-agreements, and with the Ordinance on Technical Rules (SFS 1994:2029, 20 §). These procedures require national measures falling outside the scope of specific EU legislation to be reviewed in order to detect potential trade barriers in contradiction of general EU rules on the free movement of goods. This means that notified national measures can be reviewed and commented upon by stakeholders at a stage where the rules are not nationally adopted. The notification procedures therefore work as a tool for increased transparency as well as for better regulation. The National Board of Trade (*Kommerskollegium*) is responsible for checking that the other government authorities observe these obligations. The Board is a government authority among others and has no power to force other government authorities to notify their drafts. The so-called *Securitel Judgement* of the EC Court of Justice<sup>7</sup> entails that non-notified technical regulations cannot be applied. This, combined with the possibility for damages when breaching EU rules, gives an incentive for regulating authorities to notify national measures.

## Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. The most recent Government Communication to the *Riksdag* on the Action Plan for Better regulation (Appendix 2) explains that just over 52% of administrative costs to business stem from EC regulations (all costs in the areas of food and communications).
3. *www.kommers.se*.
4. Cf. *www.sweden.gov.se/sb/d/9625/a/88956*.
5. Cf. *http://ec.europa.eu/internal\_market/score/index\_en.htm*.
6. Examples cited were in the energy/environmental sphere, and social/labour regulations.
7. Judgment C-194/94 CIA Security International, REG 1996, p. 2201.

