Chapter 4

The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true- impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional "command and control" regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use "soft" approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

Assessment

Processes for making new regulations

There are several processes through which interested parties may find out about proposed new legislation, but these are scattered. Different instruments ensure that those inside and outside government can, if they wish, keep in touch with legislative plans (for example, the annual Budget bill, and information on Committees of Inquiry work). The parliament drew attention to an unhelpful "bunching" of law making activity. Forward planning could be made more transparent to those inside and outside government by publishing, on a regular basis, the list of proposals for new bills. There does not appear to be any systematic information dissemination process for the development of secondary regulations.

Recommendation 4.1. Review the processes which are currently in place for forward planning of new laws and secondary regulations, in consultation with interested parties (such as the parliament and the business community) and take steps to remedy weaknesses.

Legal quality and plain language

Processes to secure legal quality are a strong feature of the Swedish system. Law drafting benefits from a strong framework of supporting institutions, guidance and training, which have their roots in the constitution (Instrument of Government). The institutional support framework includes a Directorate General for Legal Affairs in each ministry, which is responsible for ensuring that draft bills are well prepared, legally correct and conform with requirements. The Prime Minister's Office and the Ministry of Justice provide further support. The Council on Legislation provides a further legal check at the end of the process. Sweden also emphasises the importance of plain language, spearheaded by the Ministry of Justice. This includes work on the promotion of plain language within the EU institutions. The parliament also takes a keen interest in plain language, with the adoption of a law in 2005, where several national language policy goals were adopted, among them on plain language. This was followed in 2008 with a Swedish language law, which among other issues states that authorities should strive to use clear and comprehensible language.

Ex ante impact assessment

Sweden has taken steps to strengthen its impact assessment processes since the 2007 OECD report. The 2007 OECD report drew attention to a number of serious shortcomings. The system was fragmented (different arrangements for ministries, agencies and committees of inquiry), there was a heavy focus on SME impacts (the only mandatory part of the system) to the detriment of a broader perspective, and no integrated institutional framework to monitor compliance and challenge the quality of impact assessments. The quantitative dimension was very weak. Sweden acknowledged that it had so far failed to develop an effective system.

There was considerable support for improvement to secure a stronger evidence base for policy and rule making, not only inside the government but also with the parliament and the business community. The new policy has sought to broaden the approach and strengthen the institutional framework, not least through the establishment of the Better Regulation Council which will scrutinise draft impact assessments.

Box 4.1. Recommendation from the 2007 OECD report

Streamline the current Regulatory Impact Analysis (RIA) system and improve its quality control.

Sweden should consider introducing a comprehensive, integrated and uniform system for RIA, based on a single ordinance that provides clear guidance on when and how to undertake RIAs. This should be complemented with clarification of the role of the quality control institutions: the Better Regulation Unit in the Ministry of Industry, Employment and Communications, the Swedish National Financial Management Authority and the Swedish Agency for Economic and Regional Growth (*Tillväxtverket*). The Government offices, Committees of Inquiry and agencies, should be given more resources to undertake RIAs, including staff with relevant technical competences.

The current picture is mixed. Most necessary tools are available, as well as the formal obligation to integrate RIAs fully in the decision-making process through the existence of different ordinances. Moreover, major reforms prepared by Committees of Inquiry and extensive consultation with affected parties ensure draft regulations of high quality. The RIA guidelines provide good substantive and procedural advice on how to conduct RIAs, although there is scope for improvement in certain areas, such as data collection and targeting. Training is constantly developed to support regulators to improve the quality of RIAs.

However, there is a lack of a comprehensive framework to weigh and consolidate the different RIAs carried out. No single unit is responsible for the review, support and monitoring RIAs: three different institutions deal with this issue, depending on who produced the RIA, lacking formal power to veto in case their quality is not sufficient. Quality checks and sanctions for non-compliance with RIAs do not exist. RIAs, even if they are public documents, are not systematically made available to the public, reducing the value of the instrument and the transparency of the process. The approach does not provide for systematic quality assurance. Quantification of costs and benefits is not carried out for all legislation and there is no mechanism, except for the RIA on SMEs, to evaluate quantitative assessments. As a consequence, cost-benefit analysis is rarely used. Together with the lack of a single or lead oversight body responsible for quality control of all RIAs, this means that the scrutiny of draft regulations may vary significantly. An integrated institutional approach would be beneficial.

Several agencies have requested that the requirements for impact assessments in the committee and *Tillväxtverket* ordinances shall be combined and that roles of *Tillväxtverket* and The National Financial Management Authority must be clarified.

Oversight for impact assessment has been strengthened, with the Better Regulation Council providing some integrating glue. The institutional support framework has traditionally consisted of different arrangements for ministries, government agencies and committees of inquiry. This division of responsibilities has not changed since the OECD report of 2007, with the notable exception of the Better Regulation Council. The Council will scrutinise proposals prepared by both ministries and agencies as well regulatory proposals from Committees of Inquiry (the majority of its work has so far been on proposals of government agencies and Committees of Inquiry). It criticises, in its opinions, drafts if they are not good enough, but cannot send them back. The other improvement is an enhanced status and role for the Ministry of Enterprise in respect of

ministry impact assessments, as part of its broader co-ordinating responsibilities for Better Regulation. The issue is whether these changes are going to be sufficient to secure effective and coherent oversight. It is too early to tell. However, it is clear that much depends on the Better Regulation Council, the only actor with a complete view given the continued fragmentation of other actors and their essentially advisory role. Capacities and resources is another weak spot. The Ministry of Enterprise is already short on capacities to meet its responsibilities, and its resources may well need to be strengthened.

Recommendation 4.2. Monitor closely the institutional framework for overseeing *ex ante* impact assessment and be ready to strengthen it quickly if impact assessments fail to improve.

For the government agencies, support continues to be provided by the Swedish Agency for Economic and Regional Growth (Tillväxtverket), with input from the Swedish National Financial Management Authority (Ekonomistyrningsverket, ESV). Streamlining this part of the institutional structure would likely benefit efficiency. The 2007 OECD report had already drawn attention to the issue, and *Tillväxtverket* continues to have some reservations about the current process.

Recommendation 4.3. Review the arrangements under which both *Tillväxtverket* and *ESV* have responsibilities for advising on agency impact assessments, and address any issues that are found.

Although the new ordinances and guidelines appear to have clarified requirements, the handling of some key issues remains weak. In some respects this seems to be a refreshment of existing policies rather than a completely new departure. Some issues need further attention. Quantification of costs and benefits is not sufficiently emphasised. The support arrangements for ministries to carry out quantification may not be adequate, given that this is new territory for many officials.

Recommendation 4.4. Reassess the quantification of costs and benefits.

The policy remains highly business focused. The new ordinances and guidelines anticipate that social and environmental impacts as well as economic and business impacts, should be addressed. Although the new approach clearly signals the need to go beyond impacts on SMEs (the main focus of the previous policy) the emphasis remains on business. The mandate for the Better Regulation Council's work requires it to focus on business, even if other aspects may be taken into account. Sweden also wants to avoid the "Christmas tree" effect. A business focus is valuable and necessary, especially post crisis and given the prominence of Sweden's Better Regulation strategy as part of a drive to enhance competitiveness. However, work on other impacts may be crowded out and this risk alienating stakeholders both inside and outside government.

Recommendation 4.5. Ensure that the full range of important impacts, costs and benefits is addressed in *ex ante* impact assessments.

Given the weaknesses that may still be in the revised ex ante impact assessment system, an early and objective evaluation will be important. The new system, is an improvement in many respects, but nonetheless contains some potential weaknesses. This means that evaluation will be important, sooner rather than later, so that the necessary steps can be taken to remedy weaknesses as quickly as possible. Two potential candidates for carrying out the evaluation are the Better Regulation Council (with hands on experience of the new system) and the National Audit Office (*Riksrevsionen*), which has previously shown interest in Better Regulation.

Recommendation 4.6. Plan for a full evaluation of the new policy in the near future.

Background

General context

The structure of regulations

The constitution takes precedence over all other laws, and no other law may conflict with its provisions.[1] The hierarchy of regulations is relatively simple- primary laws (mostly proposed by the government and always enacted by the parliament), and secondary regulations (ordinances, promulgated by the government, and regulations, promulgated by the government agencies). Generally speaking, primary legislation often takes the shape of framework laws, which are then fleshed out in secondary regulations, usually by the agencies.

There are also recommendations (*allmänna råd*). Whilst laws, ordinances and regulations are binding norms (there is an obligation to comply with a regulation and it is binding on courts of law and other adjudicating bodies), recommendations are not formally binding on the people and organisations to which they apply. There is no obligation to follow a recommendation, nor does it bind adjudicating bodies. They are however discouraged and some government agencies have stopped issuing them, in order to sustain the clarity of the basic regulatory structure.

Only the parliament and the government have the right, under the Instrument of Government, to issue legal norms. However both the parliament and the government may delegate rule- making powers to government agencies and local governments. To have legal force, a provision adopted by a public authority or by a municipality must have support in a higher statute and, in the last resort, in one of the fundamental laws. Where the government is competent to adopt legal norms, whether directly by virtue of the Instrument of Government, or indirectly by authority of the *Riksdag*, it may delegate this competence to a subordinate authority or a municipality (sub-delegation). Where the government is acting by authority of the *Riksdag*, it is necessary for the *Riksdag* to have authorised the sub-delegation in a law. As primary legislation often takes the shape of framework laws, this means that almost all laws contain provisions concerning delegation of regulatory power to the government and/or to government agencies and local governments.

The Government initiates most legislative proposals presented to the parliament, but members of Parliament and the parliamentary committees also have a right to submit new legislative proposals to Parliament.

The Instrument of Government (Article 17, Chapter 8) stipulates that "no law shall be amended or repealed otherwise than by a law". This means that a law is abrogated in the same way that it is adopted, which has important consequences for the stock and flow of laws and ordinances.

Box 4.2. Structure of regulations

Chapter 8 of the Instrument of Government, under the heading "Laws and Other Regulations" sets this out. At the central level, regulations can be adopted by three bodies: the parliament, the government and agencies.

- *Primary laws (lagar).* The parliament is the sole enactor of primary laws.
- *Ordinances (förordningar).* The government may lay down secondary regulations, called ordinances. A particular group of ordinances are regulations governing the agencies.
- *Regulations (föreskrifter).* The agencies attached to central government lay down regulations.

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Trends in the development of regulations

Table 4.1. Stock and flow of laws and ordinances in Sweden – The Swedish Code of Statutes (SFS)[1]

	2006	2007	2008	2009
Total number of new or amended laws and ordinances	1 592	1 475	1 444	1 608
New laws	59	28	49	52
New ordinances	118	319	111	155
Amended laws and ordinances*	1 415	1 128	1 284	1 401
Total number of pages in SFS[2]	3 085	3 123	2 870	3199
Total number of laws and ordinances that are in force by …	3 670	3 722	3 755	3 763
	1st Jan	1st Jan	1st Jan	1st Jan

Source: Ministry of Justice, January 2010. *As from 2006, "new ordinance" includes all types of subordinate regulations.

There are about 1 000 laws in Sweden, and over 2 000 ordinances. There are over 7 000 government agency regulations, by far the largest part of the regulatory system, which are more extensive in content than laws and ordinances.

The OECD peer review team heard that it was difficult to be clear about production trends. It was pointed out that some structural reforms inevitably generate new regulation to frame the new circumstances and to manage the effects of competition (the deregulation of the pharmaceuticals market was cited).

Procedures for making regulations

The law making process

Box 4.3. The legislative process in Sweden

The Swedish government lays some 200 legislative proposals every year. They are presented to the Swedish Parliament (*Riksdag*) in the form of government bills. Some of them contain proposals for new legislation, requiring extensive debate before a decision can be reached, while others consist of proposals for major and minor amendments to existing laws.

The law making process in Sweden includes the following stages: as primary legislation often takes the shape of framework laws, which are elaborated further in secondary regulations the bills may also contain explanations on what further regulations will be needed to fulfil the initiative.

The process for adoption of government ordinances does not follow the process described below but the provision in the Instrument of Government stipulating that the necessary information and opinions shall be obtained from the public authorities concerned and that organisations and private persons shall be afforded an opportunity to express an opinion as necessary applies in this procedure as well.

1. *Initiation*. Although most legislative proposals submitted to the *Riksdag* are initiated by the government, some bills may be based on suggestions put forward by the parliament or by citizens, special interest groups or public authorities.

2. *The inquiry stage*. Before the government can draw up a legislative proposal, the matter in question must be analysed and evaluated. The task may be assigned to officials from the ministry concerned or to a commission of inquiry or a one-man committee. Inquiry bodies, which operate independently from the government, may include experts, public officials and politicians. The reports setting out their conclusions are published in the Swedish Government Official Reports series (*Statens Offentliga Utredningar, SOU*). The reports are available in Swedish on the Internet.

3. *The referral stage (external consultation)*. Before the government takes up a position on the recommendations made by a commission of inquiry, its report is referred for consideration to the relevant bodies. These referral bodies may be central government agencies, special interest groups such as business or consumer organisations, trade unions, academic society, courts, regional and local government authorities or other bodies whose activities may be affected by the proposals. This process provides valuable feedback and allows the government to gauge the level of support it is likely to receive. If a number of referral bodies respond unfavourably to the recommendations, the government may try to find an alternative solution.

   In principle, referrals must be in writing and the referral bodies must be given at least three months in which to submit their opinions. Only in exceptional cases can other forms be used, for example referral meetings. Any member of the public can choose to participate in the consultation. There have been no changes in recent years to the consultation process to make it more effective or efficient.

4. *The drafting stage*. When the referral bodies have submitted their comments, the responsible ministry drafts the bill that will be submitted to the *Riksdag*. If the proposed law has important implications for private citizens or the welfare of the public, the government should first refer the

proposal to an independent body, the Council on Legislation (*Lagrådet*). The Council's scrutiny shall relate to the manner in which the draft law relates to the fundamental laws and the legal system in general, the manner in which the different provisions of the draft law relate each other, the manner in which the draft law relates to the requirements of the rule of law, whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law and what problems are likely to arise in applying the act of law.

The drafting procedure for a government bill starts within a ministry through consultations between the political executive and public officials, and among public officials (*beredning*). Then there is a joint drafting procedure between public officials at different ministries, sometimes involving political officials as well (*gemensam beredning*). Sometimes all the members of the government also discuss a matter at a so-called general meeting (*allmän beredning*). In order to obtain different views the matter is then circulated for comments to all ministries (*delning*). The minimum period allowed for this last type of consultation comments inside the government is, in principle, one week. Proposals may not go any further in the legislative process until they have been approved.

When the joint drafting procedure is complete, the matter is placed on the agenda for the next Cabinet meeting. The minister in question presents the matter at the Cabinet meeting (*regeringssammanträde*). The formal government decision is then taken collectively by the members of the government (*regeringsbeslut*).

5. *The parliamentary stage.* Responsibility for approving all new or amended legislation lies with the *Riksdag*. Legislative proposals, whether proceeding from the government or a private member, are dealt with by one of the parliamentary committees. Anyone of the 349 members of the *Riksdag* can table a counter-proposal to a bill introduced by the government. Such a proposal is called a motion. If a motion is formally adopted by the *Riksdag*, the government is bound to implement its provisions. When the committee has completed its deliberations, it submits a report and the bill is put to the chamber of the *Riksdag* for approval. If adopted, the bill becomes law.

6. *Promulgation.* After its successful passage through the *Riksdag*, the new law is formally promulgated by the government. All new or amended laws are published in the Swedish Code of Statutes (*Svensk författningssamling*, SFS).

Forward planning

Work flows from the government's political agenda, based on the coalition agreement at the start of each political term. The Prime Minister's Office (PMO) submits a list of upcoming bill proposals twice a year to the parliament. The annual Budget Bill also indicates the direction of reforms. It gives significant information about the priorities, including new legislation, for the coming years. The government notes that it is not possible to make any comprehensive list regarding regulations to be adopted by government agencies. The government also informs the *Riksdag* annually about appointed Committees of Inquiry and their work (*kommittéberättelsen*, the Committee Report). These documents are available on the government's websites.[2] Most ministries inform others of upcoming regulations, although some could do better.

Administrative procedures

Law drafting (Box 4.3 above) is highly co-ordinated, with drafts circulated by the responsible ministry at several levels and stages before a bill is adopted by the Cabinet and tabled with the parliament. The same goes for those ordinances that are not subject to a bill. The Instrument of Government[3] requires that authorities must obtain

information from and the views of other authorities, if there is a need to do so, and sets procedures for consultation between the ministries. The aim is to ensure that all points of view are captured and a consensus established before a bill is adopted.

The responsibilities and functioning of the Government Offices are set out in special rules of procedure *(Instruktion för Regeringskansliet, Arbetsordningen*). These also promote collective decision making and a consensus driven approach to policy development.

Legal quality

Fundamental provisions to secure legal quality and uniformity are stipulated in the Instrument of Government. Procedures are further developed in legislation and secondary regulations, as well as a range of guidelines and policy statements. These include the checklist for legal drafters, the Green Book guidelines for writing laws and regulations, and the Bill handbook issued by the Prime Minister's Office. The guidelines and related training (see Chapter 2) target all levels of authority involved in the development of new regulations: the Government Offices, agencies and Committees of Inquiry. They promote principles of legal quality, but also broader regulatory quality, such as fulfilling the aim, solving the problem identified, regulatory impact analysis, reduction of administrative burdens on business, consultation, alternatives to regulation, plain language drafting, intelligibility (clear structure and clear language) and access to legislation.

Responsibility, as in most other OECD countries, starts with the individual ministries which make up the Government Offices. There is no separate body of officials for legal drafting. Special training is offered to officials on drafting and legal quality principles (see Chapter 2). Each ministry has a Directorate General for Legal Affairs responsible for ensuring that draft bills are well prepared, legally correct, consistent and conform with requirements. The Directorate also reviews bills to check that the requirements for inter-ministerial consultations have been met.

Two authorities assume a more general role in quality control:

- The *Prime Minister's Office* is responsible for legal (as well as political) co-ordination of legislative work within the Government Offices. It has a Director General of Legal Affairs who is formally responsible for co-ordinating legal and linguistic questions to promote conformity and high quality in legislation. To this end it may issue handbooks (including the Checklist for legal drafters, which helps civil servants, officers engaged with inquiries and investigations and employees of the public authorities to ask themselves the right and necessary questions in regulatory work), guidelines and other materials.

- The *Ministry of Justice* plays an important advisory and legal checking role. Its Division of Constitutional Law provides legal assistance to ministries on constitutional issues, and expert advice to Committees of Inquiry if an issue of constitutionality arises in their work. Its Division for Legal and Linguistic Draft Revision has responsibility for publication of the Swedish Code of Statutes and provides linguistic services to ministry officials (see below). The two divisions share the responsibility to review all draft government bills, ordinances and terms of reference for Committees of Inquiry, from a perspective of general quality as well as the constitution. The two divisions also scrutinise draft

legislation to check conformity with the constitution, including a check that the Government Offices have consulted externally, in conformity with the Instrument of Government. The Ministry of Justice provides assistance throughout the internal procedure. The consultation is mandatory in the second stage.

The Council on Legislation provides an important further legal check on bills at the end of the process, once the consultation process inside government has been completed. The constitution requires that the government refer major items of draft legislation to the Council for a legal opinion. Its opinion is sought, above all, to ensure conformity of a proposed new regulation with the legal system and compatibility with constitutional law (legal security, capacity to appeal). The Council explained, however, that it also scrutinises draft laws in terms of their capacity to meet stated objectives, and whether issues of compliance and enforcement are likely. It can make "drastic recommendations" such as merging two laws. The Council only considers draft laws: it does not check other forms of regulation.

The Council is a consultative body. The government, and the parliament, may ignore its advice. In practice, although its views are not always followed in every detail, it is a well respected institution and the fact that its opinions are made public lends weight to these. Its advice is generally accepted. In the first instance, if it finds against a proposal, its advice goes back to the responsible ministry and the proposal is either withdrawn or revised. If the government wants to bring a rejected proposal before the *Riksdag*, a rare event, the government has to present arguments in favour of the proposal against the opinion of the Council. The Council's advice is also set out in the explanatory memorandum which is attached to bills laid before the parliament.

Plain language

Plain language is a statutory requirement for drafting laws, ordinances and regulations and has been promoted over a number of years. Recent years have seen specific projects designed to simplify and improve the design and drafting of official documents. The Ministry of Justice Division for Legal and Linguistic Draft Revision currently has five language experts to ensure compliance with plain language drafting requirements and has produced guidelines advising on the use of plain language. The Division for Legal and Linguistic Draft Revision offers training sessions for legal drafters; handbooks, guidelines and articles; advice by phone or e-mail; and takes part in the work of law commissions appointed by the government to redraft legislation. It may give courses on an *ad hoc* basis for special projects and for officials who ask for it.[4]

The Plain Swedish Group (*Klarspråksgruppen*) was appointed by the government in 1993 to encourage agencies to start plain language projects. It channeled knowledge, ideas and experience gained from plain language projects in Sweden and abroad. As part of its work, the group arranged conferences and visited government agencies to inform them about plain language. In 2006, this work became one of the many tasks of the newly set up Language Council (*Språkrådet*), which is a department of the official language agency, the Institute of Language and Folklore.[5]

EU and international aspects are also covered. Two of the Ministry of Justice language experts devote half their time to promoting plain language within the EU institutions. The ministry website contains guidelines and recommendations for EU texts.[6] The Swedish documentation on plain language interestingly draws attention to the work of other bodies.[7]

The role of the parliament

The explanatory memorandum (EM) attached to a bill must include a description of stakeholders consulted ("referral bodies", "*remissinstanserna*"), their views, and whether and how these have been taken into account. The opinion of the Council on Legislation is also recorded. The EM also contains a description of various impacts. The OECD peer review team was told that the best examples give a transparent picture of preparation and views expressed, as well as implementation.

The OECD peer review team heard that an issue is the unstable workflow, as there are "seasons" for law making. The parliament has put pressure on the government to improve the flow of information on upcoming legislation.

The parliament takes an interest in plain language. In 2005, the *Riksdag* adopted a bill for a concerted language policy with the objectives: Swedish is to be the main language; Swedish is to be a complete language, serving and uniting society; public Swedish is to be cultivated, simple and comprehensible; and everyone is to have a right to language, to develop and learn Swedish, to develop and use their own mother tongue and national minority language and to have the opportunity to learn foreign languages. This was followed by the adoption, in 2008, of a bill on a new language law. This states, among other things, that Swedish is the main language of Sweden, protects the five minority languages and states that public authorities in Sweden must strive to be express themselves clearly and comprehensibly.

Ex ante impact assessment

Policy

Initial framework

Sweden started to develop its policy for *ex ante* impact assessment over ten years ago. Given its relatively unusual institutional structure (a small core of ministries and a much larger network of agencies with significant responsibilities for the development of secondary regulations, together with a system of Committees of Inquiry that play an important role in policy and regulatory development) it rightly decided that all of these actors needed to be covered. This resulted in a three tiered system, with varying arrangements (albeit broadly with the same requirements) for each type of institution:

- For agencies, the government Agencies and Institutes Ordinance (SFS 1995:1322) laid down principles for the development of new regulations, including analysis of economic and other consequences, and consultation of other agencies and sub national levels of government as well as the Swedish National Financial Management Authority (*Ekonomistyrningsverket*, *ESV*) if a regulation was expected to increase costs.

- For Committees of Inquiry, the Committees Ordinance (SFS 1998:1474) made it clear that general cost calculations and consequences must be covered, with particular attention to SMEs, and the government usually set these out in more detail in the terms of reference establishing a committee.[8]

- For the Government Offices (ministries), a checklist for legal drafters was the starting point. In 1999, a group of State Secretaries appointed to promote regulatory reform established guidelines on the same principles as the Committees Ordinance, and the *Simplex* Ordinance for government agencies, to promote the special needs of for SMEs.

The so called *Simplex* Ordinance on special impact analysis of rules on small enterprises (1998:1820), which came into force in 1999 was the only mandatory requirement. It stipulated that a government authority[9] has to undertake, as soon as possible, a special impact analysis on SMEs if new or changed rules have significant effects on small enterprises' working conditions, competitiveness, etc. The Ordinance contained a checklist with twelve questions to help understand the consequences of regulations, and indicated that there should be consultation with representatives from the business community as well as other affected authorities. They provide among other issues rules on how to consider whether public action is necessary, how to identify alternatives to solve a problem and how to make impact assessments.

Recent developments

The 2007 OECD report drew attention to a number of shortcomings in the approach. In particular, it identified as issues, the fragmentation of the system (different arrangements for ministries, government agencies and committees of inquiry), the fact that it focused heavily on SME impacts (the only mandatory part of the system) to the detriment of a broader perspective, and not least the lack of any strong and integrated institutional framework to monitor compliance with instructions to carry out impact assessments and challenge the quality of impact assessments. The report noted, for example, that there were no legal requirements for agencies or committees to submit their impact assessments for a quality check, and no procedures for handling reports that did not meet the requirements.

The Swedish government decided subsequently to give the process a significant boost, accepting that results had been disappointing so far and that there had been a relative failure to embed culture change across the administration in support of effective assessments. The new policy seeks to promote a uniform and broader approach going beyond impacts on small firms, and a strengthened institutional framework. The emphasis remains firmly on the economic and business aspects. The centre piece of the revised approach is a new Regulatory Impact Assessment Ordinance for the agencies, which entered into force on 1 January 2008.[10]

The ordinance, which replaces the so-called *Simplex* Ordinance (SFS 1998:1820) and Paragraphs 27 and 28 concerning impact assessments in the Government Agencies and Institutes Ordinance (SFS 1995:1322), sets specific and broader requirements for impact assessment. It states that when making new regulations, all relevant consequences (economic, social, environmental etc) should be taken into account and documented in a written justification, with a level of analysis proportionate to the importance of the issue.

The new ordinance for agencies has been used as a template to update and strengthen requirements on ministries, as well as on the Committees of Inquiry. The group of State Secretaries responsible for co-ordinating Better Regulation within the Government Offices adopted in June 2008 guidelines stating that the same principles laid down in the agency Ordinance also apply to ministries. The Committees Ordinance has also been amended to reflect the same principles.[11]

As might be expected the development of the new system generated some discussion about the extent to which the system should encourage a broad view of impacts beyond the business and economic impacts. The current system does in fact state the need to take into account all consequences (including social and environmental). However in practice, economic consequences are the main focus of the process. For example, the Better Regulation Council does not normally scrutinise the environmental and social impacts of regulations.

Institutional framework

The institutional support framework for impact assessment has traditionally consisted of a different coverage for ministries, agencies and Committees of Inquiry. The Ministry of Enterprise has been the focal point for supporting the ministries with business related impact assessment, and has also covered the Committees of Inquiry through involvement in setting their terms of reference. The Swedish Agency for Economic and Regional Growth (*Tillväxtverket*) has done the same for the government agencies, together with the Swedish National Financial Management Authority (*ESV*). As in most other OECD countries, ministries and agencies are individually responsible for drafting regulations and the impact assessments that go with this process (other ministries may comment upon the draft and the mandatory impact assessment for SMEs). The oversight structure has now been strengthened and to some extent integrated (albeit not wholly).[12]

Better Regulation Council

The most important development is the establishment of the Better Regulation Council, which will scrutinise proposals prepared by both ministries and agencies (and by Committees of Inquiry when their proposals are being referred for consideration). So far, the majority of proposals scrutinised by the Better Regulation Council are the final reports from Committees of Inquiry. The requirement to submit draft proposals and their impact assessments to the Council is built into the agency ordinance and ministry guidelines. The agency ordinance[13] states that "before an agency decides on regulations that may significantly affect the operational conditions of enterprises, their competitiveness or other conditions" the Council must be given at least two weeks to comment.[14] The Council will not scrutinise impact assessments carried out by the European Commission on draft EU directives (there are no current plans for the Swedish government to submit draft EU directives for national *ex ante* impact assessment).

The majority of the proposals that the Better Regulation Council scrutinises have been, until now, those which are found in the reports of the Committees of Inquiry (*i.e.* the BRC is on so-called referral body among several other referral bodies) and proposals from government agencies. Due to time constraints (as well as other reasons) not that many proposals for laws and ordinance drafted solely by the Government Offices, without involvement of a Committee of Inquiry, are sent to the BRC.

Only proposals for new or amended regulations that affect business need to be submitted. The Council's mandate refers to consequences for business, and it must take a position on whether the impact assessment makes it possible to see the effects on administrative costs for businesses. The Council does not normally scrutinise social and environmental aspects. It will emphasise the need to consider alternatives to regulation.

If an impact assessment is found to be inadequate, the Council can issue a public statement and express its opinion about the impact assessment and the proposal (the Council secretariat explained that it wants to avoid making changes itself, as it is important that ministries do this, but that it will give advice). All opinions of the Council are public and available at its homepage *www.regelradet.se*. The Council is advisory and cannot force the government or agencies to follow its advice (this would be against the constitution). The Council may set up its own guidelines for its work (working methods).

Ministry oversight

The Market and Competition Division of the Ministry of Enterprise supports and gives feedback, to a certain extent, on impact assessment concerning business aspects carried out by ministries, as part of its co-ordination of the business related work of Government Offices on Better Regulation. Specifically, the division carries out a quality control of ministry proposals. If a proposal affecting businesses is not accompanied by an impact assessment, the Market and Competition Division can, just like any other division at the different ministries affected by the proposal, refuse to accept it during the joint drafting procedure. The same goes if the impacts on businesses are poorly analysed or if the proposals contain unnecessary burdensome regulations or could be simplified in any other way, etc.

The Division (see also Chapter 2) has a team of about 8-9 persons for this and related work to support regulatory simplification in the Government Offices (they also have other tasks). The work is also supported by the State secretary steering group for Better Regulation, chaired by a State Secretary at the Ministry of Enterprise, and an inter-ministerial officials group, also chaired by the Ministry of Enterprise. Officials at the Ministry of Enterprise interact on a regular basis with officials responsible for business related regulations at the different ministries.

The Market and Competition Division has developed guidelines with more information on how to carry out impact assessments. These are available on a web portal of the government intranet, accessible to officials at the Government Offices. There is also a template for setting out impact assessments, consisting of twelve steps, which officials within the Government Offices are encouraged to fill in.

Government agency oversight

The new Regulatory Impact Assessment Ordinance[15] states that the Swedish Agency for Economic and Regional Growth (*Tillväxtverket*) and the Swedish National Financial Authority (*Ekonomistyrningsverket*, *ESV*) are responsible for methodological development, training and advice, and that *Tillväxtverket* is responsible for co-ordination. *Tillväxtverket* no longer receives, as it did, the impact assessments. Its role is advisory. It has no powers to send back an impact assessment if the draft is inadequate, or to require one to be carried out if there has been a failure to do so.

Tillväxtverket has created a contact group of agency representatives. An important part of *Tillväxtverket*'s work is to train agency officials in the use of impact assessment as a practical tool. This includes group work on a case study. The training also serves as forum for exchange of experiences and is partly designed to meet each agency's individual experiences and requests. All training includes a general presentation of the situation of businesses and of Better Regulation in Sweden. The training is often co-ordinated with presentations of the measurements of administrative costs for businesses.

Box 4.4. *Tillväxtverket* checklist for Impact Assessment (IA) by government agencies

Attitudes: Is IA work considered important, supported by management? Are IAs in demand as background for decision making?

Working forms: Are there clear and well known routines for IA, early in the process?

Resources: Are sufficient time and personnel resources allocated for this task and are the correct competences available?

In house support: Is there access to in house support facilities such as training, and quality assurance?

Plus: Agency regulations are the final link in the regulatory development chain so need to look at upstream IAs, and early views from business on how they might be affected can be valuable. Use the *MALIN* database as input.

General recommendations to government agencies:

Perspectives: *i*s the company perspective a self evident element of the design of regulations and services?

Dialogue: Is there a good dialogue with business? Is there a good dialogue within government agencies? With other agencies? Relevant ministries?

Regulations: Is it easy to find the relevant regulations? Are they easy to read, understand? Routines for follow up? Is there still a need for them? Are new or amended regulations really necessary? Can some companies be exempted? Are costs and other impacts on business adequately considered? Can the EU dimension be more actively pursued?

Matters: How can processing times be cut back? Is the language used in decisions and notices simple?

Information gathering: Is all the information required of companies necessary or can it be reduced? Is the same information requested several times? Same information from different parts of the same company? Can another agency collect the same information? Can the frequency of collection be reduced? Can forms be improved, or use electronic means?

Inspection: Could inspection be co-ordinated with other government agencies? Could they be designed to cause less of a burden? Do they have to be carried out as often as they are now?

Information and service: Can information to companies be improved? Can companies contact agencies when and how they want? What is done with proposals submitted by companies?

Tillväxtverket wants government agencies to think twice in their regulatory work, in order to help ensure that companies have time for other things than meeting administrative requirements.

Together with *ESV*, *Tillväxtverket* has developed a web-based guidance tool on impact assessments. *Tillväxtverket* raised issues about the relationship with *ESV*, which seems to stand in the way of a more streamlined approach.

Methodology

The Regulatory Impact Assessment Ordinance (SFS 2007:1244) on which the other parts of the system[16] are based sets out a number of issues that must always be addressed. Before deciding on a regulation, the agency shall explore as soon as possible the costs and other impacts, to the extent necessary. Impact assessment should address social, environmental and economic impacts, where appropriate. Results shall be documented. Administrative authorities and business shall have the right to be heard. Paragraph/Article 6 specifies the content in more detail: a description of the problem to be solved, the objectives to be achieved, the alternative solutions, the effects if a proposed regulation is not adopted, costs and other impacts in relation to EU regulation, entry into force and need for information. Paragraph/Article 7 specifies that where impacts concern enterprises, a deeper description is required on different aspects *e.g.* impacts on firms of different size, competitiveness, action needed by firms, time schedules. There remains a special focus on companies, especially SMEs. The potential administrative costs for businesses of a regulatory proposal should be included. The *Tillväxtverket* database of measurements, called *Malin*, which is updated annually, should be used by officials to simulate administrative costs when drafting new regulations. Finally, impact assessments must include a provision for *ex post* review.

Quantification of costs where possible is underlined in different steering documents/guidelines. According to Article 4 in the Regulatory Impact Assessment Ordinance (SFS 2007:1244) an agency shall, as early as possible, before it decides on regulations or general advice, make an assessment of the financial impact and other consequences of the regulations or the general advice to the extent necessary in the individual case, and document this assessment in an impact assessment. The same goes for Committees of Inquiry (cf. Article 14 and 15 a in the Committee Ordinance (SFS 1998:14747). The same goes for ministries within the Government Offices according to guidelines issued by the group of State Secretaries on Better Regulation. There are also internal guidelines for the Government Offices on how to carry out impact assessment (*Konsekvensutredning vid regelgivning – en vägledning* ("Impact Assessment when regulating – a guidance"), available on the internal web portal for Better Regulation), where it is stated that one should try to quantify the costs and other impacts.

The new provisions require:

- Confirm as far as possible that a given regulation is really necessary and that it solves the problem it was designed to address.
- Generate comprehensive support data needed for estimating the costs and other effects, such as environmental and social impacts, that comes with the regulation.
- New or amended regulations must be simple and appropriate.
- Impact assessments must also serve to improve the quality of regulations and reduce the need for interpretation, help restrict costs of compliance and reduce the number and extent of regulatory provisions, *i.e.* the total corpus of regulations.

- Scope must match the needs of each individual case. Description of problem to be solved, objectives to be achieved, alternative solutions and the effects when a proposed regulation is not adopted.

- Impact in terms of cost and other factors.

- Whether the regulation is in conformity with or goes beyond EU obligations.

- Special clause (Article/Paragraph 7) addresses the case where the proposed regulation affects the conditions under which an enterprise operates, its competitiveness or other conditions. Whether special consideration needs to be given to the needs of small enterprises.

The Board of Swedish Industry and Commerce for Better Regulation (*NNR*) notes that *ex ante* assessments of impacts are necessarily imprecise. Paragraph/Article 8 of the Regulatory Impact Assessment Ordinance is very important in this respect. It states that government agencies must monitor the consequences of their regulations and general recommendations, and that if the basic preconditions for a regulation have changed, it must be reviewed and a new impact assessment introduced.

Consultation and communication

There is strong encouragement (and sometimes a requirement) to consult as part of the process. The Regulatory Impact Assessment Ordinance states very clearly that government agencies are expected to consult.[17] Committees of Inquiry are subject to clear procedures in this regard. The terms of reference for Committees of Inquiry usually contain instructions for them to interact with stakeholders to gather information which will form a basis for impact assessments. Since 2001, terms of reference for committees dealing with issues of interest for the business community often include an obligation to consult with the Board of Swedish Industry and Commerce for Better Regulation (*NNR*) on administrative consequences for the businesses. Stakeholders may later comment on the committee report and the impact analysis during the consultation procedure. This external consultation provides feedback on the report (if the reaction is negative, the proposal may be dropped, or an alternative approach identified). A final stage may be that the responsible ministry opts for further consultation on the draft law, to which comments received and a justification of the course adopted may be attached. This consultation may be specifically targeted at the entities (such as companies) most affected by the proposed law.

The Swedish government draws attention to the principle of public access to official documents, which guarantees all individuals and the press access to official documents held by public authorities (see Chapter 3). Anyone who wishes to study a public document can address themselves to the relevant authority in order to get a copy of the document. When proposals regarding new acts are made official, the impact assessment is a part of the proposal and can be found at the government's website. Bills containing legislative proposals and submitted by the Government Offices to the Parliament traditionally contains a special section with impact analysis. However, it is not mandatory to make impact assessments official for proposals regarding ordinances that are not part of a bill that is submitted to the Parliament. If an impact assessment has been carried out, it should then be kept in a file at the ministry. It can then be made available to the public upon request.

Views on the process

The OECD peer review team heard a range of comments on the new system. The Ministry of Enterprise notes that the key challenge is to change attitudes and work habits, and that this takes time.[18] Some stakeholders noted that the new framework is clearer in setting out requirements. The Better Regulation Council should be a useful check, as in practice, ministries expect to have to redo their assessments if these are not good enough. There are concerns about capacities for carrying out detailed economic analysis in a system that has been largely driven so far by a legal perspective. The Swedish Agency for Economic and Regional Growth (*Tillväxtverket*) fears that the approach of basing the ministry guidelines on an agency ordinance is not very transparent and may weaken ministry resolve to follow them. There is a need to educate ministries and raise awareness of the importance of *ex ante* impact assessment.

An issue raised by several stakeholders with the OECD peer review team was the scope of impact assessments, which in practice (even though in principle, according the government, all kinds of impact should be given the same weight) remains largely confined to the business and especially, simplification, dimension. There is, for example, concern that other issues (such as consumer protection or environmental impacts) are crowded out by the emphasis on business impacts. The environmental dimension especially is not adequately highlighted. Business organisations would for their part like to see impact assessment address the full range of compliance costs rather than focus the main effort on regulatory simplification and administrative burdens.

The Board of Swedish Industry and Commerce for Better Regulation (*NNR*) has reported on the quality of impact assessments since 2002 (Box 4.5). Overall, the *NNR* concludes that the quality of impact assessments remains unacceptably low. The National Audit Office is also critical of current impact assessment quality, which needs to move beyond legal quality. *Tillväxtverket's* review of impact assessments in the course of its work suggests variable quality, both between government agencies and within them. It notes that quantification has some way to go, even at the simple level of the number of companies affected, time needed and costs.

Box 4.5. *NNR* reports on the quality of impact assessments

Each regulatory proposal and its impact assessment are assessed against quality factors registered in a database. 2008 was a transition year, with the establishment of the government's new impact assessment system. Quality factors now reflect the new rules. The 2008 results show that too few impact assessments comply with the adjusted quality factors. A comparative analysis of developments over time (2002-2008) shows however that most quality factors show a favourable trend. For example, different options are described in 46% of cases compared with 26%; the number of companies affected in 54% of cases compared with 6%; total costs are reported in 16% of cases compared with 4%; and the effect on business competitiveness is recorded in 37% of cases compared with 9%.

It should be noted that the *NNR* Regulatory Indicators use a rather simple and inflexible methodology. If the answer is "no" on just one of several aspects, then the overall answer is "no".

Alternatives

This review was not able to go into this issue in any detail. Paragraph 6 of the Ordinance on Regulatory Impact Assessment requires, among other things, the consideration of alternative solutions to regulation, including consideration of the effects of a "no-action alternative". From a business perspective, the *NNR* notes the importance of choosing the option that is the least costly for companies, whilst achieving the purpose of the regulation. It has not noted any significant development in this area, and does not consider that the issue has been adequately highlighted in the government's Better Regulation plans.

Notes

1. EU law takes precedence in the areas where transfer of rights of decision-making has been made by the *Riksdag*.

2. *www.sou.gov.se* or *www.regeringen.se.*

3. Chapter 7, Article 2.

4. The focus on this issue is considered important because Sweden is an increasingly multilingual country with over 150 languages spoken and over a million people have a non-Swedish background. English is used increasingly, and in the year 2000, five languages were given the status of national minority languages.

5. For further information, see: *www.sprakradet.se/international.*

6. *www.regeringen.se/klarsprak.*

7. Clarity is a worldwide organisation of lawyers and other interested parties. Fight the Fog is a campaign run by the English translators at the European Commission, to get rid of EU jargon. The UK has a Plain English Commission and a Plain English Campaign.

8. The basic requirements are supplemented by guidelines. For example, the Committee Handbook (*Kommitténandboken)* outlines how to carry out an impact analysis. Since 2001 the government includes in the terms of reference, especially for business relevant committees, an obligation to consult with the Board of Swedish Industry and Commerce for Better Regulation (*Näringslivets Regelnämnd*, NNR) on the consequences for the business sector and businesses.

9. The Simplex Ordinance applied to government agencies. According to guidelines issued by the group of State Secretaries, the same kind of checklist was expected to be applied by the Government Offices.

10. *Förordningen om konsekvensutredning vid regelgivning*, SFS 2007:1244.

11. By adding a new Paragraph/Article to the Ordinance, 15 a §.

12. There is a constitutionally based reason why it is hard to integrate the institutional oversight of ministry and agency impact assessments.

13. See Annex B.

14. The agency ordinance does, however, specify a number of cases where an agency may refrain from providing the Better Regulation Council with an opportunity to give its advice. These are : review would be "irrelevant" ; the agency, for reasons of secrecy, is not able to provide the Better Regulation Council with the information it would need to be able to state its opinion ; it would cause significant inconvenience if the information that the Swedish Better Regulation Council needs to enable it to state its opinion were made public ; it would delay the processing of the case in such a way as to cause significant inconvenience ; or the agency, pursuant to the provisions of Articles/Paragraphs 2 or 5 of the Regulatory Impact Assessment Ordinance (2007 :1244) has not conducted an impact analysis.

15. SFS 2007:1244, last Paragraph/Article 9 §.

16. Paragraph/Article 15 a § in the Committees Ordinance (SFS 1998:1474) and the guidelines on how to carry out impact assessment, issued by the group of State Secretaries with special responsibility for the better regulation work within the Government Offices.

17. Paragraph/Article 4 in the Regulatory Impact Assessment Ordinance (SFS 2007:1244) states: "As early as possible, before an agency decides on regulations or general advice, the agency shall: 1. make an assessment of the financial impact and other consequences of the regulations or the general advice to the extent necessary in the individual case, and document this assessment in an impact analysis; and 2. provide central government agencies, municipalities, county councils, organisations, the business sector and other parties that will be significantly affected financially or otherwise with an opportunity to state their opinion on the issue and on the impact analysis" The ministries and the government agencies may also undertake, and some of them do so, public consultation on a voluntary basis.

18. Response to OECD questionnaire.

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