Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates (CCDs) can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text, for example appeals are considered in Chapter 6).[1]

Assessment

Public consultation

Sweden's underlying and long established commitment to openness frames the overall approach to public consultation, which is based on a traditional, methodical approach. The establishment of Committees of Inquiry remains a cornerstone of the Swedish policy and rule making process, especially for significant issues. They must follow certain carefully established working methods, and considerable information about their work is made public, including not least the report on their findings to the government. They are required to consult widely. Sweden also has a longstanding tradition of consultation with the social partners. Beyond this, there is a general requirement on ministries to consult, and the Ministry of Justice checks that this has been done. Public consultation with policy affected by a certain piece of legislation is a routine part of developing draft laws and subordinate regulations. Consultation is in principle, mandatory, based on the 1974 Instrument of Government which sets out that

"In preparing Government business, the necessary information and opinions shall be obtained from the public authorities concerned. Organisations and private persons shall be afforded an opportunity to express an opinion as necessary." There is also a range of further guidelines on regulatory management which cover consultation. There seems to be a general level of satisfaction among stakeholders who engage with the system.

There have been some positive changes since the 2007 OECD report, concerning consultation with the business community. The Government's Better Regulation policy and Action Plan have given rise to significant new developments since the 2007 OECD report, regarding consultation with the business community. The Ministry of Enterprise has established a central working group with business representatives to identify areas of particular concern to business. Several ministries and government agencies have either established similar working groups or have held meetings with business organisations and other stakeholders in their better regulation work.

Whilst generally supporting Sweden's approach, participating stakeholders do have some issues with the system. Within the framework of guiding documents, ministries may define their own approach. With regard to major legislative changes, before the government takes a position on the recommendations of a Committee of Inquiry, its report is referred for consideration to a wide range of relevant "referral" bodies. This provides feedback and allows the government to judge the level of support it is likely to receive. If there is a significant unfavourable response, the government may try to find an alternative solution. Despite these provisions, some issues were raised with the OECD peer review team. These included "one way" consultations (more information than consultation), unhelpfully short deadlines for making comments and a tendency to accelerate the process, inadequate feedback, and the need to incorporate views at an earlier stage in the process.

The system may lack transparency for outsiders, even if this is not the intention. Public consultation is a routine part of developing draft laws and subordinate regulations and it is in principle mandatory. Nonetheless, it was suggested that ordinary citizens can be left out of the loop, the first practical opportunity for access to a draft law being when the text is submitted to the Council on Legislation. The Committees of Inquiry system appears to work well for established stakeholders (and big issues), but is less effective for the general public (where it is desirable to engage the latter), even though there is a formal right to participate in the system. The number of Committees of Inquiry set up at any one time may not help. The 2007 OECD report noted that consultation procedures seem to be effective in communicating future legislation and consolidating the participation of invited stakeholders, but had some misgivings about the extent of transparency, and heard that participation by some groups was difficult because of the resources that needed to be committed. An updated, practically oriented, consultation guide would be helpful in highlighting good practices, and in encouraging the use of new approaches, such as the Internet, as well as emphasising the importance of timelines, feedback and other issues.

Recommendation 3.1. Review the Committee of Inquiry process to check for issues that make it hard for stakeholders to participate effectively (deadlines for comments, feedback processes, starting consultation at an earlier stage). Consider whether there is a need to review the way in which the general public may access the Committee of Inquiry process in order to make its voice heard. Encourage the use of new approaches, such as Internet consultations, where there is a real need to reach out to a broad audience.

Recommendation 3.2. Consider whether it would be helpful to provide updated consultation guidelines covering key aspects of good practice such as timing, scope, methods and feedback (the United Kingdom guidelines provide a good example). Consider how to ensure that the guidelines are respected.

Box 3.1. Findings from the 2007 OECD report

The extensive consultation procedures seem to be effective in communicating future legislation and consolidating the participation of invited stakeholders. Standards for consultation mechanisms during the law-making process are of high quality. Consultation procedures during the legislative process add benefits in terms of improved legitimacy and transparency and they contribute to internal co-ordination between different institutions. While the work of a Committee of Inquiry provides a thorough and extensive assessment of the underlying issue, it can also take time and is not necessarily conducive to decisions. After the Committee of Inquiry has submitted its report, this is referred for consideration to the relevant bodies and the referral bodies are, normally, given three months to submit their comments.

There is, however, scope to improve the quality of consultations, especially with the business sector and consumers, and to incorporate their views in the draft proposals at an early stage of the process. This could help to better weigh up the costs imposed to citizens and businesses, the possible alternatives and the impacts of future legislation. Consultation procedures of government agencies could be strengthened, as they are the implementing bodies of most of regulations that affect stakeholders. Swedish agencies use consultation procedures quite extensively, *e.g.* in connection with regulatory changes or before taking positions on international issues. Some agencies also use consultation procedures in connection to the development of new products or services.

There appears to be a specific issue regarding the development of regulations by government agencies. Regulations developed by agencies to give effect to primary laws are a key part of the Swedish regulatory infrastructure. A handbook for agencies on how to draft regulations includes consultation, and beyond this, the government agencies may develop their own procedures. It is not, however, clear to what extent agencies apply the principles of Better Regulation regarding consultation and transparency. Although government agencies are not legally obliged to comply with advice provided by the handbook, this kind of advice from the government is traditionally adhered to by the agencies. The 2007 OECD report noted that the consultation procedures of government agencies could be strengthened, as they are the implementing bodies of most of the regulations that affect stakeholders. There is no clear evidence of progress in this field.

Recommendation 3.3. Consider how to ensure that government agencies systematically apply best practice principles for public consultation, at least as regards their more significant draft regulations.

Public communication

Public communication of regulations is handled robustly with a number of access points. This is a strong feature of the Swedish system. It includes a number of well maintained websites where interested parties may consult developments in a number of different ways. The *NNR* has, however, noted that companies can find it hard to obtain

information on which regulations apply, and how to comply in practical terms. It also notes that more could be done to communicate on changes in regulations, as companies may not otherwise notice that regulations have been simplified.

Background

General principles

Sweden attaches considerable importance to the principle of transparency, with roots going back to the eighteenth century. It led Europe as regards the right of access to public documents. Transparency is enshrined at the highest level, in two of the four fundamental laws making up the constitution:

- **Instrument of Government**. This sets a requirement on government authorities to consult interested parties on the development of government business. Chapter 7, Article 2 states that "In preparing Government business the necessary information and opinions shall be obtained from the public authorities concerned. Organisations and private persons shall be afforded an opportunity to express an opinion as necessary".

- **Freedom of the Press Act.** This sets rules for public access to official documents. Chapter 2 contains detailed provisions on when a document becomes "public domain", and on the modalities of right of access. The rules, however, do not apply to issues under development (working material), until the issue is "finished". There are also exceptions to the access rule, listed in a special Act on Public Access to Information and Secrecy (*offentlighets- och sekretesslagen*, SFS 2009:400).

Principle of public access

The principle of public access guarantees the general public and the mass media an unimpeded view of activities pursued by the government and local authorities:

- everyone is allowed to read public documents held by public authorities to the extent that documents are not secret (public access to official documents);

- civil servants and others who work in the central government sector or for local authorities have the right to tell outside parties what they know, to the extent that the information is not secret (freedom of expression for civil servants and others);

- civil servants also enjoy special freedoms to provide information to the media (freedom to publish for civil servants and others); and

- court proceedings are open to public, as are meetings of legislative and decision-making assemblies.

The principle thus applies to official documents held by public authorities. It is, however, subject to two restrictions. Firstly, not all documents are regarded as official documents. A document is official if it is held by a public authority and, according to

special rules, is regarded as having been received or drawn up by an authority. There are a number of rules relating to when a document is considered to have been drawn up by a public authority. A document is considered to be drawn up when it is dispatched. A document which is not dispatched is drawn up when the matter to which it relates is finally settled by the authority. If the document does not belong to any specific matter, it is drawn up when it has been finally checked or has otherwise received its final form. For certain kinds of documents other rules apply. Secondly, a number of official documents might be considered as secret, according to specific secrecy rules. Anyone who wishes to study a particular public document can address him/herself to the relevant authority. If, for example, a stakeholder wishes to access regulatory material before it is published as a bill, it can ask for this material, referring to the principle of public access.[2]

In keeping with the principle of public access, material related to the work of Committees of Inquiry (see below) and the opinions of the Council on Legislation are published on the relevant websites.

Public consultation on regulations

Public consultation is well embedded in the Swedish tradition and has strong roots. It is a routine part of developing draft laws and subordinate regulations. In the 1974 Instrument of Government (one of the four fundamental laws on which the Swedish Constitution is based), Chapter 7, Article 2, states that "In preparing Government business the necessary information and opinions shall be obtained from the public authorities concerned. Organisations and private persons shall be afforded an opportunity to express an opinion as necessary". Public consultation by the government with parties affected by draft legislation is in principle mandatory.[3] Through its scrutiny of drafts for conformity with constitutional requirements, the Division for Legal and Linguistic Draft Revision at the Ministry of Justice checks that the requirement to consult interested parties has been fulfilled. The results of consultation are aggregated by the responsible ministry, and set out in the explanatory memorandum to a bill when it is sent to the parliament. The parliament may also hold hearings with stakeholders and experts.

The Committee of Inquiry system is a key process for all significant proposals (see below). Before significant changes are made to major legislation, a Committee of Inquiry is normally set up, which writes a report that is submitted to the Government Offices and to the relevant ministry. The report is then referred to relevant bodies for consideration. Comments may also be submitted by the general public. The public is normally informed of the decision to develop a draft government bill. Terms of reference for Committees of Inquiry are made public on the Internet, as are the committee reports and the government bills.

Beyond the Committee of Inquiry system which covers major legislation, there is a general requirement to consult. As can be observed in many other European countries, there are no explicit or shared guidelines on how to carry out this consultation. Ministries and agencies may define their own approach, including direct consultation of the public. Consultation is generally written, although special hearings can be organised. For example, the final version of a draft regulation may include a compilation of the different comments sent in and a justification of the final wording. The new regulation may be circulated more widely to the actors within a specific

branch, for example, to all companies that have licences or permits issued by the authority and would be affected by the new rules.

Committees of Inquiry

Committees of Inquiry are a fundamental part of the Swedish policy and rule making process and the means by which public consultation is usually carried out in the development of significant policies or legislation.[4] In particular, before the government can draw up a legislative proposal, the issue is analysed and evaluated by a Committee of Inquiry. Committees are appointed *ad hoc* by the government to analyse an issue, as a basis for political discussion and decision making. The traditional view of this approach, which is unique as it can be distinguished from the more permanent advisory group arrangements of some other European countries, is that membership of a Committee allows stakeholders not only to make their views known effectively and at an early stage in the process, but also to "buy in" to the result. The Government underlines that this process provides valuable feedback to the government. In principle, referrals must be in writing and the referral bodies must be given three months in which to submit their opinions. In exceptional cases, other forms can be used, *e.g.* referral meetings (hearings). Ordinary citizens have a formal possibility to submit their comments, even if they are not specifically addressed as referral bodies.

The Committees Ordinance (*kommitté förordningen*, SFS 1998:1474) sets out general provisions for their composition and working methods. The first step in the process is for the Committee to be assigned terms of reference (letter of instruction) and a closing date for its work by the relevant ministry (responsible for the legal domain in which the committee will carry out its inquiry). The work of Committees usually spans 6 months – 1 year though some can work for longer periods. The terms of reference are circulated for internal consultation around the Government Offices, which allows ministries to propose adjustments (for example, the Ministry of Enterprise may ask that the Committee should pay special attention to avoid unnecessary administrative burdens on businesses in its proposals for regulations). The Committee's terms of reference are made public. Committees carry out their work independently of the government, and have traditionally consisted of a chairperson and one or more members (experts, officials and politicians). "One person" committees (*utredare*) are, however, increasingly common, assisted by experts and a secretary. The secretary is normally a lawyer or an expert in a particular field. Some of those interviewed by the OECD peer review team suggested that the single person approach and shorter timescales for completion of the work may be undermining an adequately broad based and transparent analysis.

When it has completed its work, the Committee of Inquiry submits a report to the government with recommendations, which is published.[5] Before the government takes a position on the recommendations, the report is referred for consideration to relevant "referral" bodies: government agencies, interest groups such as business or consumer organisations, trade unions, academics, courts, regional and local government authorities or other bodies whose activities may be affected by the proposals. Any member of the public may ask to participate in these consultations. This provides feedback and allows the government to judge the level of support it is likely to receive. If there is a significant unfavourable response, the government may try to find an alternative solution. In principle, referrals must be in writing and referral bodies should be given at least three months in which to submit their opinions. Only in exceptional cases can other approaches be used, *e.g.* referral meetings. Any member of the public

can choose to participate in the consultation. Committee reports are also circulated internally to ministries. The information consulted stakeholders are asked to provide varies from case to case. The views of the referral bodies are taken into account by the government in the further development of the draft regulation.

Ex ante impact assessment in Committee reports

An important development since the 2007 OECD report concerns the strengthening of *ex ante* impact assessment as part of the work of the Committees (see Chapter 5). Committee reports have always included a consequences assessment ("analysis of the impacts of proposals"). The Committees Ordinance (SFS 1998:1474) makes 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. With the addition of Article 15a § to the Committees Ordinance, the Committees of Inquiry shall apply the same rules on how to carry out impact assessment as the government agencies (according to the Regulatory Impact Assessment Ordinance (SFS 2007:1244) and the ministries within the Government Offices (according to guidelines issued by the group of State Secretaries on Better Regulation).

Developments in the framework of the Action Plan for Better Regulation

The Government's Better Regulation policy and Action Plan have given rise to significant new developments since the 2007 OECD report, regarding consultation with the business community. The Ministry of Enterprise has established a central working group with business representatives to identify areas of particular concern to business. Several ministries and government agencies have either established similar working groups or have held meetings with business organisations and other stakeholders in their better regulation work. These groups and meetings discuss how to reduce administrative burdens and simplify the regulatory framework for business. All ministries and government agencies involved in the Action Plan must report annually on their actions in this respect, ahead of the annual report to the parliament on progress with the Action Plan.

Consultation and the social partners

The Swedish tradition is to have extensive consultation with the social partners, which is considered very much a "part of everyday life". Union membership is high. 70% of employees belong to a union, and 70-80% are covered by a collective agreement. When relevant the social partners are consulted as referral groups for the Committees of Inquiry (see above). The Ministry of Employment noted, however, that the original tripartite arrangements for consultation have more or less disappeared since the 1980s, and there is today no formal institutional structure for discussion with social partners (for example, no structured social board or council).

Public consultation by the government agencies

There is a handbook for government agencies on how to draft regulations, including to some extent consultation.[6] The agencies are responsible for their own regulations and the central government does not keep information on the extent to which the government agencies have developed their own handbooks for rule-making.

Stakeholder views on transparency in public consultation

The OECD peer review team heard a range of sometimes conflicting views on the strength and transparency of public consultation in practice. Many feel that the tradition of careful consultation and openness is in good shape and consultation is taken very seriously. The business organisations considered that the consultation system is well established and generally works well, noting a welcome growth in informal consultation at an earlier stage in the development of regulations. But they also underlined the scope for further improvement. Some consultations are "one way" – more information than consultation. The formal system takes time, which is a problem for EU regulations. The three month timeline is often not observed, or done in vacation. The short deadlines for responses was an issue raised by several stakeholders. The trade unions noted some deterioration as there is a tendency to "haste" in the process, with the government using hearings (which does not allow views to be captured on the record, and generally reduces the quality of comments) for potentially sensitive issues. Consumers confirmed that their views were sought on relevant issues, although more effort appeared to go into discussion with the business community. Feedback was not systematic, and varies between ministries. It was also suggested that ordinary citizens may be left out of the loop, the first real opportunity for access to a draft law being when the text is submitted to the Council on Legislation.

Public communication on regulations

There is an obligation on the government to publish acts and ordinances, including amendments, in the Swedish gazette for regulations, the Swedish Code of Statutes (*Svensk författningssamling, SFS*), which is updated weekly, every Tuesday. New regulations are usually published four weeks before their entry into force. The information is also published in a consolidated (free of charge) database on the Internet, which is updated a few days after publication of the paper version.[7] The database contains a directory of all laws, ordinances as well as government agency regulations. Case law from the courts is also available. Most of the government agencies publish their regulations on their own websites as well. The government also publishes bi-annually general information on important new laws that will enter into force in the coming six months.

A recent report by the Committee of Inquiry on the electronic publication of acts and ordinances[8] proposes going a step further: acts and ordinances should be published electronically in the Swedish Code of Statutes, to be made available on a special website. The Committee of Inquiry considers that it is both possible and appropriate to introduce an electronic system at this stage. It is technically possible to create a reliable and secure system with a reasonable level of resources. Electronic publication would provide greater access to the authentic version of a statute. The report proposes the introduction of the new system from 2011.

Three other websites provide further information. Two government websites contain relevant information in Swedish, English and other languages.[9] These websites offer a large number of documents from the government, such as terms of reference for committees, committee registers, committee reports, ministerial reports, bills, international agreements and laws and ordinances as they are published. The Parliament (*Riksdag*) website also provides relevant information presented in different languages.[10] This website offers a large number of texts from the parliament such as government bills (*propositioner*), minutes of debates (*protokoll*), proposals from

members of the *Riksdag* and committee reports (*utskottsbetänkanden*). It also contains guides, fact sheets and explanatory texts. All Internet sources and databases are available free of charge.

According to custom many regulations are introduced in January and July of each year, but this is not a formal decision. It is still possible to introduce regulations at other times during the year. The *NNR* notes that companies can find it hard to obtain information on which regulations apply, and how to comply in practical terms. It would be helpful to have this kind of information available before new regulations come into force, especially for SMEs.

Notes

1. Procedures for rule-making (Chapter 4); codification (Chapter 5); appeals (Chapter 6).
2. The requested material will probably be considered as "working material" and not regarded as official documents.
3. The provision does not apply to the agencies. The expression "government business" in Chapter 7, Article 2 in the 1974 Instrument of Government (one of the four fundamental laws on which the Swedish constitution is based), includes all issues that the government has to decide upon.
4. There is no definition of what has to be reviewed by a Committee of Inquiry.
5. Swedish Government Official Report series (*Statens Offentliga Utredningar*, SOU). If a government ministry has conducted the inquiry, it is published in a series known as the Ministry Publications Series (*Departementsserien*, Ds). These documents are available at *www.regeringen.se* and *www.lagrummet.se*. Ongoing inquiries are also referenced.
6. *Myndigheternas föreskrifter - Handbok i författningsskrivning*, Ds 1998:43.
7. *www.lagrummet.se.*
8. SOU 2008:88.
9. *www.regeringen.se; www.sweden.gov.se.*
10. *www.riksdagen.se.*

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