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STATSKONTORET

National Agencies in the Internal Market

Applying Free Movement

Contents

Preface and summary

The Swedish Agency for Public Management is a central government agency that evaluates, analyses and reviews public or publicly funded activities. The Agency supports the Government in promoting efficient administration well adapted to its purpose. Most of its reviews are commissioned by the Government or public commissions of inquiry.

In May 2006, the Swedish Agency for Public Management was commissioned by the Government to survey how Sweden's national and municipal administrations apply and observe the framework for free movement inherent in the EC Treaty. The non-harmonised area of free movement for goods and services was selected as the object of this survey.

The original report was published in Swedish in December 2006.[1] The present report is an abridged version, focusing on analysis and proposals aiming at improving application of and compliance with the free-movement rules. Empirical data are largely omitted.

The main conclusion of this study is that application of and compliance with the free-movement rules in Swedish administration could be improved. The following problems have been identified:

- There is a lack of awareness and knowledge of the EC Treaty and the case law of the European Court of Justice in Swedish administration.
- In general, Swedish regulations lack recognition of the free--movement rules.
- Public officials are unfamiliar with the legal methodology of EC law, where case law constitutes the predominant source for interpretation of the Treaty.
- Responsibility for the internal market is dispersed and a coherent internal-market policy is lacking.

[1] *Förvaltning för fri rörlighet* ('Public Administration for Free Movement'), 2006:16.

- There is a risk of conflict between the public agencies and the Government, since the principle of administrative direct effect allows the agencies to overturn national legislation in favour of Community law. The potential of such conflict in Sweden is increased by the marked independence of Swedish public agencies.
- Protection of individual rights in administrative procedure vis-à-vis Swedish public agencies and the right to an effective legal remedy are too restrictively construed.

We propose that, in order to enforce the rules of free movement more effectively, the Government should prioritise the following:

- Take a determined political stance by establishing that promotion of the internal market is an objective *per se*.
- Improve the Swedish administration's capacity to implement free movement by creating clear channels of information between responsible public agencies and by establishing the internal-market perspective in the legislative process and in existing regulations.
- Strengthen procedural rights for individuals intending to make use of their right to free movement.
- Construe protection of individual rights in administrative procedure vis-à-vis Swedish public agencies, as well as the right to an effective remedy, less restrictively.

The work of editing and translating the original report was carried out by Jane Reichel and Björn Hammarstedt.

1 Background

1.1 Free movement of goods and services

Under the Treaty establishing the European Community (the 'EC Treaty'), the Member States of the European Union have established a framework for an internal market to enable goods, services, workers and capital to move freely across national borders. The internal market is underpinned by several components, free movement being one. The others are a common monetary policy, a common currency, prohibition of state aid and a common trade policy.

The regulatory framework of free movement consists of a harmonised area, in which the EC has enacted secondary legislation laying down common rules for the internal market, and the non-harmonised area, where the general provisions of the EC Treaty apply. The rules of the Treaty include general prohibitions against Member States' barriers to intra-Community trade, and further general exceptions to the prohibition. The Member States thus have some discretion to uphold national market regulations, in so far as they may be considered necessary, non-discriminatory and proportionate. The prohibition and exceptions in the Treaty are worded in abstract terms, giving little guidance on application and interpretation in specific situations. The areas of application of, as well as exceptions to, the rules have been interpreted by the European Court of Justice (ECJ) on a case-by-case basis. Applying the rules of free movement correctly calls for an understanding both of the scope of Community legislation and of ECJ case law.

1.2 Assignment

In May 2006, the Swedish Agency for Public Management was commissioned by the Swedish Government to conduct an initial survey on how the framework for free movement of goods and services is applied and observed by Swedish national public agencies. The assignment was confined to the non-harmonised area of Community law and, moreover, prescribed that the survey was to be carried out

through case studies. It also included investigating possible measures to improve and facilitate application of the rules, and discussing whether the institutional provisions of Swedish administration promote or inhibit their correct application.

In accordance with the assignment, we have assessed unexceptional cases illustrating how Swedish administration handles situations requiring compliance with the free-movement framework**.** The cases include measures taken by public agencies at the national, regional and local levels. These measures fall into three categories: issue of non-binding information and recommendations, public-private partnerships (outside the scope of the Public Procurement Directives) and regular administrative decisions. Our purpose has been not to review whether the measures taken by public agencies do indeed constitute unlawful barriers to trade, but to evaluate how far free movement has been considered in the decision-making process. We have conducted a series of interviews with key actors both at European and national level, namely the European Commission (DG Enterprise and Industry and DG Internal Market and Services), the Swedish Government Offices, the Swedish National Board of Trade, the Swedish Parliamentary Ombudsman (JO), municipal spokesmen and representatives of Swedish and European business associations.

The non-harmonised area of goods and services is very extensive and covers all sorts of public measures at every political and administrative level. Within the scope of this initial study, how the framework for free movement is applied and observed by Swedish public agencies can be covered only to a small extent. Our case studies should be viewed as examples of how the agencies *typically* handle matters related to the internal market.

1.3 Grounds for upholding the free-movement framework

There are at least three important reasons why Swedish administration should give priority to observing and correctly applying the rules of free movement. First, ***Sweden has committed itself to free movement***

by joining the EU. Implementing the EC Treaty and the evolving case law is a fundamental legal responsibility for every Member State. Failing to do so may mean that Sweden is subjected to infringement proceedings by the Commission and may have to stand before the ECJ. Such proceedings should not be the result of public officials' lack of knowledge. Deviation from Community law should occur only as a result of deliberate political decisions, when the Government is seeking to uphold a national interest within the scope of the exceptions laid down in the Treaty.

Second***, free movement is an individual right for citizens and enterprises*** wherever they reside within the Union. This right is *directly effective*, which means that all national public agencies and bodies must ensure that this right is upheld without awaiting further directions from the national legislature. Furthermore, given the *supremacy of Community law*, this individual right takes precedence. Accordingly, in the event that a national rule or regulation conflicts with free movement, all government agencies are obliged to disregard it and comply with the rules of Community law instead.

Thirdly, the internal market is a key feature of the Lisbon Strategy, which aims at ***making the EU the most competitive region in the world by 2010***. All Member States must be committed to pursuing the goals set up in the Lisbon Strategy, and free movement is an essential means to this end. A well-functioning internal market also promotes the interests of Swedish citizens and enterprises since it fosters growth and employment, thereby paving the way for general improvements in welfare.

1.4 Previous surveys

In 2005, the Swedish National Board of Trade published a series of reports on how Sweden has been able to benefit from the internal market.[2] One of the Board's key conclusions was that the advantages

[2] Four reports from the National Board of Trade, in Swedish: *Europa – ja, men hur? Svenska myndigheters uppfattning om EU:s inre marknad* ('Europe — Yes, but How? Swedish Government Agencies' Views of the EU Internal Market', 4 January 2005); *Europa, ja men när? Uppfattningen hos svenska domstolar om EU:s inre marknad*

of the internal market are diminished by a severe lack of knowledge and awareness of Community law. Thus, violations of the rules of free movement are likely to occur owing to inadequacies within both public agencies and courts.

To define the issues to be tackled in our study, we have also studied reports from the European Commission, the Union of Industrial and Employers' Confederations of Europe (UNICE)[3] and the Swedish Institute for European Policy Studies. The European Commission has identified certain problems concerning observation of the rules on free movement at the national level. The Commission has concluded that doing business is still more complicated and cumbersome across borders than within national markets. For instance, where a violation of the principle of mutual recognition occurs, the rights of individuals and enterprises are often not safeguarded. Offended parties are often denied access to information about administrative proceedings, as well as an effective legal remedy.

According to the Commission, it has been particularly difficult for enterprises to offer *services* across borders.[4] The lack of mobility of services follows partially from the variance of regulatory requirements across the Union. It is also partially due to lack of trust in other Member States' regulations, which deters Member States from fully applying the principle of mutual recognition.

('Europe — Yes, but When? Swedish Law Courts' Views of the EU Internal Market', 30 March 2005); *Visst är Europa vår hemmamarknad – nästan all vår export går dit, svenska företags uppfattning om EU:s inre marknad* ('"Yes, of Course Europe is our Home Market — Nearly all our Exports Go There." Swedish Companies' Views of the EU Internal Market', 30 March 2005); and *Europa, ja men hur? Svenska intressenters uppfattning om EU:s inre marknad slutrapport* ('Europe — Yes, but How? Swedish Stakeholders' Views of the EU Internal Market', final report, 30 March 2005).

[3] Since January 2007, BUSINESSEUROPE.

[4] See *The State of the Internal Market for Services*, COM (2002) 441 and *Internal Market Strategy — Priorities 2003– 2006*, KOM (2003) 238.

1.5 Three kinds of trade barrier

To ensure the relevance of the cases selected, we have sought to choose cases that reflect a variety of situations in which the right to free movement may be violated. The six specific cases selected include cases of direct concern to individuals, as well as cases where measures of more general concern have been taken. Binding as well as non-binding measures have been studied. In this abridged edition of the full report, the account of the case studies has been largely omitted. However, we wish to give a short account of the types of situations we have studied.

The cases have been divided into three categories. The first category consists of cases where public agencies have attempted to influence consumption patterns among the general public, by issuing *recommendations, guidelines or some other sort of information*. Such information may have discriminating effects, in violation of the principle of equal treatment of EU citizens. We have studied how two municipalities seek to inform the public about sustainable consumption of food and construction products. In isolation, these cases may not constitute serious violations of the free-movement framework, but they illustrate how unlawful trade barriers appear in everyday administrative contexts. Moreover, taken together, such recommendations may amount to quite substantial trade barriers, which are difficult for the producers concerned to detect and act upon.

The second category consists of situations where municipal agencies enter into *long-term contracts with private partners.* Deregulation of public services or other activities frequently gives enterprises unique opportunities to enter into favourable deals, and the procedure for selecting private partners is therefore pivotal from a free-movement point of view. This procedure must be characterised by transparency and predictability, so that local or national enterprises are not unlawfully favoured. If the procedure does not meet these criteria, there is a bias against enterprises from other areas and Member States, since the scope for receiving information about a contract, and thus of competing for it, decreases with distance. The ECJ has concluded that the only prerequisite for Community law to be effective in contractual

situations is for the contract in question to be of interest to a company in another Member State.[5]

The third category of cases in our study concerns situations where public agencies take *decisions in administrative matters* more directly associated with the task of the agency in question. We have primarily studied individual cases, but decisions regarding more general conditions for certain activities have also been included.

Moreover, the cases have been selected to represent both national and municipal agencies. The national agencies include sectorial agencies as well as more general, regional bodies representing the Government (e.g. county administrative boards). The Swedish Agency for Public Management has been assigned to study whether the institutional provisions of Swedish administration promote or inhibit correct application of the rules of free movement. Thus, it has been imperative to select cases that illustrate the boundaries of remits and powers among various public bodies. Particular attention has been paid to municipal agencies' activities.

The sample of administrative cases has further been selected with regard to relevant legal principles of Community law and procedural requirements addressed to national administrations. These cases illustrate the principles of equal treatment, proportionality and mutual recognition, as well as the requirements of transparency, good administration and access to court.

[5] See C-231/03 Consorzio Aziende Metano vs Comune di Cingia de' Botti ECR 2005, p. 1–7287, points 16–19.

2 Application of and compliance with free movement

2.1 Obligations of national public agencies

The doctrine of direct effect and the supremacy of Community law entail far-reaching obligations for national administrations. Central government agencies are required, even on their own initiative, to assess national regulations of all kinds in the light of Community law and disregard the former whenever they conflict with the latter.[6] This obligation is incumbent on the entire range of public bodies, from the Government itself to municipal boards. Officials must always ensure that free movement and other Community principles are taken into account. This notion may be referred to as 'administrative direct effect'.

The obligation to uphold free movement also has implications for the organisation of national public agencies. The *principle of loyalty* implies that national bodies must take the rights of individuals into account in all matters relevant to the internal market. This obligation may also have repercussions on the organisation and procedures of administrative bodies, since cumbersome administrative procedures may constitute unlawful trade barriers *per se*.[7] The ECJ requires national administrative procedural rules to meet standards of transparency, objectivity, proportionality and predictability, in order to minimise the scope of discretion for government agencies. To the extent that these agencies grant or deny permits for selling certain goods or offering certain services, they should publicly announce on which grounds they intend to reach their decisions. Where contracts are awarded to private partners, the selection process must be characterised by principles of good administration.

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[6] See case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* ECR 2003, p. I–8055.

[7] Regarding goods, see e.g. case C-344/90 Commission v France ECR 1992, p. I–4719, point 9 and case C-24/00 Commission v France, 2004, p. I-1277, point 26. Regarding services, see case C-205/99 *Analir et al v Administración General del Estado* ECR 2001, p. I-1271, points 21–22 and case C-439/99 Commission v Italy ECR 2002, pp. I–305, point 25.

The interpretation of free movement as an individual right also has a bearing on the individual's position in relation to public agencies that restrict free movement. Community law seeks to make it easier for Union citizens to use their right to free movement. The most important procedural tool is the right to an effective remedy in all cases where alleged trade barriers exist. Furthermore, individuals may have certain rights to participate in administrative procedures and to reasoned decisions in all matters that concern them.

2.2 Independent status of Swedish administrative public agencies

The main objective of public agencies is to carry out the policies laid down by the Government. Consequently, Swedish public agencies are subordinate to the Government according to Swedish basic law.[8] In the Swedish model of administration, the agencies enjoy what is, in an international perspective, an unusually strong and independent status. The Swedish administrative model is characterised by small Government Offices and large central government agencies that are both organisationally and legally independent from the Government. Regional and municipal government agencies also enjoy the same independence.

According to the Instrument of Government, all involvement on part of the Government, Riksdag (Swedish Parliament), municipal councils or other public administrative agencies in a government agency's decision-making process is prohibited, when it comes to matters involving the application of law or the exercise of public authority in individual cases.[9] This provision does not discriminate between different legal sources, but applies to Community law and Swedish law alike. Swedish tradition thus presupposes that public agencies will independently interpret all legal instruments that are relevant to the individual cases concerned. This is further developed in another provision of the Instrument of Government (11:14), which accords to all public agencies the authority to circumvent any legislation that

[8] Instrument of Government, Chapter 11, Article 6.
[9] Instrument of Government, Chapter 11, Article 7.

conflicts with higher-ranking law. Thus, Swedish public agencies have the same constitutional powers as the judiciary in these matters.

Although Sweden is a unitary state, its municipalities enjoy substantial municipal autonomy. Local self-government is established by Article 1 of the Instrument of Government. They have their own democratic basis and the right to impose their own taxes. It is the Riksdag that formally determines the extent and direction of local self-government, but tradition and popular support allow for extensive municipal autonomy. Moreover, there are no provisions for external review of how municipalities organise their activities. The Government's scope for influencing how far the municipalities comply with national legislation or Community law is therefore very limited.

2.3 Dual loyalty of national administrations

As mentioned above, public agencies are obliged to implement Community law and, for instance, disregard any national regulations that restrict free movement. Interpreting the rules concerning free movement may often be a complex task. The Treaty provisions are vague and their scope of application is wide. Further, ECJ case law is complex and far from exhaustive. Situations where claims of Community law may arise, as well as how it relates to national legislation, are therefore hard to predict. Moreover, Swedish legislation lacks guidance on how such interpretative operations should be pursued.

The provisions laid down by the Instrument of Government place a major restraint on the Government's scope for giving political guidance in its legal interpretation. It is thus presumed in the Swedish constitution that public agencies possess an autonomous scope of interpretation and that this, in a national context, safeguards the principle of legality and legal certainty in Swedish administration. However, this independence may be more problematic in a context where the legislation in question is enacted by a supranational polity, in which case conflicts of interpretation may arise between national and supranational law. Since the interpretative prerogative is held by independent government agencies, there is a risk of agencies reaching

different conclusions on, for example, how Swedish law is confined to the rules of free movement as laid down by the Government.

These effects of administrative independence are nonetheless fairly hypothetical, since very few public agencies seem to set aside Swedish regulations in favour of Community law. Yet the agencies' administrative independence enables any administrative body to pursue legal interpretations without seeking political support. The doctrine of administrative direct effect may therefore be especially powerful in an administrative organisation such as Sweden's. The Swedish Tax Agency has on several occasions, for example, declared that certain provisions of income-tax legislation are contrary to Community law and must therefore be set aside. This arrangement implies that Swedish tax law is constantly developing without involvement from the national polity. If many public agencies follow suit, this may undermine the legitimacy of national legislation in general.

Unlike national courts, public agencies cannot turn to the ECJ and require a preliminary ruling on unresolved legal question in Community law. Thus, when public agencies set aside national legislation in decisions that are favourable to individuals, the agencies' interpretations are not be subjected to a judicial review, since favourable decisions are very unlikely to be appealed. According to our findings, however, the practice of the Tax Agency is still somewhat unique. Instead, our observations strongly indicate that public agencies are reluctant to set aside national regulations. This may, on the other hand, result in infringement proceedings against the Swedish state.

The independent status of Swedish administration may therefore entail a risk of uneven and inadequate application of the free-movement rules of Community law. Ultimately, the Swedish Government that will answer before the ECJ for transgressions of Community law in the Swedish state. This responsibility does not seem to correspond fully with the measures available to the Government in Swedish basic law to steer the administrative public agencies in their implementation of Community law.

2.4 Swedish public agencies' difficulties in upholding free movement

In our study, several problems regarding compliance with and application of free movement in Swedish administration have been identified. These problems have been classified as follows:

- Lack of awareness of free movement and the internal market
- Lack of a free-movement perspective in domestic legal sources
- Unfamiliarity with interpreting Community law and the doctrine of supremacy
- Fragmented responsibility for internal-market issues and lack of an express internal-market policy
- Lack of external review of municipalities
- Narrow application of Swedish administrative procedural law

In this English edition of this report, references to the case studies are omitted. The account of problems is therefore confined to a description of the general problems we have detected.

2.4.1 Lack of awareness of free movement and the internal market

For the public agencies to meet the obligations imposed by the Treaty, public officials must have at least a basic grasp of the fundamental nuts and bolts of the internal market. Failing such a grasp, the question of whether a measure or a regulation may constitute a trade barrier never arises. Thus, the public agencies never pose the question of whether Swedish arrangements are compliant with Community law.

Most of our case studies illustrate the problem of lack of awareness and knowledge of Community law. The obligations entailed by Sweden's accession to the EU, especially the public agencies' own obligations, are not given due attention. Public officials underestimate

the reach of Community law and do not see its relevance to their everyday work. Neither does the issue seem to attract higher officials' attention. Swedish law is widely presumed to be both accurate and exhaustive. Officials take for granted that any measure that complies with Swedish law is acceptable, and hold it impossible to constantly assess Swedish regulations in the light of Community law.

This problem is underlined by the fact that officials must regularly consider legal aspects from several different areas simultaneously, under the aegis of various public agencies. Municipal officials are, moreover, guided by local political agendas and ambitions. As a result, more abstract principles whose application is less clearly set out, such as free movement, may be left out of the administrative process.

2.4.2 Lack of free-movement perspective in legal sources

Our case study confirms what have already been found in earlier studies: that Swedish legal statutes and 'soft'-law instruments often lack reference to the internal market, and some even run counter to free movement. Except where clauses of mutual recognition have been inserted into present regulations, free movement is absent from legal statutes at all levels. The travaux préparatoires are generally an important source of law, but rarely contains considerations of how Swedish rules comply with the internal market. Neither has free movement found its way into administrative routines in other ways. In the absence of clear guidelines, free movement may easily be lost among other objectives, such as safety or environmental considerations. Public officials feel that it is somebody else's (primarily the Government's) task to make sure that Community law is enforced.

We have also noticed a few, but alarming, cases in which legal sources not only lack provisions to facilitate compliance with Community law, but actually counteract it. For instance, hunting regulations explicitly discriminate between people registered as resident in Sweden and

others.[10] Both a government ordinance and a statute from the Swedish Board of Agriculture hold that the rights of individuals living abroad may lawfully be restricted, while those who are registered in Sweden may not. Such provisions encourage discrimination based on nationality, which is a violation of Community law.

2.4.3 Unfamiliarity with Community law and the doctrine of supremacy

Public officials are largely unfamiliar with the legal methodology of Community law, where case law constitutes the primary source for interpreting the Treaty. Neither is there any comprehension of the idea that national laws may have to be scrutinised in the light of Community law before their application. Community law is therefore not deemed to be as immediately relevant as Swedish law.

When handling individual cases, public officials seldom look beyond what is explicitly established by Swedish legal sources. There is neither experience nor understanding of the concept of supremacy, the principle of loyalty or the direct administrative effect of Community law. The concept of mutual recognition is often viewed with suspicion, even where clauses of recognition are in place. In one of the cases we studied, Swedish standards appear to be upheld literally, with the explicit ambition to 'preserve competition, as exceptions would give unfair advantages to foreign producers'. The officials also hold the view that a literal application of the market regulations is necessary to achieve the intended safety level.

Several officials state that presumption of the validity of national legislation is primarily a matter of pragmatism, as a full assessment of how the regulations relate to higher-ranking standards would be far too demanding an exercise. The attitude is parallel to that towards the basic laws; neither do officials keep the provisions of the Instrument of Government in mind while processing cases of an everyday character. This condition is, however, more problematic in the case of

[10] Since this report was written in autumn 2006 some county administrative boards have, however, adjusted the regulations.

Community law, which — unlike the basic laws — is absent in the preparatory stages of the legislative process.

2.4.4 Fragmented responsibility for internal-market issues and lack of explicit internal-market policy

A prominent feature of the Swedish model of administration, as described above, is the strong and independent status of Swedish public agencies. The central government agencies are important actors in development within their respective sector of law, such as food, the environment, workers' safety, etc. The central government agencies have an important regulatory role, while actual implementation is often carried out by public agencies at a regional or municipal level, under the supervision of the central agencies. This specialisation may become a problem where cross-sectoral, horizontal issues, such as free movement, need to be given priority. Horizontal issues are likely to be marginalised alongside the primary field of interest of the agency in question. Sector-specific agencies tend to look to their own primary field of interest, without taking free movement into due consideration.

This risk is further underlined by the lack of an express internal-market policy. One manifestation of this lack is the absence of an internal-market perspective in legal sources, as pointed out above. The implementing public agencies, which are often on a low level in the administrative hierarchy, are under the obligation to consider several different interests laid down in statutes and regulatory instruments, without free movement being the primary priority of any one of them. In handling individual cases, these public agencies must often apply several different regulatory instruments simultaneously. There is therefore an obvious risk of the free-movement aspect not being addressed.

2.4.5 Lack of external review of municipalities

As seen above, free-movement issues are often handled by public agencies at municipal level. The municipalities' autonomy means that the Government has few ways of exerting influence over and controlling the municipalities. The main sanction available against contravention of legal obligations (whether based on Swedish legislation or Community law) is cutbacks in government funding. This measure is fairly blunt, and therefore unlikely to be used other than in exceptional situations.

In our case study we noticed among municipal representatives a certain resistance to the idea that Community law is a concern for local as well as national government. Officials held the view that meeting EU obligations is a national issue that should be handled, or at least funded, by the Government.

It is the Government that is will have to answer before to the Commission and the ECJ for the municipalities' fulfilment of their obligations. At present, there is no external review of how municipalities observe the framework for free movement. There therefore appears to be an asymmetry between municipal powers and responsibilities in implementing free movement.

2.4.6 Narrow scope of Swedish administrative procedural law

Several of our case studies show that protection of individual rights in administrative procedure vis-à-vis Swedish public agencies, as well as the right to an effective legal remedy, are too restrictively construed.

There are two types of procedural requirements of Community law, regarding how Member States organise their administrations. Firstly, the administrative process preceding a decision must meet certain standards, for instance concerning transparency, placing of burden of proof and equal treatment. Secondly, individuals must have adequate recourse to legal action after a decision is made.

In its case law, the ECJ has ruled that national administrations must be organised so that they are open, accessible and predictable for Union citizens intending to make use of their right to free movement. It is difficult to extract from ECJ case law, in precise and positive terms, what administrative procedure is acceptable for the Member States to apply. The prerequisites also vary depending on what kind of decision or other measure an agency takes into consideration. The requirements are generally negatively defined: Member States may arrange their administrations according to national procedural traditions, as long as free movement is not actually or potentially impaired. Administrative schemes encompassing objective, non-discriminatory criteria made known in advance, as well as predictable time limits, will be deemed more acceptable.

Member States are obliged to provide certain procedural tools so that Union citizens may exercise their right to free movement. The primary tool is the right to an effective legal remedy, i.e. means of accessing national courts for an impartial review of the alleged violation of free movement. Member States are also required to supply procedural forms for actions for state liability.

Our analysis shows that the scope of application of the Swedish Administrative Procedure Act (*Förvaltningslag*, 1986:223) concerning individual rights in the administrative process is too narrowly construed. The Administrative Procedure Act is applied only in individual cases handled by public agencies, and the core administrative procedural rules, such as the right to be heard and a right to a reasoned decision, are applicable only in cases that may be defined as involving 'exercise of public authority' (*myndighetsutövning*).

There are, however, many situations that are not covered by the Act, but where free movement may be unlawfully restricted. There may, for example, be measures that may amount to a barrier to free movement but, in a fairly narrow interpretation of Swedish law, are considered as general administrative matters that do not directly concern individuals. Cases where an agency enters into any kind of contract also fall outside the scope of application. In such situations, there is no Swedish legal framework to ensure individual rights in administrative procedure.

Consequently, the process tends to be closed and the parties involved are given no access to information about the proceedings. Private individuals thus have no scope for influencing the decision-making process; nor are they given reasoned decisions.

Although access to courts for review of administrative action has been expanded dramatically in Swedish law over the past few decades, there are still situations where Swedish law does not provide for an effective remedy. One example in the kind of situation described above regarding general administrative measures. Furthermore, the Swedish Administrative Procedure Act does not allow for court review of the public agencies' failure to act. Delays caused by administrative procedures may, in some circumstances, constitute unlawful barriers to free movement.[11]

[11] For reference, see footnote 3.

3 Enforcement of free movement

3.1 Three general strategies

To enforce the rules of free movement, we propose that the Government should prioritise the following:

- Take a determined political stance by establishing that promoting the internal market is an objective *per se*.
- Improve the Swedish administration's capacity to implement free movement.
- Strengthen procedural rights for individuals intending to make use of their right to free movement

The doctrine of direct effect requires that conscious and informed individuals and enterprises should be able to invoke their right to free movement in dealings with public agencies and courts. This obliges Member States to *organise their national administrations* in such a way as to facilitate individuals' reliance on their rights. They are also obliged *to provide individuals and enterprises with adequate procedural tools* in order for them to enforce their rights themselves. Our analysis indicates that Swedish administration has certain problems in both respects. In many cases an adequate organisational and regulatory structure is lacking, as is effective administrative procedural protection.

One reason for this may be that the internal market has generally been regarded as part of regular trade policy. The reach of the free movement rules has perhaps been underestimated. It is therefore imperative for the issue to be given priority, to raise awareness of the obligations of Swedish administration due to Union membership. The Government should therefore set the course by emphasising that the rules of free movement involve all public agencies.

Apart from a determined political stance, we propose a number of measures aimed at enforcing free movement. Our proposals follow two general strategies referred to as institutional and private enforcement.

Institutional enforcement aims at improving compliance with legal frameworks through public agencies and public institutions. This strategy is intended both to relieve the agencies by incorporating EC requirements in Swedish administrative regulations and practices, and to make public officials more assiduous in fulfilling their obligation to enforce free movement on their own initiative. This makes for more effective and uniform implementation of rules, thereby avoiding their contravention.

Private enforcement aims to empower individuals and enterprises by providing tools that enable them to take charge of their right to free movement. The level of abstraction of the rules of free movement and its prohibitions and exceptions, remit a substantial discretion to the interpreter. It is therefore imperative that individuals are able to challenge alleged restrictions of their free movement. Foreign enterprises and individuals, in particular, may incur disadvantages, since they may have little knowledge of Swedish regulations and administrative procedures.

The proposed strategies comply with ECJ case law with regard to requirements on administrative standards of transparency and accessible and non-discriminatory procedures. These standards have further been incorporated into secondary legislation regarding several aspects of the internal market, such as the procurement directives, the directives enacted as part of the 'New Approach' to technical harmonisation, and in several different areas, such as telecom markets and professional qualifications.[12]

The newly enacted Services Directive introduces these types of administrative rules, to be applied horizontally in all types of

[12] See Directive 2004/18/EC on procurement, resolution of 07.05.1985, Directive 2005/36/EC on the recognition of professional qualifications and Directive 2002/21/EC on a common regulative framework for electronic communication networks and services.

administrative proceedings affecting the free movements of services.[13] The directive includes minimum rules on how national procedures, as well as rules concerning the organisation of national administration, should be construed. Under the Directive, Member States are required to establish national points of contact to furnish other Member States, public agencies, citizens and enterprises with information about relevant regulations and procedures. It is foreseeable that the importance of central agencies, as central agents in terms of free movement, will increase in the future, and that Swedish administration will have to reorganise itself accordingly. It is our considered opinion that the model of administration proposed in the Services Directive should be applied generally, i.e. outside the scope of application of secondary EC legislation.

Today, the internal market comprises 30 Member States (three of which belong to the European Economic Area [EEA]). The Commission lacks the capacity to supervise all Member States and must therefore trust national governments to shoulder this responsibility. It is in the interest of all Member States embracing the internal market to play their part in this process.

[13] See Directive 2006/123/EC on services in the internal market. Other examples of horizontal secondary legislation in this area are Directive 2004/38/EC on free movement of Union citizens and the Commission proposal for a Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State. COM (2007) 36 final.

3.2 Political resolve

A determined political stance on free movement requires the following:

- An express strategy for improving the framework for free movement at the European level, by promoting the enactment of secondary legislation on free movement, and by intervening in cases before the ECJ.
- The Government should clarify how agencies should handle the scope of discretion afforded by the rules of free movement to implement free movement in Sweden.

To improve how Swedish administration implements the rules of free movement, the Government and the legislature should affirm that realising the internal market is an urgent priority for all public agencies. The internal market should be viewed as a domestic issue rather than a matter of foreign policy. Accordingly, in the long term, allocation of responsibilities within the Government Offices for internal-market issues should be organised as to reflect this.

A clear and balanced internal-market strategy should encompass political standpoints on both the preparation and enactment of new rules, and interpretation and application of the rules in Sweden. The Government should actively promote improvement of the free-movement rules at both European and national levels. The government should also pay close attention to what cases are pending before the ECJ and make use of the opportunity to intervene where the rules of free movement may be expected to develop.

As with the application of the free-movement rules in Sweden, the Government should clarify how public agencies should handle the scope of discretion inherent in the non-harmonised area of free movement. The rules of free movement, combined with the principle of administrative direct effect, may give rise to difficult considerations where sector-specific interests conflict with those of free movement. In the Swedish administrative model, with its independent and

decentralised public agencies, the task of applying the rules of free movement, including the task of interpreting and evaluating Swedish law in the light of free movement, may also be assigned to agencies in very peripheral positions within the administrative hierarchy.

It is, in some cases, questionable whether the Swedish administrative model leads to the most purposive allocation of interpretative prerogatives. As discussed above, the Instrument of Government prohibits any external involvement when public agencies handle individual cases involving exercise of public authority or in the interpretation of law. The extent of administrative independence is a perennially controversial topic that has been touched upon in many public inquiries. It is commonly perceived as permissible for the Government and its Offices to engage in informal dialogue with the public agencies, as long as the dialogue remains confined to general issues and exchange of information. It is also regarded as self-evident that the final decision is always taken by the agency alone. In our view, these contacts can help to improve the scope for a well-balanced and broadly agreed application of the rules of free movement in Sweden. It may also be a useful tool to ensure that the public agencies are aware of their responsibilities under Community law.

3.3 Improving public agencies' capacity

The National Board of Trade should be upgraded to a prominent internal-market agency with a primarily supportive role towards other public agencies.

The internal-market perspective must be incorporated into the legislative and regulatory process, as well as into present legal sources.

- A general screening of Swedish legal sources should be carried out.
- The internal-market perspective must be established in the general instruments of governance, i.e. the Government Agencies and Institutes Ordinance, appropriation directions, etc.
- An obligation to perform an internal-market compatibility test whenever new regulations are enacted should be introduced.

3.3.1 Focusing on a prominent internal-market authority

Current developments in the EU seem to be enlarging the role of public agencies in ensuring that the internal market is upheld. In the case of Swedish administration, this development underlines the need for administrative structures supporting sector-specific agencies in their task of exerting this responsibility. Our case study shows that, at present, many public officials are unaware of their responsibilities. If internal-market issues are identified, few officials know where to seek guidance and support.

To meet the needs of public agencies and officials, the informational structures within Swedish administration with regard to internal-market issues should be both reinforced and clarified. As mentioned above, responsibility for implementing the rules of free movement is dispersed among various agencies at different levels in the administrative hierarchy. There is therefore a need for a superior

coordinating agency to offer advice and information on how to relate to the internal market.

At the moment, there are several public agencies with overlapping responsibility for informing other public agencies and citizens. For instance, there is the National Board of Trade (which coordinates the notification process according to the directive 98/34 and represents Sweden within the Solvit network), the Swedish Agency for Economic and Regional Growth (which is responsible for regulatory simplification) and the Swedish Board for Accreditation and Conformity Assessment (which plays a key part in CE product safety cooperation).

The National Board of Trade is the agency with the most extensive, but generally worded, internal-market responsibility. There is, however, a need to develop its remit further, thereby making it an agency to which other agencies can turn for support. The Board's role should therefore be extended, transforming the Board into a distinguished expert agency.

There are several conceivable ways of turning the National Board of Trade into a general expert agency. With a supervisory role vis-à-vis public agencies the Board of Trade could, in theory, achieve an improved coordination of internal-market issues. A combination of supervision and penalties (in terms of fines) may create incentives for public agencies to give priority to free movement. Owing to the complexity and reach of the non-harmonised area of free movement, this role seems somewhat inappropriate. A remit to scrutinise other public agencies would include almost all other political and judicial fields within Swedish administration. Such task would not, in reality, be feasible, especially because of the constant informational disadvantage of public agencies under scrutiny. In our view, it is doubtful whether such responsibility can be assigned to a public agency.

Instead, we propose focusing the Board of Trade's role on giving support, guidance and information to other public agencies, based on the agencies' mutual cooperation. The Board of Trade should aim to cooperate with agencies at both national and municipal level, thereby

promoting its position as a national resource to which other public agencies may turn. The proposals presented below aim at finding effective ways of reinforcing informational structures and increasing cooperation between public and private actors.

- *The Board of Trade should actively participate in the development of internal-market strategies in other public agencies*. Other agencies should be encouraged to cooperate with the Board of Trade through existing bodies of inter-agency coordination and collaboration.

- *The Board of Trade's current work to develop customised Internal Market Guides for particular public agencies should be supported*. In the next step, these agencies should be commissioned to develop sector-specific guides to support executive officials, especially where operative responsibilities are delegated to municipal agencies.

- *The Board of Trade should initiate cooperation with the Swedish Association of Local Authorities and Regions (SALAR),* aimed at addressing the lack of awareness and knowledge of the framework for free movement.

- *The Board of Trade should set up a helpdesk* to which public agencies may turn for advice on the interpretation of Community law. The Board may also give legal opinions to courts and other agencies assessing internal-market issues.

- *The Board of Trade should involve private actors in boosting awareness of the rights endowed by Community law.* This may have spin-offs affecting Swedish administration, since private claims may raise public agencies' awareness of individuals' right to free movement.

3.3.2 Establishing the internal-market perspective in the legislative process and existing regulations

The Swedish administrative model implies certain restrictions regarding government influence on public agencies' handling of particular cases, as discussed in section 2.2. In addition, municipal autonomy restricts the influence the Government may seek to exert over the municipalities. Governance is therefore performed primarily through legislation and ordinances, which — to ensure proper governance — must be clear and articulate.

We have concluded that Swedish regulatory frameworks often lack an internal-market perspective. The rules have not been drafted with reference to the interest of free movement. This leaves implementing public agencies with the task of sorting out and assessing possible clashes with Community law. We have also found a case in which a legal instrument even encouraged the implementing agency to restrict free movement for non-domestic individuals. The general instruments of governing public agencies — i.e. the Government Agencies and Institutes Ordinance (*Verksförordningen*, 1995:1322) and appropriation directions (*regleringsbrev*) — also lack reference to the obligations entailed by EU membership.

Apart from the lack of reference to free movement in the legal sources, the capacity of Swedish public administration to uphold free movement is undermined by lack of experience of the legal method of interpreting Community law. In the Swedish legal tradition of regulatory governance, legal interpretation is normally based on the travaux préparatoires, from which courts only very rarely depart. Upholding general and vague EC principles, whose concrete contents may be deduced only from extensive case law, is a complicated task even for expert scholars. For those who lack knowledge of both case law and the very method of acquiring such knowledge, the task is nearly impossible. It is therefore urgent to minimise the need for public agencies and operative officials to make their own interpretations of the free-movement rules. This cannot be achieved without articulate and deliberate legal frameworks.

It is imperative to give the internal-market perspective priority in the preparatory stages of the legislative process. In the Swedish lawmaking tradition, commissions of public inquiry play a key role and their reports form part of the travaux préparatoires, which are an important source of law in the Swedish legal system. The internal-market perspective is, however, inadequately expressed in instructions to the commissions of public inquiry, as well as in other instruments of governance.[14] At the administrative level, the internal-market perspective may be transmitted through already existing forums in Swedish administration, such as the Enforcement and Regulations Council, where public agencies with adjacent tasks collaborate on issues of common concern.

- *The Government should actively and continuously ensure that Swedish legislation does not entail violations of the free-movement rules*. Where violations are identified, the Government must take proactive steps to avoid shortcomings in legislative stringency and coherence. The provisions of the Services Directive, concerning screening of national legislation should be embraced and applied on a large scale. The Danish Task Force for the Internal Market may serve as inspiration.

- *The public agencies should be commissioned to perform a screening of administrative regulations and guidelines.* This task should be carried out in collaboration with the National Board of Trade and may also involve the above-mentioned collaborative forums. The involvement of the National Board of Trade should not imply a supervisory role or any obligations to participate in operative activities. The proposal aims at enabling an overview of how the internal-market perspective is prioritised, as well as supporting the public agencies in their efforts to safeguard the internal market within their respective field. In the next step, central government agencies should be commissioned to support operative agencies at regional and municipal levels.

[14] See, for example, the Ordinance of Committees (*Kommittéförordningen*, 1998:1474), the Committee Handbook (*Kommittéhandboken*) and the Handbook of Statute Composition (*Handbok i författningsskrivning*).

- *Establish the internal-market perspective in the formal instruments of governance.* The Government Agencies and Institutes Ordinance, appropriation directions for the specific public agencies, and other instructions and regulations aimed at the agencies should reflect the obligations imposed on the agencies by Community law. One example is the obligation to observe internal-market aspects ex officio, i.e. at their own initiative. The individualised appropriation directions should draw the attention of public agencies to their responsibilities regarding free movement.

- *Introduce a mandatory internal-market compatibility test whenever new legislation or other regulations are enacted.* In order for internal-market aspects to be considered at an early stage in the legislative process, commissions of public inquiry should be obliged to assess the consequences of a proposal for the internal market in general and free movement in particular. Such an obligation may be introduced by law, by a specific ordinance, by the Committee Ordinance or by specific directions on a case-by-case basis. The compatibility of legislation must be addressed in the travaux préparatoires**.** At the administrative level, the compatibility test would complement the existing obligation to notify technical regulations under Directive 98/34.

3.4 Empowering citizens and enterprises

- Promote a general application of the model proposed in the Services Directive regarding accessible regulatory frameworks.
- Continue the efforts on regulatory simplification
- Examine the option of establishing a general action on failure to act in administrative procedures
- Examine the option of introducing a general right to good administration and a right to legal remedy to the catalogue of individual rights in the Instrument of Government.

3.4.1 Creating transparent procedures and accessible regulations

The Services Directive requires Member States to clarify the prerequisites for entering different sectors of the services markets within the Member States. This should be realised by decreasing transaction cost for enterprises and red tape connected to cross-border trade and establishments. To this end, Member States are obliged to establish so-called Points of Single Contact, to which enterprises may turn for information on what they have to do to enter national markets. The Points of Single Contact should inform enterprises of necessary administrative proceedings as well as regulatory requirements. Information should also be offered in foreign languages. The Swedish Agency for Public Management proposes that this arrangement is embraced in general, not only within the service sector.

- *Promote a general application of the model proposed in the Services Directive* regarding accessible regulatory frameworks, regulatory simplification and clear administrative proceedings.
- *Take advantage of the necessary adaptation process following the implementation of the Services Directive* for raising awareness and knowledge about administrative obligations related to the internal market

3.4.2 Strengthening the position of individuals vis-à-vis agencies

The ways for individuals to influence the proceedings within Swedish public agencies, as well as their access to legal remedy, are sometimes too narrowly construed. Swedish law does not define free movement as an individual right per se. This implies that regulations ensuring individual rights do not always come into effect, even if the right of free movement is restricted. If a matter is not defined as involving exercise of official authority, several basic rules constituting administrative safeguards, such as the right to be heard and the right to a reasoned decision, do not apply. The concept of 'exercise of public authority' in connection with free movement is defined fairly narrowly,

and this substantially limits the scope of the protection of individual rights within administrative procedures. For example, all types of contracts that public agencies enter into fall outside the definition. Moreover, under the Administrative Procedure Act, the right of appeal requires that the agency's action takes the form of a decision that directly concerns individuals.

We conclude that the position of individuals in relation to public agencies should be strengthened in situations where agencies handle matters that concern their right to free movement. Individual rights related to good administration should be given wider scope of application, so that they are also applicable where the exercise of public authority is not considered to be at hand, or where a measure does not result in an individual decision.

Individuals need means to influence the actions of public agencies in all cases where their right to free movement is being handled by the agencies. Enterprises in Sweden are concerned about the fact that Swedish law does not provide for a remedy in a situation where an agency refrains from taking a conclusive decision within reasonable time. This problem may be addressed by introducing an action for failure to act, which would give the enterprise a legal tool to convince public agencies to reach a decision, or at least having the delay reviewed be courts. Today, mutual recognition may be substantially impaired by cumbersome assessment procedures where the agencies do not reach decisions within predictable time frames.

An action for failure to act may further be drafted so that it also covers the failure on the part of public agencies to end measures in breach of Community law. This would enable enterprises to have their claims reviewed in situations where there is no decision addressed directly to them.

The question of whether the Swedish legal order entails the right to an effective remedy has been addressed many times, notably in the light of the European Convention on Human Rights and Community law. At present, the Working Committee on Constitutional Reform is investigating the role of the courts within the Swedish constitutional order. The procedural rules applied by public government agencies

have not been scrutinised in the light of Community law to date. The Swedish Agency for Public Management wants to emphasise the importance of administrative procedural rules in the establishment of an internal market.

Several new secondary legal instruments within the area of free movement in recent years (the Services Directive, the Directive on professional qualifications and the new draft technical regulation of goods) include harmonised rules on administrative procedure.[15] This secondary legislation thus lays down common minimum rules on how national public agencies should handle cases, specifying the condition of the duty to investigate, the individual's right to procedural transparency, the right to be heard and access to legal remedy.

In view of the facts accounted for above, we propose an extensive evaluation of how Swedish administrative proceedings meet the requirements laid down by the rules for free movement. The following aspects should be given particular attention:

- *Investigating the option of introducing an action of failure to act.*
- *Investigating the option of introducing the right to legal remedy and to good administration in the Instrument of Government*. This would protect individual rights wherever other provisions (e.g. those in the Administrative Procedure Act) are not applicable. This solution has been adopted in Finland, whose administrative traditions are similar to Sweden's.
- *Extending the scope of application of the Administrative Procedure Act* by expanding the exception in Article 3, Section 2, which states that restrictions set out in specific legislation regarding the right of appeal are not applicable in matters covered by Article 6 of the European Convention of Human Rights. The exception should thus cover the right to an effective appeal and the right to proper administration under Community law.

[15] See note 10 above and the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, COM (2007) 36 final.

3.5 Better scope for review

The aim is to clarify Swedish legal frameworks and administrative obligations and improve administrative procedures. These measures will improve the capacity of supervisory bodies (such as the Chancellor of Justice, the Parliamentary Ombudsmen and the Swedish National Audit Office) to review compliance with and application of Community law.

The interpretative prerogative that the Swedish administrative model confers upon public agencies must be subject to external review. Within the non-harmonised area of free movement, application of the rules often includes balancing the objective of free movement against various national concerns, such as healthcare, environmental conservation or benefits to consumers.

The Swedish National Audit Office, the Chancellor of Justice and the Parliamentary Ombudsmen (JO) are all competent to initiate independent reviews of Swedish public agencies. However, the government has no scope for exercising any influence over these independent institutions. Thus, the Swedish Agency for Public Management cannot propose how the review should be performed. Still, we wish to emphasise the marked need for an external and independent review of public agencies' compliance with their obligations. Review is particularly needed at municipal level, since the overview of how municipal agencies observe and apply the framework for free movement appears inadequate. The European Commission lacks the capacity to supervise all the national public agencies, especially in a Union of 27 Member States. The proposals put forward in this report concerning better regulation, clarified administrative responsibilities and improved administrative proceedings should pave the way for effective review.