

The quality of European legislation and its implementation and application in the national legal order

Swedish answer to the questionnaire for the 2004 Colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union

1 Preventing interpretation problems

1.1

The hierarchy of European legal norms is already clear in so far as the Treaties have a position above the secondary legislation. The lack of clarity concerns only the different forms of secondary legislation. This has however very seldom raised problems for the Swedish legislator and courts. Should a conflict between European norms arise, it has to be solved the same way as when national norms are incompatible. A factor to keep in mind when dealing with such a conflict is the difference between the national legislator, who in principle has omnipotent powers and can legislate on everything, and the European legislator, who only has power to legislate on issues where the Treaties gives him that power.

For anyone interested in order and clarity an explicit hierarchy between norms must be a good thing. The language used by the Convention on this question, article 32 of the proposal, is however more confusing than enlightening. To distinguish between legislative and non-legislative normative acts serves no purpose.

I can not see what problems other proposed differentiations of legal instruments could create.

Transparency of the entire process of drafting European legislation will foremost improve the quality of the legislation itself. Knowledge of the intentions behind the legislation will certainly also facilitate the implementation, interpretation and application of it. A complicating factor is however that it is not always possible to find a consistent will behind a European legal act. There might have been many conflicting interests to balance and the end result might be a compromise nobody is happy with.

In the Swedish legal tradition the *travaux préparatoires* plays an important role in the interpretation of unclear laws. If the law is unambiguous there is no need to consult the preparatory works. But if there is a room for interpretation, they might be useful. An advantage with easily available preparatory works is that this source for the interpretation is accessible to

all and the knowledge that they will be used to clear uncertainties increases legal certainty. The function of preparatory works is not to prevent but to solve interpretation problems.

1.2

The adoption of the terminology of European legislation is always problematic, since the European legislator very seldom enters upon virgin soil. The need to approximate national legislation arises from the very fact that there is already legislation on the subject matter and the terms available have already been used in national legislation and they have there acquired specific meanings. When the same terms are used in European legislation they might get an interpretation different from the meaning of the same term in previous national legislation. The lawyers have to adjust, but the force of habit is strong. And if the same term is used in fields of legislation outside as well as inside the scope of European law, the result might be confusion.

For a small language like Swedish there is an additional problem. The negotiations on European legislation are normally based on documents in a foreign language. Translations do come, but the very latest version of a new directive, i.e. the one that is of interest to the negotiators, had, at least in the beginning of the Swedish membership, often not yet been translated. This can lead to a lack of interest in the national language version during negotiations that it is hard to remedy at a later stage.

It is impossible to categorically choose between the options of patching up existing national legislation or making a total revision of it when European legislation necessitates amendments. It has to be decided on case by case, taking many different factors into account: the time available, the general need for modernizing the legislation, the extent of the required reform etc.

European legislation is mostly implemented into Swedish law at the same constitutional level as national rules on the subject matter in question are decided. Some directives require that Parliament adopts new laws; others can be implemented by a Government regulation and for some it is sufficient with provisions by a Government agency. Some directives are implemented at all three levels.

The usefulness of a data base on national implementation measures is questionable. The reason for that is that when a new directive has to be implemented, all the member states of the European Union will be working on the implementation of it at the same time. And only when the time for implementation is almost at an end, the data base will be filled with information. That will for most member states be too late to seek inspiration. Only those who are in delay will profit from it.

1.3

It is difficult to see a role at the European level for either the Swedish Supreme Administrative Court or the Swedish Law Council in the preparation of European legislation. The issue of a European Council of State has however lately been touched upon by a member of the Supreme Administrative Court in *Common Market Law Review*, see annexed pdf-file.

2 Handling and solving interpretation problems

2.1

The interpretation and application of European law is by now an everyday affair. Sometimes problems of interpretation arise. The courts can often solve the problems themselves. If not, they can always ask the European Court of Justice for a preliminary ruling. (The Supreme Administrative Court has asked quite a few questions, e.g. if a trained riding horse shall be regarded as a “used good” in the sense of the Sixth VAT directive!)

It goes without saying that the interpretation of European legislation influences the interpretation of national legislation implementing the common rules. That’s the very idea of European legislation.

The European *travaux préparatoires* are very scarce and therefore not an important factor for interpretation. The national *travaux préparatoires* are not used to ascertain the innermost meaning of the European rule but could be valuable when determining whether the solution made by the national legislator is in conformity with the European rule or not. If a directive leaves many options for its implementation or if there is a margin of appreciation for the national legislator, he should have the possibility to present the arguments for his choice.

Documents drawn up by the Commission at a later date can not be regarded as preparatory works and have therefore not the same weight. To my knowledge, the Supreme Administrative Court has never relied on such documents when interpreting European law.

The preamble is an integral part of the piece of legislation and is of course of great importance. The statements in the minutes of the Council have as far as I know never been used by a Swedish court. They do however sometimes play a role in the political debate.

The different language versions are very useful when determining the proper interpretation of a certain concept. They make it possible to determine if the expression used in the national language version is the correct one.

2.2

The length of time for a preliminary ruling to be answered is a serious problem and it can be argued that the national court ruling based on the answer comes to late to be in conformity with Article 6 of the European Convention of Human Rights. For a court whose main task is to give rulings working as precedents, it is however sometimes inevitable that the interest of a correct ruling is given priority over the interest of a rapid handling of the case. The parties are heard both on the issue if a preliminary ruling should be requested and on how the question should be formulated. Their opinions are considered but not given decisive importance.

The system of preliminary rulings has definitively been established in the abstract interest of a uniform application of community law. That is why the courts of last instance are obliged to

ask, whereas others have to possibility to ask. In that way incorrect rulings of precedential importance can be avoided. The founding fathers of the Treaties can not have been so naïve as to believe it to be possible to avoid any wrongful decision or ruling by national courts.

We do not formally consult other instances outside the court than the parties before posing questions. A network of contacts between the national courts on what questions there is a common interest in having answered could be of value. I am more doubtful if the national courts should discuss the question with the ECJ.

The CILFIT judgement makes it necessary for the national courts to handle the institution of preliminary rulings with a fair amount of common sense. In the interest of not overloading the system courts must abstain from asking questions it would be nice to have answered, but that are not necessary for the adjudication of pending cases. I don't think however, that the national courts should restrict themselves only to ask questions when it is inevitable. But they should consider whether the answer could be of interest also to other courts in other member states. If the question concerns a strictly national problem, it might not be as necessary to have the question answered. The Association could play an important role as a point of contact between national courts in assessing whether their problems are of common interest or not.

Any system where the ECJ would give its ruling only after the national court had expressed its view on the issue in question would in a fundamental way change the relationship between the national courts and the ECJ. The latter would turn into a superior court within a hierarchy of courts comprising both national and European courts. Today there is a division of labour but not a hierarchical relationship. I don't think that should or could be changed.

3 Attaching consequences to interpretational errors

If the Law Council when scrutinizing a proposal for a new law implementing an EC directive observes errors in the implementation, the Governments proposal to Parliament is almost always rectified in order to comply with the directive. If a court in a ruling in an individual case finds an error, the mistake has already happened. The rapidity with which the legislator reacts in such cases differs. The fault will however normally be corrected.

It could in my opinion not be the task of national courts to adjust or complete faulty implementation of Community law in any other way than to ensure that individuals are able to enjoy the rights they have according to Community law. The fact that the Commission criticizes national implementation does not mean that the implementation is wrongful and should not on it's own accord influence the national courts.

We all, even the legislator, learn by our mistakes and in that way the result of any examination of measures of implementation is of value for the future. Such examination is of great value both at national and communitarian level.

The Commission has so far been reluctant to start infringement proceedings based on the actions of national courts. There is however nothing that formally prevents the Commission to bring a member state before the ECJ because of the activities of the national judiciary. Whether that should be done must be dependent on the gravity of the infringement and it must be up to the Commission to decide if and how it should be done.

There is according to the ECJ a right to compensation for wrongful implementation of Community law and that is observed also by Swedish courts. National courts are capable to handle such cases and I don't think we should put that burden on the shoulders of the ECJ.