Clarifying Gold-Plating

– Better Implementation of EU Legislation

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Foreword

Gold-plating is frequently mentioned in discussions about the EU and the single market. It is assumed to lead to increased costs, unnecessary regulatory burdens and competitive disadvantages for business, as well as a fractured single market. This hampers growth and job creation. However, the discussions often stop at the fact that someone ought to do something about the problems. But what should be done and how, remains unsaid. Finding solutions to these problems is important for business but also for the Swedish Government, which strives for better regulation and to increase the competitiveness of Swedish companies. One reason for the absence of solutions is that it is unclear to what 'gold-plating' actually refers. Some people assign more to the concept, and others less. An imprecise definition makes it difficult to conduct an objective discussion of the issue.

Sometimes new approaches and angles are needed to find solutions to a problem. A joint project involving a business organisation and a government-appointed committee breaks new ground, which is perhaps precisely why it has generated results. The aim of the Board of Swedish Industry and Commerce for Better Regulation (Näringslivets Regelnämnd, NNR) and the Swedish Better Regulation Council (Regelrådet) is that regulation should be fit for purpose and not give rise to unnecessary costs for companies. We work in different ways to achieve this, but have both noted a need for a number of measures to ensure that implementation of EU legislation does not impair companies' competitiveness.

In the coming together of our organisations' different starting points, expertise and approaches, new ideas have emerged, which we are now presenting together. Our ambition is that the conclusions and recommendations in this report will lead to a clearer discussion of alternatives when implementing EU legislation in Sweden, and to the impacts of these alternatives on companies' competitiveness being analysed and documented. In brief, we hope they will lead to business-friendly and transparent implementation of EU legislation in Sweden.

We would like to express our thanks to all those who have contributed their expertise and experience in the compilation of this report: persons within the Government Offices of Sweden and at government agencies in Sweden, at the Faculty of Law at Uppsala University, within NNR's member organisations, within the British, German and Dutch central government administrations and at the Secretariat-General of the European Commission, as well as the members of Business Europe's Better Regulation Working Group. Authors of the report are Karin Atthoff from NNR and Mia Wallgren from the Swedish Better Regulation Council.

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The report's main recommendations

The English term 'to gold-plate' is frequently used in regulatory contexts in the EU to designate the situation where national implementation of EU legislation exceeds what a legal act requires while staying within legality. One central issue is which level should be the starting point for assessing what exceeds the requirements of a Directive. There can hardly be any point in experimenting with a level above the minimum level, as, in that case, where would the level lie? We consider that the starting point of the assessment should therefore be the minimum level.

Gold-plating as a concept is used for a number of phenomena associated with implementation of EU law in the Member States. The widest interpretation of the concept covers seven different measures that those responsible for determining how EU legislation is to be implemented must consider. However, in discussions both nationally and internationally, different understandings of what 'gold-plating' actually covers emerge. This renders dialogue and discussion of different alternatives regarding implementation and the impacts of these more difficult. There is also a risk that 'gold-plating' is used and interpreted in a narrow sense and thus excludes several measures that may entail regulatory burdens, unnecessary costs and impaired competitiveness for companies.

An impact assessment must be prepared when EU legislation is implemented in Sweden. What information an impact assessment should cover is set out in e.g. the Swedish Ordinance on Regulatory Impact Assessment (2007:1244). Although this states that a regulatory proposal's relationship to EU law must be described, NNR and the Swedish Better Regulation Council have observed that it is not unusual for impact assessments to lack descriptions of different alternatives for implementation of EU legislation and the impacts of these. The Swedish ordinance is extremely detailed regarding impacts for companies, which makes it easier both for those analysing proposed regulations and for the decision-maker to ask the 'right questions' and get answers to these, but there is no equivalent guidance when it comes to the regulatory proposal's relationship to EU law. Our conclusion is that there may be reasons to exceed the minimum level pursuant to the EU legislation but, in that case, the reasons for this should be carefully explained and the impacts of this made clear in an impact assessment.

We therefore recommend that:

- The Government decides that the minimum level for implementation of Directives shall be determined in each individual case and form the starting point for assessing how a Directive is to be implemented.
- The Government, after consultation with stakeholders, decides a generally applicable definition for Sweden of the concept 'gold-plating' that is clear and usable in discussions of alternatives that exceed the minimum level in the implementation of EU legislation. The definition should cover the seven measures described in Section 3.1.1 in this report.
- The Government introduces a 'minimum principle' such that the minimum level pursuant to the EU legislation shall serve as a guideline for the regulator in the implementation but that, if there are reasons to exceed this level, this shall be clearly described and the impacts for companies analysed and

reported in a public document.

- The Government introduces a provision stating that, with regard to implementation of EU legislation, the impact assessment shall – over and above what is stated in paragraph 6 and 7 of the Ordinance on Impact Analysis of Regulation – contain a description of the EU regulation's scope and minimum level. Based on this minimum level, it shall also be specified whether the proposal entails:

1. Adding regulatory requirements beyond what is required by the Directive in question.

2. Extending the scope of the Directive.

3. Not taking (full) advantage of any derogations.

4. Retaining Swedish national regulatory requirements that are more comprehensive than is required by the Directive in question.

5. Using implementation of a Directive to introduce national regulatory requirements that actually fall outside the aim of the Directive.

6. Implementing the requirements of the Directive earlier than the date specified in the Directive.

7. Applying stricter sanctions or other enforcement mechanisms than are necessary to implement the legislation correctly

Other conclusions and recommendations will be found in Chapters 3 and 4. A summary of the report will be found in Chapter 5.

1 Introduction

1.1 Common starting points

1.1.1 Starting points

The Swedish Government has established that more than half of the regulatory burden on Swedish companies is a consequence of EU law. It is therefore important that the implementation of EU legislation does not lead to more regulatory burdens and higher costs than necessary. Implementation of EU legislation at national level in the EU Member States is an area where efforts to simplify regulation and the desire for a well-functioning European single market[1] come together. The aim of better regulation work, both at EU level and in Sweden, is that regulation and related processes and procedures that affect companies should be fit for purpose and effective, and not create regulatory burdens or competitive disadvantages for companies unnecessarily.

In its 2010 Statement of Government Policy, the Alliance Government clearly set out that its primary goal is to lead Sweden towards full employment and that 'a robust and dynamic business community is a central requirement for increased employment'.[2] Better regulation is part of the Government's overall political strategy, which aims to create frameworks for increased competitiveness, growth and job creation. To achieve these goals, the Govern-ment must also work to ensure that the legislation adopted jointly by the EU Member States is fit for purpose and effective, and that its implementation at national level does not create regulatory burdens or competitive disadvantages if this can be avoided.

In order for the European single market to function as intended, similar rules for the market are required in the Member States. These rules are decided jointly at EU level, but barriers to trade can arise when they are implemented at national level. If a Member State chooses not to implement jointly adopted rules or to do so in a way that is markedly different from other Member States, barriers arise to free movement in the single market. The Swedish Minister for Trade, Ewa Björling, has stated that the EU's single market is a cornerstone of European cooperation and is key to creating sustainable growth, increased competitiveness, employment and welfare in Europe, and that the Swedish Government attaches great importance to a modern and well-functioning single market.[3]

1.1.2 About the Board of Swedish Industry and Commerce for Better Regulation and the Swedish Better Regulation Council

The Board of Swedish Industry and Commerce for Better Regulation (henceforth NNR, its Swedish acronym) is a politically independent non-profit organisation wholly financed by its 14 members drawn from Swedish business organisations and trade associations.[4] NNR's task is to advocate and work to achieve simpler and more business-friendly regulations, and a reduction in companies' submission of information to government in Sweden and the EU. NNR also coordinates the business community's scrutiny of impact assessments concerning proposals for new or amended regulations.[5]

The Swedish Better Regulation Council (Regelrådet) is a government-appointed committee that works to simplify companies' day-to-day work by scrutinising the formulation of proposals for new and amended regulation that may have financial consequences for business. The Swedish Better Regulation Council assesses whether proposals for new or amended regulations have been formulated so as to achieve their purpose at the lowest possible administrative cost for companies and whether the effects for companies are

described insufficient detail in the impact assessments that committees of inquiry, ministries and government agencies must prepare when proposing new or amended regulations.[6]

It is the two organisations' similar experience of working to achieve simple business regulations and reviewing the evidence base on which these are adopted that underlies NNR's and the Swedish Better Regulation Council's decision to work together in this project on implementation of EU legislation in Sweden.

1.1.3 The concept 'gold-plating'

The English term 'to gold-plate' is frequently used in contexts where implementation of EU legislation is being discussed. When it first started to be used as a concept, it was to designate situations where the national implementation of European Union legislation exceeded what a legal act required while staying within legality. Over time the concept has gained a wider import in many contexts and is used for a number of phenomena in implementation of EU legislation in the Member States. Gold-plating is often assumed to have negative impacts on enterprise, competition and growth. In such cases it should, if possible, be avoided. However, it is difficult to specify what precisely should be avoided when there are different understandings of which measures the concept 'gold-plating' includes. This uncertainty is the starting point for the current project.

NNR and the Swedish Better Regulation Council have noted that companies in Sweden perceive that the way EU legislation is implemented often leads to companies being subjected unnecessarily to regulatory burdens and costs. Unnecessary regulatory burdens and costs may, in turn, impair companies' capacity for development, growth and job creation. Many of the problems that companies perceive in connection with implementation of EU legislation are referred to as gold-plating. Individual companies and their representative business organisations are therefore demanding that the Swedish Government, as part of its better regulation work and its commitment to the functioning of the single market, decides that gold-plating is to be avoided.

The European Commission claims that as much as 32 per cent of companies' administrative costs of complying with regulation that originate from the EU are caused by inefficient implementation by the Member States, or gold-plating.[7] During the spring of 2012, gold-plating was the subject of renewed attention from the Swedish Government. The issue, however, is whether companies, politicians and government officials mean the same thing when they talk about gold-plating.

1.1.4 Considering the impacts of EU legislation on companies in Sweden

A fundamental part of both organisations' work is scrutinising impact assessments when new or amended regulations are proposed. Both NNR and the Swedish Better Regulation Council have noted that there are often shortcomings in the impact assessments when it comes to implementation of EU legislation. It is not uncommon for an account of different implementation alternatives, of why a specific alternative has been chosen and the impacts of the selected alternative for business to be missing. In all too many cases, there is thus a lack of a complete evidence base on which to make decisions. Both NNR and the Swedish Better Regulation Council have sought to make the Government aware of the

impact assessments of proposals for EU importance, at an early stage, of preparing and reporting national legislation that are to be negotiated at EU level. Not beginning the work to examine impacts at national level until EU legislation has been adopted means it is no longer possible to influence the content of the legislation, even if it should prove to have negative impacts on companies in Sweden.

Impact assessments are also an important part of the evidence base when implementing EU legislation. The Swedish Better Regulation Council and NNR therefore consider that a clear description of the advantages and disadvantages of different implementation measures in the impact assessments would be one way for the Government and the central government administration to ensure better founded and more transparent implementation. The fact that impact assessments – both of proposals for EU legislation and in connection with implementation of adopted EU legislation – are important in these contexts is reinforced by the fact that almost half of all new or amended regulations in Sweden originate from the EU. [8]

1.1.5 The single market

Trade in the European single market dominates Sweden's foreign trade and, for an export-dependent country such as Sweden, the single market is extremely important.[9] It has been calculated that around 8 per cent of all the EU Member States' exports and imports of goods and 5 per cent of their imports and exports of services are a direct consequence of the presence of a single market in the EU.[10] Trade within the single market, which is of such great importance to Sweden and other Member States, can, unfortunately, be restricted in various ways. For example, national special rules can lead to trade barriers for products that are sold in other Member States. According to the European Commission, special rules of this nature contributed to a reduction in trade in goods in the single market of up to 10 per cent during 2000.[11]

Most of those involved in better regulation work within the EU agree that a lack of uniformity in implementation of EU legal acts impairs competition on equal terms and obstructs achievement of the aims of the single market. The Statement of Government Policy 2010 laid down that the Government's work to improve the business climate in Sweden must continue, and that Sweden must be at the heart of European cooperation and be proactive, among other things, in deepening the internal market.[12]

1.2 Outline etc.

1.2.1 Outline

NNR and the Swedish Better Regulation Council are working to ensure that regulations fulfil their purpose in a way that promotes competition to the greatest degree possible. Our joint project is therefore targeted at regulations that impact on business. We hope that the recommendations presented in this report will help to avoid unnecessary competitive disadvantages for companies in the future.

We have attached great importance to analysing the format of the European legislative process – from when a proposal for new legislation is presented by the European Commission until a decision is to be implemented in Sweden – to see where changes and improvements could be made within the present framework. Less importance has been attached to looking backwards and analysing examples where implementation in Sweden may have had negative impacts on companies' competitiveness. Analysing individual cases of implementation and assessing the advantages and disadvantages of how this was done and what the effects were for companies and enterprise requires resources that neither NNR nor the Swedish Better Regulation Council have available. Moreover, from a business perspective, it is more usual to deploy resources to influence future legislation, as companies adapt to legislation that has been adopted and implemented.

In the current project we have decided to address the following questions:

- Is there consensus within the Swedish business community, the Government and the rest of the central government administration as to which phenomena are covered by gold-plating, and is it possible to find a generally applicable and usable definition of the concept?
- What can be done to avoid implementation of EU legislation creating unnecessary competitive disadvantages for companies?

To answer these questions, we have collected an extensive body of material. We have analysed written documentation available to us and interviewed representatives of the Government Offices, government agencies and business organisations as well as academics in Sweden. To introduce a comparative aspect, we have also studied how the European Commission, the United Kingdom, Germany and the Netherlands view implementation of EU legislation, by means of both available written documentation and interviews.

The report is organised such that the European legislative process is explained in Chapter 2 to provide a basis for the subsequent analysis in Chapter 3 and 4. Chapter 3 contains an analysis and discussion of the concept 'gold-plating'. Chapter 4 discusses the importance of a sound evidence base for decisions concerning implementation of EU legislation in Sweden. Chapter 5 contains a summary of the recommendations made in Chapter 3 and 4.

1.2.2 Delimitations

Defining the boundary for incorrect implementation and non-compliance

This report focuses on implementation measures that are authorised under EU law but that may negatively impact on companies' compe-titiveness. The report does not, on the other hand, look at failure to implement Directives, or late or incorrect implementation. The boundary between correct and incorrect implementation is not, however, always obvious. The assessment depends on the opinions

formed when the Directive is analysed. National measures therefore need to be carefully justified on the basis of the aim of the Directive. It is the European Commission in the first instance and ultimately the Court of Justice of the European Union that determine whether a Directive has been implemented correctly.

Other related areas

NNR and the Swedish Better Regulation Council are aware that problems arising in implementation of EU legislation do not always relate to national measures. The problems may originate in the fact that the legislation in itself is difficult to understand and that insufficient account has been taken of implementation and application aspects in drafting the legislation. This area is under discussion at EU level and is addressed to some extent in this report, although it is not covered by the report's main recommendations.

NNR and the Swedish Better Regulation Council have furthermore restricted the current project to 'implementation' of EU legislation and, have not in any depth touched on issues of application and enforcement. Several inquiries and reports have established that there is also a need to review the Swedish administrative model and working methods within the central government administration in relation to Sweden's membership of the EU. However, NNR and the Better Regulation Council have chosen not to comment in the present project on how Swedish EU work is organised generally. This issue deserves to be handled separately and in more detail than would be possible in this report.

1.2.3 Terms used in the report

EU legislation

This report primarily concerns EU Directives, but it also happens that EU Member States have to adopt measures to ensure that EU Regulations have their intended effect at national level. We have noted in these contexts that 'EU law' and 'EU legislation' are often used interchangeably. As we understand it, the term 'EU law' covers both primary and secondary legislation, while 'EU legislation' can only be used to designate secondary legislation.

We have therefore chosen to use the term 'EU legislation'[13] as a generic term for such European secondary legislation that requires implementation measures in order to be effective in Sweden. Where we refer to both primary and secondary legislation, this is expressed by the term 'EU law'.

Measures

In normal usage the word 'measures' is used to mean that someone actively does something. However, here we use the term both in this sense and in the sense of someone choosing not to do something, for example not taking advantage of any derogations in a Directive.

2 The European legislative process

2.1 General information on European legislation

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the 'ordinary legislative procedure' has been applied to the majority of the legislative acts adopted within the EU. The European Commission, the Council of the European Union (often called the Council of Ministers or just the Council)[15] and the European Parliament participate in the ordinary legislative procedure. Swedish Government bodies participate in the legislative procedure through the Council and its committees and working groups. Sweden is represented in these by politicians and government officials from ministries and/or government agencies. Under the Treaty of Lisbon, the European Commission has the right of initiative to make legislative proposals. The right of initiative relates exclusively to European Union issues.[16] The European Commission's legislative proposals are submitted to the European Parliament and the Council, and sent to the parliaments of the Member States. The national parliaments then have an eight-week period in which to send a reasoned opinion to the presidents of the Parliament, the Council and the Commission as to whether the legislative proposal conforms to the principle of subsidiarity.[17]

A legislative proposal goes through two readings by the European Parliament and the Council. The new legislation may be adopted after the first and second readings if the institutions are in agreement.[18] The legislation must, however, be published in the Official Journal of the European Union before it can enter into force. If the two institutions cannot reach agreement on the wording of the legislation after two readings, the work continues in a Conciliation Committee made up of equal numbers of representatives of each institution. The European Commission also participates in the Conciliation Committee. When an agreement has been reached in the Conciliation Committee, the proposal is sent to the European Parliament and the Council for a third reading. When both institutions have approved the agreement, it is signed and published. If the Conciliation Committee fails to reach a compromise, the legislation is considered as not adopted and the procedure is closed.

The Council consists of Ministers of the Member States and meets in ten different configurations depending on the issues being discussed. All the Council's work is prepared and coordinated by the Permanent Representatives Committee (COREPER[19]), which comprises the Brussels-based Permanent Representatives of the Member States and their assistants.[20] Preparatory work for COREPER is carried out by approximately 250 committees and working groups made up of delegates from the Member States.[21]

2.1.1 Different legal acts

As mentioned in Chapter 1, secondary legislation under European Union law comprises five types of legal acts, namely Regulations, Directives, Decisions, Recommendations and Opinions. As a rule, Regulations do not occasion national legislative measures but are binding and directly applicable in the Member States. It follows from this that it is mainly Directives that are of interest in this report.[22] However, it can happen that Regulations entail implementation requirements, for example with regard to introducing effective sanctions, the form of competent authority with supervisory responsibility, or other national measures in support of the regulation's aim. In these cases the Member States must adopt measures to ensure that the regulations achieve full application, and make corresponding provisions for this as for Directives.[23] The report's

recommendations extend to Regulations in this regard. Directives are binding in terms of the result to be achieved, but the EU Member States are responsible for determining the form and procedure for implementation of the Directive.[24]

A Directive needs to be analysed in terms of the legal basis on which it has been drawn up, its aim and general structure. Directives may contain provisions with different degrees of detail (framework Directives and sectoral Directives) and different degrees of harmonisation (full and minimum harmonisation). One and the same Directive may contain both full and minimum harmonisation provisions. In the case of a full harmonisation Directive, the national legislation may not depart from the legal position that is to be achieved through the Directive.[25]

A minimum Directive stipulates the lowest common denominator that all Member States must fulfil within the area being harmonised in the Directive. The Member States have the opportunity to go further than ensues from the Directive, for example to introduce rules that provide a higher level of protection or cover more categories of businesses, provided the national legislation is compatible with EU law as to the rest. Anything outside the scope of a Directive is either national law or regulated elsewhere in EU law.

Higher national requirements and special rules may be justified with respect to prioritised political goals but may also have negative impacts on companies' competitiveness and ability to create growth and jobs. Companies may be affected by regulatory burdens and competitive disadvantages, both nationally and in the single market, which could be avoided. It is impossible to generalise as to when higher national requirements of this nature are justified; an assessment must be made in each individual case. What falls within or outside the scope of the Directive is sometimes difficult to decide. The analysis is best carried out by those who were involved in drawing up the Directive.

2.1.2 Infringement proceedings and failure to fulfil obligations

Pursuant to Article 4.3 of the Treaty on European Union, the EU Member States shall take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions.[26] If a national regulation contravenes a regulation under EU law, EU law shall always be applied and the national provision overridden.[27]

This principle of the primacy of EU law has been laid down by the EU Court of Justice on a number of occasions. The European Commission checks that EU law is implemented and applied by the Member States, and that they do so correctly and on time. If the Commission considers implementation or application in a Member State to be questionable, it may initiate 'infringement proceedings' against the Member State[28], which may result in an action being brought against the Member State in the Court of the Justice for failure to fulfil obligations under the Treaties. 'Failure to fulfil obligations under the Treaties' means that the Member States are failing to fulfil their obligations under EU law. Before a case is referred to the Court of Justice, the European Commission enters into correspondence with the Government of the Member State concerned. If, after this, the Member State still chooses not to follow the EU rules, the Court of Justice may impose a fine.[29]

The entry into force of the Lisbon Treaty streamlined infringement proceedings in some respects. This concerns above all the situation where Member States are guilty of late implementation of EU legislation. In contrast to purely national regulation, Directives have a set date by which they must be implemented. EU institutions have agreed that two years is a suitable period for implementation.[30] Within the framework of infringement proceedings, the European Commission may initiate proceedings at the Court of Justice concerning economic sanctions against a Member State for late implementation. This is a significant development for Sweden, as the Swedish legislative process, which is also used for implementing EU legislation, is relatively time-consuming.

2.1.3 Notification procedure

Goods, services, people and capital shall be able to move freely within the European single market. Where free movement of goods in the single market is concerned, there is an information system in place to prevent national regulation acting as barriers in the common market. The rules on this are contained in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, amended by Directive 98/48/EC of the European Parliament and of the Council (also called the Notification Directive). The amendment widens the scope of the Directive such that it now covers all agricultural and industrial goods as well as information society services.

Pursuant to Directive 98/34/EC, authorities in EU Member States are obliged to notify the European Commission of all proposals for new provisions that impose any type of requirement on product characteristics as well as proposals for national provisions that specifically relate to the information society. If, in its implementation of EU legislation, a Member State chooses to adopt purely national reforms that are not covered by the EU legislation, a duty of notification may arise. [31]

The notifications are collated in the European Commission's TRIS database (Technical Regulations Information System). The database is public and all parties – Member States' Governments and central government administrations, companies and business organisations – that consider that a notified proposal for national regulations could lead to barriers to trade may, in turn, notify this to the European Commission.[32] When a Member State notifies a draft regulation, it may not be adopted for three months in order for others to have time to submit opinions to the Commission. The Notification Directive thus gives the European Commission, the Member States and other concerned parties opportunity to identify any barriers to trade and ensure that the draft regulation either does not enter into force or is made compatible with EU law.[33] Technical regulations that solely concern a binding act of secondary legislation do not require notification. In cases where authorities consider that health, safety and the environment must be protected, they may require that national product regulations are observed.

Services in general are not covered by the Notification Directive but there is a separate process for ensuring free movement of services within the framework of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, the Services Directive. Also this process means that an authority

adopting a new regulation that may affect the free movement of services must notify this to the European Commission. The National Board of Trade is the Swedish point of single contact for the Notification Directive and for notifications pursuant to the Services Directive.[34] The Ministry for Foreign Affairs shall also monitor that Swedish regulations do not obstruct the single market.

2.2 Sweden's work within the European legislative process

2.2.1 The Swedish process regarding work at EU level

Once the European Commission has presented a legislative proposal, the ministry that will be responsible for preparing the matter in Sweden is identified.[35] Each ministry handles the EU issues that fall within its area of responsibility. A decision is made within the ministry as to which unit and administrator will have main responsibility for the coming work and negotiations within the Council. EU matters that affect several ministries are prepared jointly in the Government Offices.[36] Government agencies may also be appointed to take part in the work, particularly if the legislative proposal is technically complex and the ministry lacks the necessary expertise in the area or if it is anticipated that the legislation may be implemented by means of administrative provisions.[37]

The Government Offices' Handbok för EU-arbetet (Handbook for EU work, also referred to as the EU Handbook) addresses the issue of instructions for those preparing and handling EU matters. This is aimed in the first instance at new EU administrators, EU coordinators or delegates in working groups and Commission committees. The intention is to provide clear information on the EU and its institutions, on how EU issues are handled in the Government Offices and on negotiation meetings in Brussels.[38] Pursuant to the EU Handbook, a number of documents are to be produced by those appointed to prepare the matter when a proposal for new legislation has been presented by the European Commission. The Swedish Parliament shall receive preliminary information on the proposals in a factual memorandum. A factual memorandum shall contain details of the European Commission's proposal, any Swedish regulations that already exist in the area and a description of the impacts of the proposal for Sweden. In the case of 'more important issues', a position memorandum shall be drawn up as soon as possible. This shall contain Swedish positions and a strategy for how the work is to be conducted. It may also contain information on which implementation measures may be required at national level if a decision is taken on legislation at EU level. A position memorandum should be able to function as a basis for negotiation throughout the process.[39] In contrast to factual memoranda to the Swedish Parliament, position memoranda are internal documents for the Government Offices. Factual memoranda are published on the Parliament's website.[40] In addition to these two documents, negotiation instructions shall be drawn up for those representing Sweden, and the Prime Minister's Office, EU Coordination Secretariat (EU Secretariat), shall send instructions for COREPER to Sweden's Permanent Representation.[41]

Guidelines will also be found in Circular 3, *Riktlinjer för framtagande och beredning i Regeringskansliet av svenska ståndpunkter i EU-frågor m.m.* [Guidelines for drawing up and preparing Swedish positions on EU issues etc. in the Government Offices], published by the Prime Minister's Office. Circular 14, *Riktlinjer för genomförande av unionsrättsakter* [Guidelines for implementation of legal acts of the European Union], published by the Prime Minister's Office, EU Secretariat, also contains guidelines on analysis and actions before and during negotiation of legal acts. Instructions and guidelines in the EU Handbook and circulars are advisory but not binding.

There are major differences in how different ministries handle their EU work. The final report from the 2006 administration committee, '*Styra och ställa – förslag till en*

effektivare statsförvaltning' [Managing – Proposals for a more efficient central government administration], Official Government Report 2008:118, states that the ministries must in part have different working methods as they are responsible for different policy areas, but that most lack actual written procedures or guidelines for the work. The circulars common to the Government Offices do not apply to government agencies and, in general, there is no documentation of how the cooperation between ministries and government agencies should proceed on EU issues. The Ministry of the Environment is identified as a positive exception, having both special guidance for preparation of EU matters and guidelines for its EU work with government agencies. The guidelines have been produced jointly with the Swedish Environmental Protection Agency, the Swedish Chemicals Agency and the Swedish National Board of Housing, Building and Planning. The administration committee states that the Ministry of Education and Research has also drawn up its own procedures.[42]

2.2.2 Early analysis of impacts for Sweden of legislative proposals

Many issues that arise when implementing EU legislation at national level may have their basis in the original EU decision. It is therefore important that the various aspects associated with implementation of proposals for EU legislation are thoroughly discussed at an early stage. When the European Commission's proposal is presented and then negotiated in the Council, the entire legislative process right up to implementation and application needs to be taken into account[43]. A successful implementation from a formal or legal perspective is not necessarily the same thing as a successful implementation from a practical perspective. In the end, it is the cumulative effects of regulatory requirements, application and enforcement, observance and supervision that are significant for enterprise, competition and the efficiency of the single market.

"High quality regulation forms a chain from the earliest stages of its preparation through to its implementation. More attention should be paid at European level to implementation concerns to ensure that the full impacts are understood and considered. Member States should accord implementation of European regulation higher priority."[44]

The Swedish EU Handbook states that Swedish representatives should start working to influence priority issues for Sweden even before the European Commission submits a proposal for new legislation[45]. Circular 14 also highlights the importance of analysis at an early stage: 'Generally speaking, the national preparations can be started as early as during the negotiation phase, and sometimes even during the proposal phase, by means of analysing the Swedish legislation affected, what impacts may arise, measures that may be required and so on. The Ministry's legal functions should be involved, among other things to assess what impacts the Commission's proposal may have on Swedish law'.[46]

To enable Swedish politicians and government officials to participate constructively in negotiations in the Council and to influence the wording of a proposal so as to look after Swedish interests, there should, of course, be a sufficiently detailed evidence base illustrating circumstances particular to Sweden. If the European Commission has carried out an impact assessment, this can be used as a starting point or support for the national impact assessment. As soon as the impacts for Swedish circumstances can be identified, it is

also possible to assess how the implementation should be organised.[47]

In the United Kingdom, a proportionate assessment of likely effects of proposals for EU legislation, including for companies, is required as part of an approved negotiating position.[48] The Swedish Better Regulation Council's Dutch counterpart, Actal, has proposed that the Dutch Government should observe the need for early national impact assessments of the European Commission's proposals. Actal considers that this would strengthen national preparations ahead of negotiations at EU level. Actal is of the view that Dutch ministries should begin an analysis of the effects of new regulations on e.g. companies as soon as possible, so that Dutch positions during the European decision-making process are fact based.

NNR has long argued that the Government ought to introduce a requirement for national impact assessments of legislative proposals from the European Commission that will affect companies. This is a matter of knowing the advantages and disadvantages of various proposals right at the negotiation stage, to drive positions that genuinely benefit Swedish interests.[49]

Together with the Swedish Agency for Economic and Regional Growth, the Swedish Better Regulation Council is running a project on government agencies' EU work. The interim report published on 30 March 2012 concludes that there are various opportunities for influencing the form of EU regulations before their form is final and there is only minimal scope for individual simplifications.[50] Measures proposed in the report include:

- Preparing a Swedish impact assessment as early as possible. This is done to assess how the proposal may impact on companies in Sweden and to evaluate alternative solutions for achieving the aim of the proposed regulation.
- Using the impact assessment prepared as a basis for influencing Sweden's position on future EU rules.[51]

Consultation and cooperation with the business community and other stakeholders are important to illustrate the economic effects of the proposal for companies in Sweden when a government agency:

- Is participating in Commission-led public consultations.
- Is participating in the Commission's consultation via its own experts.
- Has informal consultations with the Commission, the Council and the European Parliament.
- Is participating in COREPER's working groups.
- Is drawing up instructions ahead of committee meetings.
- Is working to produce a position memorandum .
- Is participating in committee work.[52]

In December 2010 the Swedish Better Regulation Council published a report titled 'Synpunkter på regeringens arbete med EU-lagstiftning' [Views on the Swedish Government's work on EU legislation].[53] It emerged from the report that the effects for

Sweden of the European Commission's proposals for new legislation are rarely dealt with in any detail in the Government's own analyses. In the report the Swedish Better Regulation Council argues that a position memorandum is a key instrument for both the negotiation process and for meeting the need for a well-founded evidence base. The Swedish Better Regulation Council assessed that the template available for position memoranda in the Government Offices is designed in a way that makes it easy to illustrate and analyse the impacts on companies of a proposal from the European Commission and how it affects the state, local authorities, county councils and individuals.

The Swedish Better Regulation Council proposed, on the one hand, that the EU Handbook should specify that a position memorandum should be drawn up in each matter that involves proposals for new EU legal acts and not only for 'more important issues'[54], and, on the other, that the template available for position memoranda should be used. However, the Swedish Better Regulation Council pointed out that in order for the template to be used effectively, it may need to be supplemented with information on how the impacts are to be described. The Swedish Better Regulation Council proposed that both guidelines and the template for position memoranda should state that a proposal's impacts on Swedish companies must be illustrated; the requirements of the Ordinance on Regulatory Impact Assessment (2007:1244) may provide guidance in this respect.[55]

There is no obligation for Swedish government officials representing Sweden in the European legislative process to carry out an early national impact assessment regarding the impacts on Swedish companies of proposals by the European Commission. On the other hand, there is a structure in place which, if it were used and adjusted in certain respects, could function for preparing early national impact assessments. National impact assessments of proposals by the European Commission for new EU legislation should be public documents. It is important that stakeholders are able to assist ministries and government agencies in preparing the impact assessment and also Swedish positions in interim negotiations in the Council. If the template for position memoranda is used to draw up national impact assessments, the relevant section of the memorandum must also be reported in a public document.

2.2.3 Consultation in the early process

When a proposal is received from the European Commission, the ministry responsible sometimes circulates the proposal to business organisations for consideration, but this is not done systematically. The next consultation opportunity is in connection with implementation at national level. There is extensive knowledge and experience within the business community of various areas affected by EU legislation. There is also often a good understanding of how a proposal from the European Commission may impact on the conditions in which companies operate. It is in the interests of Swedish politicians and government officials to profit by this knowledge and experience in their work representing Sweden and Swedish interests at EU level.

Pursuant to the EU Handbook, a well-supported position at national level provides valuable support for the Government's EU work. It is therefore important that those who prepare and administer EU matters consult with representatives of other government

agencies, local authorities and county councils as well as business organisations. It is further stated that cabinet members are responsible for consultation being organised in their policy area with concerned parties and business organisations. Consultation is particularly important when EU legislation affects companies' operations or when government agencies, county councils and local authorities are responsible for application. It is important that those affected are given the opportunity to participate at an early stage and that they are regularly updated on the work. Continuous dialogue with concerned parties facilitates the formulation of Swedish positions and implementation of Directives.[56]

The section on strategic and coordinated EU work in Government Bill 2009/10:175, Public administration for democracy, participation and growth, states that "it is important that stakeholders are involved throughout the legislative process. Work to gain early and broad support increases the opportunities for well-founded Swedish action and better implementation."[57]

2.3 National implementation of EU legislation

Once EU legislation has been adopted, it is the Government's responsibility to ensure that it is implemented correctly and on time. The Government is responsible for the issuance of regulations by government agencies, as laid down in the Instrument of Government. If an EU Directive is to be implemented by means of administrative provisions, the Government must delegate competence to the government agencies to issue new regulations. If a Directive is not to be implemented by means of administrative provisions, it is left to the responsible ministry. Each ministry is responsible for preparatory work within its area of responsibility[58] but the Prime Minister's Office, EU Secretariat, has overall responsibility for EU issues within the Government Offices and shall work to achieve correct and up-to-date implementation. The EU Secretariat is responsible for maintaining an implementation database in which each ministry shall enter details of which legislation is to be implemented, which ministry is responsible, which legal means are to be used and when the implementation must be complete. The database functions as a planning tool and also contains details of infringement matters. The information in the database is not public. The Prime Minister's Office supervises implementation in line with set timeframes but not the quality of implementation of EU legislation in Sweden.

The Government's work to simplify regulations, and the desire for the European single market to function as intended, come together in the implementation of EU legislation at national level. Where Swedish efforts to simplify regulations are concerned, there is a unit with overall responsibility for co-ordinating this at the Ministry of Enterprise, Energy and Communications. Where the single market is concerned, coordination responsibility rests with the Ministry for Foreign Affairs' Department for the EU Internal Market and the Promotion of Sweden and Swedish Trade, and with the National Board of Trade. Although EU matters are not considered to constitute government matters, they must, pursuant to the Government Offices' Circular, be prepared in the same way.[59] The Swedish legislative process is thus in principle the same whether it concerns implementation of Directives or national regulations. Whether the Directive is implemented by law or administrative provisions, the mandatory preparation procedure laid down in Chapter 7, Article 2 of the Instrument of Government must be followed and the standard procedure for inquiry and consultation applied. Among other things, this means that the necessary information and opinions shall be obtained from the government agencies concerned and, to the extent necessary, from local authorities, organisations and private persons.[60] Instructions for implementation of EU legislation in Sweden are contained in Circular 14 from the Prime Minister's Office, EU Secretariat. As mentioned above, the Circular is not binding. As well as Circular 14, implementation is carried out in accordance with other Swedish rules laid down in the Instrument of Government, the Riksdag Act and the Ordinance with instructions for the Government Offices.[61] The remainder of the report deals with issues concerning implementation of EU legislation in Sweden that is authorised under EU law, i.e. not incorrect or late implementation.

Late implementation of EU legislation may lead to uncertainty as to which rules apply – existing Swedish rules or, based on the primacy of EU law and the principle of direct effect, those contained in the Directive. It is obvious that this could lead to problems in application and enforcement. The time aspect regarding

implementation of EU legislation has assumed increased relevance for Sweden. The Lisbon Treaty means that Member States can relatively quickly be subject to fines in the event of late implementation, necessitating a review of the time-consuming Swedish legislative process. This important aspect is not addressed here. Please refer instead to the report 'Att göra rätt och i tid – Behövs nya metoder för att genomföra EU-rätt i Sverige?' [Doing it right and on time – Are new methods needed for implementing EU law in Sweden?]. The report is written by Jane Reichel, Senior Lecturer in Administrative Law, Faculty of Law, Uppsala University, and Jörgen Hettne, Senior Researcher in Law and Deputy Head of Agency at the Swedish Institute for European Policy Studies (Sieps) and Lecturer in EU Law, Faculty of Law, Lund University.

3 Gold-plating

3.1 Views on gold-plating in Sweden

3.1.1 The business view on gold-plating

Gold-plating is a much-discussed topic within the Swedish business community. When companies in Sweden feel that Swedish ministries and government agencies choose to exceed what is required to implement EU legislation correctly and on time, this is generally called gold-plating. Implementation of this nature, which exceeds the minimum level in the Directive, is considered to give rise to costs, regulatory burdens and competitive disadvantages for Swedish companies in the single market that could have been avoided.

NNR's 14 members represent just over 300,000 companies. NNR and the Swedish Better Regulation Council have consulted with experts within these 14 organisations concerning the business community's views on what gold-plating means and covers. In the discussions conducted with business representatives it emerged that the widest interpretation of gold-plating covers seven different measures on which Swedish politicians and government officials must take up a definite position when determining how EU legislation is to be implemented in Sweden. These seven measures are:

1. Adding regulatory requirements beyond what is required by the Directive in question.

2. Extending the scope of the Directive.

3. Not taking (full) advantage of any derogations.

4. Retaining Swedish national regulatory requirements that are more comprehensive than is required by the Directive in question.

5. Using implementation of a Directive as a way to introduce national regulatory requirements that actually fall outside the aim of the Directive.

6. Implementing the requirements of the Directive earlier than the date specified in the Directive.

7. Applying stricter sanctions or other enforcement mechanisms than are necessary to implement the legislation correctly.

Opinions differ as to whether all the named measures should be covered by gold-plating. Business experts are, however, agreed that the Government ought to adopt as a principle that these measures should, as a main rule, be avoided. In cases where the politicians and government officials responsible still consider that there are various reasons to adopt one or more of these measures, they should explain the reasons and the impacts of the measures in a public document. There are several examples of cases where representatives of the business community have drawn attention to the fact that politicians and government officials have chosen one or more of the above measures when implementing EU legislation. Some of these are:

- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (the Working Time Directive). In implementing the Working Time Directive, Sweden has not taken advantage of derogations and has retained national rules that go beyond what is required in the Directive.[62]

- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (the Agency Workers Directive). The deadline for Member States to implement the Agency Workers Directive was 5 December 2011. In Sweden, implementation is delayed. If the Directive were to be implemented as proposed in the report *'Bemanningsdirektivets genomförande i Sverige'* [The Agency Workers Directive implementation in Swedish national law], Official Government Report 2011:5, this would mean Sweden adding regulatory requirements beyond what is required pursuant to the Directive, and extending its scope.

- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. Sweden has chosen not to take advantage of derogations.

- Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, amended by Directive 97/11/EC and Directive 2003/35/EC. In Sweden the scope of the Directive has been extended such that more businesses than required by the Directive are covered by Swedish requirements to carry out environmental impact assessments.

- European Parliament and Council Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (the Lifts Directive). There are also a number of recommendations for existing lifts. Sweden is one of the few countries that require existing lifts to be adapted to the requirements for new lifts, thus extending the scope of the Directive.

- Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings. In Sweden the requirements of the Directive have been extended such that, pursuant to Sweden's implementation, requirements for energy declaration also cover on-site building inspections.

- The Basel III framework, which is planned to be implemented in the EU by means of changes to the Capital Requirements Directive (Capital Requirements Directive IV), expected to enter into force on 1 January 2013. In Sweden, the Government has communicated that regulatory requirements are to be introduced earlier and that some of the capital requirements will be higher than is required pursuant to the Directive.

This list of examples is not intended to be exhaustive. The aim of providing these examples is to point out higher requirements and special rules that have emerged both with regard to legislation that is to be applied generally, irrespective of industry, and industry-specific legislation. They may teach by example so that future implementation is as fit for purpose and efficient as possible, without companies being affected by unnecessary costs and impaired competitive opportunities.

3.1.2 Views of the Swedish Government and central government administration on gold-plating

Circular 14, Riktlinjer för genomförande av unions-rättsakter [Guidelines for

implementation of legal acts of the European Union], contains a paragraph stating what ministries should bear in mind when drawing up a timetable for implementation of legal acts of the European Union. This paragraph specifies that "it is of the greatest importance that the ministry is mindful of the risk of delays arising if implementation of Directives is planned in connection with other reforms in the area, and that an analysis of any measures that exceed the requirements of the Directive (gold-plating) is carried out from the perspectives of both simplification and EU law." There is, however, no more detailed explanation of what is meant by exceeding the requirements of the Directive. 'Gold-plating' as it is used by the Prime Minister's Office, EU Secretariat, could thus be interpreted broadly and cover the seven measures discussed above. In the interviews we have conducted with officials in ministries and government agencies, however, it has emerged that most people spontaneously interpret gold-plating more narrowly. It has also become clear that there are several different interpretations and views as to what should be considered to be covered by the concept and that there is no common or established interpretation within the central government administration. On the other hand, there is an understanding that the seven measures (see Section 3.1.1) and delays in the implementation may have a negative impact, e.g. on companies' competitiveness.

3.1.3 OECD's review of Sweden

As part of the Better Regulation in Europe – the EU 15 Project, the OECD has reviewed and assessed Sweden's work to achieve efficient regulations within the framework of the on-going work to simplify regulations. The Better Regulation in Europe – Sweden report was published in 2010. Among other things the report reviews the policy underlying the better regulation work and the institutional structures and decision-making processes that impact the results of the work. The OECD has noted that a number of the interviewed stakeholders mentioned that gold-plating is a problem when implementing EU legislation in Sweden. This is interpreted in the report as meaning that those responsible for implementation go beyond what is required by a Directive. Thus, here too, there is scope for a wider or narrower interpretation of what gold-plating actually means. In recommendation 7.3 in the report, OECD encourages Sweden to review its transposition of EU legislation both in terms of it being done on time and in terms of difficulties that arise in connection with transposition.[65]

On 25 May 2012 Minister for Enterprise, Annie Lööf, commissioned[66] Christer Fallenius, former President of the Swedish Market Court, to undertake an inquiry into, among other things, whether EU Directives within the Ministry's policy areas have been implemented in such a way that they have resulted in costs that are not a direct consequence of the EU Directive. The annex to the terms of reference of the inquiry states that the OECD recommended that Sweden review its existing legislation.[67] The mandate also discusses gold-plating and the European Commission's definition of gold-plating is explained; see further section 3.2.1 below.

It is further stated that when EU Directives are implemented in national law, this can happen in a way that involves higher substantive requirements, broader application, addition of national requirements or special rules, or the application being stricter than in other EU Member States. It is unclear whether this statement is intended as an official Swedish definition of gold-plating and whether this should

be understood as an exhaustive account of what is covered by the concept. We are pleased that the Ministry of Enterprise, Energy and Communications has taken the initiative to map how EU Directives have been implemented, but consider that a wider formulation of the inquiry's terms of reference would have been desirable. As it now stands, it omits a number of important problem areas. If the purpose of the inquiry is to be achieved, it should cover the seven measures discussed in Section 3.1.1 and the problems that may arise in connection with late implementation. Or, in the words of the Ministry of Enterprise, Energy and Communications, "what is important is that the implementation happens in such a way that it does not entail undesired impacts on competition etc."[68]

3.2 Views on gold-plating in the EU

It has emerged from interviews and contacts with representatives of the business community and central government administrations in other EU Member States that there are two explicit definitions or descriptions of what gold-plating involves.

3.2.1 The European Commission

The European Commission's Better Regulation glossary states that:

"In the EU context, 'gold-plating' refers to transposition of EU legislation, which goes beyond what is required by that legislation, while staying within legality. ... If not illegal, 'gold plating' is usually presented as a bad practice because it imposes costs that could have been avoided. Gold-plating therefore is different from a transposition measure in contradiction with a Directive and subject to infringement procedures. 'Opting out' of deregulatory measures is not gold-plating either. Some Directives only invite, but do not oblige, Member States to remove a set of national rules. When a Member State decides to maintain its rules, there are indeed no additional requirements to the Directive."[69]

The European Commission's description of what gold-plating involves thus covers only those implementation measures that add something to the requirements in a Directive. The European Commission does thus not consider not taking advantage of derogations or retaining national regulations that already existed before a joint decision was taken at EU level to constitute gold-plating.

3.2.2 The United Kingdom

The British Government has published guidelines for implementation of EU legislation titled 'Transposition Guidance: How to implement European Directives effectively'. The guidelines, which are intended for policy makers and lawyers across government, describe how implementation of, above all, Directives is to be carried out and the requirements related to implementation. The guidelines are based on five principles for implementation of EU legislation: 'Guiding Principles for EU Legislation'. One of these principles is that, when implementing EU legislation, "the Government will endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts".[70] The more detailed explanation of this principle states that the Government's attitude is that the body responsible for implementation of EU legislation should not do more than the minimum required in a Directive, unless there are very special reasons to do so, and in this case these reasons must be able to be justified by means of a cost-benefit analysis and after consultation with stakeholders. Doing more than the minimum required is considered gold-plating, which means for example:

- Extending the scope, adding in some way to the substantive requirement or substituting wider UK legal terms for those used in the Directive; or
- Not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- Retaining pre-existing UK standards where they are higher than those required by the Directive; or

- Providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or

- Implementing early, before the date given in the Directive.'[71]

This description of gold-plating is more extensive than the European Commission's and includes, as we interpret it, the seven measures mentioned above in Section 3.1.1.

The guidelines also contain a description of what is meant by 'double-banking', which is when existing national legislation overlaps EU legislation but without this necessarily involving higher requirements compared with the EU legislation.

3.2.3 Other actors' views on gold-plating

The High Level Group of Independent Stakeholders on Administrative Burdens

The High Level Group of Independent Stakeholders on Administrative Burdens, also known as the Stoiber Group after its chairman Dr Edmund Stoiber, was established in 2007 to advise the European Commission on administrative burden reduction measures suggested in the context of the Action Programme for Reducing Administrative Burdens in the EU.[72]

In November 2011 the High Level Group published a report on best practice in the EU Member States for implementing EU legislation. The report collates examples of methods for minimising new regulatory burdens on companies. The primary aim of the Group's report is to provide concrete ideas for improving implementation of EU legislation. Among the Group's 15 recommendations to the EU Member States, it is stated that "Gold-plating: unnecessary administrative requirements and burdens for companies should be avoided." Gold-plating is described here as introducing requirements that are stricter than the EU's. The report's checklist for good implementation of EU legislation also divides gold-plating into active and passive gold-plating. 'Active gold-plating' refers to situations where national authorities have decided to implement EU legislation in a way that goes beyond copying the substance of that legislation – either procedurally or by subject matter.

'Passive gold-plating' means that a Member State retains current national legislation although it contains higher requirements than the new EU legislation.[73] The High Level Group seems to follow the European Commission's description of gold-plating but calls it 'active gold-plating'. The Group's description of 'passive gold-plating' seems to correspond to one of the points in the British description of gold-plating, i.e. the one about retained national regulations exceeding EU regulations.

Germany

The German Government's Coalition Agreement of 15 September 2009 states that "We shall implement EU Directives in a competitively neutral way ('one to one') so that companies in Germany are not put at any disadvantage" and "The functionality of the European internal market hinges on the timely implementation of EU Directives. Implementation that exceeds EU guidelines or that is combined with other legal measures should, in principle, be excluded."[74] We have been in contact with

the Swedish Better Regulation Council's counterpart in Germany, Nationaler Normenkontrollrat, regarding the German Government's attitude to gold-plating. As we have interpreted the information from Normenkontrollrat, the German Government has decided that gold-plating should not normally come into question. The Federal Government's guidelines for impact assessments state that the assessments should include an explanation if the proposed implementation exceeds the requirements of the European legislation. This is what is considered gold-plating, but no more detailed description of the concept is to be found.

The Netherlands

We have also been in contact with the Swedish Better Regulation Council's Dutch counterpart, Actal, regarding the Dutch Government's views on gold-plating. As we have understood the information from Actal, there are no explicit requirements as to how gold-plating is to be described in national impact assessments when implementing EU legislation.

We have also been made aware that the group responsible for better regulation within the Dutch central government administration is planning a new project that will study the existence of gold-plating or cases where national special rules have been added when implementing EU legislation.

3.3 Recommendations concerning gold-plating

As stated in Chapter 1, we decided to investigate whether there is a consensus within the Swedish business community, the Government and central government administration as to which phenomena are covered by gold-plating and whether it is possible to find a generally applicable and usable definition of the concept.

Our conclusion is that there is no unanimity as to what gold-plating covers. There does, however, seem to be unanimity that requirements that exceed the Directive's minimum level may have negative impacts on competition and growth. Moreover, this may cause trade barriers in the single market. The aim in implementing EU legislation should be not to subject companies to regulatory costs and competitive disadvantages that can be avoided.

It is desirable to establish what the concept should cover. We see a risk in gold-plating being interpreted in a narrow sense that excludes several of the measures that the business community has highlighted and that may cause problems for companies. We consider that a generally applicable and usable definition of gold-plating needs to be decided at government level after consultation with stakeholders, including companies and their business organisations. Such a definition of gold-plating should cover the seven measures discussed in Section 3.1.1. The minimum level that is required for a Member State to be considered to have implemented a Directive correctly shall be the starting point for the implementation. Only then is it possible to assess whether various measures exceed what is required by a Directive.

We therefore recommend the following:

- That the Swedish Government follows the lead of the United Kingdom and Germany and adopt the principle that EU legislation should be implemented in a way that does not disadvantage companies' competitiveness.

- That the Government decides that the minimum level for implementation of Directives shall be determined in each individual case and form the starting point for assessing how a Directive is to be implemented.

- That the Government, after consultation with stakeholders, decides a generally applicable definition of gold-plating for Sweden that is clear and usable in discussions of different alternatives that exceed the minimum level in implementation of EU legislation. The definition should cover the seven measures described in Section 3.1.1.

4 Well-reasoned implementation with a clear evidence base

4.1 Impact assessments

4.1.1 Impact assessments in connection with implementation of EU legislation

The Government Offices' committees of inquiry have a special role in the Swedish legislative process. A committee of this nature usually consists of an investigator and a secretariat comprising one or more senior officers. Committees are a proven tool for gathering knowledge and reaching consensus on how an issue is to be regulated. The legislative proposal is thoroughly analysed, any unclear points can be dealt with in depth and the EU law-related regulation can be incorporated in the Swedish legal system in a well-founded manner. There are, however, also disadvantages. When the issue concerns implementation of Directives, the committee of inquiry must spend considerable time familiarising itself with the matter and understanding the aim of the Directive and the underlying intentions. The actual appointment of the committee takes time, and terms of reference must be drawn up. There are no formal barriers to appointing a committee at an early stage but normally this does not happen until the adopted Directive is handed over to the responsible ministry and the implementation begins. "In many cases Directives are then so detailed that the usefulness of a committee of inquiry is questionable if it is not started until after the Directive has been adopted. There is often no scope to make legislative choices in the implementation work at this stage."[75]

As described above, the Swedish legislative process is in principle the same whether it is a question of implementing Directives or national regulations, and the mandatory preparation procedure laid down in Chapter 3, Article 2 of the Instrument of Government thus also applies to implementation of EU legislation. The fact that impact assessments are to be carried out in connection with committee inquiries and the issue of regulations by government agencies is regulated partly by the Committees Regulation (1998:1474) and the Ordinance on Regulatory Impact Assessment (2007:1244). These regulations also specify what an impact assessment must contain (see Section 4.1.2). The committee terms of reference also stipulate that the committee of inquiry must account for the impacts of the proposal.

The aims of impact assessments are partly to be a tool during the legislative process for finding the best solutions to the problems that the proposed regulation is intended to solve, and partly to provide a good decision basis to aid the decision-makers. However, the impact assessments fulfil a further purpose, namely documenting the choices made and the boundaries for the measures that may come into question. A clear and well worked-out account is important throughout the process but also afterwards, as it facilitates a discussion of the ability of the regulation to solve problems. Moreover, an impact assessment is of interest if the effects of the legislation are to be evaluated. The documentation also embodies a necessary transparency, which may give regulations legitimacy.

A general problem with impact assessments is that all too often they are used as a form of documentation analysis rather than, as intended, a tool for producing a balanced analysis of how a given social problem should be solved. In many cases an impact assessment is carried out as a final step in the legislative process and the basic proposal is very rarely revised as a result of its outcome. Moreover, reasons are rarely given for why the chosen solution to a problem is the best one with regard to the various stakeholders.

4.1.2 The content of impact assessments – the minimum principle

Committees, ministries and government agencies shall carry out an impact assessment in connection with implementation of EU legislation. Committees and administrative agencies must follow paragraph 6 and 7 of the Ordinance on Regulatory Impact Assessment.[76] In the case of ministries, paragraph 6 and 7 of the Ordinance should serve as guidance when proposals for new or amended regulations are drawn up.[77]

When new or amended regulations are proposed, the impact assessment pursuant to paragraph 6 of the Ordinance on Regulatory Impact Assessment shall contain:

1. A description of the problem and what is to be achieved.
2. A description of the alternative solutions for what is to be achieved and the effects of no regulation coming into being.[78]
3. Details of who/what is affected by the regulation.
4. Details of the cost-related and other impacts of the regulation and a comparison of the impacts of the alternatives considered.
5. An assessment of whether the regulation conforms to or exceeds the obligations ensuing from Sweden's membership of the EU.
6. An assessment of whether the date of entry into force needs to be taken into special consideration and whether there is a need for special information initiatives.

Pursuant to paragraph 7 of the Ordinance on Regulatory Impact Assessment, if a regulation may have significant impacts on companies' working conditions, competitiveness or conditions in general, the impact assessment must also contain a description of:

1. The number of companies affected, which industries the companies are active in and the size of the companies.
2. What time expenditure the regulation may entail for companies and what the regulation means for companies' administrative costs.
3. What other costs the proposed regulation entails for companies and what changes in operations companies may need to adopt as a result of the proposed regulation.
4. To what extent the regulation may impact on the competitive conditions for companies.
5. How the regulation may impact on companies in other respects.
6. Whether special consideration needs to be given to small companies in formulating the regulation.

Paragraph 6 of the Ordinance on Regulatory Impact Assessment specifies that the relationship to EU law must be described, but experiences from the review conducted by the Swedish Better Regulation Council and NNR suggest that the description is frequently inadequate in this respect. It is not unusual for it simply to be stated that the proposal does not contravene EU law or that the proposal is a direct consequence of an EU Directive and that there is therefore no alternative to the new regulations that are being proposed. In the

view of the Swedish Better Regulation Council and NNR, the description should also contain a discussion of alternative regulation options and measures, and an account of the effects of these and the reasons for choosing the recommended solution.[79]

The provision on the draft statute's relationship to EU law is contained in paragraph 6 and not paragraph 7 of the Ordinance on Regulatory Impact Assessment, which specifically relates to impacts on companies. This may have contributed to the fact that the impact assessments often lack a sufficiently clear description of different alternatives for implementation and what impacts these may have for companies. This applies to impact assessments both from committees of the Government Offices and government agencies. Where impacts on companies are concerned, the Ordinance is detailed, making it easier both for those who need to prepare an impact assessment and for the decision-maker to ask the 'right' questions and get answers to them. In order to ensure thorough and transparent assessment of different positions in connection with the implementation of EU legislation, we see the need for a supplementary provision that specifies more clearly what information is required regarding the proposal's relationship to EU law.

If a regulation intends to implement an EU Directive or otherwise implement EU law, the impact assessment should therefore – over and above what is specified in paragraph 6 and 7 of the Ordinance on Regulatory Impact Assessment – contain a description of the minimum level of the EU legislation. Taking this minimum level as a starting point, it must be stated whether proposed measures are 'more than minimum' (the minimum principle), i.e. whether the body issuing the regulation intends:

1. To add regulatory requirements beyond what is required by the Directive in question.

2. To extend the scope of the Directive.

3. Not to take (full) advantage of any derogations.

4. To retain Swedish national regulatory requirements that are more comprehensive than required by the Directive in question.

5. To use the implementation of a Directive to introduce national regulatory requirements that actually fall outside the aim of the Directive.

6. To implement the requirements of the Directive earlier than the date specified in the Directive.

7. To apply stricter sanctions or other enforcement mechanisms than are necessary to implement the legislation correctly.

If the proposal contains one or more of these measures, the impact assessment must contain a justification for the chosen solution and an account of the impacts of this for companies. In cases where regulators decide to keep to the minimum level, this should also be specified.

Among the National Board of Trade's proposals for the European Commission's planned Single Market Act II is a proposal on an obligation to state the reasons for gold-plating. The National Board of Trade proposes that Member States that intend to adopt more stringent regulations than the minimum harmonisation rules be required to justify these in terms of EU law and to notify the European Commission of their intention in connection with communicating the

legal acts that have been adopted for implementation of a specific EU Directive. In this case the National Board of Trade's interpretation of gold-plating covers all national requirements added when implementing an EU Directive.[80]

4.1.3 Establishing the Directive's minimum level

Establishing the minimum level for what must be done at national level in EU legislation is a necessary starting point and first step in being able to deliver a justified and acceptable implementation. This level must therefore be clearly established in the impact assessment that will form the basis for implementation of a Directive.

However, the minimum level in an EU Directive is sometimes unclear. As described in Chapter 2, there are framework and sectoral Directives as well as full and minimum harmonisation Directives. One and the same Directive may contain both full and minimum harmonisation provisions. Furthermore, a Directive rarely specifies the minimum level with regard to application and supervision. It is the Member States themselves that must decide what resources are needed to ensure regulatory compliance. Establishing the minimum level is therefore no easy task.

Implementation is not solely a national issue. Often government agencies need to cooperate with their counterparts in other Member States to establish the minimum level. There are European networks in which Swedish Government agencies can discuss minimum levels and implementation with representatives of their European counterparts. Such discussions can provide guidance in interpreting and applying the Directive. One example of such a network is the European Union Network for the Implementation and Enforcement of Environmental Law, IMPEL (http://impel.eu). This is a cooperation organisation for agencies within the environmental area.

Those with the best knowledge of the subject area and the processes involved in drafting the Directive are those in the best position to establish the minimum level. It should therefore be up to the experts who participated in negotiations at EU level and who are working on the national impact assessment in connection with the implementation to specify the minimum level for a Directive. In cases where committees of inquiry are appointed as a first step in implementation at national level, the minimum level should be established and explained in the committee's report.

4.2 Other important aspects regarding impact assessments

4.2.1 Notification procedure

Chapter 2 described the notification procedures for national special rules regarding characteristics of products and services ensuing from Directive 98/34/EC and the 'Services Directive'. Some of the seven measures that we consider should be accounted for in impact assessments in connection with implementation of EU legislation may be captured in the notifications to the European Commission. As the duty of notification is limited to characteristics of products and services, it cannot, however, replace the extended requirements for impact assessments that we propose in Section 4.1.2. Detailed impact assessments of the type we propose can strengthen the documentation in connection with notifications.

4.2.2 Importance of impact assessments for transparency and knowledge transfer

In addition to the obvious advantages of clearly describing the impacts on companies, early impact assessments are a way of documenting the legislative process. In cases where the same persons are not responsible for the entire process – which is often the case in Sweden when a committee of inquiry is to be appointed ahead of implementation – the impact assessment is also a way of securing knowledge transfer. Lost knowledge impacts the quality of regulations and increases the time spent on implementation. In addition, national impact assessments that track proposals of the European Commission and changes that are made during negotiations in the Council would represent an important source of information for the impact assessment that is to be prepared in connection with implementation of adopted EU legislation. Having an impact assessment that documents the entire process would make things easier for both policy makers and stakeholders, and contri-bute to a more efficient legislative process and better worked-out decisions.

4.2.3 Consultation

As mentioned in Chapter 2, the mandatory preparation procedure laid down in Chapter 7, Article 2 of the Instrument of Government must be followed whether a Directive is to be implemented by law or other statutes. This means that information and opinions shall be obtained from concerned government agencies, from local authorities, organisations and private persons. Involving county councils and local authorities is important as they are often responsible for application and enforcement of the EU legislation. In many cases it is at this level, in direct contact with the enforcement authorities, that companies encounter regulatory burdens and difficulties. The established consultation procedure should be system-atised and supplemented with other forms of consultation, for example working groups and consultation meetings or other forms of direct contact. It is difficult to determine afterwards whether consultation has taken place and what it led to. For this reason, the impact assessment should document how, when and where consultation has taken place and its outcome. Sometimes, business even advocates that Sweden should implement EU legislation in a way that exceeds the minimum level in a Directive. The justification for this may also emerge through consultation. For consultation to work well, commitment is required from all parties.

4.3 Recommendations concerning justified implementation proposals

In Chapter 4 we have sought answers to the question of what can be done to avoid implementation of EU legislation creating unnecessary competitive disadvantages for companies.

An impact assessment must be prepared when implementing EU legislation in Sweden. As mentioned previously, however, NNR and the Swedish Better Regulation Council have observed that impact assessments often lack descriptions of different alternatives for implementation of EU legislation and the estimated impacts of these for companies. There is extensive knowledge and experience within the business community of various policy areas that are affected by EU legislation, as well as familiarity with how a proposal may impact on companies' conditions.

Continuous and systematic consultation is important to make the underlying basis as complete as possible. In order to facilitate better participation by various stakeholders, the impact assessments should be public wherever possible. In light of the material we have studied, we recommend that:

- A 'minimum principle' be introduced, i.e. the minimum level in accordance with the EU legislation specified in Section 3.3 in this report shall serve as a guideline for the regulator in the implementation but, if there are reasons to exceed this level, this shall be clearly described and the impacts for companies analysed and reported in a public document.
- The Government considers how consultation with stakeholders can be improved and systematised such that the consultation is continuous throughout the European legislative process from the European Commission's proposal to implementation at national level.
- The Government introduces a provision stating that, with regard to implementation of EU legislation, the impact assessment shall – over and above what is stated in paragraph 6 and 7 of the Ordinance on Regulatory Impact Assessment – contain a description of the EU regulation's scope and minimum level. Based on this minimum level, it shall also be stated whether the proposal entails:

1. Adding regulatory requirements beyond what is required by the Directive in question.
2. Extending the scope of the Directive.
3. Not taking (full) advantage of any derogations.
4. Retaining Swedish national regulatory requirements that are more comprehensive than is required by the Directive in question.
5. Using implementation of a Directive as a way to introduce national regulatory requirements that actually fall outside the aim of the Directive.
6. Implementing the requirements of the Directive earlier than the date specified in the Directive.
7. Applying stricter sanctions or other enforcement mechanisms than are necessary to implement the legislation correctly.

If the proposal contains one of more of these measures, this shall be justified and explained.

5 Summary

5.1 Conclusions and recommendations in Chapters 2-4

5.1.1 An overall objective

The Government has stated that almost half of all new or amended regulations in Sweden originate from the EU. The European Commission claims that as much as 32 per cent of companies' administrative costs incurred in following regulations that originate from the EU are caused by inefficient implementation by the Member States, or gold-plating. Working actively to simplify regulations in all phases of EU legislation is therefore very important for the prospect of making progress with the better regulation work at national level. It is often helpful to have an overall objective that specifies the direction of what we are seeking to achieve.

We recommend that the Swedish Government follows the lead of the United Kingdom and Germany and adopt the principle that EU legislation should be implemented in a way that does not disadvantage companies' competitiveness.

5.1.2 Mandatory national impact assessment at an early stage

In general, the national preparatory work on implementation can be started as early as the proposal or negotiation phase. Once a legal act has been adopted, the scope for influencing aspects that may have bearing on the national implementation is reduced. To assess how a proposal may impact on Swedish circumstances and evaluate alternative solutions for achieving the purpose of the proposed regulation, an analysis of its impacts is required. At present there is no obligation for Swedish policy makers to prepare an early national impact assessment. On the other hand, there are instructions and a template for position memoranda which, if they are used and the information concerning impacts of proposals is made public, could correspond to the requirements of an impact assessment. This impact assessment can be used as a basis for shaping Sweden's position on coming EU regulations and to gain influence in negotiations at EU level. It is important that stakeholders gain access to these national impact assessments to be able to assist ministries and government agencies in assessing impacts for Swedish circumstances of proposals from the European Commission.

We recommend that the Government makes it mandatory for government officials representing Sweden in the legislative process at EU level to prepare national impact assessments for proposed EU legislation. The impact assessments must be updated and developed in line with negotiations and the decision process at EU level. They must also be public and available to stakeholders.

5.1.3 The concept 'gold-plating'

The English term 'gold-plating' is frequently used in regulatory contexts in the EU. When it started to be used within the EU institutions, it was to designate the situation where national implementation of European Union law exceeded what the EU legislation required while staying within legality. Over time the concept has gained a wider import in many contexts and is now used for a number of phenomena in implementation of EU legislation in the Member States. However, different understandings of what the concept actually covers emerge in discussions both nationally and internationally. In our understanding, the widest interpretation of the concept covers

seven different measures on which regulators must take up a definite position when determining how EU legislation is to be implemented.

At present it is difficult for those involved in the implementation to discuss different implementation alternatives and analyse gold-plating objectively, as it is uncertain to what the concept refers. There is also a risk of gold-plating being interpreted in too narrow a sense that excludes several measures that may give rise to regulatory burdens, unnecessary costs and competitive disadvantages. It has proved difficult to find unanimity as to what gold-plating entails. The British Government has explained what it considers gold-plating to cover and in this way determined how it is to be interpreted. Our conclusion is that a generally applicable and usable definition of the concept for Sweden should also be decided at Government level to gain impact.

One central question is which level should be the starting point when deciding whether national implementation exceeds the requirements in the EU legislation. There can hardly be any point in experimenting with a level above the minimum level, as, in that case, where would the level lie? Our conclusion is therefore that the starting point for the assessment must be the minimum level. Those with the best knowledge of the subject area and the processes involved in drafting the Directive are most suitable to establish the minimum level. It should therefore be up to the experts who participated in negotiations and who worked on the national impact assessment during the legislative process in the EU to specify the minimum level for the EU legislation in question.

We recommend that the Government decides that the minimum level for implementation of Directives shall be established in each individual case and form the starting point for assessing how Directives are to be implemented.

We recommend that the Government, after consultation with stakeholders, decides a generally applicable definition of gold-plating for Sweden that is clear and usable in discussions of different alternatives that exceed the minimum level in the implementation of EU legislation. The definition should cover the seven measures described in Section 3.1.1 in this report.

5.1.4 An explicit principle – the minimum principle

The regulators should be guided by the minimum level of the EU legislation. There may, however, be situations when there is reason to exceed the minimum level. Our conclusion is that if the regulator considers there are reasons to exceed the minimum level, this must be clearly explained and justified in a public document, together with an account of the effects of the chosen solution.

We recommend the introduction of a 'minimum principle', which means that the minimum level in accordance with the EU legislation shall serve as a guideline for the regulator in the implementation but, if there are reasons to exceed this level, this shall be clearly described and the impacts for companies analysed and reported in a public document.

5.1.5 Description of implementation in the impact assessment

An impact assessment shall be prepared when new or amended regulations are proposed within the Swedish legislative process. Paragraph 6, point 5 of the Ordinance on Regulatory Impact Assessment (2007:1244) states that the proposal's relationship to EU law must be described. However, experience from the review conducted by the Swedish Better Regulation Council and NNR suggest that the account is frequently inadequate in this respect.

In order to increase the clarity in these contexts, we recommend that the Government introduces a provision stating that, with regard to implementation of EU legislation, the impact assessment shall – over and above what is stated in paragraph 6 and 7 of the Ordinance – contain a description of the EU regulation's scope and minimum level. Based on this minimum level, it shall also be stated whether the proposal entails:

1. Adding regulatory requirements beyond what is required by the Directive in question.
2. Extending the scope of the Directive.
3. Not taking (full) advantage of any derogations.
4. Retaining Swedish national regulatory requirements that are more comprehensive than is required by the Directive in question.
5. Using implementation of a Directive as a way to introduce national regulatory requirements that actually fall outside the aim of the Directive.
6. Implementing the requirements of the Directive earlier than the date specified in the Directive.
7. Applying stricter sanctions or other enforcement mechanisms than are necessary to implement the legislation correctly.

If the proposal contains one or more of these measures, this shall be justified and explained.

5.1.6 Consultation – an important part of the evidence base for decision-making

The starting point for competition-enhancing implementation of EU legislation should be not to add requirements and difficulties that can be avoided. Achieving this form of implementation necessitates consultation with companies and their business organisations early in the process. There is extensive knowledge and experience in the business community of various policy areas that are affected by EU legislation, as well as familiarity with how a proposal may impact on companies' conditions. It is in the interests of Swedish politicians and government officials to profit by this knowledge when representing Sweden and Swedish interests at EU level. Information on how and when consultation has taken place, with whom and what it has led to should also be documented in the impact assessments. In order to facilitate better participation by various stakeholders, the impact assessments should be public wherever possible.

We recommend that the Government consults with stakeholders on a continuous basis and document this throughout the European legislative process, from the European Commission's initial proposal to implementation at national level.

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Footnotes

[1] The single market is common to the EU Member States and the EEA countries (Norway, Iceland and Liechtenstein).

[2] The Swedish Government, Statement of Government Policy, 2010, p. 8.

[3] Ministry for Foreign Affairs, Ewa Björling puts focus on growth-enhancing measures in the EU's single market, press release of 18 February 2012.

[4] The Confederation of Swedish Enterprise, the Federation of Swedish Farmers (LFR), the Swedish Federation of Business Owners, the Swedish Bankers' Association, the Swedish Property Federation, the Stockholm Chamber of Commerce, the Swedish Petroleum & Biofuel Institute, the Swedish Industry Association, the Swedish District Heating Association, Swedenergy, the Association of Swedish Finance Houses, the Swedish Investment Fund Association, the Swedish Securities Dealers Association, the Swedish Federation of Small Businesses.

[5] Read more about NNR at http://www.nnr.se

[6] Read more about the Swedish Better Regulation Council at http://www.regelradet.se

[7] Capgemini, Deloitte and Rambøll Management, Note on Normal Efficient Transposition (NET), EU Project on Baseline Measurement and Reduction of Administrative Costs, 2009, and the European Commission, Cutting Red Tape – Overview of Reduction Measures and Illustrative Examples, MEMO/09/474, 2009.

[8] The Ministry of Enterprise, Energy and Communications, The Government's action plan for regulatory simplification, 2009/10, 2010, p. 10.

[9] EU, Sverige och den inre marknaden - En översyn av horisontella bestämmelser inom varu- och tjänsteområdet [EU, Sweden and the Single Market – A review of horizontal rules concerning goods and services], Official Government Report: 2009:71, 2009, p. 23.

[10] Straathof, B., Linders, G. J., Lejour, A. and Möhlnmann, J., The Internal Market and the Dutch Economy – Implications for trade and economic growth, CPB, no. 168, 2008 p. 9.

[11] The European Commission's impact assessment SEC (2007) 113 p. 2.

[12] The Swedish Government, Statement of Government Policy, 2010, p. 25.

[13] The primary law of the European Union is represented by the treaties of the European Union. The treaties and their protocols and annexes take precedence over all other European Union law and establish the principles for cooperation, how the EU's institutions are to work and which powers the EU is to have. The secondary law of the European Union comprises five types of legal act: Regulations, Directives, Decisions, Recommendations and Opinions.

[14] The Treaty of Lisbon amended the Treaty on European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty). The EC Treaty was renamed the Treaty on the Functioning of the European Union (TFEU). The provisions on the ordinary legislative procedure will be found in Article 294 TFEU. Certain areas such as the Common Foreign and Security Policy are not covered by the ordinary legislative procedure.

[15] Not to be confused with the European Council that does not have a legislative function. The European Council comprises the Heads of State or of Government of the Member States, together with its president-in-office and the President of the European Commission. The role of the European Council is to drive forward the development of the EU and determine its general political guidelines and priorities. The political guidelines on which the European Council agrees at a meeting are summarised in 'Council conclusions'. The Member States have the right to refer issues to the European Council if they consider important national interests to be under threat.

[16] The European Parliament also has the right of legislative initiative. In addition, the Treaty of Lisbon introduced a right of initiative for EU citizens to increase their participation in the EU's decision-making. This enables EU citizens to submit proposals to the Commission, provided the proposal is supported by at least one million signatures from a number of Member States. A request for a legislative proposal to be adopted can also come from the Court of Justice of the European Union or the European Investment Bank. The European Central Bank may also submit a recommendation for a legislative act.

[17] This principle means that the EU must only adopt measures if the aims of the proposed measure cannot adequately be achieved by the Member States individually.

[18] See http://www.europarl.europa.eu/aboutparliament/en/0080a6d3d8/Ordinary-legislative-procedure.html.

[19] Derived from the French name 'Comité des représentants permanents'. COREPER is divided into two parts: COREPER I deals with, among other things, issues concerning competition, the environment and consumer law, while COREPER II deals with justice and home affairs, and issues concerning the EU's external relations.

[20] http://www.consilium.europa.eu/council/council-configurations?lang=en

[21] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009, p. 11.

[22] A decision is also binding in all respects but is generally directed at one or more legal persons and is in that case only binding for them.

[23] Government Offices of Sweden, the Prime Minister's Office, EU Coordination Secretariat, Circular 14, Riktlinjer för genomförande av unionsakter [Guidelines for implementation of legal acts of the European Union], 2010.

[24] Art. 288 TFEU.

[25] The Prime Minister's Office, EU Coordination Secretariat, Circular 14, Riktlinjer för genomförande av unionsakter [Guidelines for implementation of legal acts of the European Union], 2010, p. 3.

[26] Ibid. p. 3.

[27] National Board of Trade, Inre marknadsguide för myndigheter [Single market guide for Government agencies], 2010, p. 7.

[28] Pursuant to Articles 258 and 260 TFEU.

[29] http://www.eu-upplysningen.se

[30] Interinstitutional agreement on better law-making, 2003/C 321/01.

[31] Government Offices of Sweden, the Prime Minister's Office, EU Coordination Secretariat, Circular 14, Riktlinjer för genomförande av unionsakter [Guidelines for implementation of legal acts of the European Union], 2010, p. 11.

[32] The National Board of Trade, Fakta från Kommerskollegium [Facts from the National Board of Trade] No. 2, Hjälp till att förebygga nya handelshinder inom EU [Help to prevent new trade barriers within the EU], 2011.

[33] The European Commission, Directorate General Enterprise and Industry, The relationship between the Mutual Recognition Regulation and Directive 98/34/EC, 2010.

[34] http://www.kommers.se

[35] Pursuant to Arbetsordningen för Regeringskansliet [Rules of procedure for the Government Offices of Sweden], RKF 2011:9.

[36] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009, p. 57 ff.

[37] Bratberg, S. and Gardner, C. Hur påverkas den svenska lagstiftningsproceduren av Lissabonfördraget vid genomförande av EU-direktiv i svensk rätt? [How is the Swedish legislative process affected by the Lisbon Treaty when implementing EU Directives in Swedish law?], Europarättslig tidskrift [Swedish Journal of European law], no. 4, 2011, p. 728.

[38] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009.

[39] Ibid. pp. 54, 57 and 62.

[40] http://www.riksdagen.se/sv/Dokument-Lagar/EU/Fakta-PM-om-EU-forslag1/

[41] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009, p. 54.

[42] Official Government Reports 2008:118 annex 5, p. 171 ff.

[43] The European Commission has undertaken to make greater use of 'implementation plans' for the proposals it submits for new EU legislation to facilitate the implementation of adopted legislation in the Member States; see also the Commission's notification 'Smart Regulation in the European Union', COM (2010) 543 final.

[44] The Mandelkern Group on Better Regulation, Final report, executive summary, 2001, p. ii.

[45] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009, p. 54.

[46] Ibid. p. 8.

[47] Ibid, p. 8.

[48] For more information on the United Kingdom, see the website for the Department for Business, Innovation & Skills: http://www.bis.gov.uk/policies/bre/assessing-impact

[49] See e.g. NNR's Regulation Indicators 2004-2009 and Regulation Agenda 2010.

[50] The Swedish Agency for Economic and Regional Growth and the Swedish Better Regulation Council, Från EU-förslag till myndighetsföreskrift – att åstadkomma enkla och ändamålsenliga regler [From EU proposal to administrative provision – achieving simple and fit-for-purpose regulations], 2012, p. 18.

[51] Ibid. p. 18.

[52] Ibid. p. 19.

[53] The report is a study of the Government Offices' procedures for influencing the form of new EU rules.

[54] The Swedish Better Regulation Council, Synpunkter på regeringens arbete med EU-lagstiftning [Views on the Swedish Government's work on EU legislation], 2010, p. 9 ff.

[55] Ibid. p. 10.

[56] Government Offices of Sweden, Handbok för EU-arbetet [Handbook for EU work], 2009, p. 61.

[57] Government bill 2009/10:175, p. 51.

[58] Government Offices of Sweden, the Prime Minister's Office, EU Coordination Secretariat, Circular 14, Riktlinjer för genomförande av unionsakter [Guidelines for implementation of legal acts of the European Union], 2010, p. 6.

[59] The Government Offices, Prime Minister's Office, Circular 3 Riktlinjer för framtagande och beredning i Regerings-kansliet av svenska ståndpunkter i EU-frågor m.m. [Guidelines for drawing up and preparing Swedish positions on EU issues etc. in the Government Offices], 2008, p. 7.

[60] Reichel, J. and Hettne, J., Att göra rätt och i tid – Behövs nya metoder för att genomföra EU-rätt i Sverige? [Doing it right and on time – Are new methods needed for implementing EU law in Sweden?], 2012, p. 42.

[61] Ibid. p. 37.

[62] Within labour law there are 'non-regression clauses' that regulators at national level must take into account. These principles mean that an EU rule containing minimum requirements must not be allowed to lead to regressions in the Member States. They do not, however, mean that Member States are not able to amend national regulations.

[63] On 21 June 2012 the European Commission published a reasoned opinion stating that Sweden had two months to notify the measures taken to implement the Agency Workers Directive, otherwise it may be referred to the EU Court of Justice for failure to fulfil obligations.

[64] Government Offices of Sweden, the Prime Minister's Office, EU Coordination Secretariat, Circular 14, Riktlinjer för genomförande av unionsakter [Guidelines for implementation of legal acts of the European Union], 2010, p. 11.

[65] OECD, Better Regulation in Europe – Sweden, 2010, p. 156.

[66] The Ministry of Enterprise, Energy and Communications, Inquiry assigned to Christer Fallenius N2012/2736/KLS.

[67] Ibid.

[68] Ibid.

[69] http://ec.europa.eu/governance/better_regulation/glossary_en.htm

[70] HM Government, Transposition Guidance: How to implement European Directives effectively, 2011, point 1.3b.

[71] Ibid. point 2.7.

[72] The Group has 15 members selected on the basis of their expertise in Better Regulation and/or the policy areas covered by the Action Programme. The members are supplemented by observers from the European Parliament, the Committee of the Regions, Actal and the Better Regulation Council. The Group's mandate was renewed in 2010 and extended until autumn 2014.

[73] The High Level Group of Independent Stakeholders on Administrative Burdens, Europe can do better: Report on best practice in Member States to implement EU legislation in the least burdensome way, 2011.

[74] From the English version of the Coalition Agreement: Growth. Education. Unity. The Coalition Agreement between the CDU, CSU and FDP for the 17th legislative period.

[75] Reichel, J. and Hettne, J., Att göra rätt och i tid – Behövs nya metoder för att genomföra EU-rätt i Sverige? [Doing it right and on time – Are new methods needed for implementing EU law in Sweden?], 2012, p. 67.

[76] For committees, this is regulated by Section 15 a of the Committees Regulation (1998:1474), which states that the impacts must be specified in a manner corresponding to Section 6 and 7 of the Ordinance on Regulatory Impact Assessment (2007:1244). The Ordinance is directly applicable to administrative agencies under the Government.

[77] Government Offices, Ministry of Enterprise, Energy and Communications, Riktlinjer för arbete med konsekvens-utredningar i Regeringskansliet [Guidelines for work on impact assessments in the Government Offices], 2008.

[78] Alternatives can refer both to alternatives to regulation and alternative regulation options.

[79] The NNR has stated for many years that, when implementing EU decisions, it must be clear if and, if so, why Swedish regulations exceed the EU decision. See, for example, NNR's Regulation Indicators 2002-2007.

[80] National Board of Trade, Förslag till Single Market Act 2 [Proposal for Single Market Act 2], journal no. 3.4.1-2012/00513-1, 2012, pp. 7 and 17.