Community Directives: Effects, Efficiency and Justiciability in Sweden

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Artikeln tar upp olika frågeställningar rörande EG-direktivens genomförande i den svenska rättsordningen, bl. a. hur den svenska normhierarkin påverkar direktivens genomförande. Därutöver diskuteras ett antal svenska domstolsärenden som rört tillämpningen av direktivsbestämmelser, särskilt i fall då den svenska lagstiftningen påstått stå i strid mot sådana bestämmelser. Slutligen behandlas hur straffsanktionerade bestämmelser i direktiv genomförts i Sverige. Artikeln är ett svenskt bidrag till den 18:e FIDE-kongressen som skall hållas i Sverige i juni i år.

1. Introduction

This paper, which is a modified version of the authors' contribution to the 18th FIDE Congress 1998, is divided in three parts. The first part concerns the attitude of national authorities when directives are to be implemented in Sweden. The second part deals with how Swedish courts have acted when questions concerning implemented, not implemented or wrongfully implemented directives, have arisen. The third part discusses the transposition of provisions in directives concerning penalties and judicial remedies.

2. Transposition: the attitude of national authorities

2.1 Introduction

Unlike other Member States of the European Union, Sweden has a Constitution which allows normative acts to be adopted at three different levels. Firstly, there are laws adopted by Parliament; secondly, there are ordinances adopted by the Government; and, thirdly, there are decrees adopted by independent public authorities.

The specific feature of this system is, of course, the decrees adopted by the independent public authorities. More than 100

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public authorities exist. These authorities have their origin in the constitutional reforms that were carried out in Sweden during the seventeenth century. The tasks assigned to them are governed by general instructions issued by Parliament and the Government. They are entrusted with administrative tasks and normally also with the authority to adopt normative acts. When they are dealing with administrative and judicial matters in individual cases, they are completely independent in carrying out their tasks, and Parliament and the Government are in these cases prohibited by provisions in the Constitution from interfering with the work of the authority. If an authority is to adopt normative acts, it must have been empowered with the competence to adopt such provisions. Such delegation of powers is often foreseen when Parliament adopts legislation. Generally, Parliament only decides on the general principles concerning a specific subject matter, whereas the power to adopt detailed provisions complementing these principles is normally delegated to the Government or, as the case may be, an authority. The limits within which Parliament may delegate normative powers are laid down in the Constitution. Although difficult to assess, it has been held that Sweden's membership of the Union resulted in more powers being delegated by Parliament to the Government and the agencies.

Obviously, the constitutional system for adopting normative acts is decisive for the manner in which directives are implemented. As a general rule it could be said that the provisions of a directive are implemented at the level where the corresponding provisions of national law are normally adopted. This means that the provisions of a directive may well be divided vertically, i. e. that some of the provisions of the directive are implemented through legislation adopted by Parliament, while other provisions may be implemented through provisions adopted by the Government, and yet other provisions may be implemented at the level of the authorities. If provisions are to be implemented by the Government or an authority, Parliament must have delegated the necessary powers.

In this context it should be noted that the authorities are generally established to carry out administrative and normative tasks in particular fields. Thus, for example, the National Board for Consumer Policies and the Consumer Ombudsman are entrusted with the task of protecting the interests of consumers; the National Environmental Protection Agency is entrusted with the task of protecting the environment; and the National Board of Health and Welfare is responsible for the social welfare system.

Considering this from a directive transposition perspective, it could be said that the provisions of a directive may also be divided horizontally. Thus, while EC directives concern different categories of product, the Swedish authorities are responsible for certain pol-

icy areas. Although probably an exception to the rule, it has been said that nine different authorities have been involved in adopting provisions to implement the Machinery Directive (89/392/EEC). Thus, for example, the National Board of Occupational Safety and Health has adopted rules for machines used in the workplace; the National Board of Agriculture has adopted provisions concerning the use of agricultural machines; and the National Road Administration has adopted provisions concerning the use of machines to be used in road constructions. The two EC directives on genetically modified organisms (90/219/EEC and 90/220/EEC) are implemented by a law adopted by Parliament, an ordinance adopted by the Government and decrees adopted by eight different public authorities.

The fact that the provisions of a directive may be divided both vertically and horizontally makes its very difficult to obtain an overview of how directives have been implemented in Sweden.

2.2 The procedure for adopting normative acts in Sweden

The procedure for implementing directives follows the manner in which normative acts in general are adopted in Sweden. If the transposition is to take place by a law, it frequently happens, in line with a long-standing tradition, that a special committee is appointed to elaborate a proposal. The committee presents its proposal to the Government. The task of the Committee is laid down in a special government decision which contains the parameters within which the committee shall work, time limits, etc. Such committees may consist of one person who may then be assisted by experts. However, such a committee may also be composed of Members of Parliament. In such cases the Chairman is normally a judge with legislative experience.

Once the committee has presented its proposal to the Government, the report is circulated by the Government to interested parties, branch organizations, the courts, employers' and employees' organizations, universities, etc. This obligation is set out in the Constitution. On the basis of the proposal from the committee and the comments received, the Government elaborates a proposal. This proposal is then normally screened by the Law Council, which is composed of judges from the Supreme Court and the Supreme Administrative Court, who, i. a., assess whether the proposal is in conformity with the Constitution. Often the Law Council also makes general comments as to the legislative techniques used, terminology, etc. The Law Council may also make comments as to the compatibility of the proposal with EC law, i. e. whether a directive is properly implemented by the proposal. Although not of a

binding character, the opinion of the Law Council is very important for the Government when the final proposal is to be adopted.

During the legislative process, formal and informal consultations with the other Nordic countries are usually also carried out. In some fields, e. g. intellectual property and maritime law, there exists uniform legislation in the Nordic countries. The aim is that this uniformity should be maintained and developed despite the fact that not all the Nordic Countries are members of the Union.

The Government may, if necessary, reformulate its proposal after the Law Council has commented. Thereafter the formal bill is decided by the Government and presented to Parliament.

When the provisions of a directive are to be implemented by a government ordinance, the Ministry concerned with the subject matter covered by the directive elaborates a proposal. This proposal is then submitted for comment to the other Ministries, the agencies concerned and interested parties. On the basis of the comments received, the Governments decides on the ordinance.

When decrees are to be adopted by authorities, the authority concerned elaborates a proposal. It generally sends the proposal to other authorities concerned and sometimes also to the Ministry concerned. On the basis of the proposal submitted and the comments received, the board of the authority, often composed of politicians, proceeds to adopt the decree.

Irrespective of which body transposes a directive, there is no formal obligation to consult the Commission. However, it would be fair to say that informal consultations with the Commission services are rather frequent. As one civil servant said: ”It is better to have them (the Commission) on board when the provisions are to be adopted than to have them on your back when the directive has already been implemented.”

2.4 The transposition of framework directives

The recent Community practice of adopting framework directives has both advantages and disadvantages from the perspective of the Swedish legislative system.

In general it may be said that the advantages of directives as compared to regulations are that, within the parameters laid down in the provisions of the directive, they allow the content, systematics and structure of the national legal order to be maintained as long as the objectives of the directives are achieved. This is even more true as far as framework directives are concerned. Whereas a directive as such leaves to the national authorities the choice of form and method for achieving the result set by a directive, the room for manoeuvre when the national legislation is to be adopted

is, of course, greater the more general the provisions of a directive are.

The old type of directive, with its very detailed provisions, minimized the possibilities for the national legislator to choose the form and method for implementing the directive to the extent that provisions of directives were in some cases directly transposed into the national legal order of Member States. This occurred to such a degree that the use of directives in EC law was questioned.

Regarding the Swedish legislative system, where Parliament generally adopts only the general principles or the framework within which the Government or, more frequently, the authorities shall adopt complementary and detailed provisions to implement the directive, it is obvious that the practice of adopting framework directives is a welcome development. It enables the national legislator to use the existing legislative system as the basis for the transposition work. The more general the provisions of a directive are, the better the possibilities are to use the national legislation as a basis for the implementation work. This, in its form, simplifies the application of the rules.

The disadvantages of framework directives lie in the fact that an overview of how a directive is being implemented is lost. As already indicated, there is in Sweden no general forum for deciding how a directive shall be incorporated into the Swedish legal order. Consequently, in practice each Ministry decides more or less for itself whether a new directive shall be implemented by provisions in a new law to be presented through a bill to Parliament, or whether provisions should be decided at government level in the form of an ordinance. Thereafter it is up to each individual authority to analyse whether or not a directive requires that further provisions be elaborated at the level of the agencies concerned. Considering, for example, that the above-mentioned Machinery Directive has been implemented by nine different authorities, it is easy to understand that if each individual authority has to ensure that the provisions of a directive are being implemented in their respective sectors, the potential for lacunae or overlapping in the implementing work is obvious.

A specific question in this context is whether an already existing delegation of powers from Parliament and the Government requires an authority to adopt the necessary provisions to implement the directive. This question has been raised since the delegation of powers is often formulated as the authority ”may adopt detailed provisions” in a particular field. Taking into account such formulations, it has been questioned whether the authorities are obliged to take on their own initiative the necessary measures to implement provisions of a directive when these provisions come within the sphere of competence delegated to them. One alternative used is

that the Government by a specific decision orders the authority concerned to adopt the necessary measures. The constitutional standing on this point seems to be unclear. Initially there were some cases where the Government, by a specific decision, actually had to order the authority concerned to adopt the necessary implementing provisions. However, it would seem that a practice has evolved implying that each authority, on its own initiative and naturally within its sphere of competence, takes the necessary measures to implement the provisions of a directive without a specific government decision being required.

2.5 Cases where existing legislation already fulfils the provisions of directives

Prior to Sweden's participation in the European Economic Area and membership of the Union, a very comprehensive analysis of the compatibility of Swedish legislation with Community law was carried out. The result of that process was that around 100 new laws or alterations to existing pieces of legislation were adopted. In addition, almost as many ordinances were adopted. It is, however, at the level of the authorities that the greatest number of provisions have been adopted. It is not possible to give a complete account of the number, but a rudimentary analysis has shown that approximately seventy percent of the directives which are of relevance for the internal market have been implemented at the level of the authorities.

The rather limited amount of new legislation adopted prior to Sweden's membership of the Union has various explanations. First of all, Sweden is a Western European democracy with living conditions similar to those in many other Member States. Thus, we have often had to confront common problems and have solved them in similar ways. In some instances it may also be concluded that Sweden has found inspiration in the EU or its Member States. In some cases the situation may also be reversed. Thirdly, in 1988 the Government decided that all committees which suggested legislative proposals had to discuss how the proposed new legislation would correspond to EC law. In practice this has meant that only rarely has legislation been adopted since 1988 that is in contravention of EC law. The reason for the Government's adopting this approach was that Parliament had stated that for Sweden it was necessary to align the legislation with that of the Community so as to facilitate trade between Sweden and the Community. Following Sweden's participation in the European Economic Area and membership of the Union, this government decision has for obvious reasons been repealed.

2.6 Retroactive effects of belated transpositions of directives

So far the Court of Justice (ECJ) has not, in proceedings under Articles 169 or 171 of the EC Treaty, found any breach of Community law in Sweden. Therefore it is not possible to give an answer to the question whether rulings concerning delayed implementation of directives has retroactive effect in Sweden. However, from a general point of view it would seem that, when the ECJ has ruled that the provisions of a directive have not been properly implemented, such a ruling could well be applied in another case where the delayed transposition could be invoked. In such a case the national court could apply the ruling of the ECJ even if the circumstances of the case had their origin prior to the ruling of the ECJ. Obviously, the national court would only have such possibilities from the date on which the directive should have been implemented.

2.7 Are directives implemented prior to the date on which they have to be adopted?

From statistics presented in the Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law, it appears that the proportion of directives implemented in Sweden is comparatively high. One reason for this is probably that once a directive has been adopted, each Ministry and agency concerned scrutinize the directive to see what sort of implementation work is required. Generally this knowledge is gradually acquired during the deliberations on a directive in the Council Working Groups. Once the analysis of the legislative requirements has been finalized, each Ministry and authority plans for the adoption of the implementing provisions. In that work the dates on which the directives have to be implemented of course play a decisive role. So far it has not been possible to discern any difference between directives which should have been transposed before or on a specific date.

2.8 The application of directives by organs or bodies of the State, emanations of the State and administrative and local authorities

In several cases from the ECJ the obligations on various organs of the States, emanations of the States and administrative and local authorities have been discussed. Since Sweden's membership of the EU is as recent as 1995, comparatively few cases concerning Community law have appeared before national courts and it is not possible to elaborate on how State organs etc. have applied directives.

3. The attitude of Swedish courts

3.1 Introduction

The first part of this paper dealt with the attitude of national authorities when a directive is to be implemented. Generally speaking it is possible to draw the conclusion that the Swedish authorities have carried out what was expected and required of them.

As far as the Swedish courts are concerned, it is not that easy to make the same kind of general observations since so far only a rather limited number of cases have appeared before the courts. Despite this qualifier it would seem possible to make the general observation at this stage that Swedish courts have not made any reservations when accepting the various principles elaborated by the ECJ concerning the effect of Community directives. Various cases both from general and administrative courts of first instance demonstrate that Swedish judges have not hesitated to set aside national legislation and decisions by national authorities in favour of Community directives.

Accordingly, in a judgement by the District Administrative Court of Stockholm, rendered on 18 January 1996 (Case Ö 10461-95), the National Board of Health and Welfare issued an administrative sanction against the Swedish Tobacco Company of SEK 100,000, aimed at forcing the company to comply with the Board's requirement of a strong contrast between warning-text and background on tobacco products. The District Administrative Court found that these requirements went beyond the requirements prescribed in Directive 89/622/EEC and Directive 92/41/EEC and consequently annulled the Board's decision. Similar annulments have been decided by District Courts in a number of cases when national authorities have made decisions founded on a wrongful interpretation of directives.

Another general observation which it is possible to make at this stage is that Swedish courts seem inclined to make their own interpretation of directives even where the interpretation tends to be of a rather intricate kind and regardless of the fact that, in some cases, the parties have expressly demanded that the court ask for a preliminary ruling. District courts are perfectly entitled to do so (provided they do not question the legality of the directive). However, it appears that in some cases courts of last instance have also made rather advanced interpretations of directives. Thus, the Labour Court has in several cases (AD 134/95, AD 163/95, AD 67/97, AD 81/97) made its decisions after having carefully examined the rights of an employee according to Directive 77/187/EEC and to corresponding case law by the ECJ. The Labour Court, in view of the fact that the implementing Swedish legislation is of framework character and therefore gives little guidance, has in

three of the cases founded its decisions, i. a., on a comparison between the Swedish, English, French and German versions of certain terms in the directive. In none of the four cases mentioned did the Labour Court consider it necessary to ask for a preliminary ruling, claiming that the case law of the ECJ was sufficiently clear. In two of these cases a minority in the Labour Court was in favour of such a request. This extensive interpretation of the *CILFIT* criteria has caused some criticism in Sweden. Although not mentioned in the judgements, one reason for the unwillingness to ask for a preliminary ruling might well have been the need to get the dispute settled quickly.

3.2 The effect of directives wrongfully implemented or not transposed within the prescribed time limit

In a number of cases, where directives have either not been transposed or been wrongfully implemented, Swedish courts have refused to apply contesting national provisions. One example is found in a judgement of 26 June 1996 by the Supreme Administrative Court (Case RÅ 1996, Ref 50). The provisions of directive 92/13/EEC (a public procurement directive) concerning the possibilities for an applicant to have his case reviewed were not properly met in the implementing Swedish legal act, which was adopted by Parliament in 1992 (that is well *before* Sweden's membership). In its judgement the Supreme Administrative Court gave precedence to the provisions in the directive, which were more favourable for the applicant than the corresponding provisions in the national legal act. Moreover, the Supreme Administrative Court found that the non-compliance of the national legislation was so evident that there was no need to ask for a preliminary ruling. (The latter conclusion has been criticized by some Swedish lawyers, cf. the foregoing remark.) However, it was also found that in this particular case the time limit prescribed in the directive for a review had been exceeded (which in practice meant that the applicant had no other possibility than to demand compensation from the state because of incorrect implementation).

3.3 May the State invoke unimplemented directives?

Although no case law has been found, it is not likely that the State or the national authorities, as defendant in judicial proceedings, would be permitted to invoke for their benefit unimplemented directives within the framework of litigation with private parties. The reason for that would be that such a wide-ranging application of unimplemented directives is not provided for either in the case law of the ECJ or in national legislation. Furthermore, an application of this kind, which would have harmful effects for the individual,

might well be considered as contrary to the Swedish Constitution. This does not mean, of course, that the State or a national authority is prevented from counter-arguing what a private litigant might say on the applicability of an unimplemented directive in a particular case.

3.4 Horizontal effect of directives

No genuine example of direct horizontal effects has been found in the practice of Swedish courts. The Government Bill to Parliament on Sweden's accession to the EU contains a reference to *Marshall* and gives the information that, according to the standing of EC law at the time of the Bill (1994), directives cannot have direct horizontal effect. Even though not all Swedish judges are particularly interested in EC law, they normally read the bills of the Government accompanying new legislation, which ought to mean that this information is widely spread among judges and lawyers in Sweden.

This being said there are, however, some judicial decisions in Sweden which are of interest in this context. Although some of these cases may well be considered as an application of treaty conform interpretation, they are in practice coming close to giving directives direct effect within the framework of litigation between private parties. An interesting example is the abovementioned judgement by the Supreme Administrative Court (Case RÅ 1996, Ref 50), where the court refused to apply a provision in the Swedish public procurement legislation limiting the possibilities to have a decision reviewed, referring to Directive 92/13/EEC, which was found to be more generous in that respect. The theoretical consequence of the judgement was that one individual, who according to Swedish law had already been granted a public procurement contract, had to accept that his right was contested by another individual, who also wanted the contract.

In other cases a kind of horizontal effect has occurred due to the fact that Sweden sometimes, mainly because of lack of time, has implemented the directives briefly and with few details. This means that the court has to interpret the directive if it is to give a judgement at all. That in turn seems to mean that the court in reality, through its interpretation, causes horizontal effects of individual provisions in the directive. An example of this is the above-mentioned four cases from the Labour Court, where the Labour Court examined in detail and gave direct effect to provisions in Directive 77/187/EEC affecting the rights of an employee in his relations with an employer.

A somewhat peculiar example of the applicability of a directive is found in a judgement by the Labour Court of 28 May 1997 (case no. AD 69/97), whereby a previous judgement by the Stockholm

District Court was dismissed. A female judge claimed that she would have been more competent to be the Swedish member of the ECJ than the male judge chosen by the Swedish Government and actually appointed by the Council. She claimed that by not nominating her the Government had overlooked Directive 76/207/EEC or the implementation of the principle of equal treatment for men and women and for that reason should pay her damages. The District Court found that the directive was not applicable. The Labour Court stated, however, that the relevance of the directive in the case was unclear, that a judgement based on the possible relevance of the directive could not be given without a preliminary ruling from the ECJ and that the District Court should consider the case once again.

3.5 The damage liability of the State in the event of non-transposition of directives or of incorrect transposition

Some cases have emerged before Swedish courts concerning the criteria of *Francovich* and its follow-up cases. Accordingly, in a judgement of 29 September 1997 the District Court of Solna (Case no. T 360/96; judgement appealed), the applicant claimed that, according to Directive 77/388/EEC, he should be regarded as a person liable to value added tax, in order to assure him certain deductions. Under Swedish law at that time he had no such possibility. The District Court found that Sweden had not implemented the Directive 77/388/EEC correctly in this respect. Furthermore, the District Court, referring to the case law of the ECJ (Case C-62/93, *Soupergaz*), stated that the directive was probably not primarily aimed at giving individual rights but that it indirectly had such an effect, that the article concerned was sufficiently clear and that the infringement by the State must be deemed deliberate. Consequently, the District Court ordered the State to pay the litigant SEK 500,000 damages.

Another example is the judgement of 28 November 1995 by the Svea Court of Appeal (RH 1996:37). In this case a company employee, whose mother owned all the shares in the company at the time of its bankruptcy, was denied payment from the State according to restrictive criteria in the Swedish Wage Guarantee Act. The Svea Court of Appeal found that the Wage Guarantee Act was in that respect contrary to Directive 80/987/EEC. With reference to *Francovich* and *Miret* the Svea Court of Appeal stated that the directive did not have direct effect and that consequently the applicant's claim should be dismissed. However, the Svea Court of Appeal emphasized that the applicant could not base his petition against the State *with respect to the Wage Guarantee Act* directly on the directive, thereby — as it seems — giving the applicant a hint that

he could demand compensation from the State because of incorrect implementation. In this context it is worth mentioning that Swedish legislation was recently amended in conformity with the directive. Employees who have suffered as a result of wrongful implementation of this directive have in a large number of cases received compensation directly from the State.

A peculiar situation emerged in the District Court of Stockholm Case no. T 6-16-97. An employee whose employer was declared bankrupt in 1994 claimed that the State was responsible according to the *Francovich* principles for not having implemented the above-mentioned Directive 80/987/EEC correctly at the time. Sweden was by then bound by the EEA agreement but it was not until 1995 that Sweden became a member of the EU. The District Court has now asked the ECJ whether the directive (and the *Francovich* principles) can have such retroactive effects.

3.6 The reliance on directives before the Criminal Courts

There are a few cases in which Swedish courts have asked for preliminary rulings where questions have arisen regarding reliance on directives in criminal proceedings. In a case pending in the District Court of Landskrona (Case no. B 233/96), a man has been prosecuted for selling sweets containing a colorant which is forbidden according to Swedish subordinate legislation but which is allowed according to Directive 94/36/EC on colors for use in foodstuff. The dispute concerns, among other things, whether the directive has direct effect in a situation in which the Swedish Government has notified the Commission, as provided in Article 100 a 4 of the EC Treaty, with reference to public health aspects.

Another case is pending before the District Court of Helsingborg (Case no. B 415/96). In this case three people have been prosecuted for using without the permission of the Swedish Agricultural Authority sperm from bulls that carry hereditary defects. In this case the sperm came from bulls of the breed known as ”Belgian Blue White”. The Swedish law prohibits on animal welfare grounds, the reproduction of cattle breeds which carry a defective gene, e. g. muscular hypertrophy. The District Court has referred the case to the ECJ, asking whether Directive 87/328/EEC on reproducers of pure race (and Article 30 of the EC Treaty) is opposed to the above-mentioned Swedish provisions.

4. Penalties and Judicial remedies in Sweden

4.1 Introduction

The preceding two sections of this paper have discussed two subject matters which are of a rather general nature, namely the attitude of the national authorities when directives are to be trans-

posed, and how the national courts in Sweden have acted when questions concerning the transposition of directives have been raised. This part of the paper deals with a question of a more specific nature, namely how provisions of directives concerning penalties and judicial remedies are dealt with when such provisions are transposed into the Swedish legal order.

When discussing this question it is important to keep in mind that in general terms the Community legal system is administered by national authorities. It is up to the national order of each Member State to lay down the rules for proceedings and to decide on the judicial remedies to ensure the protection of the rights which individuals acquire through Community law. Again, some recent directives contain provisions on appropriate penalties, while other directives, not least those relating to consumer protection and public work contracts, contain provisions on procedures and judicial remedies, and these provisions must be implemented. Many of the provisions are so detailed that the discretion to choose form and method for the implementation is severely restricted. Nevertheless, there might be a few distinctive features in the Swedish implementation of directives that could be of relevance for this paper.

4.2 Judicial remedies

4.2.1 Introduction

A specific feature of the Swedish legal order is, as mentioned in the first part of this paper, the existence of independent public authorities. These authorities play a role not only when directives are to be implemented, but also where judicial remedies are concerned. Accordingly, a specific characteristic is that the remedies available for individuals under private law, such as actions for damages, agreed sum or specific performance, are supplemented by control systems for a variety of public authorities under administrative law, often including actions for prohibitory injunctions. The authorities have a function not only for public administration but also — many of them — play an important role in respect of individual rights conferred by Community law. In their respective areas, they independently supervise compliance with the law and issue binding decrees as well as general recommendations.

4.2.2 Consumer policy

Some examples can be found in the directives relating to consumer protection. Directive 93/13/EEC on unfair terms in consumer contracts is implemented by the Consumer Contract Terms Act (1994:1512), which supplements the contractual consumer protection in the Contracts Act (1915:218). According to a provision in the Contracts Act, a contract term may be set aside or modi-

fied if it is found to be unfair having regard to the contents of the contract, the circumstances that prevailed when the contract was made, later events and other circumstances. In the application of this provision, special consideration is to be given to the need for protection of a person who is a consumer or otherwise occupies an inferior position in the contractual relationship. Hence, under the Contracts Act an individual consumer can take legal action or defend himself against an unfair contract and the judicial remedy is that the contract is declared void or modified. In practice, however, the Contracts Act plays a more secondary role to the additional administrative protection under the Consumer Contract Terms Act. According to the latter act, if a contract term is unfair towards a consumer, a special court, the Market Court, may prohibit the businessman from using the same terms in the future in similar cases, provided that the prohibition is called for in the public interest or is otherwise in the interest of consumers or competitors. An issue of prohibition is dealt with by the Market Court upon the application of a public authority, the Consumer Ombudsman. If the Consumer Ombudsman in a particular case decides not to make an application, an application may be brought by an association of businessmen, consumers or salary-earners but not by an individual consumer. If there are special reasons, a prohibition may be issued for the period pending a final decision. In cases which are not of major importance, the Consumer Ombudsman may himself issue a prohibition for approval by the businessman. Similar parallel systems of redress are found in the Consumer Credit Act (1992:830), which implements Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as well as in other legislation implementing directives relating to consumer protection. Through this legislation, the rights of the consumer to pursue remedies against the other contractual party (or, as in the case of consumer credit, the grantor of credit) are supported by administrative control systems according to which the Consumer Ombudsman and other public authorities, such as the Financial Supervisory Authority, supervise compliance with the legislation and may bring actions for prohibitory injunctions or use other means of redress. A prohibition restrains the businessman from future breaches and does not in itself involve decisions on already defaulting businessmen, but supplementary administrative protection exists for such cases. A consumer may choose not to take a dispute to court and instead bring a complaint before the Public Complaints Board, which is a public authority. The Public Complaints Board, with a judge presiding, examines disputes between consumers and businessmen concerning goods and services. The remedy is a recommendation by the Board on how

the dispute should be solved. The recommendations are not enforceable but in nearly all cases are followed by the businessman. The Public Complaints Board often applies legislation implementing consumer directives: one example is Directive 90/314/EEC on package travel, package holidays and package tours. The administrative and civil systems for consumer protection are independent of each other and a decision in one is not formally binding upon the other but is, of course, not without importance.

4.2.3 Equal treatment

Similarly, a supportive administrative control plays an important role in respect of the implementation of rights under directives relating to the principle of equal pay and equal treatment for men and women. According to these directives, the Member States shall introduce into their legal systems such measures as are necessary to enable all employees who consider themselves wronged to pursue their claims by judicial process. The directives are implemented by the Act concerning Equality between Men and Women (1991:433). The Equal Opportunities Commission and the Equal Opportunities Ombudsman supervise compliance with this Act. Upon the application of the Equal Opportunities Ombudsman, the Equal Opportunities Commission may order employers to take active steps to promote equality in general at the workplace. In case of discrimination, the Equal Opportunities Ombudsman may bring proceedings on behalf of the employee against the employer before the Labour Court and claim damages but not enforce other remedies such as employment.

4.2.4 Public procurement

As a final example on the reliance on public authorities it can be noted that a new authority was set up at the implementation of Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and of Directive 92/13/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of Community rules on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. The Public Procurement Board supervises compliance with the Public Procurement Act (1992:1528), by which the directives are implemented. However, in the main, the responsible bodies are judicial, though with some administrative connection. Thus, review proceedings are not brought before the general courts but before an administrative court. The administrative court has the

power to set aside an award of a public contract as well as to suspend the procedure for the award but does not have the power to award damages. An action for damages is brought before a general court in separate proceedings.

4.3 Penalties

A distinguishing feature of the Swedish implementation is a disposition to doubt the effectiveness of sanctions of a criminal nature and a policy to avoid such penalties when the same results can be achieved with other remedies.

Certainly, in many cases provisions on appropriate penalties have been implemented by criminal sanctions. Thus, according to the implementing Insider Act (1990:1342) infringement of the measures taken to implement Directive 89/592/EEC coordinating regulations on insider dealing shall be punished by fines or imprisonment for not more than four years, which is similar to the punishment for fraud and for embezzlement and other breaches of trust under the national Penal Code. Furthermore, according to the implementing provisions in the Act on Copyright in Literary and Artistic Works (1960:729) infringement of the rights provided for in Directive 96/9/EC on the legal protection of databases shall be punished by fines or imprisonment for not more than two years, the same scale of punishment that is laid down for infringement of copyright protected under domestic law.

However, when implementing provisions on appropriate penalties, Sweden has not seldom looked for other measures than criminal sanctions and in doing so referred to a general policy of avoiding criminal legislation. One example of this can be found in the implementation of the directive on databases. The directive provides for the exclusive right to copy a database for any use, public as well as private, and establishes that Member States shall provide appropriate remedies in respect of infringement of the rights but, according to the implementing penal rules in the Act on Copyright in Literary and Artistic Works, anyone who copies a database for private use shall be exempt from criminal responsibility. In case of infringing private copying, liability in damages alone has been considered a sufficient and a more appropriate remedy. The reluctance to impose criminal sanctions can be seen even in cases where infringement of the directive may damage the public interest as much as it would infringe individual rights. A striking illustration is the implementation of Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. According to the directive, Member States shall take appropriate measures to ensure full application of the provisions and shall in particular determine the penalties to be

applied. Nevertheless, the implementing Act on Measures against Money Laundering (1993:768) does not give any penalties for infringements. In the Government Bill it was stressed that new criminal legislation should not be enacted unless necessary and that the administrative control measures by the Financial Supervisory Authority and the available remedies under private law, e.g. labour law and contract, were sufficient.

4.4 Some general reflections concerning penalties and judicial remedies in Sweden

Apart from drawing attention to these special traits, it is difficult to make any particular conclusions about the Swedish implementation of provisions on penalties and judicial remedies in EC directives. Sweden has been a member of the Union for only a few years, and it must be borne in mind that the great bulk of Community directives, including many of those mentioned here, were implemented in connection with the EEA Agreement, admittedly with some haste. Nevertheless, it cannot be said that legal proceedings involving Community law are subject to rules less favourable than those applying to similar claims under domestic law or that applicable rules would render the exercise of rights created by Community law difficult. In some cases new remedies have been introduced and the jurisdiction of the courts been extended, such as in respect of the directives on public work contracts. It is of course uncertain how long a policy of avoiding criminal sanctions can persist when a directive explicitly provides for penalties. For instance, the lack of penalties for infringement of the measures adopted under the directive on money laundering might perhaps fall short of Community minimum standards and a government-appointed committee has recently reached the conclusion that it is necessary to create new criminal offences for money laundering. The other distinguishing feature, to rely on administrative control systems as a supplement to individual judicial remedies, has a long tradition in Sweden. It can, of course, be found in other Member States too, although seldom to such a great extent or practical significance, and provisions on judicial remedies in directives frequently presuppose an additional administrative control of rights for individuals. The method has also proved rather practicable when establishing procedures and means of redress in order to implement provisions where it is unclear who can enforce a right and what the specific remedies are. Further, the absence of a general system for class or representative action no doubt entails a strong position for the Consumer Ombudsman and other public authorities. In general, it is up to Member States to decide what the appropriate remedies are, and they may apply any procedure which is

appropriate for the purpose of protecting the individual rights conferred by Community law, civil or administrative or a combination of both. Yet it has been argued that, by sifting conflicts that otherwise might have been brought before national courts, a strong administrative control of Community rights undermines the principle that underlies Article 177 of the EC Treaty and the idea that all matters arising out of Community law are justiciable, especially since control of the administration by general courts is somewhat alien to Swedish administrative law. On the other hand, supplementing private law remedies with administrative control apparently helps to ensure the observation of Community law and provides for effective protection of the individual Community rights. Actually, the administrative control relating to private law rights has not become weaker following Sweden's membership but, in some areas, stronger. The establishment of procedures for the protection of Community rights is not in itself likely to change the Swedish tradition in this respect. However, a change may come about for other reasons. As pointed out in the first part of this paper concerning transposition, the different public authorities are often responsible for the implementation of directives and thus both issue the decrees and independently supervise them, although provisions concerning the legal relations between private subjects are laid down in law enacted by Parliament and not in decrees issued by authorities. Yet, Sweden's membership has in general strengthened the position of the public authorities. Not least in this light, their functions are at present greatly debated and subjected to examination by a government-appointed commission. Stronger government influence over the public authorities is being discussed. In the long run these and other general reforms of public administration might lead to less reliance on public authorities in the protection of individual rights under Community law.