
WHAT ABOUT STATE IMPLEMENTATION?

New Governance and the case of the European Union Water Framework Directive in Sweden

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1. INTRODUCTION

The debate regarding EU Member State implementation deficits¹ within EU environmental law and policy has been active since the early 1990s, yet the ‘gap’ between policy goals and environmental outcomes remains alarming.² For example, in the case of the EU Water Framework Directive (WFD) since 2000,³ implementation has been far from successful within EU Member States. This is illustrated by poor prognoses for achieving the WFD’s rather ambitious environmental objectives which are aimed at the ultimate goal of ‘good water status’ for all water bodies in Europe by the end of 2015.⁴ The EU Commission estimated in 2012 that only 53% of surface waters within the EU will have

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¹ The term ‘implementation’ is used throughout this article in the sense of ‘transposition, application and enforcement’, see S. Prechal, *Directives in EC Law* (Oxford University Press, 2005), pp. 5–6. The focus in the paper is therefore not solely on transposition, but rather on application and enforcement. For an analysis of the legal obligations in Member State transposition of EU Directives, see M. Bergström, *Det nationella genomförandetrymmet – Reella valmöjligheter under påföljdsansvar eller rutinmässig sanktionering av redan fattade beslut?*, ERT, 2008, pp. 995–1017.

² A. Jordan, *The Implementation of EU Environmental Policy: A problem without a Political Solution?* (1999), *Environment and Planning Government and Policy*, 17 (1), pp. 69–90; Decision No 1386/2013/EU, *The 7th Environment Action Programme to 2020 – Living well, within the limits of our planet*.

³ Dir 2000/60/EC.

⁴ Art. 4 and Annex V, Dir 2000/60/EC. ‘Good water status’ encompasses the environmental objectives of good ecological and chemical status of surface waters and good quantitative and

reached good water status or potential therein within the original time frame.⁵ Essential reasons for such poor prognosis are an absence of robust legal frameworks and appropriate water administrations in the majority of EU Member States.⁶ In Sweden, for example, the responsible authorities declare that a good water status will not be attained in a majority of the countries water bodies by the end of 2015.⁷

In this article I argue for a renaissance in the fundamental role of legal perspectives within modern and complex management systems. The Swedish implementation of the WFD is used as an example to discuss the need for clear legal frameworks in EU Member States, when implementing framework Directives and other vague and flexible EU legislation. The Swedish case is interesting since it exhibits difficulties in WFD implementation within an EU Member State, known to be one of the leading countries in the field of environmental law and policy. The analysis is founded on applicable EU and Swedish sources of law, official documents and reports regarding the WFD and its implementation in Sweden, alongside a review of relevant legal and political science literature. Most scholars argue from preconceived stances whereas here I combine valuable insights from political science literature on new governance, with a more traditional legal perspective on modern governance solutions.

Generally it is maintained that the modern water management system prescribed in the WFD coincides with a shift in EU environmental law and policy from 'government' to 'new governance.' One way of explaining the gap between policy goals and environmental performance is that an increased use of new governance approaches within the EU has diminished legal perspectives. Such new governance approaches include the favouring of open and flexible framework legislation over detailed Acts, and the prioritising of consideration of national diversities under the flag of subsidiarity.⁸ At the same time, prerequisites for EU Member States seem to have changed due to the fact that national implementation of EU legal Acts has become increasingly important. Traditional concepts of law and law-making within the EU have been displaced with-

chemical status for groundwater, however there are several exceptions and derogations contained within Article 4, such as extended deadlines until 2027 for achieving the ultimate goal of good water status.

⁵ COM 670 final, 2012, pp. 6–8. The prognosis still stands according to the latest EU commission report regarding the EU Water Framework Directive, see COM 120 final, 2015, pp. 2–3.

⁶ COM 670 final, 2012, pp. 6–8.

⁷ Survey of the official documents of the five Water Authorities, distributed for the purpose of public consultation on the proposals for the next water management cycle, reaching from 2015–2021, available at www.vattenmyndigheterna.se (2015-03-04).

⁸ I. von Homeyer, *The Evolution of Environmental Governance*, p. 20 and M. Lee, *Law and Governance of Water Protection Policy*, p. 141, both in J. Scott (ed.), *Environmental Protection: European Law and Governance* (Oxford University Press, 2009).

out concrete alternatives serving as replacements, causing a ‘re-nationalisation’⁹ of legal measures on the EU Member State level.¹⁰ This re-nationalisation of legal measures must be taken seriously by EU Member States so that vagueness and uncertainties within EU legislation is not transferred to national legal systems and left to administrative authorities to sort out.¹¹

2. CHANGING GOVERNING STRUCTURE IN THE EUROPEAN UNION

2.1 The general trend

The governing structure of Western States has changed over recent decades and in related literature many scholars have described the changing role of the State and central Government in terms of a shift ‘from government to governance.’¹² In legal scholarship, and in particular in the context of EU governance, the expression of ‘new governance’ is commonly used as a summarising concept of these changes.¹³ The term ‘government’ is, traditionally, strongly associated with notions such as a strong central State and various components including hierarchy, formality, hard-and-fast rules, top-down control and legal enforcement.¹⁴ ‘Governance’ ideas, on the other hand, such as new governance and multi-level governance, instead imply a lesser degree of central control and systems-steering driven by visions, imprecise objectives and framework legislation. Another feature of governance is an increasing decentralisation and a shifting of the delegation of formal power and responsibility from central Government to

⁹ K. Holzinger, C. Knill and A. Schäfer, *Rhetoric or Reality? ‘New Governance’ in EU Environmental Policy*, *European Law Journal*, 2006, 12 (3), p. 409.

¹⁰ C. Scott, *Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU*, *European Law Journal*, 2009, 15 (2), pp. 161–162 and 169–170; J. Scott and D. M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, *European Law Journal*, 2002, 8 (1), pp. 1–18.

¹¹ For a summary of the Swedish Council of Legislation’s view on implementation, see O. Henkow, *Genomförande av Direktiv från EU – Hur bör “klara, precisa och ovillkorliga” bestämmelser i ett direktiv från EU genomföras i svensk rätt då bestämmelserna i vissa fall är oklara, oprecisa och tvetydiga?*, ERT, 2010, pp. 456–459.

¹² See eg J. Rosenau and E-O Czempiel (eds.) *Governance without Government: Order and Change in World Politics* (Cambridge, 1992); R.A.W. Rhodes, *The New Governance: Governing without government*, *Political Studies*, 1996, XLIV, 652–677; J. Pierre and G. Sundström (eds), *Samhällsstyrning i förändring* (Liber, 2009); R. Bellamy and A. Palumbo, *From Government to Governance* (Ashgate Publishing Ltd, 2010).

¹³ See eg n. 10 and G. de Búrca and J. Scott, *Law and New Governance in the EU and the US*, (Hart, 2006); K. Sideri, *Law’s Practical Wisdom. The Theory and Practice of Law Making in New Governance Structures in the European Union* (Ashgate Publishing Ltd, 2007).

¹⁴ R.A.W. Rhodes, n. 12, pp. 652–677; P. Björk, G. Bostedt, H. Johansson, *Governance* (Studentlitteratur, 2003), p. 22.

lower-level authorities and non-governmental actors.¹⁵ The differences between the two governance models have manifested as a shift in governmental steering from a traditional, rule-oriented hierarchical structure to a goal-oriented management culture involving more actors than would a pivotal, central Government. As presented below, these changes are currently prominent in EU law in general and in environmental management in particular.

In an EU context new governance has been described as ‘governing without law,’ where informal instruments (soft-law) and administrative networks are used in lieu of formal rules and legal enforcement.¹⁶ When it comes to analysing the instrumental use of law and methods of law-making within the history of the EU, a dividing line can be drawn between two major periods of development. The first period, from approximately 1968 to 1995, is strongly associated with the use of law as a means for Member State integration. A second period, from approximately 1995 to the present day, is one in which different modes of governance have emerged and the role of law has been diminished.¹⁷ The most important agenda during the first development period was the establishment of the internal EU market, with Member State harmonisation as the strong guiding principle. The establishment of the internal EU market was a regulatory project of enormous proportions, since ‘...there was no market without EU law and, at the same time, the most visible representation of this European market was a set of laws.’¹⁸ In this first period, use of the classic ‘Community Method’ as a means of law-making and integration prevailed. The main features of the Community Method within the EU are: *firstly*, that the EU Commission has monopoly on initiating EU legislation; *secondly*, that decisions by the European Council are taken by qualified majority; *thirdly*, that the European Parliament plays an active role in decision-making and; *fourthly*, that the Court of Justice of the European Union (CJEU) is the authoritative interpreter of EU law, thus guaranteeing a uniform interpretation of relevant key concepts.¹⁹

The focus on law as the force of integration, as well as an ambition to use legal means so as to create full harmonisation of the internal market, strongly represents the government perspective during this first period in the history of the EU. In contrast, new governance, as part of the second period, has been defined as ‘any major departure from the classic Community Method’ of law-

¹⁵ P. Hall and K. Löfgren, *Politisk styrning i praktiken*, (Liber, 2006), p. 207; J. Scott and D. M. Trubek, n. 10, pp. 5–6.

¹⁶ C. Scott, n. 10, pp. 169–170.

¹⁷ *Ibid.* 161–162 and 169–170; c.f. R. van Gestel and H-W. Micklitz, ‘Revitalising Doctrinal Legal Research in Europe: What About Methodology?’ In: U. Neergaard, R. Nielsen, L. Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation* (DJOF, 2011), p. 38.

¹⁸ R. van Gestel and H-W. Micklitz, n. 17, p. 42.

¹⁹ COM (2001) 428 final, p. 8.

making.²⁰ The ultimate evidence of a governance shift within the EU came with the EU Commission's *White Paper on Governance* in 2002.²¹ The development towards new governance was propelled, *inter alia*, by a lack of overview and capacity for legal control of the many laws adopted during the first stage of EU development, coupled with the increasing complexity of EU law and policy. In essence, the EU Commission needed new methods with which to enforce and control EU law. At the same time, the principle of subsidiarity within the EU increased a need for participatory approaches and a widened dialogue involving both national administrative authorities and local stakeholders.²²

With the White Paper followed a 'politicization of law-making',²³ in which traditional legislation received a more obscure role in favour of differing methods of new governance. Such new governance methods have included co-regulation and self-regulation, soft law in lieu of hard law, framework legislation in lieu of detailed Acts, and the emergence of a more integrated administrative structure within the EU.²⁴ This new administrative structure is based primarily on informal co-operation between EU authorities and national administrative authorities, whereby EU authorities steer Member State behaviour through a network approach rather than through law and legal means.²⁵

2.2 Towards 'New Governance' in EU Environmental Law and Policy

The shift towards new governance occurred even earlier with respect to environmental law and policy, where it can be seen from the mid-1980s onward. In this policy field the shift was impelled against the backdrop of an increased realisation that effective management of complex environmental problems, such as sustainable use of water resources, requires involvement from and collaboration amongst many different actors.²⁶ A formalisation of the changes within environmental law and policy came with the adoption of the EU's Fifth Environmental Action Programme in 1993,²⁷ declared in the wake of the United Nations' Conference on Environment and Development held in Rio de Janeiro in 1992. The EU programme was entitled 'Towards Sustainability' and, in

²⁰ J. Scott and D. M. Trubek, n. 10, p. 1.

²¹ COM (2001) 428 final.

²² J. Scott and D. M. Trubek, n. 10, pp. 6–8; J. Reichel, *God förvaltning i EU och Sverige* (Jure, 2006), p. 564.

²³ R. van Gestel and H-W. Micklitz, n. 17, p. 46.

²⁴ J. Scott and D. M. Trubek, n. 10, p. 2; C. Scott, n. 10, p. 167.

²⁵ See *infra* section 3.1 where the strong influence of the informal CIS network elaborated within the WFD is discussed.

²⁶ L. Hooge and G. Marks, *Types of multi-level governance*, European Integration online Papers, 2001, 5 (11), p. 4.

²⁷ Official Journal of the European Communities, C 138, 17.05.1993.

comparison with earlier action programmes, it was a much more strategic policy instrument containing long-term goals, in lieu of short-term concrete measures.²⁸ The programme accentuated joint responsibility amongst all sectors of society and opened the door for the use of new and broader instruments. Such instruments included public information and education and the use of 'bottom-up' strategies rather than the previous 'top-down' legislative approach.²⁹

Political scientist Ingmar von Homeyer describes the evolution of EU environmental law and policy through identifying and explaining four different regimes: *the Environment regime (1972–1982)*, *the Internal market regime (1982–1992)*, *the Integration regime (1992–1998)*, and *the Sustainable development regime (1998–present)*.³⁰ Similar to the first of the two EU development periods presented above, the first two environmental regimes are associated with harmonisation and primarily with legally binding, top-down regulation alongside strong legal enforcement action on the part of the EU Commission. Characteristic of the two latter regimes has, instead, been a focus on economic efficiency, transparency and environmental effectiveness; all of which are features closely connected to governance ideas. The legislation of the integration regime, for example, contained a certain degree of flexibility and decentralisation, often at the cost of Member State harmonisation. Another significant feature of the integration regime was its shift towards 'more inclusive, networked governance'.³¹ In sum, the period from 1992 to the present day emphasises a decentralised governance model and decision-making that reflects broader participation, including stakeholders and experts, so as to create more flexible and locally-adapted management solutions.

Framework Directives, such as the WFD, are the most characteristic regulatory instrument of both the integration regime and the latter sustainable development regime. Main features of these Directives include vague objectives and long-term environmental targets, a broad scope and focus on the environment in the large. Other significant features of these framework Directives is a focus on procedure and flexibility in implementation, leaving much decision-making and responsibility to EU Member States.³² In the context of legislative measures the use of new governance approaches have altered roles within the EU and shifted the balance between EU authorities and the Member States, enabling EU Member States to 'exercise their own command capacity'.³³ The hard rules,

²⁸ J. H. Jans and H. H. B. Vedder, *European Environmental Law*, 4th edition (Europa Law Publishing, 2012), p. 340.

²⁹ *Ibid.* 340 and 407–408; Official Journal of the European Communities, C 138, 17.05.1993, p. 17.

³⁰ I. von Homeyer, n. 8, pp. 1–26.

³¹ *Ibid.* 15.

³² *Ibid.* 16–18.

³³ M. Lee, n. 8, p. 41.

previously provided by the EU through legally-binding, top-down regulation focused on specific environmental problems during the first two regimes, must now be provided through national legislation.³⁴ This re-nationalisation of legal measures needs to be taken seriously by EU Member States, however, in practise this has not always occurred.³⁵

3. NEW GOVERNANCE AND THE EU WATER FRAMEWORK DIRECTIVE

3.1 The purpose and goals of the WFD

The WFD represents an illustrative example of new governance approaches within EU environmental law and policy. The overall ambition of the Directive is to promote sustainable water use based on long-term protection of water resources.³⁶ Constituting a framework Directive under Article 192 of the Treaty on Function of the European Union (TFEU), the WFD leaves considerable room for flexibility and national discretion in implementation. As long as Member States uphold prescribed deadlines and meet the overall environmental objectives headed towards good water status, the Directive is considered to be adhered to.³⁷ The key instruments prescribed in the WFD in order to fulfill environmental objectives are ‘programmes of measures’³⁸ and ‘river basin management plans’³⁹. A programme of measures specifies operative measures in order to fulfill environmental objectives, whilst a management plan is intended to provide an overview of current water status and provide focus for future work in a particular ‘river basin district’. River basin districts are identified in the WFD as the main units for the management of river basins.⁴⁰

The new governance ideas of the WFD have challenged traditional water management in a number of ways in most EU Member States, including Sweden. *Firstly*, the division into river basin districts and an ‘integrated river basin management approach’⁴¹ means that related administrative arrangements must be based on waters’ natural boundaries, i.e. ecosystem-based. Traditional divi-

³⁴ L. Krämer, *The Environment and the Ten Commandments*, Journal of Environmental Law, 2008, 20:1, p. 6.

³⁵ COM 670 final, 2012, pp. 6–8; see also Case 32/05, Commission v Luxembourg [2006], ECR I-11323, in which Luxembourg was condemned for not transposing WFD environmental objectives into binding national law correctly and in due time.

³⁶ Art. 1.b, Dir 2000/60/EC.

³⁷ M. Lee, n. 8, pp. 27–35.

³⁸ Art. 11, Dir 2000/60/EC.

³⁹ Art. 13, Dir 2000/60/EC.

⁴⁰ Art. 2.15, Dir 2000/60/EC.

⁴¹ Art 3.1, Dir 2000/60/EG.

sions, built for example on administrative or geographical boundaries such as counties and municipalities, are hence no longer acceptable. *Secondly*, the WFD prescribes an adaptive management system, to be carried out in six-year cycles.⁴² Adaptive management requires a process that is open to ecosystem changes due to the fact that knowledge of the complex and dynamic nature of ecosystems is constantly growing. The key components in adaptive management are, thus, to plan, follow up and adjust management strategies and operative measures in accordance with new [scientific] knowledge, discoveries and environmental conditions.⁴³ The key elements of adaptive management in the WFD are to: a) characterise current water status, b) define and establish proper environmental objectives, programmes of measures and river basin management plans, c) monitor progress and d) evaluate and report back to the EU Commission.⁴⁴ *Thirdly*, the WFD prescribes ‘a procedural approach,’⁴⁵ which consists of binding procedures regarding aspects such as planning, measurements, reporting, information and participation by stakeholders including the public.⁴⁶ In sum, implementation of the WFD has demanded significant changes in the administration of water within EU Member States.

The environmental objectives prescribed in WFD Article 4 are essential to fulfilling the scope of the Directive, which makes the question of meeting those requirements central in national implementation. The environmental objectives of WFD Article 4 are vaguely formulated, with several exceptions and derogations, leaving the construction of concrete targets and limit values to daughter Directives, soft-law guidance documents and the EU Member States.⁴⁷ In order to be achieved, environmental objectives must be ‘operationalized,’⁴⁸ in this case transformed into practical measures of action and duties through programmes of measures. Member States legal systems have a fundamental role in operationalization, because national legislators are obliged, under EU law and its principle of effectiveness in general, and by the WFD in particular,⁴⁹ to ensure that every

⁴² Art. 11.8 and 13.7, Dir 2000/60/EG.

⁴³ C.S Holling (ed.), *Adaptive environmental assessment and management* (Johan Wiley and Sons, 1978); G. Michanek and A. Christiernsson, *Adaptive Management of EU Marine Ecosystems – About Time to Include Fishery*, (Uppsala University, 2013), p. 9.

⁴⁴ Art. 4, 8, 11, 13, 15, Dir 2000/60/EC.

⁴⁵ I. von Homeyer, n. 8, p. 17.

⁴⁶ The importance of procedure is also highlighted by a new possibility for the EU Commission, in accordance with Article 260.3 TFEU, to directly request the imposition of a lump monetary sum or penalty payment in the context of infringement cases concerning non-communication of implementing measures, as introduced through the Treaty of Lisbon, see H. H. B. Vedder, *Treaty of Lisbon and European Environmental Law and Policy*, *Journal of Environmental Law*, 2010, 22:2, pp. 296–297.

⁴⁷ J. H. Jans and H. H. B. Vedder, n. 28, p. 396.

⁴⁸ L. Gipperth and R. Elmgren, *Adaptive Coastal Planning and the European Union’s Water Framework Directive: A Swedish Perspective*, *Ambio*, 2005, 34 (2), p. 158.

⁴⁹ Art. 4.3, TFEU and art. 4.3, Dir 2000/60/EC.

threat against achieving the environmental objectives of the WFD is effectively prevented by national legislation.⁵⁰ Another important aspect in meeting WFD environmental objectives is pollution prevention and control. In this regard the WFD relies on ‘a combined approach,’⁵¹ which means setting ‘emission limit values,’ demanding best available technology for known point sources of emissions, and setting common ‘environmental quality standards’ for certain prioritised and hazardous substances in the water environment.⁵²

The open and flexible framework legislation of the WFD is supplemented by a great amount of informal guidance in the form of a non-binding ‘Common Implementation Strategy’ (CIS).⁵³ The CIS consists of an administrative network of representatives from the EU Commission, national administrative authorities, non-state actors and stakeholders, and provides that the parties within the network work together when implementing the WFD. At present, several work programmes and thirteen thematic information guidelines have been elaborated within the network, all of which have had significant impact on State implementation in practice, despite their informal status. According to a study on judicial enforcement of the WFD in 2014, the majority of implementation problems and interpretation of unclear rules, concepts and obligations are handled within the CIS network instead of by the Court of Justice of the European Union (CJEU), meanwhile basically all cases brought to the CJEU concern formalities and breaches of procedural commitments.⁵⁴ Only one out of the eighteen WFD infringement cases heard by the CJEU when the study was undertaken concerned concept litigation. This statistic implies that a harmonised understanding of key concepts is not being delivered by the CJEU. Examining this reality brings into question the role of the CJEU as the authoritative interpreter of the content of EU law as prescribed in Article 19 of the Treaty on the European Union (TEU).⁵⁵

The increased adaptation of trans-governmental administrative networks such as the CIS has been described as ‘an informal “back-door” for the EU Commission to advance administrative integration and harmonisation of regulatory practices within the EU.’⁵⁶ Furthermore, the processes of the informal

⁵⁰ O.O. Green, A.S. Garmestani, H.F.M.W. van Rijswijk, A.M. Keessen, *EU Water Governance: Striking the right balance between regulatory flexibility and enforcement?*, Ecology and Society, 2013, 18 (2:10).

⁵¹ Art. 10, Dir 2000/60/EC.

⁵² 2008/105/EC, amended by Dir 2013/39/EU.

⁵³ The Strategy and its related documents can be found at http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm (2014-12-18).

⁵⁴ E. Korkea-aho, *Watering Down the Court of Justice? The Dynamics between Network Implementation and Article 258 TFEU Litigation*, European Law Journal, 2014, 20 (5), pp. 649–666.

⁵⁵ According to Article 344 TFEU, EU Member States are, as a general rule, even prohibited from solving disputes concerning the interpretation or application of the Treaties.

⁵⁶ M. Martens, *Administrative Integration through the Back Door? The Role and Influence of the*

CIS network 'seem to operate completely beneath the legal radar, invisible to ordinary as well as constitutional law.'⁵⁷ This indicates a strong EU Commission influence within these informal networks, primarily based upon national officials' perception of the EU Commission as an institution endowed with the knowledge, credibility and overview of the EU system.

3.2 Swedish implementation of the WFD

From a Swedish perspective it has been argued that governance ideas are not something completely new. The Swedish decentralised administrative system has incorporated a high degree of autonomy and self-organisation amongst various administrative authorities, as enshrined by the Swedish Constitution.⁵⁸ Municipalities and other local authorities in Sweden have also experienced, for quite some time, a high degree of trust from the central Government due to 'the principle of local self-government.'⁵⁹ The 'new' governance in the Swedish context is, therefore, more related to the role of the State and, more specifically, to the degree and character of governmental steering. This is so especially in regards to formal guidance, such as detailed and precise legislation having decreased in favour of softer steering instruments, further decentralisation and less control by the central Government.⁶⁰ These changes are even more apparent when it comes to the implementation of EU law.⁶¹

The ultimate responsibility for implementing EU Directives rests with the Swedish Parliament and Swedish Government. Together these governance bodies have decided upon a new water administration in Sweden through amendments to the Swedish Environmental Code⁶² 1998, and the Swedish Ordinance for County Administrative Boards⁶³ 2007, as well as the instatement of a Swedish Water Quality Management Ordinance (WQMO).⁶⁴ The central authority appointed at the national level, the Swedish Agency for Marine and Water Management (SwAM), has the general mandate of managing Sweden's

European Commission in Transgovernmental Networks within the Environmental Policy Field, European Integration, 2008, 30 (5), p. 636.

⁵⁷ J. Scott and J. Holder, *Law and New Environmental Governance in the European Union*, In G. de Búrca and J. Scott, n. 13, p. 236.

⁵⁸ Instrument of Government, Chapter 12, Section 2.

⁵⁹ Instrument of Government, Chapter 1, Section 1 and Chapter 14.

⁶⁰ G. Hedlund and S. Montin (eds), *Governance på svenska* (Santerus, 2009), pp. 13–14.

⁶¹ See e.g. T. Bull, L. Halje, M. Bergström, J. Reichel and J. Nergelius, *Arvet från Oxenstierna – reflektioner kring den svenska förvaltningsmodellen och EU*, (SIEPS, 2012:2); D. Mattson, *Implementering av Europarätten i Sverige – Några reflektioner om utvecklingen*, ERT 2009, pp. 417–426.

⁶² *Miljöbalken (1998:808)*.

⁶³ *Förordning (2007:825) med länsstyrelseinstruktion*.

⁶⁴ *Förordning (2004:660) om förvaltning av kvaliteten på vattenmiljön*.

marine and freshwater resources. To implement the WFD's integrated river basin management approach the country has been divided into five river basin districts.⁶⁵ In each district, a County Administrative Board has been designated river basin district authority (hereafter Water Authority),⁶⁶ with overall responsibility for the management of water resources in the district. Within the scope of the Water Authorities' responsibilities lies, *inter alia*, the characterisation of current water status,⁶⁷ the establishment of environmental objectives and quality standards,⁶⁸ and the construction of programmes of measures⁶⁹ and management plans,⁷⁰ in a participatory process involving other administrative authorities, municipalities and stakeholders including the public.⁷¹ The Water Authorities are also responsible for monitoring progress, following up on prescribed actions,⁷² and reporting to the central administrative authority, SwAM.⁷³ To each Water Authority the Swedish Government has appointed a decisive organ, Water District Boards. The Boards consist of up to eleven expert delegates assigned by central Government, representing the County Administrative Boards, municipalities and different stakeholder groups, and the County Governor sits as Water District Board Chairperson.⁷⁴ The Board Members decide upon environmental quality standards, programmes of measures and management plans for each district.⁷⁵

The operative responsibilities for actions and measures decided upon are assigned to the administrative authorities in Sweden, for example national Agencies, County Administrative Boards and municipalities. At the regional level, all twenty-one County Administrative Boards have major responsibilities regarding practical implementation, including monitoring of water quality and supervision of water activities. Most of the work related to the WFD is carried out by an advisory group secretariat, mandatory in all County Administrative

⁶⁵ Environmental Code, Chapter 5, Section 10.

⁶⁶ Environmental Code, Chapter 5, Section 11.

⁶⁷ WQMO, Chapter 3, Section 1.

⁶⁸ WQMO, Chapter 4, Section 1. The environmental objectives have in the Swedish legislation misleadingly been categorised as 'environmental quality standards', a term that has a considerably narrower definition in the EU context, see further L. Gipperth, *Miljö kvalitetsnormer – en rättsvetenskaplig studie i regelteknik för operationalisering av miljömål*, (Uppsala University, 1999); C. Ohlsen Lundh, *Environmental Quality Requirements or Environmental Quality Standards? Reflections on a report on Sweden's implementation of the Water Framework Directive*, *Nordic Environmental Law Journal*, 2014:2, pp. 61–94.

⁶⁹ WQMO, Chapter 6, Section 1.

⁷⁰ WQMO, Chapter 5, Section 1.

⁷¹ WQMO, Chapter 2, Section 4.

⁷² WQMO, Chapter 7, Section 1.

⁷³ WQMO, Chapter 9, Section 2.

⁷⁴ Ordinance for County Administrative Boards, Section 25.

⁷⁵ Ordinance for County Administrative Boards, Section 24.

Boards, with the task of assisting the Water Authorities in the practical implementation of the WFD.⁷⁶

The responsibilities of the Water Authorities also include the creation of collaborative groups meant to represent broad participation within each district.⁷⁷ For that purpose, about 125 Water Boards now actively engage in this informal collaboration within Sweden. The main functions of the Water Boards are to contribute local knowledge regarding water conditions and to provide a forum for dialogue with water stakeholders in each district. The Water Boards are voluntary and open to anyone who is interested in participating; however, their function is solely consultative.⁷⁸ In addition to collaboration with the Water Boards, all related materials and information must be communicated to the administrative authorities, municipalities, and general public before important decisions about environmental objectives and quality standards, programmes of measures and management plans are made. The purpose of this procedural component is to give everyone who is interested an opportunity to voice opinions about the suggested plans and measures, so as to make the process as transparent and legitimate as possible.⁷⁹ This traditional ‘circulation for comments’ is an important collaborative element of the Swedish political system.

3.3 Identified WFD implementation hurdles in the case of Sweden

There are many different actors involved in the current multi-level water administration in Sweden, and conflicts between traditional water management, built on already-established routines, and the new governance approaches of the WFD are causing problems in implementation. The main critique expressed when it comes to the Swedish water administration is related to the minimal State involvement and lack of formal steering, not least in terms of legal distribution of power and responsibilities between the various authorities involved.⁸⁰ The absence of clear and precise decisions is commonly criticised in regards to systems inspired by new governance ideas, as such absence makes degrees of steering difficult to establish.⁸¹ In the Swedish case, due to the fact that the organisation is multifaceted, fragmented and sectorised with a patchwork quilt of administrative authorities, associations and stakeholder groups

⁷⁶ Ordinance for County Administrative Boards, Section 27, Paragraph 1.

⁷⁷ WQMO, Chapter 2, Section 4.

⁷⁸ Government bill 2003/04:157, p. 12.

⁷⁹ Government bill 2003/04:2, pp. 24–25.

⁸⁰ State Government Official Report, SOU 2014:50, pp. 287–301.

⁸¹ P. Hall and K. Löfgren, n. 15, p. 204.

involved, a lack of formal steering is causing the water administration to have difficulties in overview, coordination and reform.⁸²

The most significant example of absence of formal steering is the lack of a proper mandate for the Water Authorities, notwithstanding their key role in Swedish water management. The Water Authorities were established in an already-existing administrative structure without sufficient clarification of their role in relation to the pre-existing administration.⁸³ Moreover, there is no budget allocated from central Government to the Water Authorities. National Agencies are regulated through an annual 'appropriation direction,' [regleringsbrev] describing the goals they are to meet and under which budget those goals reside. There is no such appropriation direction addressed to the Water Authorities as, formally, they are not considered a central Agency. Instead, the Water Authorities fall partly under the appropriation direction of the County Administrative Board they are located within, and whose budgets are not specified at all, and partly under the appropriation direction of the SwAM, which can allocate a non-specified amount of its budget to the five Water Authorities.⁸⁴ Thus, the Swedish Water Authorities have significant responsibilities in the management of water and practical implementation of the WFD, but no specified budget allocated to them for handling that assignment. The lack of resources for operative measures is an issue that is often highlighted by the operative authorities within the Swedish water administration.

In addition, the Water Authorities are without proper mandate to enforce decisions against other actors in the water organisation, even if such steps are deemed necessary in order to achieve decided environmental objectives and quality standards. The role of the Water Authorities is, according to themselves, foremost to serve as coordinators in the water administration and provide action-based recommendations for the WFD's environmental objectives to be met.⁸⁵ Overall, the Water Authorities, as well as their decisive organs the Water District Boards, are quite invisible in terms of formal steering and governmental control related specifically to the implementation of the WFD. This lack of formality in the water administration constitutes one example of how an increased use of new governance approaches, such as informal in lieu of formal steering, can cause negative ripple effects in terms of actually achieving results headed towards good water status.

⁸² J. Pierre and G. Sundström, n. 12, p. 131; see also the Water Authorities proposals for 'Management Plans 2015–2021' where the need for clearer roles and responsibilities within water administration is identified as a key obstacle in achieving a good water status.

⁸³ Government bill 2003/04:2, p. 27 and Government bill 2003/04:57, p. 10.

⁸⁴ See the appropriations directions to the CABs (published 2013-12-19) and the SwAM (published 2014-09-04), <http://www.esv.se/Verktyg--stod/Statsliggaren/> (2014-11-04).

⁸⁵ www.vattenmyndigheterna.se (2015-01-30).

In an often-cited article from 2004, Swedish political scientist Lennart Lundqvist foresaw that the Swedish proposal for implementing the WFD could potentially cause problems. He predicted these problems would result mostly from unclear roles and distribution of responsibilities and authority amongst the different levels in the proposed multi-level water administration.⁸⁶ Since then, the debate regarding organisational difficulties within the Swedish water administration has been extensive. Several Government Commissions have been appointed to the matter, and numerous reports from the involved administrative authorities have been published.⁸⁷ The EU Commission has also questioned aspects of the Swedish implementation in their communication with Sweden concerning the practical implementation of the WFD.⁸⁸

In the Swedish implementation of the WFD, environmental quality standards and programmes of measures are the key instruments appointed so as to achieve the environmental objectives of WFD Article 4.⁸⁹ These instruments were incorporated into Swedish legislation through the instatement of the Swedish Environmental Code in 1999, but the formulation of legislation regarding these instruments has been questioned and debated ever since the first incorporation decision.⁹⁰ All in all, until it can be guaranteed that every threat against achieving the environmental objectives of the WFD is effectively prevented by the Swedish legal system, the WFD cannot be considered fully implemented in Sweden.

4. A LEGAL PERSPECTIVE ON NEW GOVERNANCE

Many unifying features connect a legal perspective with the traditional view on governmental steering, for example conformity to law, hard rules, hierarchy, control, formality and a strong central Government. In new governance systems, including modern water management, these values are downgraded and

⁸⁶ L. J. Lundqvist, *Integrating Swedish Water Resource Management: a multi-level governance trilemma*, *Local Environment*, 2004, 9 (5), pp. 421–422.

⁸⁷ See eg the reports and materials published within the Swedish Government Commission 'Miljömålsberedningen,' Dir. M 2010:04, available at <http://www.sou.gov.se/sb/d/17400> (2014-11-21); B. Sjöberg, *WFD implementation in a European perspective*, *Journal of The Royal Swedish Academy of Agriculture and Forestry*, 2006, 145 (8) nr. 8, pp. 14–19; and the State Government Official Reports SOU 2008:11, SOU 2008:62, SOU 2008:118, SOU 2010:8, SOU 2014:50.

⁸⁸ See eg Commission Staff Working Document, SWE(2012) 379 final.

⁸⁹ WQMO, Chapter 4 and 6.

⁹⁰ See eg SOU 2002:107, SOU 2005:59, SOU 2005:113; L. Gipperth, n. 68; M. Ekelund Entson and L. Gipperth, *Mot samma mål? Implementeringen av EU:s ramdirektiv för vatten i Skandinavien* (University of Gothenburg, 2010); J. Söderberg, *EU:s ramdirektiv för vatten och dagvattenförorening – Klarar Sverige kraven?*, *Nordic Environmental Law Journal*, 2011:1, pp. 3–30.

considered rather obsolete in favour of softer values such as flexibility, decentralisation and participation as guiding components. As a result, in new governance systems there exists a built-in conflict between law and governance. This conflict forms a premise that constitutes the overall challenge of new governance from a legal perspective: to adjust relevant legal solutions to a more goal-oriented structure in lieu of a rule-oriented structure, in order to support the bottom-up steering techniques emphasised in new governance.⁹¹

One of the key challenges in governance systems identified in previous research is to find proper balance between formality, such as the use of legal means and strong, governmental steering, and informality, such as dialogues and softer steering instruments.⁹² A clear legislative framework serves as a foundation when implementing a new, often multi-level governance organisation wherein each actor is properly empowered and supported by formal rules and an administrative system.⁹³ Along those lines, decentralised management requires clearly-defined roles and responsibilities, including formalised rules for decision-making. The role of central Government is foremost to coordinate and organise complex governance networks rather than on steering and controlling lower-level authorities.⁹⁴ Important to note, however, is that some degree of governmental steering is needed to support organisations built upon governance ideas.⁹⁵ In other words, new governance does not equate to zero governmental involvement. By providing a multi-level organisation with a proper institutional framework that includes clear delegation of responsibilities and authoritative mandates, the chances of achieving designated goals will increase significantly. The fact that administrative arrangements and distribution of responsibilities in order to implement an EU-Directive falls under the institutional autonomy of the particular Member State, does not prevent governmental measures in this regard.⁹⁶

In environmental governance, the role of the State has been described as tripartite, with the State providing definitional guidance, participatory incentives and enforcement capability.⁹⁷ Definitional guidance means defining governance arrangements, for example in terms of scope and anticipated outcomes,

⁹¹ C.f. K. A. Armstrong, *The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance*, Current Legal Problems, 2011, 64, pp. 184 and 212.

⁹² See e.g. P. Björk et al, n. 14, p. 124; G. Hedlund and S. Montin (eds), n. 60, pp. 13–14.

⁹³ See e.g. L. J. Lundqvist, n. 86, pp. 414 and 421; A.W. Hall, 'Water and governance,' In: G. Ayre and R. Callway (eds.), *Governance for sustainable development – a foundation for the future* (Earthscan, 2005), pp. 119–124.

⁹⁴ G. Hedlund and S. Montin (eds), n. 60, pp. 13–14.

⁹⁵ Same opinion J. Pierre and G. Sundström, n. 12, p. 14; P. Hall and K. Löfgren, n. 15, p. 203.

⁹⁶ For a closer discussion of the institutional autonomy of EU member states see M. Bergström, n. 1, p. 998.

⁹⁷ N. Gunningham, *Environmental law, Regulation and Governance: Shifting Architectures*, Journal of Environmental Law, 2009, 21 (2), pp. 207–208.

extent of participation and funding arrangements. Participatory incentives refer to the State's ability to organise and fund such arrangements. Enforcement capability refers to the mechanisms necessary to ensure that obligations are fulfilled by all actors involved.⁹⁸ In this light, environmental governance within EU Member State legal systems must also provide sufficient control measures and proper feedback functions, so as to ensure practical implementation of actions decided upon.⁹⁹

As mentioned above, legal solutions need to serve as a foundation in water management, not least due to the fact that, in many cases, such a foundation is the best way to actually achieve results in the form of improved environmental performance. A combination of different instruments is, thus, most effective: mixing, *inter alia*, information-based strategies with traditional regulation and legal enforcement, since 'many, less interventionist strategies are far less likely to succeed if they are not underpinned by direct regulation.'¹⁰⁰ With this backdrop I hold that the fundamental role of legal rules in any management system must be re-established, so as to support flexible governance solutions and decentralised decision-making without jeopardising effective enforcement of prescribed actions headed towards set environmental objectives.

5. CONCLUSIVE REMARKS

In this article I have argued that the shift from 'government' to 'new governance' in EU environmental law and policy is causing problems in national implementation of the WFD and other EU framework legislation. I have reasoned that, somewhat simplified, EU Member States have been previously accustomed to legally-binding, top-down regulation focusing on specific environmental problems and currently what EU Member States face are long-term, vague objectives within the scope of framework Directives, supplemented with non-legally-binding guidance concerning implementation. One solution to the existing gap between environmental objectives and performance, due to this shift in steering from the EU, is that EU Member States must pick up where the EU has left off, specifying vague EU framework legislation through clear Member State rules. In most Member States this re-nationalisation process, occurring primarily under the flag of subsidiarity and partially under a sustainable development paradigm, has not yet resulted in the necessary adaptation of existing legal frameworks and water administrations.

⁹⁸ Ibid.

⁹⁹ See L. Gipperth and R. Elmgren, n. 48, p. 161.

¹⁰⁰ N. Gunningham, n. 97, p. 208; See also K. Bosselmann, *Losing the Forest for the Trees: Environmental Reductionism in the Law*, Sustainability, 2010:2, p. 2427.

In the case of the WFD, much of the related practical implementation is delegated to experts and officials of administrative authorities within EU Member States, and the process is strongly guided by the informal administrative CIS network. This situation creates a highly-professionalised management culture, which, in part, can explain the lack of formal rules supporting water administrations at the Member State level, as shown by the Swedish case. From a legal perspective, these informal administrative networks can be questioned; their legal foundation is virtually non-existent, whilst their practical implications are quite significant. A system that circumvents central national authority in this way has the potential to lack legitimacy, transparency and accountability. However, most importantly it raises questions of legality and objectivity; can such important legal values be guaranteed in a system that leaves to administrative authorities the very task of interpreting their own responsibilities, under the flag of decentralisation and flexibility? In light of such uncertainties, perhaps it is time for legitimate, transparent EU Member State Governments to recapture their primary responsibilities and due control.

As a suggestion, a fundamental role of the legal system is to provide formal, institutional arrangements and legal solutions to fall back on when and if informal structures, such as dialogues and collaborative processes, are not working satisfactorily in terms of achieving designated goals. In the situation of the WFD, this would be in the form of the achievement of environmental objectives headed towards good water status, which currently are not happening in a satisfactory way in Sweden. A solution to the implementation problem at hand involves the creation of a formal system that is precise enough to both solve potential conflicts of interests and ensure that prescribed measures are enforced through clear legal means, such as intermediate targets upheld by legal sanctions. In summary, there seems to be a need for a renaissance in the fundamental role of national legal orders alongside an increase in traditional, centralised Government solutions in the context of the European Union and new governance systems, which is particularly evident in water management.