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# Country report

## Gender equality



Sweden

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# **Country report**

## **Gender equality**

How are EU rules transposed into national law?

### **Sweden**

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Reporting period 1 January 2019 – 31 December 2019

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## 1 Introduction

### 1.1 Basic structure of the national legal system

The authority to enact laws is vested in the Swedish Parliament (the *Riksdag*). The Government, however, has the power to issue decrees concerning less important matters. To some extent this power stems directly from the Instrument of Government (1974:152), one of Sweden's four constitutional laws but the Government can also be granted authority to issue decrees by means of acts of law passed by Parliament. Legal instruments relating to the personal status of private subjects or the personal and economic relations between private subjects – that is, matters of civil law – fall under the exclusive competence of Parliament and must thus be regulated by law.<sup>1</sup> Employment legislation falls under this category. Neither local nor regional authorities have any legislative powers in this field.

As regards the law-making process, in Sweden the groundwork in the preparation of bills is laid by commissions of inquiry, legal experts in the ministries, and Parliamentary standing committees. Legislative initiative lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.<sup>2</sup> Another alternative is that Parliament, on the basis of bills introduced by individual members, requests that an inquiry should take place concerning legislation on a certain issue. Swedish legislative commissions, likely to prepare any bill of importance, are responsible for carrying out detailed inquiries published in a special series known as Swedish Government Reports (*Statens offentliga utredningar, SOU*). To a certain extent, inquiries into matters of legislation are carried out at the ministry principally concerned, with the assistance of the ministry's own officials.

The most important part of Parliament's legislative work is performed within standing committees. The committees deal with the Government's bills and with Parliament Members' bills containing various amendments. This results in a committee report. The bill and the report are subsequently dealt with at a plenary session of Parliament which, after a debate, votes on the bill.

The Swedish law-making process thus generates a voluminous body of printed material which is important in applying the legislation. Given the care taken in these materials to formulate the reasons and intent of the law, it becomes natural for the courts, the authorities and individual lawyers to rely on them as important sources of interpretation.

Primary responsibility for the enforcement of legal rules devolves upon the courts and the various administrative authorities. As in other European countries, the court system occupies a special position. The difference between adjudicatory and administrative authorities is less pronounced in Sweden than in most European countries, although there is a clear borderline between the courts and the administrative agencies.

As for the *general courts*, Sweden has a three-tier hierarchy: the district courts (*tingsrätt*), the courts of appeal (*hovrätt*), and the Supreme Court (*Högsta domstolen*). As a general principle it may be said that the general courts enforce civil law and criminal law legislation. *The Labour Court* is a special court with the task of resolving labour disputes.

The national administration is conducted by the Government and the various ministries and is organised in a well-developed network of administrative authorities. The central administrative agencies have a relatively independent position regulated in general by instructions handed down by the Government. In the area of discrimination there is now a 'single' Equality Ombudsman (*Diskrimineringsombudsmannen*, hereinafter DO) covering not only gender discrimination but also other protected grounds such as ethnicity, religion, sexual orientation, disability and age.

<sup>1</sup> Article 2 of Chapter 8, Instrument of Government.

<sup>2</sup> Article 3 in Chapter 4 of the Instrument of Government.

## 1.2 List of main legislation transposing and implementing the directives

The main legislation transposing and implementing EU gender equality law is:

- *Föräldraledighetslagen* (1995:584) (The Parental Leave Act), implementing Directive 92/85/EEC.
- *Diskrimineringslagen* (2008:567) (The Discrimination Act), implementing Directive 79/7/EEC, Directive 2010/41/EU, Directive 2004/113/EC, Directive 2006/54/EC, Directive 92/85/EEC, Directive 97/81.
- *Socialförsäkringsbalken* (2010:110) (The Social Security Code) implementing Directive 2010/41/EU, Directive 92/85/EEC.

## 1.3 Sources of law

The concept 'source of law' has an extensive application, and its content is not firmly decided.<sup>3</sup> There is no legal regulation of the sources of law, apart from the constitutional provision in Chapter 1 Section 1 of the Instrument of Government stating that all public power is exercised under the laws. For international conventions, Sweden applies a dualistic approach; international legal norms are not applied by the domestic authorities and may not be invoked before domestic courts until they have been transformed into national law.<sup>4</sup>

Constitutional and then statutory laws, which must be interpreted in conformity with EU law, are at the top of the hierarchy of the legal sources. Within the field of labour law, collective agreements also belong to this top-level category, along with the individual employment contract. Other sources of law; preparatory works, precedents, customs, legal scholarship are combined in the interpretation of what is existing law. As regards these other legal sources, there are different views as to whether there is a strict hierarchy between them, and, if so, what the actual content of this hierarchy should be.

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<sup>3</sup> Bergholtz, G. and Peczenik, A. (1997) 'Precedents in Sweden', in: MacCormick, D.N. and Summers, R.S. (eds.) *Interpreting precedents: a comparative study*, Aldershot, Ashgate/Dartmouth 1997.

<sup>4</sup> Melander, G. (1995) 'Sweden', in: Scheinin, M. (ed.), *International Human Rights Norms in the Nordic and Baltic Countries*, Kluwer Law International, Dordrecht. The State is bound by the convention already from the time of ratification.

## **2 General legal framework**

### **2.1 Constitution**

#### 2.1.1 Constitutional ban on sex discrimination

The Instrument of Government (1974:152) Chapter 1 Section 2(5) and Chapter 2 Section 13 addresses sex discrimination.

Chapter 1 Section 2 states that it is an obligation for public entities to counteract, at all times, all discrimination on – among other grounds – the ground of sex/gender. This is more of a policy statement than a rule and cannot be adhered to in legal proceedings other than as a supporting argument in a legal complaint.

Chapter 2 Section 13 states that a 'law or other regulation may not imply negative differential treatment on the grounds of gender.' There is, however, also an exception for positive action: '... unless this differential treatment is part of efforts to promote equality between men and women or with regards to military or similar services'. This rule, too, is addressing the legislator as such and cannot be a ground for an individual complaint resulting in damages.

#### 2.1.2 Other constitutional protection of equality between men and women

There is no other constitutional protection of equality between men and women.

### **2.2 Equal treatment legislation**

As of 1 January 2009, there is a 'single non-discrimination act' in place – the Discrimination Act (hereinafter DA) (*Diskrimineringslagen* (2008:567)). It covers not only sex/gender but also 'transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age' in Chapter 1 Section 1. Both with regard to the grounds and the areas of society covered, the DA clearly exceeds the requirements of EU law.

### **3 Implementation of central concepts**

#### **3.1 General (legal) context**

##### 3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

In 2017, the Inquiry concerning a Stronger Status and Improved Living Conditions for Trans People delivered its report to the Government.<sup>5</sup> The inquiry highlighted that the current, binary definition of sex as referring to men and women could lead to difficulties for transgender persons. The report puts forward a number of examples, such as the risk of involuntarily getting their transidentity or trans background revealed to the public; the fact that people who cannot or do not want to identify as a man or woman are invisible in the statistics; and that this group does not get legal recognition because their gender identity is not recognised by the State. The inquiry has proposed that the government appoint an investigation to explore the possibility of introducing a third legal gender in Sweden, including gender-neutral social security numbers. To date, the Government has not initiated such an investigation.

##### 3.1.2 Other issues

There are no other issues to report.

##### 3.1.3 General overview of national acts

The Discrimination Act (DA) (*Diskrimineringslagen* (2008:567)).

##### 3.1.4 Political and societal debate and pending legislative proposals

In 2019, #metoo was still high on the agenda in political and societal debate. In addition, the issues of men's violence against women, and honour-based violence and oppression have received particular attention.

There are no pending legislative proposals concerning gender equality.

#### **3.2 Sex/gender/transgender**

##### 3.2.1 Definition of gender and sex

Chapter 1 Section 5(1) of the DA defines sex as the fact 'that someone is a woman or a man.' In addition, it is stated – in Section 5(2) – that 'a person who intends to change or has changed the sex they belong to is also covered by sex as a ground of discrimination.'

##### 3.2.2 Protection of transgender, intersex and non-binary persons

Transgender, intersex and non-binary persons are protected under a special ground covered by the DA. This ground is defined as when 'someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex', Chapter 1 Section 5(2).

Should the person consider a change of sex, Chapter 1 Section 5(2) also provides protection. It states that 'a person who intends to change or has changed the sex they belong to is also covered by sex as a ground of discrimination.'

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<sup>5</sup> Government Report SOU 2017:92.

### 3.2.3 Specific requirements

In order to benefit from legal non-discrimination protection, no special requirements have to be fulfilled.

## 3.3 Direct sex discrimination

### 3.3.1 Explicit prohibition

Direct sex discrimination is explicitly prohibited in national legislation. Chapter 1 Section 4 of the DA contains a set of definitions, among them, direct discrimination, meaning:

'That someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.'

This definition is designed in close parallel with that of the Recast Directive (2006/54) itself. The author of this report considers it to comply with EU law.

### 3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination is only indirectly – and tacitly – covered by the DA ban on direct sex discrimination as interpreted in line with the CJEU case law on these matters. There is thus no explicit reference to pregnancy and maternity in the Discrimination Law (2008:567). The Swedish implementation can be – and has been<sup>6</sup> – criticised for not being sufficiently transparent.

### 3.3.3 Specific difficulties

To the knowledge of the author, there are no specific difficulties in applying the concept of direct sex discrimination.

## 3.4 Indirect sex discrimination

### 3.4.1 Explicit prohibition

Indirect sex discrimination is explicitly prohibited in national legislation. Chapter 1 Section 4 of the DA contains a set of definitions, among them, indirect discrimination, which is defined as when:

'someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, .... at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.'

This definition is designed in close parallel with that of the Recast Directive (2006/54) itself. The author of this report considers that it complies with EU law.

### 3.4.2 Statistical evidence

Statistical evidence is sometimes used to establish a presumption of indirect sex discrimination.

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<sup>6</sup> Compare Julén Votinius, J. (2011) 'Troublesome Transformation. EU Law on Pregnancy and Maternity Turned into Swedish Law on Parental Leave', in: Rönmar, M. (ed.), *Fundamental Rights and Social Europe*, Hart Publishing, Oxford.

According to the definition, people of a certain sex must be placed at a particular disadvantage by the provision, criterion, or procedure in order for it to be indirectly discriminatory, meaning that there should be a considerable difference. This can, but must not necessarily, be proven by statistical evidence. One example of the use of such statistical evidence is the case No. 87 decided by the Labour Court in 2005. In this case the employer, Volvo, required applicants for certain positions to be 163 centimetres or taller. This was found to amount to indirect discrimination against women, since 28.2 % of all women were excluded as compared to only 1 % of all men.

#### 3.4.3 Application of the objective justification test

In the view of the author of this report, the justification test is correctly applied in national case law. One example is the case No. 87 decided by the Labour Court in 2005, just referred to in the above Section 3.4.2. In this case, the height requirement for applicants for certain positions at a car-producing company, 163 centimetres, was found to be to the detriment of women as a group, based on statistical evidence. Since the employer could not prove in a satisfactory way that the height requirement was really justified by health and safety reasons – less risk of injury when operating certain machinery – the requirement was not deemed to be objectively justified and was thus considered indirectly discriminatory.

#### 3.4.4 Specific difficulties

To the knowledge of the author, there are no specific difficulties in applying the concept of indirect sex discrimination.

### 3.5 Multiple discrimination and intersectional discrimination<sup>7</sup>

#### 3.5.1 Definition and explicit prohibition

Neither the concept of multiple discrimination nor that of intersectional discrimination is expressly addressed in Swedish law. Multiple discrimination claims may be facilitated by the fact that the DA is a 'single non-discriminatory act' and that discrimination only requires that disadvantageous treatment have a connection<sup>8</sup> with a covered ground; there is thus no requirement of a proper causal link between the ground and the disadvantageous treatment. There may well be multiple reasons for specific treatment although none of them alone is enough to actually 'cause' this treatment! However, the current case law does not really confirm such a positive effect, as illustrated in the next section.

#### 3.5.2 Case law and judicial recognition

There are only a few cases on multiple discrimination in Swedish case law, none in terms of intersectionality. The two cases Labour Court 2009 No. 11 and 2006 No. 96 both concerned discrimination on the grounds of gender and ethnicity. Both cases were lost by the applicant since she could not prove that she was in a similar position to that of the male comparator. The case Labour Court 2010 No. 91 concerned the grounds of age and gender. A 62-year-old woman applying for a job as a career coach at a public employment office was not called for an interview, nor was she eventually employed. The Labour Court found discrimination on both grounds to have taken place in relation to the interview and age discrimination in relation to the employment. Discrimination compensation was set fairly high – at SEK 75 000 (approx. EUR 7 000), a sum not expressly argued in terms of

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<sup>7</sup> See for more information Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law* European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>8</sup> This wording is part of the very definition of the ban on direct discrimination.

multiple discrimination, however. The case provides certain room for a discussion on an element of intersectionality – among those interviewed were not only men with fewer merits and younger women with fewer merits, but also a man of equal age. From an intersectional perspective, it would seem reasonable to consider the possibility that the woman had been discriminated against because she was an elderly woman, thus on the combined ground of age and gender.

### 3.6 Positive action

#### 3.6.1 Definition and explicit prohibition

Positive action in relation to sex/gender is already provided for at the constitutional level through Chapter 2 Section 13 of the Instrument of Government. There is no other definition than that the differential treatment at stake is 'part of efforts to promote equality between men and women.'

In the DA the scope for positive action is provided for, on an area by area basis, in a number of special provisions in its Chapter 2. All these separate rules cannot be listed here but will be described in the different sections below whenever relevant. Normally these rules, too, are formulated as 'measures that contribute to efforts to promote equality between women and men' – see Chapter 2 Section 2.2 with regard to working life.

Also to be mentioned here is, however, the special Swedish concept of 'active measures' regulated in Chapter 3 of the DA. Such measures concern working life and education, respectively, and aim to create inclusive and accessible workplaces and educational institutions. In 2017, the provisions on active measures in the Discrimination Act were revised. Up until then, the employer's or education provider's work on active measures were to be carried out in three-year cycles (or, before 2008, once every year). The three-year cycle is now repealed; instead the employer or education provider must continuously and actively seek information on needs that may arise in relation to different grounds for discrimination. The aim of the investigation is to gain knowledge on the general level of the needs represented within the organisation. It is not meant to map out ethnicity, religion, sexual orientation or other personal conditions on the individual level, and shall not increase the registration of personal data.<sup>9</sup> The information gathered must then be transposed into active measures to create an inclusive and accessible workplace or educational institution. Employers with at least 25 employees, and education providers, are required to document all elements of their work on active measures.<sup>10</sup>

#### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

Positive action is conceptualised as 'measures that contribute to efforts to promote equality between women and men', see for instance DA Chapter 2 Section 2(2) and Chapter 2 Section 6(1). Positive action is thus regarded as a means to an end, where 'equality between men and women' is the end.

There is no statutory definition of the term. In the preparatory works of the Discrimination Act (2008:567), the Government stated that positive action refers to specific measures that: amount to preference, advantages or preferential treatment for neglected or underrepresented groups; aim to achieve actual gender equality (*reell jämställdhet*) in practice for persons belonging to the group in question; are temporary in the sense that they are only to be applied as long as they are necessary; and may, but do not have to be, applied.

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<sup>9</sup> Government Bill Prop. 2015/16:135, p. 37.

<sup>10</sup> Government Bill Prop. 2015/16:135, p. 32.

### 3.6.3 Specific difficulties

The rules on positive action (not the rules on 'active measures' in Chapter 3 of the DA) are voluntary in character – they allow both public and private employers to apply such measures within the scope of the law.

Over the years, however, there have been some uncertainties about what positive action really means. For a long time, it was considered that there was specific scope for positive action also in cases where there was a clear difference in merits between two applicants of the opposite sex as long as both were sufficiently competent for the position at stake and the preferred sex was underrepresented. This was the background to the famous *Abrahamsson* case – case C-407/98 – before the CJEU.<sup>11</sup> In this case, the CJEU ruled on a Swedish regulation to promote gender equality in academia. The Court found that the requirement in the regulation to appoint a person of the underrepresented sex 'who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex' was disproportionate, and therefore unlawful. In the same case, however, the CJEU also held that the Swedish administrative practice applied in the public sector – according to which the rule of preference for the underrepresented sex is applied when candidates possess 'equivalent or substantially equivalent merits' – was in accordance with Community law. The current rule in Chapter 2 Section 2(2) of the DA is now interpreted – should it be applied – in line with the case law of the CJEU.

Another famous set of cases concerned the area of higher education. There is a rule permitting positive action in order to promote gender equality in Chapter 2 Section 6(1). It only applies to education other than that referred to in the Education Act – i.e. it applies to pre-schooling, higher education, etc., but not to basic schooling – and in relation to access to the education at issue. In the area of higher education, there was previously specific legal scope for local selection rules with regard to the admission of new students in the Ordinance of Higher Education. Some universities applied selection criteria which gave preference to the underrepresented sex (normally men) when the merits were equal. The selection criteria concerning admission to the veterinary programme worked to the detriment of women: for applicants with equal merits, the positions were distributed through a weighted lottery in which male applicants were given an 85 % chance of winning. As a result, in the group of applicants covered by the lottery, all persons admitted to the programme were men. Consequently, 44 complaining women were considered to have been discriminated against by the district court,<sup>12</sup> a decision which was later confirmed by the Court of Appeal.<sup>13</sup> The court of appeal questioned the lawfulness in the selection criteria applied, as the outcome of the criteria was that no women were admitted in this group. The Court of Appeal added that even if the selection criteria might be permitted, the detrimental effect that the criteria had on women was disproportionate in relation to the very limited positive effect that the selection criteria had on gender equality in the educational programme and in the labour market.

### 3.6.4 Measures to improve the gender balance on company boards

There is no quota legislation regarding women's representation on company boards. In September 2016, a government ministry report (Ds 2016:32) suggested an amendment to the Companies Act (*Aktiebolagslagen 2005:551*) to increase the share of women on company boards.<sup>14</sup> Following the report, the Government declared as its intention to present a legislative proposal, requiring at least a 40 % representation of each sex on boards of companies listed on the stock exchange. Due to lack of support in Parliament,

<sup>11</sup> C-407/98, *Abrahamsson and Anderson*, [2000] ECR I-05539 ECLI:EU:C:2000:367.

<sup>12</sup> Uppsala, District Court of Uppsala, case T 3897-08.

<sup>13</sup> Svea Hovrätt, Appeal Court of Svea Hovrätt, case T 3552-09.

<sup>14</sup> Ministry report Ds 2016:32, *Könsfördelning i bolagsstyrelser* (Gender balance on corporate boards) available (in Swedish only) at: <https://www.regeringen.se/4a58e0/contentassets/d5335167a2ee4e17b4dd025c3a78b784/jamn-konsfordelning-i-bolagsstyrelser-ds-201632>.

the Government later changed its plans and decided not to present any proposal on the matter.

As for now, there is the code of conduct 'Swedish Code on Corporate Governance' which is valid for private and public limited-liability companies listed at the OMX Nordic Exchange in Stockholm and NGM Equity, which is monitored by the Swedish Corporate Governance Board.<sup>15</sup> The Code includes a rule (4.11) stating that 'an equal distribution among the sexes shall be the goal.' The Code is based on the principle of 'comply or explain'. This means that a company may deviate from the provisions in the Code and choose another solution, provided that it 1) clearly states that it has not complied with the rule, and 2) explains both the alternative solutions that have been chosen and the reasons for this. This is to be done yearly in the annual corporate governance report of the company.<sup>16</sup> The supervision of individual companies regarding the application of the Code is done by the stock exchanges on which the companies' shares are listed, in accordance with the listing agreement of the stock exchange in question.

In the Eurostat statistics, the key indicator of gender representation on corporate boards is the proportion of women involved in top-level business decision-making, i.e. in the *largest* companies in the Member States. In April 2016, the average share of women on the boards of the largest companies in Sweden was 36.9 %.<sup>17</sup> As for *all* Swedish companies listed in the Stockholm stock market exchange, the share of women on the boards was almost 32 % in 2016.<sup>18</sup> The boards of the Stockholm stock exchange will be equal within the next 10 years if the progress continues, and if the dramatic growth from last year continues, equal boards might be realised in just 4 years' time.<sup>19</sup>

Since spring 2019, a majority (54 %) of the companies fully or partly owned by the Swedish state have a female company board chair. Of the total 300 company board members in these companies, 47 % are women and 53 % are men.

### 3.6.5 Positive action measures to improve the gender balance in other areas

There is no legislation as regards positive action measures to improve the gender balance in other fields, e.g. in political candidate lists or political bodies. However, in 1988, the Parliament (*Riksdag*) decided on intermediary targets on women's presentation in government agencies.<sup>20</sup> The goal of 40 % women was reached in 1995, and the goal of 50-50 gender distribution was reached in 2015. The numbers refer to boards, advisory councils, committees and foundations where the government appoints all or part of the members.<sup>21</sup>

In addition, the representation of women in the Swedish Parliament as well as the Swedish Government is close to 50 %. This relative gender balance was achieved voluntarily and without the need to resort to gender quotas. During recent decades, a general practice among political parties has emerged whereby every second candidate for election is a woman (the main motive being public opinion or general expectations among voters).

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<sup>15</sup> Swedish Corporate Governance Code (*Svensk kod för bolagsstyrning*), available at: <http://www.corporategovernanceboard.se>.

<sup>16</sup> Ch 10 Sec 1 of the Swedish Corporate Governance Code. The statutory requirement to present a corporate governance report follows from Ch 6 Sec 6-9 of the Annual Accounts Act (1995:1554).

<sup>17</sup> [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm);  
[http://eige.europa.eu/gender-statistics/dqs/indicator/wmidm\\_bus\\_bus\\_wmid\\_comp\\_compbm](http://eige.europa.eu/gender-statistics/dqs/indicator/wmidm_bus_bus_wmid_comp_compbm).

<sup>18</sup> Government Report Ds 2016:32, p. 13.

<sup>19</sup> The Allbright Foundation is an independent body that continuously maps business leaders and boards to highlight the issue of representation, with focus on how to reach solutions. Allbright Foundation (2015) *Wanted: 220 Women*, available in English at: [http://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/5700bcc4f699bbaade54e3aa/1459666119191/ENG\\_So%CC%88kes%2C+220+kvinnor.pdf](http://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/5700bcc4f699bbaade54e3aa/1459666119191/ENG_So%CC%88kes%2C+220+kvinnor.pdf).

<sup>20</sup> Government Bill Prop. 1987/88:105.

<sup>21</sup> <https://www.regeringen.se/rapporter/2018/11/konsfordelningen-i-statliga-myndigheters-styrelser-och-insynsrad-m/>.

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

It should be noted that, with regards to harassment and sexual harassment, the DA works along three different lines. First, the ban against *discrimination* applies in cases where the harassment or sexual harassment is conducted by the employer. Secondly, there is a duty on the employer to *investigate allegations and take measures against* harassment and sexual harassment in cases where the perpetrator is a co-worker. An individual employee may base a legal claim before a court on both these provisions. Finally, the DA also contains an obligation for employers to take *active preventive measures* to create an inclusive and accessible workplace. This obligation does not correspond to any particular rights for individual employees. Instead, the requirement on employers in this area is a matter for the supervisory activities of the Equality Ombudsman.

Both the concept of harassment and the one of sexual harassment are defined as discrimination in the DA, Chapter 1 Section 4(4). It is defined as discriminatory:

'conduct that violates a person's dignity and that is associated with one of the grounds of discrimination: sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.'

In the author's opinion, this definition meets the requirements of EU law despite the fact that it does not explicitly mention the behaviour to be unwanted – this is rather a restricting criterion and so is the Directive's precision that harassment shall have the purpose or effect of creating a hostile environment.

### 3.7.2 Scope of the prohibition of harassment

Since harassment is considered to be discrimination, as such, it is covered by all the prohibitions on discrimination in the DA. This means that the prohibition covers the six grounds in addition to sex/gender (transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age). It also means that it is applicable in a number of areas other than working life, i.e. education, labour market policy activities and employment services, starting or running a business and professional recognition, membership of certain organisations, goods, services and housing, health and medical care and social services, social insurance systems, national military and civilian service and public employment (performance).

### 3.7.3 Definition and explicit prohibition of sexual harassment

Just like harassment, sexual harassment is also regarded as discrimination and is defined in Chapter 1 Section (4)5 of the DA as 'conduct of a sexual nature that violates someone's dignity.' In the opinion of this author, this definition meets the requirements of EU law. The definition of sexual harassment goes even further and thus covers not only sex/gender but all the regulated grounds.

### 3.7.4 Scope of the prohibition of sexual harassment

Since harassment is considered to be discrimination, as such, it is covered by all the prohibitions on discrimination in the DA. It covers not only six grounds in addition to sex/gender ('transgender identity or expression',<sup>22</sup> ethnicity, religion or other belief,

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<sup>22</sup> This ground covers non-binary and agender persons. However, the word trans (*könsöverskridande*) is used in the law. The preparatory works makes a certain point of using this terminology, and not using the concept 'gender identity or expression'. The provision covers anyone who does not identify as a man or a woman, or identifies as or expresses their gender belonging differently from what traditionally has been the norm for women or men respectively. In addition, the preparatory works state that this ground for

disability, sexual orientation or age) but also a number of areas other than working life, i.e. education, labour market policy activities and employment services, starting or running a business and professional recognition, membership of certain organisations, goods, services and housing, health and medical care and social services, social insurance systems, national military and civilian service and public employment (performance).

### 3.7.5 Understanding of (sexual) harassment as discrimination

Both harassment and sexual harassment amount to discrimination according to Chapter 2 Section 4 of the DA. As such, harassment / sexual harassment is also covered by the prohibition of reprisals regulated in Chapter 2 Sections 18 and 19 of the DA. Reprisals are not by definition regarded as discrimination. In many situations, though, reprisals can be regarded as part of the harassing act itself and thus discrimination.

### 3.7.6 Specific difficulties

To the knowledge of the author, there are no specific difficulties in applying the concepts of harassment or sexual harassment.

## **3.8 Instruction to discriminate**

### 3.8.1 Explicit prohibition

Instructions to discriminate is a form of discrimination in Chapter 1 Section 4 of the DA and defined as follows: orders or instructions to discriminate against someone in a manner referred to in points 1-5 (of that same section, i.e. direct discrimination and so forth) that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person.

### 3.8.2 Specific difficulties

To the knowledge of the author, there are no specific difficulties in applying the concept of instructions to discriminate.

## **3.9 Other forms of discrimination**

No other forms of discrimination relating to sex or gender is prohibited by law.

## **3.10 Evaluation of implementation**

To the knowledge of the author, the only shortcoming as regards the implementation of the concepts referred to in this chapter concern the protection against discrimination in connection with pregnancy. Pregnancy discrimination falls under direct sex discrimination, but is not explicitly mentioned in the law.

## **3.11 Remaining issues**

There are no remaining issues to report.

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discrimination may not be strictly defined, and that there is no exhaustive list of the groups that may be covered by the ground.

## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### 4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

In 2015, the Delegation for Gender Equality in Working Life delivered a report compiling existing information about how work conditions differ for women and men, and suggesting initiatives to promote equality in the workplace and reduce the pay gap between women and men. The report found that the most important explanation with regard to the wage gap between women and men is that they often work in different professions, in combination with the 'compressed' wage structure<sup>23</sup> in female-dominated sectors, which makes the financial reward for professional development, for broadening of expertise or for taking on managerial tasks, very small in these professions.

Since 2007, the Swedish Mediation Office (*Medlingsinstitutet*) delivers an annual report on the gender pay gap.<sup>24</sup> The 2017 report highlights the fact that the pay gap between men and women has been decreasing year by year for the past decade. There are several explanations for this. One explanation is a reduction in the significant gender segregation related to labour market sectors. Another explanation is that the proportion of employees with post-secondary education has increased more among women than men, and a third explanation is that more women become managers.

In 2017, the Expert Group on Public Economics (ESO) delivered a report on the gender pay gap, focusing on discrimination as an explanatory factor.<sup>25</sup> The report states that although the unexplained part of the gender pay gap cannot straightforwardly be interpreted as a measure of discrimination in the labour market, women both earn less in female-dominated occupations than men do in male-dominated occupations, and earn less in male-dominated occupations than equally qualified men do when they work in the same occupations. Exactly how much of the unexplained wage differences that can be attributed to employers' discriminatory behaviour cannot be determined in the study. The author points out that many of the differences are due to the fact that men and women choose different educational orientations, different amounts of hours worked, different parental leave withdrawals, i.e. that women's and men's labour market supply differs.<sup>26</sup>

#### 4.1.2 Surveys on the difficulties of realising equal treatment at work

To the author's knowledge, there are no surveys on the difficulties in realising equal treatment at work.

#### 4.1.3 Other issues

There are no other issues to report.

#### 4.1.4 Political and societal debate and pending legislative proposals

In the aftermath of the #metoo movement in 2017, a number of trade unions, organisations and authorities initiated investigations regarding sexual harassment, out of

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<sup>23</sup> 'Compressed' means that the difference between the higher salaries and the lower salaries is less salient. Among men, the wage range is greater.

<sup>24</sup> The National Mediation Office in Sweden is a central government agency under the Ministry of Employment, tasked to mediate in labour disputes, to promote an efficient wage formation process, and to oversee the provision of public statistics on wages and salaries.

<sup>25</sup> The Expert Group on Public Economics (ESO) consists of eight members (the board) supported by a secretariat. Formally, ESO is a committee attached to the Ministry of Finance.

<sup>26</sup> [https://eso.expertgrupp.se/wp-content/uploads/2014/12/ESO-rapport-2017\\_5.pdf](https://eso.expertgrupp.se/wp-content/uploads/2014/12/ESO-rapport-2017_5.pdf). In Swedish with English summary.

which some have resulted in reports.<sup>27</sup> Others are still pending. In late 2017, the Government allocated EUR 12 million to promote the work of (primarily) authorities with issues related to #metoo during 2018. In a follow-up survey, public service media reported the authorities had not managed to make use of this extra funding. About half of the allocated money had been paid back to the State. The money spent had been used mainly on conferences, brochures, and web-based education programmes. Criticism has been made of the very tight timeframe within which the money had to be spent, and the investment has been described as merely 'symbol politics'.<sup>28</sup> In 2019, the Government extended the goals initiated in 2018, of the Equality Ombudsman and the Work Environment Authority, regarding dissemination of information about the provisions on preventing sexual harassment.

## 4.2 Equal pay

### 4.2.1 Implementation in national law

The principle of equal pay for equal work means that:

'on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work should take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions',

Chapter 3 Section 10 Discrimination Act 2008:567.

### 4.2.2 Definition in national law

There is no definition of pay in national law. In the early preparatory works, the government defines pay with reference to the interpretation of the CJEU in cases such as C-262/88 *Barber* and C-236/98 *Jämställdhetsombudsmannen*.<sup>29</sup> In the first case, the CJEU defined pay as 'any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer'. The second case was about how pay is to be compared – as a lump sum or each element separately. According to the CJEU, every share of wages – i.e. basic pay, an inconvenient-hours supplement, etc. – must be compared separately. The Swedish Labour Court's interpretation of the concept follows these cases.

### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

There is no explicit implementation of Article 4 of the Recast Directive 2006/54. The Swedish regulation on this point in the DA is very subtle in its design: pay discrimination is covered by the general prohibition on discrimination (on any ground covered by the DA, among them sex) in working life, in its Chapter 2 Section 1.

This 'tacit' way of regulating pay discrimination without explicitly addressing the matter of pay can be criticised for being insufficiently clear.

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<sup>27</sup> See, for instance, Karlsson, M. and Ström, G. (2019) *#Obekväm arbetstid. En rapport om #Metoo-uppropet inom handeln* (#Inconvenient working hours. A report on the #metoo-call in the retail sector), The Commercial Employees' Union (Handels) available (in Swedish only) at: <https://handels.se/globalassets/centralt/aktuellt/rapport-obekvamarbetstid.pdf>.

<sup>28</sup> The survey is described in an article of the webpage of the Swedish Television, <https://www.svt.se/nyheter/svt-nyheter-avslojar-miljonfiasko-for-regeringens-metoo-satsning-klarar-inte-av-att-anvanda-pengarna>.

<sup>29</sup> Case C-262/88, *Barber* [1990] ECR I-01889, ECLI:EU:C:1990:209, and case C-236/98 *Jämställdhetsombudsmannen* [2000] ECR I-2189, ECLI:EU:C:2000:173.

#### 4.2.4 Related case law

There is no related case law to be reported on.

#### 4.2.5 Permissibility of pay differences

There is no exception from the prohibition against pay discrimination.

#### 4.2.6 Requirement for comparators

In principle, a comparator is required, since the definition of (direct) discrimination refers to a 'comparable situation.' According to the same definition, a hypothetical comparator is enough. To the knowledge of the author there is, however, no relevant case law to refer to.

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

Chapter 3 Section 2 paragraph 2 contains a definition of work of equal value:

'Work is to be regarded as of equal value to other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work should take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.'

Swedish case law contains a few old but really instructive cases as regards the comparison of work claimed to be of equal value: Labour Court Case 1996 No. 41 as compared to Labour Court Case 2001 No. 13. Both concerned the Örebro County and the health sector. The issue at stake was whether the pay of a midwife was discriminatory as compared to that of a hospital technician. The Labour Court did not exclude the possibility that the work of a midwife and a hospital technician could be compared and found this to be of equal value, but in the case at stake it did not find the method used by the Equality Ombudsman (DO) to be sufficient to prove this. No discrimination was thus found to be in play. The second case, too, concerned the alleged pay discrimination of a midwife as compared to a hospital technician. In this case, the midwife and the technician were indeed found to perform work of equal value following an assessment in terms of knowledge and skills, responsibility, effort and working conditions (now part of the definition of work of equal value according to the 2008 Discrimination Act). A prima facie case of pay discrimination was thus found. The Labour Court, however, accepted the employer's objection that the higher wages of the technician were due to market arguments – there was an alternative labour market for technicians with significantly higher wages, an acceptable motive to adjust the wages of technicians at a somewhat higher level. There was thus no discrimination. This is to compare with the 'parallel' Labour Court Case 2001 No. 76, in which a nurse and a hospital technician were compared and their work was found to be of equal value, but the wage difference could be explained by market reasons – thus, also in this case the wage discrimination claim was dismissed.

#### 4.2.8 Other relevant rules or policies

There are no other relevant rules or policies that provide such parameters.

#### 4.2.9 Job evaluation and classification systems

In Sweden, wages and wage structures are regulated by the social partners in autonomous collective bargaining. Collective agreements must be in accordance with the requirements in the Discrimination Act 2008:567, but there is no statutory requirement for the employer to apply a systematic or factor-based job evaluation system when deciding work that is to

be regarded as of equal value to other work. Nevertheless, such systems are frequently applied.

There are job classification systems developed by employers' organisations, trade unions, by the social partners together or by external consultants.

Normally, job classification is dealt with in collective agreements. In the public sector, social partners have jointly developed a job classification system called BESTA, as a tool in the wage formation process on the sectoral and local level, and the foundation for the jointly collected wage statistics. On the basis of BESTA, the partners have created a methodological support system to be used in pay audits, called BESTA vägen (best way).<sup>30</sup> Outside the state sector, IPE (internal position evaluation) and BAS (*Befattnings- och arbetsvärderingssystem* – position and work evaluation system) are two frequently used systems, but there are also many other systems in place.<sup>31</sup>

It should be noted that there is no clear information available as to the extent of the use of different job classification systems. Until 2008, the Equality Ombudsman collected information on the tools that were used. As these investigations have ceased, it is not possible to answer the question.

Until 2015, the Equality Ombudsman also provided specific tools to assist in establishing gender neutral job evaluation schemes, pay systems etc; the wage evaluation scheme *Analys Lönelots* and a more general tool for gender equality analysis of wages *Jämställdhetsanalys av löner – steg för steg*.

#### 4.2.10 Wage transparency

National (case) law does not address wage transparency.

#### 4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

To some extent Sweden can be said to have implemented the transparency measures set out by the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through the rules on active measures in Chapter 3 of the DA. Chapter 3 Section 11 requires the employer to carry out yearly pay audits. The audit must comprise a survey and analysis of wages and wage differences, referring in particular to the comparison between:

- women and men performing work that is to be regarded as equal;
- groups of employees performing work considered to be dominated by women and groups not dominated by women performing work of equal value;
- employees performing work considered to be dominated by women and a group of employees performing work not considered to be women-dominated but better paid despite the work requirements being deemed to be lower.

The pay audits must be carried out in collaboration with employee representatives, Chapter 3 Section 11. Organisations with 10 or more employees are required to document the work made in relation to salary surveys. This information is not to be sent or reported

<sup>30</sup> Available (in Swedish only) at <https://www.arbetsgivarverket.se/besta/om-besta2/>.

<sup>31</sup> Kumlin, J. (2016) *Sakligt motiverad eller koppling till kön? En analys av arbetsgivares arbete med att motverka osakliga löneskillnader mellan kvinnor och män*. Report 2016:1, Equality Ombudsman (DO), Stockholm, p. 52. Available at <https://www.do.se/globalassets/publikationer/rapport-sakligt-motiverad-eller-koppling-till-kon2.pdf>. English summary available at <https://www.do.se/globalassets/publikationer/rapport-summary-justified-pay-related-gender.pdf>.

anywhere. However, it must be sent to the Equality Ombudsman upon request (Chapter 4 Section 3 of the Discrimination Act 2008:567).

This can also be said to be done through the requirement for the Swedish Mediation Office – a public/state authority – to monitor wage developments on the Swedish labour market including equal pay developments. It must be stressed here that in Sweden, pay – and pay structures – is for the social partners to decide through collective bargaining. There is, for instance, no such thing as a minimum wage in Sweden or any other proper pay regulation.

There is no right to information for individual employees based on the Discrimination Act. Pay and pay structures are a matter exclusively for the social partners, to be bargained in collective agreements. According to Chapter 3 Section 12 of the Discrimination Act (2008:567), a trade union to whom the employer is bound by collective agreement has the right to obtain the information needed to collaborate on the monitoring of wage statistics for equality, and the survey and the yearly analysis of pay levels. To the extent that this information is related to an individual employee, it is subject to rules on professional secrecy in the Co-determination Act (1976:580) (or, for public servants, the Public Access to Information and Secrecy Act (2009:400)).

As regards public employees, the matter is different. According to the principle of the right of access to public documents, all public employers are obliged to provide information on request. Appeal can be made to the Parliamentary Ombudsman (JO).

#### 4.2.12 Other measures, tools or procedures

In December 2017, the Government launched the Action Plan for Gender Equal Life Incomes, addressing a number of areas connected to life income, such as education, gender segregation in the labour market, gender pay gap, leave of absence and working hours, work environment and sick leave, and parental leave. This action plan describes the current situation and problems in a number of issues that affect life income (such as educational level, gender segregation in the labour market, pay differences, absence due to sickness and parental leave), and presents the measures that the Government has implemented, or plans to implement, in order to reduce income differences between women and men.<sup>32</sup>

In 2019, the Swedish National Audit Office (Swedish NAO) scrutinised the system for pay audits to combat pay differences between men and women. The investigation showed that whereas it is unproblematic for employers to compare wages of employees who perform the same work, both the employers' organisations and (to a somewhat lesser extent) the trade unions state that is very difficult for employers to compare the wages of employees who perform work of equal value. One reason is that, to make a comparison, it is necessary to establish that some work is female dominated and that other work is male dominated. If the majority of the employees are of the same sex, it will not be possible to define two separate groups to compare. The same applies if the groups of employees are fairly gender balanced.<sup>33</sup>

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<sup>32</sup> See <https://www.regeringen.se/4b0b1f/contentassets/f26c798733cd41258ec06ff8bd8186d5/handlingsplan-jamstallda-livsinkomster>.

<sup>33</sup> Swedish National Audit Office (2019), *Diskrimineringslagen krav på lönekartläggning – ett trubbigt verktyg för att minska löneskillnaderna mellan könen* (The requirement for pay audits in the Discrimination Act. A blunt tool for decreasing the pay gap between men and women), Stockholm, p. 52 f, available (in Swedish only) at <https://www.riksrevisionen.se/rapporter/granskningsrapporter/2019/diskrimineringslagens-krav-pa-lonekartlaggning---ett-trubbigt-verktyg-for-att-minska-loneskillnader-mellan-konen.html>.

### **4.3 Access to work, working conditions and dismissal**

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Chapter 2 Section 1 in the DA states that the personal scope of the prohibition on discrimination extends to anyone who, with respect to the employer:

'1. is an employee, 2. is enquiring about or applying for work, 3. is applying for or carrying out a traineeship, or 4. is available to perform work or is performing work as temporary or borrowed labour.'

Swedish law does not, however, contain a definition of the concept of an employee – this is decided by the Labour Court's case law on the matter applying a fairly 'holistic' view, taking into consideration all relevant characteristics of the situation in question. The Swedish concept of an employee is known to be relatively broad in an international perspective.

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

The ban on (any form of) discrimination covers any decision-making by the employer in working life with no specification whatsoever (Chapter 2 Section 1 DA).

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

The exception on occupational activities (Article 14(2) of Recast Directive 2006/54) is implemented in Chapter 2 Section 2.1 of the DA, which states that the prohibition on discrimination does not prevent 'differential treatment based on a characteristic associated with one of the grounds of discrimination if, when a decision is made on employment, promotion or education or training for promotion, this is by reason of the nature of the work or the context in which the work is carried out.'

The exception as such is thus generally formulated – in close parallel to that of Article 14.2 of the Recast Directive itself. There has been no case law whatsoever with regard to this exception and this has not been changed since its introduction in 2009.

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

Pregnancy and maternity discrimination is – in line with the case law of the CJEU – covered by the general ban on discrimination in Chapter 2 Section 1 of the DA – however, not in explicit terms, as indicated above. In addition, there is a prohibition on unfavourable treatment related to parental leave in any form (pregnancy, maternity, paternity or parental) in Section 16 of the (1995:584) Parental Leave Act.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Please see the description under 4.3.4.

#### 4.3.6 Particular difficulties

According to the Swedish Employment Protection Act, an employer is free to interrupt a probationary employment at any time, and the decision does not have to be motivated. In relation to pregnant employees in probationary employment, this means that the

obligation of Article 10 of Directive 92/85 to cite duly substantiated grounds for dismissal in writing is not upheld in Swedish law.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

With regard to positive action measures in working life (Article 3 of Recast Directive 2006/54), the DA permits measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment. For more information, please see 3.6.

#### **4.4 Evaluation of implementation**

The implementation is, in the opinion of this author, satisfactory as regards the proper provisions of the Directive. The implementation of the Recommendation on Pay Transparency has been done in relation to the Swedish industrial relations system. This means, for instance, that there is no individual right to information on wages. Instead, this right to information belongs to the trade union. In addition, although the social partners have chosen to include the matter of equal pay in collective bargaining, there is no provision requiring them to do so. This is because the principle of the autonomy of the social partners prevents the State from interfering in the collective bargaining process.

#### **4.5 Remaining issues**

There are no remaining issues to be reported.

## 5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)<sup>34</sup>

### 5.1 General (legal) context

#### 5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In 2017, an inquiry on gender equality in parenthood delivered its report, Government Report 2017:101.<sup>35</sup> The inquiry's remit was to review the provisions on parental leave and parental insurance, to identify problems and propose measures to make the parental insurance system increase its contribution to promote equality, i.e. gender equality in the labour market and gender-equal parenthood. The inquiry noted that the labour market is still highly gender segregated. In comparison to men, women more often have temporary employments, take out more parental leave and are more likely to work part time. Women are overrepresented as regards sick leave, and generally have greater responsibility for the family and domestic work. In relation to this, the inquiry noted that women's average earnings are lower, and that there are fewer women than men in senior management positions, despite that women have, on average, a higher level of education than men. Among other measures, the inquiry proposed an increase of the number of days in the parental insurance that cannot be transferred to the other parent.

#### 5.1.2 Other issues

The strength of Swedish legislation is without doubt the right to shorter working hours for employees with small children. At the same time this may provide 'a trap' for women traditionally taking on the larger part of family responsibilities. One can discuss – and this is done in Sweden – the basic design of the public parental benefits scheme, as it is based not on individual rights but on a family basis, the latter being rather uncharacteristic of Swedish welfare rights, generally speaking. Reforms have successively been made introducing the now non-transferable 'daddy months'. Since January 2016, the non-transferable period of parental leave amounts to 90 days. According to a 2017 report, men's share of parental benefit days still (2016) amounts to 27 % whereas women use 73 %.<sup>36</sup> Men's share has been steadily increasing since the scheme's introduction back in 1974, and particularly since the successive introduction of the non-transferable days. The proportion of couples who share the parental leave equally between them ('equal parenting') has more than tripled, evolving from 4 % in 2000 to 14 % in 2013. Statistics and scholarly work have identified the educational level and higher earnings – especially for mothers – as important for men's take up of parental leave. Parents working in the public sector share the parental leave more equally than those in the private sector. The same applies for those living in a metropolitan area, and parents born in Sweden.<sup>37</sup> The report emphasises the importance of enhancing the position of the mother.<sup>38</sup> Until now,

<sup>34</sup> See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>35</sup> Government Report *Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen*, SOU 2017:101, available (in Swedish with English summary) at: [https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017\\_101\\_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf](https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017_101_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf).

<sup>36</sup> *De jämställda föräldrarna* (2013:8).

<sup>37</sup> See, among many others, Ma, L., Andersson, G., Duvander, A-Z., Evertsson, M. (2018), *Forerunners and Laggards in Sweden's Family Change Fathers' Uptake of Parental Leave, 1993-2010*. Working Paper 2018:01, Stockholm University Linnaeus Center on Social Policy and Family Dynamics in Europe, SPaDE. [https://www.su.se/polopoly\\_fs/1.371819.1518171269!/menu/standard/file/WP\\_2018\\_01.pdf](https://www.su.se/polopoly_fs/1.371819.1518171269!/menu/standard/file/WP_2018_01.pdf).

<sup>38</sup> See also National Social Insurance Office, *Föräldrapenning. En analys av användandet 1974-2011* (Parental leave benefit. An analysis of the take-up 1974-2011) Social Insurance Report 2012:9.

the unequal figures have normally been attributed to persistent pay discrimination and labour-market segregation between the sexes.

Another important factor is day-care facilities for children, in Sweden provided from the age of one until well beyond the initial school age as a guarantee for working parents, and provided at a subsidised maximum cost. There is a regulation on special state funding for municipalities, applying a maximum fee (*maxtaxa*) for public childcare facilities.<sup>39</sup> Such facilities are also guaranteed within three months after the child reaches the age of one. Day-care facilities for children are therefore to a considerable extent subsidised by public means. These rights are provided at municipality level.

### 5.1.3 Overview of national acts on work-life balance issues

- The (2008:567) Discrimination Act (DA).
- The (1995:584) Parental Leave Act (PLA).
- The (2010:110) Social Security Code (SSC).

### 5.1.4 Political and societal debate and pending legislative proposals

No legislative proposals are currently pending in this area.

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

There is no definition of a pregnant worker in Swedish law.

### 5.2.2 Obligation to inform employer

There is no obligation for a pregnant woman to inform her employer of her condition.

### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no such case law.

### 5.2.4 Implementation of protective measures (Articles 4-6 of Directive 92/85)

Protective measures, as mentioned in Articles 4-6 of Directive 92/85, are implemented through a combination of the (1977:1160) Working Environment Act (*Arbetsmiljölagen*, AML), the (1995:584) Parental Leave Act (PLA) and the (2010:110) Social Security Code (SSC) and its scheme on pregnancy benefits in Chapter 10.

According to the AML, an employer has a general duty to provide a good working environment adapted to the individual employee and her (in this case) individual needs – Chapter 2 Section 1 and Chapter 3 Section 3 of the AML. There is also a special duty for the Government – or an appointed public agency – to provide for a special regulation of categories of workers with special needs – Chapter 4 Section 6 of the AML. The Swedish Work Environment Authority (*Arbetsmiljöverket*) has against this background adopted special, more detailed, requirements in relation to pregnant and breastfeeding workers – see AFS 2007:5, *Gravida och ammande arbetstagare* (Pregnant and Breastfeeding Workers), with later amendments.

The PLA thus provides a right to a transfer and/or leave in a case where a pregnant or breastfeeding woman has been prohibited from continuing her regular work under a

<sup>39</sup> The (2001:160) Ordinance on state financing for municipalities applying a maximum fee for childcare facilities.

regulation issued under Chapter 4, Section 6 of the AML (Section 18 in the PLA), or otherwise cannot carry out physically demanding work duties (Section 19 in the PLA).

The SSC thus includes a special benefit scheme – *Graviditetspenning* (Pregnancy benefits) – for pregnant workers not being able to carry out their regular job and not being transferred to other suitable work according to the PLA. This scheme applies from day 60 of the pregnancy until 10 days before the expected date of confinement.

#### 5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85

There is no case law on these issues.

#### 5.2.6 Prohibition of night work

There is no prohibition against night work for pregnant women. However, a pregnant employee or an employee who has recently given birth may not perform night work if she exhibits medical certificates stating that such work would be detrimental to her health or safety, Swedish Work Environment Statute AFS 2007: 5, Section 9A.

#### 5.2.7 Case law on the prohibition of night work

There is no case law on this issue.

#### 5.2.8 Prohibition of dismissal

There is no explicit prohibition against dismissal particularly protecting pregnant women. However, any dismissal under Swedish law requires objective grounds / just cause according to Section 7 in the (1982:80) Employment Protection Act (EPA) (*Anställningsskyddslagen*). Since dismissal related to pregnancy/maternity implies direct discrimination, such dismissals are obviously not justified. They also amount to direct discrimination in accordance with the DA (Chapter 2 Section 1) and unfavourable treatment in relation to Section 16 of the Parental Leave Act. Moreover, Section 17 of the PLA states that if an employee is given notice of termination or is summarily dismissed solely for reasons related to parental leave under the Act, the notice of termination or summary dismissal shall be declared invalid if the employee so requests. Should the worker be dismissed on other grounds – such as redundancy – Section 11 of the EPA states that the dismissal must not be made effective until the worker has returned from full-time maternity/parental leave according to Sections 4-5 of the Parental Leave Act. The employment cannot thus cease during maternity leave, nor can maternity leave remuneration.

#### 5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during maternity or parental leave, the notice period will not start until the maternal or parental leave has come to an end, EPA Section 11.

#### 5.2.10 Employer's obligation to substantiate a dismissal

Any dismissal shall always be in writing and different formal rules apply depending on the grounds for dismissal, whether on personal grounds or for redundancy. At the request of the employee, the reasons for dismissal must be substantiated in writing by the employer (Section 9 of the EPA).

As explained above, under 4.3.6, a probationary employment can be interrupted at any time, and the decision does not have to be motivated, Section 6 EPA. Only in the case that the employee demonstrates circumstances that give reason to presume that the interruption has been discriminatory, the employer must show that discrimination did not

occur. In relation to probationary employment, the obligation of Article 10 of Directive 92/85 to cite duly substantiated grounds for dismissal in writing is thus not upheld in Swedish law.

#### 5.2.11 Case law on the protection against dismissal

In December 2018, the Swedish Labour Court ruled in a case on sex discrimination regarding the interruption of a probationary employment period for a woman shortly after she had given birth to a child (Swedish Labour Court judgment AD 2018 No 74). The woman had informed the employer about the pregnancy before she started the employment, and she had received positive feedback on her performances. According to the Swedish Employment Protection Act, an employer is free to interrupt a probationary employment at any time. However, if the employee demonstrates circumstances that give reason to presume that the interruption has been discriminatory, the Discrimination Act requires the employer to show that discrimination did not occur. In this case, the Swedish Labour Court also stated that the mere fact that an employer interrupts a probationary employment before the end of the trial period for a worker who is pregnant during the probationary period and have reduced work capacity as a result of pregnancy does not give cause to assume that the interruption was related to pregnancy. Thus, the Swedish Labour Court did not shift the burden of proof to the employer to show that discrimination or reprisals had not occurred. Instead, the discrimination claim was rejected. It bears noting that, apart from a brief mentioning of case C-177/88 Dekker, the Swedish Labour Court does not make any references to EU law. This is a deficit in the reasoning of the Court, which may have had an impact on the outcome of the case. The reasoning does not only lack a basis of the substantial case law...but also lacks reference to Article 10 of Directive 92/85 on the prohibition of dismissal and on the obligation to cite duly substantiated grounds for dismissal in writing.

### 5.3 Maternity leave

#### 5.3.1 Length

The right to maternity leave in relation to the employer is regulated in Section 4 of the PLA. It amounts to seven weeks prior to the estimated time for delivery and seven weeks after the delivery (of which two weeks are compulsory). Maternity leave is also provided during breastfeeding. The law does not stipulate a time limit on this, nor is anything stated about payment. It is likely that this depends on the employer.

#### 5.3.2 Obligatory maternity leave

The right to maternity leave in relation to the employer is regulated in Section 4 the PLA. It amounts to seven weeks prior to the estimated time for delivery and seven weeks after the delivery. Two of these weeks are compulsory; these two weeks can be chosen by the mother.

#### 5.3.3 Legal protection of employment rights (Articles 5, 6 and 7 of Directive 92/85)

According to Sections 18 and 19 in the PLA a pregnant, breastfeeding, etc., woman being transferred from her regular work has a right to maintain her employment benefits as usual.

#### 5.3.4 Legal protection of rights ensuing from the employment contract

According to Section 16.5 of the PLA an employer may not disfavour an employee for reasons related to parental (including maternity) leave with regard to pay or other terms of employment. However, there is no right to pay during the pregnancy and maternity leave if this is not specifically provided by the applicable collective agreement – which is

often the case. Pregnancy and maternity benefits are regulated in the (2010:110) Social Security Code.

### 5.3.5 Level of pay or allowance

Income-related pregnancy and maternity benefits correspond to sick leave benefits according to Chapter 12 Sections 18 and 19 of the (2010:110) Social Security Code (SSC). For mothers who are not employed / have no income there is instead a benefit at the lower guarantee level. Sickness benefits amount to 80 % of the income up to approximately EUR 49 000 per annum (Chapter 28 Section 7.1 compared to Chapter 12 Sections 22 and 26 of the SSC).

### 5.3.6 Additional statutory maternity benefits

There are no other statutory maternity benefits. However, virtually all collective agreements top up the parental and maternity leave benefits for employees who have an income above the 'ceiling' in the social security parental leave scheme described in Section 5.2.5 above (note that in Sweden, collective agreements apply to around 90 % of all workers). In 2014 a parental leave supplement was introduced in the collective agreements for blue-collar workers, covering all blue-collar workers in the state and municipality sector, and more than 90 % of the blue-collar workers in the private sector. A recent follow-up to this scheme shows that the take up of the supplement is gender neutral; since its introduction in 2014, 48 % of the recipients have been men and 52 % have been women.<sup>40</sup>

### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

The rules on maternity leave benefits are fully integrated into the general parental benefit system. There are no qualifying requirements in relation to the parental leave system, thus regulating the right to leave in relation to the employer. However, there are certain requirements in relation to the Parental Benefit system in the SSC. Out of the 480 days with parental benefit in total that parents receive in relation to a child, only 390 days are at income-replacement level. These days require that one is insured for sickness benefits in cash through employment. Otherwise one will only have a right to parental benefits at the lower, guarantee, level. For the first 180 days at income-replacement level there is an additional requirement of having been insured for sickness benefits in cash through employment continuously for 240 days immediately prior to the birth of the child. The right to sickness benefits in cash is based on presumed employment for the forthcoming year.

### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

According to Section 15 of the PLA, an employee may discontinue her or his leave and resume work to the same extent as before the leave. Also, Section 16 prohibiting any unfavourable treatment for reasons related to parental leave will apply.

### 5.3.9 Legal right to share maternity leave

The maternity leave (14 weeks) is included in the total amount of days covered by the parental leave insurance, Section 4 of the PLA. For parents with joint custody, the 480 days with parental leave insurance on sick leave benefit level belong to an equal amount to each parent, SSC Section Chapter 12 Sections 12 and 15. All but 90 days may be transferred to the other parent, SSC Section Chapter 12 Section 17.

<sup>40</sup> Ingesson, T. (2017), *Extrapengar vid föräldradaghet. En utvärdering av föräldrapenningtillägget 2017, Stockholm (Extra money during parental leave. An evaluation of the supplement to the parental leave benefit 2017)*, The Swedish Trade Union Confederation LO.  
[http://www.lo.se/home/lo/res.nsf/vRes/lo\\_fakta\\_1366027478784\\_fpt\\_ht2017\\_pdf/\\$File/FPT\\_ht2017.pdf](http://www.lo.se/home/lo/res.nsf/vRes/lo_fakta_1366027478784_fpt_ht2017_pdf/$File/FPT_ht2017.pdf).

### 5.3.10 Case law

The Swedish Labour Court has ruled in a number of cases regarding pregnancy discrimination over the past 10 years. Referring to the case law of the CJEU, the Swedish Labour Court has held a firm line in acknowledging and safeguarding the prohibition against discrimination due to pregnancy and maternity leave. Nevertheless, with reference to the CJEU, in cases regarding wages during maternity leave, the Swedish Labour Court has stated that it is permitted to exclude employees on maternity leave from certain bonuses or additional payments that are paid on top of the ordinary wage.<sup>41</sup>

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

According to Chapter 11 Section 4.4 of the SSC, the concept of a parent covers adoptive parents equally. The same rules thus apply as those described in earlier sections. However, in this case the 'starting point' is the date of the child's entry into the adoptive parents' care – not the date of birth (Chapter 11 Section 7). This does not influence the length of maternity leave, which is 'included' in the maximum benefit of 480 days. Although an adoptive mother cannot take time off before the arrival of the adoptive child, the total number of days remains the same.

### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

The rules in Section 16 of the PLA prohibiting the unfavourable treatment of parents are related to the parental benefit system and this system applies equally to adoptive parents as to other parents (Chapter 11 Section 4 of the SSC).

### 5.4.3 Case law

There is no relevant case law on adoption leave.

## 5.5 Parental leave

### 5.5.1 Implementation of Directive 2010/18

Swedish law was considered to be already implementing the requirements of Directive 2010/18/EU.<sup>42</sup> This is done by the (1995:584) Parental Leave Act (PLA) concerning the right to leave and employment rights and by the (2010:110) Social Security Code (SSC) concerning the right to maternity/paternity/parental benefits. Also the (1982:80) Employment Protection Act (EPA) can be mentioned here.

### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

Both the right to leave according to the PLA and the public Parental Benefit system applies to all employers, whether private or public and regardless of the size of their activities.

### 5.5.3 Scope of the transposing legislation

The PLA covers all forms of contracts of employment – permanent, fixed-term, part-time, and so forth – and the Swedish concept of an employee is known to be very broad. The interpretation of the concept of an employee is ultimately made by the Swedish Labour Court (*Arbetsdomstolen, AD*) and is done in a 'holistic' way taking into account all important conditions of the actual working relationship.

<sup>41</sup> Swedish Labour Court AD 2009 nr 13 and 2009 nr 15.

<sup>42</sup> Compare Ministry Report Ds 2010:44, *Genomförandet av det nya föräldraledighetsdirektivet* (the implementation of the new Parental Leave Directive).

#### 5.5.4 Length of parental leave

There is a right to a total of 480 full days of benefit per child, including maternal/paternal and parental benefits (Chapter 12 Section 12 of the SSC) to be taken out until the child is 12 years of age (Chapter 12 Section 13 of the SSC). However, only 96 of these days can be taken out after the child is 4 years of age. Benefit days can be taken out as a whole, three quarters, half, one quarter or one eighth of a day. In this way, one full benefit day may equal a number of part-time working days!

#### 5.5.5 Age limits

For children born before 1 January 2014, parents are eligible for the parental leave benefit until the child has reached the age of 8 years or completed the first grade in elementary school. For children born after 1 January 2014, parents are eligible to 96 days of parental leave benefit until the child has reached the age of 12 years or completed the fifth grade of elementary school. 380 days must be taken up before the child has reached the age of 4 years.

#### 5.5.6 Individual nature of the right to parental leave

The right to leave is individual and equal for each of the parents. Some forms of leave require a right to parental benefit according to the SSC.

#### 5.5.7 Transferability of the right to parental leave

Generally speaking, parental benefit days can be transferred between the parents. However, there is a limitation – 90 days must be taken by each of the parents and are thus not transferable (60 days are non-transferable when the children were born before 1 January 2016, Government Bill Prop 2014/15:124).

#### 5.5.8 Form of parental leave

Parental benefit days – a total of 480 per child – can be taken as whole, three quarters, half, one quarter or one eighth of a day. Generally speaking, this is done in accordance with the wishes of the employee, although the distribution of leave shall be discussed with the employer. And, where this is not inconvenient for the employee, the employee shall take leave in such a manner that the employer's activity may continue without substantial disturbance (Section 14 of the PLA).

#### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

There are no qualification requirements for the right to parental leave according to the PLA.

#### 5.5.10 Notice period

According to Section 13 of the PLA, an employee shall give notice to her or his employer no later than two months prior to the commencement of the leave or, if this is impracticable, as quickly as practicable.

#### 5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

As regards full-time leave, the employer has no right to postpone the parental leave. With regard to reduced hours (part-time leave), when an agreement cannot be reached, the employer decides. In these cases, the leave must be distributed according to the wishes of the employee:

'if such distribution does not cause substantial disturbance to the employer's activity, and the employer may never, without the employee's consent, distribute the leave in any manner other than spreading it over all days of the working week, dividing the leave during the working day or distributing it to any other time other than the beginning or end of the working day' (Section 14 of the PLA).

Whenever such a decision is made in any manner other than according to the wishes of the employee he or she shall be informed as shall the employee's local trade union – if practicable no later than two weeks prior to the commencement of the leave. This issue can then be the subject of collective negotiations and is – ultimately – for the Labour Court to decide.

#### 5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no such arrangements for small firms.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

There are no special rules on the care of disabled children integrated into the Parental Benefit Scheme of the SSC with the exception that 'temporary parental benefit' when caring for a sick child – 60 days a year per child – is also available for children who are 12-16 years of age when the child is disabled. Moreover, there is always a right to such benefits concerning a severely ill child not yet 18 years of age. Otherwise, there is a special benefit scheme that applies in the case of disabled children. According to Chapter 22 of the SSC there is special 'care support' (*vårdbidrag*) if a child is ill or has a disability requiring care during at least six months, or, in the case where the disability implies extra costs. This care support, too, is listed under 'family benefits.' Such care support can amount to a maximum of 250 % of the 'basic amount' (in total approximately EUR 12 250) a year, depending on the need for care. Also, other disability schemes may apply, such as the right to assistance according to Chapter 51 of the SSC.

For parents of a severely ill child, the right to parental leave and the number of days with temporary parental leave benefit (on sick leave benefit level) is unlimited, SSC Chapter 13 Sections 30 and 31.

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

To some extent there are special rules for adoptive parents. One such rule is found in Chapter 11 Section 8 of the SSC, stating that the parental benefit scheme in general applies to children resident in Sweden. In the case of adoption, it is enough that the future adoptive parent is a Swedish resident – then the child is considered to be resident in Sweden. This rule is thus favourable to adoptive parents since it is not required that the child is already a resident in Sweden when they start using their benefit days. Generally speaking, the special rules concerning adoptive parents are of a 'technical' nature in order to make the situation 'equal' to that of biological parents.

#### 5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Article 16 in the PLA contains a prohibition on unfavourable treatment in any form related to parental leave. This ban implies a right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with the employee's employment contract. It also implies that acquired rights continue to apply during the parental leave and the employee's rights, for instance to an increase in wages, must also be taken into account during leave. During leave the employment relationship continues and there are

no changes in social security coverage. Moreover, Section 17 contains a special rule that if an employee is given notice of termination or is summarily dismissed solely for reasons related to parental leave, the notice of termination or summary dismissal shall be declared invalid if the employee so requests. It is also not regarded as a justified dismissal under the (1982:80) EPA.

#### 5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

According to Section 15 of the PLA, an employee has the right to resume her or his work to the same extent as before the leave. Any unfavourable treatment related to parental leave is banned under Section 16. However, there is also an exception: 'this prohibition does not apply if the different terms and conditions or different treatment are a necessary consequence of the leave' (Section 16 paragraph 2). This exception is to be interpreted strictly – it refers only to 'necessary' consequences. One example is when an employee on part-time leave must be temporarily transferred due to such leave not being compatible with the organisation of the specific work at issue.<sup>43</sup>

#### 5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

There is no express rule on the maintenance of rights acquired or in the process of being acquired by the worker. However, according to Section 15 of the PLA an employee has the right to resume her or his work to the same extent as before the leave. Any unfavourable treatment related to parental leave is banned under Section 16.

#### 5.5.18 Status of the employment contract or relationship during parental leave

In case of permanent employment, the contract is maintained when the employee is on parental leave. If one has reduced hours one maintains one's original – maybe full-time – employment as a 'basis'. If one has a temporary position, on the other hand, this will expire as originally agreed upon. The statutory parental benefit system is not dependent on employment but rather on previous employment. However, additional parental wages according to a collective agreement may well depend on being in employment with an employer bound by the agreement.

#### 5.5.19 Continuity of entitlement to social security benefits

Healthcare benefits in cash are income-related in Sweden and require a previous income (but not necessarily ongoing employment) and are paid out whenever sickness is a hindrance for work. Parental benefits require that one is actually taking care of the child in question, something that cannot be done if sickness is a hindrance.

Healthcare benefits in kind are based on residence in Sweden.

#### 5.5.20 Remuneration

Parental leave is not necessarily remunerated by the employer in Sweden. On the contrary, the basic parental leave scheme is a public social security benefit regulated in the SSC and financed by taxes. Employers finance it on a collective level as a payroll tax. However, since there is 'a ceiling' on the social security parental benefit, extra parental wages are important in many sectors of the labour market. Such wages are a part of collective bargaining. As described in detail above in Section 5.2.6, today, almost all employees are covered by collective agreements that top up the parental and maternity leave benefits for incomes above the 'ceiling' in the social security scheme.

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<sup>43</sup> Compare further Prop. 2005/06:185 p 79 ff and Julén Votinius, J. (2007), *Föräldrar i arbete*, Makadam Förlag, pp. 271-278.

#### 5.5.21 Social security allowance

There is a public parental leave scheme regulated in the Swedish SSC. Benefits are paid at two levels: an income-related benefit at sickness benefit level (80 % of incomes up to 10 basic amounts, a total of about EUR 49 000 per annum) or at guarantee level (SEK 180 or approx. EUR 20) per day.

#### 5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

Generally speaking, it is the author's opinion that the Swedish Parental Benefit scheme and the related rights to parental leave are quite generous and far beyond the requirements of EU law.

#### 5.5.23 Case law

The prohibition against unfavourable treatment in the Parental Leave Act (1995:548) deviates from the view that otherwise applies in labour law; that employees who perform similar or comparable tasks shall be treated equally. According to the Parental Leave Act (1995:584), an employee who is on parental leave shall be entitled to virtually the same conditions and benefits as the employees who have been in office and carrying out their duties – despite that the employee on parental leave have not been carrying out any work at all. In this sense, the introduction of the prohibition in the Parental Leave Act was quite a radical legislative measure. In a number of cases in the last 10 years, the Swedish Labour Court has applied the prohibition in this radical way. It should be noted, though, that the case law displays some uncertainty as to whom should be regarded as the comparator to the employee on parental leave (a person who is in office, a person who is on sick leave or on leave for other reasons, or a person who is not employed by the employer at all, Swedish Labour Court judgments AD 2009 No 15, AD 2009 No 45 and AD 2015 No 74).

### **5.6 Paternity leave**

#### 5.6.1 Existence of paternity leave in national law

In connection with the birth of a child there is a special right to 10 days off for the father of the child, no special conditions are attached – Chapter 13 Sections 10 and 14 of the SSC. Benefits are paid out under the parental benefits scheme regulated in the SSC. Out of the 480 days of parental leave related to each child, there are also 90 days of benefits at income-replacement level that are not transferable between the parents – generally called the three 'daddy months,' since mothers, generally speaking, still take out most of the benefit days or about 70 % thereof.

#### 5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Paternity leave is thus part of the general parental leave scheme regulated in the SSC and protected in the PLA and its Section 16, prohibiting any unfavourable treatment in relation to parental leave. Moreover, Section 17 contains a special rule that if an employee is given notice of termination or is summarily dismissed solely for reasons related to parental leave the notice of termination or summary dismissal shall be declared invalid if the employee so requests. Such dismissals are also protected under the Employment Protection Act which requires just cause for any dismissal.

#### 5.6.3 Case law

There is no case law on this matter.

## **5.7 Time off for *force majeure***

### 5.7.1 Time off for *force majeure*

The Act on the right to leave for urgent family reasons (1998:209) provides a right to time off due to urgent family reasons that require the presence of the employee. The urgent circumstances relate to severe illness or injury of a close family member, which includes persons outside the immediate family, such as grandparents. There are no explicit time limits to this right but its nature – related to serious illness or accidents making the employee's presence absolutely necessary – indicates that it is not for a long time.

The right to leave due to urgent family reasons applies to all employees, without any qualification period. There is no statutory right to be paid during the leave. However, most collective agreements include provisions on pay for a certain number of days, normally 10 days. The collectively bargained right to pay usually requires a qualification period.

### 5.7.2 Case law

The Swedish Labour Court has ruled on the Act on the right to leave for urgent family reasons (1998:209) in two cases.

In Swedish Labour Court judgement AD 2003 No 70, a nurse had requested four weeks' leave to take care of a 16-year-old niece who required constant supervision due to serious mental and social problems. When the request for leave was rejected, the nurse nevertheless stayed home from work to take care of her niece, and the county council therefore dismissed her. The Swedish Labour Court found that the Act on the right to leave for urgent family reasons (1998:209) was not applicable; the need for supervision of the niece had been long known to the nurse and the situation therefore did not constitute a case of *force majeure* (however, the dismissal was found contrary to the Employment Protection Act).

Swedish Labour Court judgement AD 2016 No 24 concerned an employee who had been absent from work for a couple of months to take care of his father in Iran, as the father had been injured in a traffic accident. The employer had granted the employee 10 days of paid leave, but after the 10 days, the employee continued to be absent and later he applied for 6 months' leave, which the employer rejected. In e-mails, the employer explained to the employee that the absence was not accepted and that it could lead to a dismissal. After having given him two more chances to return to work, the employer dismissed the employee. In this case, the Swedish Labour Court also found that the Act on the right to leave for urgent family reasons (1998:209) was not applicable; the employee had not succeeded in proving that the situation was urgent and that the employee's presence was absolutely necessary.

## **5.8 Care leave**

### 5.8.1 Existence of care (or carers') leave in national law

The regular parental benefit scheme in Chapter 13 of the SSC contains rules on the right to temporary parental benefit when caring for a sick child under the age of 12 – amounting to 60 days of benefit per child, per year. There is also a right to leave / reduced hours when caring for severely sick relatives according to the Act on leave for the care of relatives (1988:1465). This right to leave is related to special care benefits regulated in Chapter 47 SSC. The right to leave is for a maximum of 100 full benefit days – 240 days in the case of caring for a relative who has AIDS caused within the healthcare system (for example, in a hospital).

### 5.8.2 Case law

There is no case law on this matter.

## 5.9 Leave in relation to surrogacy

Surrogacy is not recognised in Sweden.

## 5.10 Flexible working time arrangements

### 5.10.1 Right to reduce or extend working time

According to the PLA there is always a right for employees, who are parents of a child up to a maximum of eight years of age, to make use of reduced working hours by up to one quarter (i.e. working 75 %) until the child reaches eight years of age (Section 7 PLA). This right thus also applies when no compensation/benefit is paid out – i.e. the employee chooses to take this leave at his/her own expense. There are no qualifying conditions related to this right. Additionally, there is always a right to leave when one has maternity/paternity/parental benefits paid out and these – as stated above – can be taken out on a very flexible, also part-time basis or as full, three quarters, half, one quarter or one eighth of a day.

These rights apply to all employers regardless of their size.

According to Section 15 of the PLA, an employee may discontinue her or his leave and resume work to the same extent as before the leave. Furthermore, Section 16 prohibiting any unfavourable treatment for reasons related to parental leave, will apply.

There are no special measures to encourage men to make use of reduced working hours apart from those that apply to the parental leave/benefit scheme as such, i.e. a number of non-transferable days, and so forth. To make parental leave less inconvenient for the parent earning more than the other (whether this is the father or the mother!) the 'ceiling' on the public parental benefits scheme was increased a few years ago, so that it is now 25 % above the 'ceiling' in sickness insurance.

### 5.10.2 Right to adjust working time patterns

There are two sets of rules on adjusted work time patterns: in relation to parental leave and in relation to leave to take care of sick relatives.

Parental leave can be taken as whole days or as parts of a day. Full-time parental leave must be distributed in accordance with the wishes of the employee, although the distribution of leave must be discussed with the employer. Where this is not inconvenient for the employee, the employee shall take leave in such a manner that the employer's activity may continue without substantial disturbance (Section 14 of the PLA).

For part-time leave (reduced working hours), if an agreement cannot be reached regarding how the leave will be taken, the employer must distribute the leave according to the wishes of the employee, if such a distribution does not cause substantial disturbance to the employer's activity. The employer may not without the employee's consent, distribute the leave in any manner other than spreading it over all days of the working week, dividing the leave during the working day or distribute it to any time other than the beginning or end of the working day.

Leave or reduced hours when caring for severely sick relatives according to the Act on leave for the care of relatives (1988:1465) relates to special care benefits regulated in Chapter 47 SSC. The right to leave is for a maximum of 100 full benefit days – 240 days

in the case of caring for a relative who has AIDS as a result of contracting HIV while under the care of the Swedish healthcare system (for example, while in a hospital) or who was infected by someone who contracted HIV in this way. The leave must be distributed in accordance with the wishes of the employee.<sup>44</sup>

#### 5.10.3 Right to work from home or remotely

There is no special regulation in Sweden on a right to work from home.

#### 5.10.4 Other legal rights to flexible working arrangements

There is no legislation whatsoever concerning flexible working time arrangements – this is regarded as an issue for the social partners and collective bargaining. Collective agreements may provide such working time arrangements. There is an abundance of collective agreements at all levels in Sweden – frequently regulating working time – and there is no possibility for the author to assess the contents of such agreements here. ‘Flexi-time’ providing a certain ‘time-span’ for starting and ending the working day and with certain room for adjustments over the working week or month, more or less generally prevails on the Swedish labour market, though, and especially so in white-collar work.

#### 5.10.5 Case law

There is no case law as regards flexible working arrangements

### **5.11 Evaluation of implementation**

Generally speaking, it is the author’s opinion that the Swedish Parental Benefit scheme and the related rights to parental leave are quite generous and far beyond the requirements of EU law.

### **5.12 Remaining issues**

In 2017, a government inquiry delivered a report reviewing the regulation on parental leave and parental insurance.<sup>45</sup> The report showed that parents who run companies of any form, generally take out less compensation from the parental insurance system than employees, despite the fact that they may have the same basic entitlement. The report concluded that this could largely be explained by reference to the regulations concerning sickness benefit qualifying income, and that a solution would require a broader and more in-depth review of the provisions concerning sickness benefit qualifying income than the inquiry’s remit allowed. In 2018, following this report, the time during which sickness benefit qualifying income is protected for persons starting up a company was extended from 24 to 36 months, the SSC Chapter 25 Section 9. It remains to be seen to what extent this legislative change will facilitate parental leave for parents who run companies.

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<sup>44</sup> Government Bill Prop. 1987/88:176 p. 119.

<sup>45</sup> Government Report *Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen*, SOU 2017:101, available (in Swedish with English summary at: [https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017\\_101\\_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf](https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017_101_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf)).

## **6 Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 General (legal) context**

#### **6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues**

There are no surveys or reports on the practical difficulties linked to occupational and/or statutory social security issues published in Sweden.

#### **6.1.2 Other issues related to gender equality and social security**

There are no other issues to be detected.

#### **6.1.3 Political and societal debate and pending legislative proposals**

There are no political or societal debates, nor pending legislative proposals, concerning occupational social security schemes.

### **6.2 Direct and indirect discrimination**

Occupational social security schemes are – in parallel with the case law of the CJEU – regarded as pay and are thus covered by the ban on (among other grounds) gender discrimination in the (2008:587) Discrimination Act (DA). This follows from Chapter 2 Section 1 of the DA, i.e. the general prohibition on all forms of discrimination in working life. This ban covers all types of employer decisions, among them on pay (or occupational social security schemes) being especially mentioned. A 'tacit' and thus not very transparent way of regulating! The main problem is that it may be difficult for non-lawyers (employers as well as employees) to immediately grasp the scope of the provision.

### **6.3 Personal scope**

As indicated above, there is no express regulation concerning occupational social security schemes – these are covered by the general ban on sex discrimination in working life in accordance with the case law of the CJEU. Typically speaking, this should cover the personal scope required by Article 6 in the Recast Directive. There is no case law.

### **6.4 Material scope**

As indicated above, there is no express regulation concerning occupational social security schemes – these are covered by the general ban on sex discrimination in working life in accordance with the case law of the CJEU. Typically speaking, this should cover the personal scope required by Article 7 of the Recast Directive. There is no case law.

### **6.5 Exclusions**

As indicated above, there is no express regulation concerning occupational social security schemes – these are covered by the general ban on sex discrimination in working life in accordance with the case law of the CJEU. The indirect effect of this is that situations such as the ones mentioned in Article 8.1.a and b are not covered despite there being an express exception.

## **6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54**

As indicated above there is no specific regulation or any case law concerning occupational social security schemes. Such collectively agreed schemes are, however, known to be gender-neutral in Sweden.

## **6.7 Actuarial factors**

Occupational pension schemes in Sweden are known to be gender neutral.

## **6.8 Difficulties**

There are, to the author's knowledge, no such difficulties.

## **6.9 Evaluation of implementation**

The implementation is, to the author's knowledge, sufficient.

## **6.10 Remaining issues**

There are, to the author's knowledge, no remaining issues.

## **7 Statutory schemes of social security (Directive 79/7)**

### **7.1 General (legal) context**

#### **7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)**

In 2014, a Government Report was launched on gender equality in the social insurance system (Government Report SOU 2014:74). The conclusion of the report was that despite the social insurances being gender neutral, they sometimes have different effects for women and men, as women and men live under partly different conditions. For instance: the construction of the guarantee pension means that this pension will lag behind both earned income and other pensions. This has gender aspects, as many women have, in whole or in part, their pension from the guarantee pension. The problem is the effect of the guarantee pension. It is designed according to principles of price indexing instead of income indexing. As a consequence, the guarantee pension is bound to lag behind both wages and other forms of pension.

Another example is that unemployment benefits are paid for only a short time, which is something that mainly affects women. This is because women often work in labour market sectors where part-time employment is more frequent, which means that many employees are part-time unemployed for long periods of time. Furthermore, the report states the need for a thorough investigation of the correlation between the ceilings in the social insurance and the distribution of parental leave, which is of importance for how the care of children and household work is distributed between men and women. As it is more common for men than for women to have an income above the ceiling, the ceiling affects men to a larger extent than women. This also means that the ceiling may discourage men from taking up parental leave.

#### **7.1.2 Other relevant issues**

There are no other relevant issues to be reported.

#### **7.1.3 Overview of national acts**

The national social security scheme is regulated in the Social Security Code (2010:110)

#### **7.1.4 Political and societal debate and pending legislative proposals**

There are no political or societal debates, nor any pending legislative proposals.

### **7.2 Implementation of the principle of equal treatment for men and women in matters of social security**

The (2008:567) Discrimination Act (DA) covers, according to its Chapter 2 Section 14 – among other areas of society – the Swedish social insurance system, regulated in the SSC, and unemployment insurance. The regulation in Section 14 paragraph 2 states that the prohibition of discrimination associated with sex does not prevent the application of provisions concerning a widow's pension or the payment of child allowance. There are no longer any widow's pensions in Sweden, though, apart from an old scheme covering a very reduced group due to transitional rules.

### **7.3 Personal scope**

Generally speaking, the Swedish social security system is individual and based on either residence or gainful activities, including both employment and self-employment. Many schemes – such as that on parental leave and pensions – include a guaranteed level

covering all Swedish residents and thus makes the coverage broader than required by Article 2.

#### **7.4 Material scope**

Generally speaking, the Swedish social security system is individual and based on either residence or gainful activities, including both employment and self-employment. There are no derived rights for spouses. There is no relevant case law.

#### **7.5 Exclusions**

National law has not applied the exclusions from the material scope as specified in Article 7 of Directive 79/7.

#### **7.6 Actuarial factors**

Sex is not used as an actuarial factor in Swedish statutory social security schemes.

#### **7.7 Difficulties**

To the knowledge of the author, there are no such difficulties. Nor is there any relevant case law.

#### **7.8 Evaluation of implementation**

The implementation is, to the author's knowledge, sufficient.

#### **7.9 Remaining issues**

There are, to the author's knowledge, no remaining issues.

## **8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 General (legal) context**

#### 8.1.1 Surveys and reports on the specific difficulties of self-employed workers

There are, to the author's knowledge, no such reports.

#### 8.1.2 Other issues

There are no other issues to be reported.

#### 8.1.3 Overview of national acts

- The (2008:567) Discrimination Act.
- The (2010:110) Social Security Code.
- The (1980:1102) Act on trading partnerships.
- The (2005:551) Joint-stock Company Act.

#### 8.1.4 Political and societal debate and pending legislative proposals

There are no political or societal debates, nor pending legislative proposals, concerning self-employment in Sweden.

### **8.2 Implementation of Directive 2010/41/EU**

The Swedish implementation is made in a complex way – often by regulations already in place – as reported by the Government in accordance with Article 16(3) of the Directive in Memorandum 2012-04-24 by the Labour-market Department. The main instruments mentioned in the memorandum are the (2008:567) Discrimination Act; the (2010:110) Social Security Code; the (1980:1102) Act on trading partnerships and the (2005:551) Joint-stock Company Act. The implementation by the 2008 Discrimination Act is rather subtle. The Act is a 'Single' Non-Discrimination Act covering 7 grounds of discrimination – among them sex – and 10 areas of society. It is truly horizontal in character – definitions are found in Chapter 1 whereas the prohibitions 'tacitly' covering all grounds as well as types of discrimination are found in Chapter 2. On the Swedish labour market there is a binary system as far as personalised work is concerned – one is either an employee or is self-employed. The concept of an employee is broad in range and covers all dependent work/workers. (As far as the concept of employee is concerned, Swedish labour law does not contain any statutory definition – instead the concept has developed through a combination of judicial interpretation and indications by the legislators in preparatory works. The courts apply a multi-factor test applied in a 'holistic' and also rather flexible manner). However, if not covered by the ban on discrimination in working life (of employed persons) the protection of the self-employed proper is 'divided' between the bans on discrimination in labour market policy activities (Chapter 2 Section 9), when starting or running a business and professional recognition (Chapter 2 Section 10), membership of certain organisations (Chapter 2 Section 11), providing goods and services (Chapter 2 Section 12), health (Chapter 2 Section 13) and in social security matters (Chapter 2 Section 14). This is done in a far from transparent way and without ever mentioning the concept of self-employment. According to the main Swedish commentary on the Discrimination Act<sup>46</sup> there is a reason to doubt whether this vague implementation of EU Law is satisfactory, as it is not sufficiently transparent. However, as far as the author understands, this remark would refer to the implementation of the Recast Directive rather than to that of Directive 2010/41.

<sup>46</sup> Fransson, S. and Stuber, E. (2015), *Diskrimineringslagen, En Kommentar*, 2nd ed., Norstedts, Stockholm p. 296.

## **8.3 Personal scope**

### 8.3.1 Scope

As explained in the previous section (8.2) in cases where a self-employed person is not covered by the ban on discrimination in working life (of employed persons), the protection is 'divided' between the bans on discrimination in labour market policy activities, in the starting or running of a business and professional recognition, as regards membership of certain organisations, in providing goods and services, and in health and in social security matters. It bears noting, however, that although covered by the DA, the Act does not explicitly mention the self-employed.

### 8.3.2 Definitions

Swedish law does not provide a specific definition of a self-employed person – they may be individual entrepreneurs or partners in a trading partnership or even the owner of a small joint-stock company. The character of self-employed is important mainly for taxation purposes but also concerning social security – and in contrast with employees (the binary divide). There are not necessarily any formalities with being an individual entrepreneur – anyone having a revenue as a result of an economic activity and not being employed is treated as being self-employed. For taxation purposes there is a definition of individual entrepreneur (*enskild näringsidkare*) implying 'economic activities carried out in a professional and independent way' (*Förvärvsverksamhet som bedrivs yrkesmässigt och självständigt*) (Chapter 13 Section 1(1) of the (1999:1229) Income Taxation Act). This is interpreted as requiring activities of some importance carried out on a continuous basis and in relation to several customers/clients. There are no regulations other than the ones described – thus no different categories, etc. The concept used is very broad and the author sees no problems with exclusion.

### 8.3.3 Categorisation and coverage

There are no special rules on different categories.

### 8.3.4 Recognition of life partners

Life partners or cohabitants, *sambor*, are recognised by Swedish law in much the same way as a marital spouse, without any formalities. This also applies to same-sex partners. Swedish social security – for instance, the parental leave benefit scheme (but also the pension scheme) – is individually based and there is often a guarantee level which applies to anyone who is legally resident regardless of their family status. Summing up, in the Swedish system people are either self-employed or employees (compare above), and this also holds true for spouses and cohabitants, i.e. helping spouses are – if not a business partner proper or running a business of their own – considered an employee in the business. (There is thus no exception or special treatment for family members in this regard. Taxation in Sweden is individual and any person has his/her individual rights to social security, etc.).

## **8.4 Material scope**

### 8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The provision has been transposed by Chapter 2 Sections 9 (labour market policy activities and employment services), 10 (starting or running a business and professional recognition) and 12 (the provision of goods and services) of the Discrimination Act. The same holds true for Article 4(2) and (3). No modifications were made as a result of the new Directive.

#### 8.4.2 Material scope

The material scope is more or less the same as that of the Directive. There is, however, a lack of transparency regarding the self-employed in Swedish law, and the author of this report would certainly not say that its scope is broader than EU law requires.

#### 8.5 Positive action

The 2008 Discrimination Act provides for positive action in that it 'does not prevent measures that contribute to efforts to promote equality between women and men' with regard to labour market policy activities and employment services (Chapter 2 Section 9 (2(1))). Nor does it 'prevent measures concerning support that contributes to efforts to promote equality between women and men' with regard to starting or running a business (Chapter 2 Section 10(3)). This author has no specific information, though, about such measures being put into practice. Special labour-market projects to promote the under-represented sex in certain areas are known to exist, though, and so are special projects on financing for women setting up a business as part of promoting more women entrepreneurs (compare the Governmental programme 'Promoting Women Entrepreneurs'). The author would imagine that such special initiatives are positive in increasing self-employment among women!

#### 8.6 Social protection

First, there is a general ban on (sex) discrimination concerning social security matters including unemployment insurance in the 2008 Discrimination Act Chapter 2 Section 14 and another one concerning health and medical services (Chapter 2 Section 13). These prohibitions also cover (tacitly) the self-employed.

The Swedish social security system as such is mainly regulated by the (2010:110) Social Security Code. It is mandatory and individual in character. Basically, there are residence-based and income-based benefits. The residence-based benefits apply to all residents whether self-employed or not and concern, among others, child benefits, child-support, parental leave benefits at the guarantee level, invalidity benefits at the guarantee level, guarantee pensions and elderly support. Income-based benefits include, among others, pregnancy benefits, parental leave benefits, sickness benefits in cash, invalidity benefits, and pensions. All these schemes provide protection for the self-employed.

It is thus mandatory for the self-employed to be part of the sickness benefits in cash system. During the initial 24 months of running a business there is 'a guaranteed sickness benefit' amounting to what an employed person would receive for equal work – afterwards it is based on the actual income as a self-employed person. The general rule is that the first seven days of every sickness period one pays oneself (for employees there are 'sickness wages' paid by the employer during the first two weeks of sickness). Here, there is an element of choice in the scheme, however – the self-employed can choose to have a longer initial period without pay (14, 30, 60 or 70 days) resulting in somewhat lower contributions. (There is special protection for those who are often sick, reducing the days without pay in certain ways).

Unemployment benefits are regulated in a special act – the (1997:238) Unemployment Insurance Act. This, too, provides for protection for the self-employed. The insurance is divided into one, mandatory, basic insurance at guarantee level and another, voluntary, income-replacement insurance requiring membership. The latter is thus voluntary for both employees and self-employed persons. (In this Act there is a definition of a self-employed person parallel to that in the Income Taxation Act). During the first 24 months of running a business it is possible to retain the level of unemployment benefits from an earlier employment. Thereafter benefits are based on the income taxed in the business during the previous year. To have unemployment benefits it is no longer necessary to actually

close down the business (or sell it) – it is enough that it is ‘passive’ in that no activities are being carried out.

As regards sickness benefits in kind – i.e. health – Sweden has a universal system that applies to all residents regardless of their economic activity.

As far as spouses / life partners are concerned, they are, of course, individually covered by all residence-based schemes (including benefits at the guarantee level). Income-based schemes require a formal revenue/income. There are no schemes which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

## **8.7 Maternity benefits**

The (2010:110) Social Security Code provide benefits at the basic/guarantee and income-replacement level, in all covering 480 days, in the form of maternity/paternity/parental leave. All residents are entitled to basic/guarantee benefits. Income-replacement benefits equal sickness benefits in cash (Article 8.3(a)) and require a formal revenue/income in relation to the taxation system, covering employees and the self-employed alike. The system as such is mandatory. Like all social security (but unemployment benefits at income-replacement level) parental leave benefits are paid for by taxation – by employers’ contributions on a payroll basis for employees and by self-contributions (*egenavgifter*) concerning the self-employed.

Since 1998, replacement services in the agricultural sector is a business activity on the market like any other and there are no public systems, subsidies and so forth.

## **8.8 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

There is no such express regulation regarding the self-employed. In fact, there is no legislation regarding occupational social security schemes at all. This is regarded as something for the social partners and sex discrimination is prohibited through the general ban on such discrimination in working life since it is regarded as indirect pay/wages.

### **8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)**

National law has not made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54, considering there is no express regulation on the matter of occupational social security for self-employed, as explained under 8.8.1.

## **8.9 Prohibition of discrimination**

As regards employment, prohibition of discrimination is implemented through Chapter 2 Section 1 of the 2008 DA. As regards the self-employed, these issues are partly covered by the prohibitions in Chapter 2 on discrimination in labour market policy activities (Chapter 2 Section 9), when starting or running a business and professional recognition (Chapter 2 Section 10), and membership of certain organisations (Chapter 2 Section 11). The ‘real problem’, however, is the impossibility under the Swedish system to provide protection against discrimination for independent ‘work’ providers in relation to clients/customers due to respecting the principle of the freedom of contract. There is no such thing, as a general rule, as forced contracts! The Swedish ban in Chapter 2 Section 10 covers the conditions for having access to self-employment as such, rather than

covering the actual choice of an entrepreneur; compare the UK case of *Jivraj v Hashwani*.<sup>47</sup> If we are dealing with a self-employed person there is no applicable discriminatory prohibition as regards the choice of a business partner. Nor does legislation cover the termination of contractual relationships with a self-employed person. These realities are, however, contravened by the very broad concept of employee that applies and that makes the group of more 'dependant' self-employed rather small to non-existent. The generally speaking broad scope of the social security and health systems is also of importance here.

### **8.10 Evaluation of implementation**

The implementation of the protection of the self-employed has been done in a far from transparent way, and the Discrimination Act does not even mention the concept of self-employment. According to the main Swedish commentary on the Discrimination Act, there is reason to doubt whether this implementation of EU Law is satisfactory, as it is not sufficiently transparent.<sup>48</sup>

### **8.11 Remaining issues**

In 2017, a government inquiry delivered a report reviewing the regulation on parental leave and parental insurance, Government Report SOU 2017:101 (compare with 5.11 above). The report showed that parents who run companies of any form, generally take out less compensation from the parental insurance system than employees, despite the fact that they may have the same basic entitlement. The report concluded that this could largely be explained by reference to the regulations concerning sickness benefit qualifying income, and that solution would require broader and more in-depth review of the provisions concerning sickness benefit qualifying income than the inquiry's remit allowed. In 2018, following this report, the time during which sickness benefit qualifying income is protected for persons starting up a company, was extended from 24 to 36 months, the SSC Chapter 25 Section 9. It remains to be seen to what extent this legislative change will facilitate parental leave for parents who run companies.

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<sup>47</sup> *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 W.L.R. 1872.

<sup>48</sup> Fransson, S. and Stuber, E. (2010), *Diskrimineringslagen, En Kommentar*, Norstedts, Stockholm p. 298.

## 9 Goods and services (Directive 2004/113)<sup>49</sup>

### 9.1 General (legal) context

#### 9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

No surveys have been conducted concerning the difficulties linked to equal access to supply of goods and services.

#### 9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There is no national research on the frequency of gender-based discrimination resulting from the use of algorithms or technologies using artificial intelligence. However, in 2018, the Equality Ombudsman initiated a project to map and estimate the risks of discrimination in algorithms, automated data processing and artificial intelligence. Based on existing international scholarship, the project identified a number of typical risks of discrimination in automatised decision-making. These risks may relate to: the *data* (non-relevant, biased or low-quality), the *programmer* (intentional discrimination, unconscious prejudices, or bad understanding of the effects of certain types of programming), or the *organisational context* in which the algorithms appear and are used (one example is that programs from different producers which are not discriminatory when used separately may have a discriminatory effect when combined in a program structure, another example is when the context in which the programs are used does not provide for checks or follow-ups). The risk may also relate to machine learning and black box systems.

The aim of the project on algorithmic discrimination carried out by the Equality Ombudsman was to increase the level of knowledge in this field, mainly at the authority level. The project had the character of a mapping exercise and concluded that there is a need to increase the public awareness of artificial intelligence and the risk of algorithmic discrimination, a need for competence in this field at authorities and organisations, and a need for increased cooperation and exchange of knowledge between authorities. The opinion of the national expert is that these observations are relevant; the need for research and increased competence on algorithmic discrimination appears to be urgent.

In 2017, the Government tasked the Swedish Social Insurance Inspectorate (*Inspektionen för socialförsäkringen, ISF*) to analyse the use of 'selection profiles' at the Swedish social insurance agency. The ISF has delivered two reports on the matter.<sup>50</sup> An important aspect of the analysis carried out by the ISF is the matter of equal treatment of men and women. The ISF explains how results are generated by machine learning algorithms, and why such results run the risk of being biased on the ground of, inter alia, gender. The conclusion is that the use of 'selection profiles' displays deficits in the area of equal treatment, but the ISF also underlines that this does not necessarily mean a violation of the Discrimination Act (2008:568). The reports concern the statutory social security scheme, but the results are equally relevant for similar products on the private market.

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<sup>49</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

<sup>50</sup> Swedish Social Insurance Inspectorate, *Profilerings som urvalsmetod för riktade kontroller* (Profiling as selection method for targeted controls), ISF Report 2018:5, and *Riskbaserade urvalsprofiler och likabehandling* (Risk based selection profiles and equal treatment), Working Report 2018:1AR, available (in Swedish only) at: <http://62.13.72.13/fb/ISF/Rapport%202018-5/HTM/22/> and <https://inspsf.se/download/18.6ce5045216a58f96d2f56214/1565330431885/Riskbaserade%20urvalsprofile%20och%20likabehandling%202018-1ar.pdf>.

### 9.1.3 Political and societal debate

There is, for the moment, no noticeable debate on this matter.

## 9.2 Prohibition of direct and indirect discrimination

The Goods and Services Directive is implemented by the (2008:567) Discrimination Act (DA) and its Chapter 2 Section 12.

## 9.3 Material scope

Chapter 2 Section 12 of the DA states that 'discrimination is prohibited on the part of a natural or legal person who supplies goods, services or housing to the general public, outside the private and family sphere', a definition which is in line with Article 3 of the Goods and Services Directive, certainly in the author's opinion. There is no relevant case law.

## 9.4 Exceptions

The content of media and advertising is simply not covered by any of the prohibitions on (sex) discrimination in the DA. The area of education is, however, covered by the DA and its regulation in Chapter 2 Sections 5-8. Section 5 states that:

'a natural or legal person conducting activities referred to in the Education Act (2010:800) or other educational activities (and education providers) may not discriminate against any child, pupil or student participating in or applying for the activities'.

The ban thus covers the whole Swedish education system including pre-schooling activities. Section 6.1 contains an exemption concerning 'measures that contribute to efforts to promote equality between women and men in admissions to education other than that referred to in the Education Act (2010:800)', which is how positive action is phrased in Swedish legal documents. The Education Act contains rules for basic schooling.

## 9.5 Justification of differences in treatment

There are very few court cases concerning the Goods and Services Directive and to the author's knowledge none of these are related to the grounds of sex. Among the claims settled by the Equality Ombudsman<sup>51</sup> we find three relevant applications. One concerned a taxi company where the driver had harassed a woman, the assistant of a disabled client. Compensation was paid at SEK 60 000 (approx. EUR 6 300). Another case concerned a bus driver in public service harassing a woman complaining about him talking on his mobile phone when driving. Compensation was paid at SEK 30 000 (approx. EUR 3 150). A third one concerned a pregnant trans man who was denied pregnancy insurance on the ground that such insurance could only be issued to persons with a female social security number. Compensation was paid at SEK 50 000 (approx. EUR 5 250).

## 9.6 Actuarial factors

In 2012, following the Test-Achats case, a new rule was inserted in the 2008 Discrimination Act Chapter 2 Section 12(a) stating that there must not be a difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors. The amendment to the 2008 Discrimination Act puts an end to previously accepted sex discrimination as regards insurance services, especially frequent in private pension schemes and motor vehicle insurance.

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<sup>51</sup> See [www.do.se](http://www.do.se).

## 9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

As a consequence of the Test-Achats case, the previous rule on explicit exceptions from the ban on sex discrimination regarding access to and the supply of goods and services in Chapter 2 Section 12 paragraph 3 of the 2008 Discrimination Act was amended and transferred to a new paragraph 12(a). An exception is still made concerning the differential treatment of men and women with regard to services and housing, when this is for a legitimate aim and the means of achieving this aim are appropriate and necessary. This exception does not, however, apply with regard to insurance:

'As far as insurance services are concerned there must not be a difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors.'

Despite this, and provided there is a legitimate aim and the means used are appropriate and necessary to reach this aim, a person's sex may still influence the assessment of other factors on which insurance premiums are based. This rule is intended to be within the Commission's guidelines concerning the scope which is still left for gender-related assessments.<sup>52</sup>

The reform entered into force on 21 December 2012 and the requirement on gender-neutral calculations only applies to insurance contracts entered into after that date.

There was, to the author's knowledge, no further intense – or even any – debate on this change to the rules in Sweden. This is reflected already in the *travaux préparatoires*: among the bodies who considered the legislative proposal for this reform, also those within the insurance sector have been characterised as being mainly in favour of the proposition.<sup>53</sup> Additionally, when the governmental proposal was dealt with in the Swedish Parliament, there was a broad consensus between the political parties.<sup>54</sup> An issue that was discussed to some extent was, however, whether or not the amendment in accordance with the Commission's opinion and the 2004/113/EC Directive recital 15 and Article 3.4 affects occupational or work-related pension schemes. The academics' trade union SACO had suggested that Sweden should prohibit gender-related premiums/pensions also in this regard. The Government rejected this on the grounds that the new legislation should be equal to EU Law requirements, generally (Government Bill prop 2011/12:122 p. 20).<sup>55</sup> (Notwithstanding this, collectively agreed occupational pension schemes have for a long time been known to be gender-neutral in Sweden).

## 9.8 Positive action measures (Article 6 of Directive 2004/113)

As explained above, there is an exception to the ban on sex discrimination concerning access to and the supply of goods and services, as regards the differential treatment of men and women with regard to services and housing, when this is for a legitimate aim and the means of achieving this aim are appropriate and necessary. Chapter 2 Section 12 paragraph 3 of the 2008 Discrimination Act.

## 9.9 Specific problems related to pregnancy, maternity or parenthood

To the author's knowledge, there are no such specific problems.

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<sup>52</sup> European Commission, Guidelines on the application of Council Directive 2004/113/EC to insurance, in light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats) COM (2011) 9497 final.

<sup>53</sup> Government Bill prop 2011/12:122 p. 16.

<sup>54</sup> Compare 2011/12: AU 11.

<sup>55</sup> Also compare the article '*Tjänstepensionen blir inte jämställd*' (Work-related pensions will not be equal) by Eva Adolphson from the insurance company Alecta, in the Swedish daily newspaper *Dagens Nyheter* 2012-03-05.

### **9.10 Evaluation of implementation**

The implementation is, to the author's knowledge, sufficient.

### **9.11 Remaining issues**

There are, to the author's knowledge, no remaining issues.

## **10 Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 General (legal) context**

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

The national strategy to counteract men's violence against women, and honour-related violence and oppression applies for the period 2016-2025, (Government Report SOU 2015:55). The strategy is to be evaluated after five years, and after the end of the strategy period. The strategy aims to establish a holistic approach to the combat of men's violence against women, along with honour-related violence and oppression; including a strong link between research and practice, and a thorough coordination of the work carried out by different authorities at different levels.

In 2018, a Government Report presented a comprehensive survey of existing relapse preventing measures for men who have exposed their relatives to violence, including suggestions to strengthen and improve these measures.<sup>56</sup>

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

Swedish legislation regarding violence against women is primarily integrated into the Penal code (1962:700). In addition, there are provisions specifically aiming to protect and support the victims of violence, such as the Restraining Orders Act (1988:688).

In 2019, a Government inquiry was established to analyse whether a new offence should be introduced in the Penal Code to specifically address honour-related violence and oppression. The inquiry is scheduled to deliver its report on 30 September 2020.<sup>57</sup>

#### 10.1.3 National provisions on online violence and online harassment

Swedish legislation in this matter is primarily integrated into the Penal code (1962:700). In 2017, a new penalty provision was inserted in Chapter 4 of the Swedish Penal Code on unlawful violation of privacy. It establishes criminal liability in certain cases for those who violate someone else's private life by spreading images or other information in a way that is intended to cause tangible harm to the person who is the subject of the information (Government Bill prop. 2016/17:222).

#### 10.1.4 Political and societal debate

Domestic violence has a high priority in the political debate, as can be seen in the abovementioned national strategy to counteract men's violence against women. From time to time, the matter of domestic violence draws a lot of media attention, particularly in connection with reports on individual cases. After such reports, the theme tends to be particularly high on the agenda in societal debate for a while.

A more recent discourse regards the activities of men who take it on themselves to push certain moral behaviour or religious beliefs on persons living in their neighbourhood, particularly young women. Such activities have been reported in different areas of

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<sup>56</sup> Government Report SOU 2018:37 *Att bryta ett våldsamt beteende – återfallsförebyggande insatser för män som utsätter närstående för våld*, available (in Swedish only) at: [https://www.regeringen.se/49baeb/contentassets/739d9a7b597a40e09fd066895b32f852/att-bryta-ett-valdsamt-beteende--aterfallsforebyggande-insatser-for-man-som-utsatter-narstaende-for-vald-sou\\_2018\\_37.pdf](https://www.regeringen.se/49baeb/contentassets/739d9a7b597a40e09fd066895b32f852/att-bryta-ett-valdsamt-beteende--aterfallsforebyggande-insatser-for-man-som-utsatter-narstaende-for-vald-sou_2018_37.pdf).

<sup>57</sup> Committee Directive Dir. 2019:43.

Sweden.<sup>58</sup> In 2019, the Parliamentary Committee on Justice decided on a number of motions on the matter, submitted by individual members of the Parliament. The motions called for a survey to map the frequency of these activities, and for the criminalisation of the persons pursuing them. The Parliamentary Committee on Justice agreed with the authors of the motions that these activities are harmful as they infringe on women's mobility and their right to an independent life, but the Committee considered that the problem should be tackled within the framework of existing legislation. The proposals were therefore rejected.<sup>59</sup>

## 10.2 Ratification of the Istanbul Convention

Sweden has ratified the Istanbul Convention. In general, the pre-existing legal framework was considered to be in compliance with the obligations under the Convention (see Government Bill 2013/14:208 and Governmental Stencil Ds 2012:52). Generally speaking, gender-based violence occupies a central position in Swedish gender policies, as expressed in the 2007 'Action plan against prostitution and human trafficking for sexual purposes'.<sup>60</sup> There is also the 'International Policy on Sexual and Reproductive Health Rights'.<sup>61</sup>

Some legal provisions were, however, introduced following accession. One such regulation concerned forced marriage. Forced marriage has been a specific stand-alone crime in Sweden since 1 July 2014, as has 'misleading a person to travel to undergo a forced marriage'.<sup>62</sup> An attempt and preparation for a forced marriage are also criminalised. At the same time, the possibility to marry before the age of 18 was prohibited in Sweden, and the possibility to recognise such marriages entered into abroad was further restricted.<sup>63</sup> Working against forced marriages is also an important part of the Government's 2014-2017 youth policy.<sup>64</sup>

A minor amendment was also made to the existing regulation of stalking (unlawful persecution) in order to decrease the requirements for issuing a domestic exclusion order – see the Restraining Order Act (1988:688) and also Government Bill 2012/13:186.

Special rules on a residence permit – implementing EU Directive 2004/81/EC – issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and who cooperate with the competent authorities, are found in the Foreigners Act<sup>65</sup> allowing for the provision of a temporary residence permit.

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<sup>58</sup> Several politically engaged women, mainly from the Muslim or ex-Muslim community, have long worked to bring the matter to the attention of the wider public. See, for instance, member of the Parliament and the founder of the Swedish branch of the organisation 'Ni Putes Ni Soumises' (*Varken hora eller kuvad*), Amineh Kakabaveh (2015), 'I förorten växer männens diktatur', *Expressen* 2015-06-22. In 2017, TV4 portrayed the phenomenon using hidden cameras, *TV4 'Hon kan inte gå ut med hunden utan att bli hotad av män'* 2017-04-03. Swedish Radio has reported on the matter with reference to a report from Municipality of Nyköping, 'Radikalisering i Nyköping: Rapport larmar om månggifte och moralpoliser', *P4 Sörmland* 2018-06-23, as well as and with reference to the Victim Support in the Municipality of Karlstad, 'Brottsofferjouren om moralpoliser: "Det finns ett stort mörkertal"', *P4 Värmland*, 2018-06-19.

<sup>59</sup> Committee Report 2018/19:JuU14 p. 38.

<sup>60</sup> Available at: <https://www.regeringen.se/49b710/contentassets/a577da47222b45dc9d993bce387ed9ec/action-plan-against-prostitution-and-human-trafficking-for-sexual-purposes>.

<sup>61</sup> Available at: <http://www.regeringen.se/sb/d/108/a/61468>.

<sup>62</sup> See Chapter 4 Sections 4c and 4d of the Criminal Code, respectively.

<sup>63</sup> Chapter 2 Section 1 of the Marriage Code and the (1904:26) Act on certain international issues concerning marriage and guardianship Chapter 1 Section 8a.

<sup>64</sup> Forced marriage was also criminalised before 2014 as a crime of 'undue force.' In relation to Youth Policy, see also *Ungdomspolitiskt handlingsprogram 2014-2017* at:

<http://www.regeringen.se/informationsmaterial/2009/09/the-swedish-governments-youth-policy/>.

<sup>65</sup> Act (2005:716).

## **11 Compliance and enforcement aspects (horizontal provisions of all directives)**

### **11.1 General (legal) context**

#### 11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

In 2016, an inquiry on improved remedies for victims of discrimination delivered its report, Government Report SOU 2016:87.<sup>66</sup> The report concludes, among other things, that the Equality Ombudsman should investigate, and strive for a settlement in, a larger number of complaints than the number currently investigated.

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

There are no other issues to be reported.

#### 11.1.3 Political and societal debate and pending legislative proposals

There are no political or societal debates, nor pending legislative proposals, concerning particular difficulties that victims of gender discrimination face in practice in obtaining legal redress.

### **11.2 Victimisation**

Discrimination Act (2008:567) (DA) Chapter 2 Sections 18-19 contains a prohibition on reprisals applicable to working life, i.e. employers. An employer may thus not subject an employee to reprisals because the employee has:

'1. Reported or called attention to the fact that the employer has acted contrary to this Act, 2. Participated in an investigation under this Act, or 3. Rejected or given in to harassment or sexual harassment on the part of the employer.'

Case law is scarce. One such case, however, is Labour Law 2013 No. 71 concerning a woman who was dismissed on the very day she made a complaint about sexual harassment. Discrimination compensation was set at SEK 75 000 (approx. EUR 7 900).

The prohibition as such seems to meet the requirements of the Recast Directive. What can be called into question is the fact that the ban on reprisals does not meet the requirement in Article 2.2.a of the Directive that it should be included in the very concept of discrimination.

### **11.3 Access to courts**

#### 11.3.1 Difficulties and barriers related to access to courts

All parts of the Swedish court system are relevant for the 2008 DA with its broad coverage of different areas of society.

As for the *general courts*, Sweden has a three-tier hierarchy: the district courts (*tingsrätt*), the courts of appeal (*hovrätt*), and the Supreme Court (*Högsta domstolen*). As a general principle it may be said that the general courts enforce civil law and criminal law legislation.

<sup>66</sup> Government Report 2016:87 *Bättre skydd mot diskriminering*, available (in Swedish with English summary) at: <https://www.regeringen.se/4af295/contentassets/b42c019548304be987083fb37f73d74f/battre-skydd-mot-diskriminering-sou-201687>.

The task of *the administrative courts* may be described as one of maintaining due observance of the law within the public administration – at the central, regional and local levels. They deal with decisions by public authorities such as tax regulations and the social security system. The proceedings are very similar to the proceedings at the courts of general jurisdiction. However, in contrast to the general courts, proceedings in writing are predominant. Thus appeals concerning tax assessments as well as appeals against certain decisions of administrative authorities and against decisions of local authorities are dealt with by county administrative courts (*Förvaltningsdomstolar*). Appeals against the judgments of these county courts are made to the administrative courts of appeal (*kammarrätter*). The highest administrative tribunal is the Supreme Administrative Court (*Högsta Förvaltningsdomstolen*).

*The Labour Court* is a special court with the task of solving labour disputes. Certain cases can be brought directly before the Labour Court, while other cases (presented by individuals *not* supported by their professional organisation or – in matters of discrimination – by the Equality Ombudsman) are to be first brought before a district court. Thereafter they can be appealed to the Labour Court. The decisions of the Labour Court are final and cannot be appealed. Workplace discrimination cases are thus ultimately to be tried before the Labour Court, either as the court of first instance or as an appeals court.

In the area of discrimination there is now a 'single' Equality Ombudsman (*Diskrimineringsombudsmannen, DO*) covering not only gender discrimination but also other protected grounds. The DO has competence to bring a case before the relevant court in any area covered by the 2008 DA.

In order to understand the functioning of Swedish labour law, and thus important parts of the non-discrimination legislation, it is crucial to bear in mind the special role designated to the social partners. The Swedish labour market is characterised by a high degree of organisation density; this is true of employees and employers alike. It is difficult to obtain exact figures on the degree of affiliation, but it is roughly 75 % among workers as well as among salaried employees. According to Swedish labour law, a trade union has a priority right to bring an action on behalf of its members under Chapter 4, Section 5 of the Labour Disputes (Judicial Procedure) Act (1974:371) – a rule which also applies to complaints regarding discrimination (compare Chapter 6 Section 2 of the DA).

According to the 2008 Discrimination Act, there is also a right to bring an action for non-profit organisations other than employees' organisations if, according to their statutes, they are tasked with looking after the interests of their members and the association can be considered 'suitable to represent the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances' (Chapter 6 Section 2 of the DA).

Access to justice for the victims of sex discrimination thus varies somewhat depending on the area at issue. In all contexts they can be represented by the Equality Ombudsman with no costs being attached. The Ombudsman has no obligation to represent an alleged victim, however, but may choose to bring an action or not with reference to its relative importance from a more general perspective. Today, the number of claims actually brought to court by the Equality Ombudsman are very limited, for instance only 4 in 2018 as compared to 2 567 new complaints.<sup>67</sup>

According to the 2008 Discrimination Act, there is a right to bring an action for non-profit organisations other than employees' organisations if, according to their statutes, they are tasked with looking after the interests of their members and the association can be considered 'suitable to represent the individual in the case, taking account of its activities

<sup>67</sup> The DO's 2018 Activity Report, <http://www.do.se/globalassets/om-do/diskrimineringsombudsmannens-arsredovisning-20182.pdf>.

and its interest in the matter, its financial ability to bring an action and other circumstances' (Chapter 6 Section 2 of the DA). The case law so far is limited, but among the few cases brought before the courts are a few important cases concerning discrimination in the field of education, such as the case before the Supreme Court NJA 2006 p. 683 (positive action on the grounds of ethnicity).

### 11.3.2 Availability of legal aid

Legal assistance free of charge is provided by trade unions for their members and, more generally, by the Equality Ombudsman (DO) – see further above. There is no obligation for the trade unions or for the DO to bring a case of alleged discrimination to the courts. The alleged victim of discrimination then has the possibility to address a relevant NGO if there is one. Ultimately, they may bring the case on their own. Then there is the possibility of legal aid according to the (1996:1619) Legal Aid Act. This right only applies to those earning less than SEK 260 000 (approx. EUR 27 300) a year and is second to possible rights to financial assistance in accordance with private insurance (quite normal with regard to 'home insurance').<sup>68</sup>

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

The question of the horizontal effect of the applicable gender equality law has to date not posed any particular problem in ensuring compliance and enforcement.

### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The recognition of horizontal direct effects of the charter provisions (in the *Bauer* ruling of the CJEU)<sup>69</sup> have not yet had any specific relevance for the enforcement of gender equality law in Sweden.

## 11.5 Burden of proof

According to the (2008:567) Discrimination Act (DA) Chapter 6 Section 3:

'if a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred.'

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

The rules on compensation and invalidity in cases of discrimination are found in Chapter 5 of the 2008 DA implementing all relevant EU law on non-discrimination. According to its Section 1 there is a special type of compensation – discrimination compensation (*diskrimineringsersättning*) – for the offence resulting from the infringement. When such compensation is decided, particular attention shall be given to the purpose of discouraging such infringements of the Act and the compensation is paid to the person offended. In relation to employers there is also the possibility of economic compensation for the economic loss that arises from the infringement. Such an indemnity is not possible, though, in relation to decisions on appointments or promotions. Here, respect for the

<sup>68</sup> Schoultz, I. (2018) Legal Aid in Sweden, in: Halvorsen Rønning, O. and Hammerslev, O. (eds.) Outsourcing Legal Aid in the Nordic Welfare States, Springer International Publishing.

<sup>69</sup> Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] EU:C:2018:871.

'hiring at will' doctrine in Swedish law impedes the payment of an economic indemnity, as the employer, according to this doctrine, is not really obliged to employ anybody. There is, according to this view, no certain economic loss to compensate. Section 3 provides for the invalidity of discriminatory provisions and legal acts.

The remedies described above thus apply in relation to the application of the DA. Occasionally also other legislation applies, such as the Employment Protection Act (EPA) or the Parental Leave Act (PLA). Here the general system of sanctions within Swedish labour law applies – i.e. economic as well as punitive damages. A dismissal can be declared null and void – both applying the PLA and the Employment Protection Act.

The monitoring of the DA is thus done by the Equality Ombudsman. In this process a financial penalty may be imposed, i.e. fines (Chapter 4 Section 4). Such fines are examined and made effective by a special board – the Board against Discrimination – regulated in Chapter 4 of the DA.

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

Generally, it is the author's opinion that the remedies meet the requirements of EU law. However, Swedish penalties are known to be generally fairly low, as compared with other EU member states. This was also the background for introducing the special 'discrimination compensation' in the DA in 2009. In cases NJA 2014 p. 499 I and II, the Supreme Court stated that discrimination compensation can be divided into two parts: dignity compensation and preventive compensation, respectively. The Labour Court, on the other hand, does not normally divide the compensation in two parts, but rather bases its decision on a more overall/holistic assessment – see Labour Court 2015 No. 51 with further references. Case law developments since the entry into force of the 2008 DA do not give cause for the conclusion that compensation has considerably increased, however. In the case law of the Labour Court, discrimination compensation generally amounts to SEK 25 000 – 125 000 (approx. EUR 2 600 – 13 150) depending on the circumstances.

There is also a special restriction with regard to economic compensation. Such an indemnity is not possible in relation to decisions on appointments or promotions according to Chapter 5 Section 1 paragraph 2.

### **11.7 Equality body**

In order to monitor the 2008 DA there is an Equality Ombudsman covering all protected grounds (among them sex) and areas of society. The duties of the Equality Ombudsman are regulated in Chapter 4 of the DA and in the Act Concerning the Equality Ombudsman (2008:568), hereinafter the AEO.

The Equality Ombudsman provides advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights (Section 2 of the AEO). In addition, the Equality Ombudsman has a duty to inform, educate, discuss and have other contacts with different stakeholders, to follow international developments, research and development work and to propose legislative amendments or initiate other measures (Section 3 of the AEO).

Between 2017 and 2019, the Equality Ombudsman conducted targeted oversight activities in certain labour market sectors (including: construction, IT, hotels and catering, media and culture, and legal practitioners) regarding the obligation for employers to have guidelines and routines to prevent harassment, sexual harassment and retaliation. The exercise addressed around 900 employers, who were informed of the legal requirements and who were made aware of deficiencies in their application of the law.

The Equality Ombudsman has a duty to oversee compliance with the Discrimination Act, and may require information and cooperation from anyone subject to the prohibitions and duties of the DA, (Chapter 4 Section 1 Para 1 and Section 1a and Chapter 4 Sections 3 and 4 of the DA).

In the first instance, the Equality Ombudsman must try to induce those to whom the Act applies to comply with it voluntarily (Chapter 4 Section 1 Para 2 of the DA).

In cases of discrimination, the Equality Ombudsman may bring a court action on behalf of an individual who consents to this. This does not apply in cases where the claimant is an employee who is represented by the trade union (Chapter 4, Section 5 of the Labour Disputes (Judicial Procedure) Act (1974:371) and Chapter 4, Section 2 and Chapter 6, Section 2 of the DA).

In matters regarding the obligation to take active prevention and promotion measures to prevent discrimination and to promote equal rights and opportunities, the Equality Ombudsman may order employers and educational providers who fail to meet the legal requirements to fulfil their obligations. Such an order is combined with a conditional financial penalty and is issued by the Board against Discrimination upon application by the Equality Ombudsman (Chapter 4 Section 5 of the DA). The Board against Discrimination is a public administrative authority with a duty to decide in matters on penalties under the DA. The activities of the board are regulated in Chapter 4 Sections 7-17 of the DA and in the Ordinance (2008:1328) on instructions for the Board against Discrimination. Decisions of the Board against Discrimination cannot be appealed (Chapter 4 Section 16 of the DA).

The Equality Ombudsman has called for an increased mandate to impose sanctions against employers and educational providers who do not comply with the obligation to conduct pay audits and other active preventive measures. In 2018, the Government appointed a committee to investigate and analyse the need for more efficient sanctions in this area. The committee is to deliver its report in October 2020.<sup>70</sup>

The Swedish Gender Equality Agency was established on 1 January 2018, to contribute to the effective implementation of Swedish gender equality policy. The authority ensures monitoring, analysis, coordination and necessary support in the area of gender equality.

### **11.8 Social partners**

Non-discrimination legislation is always mandatory. Nevertheless, the industrial relations structure and the role played by the social partners are also crucial to non-discrimination law as regards employment. The Swedish labour market is characterised by a high degree of organisation density; this is true of employees and employers alike. It is difficult to obtain exact figures on the degree of affiliation, but it is roughly 75 % among workers as well as among salaried employees. Furthermore, the organisation pattern is firmly established, and there is relatively little inter-trade union rivalry. This organisational structure is reflected in collective bargaining. There are collective agreements at three levels: national, industry-wide and local. In most instances, the relationship between an employer/employers' organisation and the union is firm and long-standing. Orderly and peaceful ways for the parties to meet, to bargain and to settle disputes can still be said to characterise 'the Swedish model' of industrial relations. Labour law generally gives established unions – i.e. unions that uphold a collective agreement with the employer in question – a privileged position. Although Swedish law does not provide for exclusive representation, established unions de facto often speak for the entire employee community. The role of the social partners is also reflected in the fact that important issues are still outside the scope of the law, for instance, wages.<sup>71</sup> Another important feature, due to the crucial role played by the social partners and collective bargaining, is the

<sup>70</sup> Committee Directive Dir. 2018:99.

<sup>71</sup> There is thus no legislation on minimum wages, for instance.

frequent use of what is generally referred to as 'semi-mandatory rules': otherwise mandatory rules that can be deviated from in collective agreements. Even important rules may be overridden by collective agreements. Moreover, at the Labour Court there is a strong representation of the social partners.

According to Chapter 3 of the DA, so-called active measures are important to sex equality in working life and according to its Section 1:

'employers and employees [through their trade unions] are to cooperate on active measures to bring about equal rights and opportunities in working life ... and in particular to combat discrimination in working life.'

Chapter 3 on active measures also contains special rules on pay involving the social partners. According to Chapter 3 Section 2:

'employers and employees are in particular to endeavour to equalise and prevent differences in pay and other terms of employment between women and men who perform work which is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men'.

Chapter 3 Sections 10-12 contain further rules monitoring equal pay practices. Every three years (from 1 January 2017, every year) employers who employ 25 employees or more are to draw up an action plan for equal pay. Such an action plan shall report the results of the employer's obligations to survey and analyse pay practices, also concerning work of equal value, from a gender perspective, to indicate 'the pay adjustments and other measures that need to be taken to bring about equal pay for work that is to be regarded as equal or of equal value' including a cost estimate and a time plan not exceeding three years, and, successively, to report on the implementation and its results. There is a right for employee representatives of organisations bound by a collective agreement towards the employer in question to have access to 'the information needed' to be able to cooperate in the survey, analysis and drawing up of an action plan for equal pay.

According to Swedish labour law the trade union has a priority right to bring an action on behalf of its members under Chapter 4, Section 5 of the Labour Disputes (Judicial Procedure) Act (1974:371) – a rule which also applies to complaints regarding discrimination (compare Chapter 6 Section 2 of the DA). In these cases, however, the role of the trade union may be a delicate one. For instance, both the individual claiming to have been discriminated against and the one who received the job, the comparator as regards equal pay, etc., are likely to be members of the same union. This is because, normally, employees within the same labour market sector are organised in the same trade union. Another example concerns wages. Different wage levels with regard to work of equal value are regularly the outcome of collective bargaining, etc.

Collective agreements are key in regulating working conditions in general and especially with regard to pay. Collective agreements are legally binding for employers and members of the signing trade union but the signing employer also has a duty to apply the collective agreements to all employees alike. Moreover, a collective agreement at the lower level may not contravene the collective agreement at the higher level – it is then null and void.

Pay regulation as such is thus an issue that rests entirely with the social partners and collective bargaining in the Swedish system. Since it must not be discriminatory there is an implicit duty on the social partners to consider equal pay practices when bargaining. There are no explicit rules on this except for the general ban on discrimination, however. Historically speaking, there have been particular policies among trade unions in order to come to terms with the gender pay gap throughout the years, varying among the specific trade unions and branches.

It is really difficult to assess the Swedish wage-setting system, based on the social partners' autonomy as it stands. No doubt, collective bargaining and its results are of major importance as regards the gender pay gap in Sweden. The Swedish labour market is highly organised and collective agreements cover most of the labour market. The labour market is also highly gender segregated, although becoming less so. As we have seen, the profession in question is the single most important explanatory factor for the gender pay gap. The general pay level nationwide for a profession/branch of industry is by and large set by the collective agreement of that profession/branch at industrial level. At the same time, trade unions are gathered in a few trade union confederations with, at least in theory, the possibility to coordinate pay policies. Segments of the labour market dominated by women are often paid at lower levels than other male-dominated sections. Despite the 'individualised' (in principle) wage-setting practices in all areas of the labour market, the function of collective bargaining and 'level-setting' by nationwide sectoral agreements for the area at issue cannot be overestimated. Coordinated equality strategies at central organisation level are necessary to come to terms with such differences among branches of industry and sectors. To some extent such initiatives on the employees' side have, historically speaking, proved efficient in bridging the gender pay gap. This is especially evident in relation to the developments within the municipality sector (compare under heading 1 above). However, pay levels between sectors have, generally speaking, proven to be quite stable.

### **11.9 Other relevant bodies**

Anti-discrimination bureaus are non-profit organisations, established on the initiative of local non-governmental organisations and largely funded by the Swedish National Board for Youth Affairs. They offer advice and assistance to victims of discrimination.

### **11.10 Evaluation of implementation**

In the opinion of the author of this report, the implementation is sufficient. However, it bears noting that the number of investigations initiated by the Equality Ombudsman based on individual complaints has decreased to a saliently low level. Which means that, in individual cases, legitimate expectations for redress will not be met. In 2016 and 2017, the Equality Ombudsman did not bring any cases on sex discrimination before court. In 2018, two cases were brought, in 2019 one case was brought, and, to date, one case has been brought in 2020.

### **11.11 Remaining issues**

In cases of discrimination in working life, trade unions may represent their members before a court. A vast majority of employees in Sweden are trade union members. However, employees who are not trade union members must turn to the Equality Ombudsman in a case of discrimination. The same applies in cases outside working life. The Equality Ombudsman has legal standing, but in recent years, the Equality Ombudsman has brought very few cases to court. Instead, the Ombudsman has focused on other activities, such as writing reports, building opinion and, in selected cases, monitoring the compliance with the DA. The chance to be represented by the Equality Ombudsman is thus very small. An individual may bring action without the support of a trade union or the Equality Ombudsman. However, in these cases the legal costs can be very high. Application can be filed for means-tested financial legal aid, but such aid is only granted to persons who have a very low income (not more than about EUR 2 200 per month) and who do not have valuable property. The financial legal aid normally covers only part of the costs for the employee's own lawyer (recipients of financial legal aid are exempt from the application

fee to the court).<sup>72</sup> More importantly, the legal aid does not cover the other party's litigation costs in the event that the employee loses the dispute.<sup>73</sup>

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<sup>72</sup> Legal Aid Act (1996:1619).

<sup>73</sup> When the parties reach an in-court amicable settlement, the parties normally bear their own litigation costs.

## 12 Overall assessment

The following transposition problems were mentioned in this report:

1. There is no explicit reference to pregnancy and maternity in the Discrimination Act (2008:567). Pregnancy discrimination falls under direct sex discrimination, but the legislation lacks transparency on this point.
2. A decision to interrupt a probationary employment does not have to be motivated. In relation to pregnant employees, this means that the obligation of Article 10 of Directive 92/85 to cite duly substantiated grounds for dismissal in writing is not upheld in Swedish law.
3. It should be noted that the Equality Ombudsman has gradually shifted its focus away from individual complaints towards opinion forming and communication activities, often addressing the theme of discriminatory structures in society. Of the individual complaints received by the authority, only a small proportion are being investigated, and the role of the authority appears to be somewhat unclear. This could mean that legitimate expectations of redress in individual cases are not met.

Sweden has a strong record when it comes to gender equality. In 2017, Sweden scored the highest result for the EU-28 in the Gender Equality Index of the European Institute for Gender Equality, making Sweden the most gender-equal society throughout the 10-year period of 2005 to 2015.<sup>74</sup>

A similar result can be found in the 2019 report of the World Bank Group, *Women, Business and the Law 2019: A Decade of Reform*, comparing the legal conditions for women's employment and entrepreneurship in OECD countries.<sup>75</sup> Here, Sweden was one of a total of six countries that scored the maximum of 100 in the gender equality index.

Still, the matter of gender equality remains high on the national policy agenda. In 2014, the Gender Equality Inquiry was appointed to study and evaluate gender equality policies 2007-2014. The mission of the inquiry did not include the provisions on sex discrimination in the Discrimination Act or the activities of the Discrimination Ombudsman in relation to these provisions. In 2015, the inquiry delivered its report (Government Report SOU 2015:86).<sup>76</sup> The report showed that gender equality had increased in several areas, while, in other areas, more needed to be done. For instance, men's violence against women has not diminished during the investigated period, and the labour market is still largely gender-segregated. The inquiry stressed the need for a new authority specifically addressing gender equality, as well as new goals for gender equality policy. Following the report, the Swedish Gender Equality Agency was established in 2018.

Generally speaking, the 2008 Discrimination Act implements most of the directives covered by this report, including the Recast Directive. Directives 92/85/EC and 2010/18/EU are mainly implemented through the Parental Leave Act. The Swedish legislator has taken a rather keen interest in the implementation of Community discrimination regulation in recent years and has even preceded EU law on occasion, such as introducing prohibitions on discrimination in areas and on grounds not yet covered by EU law. The implementation of gender law in general sufficiently meets the requirements of Community law. This also holds true for the implementation of central concepts.

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<sup>74</sup> EIGE, Gender Equality Index 2017: Measuring gender equality in the European Union 2005-2015 – Report, available at: <https://eige.europa.eu/publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report>.

<sup>75</sup> World Bank Group, *Women, Business and the Law 2019: A Decade of Reform*, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf?sequence=4&isAllowed=y>.

<sup>76</sup> Government Report 2015:86 *Mål och myndighet En effektiv styrning av jämställdhetspolitiken*, available at: [https://www.regeringen.se/contentassets/fd7240295cab45df8130384abdb600fa/mal-och-myndighet---en-effektiv-styrning-av-jamstalldhetspolitiken-sou-2015\\_86.pdf](https://www.regeringen.se/contentassets/fd7240295cab45df8130384abdb600fa/mal-och-myndighet---en-effektiv-styrning-av-jamstalldhetspolitiken-sou-2015_86.pdf).

Swedish law has been criticised by the Commission as not having included an express rule indicating that discrimination related to pregnancy and maternity leave is regarded as sex discrimination. Other gaps in the Swedish implementation of Community gender regulations have been identified by the Commission as regards the implementation of Directive 76/207/EEC as amended by Directive 2002/73/EC in respect of limited rights to compensation as well as a lack of rights for NGOs to represent alleged victims. The Government has remedied these allegations through the 2008 Discrimination Act.

A question mark can be posed as regards the situation of discrimination in hiring and promotion. Even if discrimination is proven, there is no right to the position/promotion as such or to compensation for economic loss. Arguably, with regard to transparency, etc., one can also question the set-up of the 2008 Act, which prohibits any discriminatory decision in working life without expressly mentioning access to employment, pay, pregnancy, etc. This makes the prohibitions on discriminatory pay and occupational pension schemes far from transparent, as it is not explicit about the scope of the prohibition.

Swedish legislation goes beyond the requirements of Community law with its prohibition on discrimination regarding basic schooling and higher education. The rules on rights to parental leave are quite extensive and to a great extent related to social security benefits and are protected by a general prohibition on unfair treatment for reasons connected with parental leave. It is also worth mentioning that according to Chapter 2 Section 13 of the 2008 Discrimination Act, gender discrimination concerning healthcare and social services is outlawed, which goes beyond the requirements of Community law.

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