European Monitoring Centre on Racism and Xenophobia
Observatoire Européen des Phénomènes Racistes et Xénophobes
Europäische Stelle zur Beobachtung von Rassismus und Fremdenfeindlichkeit

EUMC

Anti-discrimination Legislation in EU Member States

A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives

SWEDEN

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Report prepared by

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under the guidance of

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on behalf of the

European Monitoring Centre on Racism and Xenophobia (EUMC)

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Vienna, 2002

Published by the European Monitoring Centre on Racism and Xenophobia
Rahlgasse 3, A-1060 Vienna , Austria

This report was prepared for the European Monitoring Centre on Racism and Xenophobia (EUMC) as part of its Study to make a comparison of existing national legislation in EU Member States with the Article 13 EC Treaty Council Directives. The information for the EUMC Study was compiled by a group of independent experts, which is part of the project *Implementing European Anti-Discrimination Law,* a Joint Initiative of the European Roma Rights Center, Interights and the Migration Policy Group.

The views expressed in the reports do not necessarily reflect the opinions of the EUMC, the European Community and its Member States.

The information in the reports cover a period up to September 2001 and may not contain developments which have taken place since that date.

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PREFACE

The European Union (EU) is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to all Member States. The right to equality before the law and the protection of all persons from discrimination, together with the respect and promotion of the rights of minorities is essential to the proper functioning of democratic societies.

Strategies and activities to combat racism, xenophobia and anti-Semitism form an integral part of the European Union's work on equality, justice and social inclusion.

The Amsterdam Treaty which entered into force in May 1999, introduced a new article 13 into the EC Treaty. The European Commission proposed a package of measures to implement article 13 in November 1999 which led to the adoption in 2000 of a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a Council Directive establishing a general framework for employment equality and a Council Decision establishing a Community action programme to combat discrimination.

The European Monitoring Centre on Racism and Xenophobia (EUMC) was established by the EU during 1997 as part of the EU's aim to combat racism, xenophobia and anti-Semitism more effectively at a European level. The EUMC has the task to provide the Community and its Member States with objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action. It also undertakes studies and examines examples of good practice, formulates conclusions and opinions and publishes an Annual Report.

The EUMC as part of its work in the field of legislation commissioned a study to compare Member States' anti-discrimination legislation and the article 13 directives. Information from the study was used to produce a series of country reports. The reports aim:

- to provide an overview of existing anti-discrimination legislation on the grounds of race or ethnic origin, religion or belief in the Member States and draw a comparison with the anti-discrimination Directives;
- to support the implementation of the directives by the Member States by indicating to each Member State the developments in other Member States (with the view that by providing information on the variety of approaches adopted by Member States to deal with the same issues Member States could benefit from the experience of each other);
- to identify areas which may require further development;
- to support the European Commission in the framework of the Community Action Programme in particular under Strand 1 - Analysis and evaluation, and
- to support wider debate as the issue is of interest to a variety of sectors in society.

The EUMC takes the opportunity to thank Migration Policy Group for its work on this Study and hopes that this publication will be a useful contribution to overcoming discrimination.

Beate Winkler, Director EUMC

FRAMEWORK OF THE STUDY

Joint Project 1999-2000 "Research on national and European legislation combating racism"

In 1999, The European Monitoring Centre on Racism and Xenophobia (EUMC) undertook a joint project with Migration Policy Group on "Research on national and European legislation combating racism". The period covered in the project was from 1 May 1999 to 31 January 2000. The project carried out a comparative study on existing legislative provisions to combat discrimination on grounds of race or ethnicity and religion and belief and the proposal for a Directive concerning the elimination of racial and religious discrimination (known as Starting Line) and the proposal of the European Commission for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 1999/0253 (CNS).

EUMC Project 2001-2002 "Study on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States"

By the end of 2000, with the adoption of Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation), there existed at the European Community level an actual framework for Member States on which to base, adapt or amend national legislation.

Terms of reference of the study

With the change in the legal situation at the European Community level, the EUMC decided to follow up the Joint Project by commissioning a new study on legislation. The study would:

- produce a report on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States. The grounds of discrimination to be examined in the Council Directives for the purposes of the comparative study and report would be limited to racial or ethnic origin and religion or belief; and

- update the country reports from the Joint project with Migration Policy Group (MPG): checking to see how the adopted Council Directives compare with existing legislation in all fifteen Member States; including information on any changes in legislation in the fifteen Member States that have occurred since the drafting of the Joint Project Reports.

Timeline of the study

The EUMC launched a call for tender process in May 2001 and selected Migration Policy Group to undertake the new study.

Information was collected up until September 2001. This enabled the draft reports from the study to be completed in time for submission to the meeting of the Legal Working Group to prepare the implementation of Directives 2000/43 and 2000/78 on non-discrimination into national law which was convened by the European Commission in November 2001. The Legal Working Group had an opportunity to examine the reports and make comments by 7 December 2001. Comments received by the EUMC were then examined and incorporated where relevant and as appropriate.

Format and scope

The format for the study is a list of questions, some optional for the purposes of the EUMC, related directly to the articles of the Council Directives. Optional questions where included in the reports provide information related to gender discrimination and the new Protocol 12 to the European Convention on Human Rights. Optional questions were not essential for the reports (and are therefore not included in every report) as they do not relate directly to the Council Directives, but may provide useful complementary information.

The information provided indicates provisions in the Constitutions, the Criminal law, Civil law and Administrative Law of the relevant EU Member State. Every care has been taken to ensure that the translations of titles of legislation from the original language are as accurate as possible, but they are for information purposes only and should not be regarded as the definitive or official translations by the European Union. The title of the piece of legislation in its original language has been included and should be referred to.

Final Caveat

The reports cover legal aspects as well as institutional mechanisms to promote equal treatment and combat discrimination as outlined by the Council Directives. In all reports there is a description of the legal and institutional situation and an indication of whether their compatibility with the Council Directives should be reviewed, some reports may indicate case law where it exists to complement the information on the legal provision, there is an element of evaluation in the reports, but the main emphasis has been to indicate what provisions exist without necessarily trying to evaluate them. As a result there may be some discrepancy between reality and the situation reflected by the law.

The final decision whether national legislation is compatible with the Council Directives rests with the European Court of Justice.

Introduction

Racial and ethnic discrimination, never totally eliminated in Europe, resurfaced when European societies became increasingly diverse as a result of continuous intra and extra European migration. Governments and civil society organisations responded by designing programmes to combat these forms of discrimination. In some countries these programmes included the adoption of comprehensive anti-discrimination legislation.

Policy responses at the level of the European Communities go back as far as the re-launch of the common market in the mid-eighties. This operation moved also social issues up on the European agenda, including equal treatment and anti-discrimination. In 1984, the European Parliament established the Parliamentary Committee of Inquiry into the Rise of Fascism and Racism, leading to the adoption of the Evrigenis Report in 1986. In the same year the European Parliament, the Council of Ministers and the European Commission adopted the Joint Declaration against Racism and Xenophobia. In 1991 a second report on the issue was published by the European Parliament (the Ford Report). From the early nineties non-governmental organisations started to call for European legislative measures and drafted their own legislative proposal, called the Starting Line, which received the support of the European Parliament, some governmental agencies and a great number of non-governmental organisations[1]. In 1994, the Consultative Commission on Racism and Xenophobia was established, which in its final report made a series of recommendations including the adoption of European legal measures against racism[2]. In the same year the final decision was taken by the Council of Ministers to designate 1997 as the European Year against Racism. The European Year offered tremendous opportunities to increase the support for a European strategy against racism, including for the adoption of legal measures against racism. At the same time the 1996/7 Intergovernmental Conference discussed proposals for Treaty changes, one of them being a proposal for the inclusion of an anti-discrimination clause in the EC-Treaty.

The actual inclusion of such a clause as Article 13 of the Treaty establishing the European Community (TEC) renews Europe's human rights commitments and strategically lays the foundation for policies that promote equality and value diversity. The European Commission started to draft anti-discrimination legislation as soon as the amended EC Treaty took effect (1 May 1999) and presented its first proposals in the same year. In one and half years two legislative measures and an action programme were adopted[3]. The Directive on racial and ethnic discrimination, the Racial Equality Directive[4], prohibits both

[1] Isabelle Chopin, The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment. In: European Journal of Migration and Law I (1): 1999; Jan Niessen, The Amsterdam Treaty and NGO responses. In: European Journal of Migration and Law II (2): 2000; Isabelle Chopin, Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals. In: European Journal of Migration and Law II (3 and 4): 2000.

[2] Final report from the Consultative Commission on Racism and Xenophobia to the General Affairs Council, Brussels, May 1996 (6871/1/96 RAXEN 18).

[3] Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ L 180, 19/07/2000.b); Council Directive establishing a general framework for employment equality (OJ L 303, 02/12/2000); Council Decision establishing a Community action programme to combat discrimination (OJ L 303 02/12/2000).

[4] This Directive was adopted first. For the negotiation process see, Adam Tyson, The negotiation of the European Community Directive on Racial Discrimination. In: European Journal of Migration and Law III (2): 2001.

direct and indirect discrimination, as well as harassment, victimisation and instruction to discrimination. The material scope includes access to employment and working conditions, all kinds of vocational training, membership in professional organisations, social protection including health, social advantages, education and access to goods and services which are available to the public, including housing. The Directive allows positive action. The Directive obliges Member States to ensure judicial and/or administrative procedures for the enforcement of the obligations under the Directive and allows non-governmental actors to start legal action in cases of discrimination. The burden of proof is more equally divided between a victim of racism and the perpetrator. The Framework Directive for employment equality forbids discrimination on grounds of religion and belief in employment.

While the Commission drafted the proposals for the two Directives and the Council negotiated on the texts, the Migration Policy Group started in co-operation with the European Monitoring Centre on Racism and Xenophobia (EUMC) a research project. The research compared the requirements under the Starting Line and the proposal for a Racial Equality Directive with existing legislation in the fifteen Member States. The intention of the research was to clearly describe what the individual Member States would need to do in order to comply with the developing European standards[5]. After the adoption of the two Directives the research was updated[6], again in close co-operation with the European Monitoring Centre, by a group of independent experts who were part of the Europe-wide project *Implementing European Anti-Discrimination Law*, a joint initiative of the Migration Policy Group, the European Roma Rights Center and Interights[7].

The incorporation of the Directives into the national laws of the Member States in 2003 will keep the combat against discrimination on the national and European agendas. The transposition process requires the active involvement of national and European governmental and non-governmental institutions. The fifteen country reports and the synthesis report may contribute to a well-informed debate on the required adaptations of the laws in the Member States.

Jan Niessen, Director, Migration Policy Group

Isabelle Chopin, Migration Policy Group

[5] The fifteen country reports were made available at EUMC's web-site: Isabelle Chopin and Jan Niessen (eds), Research on national and European legislation combating racism. Joint project of the Migration Policy Group and the European Monitoring Centre on Racism and Xenophobia; Project period 1 May 1999 -31 January 2000.

[6] For this purpose religion and belief – grounds of discrimination in the Framework Directive - were included in the comparison.

[7] The group also prepared country reports for eleven accession states published in March 2002.

INTRODUCTORY REMARKS[8]

The gap between the formal legislation and its implementation is often substantial. The two different fields of law containing anti-discrimination legislation relating to ethnicity and religion are labour law and criminal law. The effectiveness of the laws in both these fields can be questioned.

The law on measures against discrimination in the workplace on the grounds of, among others, race, ethnic origin and religious faith, went into effect in 1999. It is not unusual that effective implementation of new legislation can take a number of years, particularly when the new law has replaced ineffective legislation, as in Sweden. There are some indications that the new law is effective in that there are an increasing number of settlements in relation to complaints concerning workplace discrimination. Some research has been carried out concerning discrimination in working life but it has little to do with explaining the gap between formal legislation and actual implementation and discrimination. The research has basically been limited to statistical analyses and/or subjective interviews with potential victims or perpetrators related to discrimination.

Many victims of discrimination, while aware of the laws, are also aware that the laws have limits. Even the best of anti-discrimination laws are difficult to enforce for a variety of reasons. The coming years will determine the extent to which victims can place their faith in the laws that were recently adopted. This is not necessarily going to be easy since there was little faith in the previous laws – people "knew" that they provided little or no protection. Given the increasing number of settlements (analysed below), it seems that at a minimum the Ombudsman and the unions are moving in the right direction.

Thus far, the government, as well as the research community have rejected the use of situation testing, which seems to be one of the few effective ways to expose the implementation gap. There are similar anti-discrimination laws concerning the counteracting of discrimination in the workplace on the basis of gender, disability and sexual orientation. Similar gaps in implementation seem to exist here, as well as a similar lack concerning research at the national level. It should be noted that there are indications that the gender equality legislation has been more effective than the others. On the other hand this is at least in part due to the fact that this legislation was in place a considerable time before the others (1980 as opposed to 1999).

> According to Chapter 16 Article 9 of the criminal code (16 *kap*. 9 § *brottsbalken*, in force since 1970), discrimination in economic activities based on racial or ethnic origin or religion is unlawful, if practised by a natural person representing an enterprise or organisation performing an economic activity or employed by such an or enterprise or organisation. Again the gap in effective implementation seems

[8] This report was written by Paul Lappalainen under the direction of Migration Policy Group for the EUMC project on comparing existing national legislation in EU Member States with the Article 13 Directives (Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation)). It includes information from a previous report by Ms Margareta Wadstein which was part of a joint project of the Migration Policy Group and The European Monitoring Centre on Racism and Xenophobia entitled « Research on national and European legislation combating racism ».

substantial. In general there are at most one to two convictions per year while the number of annual complaints can amount to more than two hundred. Little or no research concerning this gap has been carried out. It is fairly widely accepted that this law is ineffective (see e.g. the Government's recently adopted Action plan against racism, xenophobia, homophobia and discrimination / Skr. 2000/2001:59, *En nationell handlingsplan mot rasism, främlingsfientlighet, homofobi och diskriminering* – February 2001).

Situation testing here could also provide an important basis for analysis and criticism.

Article 1[9]

Is there any legal framework at national level that puts into effect the principle of equal treatment, or that is designed to combat discrimination on the basis of racial or ethnic origin and/or on the basis of nationality and/or on the basis of religion or belief? If so, what is the nature of this framework?

Introduction

Rather than a framework there are parts of a national framework concerning the principle of equal treatment that are developing at somewhat different speeds and manners. As noted below there are different laws against discrimination in working life on the basis of ethnicity, religion, gender, disability and sexual orientation. They vary somewhat in the level of protection provided. Since 1980, according to the Equal Opportunities Act, gender discrimination in the workplace has been banned. The first law that provided damages for ethnic discrimination in the workplace was passed in 1994. This law was very weak in that it did not, at a minimum, use the Equal Opportunities Act as a model. One reason was that the law was pushed through basically because of UN criticism about the lack of such a law and there was little realisation among politicians that ethnic discrimination was a serious problem in Sweden. Another issue was that there was some prevailing idea that gender discrimination is so fundamentally different from the other grounds that the Equal Opportunities Act could not be used for guidance. The law against ethnic discrimination adopted in 1999 was due to a somewhat more deepening insight among politicians. It was at that time that laws were also adopted concerning the discrimination grounds of disability and sexual orientation. The enquiries that proposed these three laws had basically used the Equal Opportunities Act as a foundation to build on which meant that they ended up being "better" than that Act. The Equal Opportunities Act has now been amended to bring it more into line with the others.

[9] Discrimination on the grounds of race and ethnic origin is covered by the Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (further: **Racial Equality Directive)**; discrimination on the grounds of religion and belief (but only in employment and occupation) are covered by the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (further: **Employment Equality Directive**); until Article 5 the provisions of the two Directives correspond in content and numbering; as of Article 5, the contents of articles corresponds, but the numbering differs; the reports follows the numbering of the Racial Equality Directive; the numbers of the corresponding articles on religion and belief in the Employment Equality Directive will be mentioned in a footnote.

Concerning a "framework", there are different ombudsmen for each of the discrimination grounds. Their mandates also vary somewhat.

There is also the Swedish Integration Board which was established in 1999. The Board is a government agency that has been assigned the task of promoting the overall goals of Sweden's integration policy at a broader societal level by the government and Parliament. The Board does not deal with individual cases, but with more structural issues. In short the primary goal can be summarised as the promotion of equal rights, obligations and opportunities for all, irrespective of their ethnic and cultural background, as well as diversity in society.

Finally, the "framework" can be filled out with the fact that there is a criminal code provision that bans unlawful discrimination by merchants on the basis of ethnic background and religion. Naturally, the police and prosecutors are responsible for following up violations of the criminal code.

General legal framework

Protection for the principle of equal treatment can be found both at a constitutional level as well as at the level of national legislation. The constitution lays down the principle of equal treatment, both directly and indirectly. However, the practical implementation of the principle is found in the various specific laws against discrimination in Sweden.

Constitutional provisions

Chapter 2, Article 15 of the part of the Swedish Constitution called the Instrument of Government (IG) (*Regeringsformen 2 kap.* 15 §) provides that no one may be treated unfavourably *inter alia* on grounds of race, colour or ethnic origin in any piece of legislation. The provisions of the IG in principle govern only the relationship between the individual and the state. In regard to employment in the public sector there is a constitutional requirement (*Regeringsformen 11 kap* 9 §, IG Chapter 11, Article 9) that decisions regarding an offer of employment shall be based solely on objective grounds, such as skills and merits, and it is therefore never justifiable to treat any job applicant unfavourably on the basis of ethnic background or other irrelevant factors.

Strictly speaking, these rules do not apply to local government employees. However, in practice they apply because of the constitutional rule in Chapter 1, Article 9 of the IG (*Regeringsformen 1 kap*. 9 §) which states that all exercise of public authority shall be grounded on an objective basis. As for the principle of equal treatment laid down in that Article, it applies only to authorities responsible for enforcing the law, not to the legislature at either the procedural or substantive levels.

Article 2 of Chapter 1 of the Swedish Constitution requires the State to respect "the equal worth of all and the freedom and dignity of the individual". More specifically, paragraph 4 of this provision calls on the public authorities to promote the cultural development of ethnic, linguistic or religious minorities. It should be noted, however, that these requirements have no specific normative force: they are today little more than recommendations to the legislature.

On the other hand, the various fundamental rights embodied in Chapter 2 of the Constitution like Article 15 are enforceable in law. However, this safeguard, which also applies to foreigners (Article 20, Chapter 2), is of only limited effectiveness: a court or an administrative authority may set aside a law or regulation as a violation of a fundamental constitutional right only if the violation is manifest (*uppenbart*). This limitation, that the law adopted by the Parliament not only violates, but is a *manifest* violation of the Constitution, means that, as a practical matter, this issue is rarely brought up in Swedish courts. Many lawyers point out, for example, that they basically do not bring up constitutional issues even in cases, where it might be reasonable, since they fear embarrassing themselves before the judges.

In the only case of discrimination in relation to the IG the Swedish Supreme Court has had to consider thus far, the Court reached a majority decision to the effect that, by making the State responsible for managing the ancestral hunting and fishing rights of the Sami, the legislature had not violated Article 15, as the disorganisation of the various tribes necessitated an assumption of control by the central authority; the minority view among the Supreme Court's judges was that there had been a violation (namely, placing the Sami's rights under supervision), but not to an extent warranting judicial intervention (NJA 1981 s. 1 pp. 247).

It should also be noted that The European Convention on Human Rights has been incorporated into national legislation. However, these provisions cannot be used as the basis for an independent discrimination claim in a national court. (This is why the adoption of Protocol N° 12 is important.)

National laws against discrimination

The criminal code, unlawful discrimination (olaga diskriminering)

According to Chapter 16, Article 9 of the criminal code (16 *kap*. 9 § *brottsbalken*) which has been in force since 1970, discrimination based on racial or ethnic origin or religion is unlawful, if carried out by a natural person representing an enterprise or organisation performing an economic activity or employed by such an enterprise or organisation. If that person discriminates against another person on grounds of race, colour, ethnic origin or religious belief by not giving that person access to goods, facilities and services in her or his business activities on the same conditions that the enterprise or organisation applies to other persons, unlawful discrimination has occurred. The sanctions are fines or imprisonment for a maximum of one year.

The provision also covers discrimination in the public sector by officials and elected persons of public authorities and local government. It also covers discrimination in access to public events.

It does not cover private relations between individuals (for example, a person who lets a room in her home), nor does the provision apply to employment relationships.

Naturally complaints concerning violations of the criminal code provisions above are to be submitted to the police, and the prosecutors and police are in turn responsible for the necessary investigations and prosecutions.

The Ombudsman against ethnic discrimination (DO) has only an indirect advisory role concerning ethnic discrimination related to the provision of goods and services covered by the criminal code. When complaints are submitted to the DO that fall within the criminal code, the law is explained to the complainant and information is provided concerning submission of such claims to police. The DO quite often also follows what happens with the complaints after their submission to the police and prosecutors, particularly in terms of providing advice concerning the prosecution of the case in the courts when requested by the police and prosecutors. The DOs follow-up actions have also led to the reopening of cases that were insufficiently investigated.

The case law is limited but some examples of the various cases are presented below.

A small number of cases have reached the Supreme Court. One fairly recent case (HD 1999-09-13, NJA:1999 s. 556) involved a shopkeeper's ban on entrance into his store by persons wearing wide, long and heavy skirts. The ban was determined to be discriminatory since it was formulated in such a way that it was directed at and affected basically exclusively and generally women of a Finnish Roma (gypsy) background. The sanction imposed was a criminal fine of about SEK 1800. In addition civil damages of SEK 5000 were ordered due to the violation of personal integrity involved.

One important Supreme Court case that shows the difficulty in proving that ethnicity was the decisive factor in the treatment received involved three men of African background who were denied entry into a restaurant in Stockholm (NJA:1996 s. 768). The three men were refused entry by the door guard. It is not entirely clear why – there were some references to the fact that the place was full or that table reservations were needed. The situation was also filmed by a Swedish news team. They (both were of Swedish background) were allowed into the restaurant without being stopped soon after the three men were refused entry. Originally the guard had told police that the issue had been that there was some special event that evening. The guard later changed his story. He basically stated that he could not remember what his motivation was. The restaurant manager testified that minorities were frequent guests and that they would fire personnel who discriminated. The court found the guard not guilty since it was not proven that the ethnic background of the men was the decisive factor in the guard's decision to refuse entry. The Court concluded that some factor other than their ethnicity might have resulted in the guard's decision.

On the other hand, in a 1994 case (HD 1994-09-12, Mål nr. B 555/94, NJA 1994 s. 511) a landlord refused to rent out an apartment once he found out that the applicant's cohabitant (boyfriend) had a African background. This case resulted in a criminal fine of SEK 35000 (75 day-fines times SEK 500 per day).

The claim that discrimination may be a legal defence if it is good for the victim, or if it is intended to avoid ethnic concentrations, was rejected by the Supreme Court in a 1985 decision (NJA 1985 s. 226). In this case a public housing company refused to rent an apartment to a person with a roma (gypsy) background in a particular area. It was said by the defence that there was already a concentration there. It was therefore not necessarily good for the applicants to move into such an ethnic concentration. On the other hand, an offer was made concerning an apartment in a different area. The Court stated that the law

cannot be interpreted in such a way that it would be all right to treat a person from a particular ethnic group less favourably by referring to the idea that in the long run it will benefit the group in question. This even applies when the purpose is to counteract ethnic housing concentrations. The conviction was allowed to stand. The fine amounted to SEK 750.

The first case (NJA 1976 s. 489) decided by the Supreme Court concerned a restaurant that refused entry to a woman wearing traditional Finnish roma (gypsy) clothing. The restaurant had set up a policy that meant that persons with large wide dresses were not to be allowed into the restaurant. This led to the denial of entry to the victim at hand. The restaurant had known that such a policy would result in the practical exclusion of Finnish roma women. Despite this knowledge the defendant, according to the Court, provided no acceptable explanation for retaining the discriminatory ban. The person who had ordered the discrimination was convicted of criminal instigation and fined SEK 700 while the perpetrator was fined SEK 225.

Effectiveness

This criminal code ban on unlawful discrimination is considered by many to be ineffective. The positive side is that since it is part of the criminal code, an individual can have his claims pursued by the public sector. In theory, the police and prosecutors have the necessary power, resources and interest for following up claims.

The negative side of the issue is that many feel that there are a variety of practical and theoretical drawbacks to the use of criminal law. As indicated above, the courts seem to have set an extremely high standard as to the specific intent that must be proved. In other words it seems that it is almost impossible to achieve the level of proof needed for a conviction – without some sort of confession.

At a minimum, the case law and the other factors above are an indication that the criminal code provision needs to be amended, and the efforts to enforce the provision must be increased. At the same time there seems to a growing interest in the use of civil law in relation even to issues outside of labour relations. A comparative analysis between countries with civil law regulation of discrimination (the Netherlands, England, Canada and the US) seems to indicate more success in obtaining favourable legal decisions. This is quite natural since the burden of proof is generally lower in non-criminal cases.

The Act on measures against ethnic discrimination in working life in 1999

> Concerning working life, Sweden adopted the Act on measures against ethnic discrimination in working life in 1999 (*Lagen* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*). The Ombudsman against ethnic discrimination (DO) is the main supervisory authority concerning this law. The Act (1999:131) that defines the mandate of the Ombudsman was also adopted in 1999. However, in regard to individual cases the unions have the primary responsibility for representing their members in regard to claims concerning discrimination.
>
> These two laws were adopted because it had been determined that the previous law concerning ethnic discrimination was totally ineffective. There were two cases

brought under the old law to the Labour Court. The defendant employer won both of them (AD 61/1997 and AD 134/1998). Among other problems the level of specific intent that had to be proved was similar or higher than that in many criminal cases. There were also relatively few successful settlements of discrimination claims.

The new law provides among other things for a shifting of the burden of proof once certain objective factors are shown by the victim. It also covers the entire employment process (and not just the decision to employ) as well as individualising the damages that can be demanded. Indirect discrimination as well as ethnic harassment are covered. Also, the law requires the use of active measures by the employer to promote ethnic diversity.

In regard to employment discrimination an individual complainant can be assisted by the DO, her or his union or a private attorney. Under the Act the unions are given a primary responsibility for representing their members. The DO's responsibility in such cases is subsidiary to the unions. One important advantage with representation by the DO or a union is that the individual does not have to bear the legal costs.

Although a number of cases have been filed with the Labour Court, they have all thus far been withdrawn - basically due to negotiated settlements. This means that there is no formal case law concerning the 1999 Act. However, the increase in the number of settlements since the new law went into effect represents a positive trend. Although the formal case law is lacking, apparently employers are choosing to not test its limits. Instead they are settling the cases. This is also positive in general for the individuals involved since the negotiated settlements can provide something the court does not have a right to award – a job. The courts can only award damages.

It could be said that an informal case law is developing through the settlements that have been achieved thus far. These have primarily involved cases where the DO or a union has represented the complainant. Since the new Act went into effect on 1 May 1999 about 40 settlements. The following selection of settlements may be of interest in this regard. The number in brackets is the DO's case number.

In Dnr 460-2000 a woman with a Russian background filed a complaint against her former employer. She received SEK 70, 000 as compensation. She had been working for eleven years in a home for the care of the elderly. In the autumn of 1999 she was accused by her employer of failing to exercise due care in her treatment of the patients. She asserted instead that the issue involved harassment and ethnic discrimination on the part of others in the unit. She was finally moved against her will to a care unit far away from the home. The DO concluded that she was discriminated against in that the employer would not have treated a similarly situated person of Swedish background in the same manner. In this case the union refrained from representing its member.

The Swedish National Immigration Office recently gave SEK 60, 000 in compensation to a job applicant (Dnr 964-99). The job applicant asserted that the Office had discriminated him against in connection with a recruitment procedure. The settlement resulted in the withdrawal of the case from the Labour Court.

In Dnr 998-1999 a union safety representative was subjected to ethnic harassment by his employer. The employer made comments like “why don’t you go back to where you came from”, “you and your strange Arab country”, and “you don’t understand Swedish work methods”. The employer also pushed the representative and told him to return to his workstation when he was carrying out his union duties. After negotiations with his union the representative agreed to leave the workplace and received a compensation package amounting to about SEK 250, 000.

In Dnr 834-1998 it was asserted that a Muslim woman was discriminated against by the County Dental Service. The focal point was on comments that had been made concerning her wanting to wear her headscarf if she went to work for the service. The settlement reached provided her with damages as well as an 8-month part-time position as a dentist within the Dental Service. The Service also agreed to arrange special training sessions for all of the clinic heads concerning the anti-discrimination law.

In Dnr 422-99 a Scottish woman was given a permanent teaching position in Marks County as well as SEK 10, 000 as damages. The woman was passed over even though she was the only job applicant who fulfilled the employment criteria. She was denied the job because the employer felt that she lacked sufficient communicative ability. According to the complainant and the DO she was passed over for the job because she spoke Swedish with an accent.

Effectiveness

Naturally, many consider the fact that there is no formal case law to be a problem. As pointed out above though, the settlements being reached today are a positive indication concerning the effectiveness of the new law. The cases are basically being brought and won. They are just not being decided in the courts - yet.

On the other hand there are improvements that can be made. Some will come about because the EU Directives requires amendments and improvements that will result in an expansion of the scope of Sweden’s relatively new law. For example, the law will cover unpaid trainee positions in the future.

One possible problem with the new law is the idea that unions in theory are to play a primary role in its enforcement. At least thus far this has simply not been the case, although the unions are becoming more adept and interested in this role.

Another issue is the limited amount of damages available under Swedish law. For a large employer the current informal ceiling of about SEK 80 000, in cases concerning discrimination against job applicants, can hardly be claimed to have a major deterrent effect. It is possible that the law will be complemented with the inclusion of anti-discrimination clauses in public contracts (see below). These clauses will increase the economic risks related to discrimination, which should increase the interest of companies that work with public contracts.

On the whole, the implementation of the law is moving in the right direction. As the law becomes more and more a part of Swedish society, as it becomes increasingly

known, particularly due the efforts of the DO and others, the law should become increasingly effective.

Other relevant national laws

It should be noted that two other laws banning discrimination in working life on the basis of disability and sexual orientation, respectively, went into effect at the same time in 1999. These three laws were structured on essentially the same legal basis and involved a number of improvements and innovations in comparison to the Equal Opportunities Act (covering gender discrimination). This led to demands for amendments in the latter Act as well. Thus today Sweden has four relatively similar laws concerning discrimination in working life. Among other things, this will mean that the case law concerning ethnic discrimination will be relevant in examining gender discrimination cases, and vice versa. This should lead to more effective development of the law within each of the fields.

The final law that can be mentioned here is the Personal Data Act (*Personuppgiftslagen*, SFS 1998:204) which contains provisions to protect people against their personal integrity being violated by the processing of personal data. The Act, which is adapted to the EU rules, entered into force on 24 October 1998. It is relevant in this context in that statistics are often important in terms of monitoring the effects of measures to counteract discrimination and to promote ethnic diversity. The Personal Data Act sets the guidelines for the protection of personal integrity. Thus certain forms of information collection and storage are improper and illegal concerning e.g. an individual's ethnic background, while others are fully within the framework of the law, particularly when it is up to the individual to choose the type of information he or she wants to disclose. This is assumed to be the manner in which ethnic monitoring can be carried out, i.e. on the basis of information that is volunteered by the individual employee. As pointed out in countries that carry out different forms of monitoring such as Canada, it is important that the individual understand the importance and relevance of the information asked for and that proper controls to prevent abuse are put in place. This is one manner in which this Act and the workplace anti-discrimination laws can function.

Article 2.1 and Article 2.2(a) and 2.2(b)

Is there a definition of direct and indirect discrimination in your national legal system? Is there a need to introduce definitions of direct and indirect discrimination, as defined in Article 2.2(a) and 2.2(b) of the Directives, into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

*Direct and indirect discrimination are defined in the 1999 Act on measures against ethnic discrimination in working life. The government thus needs to introduce such definitions in all fields not covered by the responsibilities of an employer towards a job applicant or an employee in this Act. For example, such definitions are lacking in the provisions on unlawful discrimination in the criminal code (*olaga diskriminering, *16* kap *9 §* brottsbalken*).*

Article 2.2(a)

The Act on measures against ethnic discrimination in working life contains the following description of direct discrimination in Article 8 paragraph 1:

"An employer may not unfairly deal with a job applicant or an employee by treating him or her less favourably than the employer treats or would have treated persons with another ethnic background[10] in a comparable situation, unless the employer shows that the less favourable treatment has no connection with ethnic background".

Article 2.2(b)

The Act on measures against ethnic discrimination in working life further contains basically the same definition of indirect discrimination as the EC Council Directive 97/80 on the burden of proof in cases of sex discrimination. Article 9 of the Swedish Act states that: "An employer may not treat a job applicant or employee less favourably by using a rule, requirement or procedure that seems neutral but which in practice is particularly unfavourable to persons of a particular ethnic background. This does not apply if the purpose of the rule, requirement or procedure can be motivated by rational reasons and the measure is suitable and necessary for achieving the purpose at issue".

However, as regards indirect discrimination, objective factors that can justify the practice, etc. for private employers, include not only regard to economic or job-related, enterprise-related grounds, but also, perhaps more unexpectedly in a Community law perspective, to social and public interest related grounds.

Gender discrimination

As regards the relationship between employers and job applicants/employees, there are comparable definitions of direct and indirect discrimination in the law that bans gender discrimination in working life. The Act was recently amended in order to, among other things, bring it more into line with the new laws against discrimination adopted in 1999. Both direct and indirect discrimination are now specifically defined in the Equal Opportunities Act (*jämställdhetslagen*).

[10] According to Article 3 ethnic background includes race, skin colour, national or ethnic origin or religious faith; throughout the report the use of "ethnic discrimination" includes also discrimination on the ground of religion, unless specifically excluded.

Article 2.3

Is unlawful harassment an identifiable concept in national law? Is there a definition of harassment in the national law that corresponds to that in the Directive? Is it necessary to introduce such a definition into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

The concept of harassment exists in Swedish law. The 1999 Act states: "In this law the term ethnic harassment means behaviour in working life that violates an employee's integrity and has a connection with the employee's ethnic background"(4 §). In addition, the Act specifically gives employers the duty to investigate and undertake measures against harassment. The introduction of the Directive's definition of harassment into law will presumably be beneficial in terms of clarity and specifying that harassment is discrimination and not just a related issue.

In 13 § the Act specifies that "An employer who receives knowledge that an employee considers herself or himself to have been subjected to ethnic harassment by another employee shall investigate the circumstances around the reported harassment and where necessary undertake the measures that reasonably can be considered to be necessary to prevent harassment in the future."

In addition, according to the legislative materials, harassment by an employer is in essence considered to be covered by the ban on discrimination (SOU 1997:174, Räkna med mångfald! – Government Enquiry 1997:174, Count on diversity!). The basic idea is that unwanted conduct by an employer related to ethnic origin that results in invasive measures is covered by the Act.

There is a comparable situation with regard to gender discrimination. However, the specific details vary somewhat. Section 6 (paragraph 2) of the Equal Opportunities Act defines "sexual harassment as such unwanted conduct based upon gender or unwanted conduct of a sexual nature that violates the employee's integrity in the workplace".

Article 22 specifies concerning an employer that:

> An employer may not subject an employee to harassment due to an employee's rejection of an employer's sexual overtures or an employee reporting the employer for gender discrimination.
>
> A person who has the right to represent an employer in the determination of working conditions shall in the application of the first paragraph be considered equivalent to the employer.

In Article 22a of the Equal Opportunities Act there is a direct equivalent to the provision concerning ethnic harassment above (13 §): "An employer who receives knowledge that an employee considers herself or himself to have been subjected to sexual harassment by another employee shall investigate the circumstances concerning the reported harassment and where necessary undertake the measures that reasonably can be considered to be necessary to prevent continued sexual harassment."

Article 2.4

Is it unlawful under national law to give instruction to discriminate on the grounds of racial or ethnic origin or religion and belief? Is it deemed to be discrimination? Is there a need to introduce a similar principle in national law?

Are there comparable definitions in national law in relation to gender discrimination?

It is not unlawful in itself to give instructions to discriminate on the basis of racial or ethnic origin. There is therefore a need to introduce such a principle into national law.

Within the framework of criminal law, giving instructions to discriminate on the basis of ethnicity (including religion) is only covered to the extent that the instructions actually result in discrimination. But giving the instruction itself is not banned.

In the area of employment, there are sanctions against the employer as such, again assuming that the instructions resulted in discrimination. In addition, it should be noted that incitement or pressure on the employer by co-workers, trade unions, clients or customers or anybody else is not prohibited by legal sanctions.

Concerning gender discrimination, the rules concerning instructions to discriminate in working life are similar to the rules concerning ethnic discrimination in the workplace. (On the other hand it can be pointed out that there is no legally sanctioned ban against gender discrimination outside of working life similar to the Criminal Code provision concerning unlawful ethnic discrimination.)

Article 3.1[11]

Does the definition of 'racial and ethnic discrimination' and 'discrimination on the grounds of religion and belief' apply to all the fields of application listed in Article 3, both in the private and the public sectors?

To which other fields of application does the definition apply? (Compare with the fields of application listed in Protocol Nº 12)

Is gender discrimination covered in the same fields?

Article 3.1 specifies the various fields of application. The framework of Swedish anti-discrimination law (described above) has three basic components: constitutional provisions that lay down a general foundation; the criminal code provision banning unlawful discrimination (based on ethnicity and religion) by merchants in the provision of goods and services as well as discrimination by public employees and officials; and, the 1999 Act on measures against ethnic discrimination in working life. Given this framework, it can be said that the ban on discrimination in working life basically satisfies the requirements of

[11] Article 3.1 of the Employment Equality Directive does not include the fields e) social protection, including social security and health care f) social advantages g) education h) access to goods and services, including housing, so the prohibition on religious discrimination of the Directive does not apply to these fields

3.1(a) related to access to employment and 3.1(c) related to employment and working conditions. It should be pointed out that the self-employed are not covered by the Act.

The Criminal Code's ban against unlawful ethnic discrimination basically satisfies the requirements of 3.1(h) related to access to goods and services.

Concerning the other fields of application referred to in the Directive, there is either no direct ban on ethnic discrimination or the ban is at best very theoretical and speculative. The extent to which ethnic discrimination, in terms of vocational training or access to practical work experience, is banned provides a good example. The Act on measures against ethnic discrimination in working life basically covers only persons who are employers and employees/job seekers. Persons in vocational training, not being employees, are thus basically excluded from coverage by the Act. The criminal code provision, on the other hand, may be applicable in theory since it covers public sector services to some extent, and those providing or assisting in the provision of vocational training are quite often within the public sector.

The implementation of the criminal code on unlawful discrimination in relation to merchants and goods and services, which is the provision's main thrust, has been quite ineffective. To expect an effective use in an area, which is more speculative and more filled with legal challenges, would be to be overly optimistic. The same reasoning applies, in general as well to the other fields of application such as social advantages, social security and education. Presumably constitutional law as well, basically requires equal treatment or non-discrimination concerning such fields. Nevertheless the practical application of constitutional law in such fields is very limited, other than in cases of extreme violations of the equal treatment principle.

Sweden has more of a patchwork rather than a framework for dealing with ethnic discrimination. Various issues fall between the cracks. One problem is the combination of the use of criminal law in relation to some issues and civil labour law for others without any logical relationship between them. This also leads to a disparity in regard to enforcement and supervisory authorities, with the unions, the DO and the Labour Court on the one hand, and the police, the prosecutors and the criminal courts on the other.

In order to fulfil the requirements of Article 3.1, the coverage of the definition of racial discrimination needs to be expanded in clear legal terms so that all of the fields of application are explicitly covered.

Gender discrimination

In general, there are various constitutional provisions that, in theory, prohibit gender discrimination in various ways, particularly in the public sector. In terms of national law, however, there is only the Equal Opportunities Act which prohibits gender discrimination in working life. For example, gender discrimination is not prohibited by the criminal code provision that prohibits unlawful discrimination (on the basis of ethnic background, religion and homosexuality) in the provision of goods and services by merchants.

Article 3.2

To what extent, if any, does national legislation go beyond the Directive in prohibiting discrimination on the ground of nationality?

This depends on the precise meaning of Article 3.2. Assuming that its scope is limited to the issue of legal status alone, e.g. does not allow the payment of lower salaries to legal residents solely due to their status as third country nationals, the Swedish legislation does not go beyond Article 3.2. The two relevant Swedish laws require non-discrimination regardless of, among other things, national or ethnic origin. This is specified in both the criminal code and the 1999 Act.

Article 4

Do exemptions relating to genuine and determining occupational requirements exist at national level? Is it necessary to restrict any exemptions to those defined in Article 4?

There are some provisions in the Swedish Act that can be said to be equivalent to as well as being broader than the exemptions specified in Article 4 of the Directive concerning genuine and determining occupational requirements.

According to Article 8, paragraph 2 of the Act on measures against ethnic discrimination in working life (8 § *andra stycket lagen* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*) the "ban does not apply if the treatment is justified with regard to an idealistic or other special interest which clearly is more important than the interest in preventing ethnic discrimination in working life".

According to the preparatory works (Prop. 1997/98:177, the decision of the standing committee of the Parliament, 1998/99:AU4) of the Act, the provision is supposed to cover a right for employers to give preference to "certain vulnerable groups" and to take important societal, social interests into account, as well as the interest of equality between women and men, of furthering of job opportunities for handicapped, and of national security.

While in some situations such considerations might be considered to be an objective justification of the treatment unrelated to race etc, it seems that the wording in the Swedish Act is broader than the wording of Article 4.

Thus there is presumably a need to adapt the wording of the Swedish Act to the more restrictive wording set out in Article 4 relating to a characteristic that "constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".

The exemptions in the Equal Opportunities Act concerning gender equality in working life differ somewhat from the Swedish Act on ethnic discrimination. In Article 15, the Act states that the ban on gender discrimination does not apply if the treatment is part of an effort to promote gender equality in working life and this is not an issue of the application of salary or other conditions for work that is of equal or equivalent value; or if the

treatment is justified with regard to some other idealistic or special interest that clearly should not give way to the interest in gender equality in working life.

Article 5[12]

Are there any specific measures that aim to ensure or promote full equality or to compensate for disadvantages linked with racial or ethnic origin and religion or belief? Is the government considering adopting such measures?

Are there are comparable measures in relation to gender discrimination?

> There are some specific measures that can be said to exist in order to ensure or promote full equality or to compensate disadvantages linked with ethnic origin. According to Articles 4-7 of the Act on measures against ethnic discrimination in working life (4-7 §§ *lagen* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*) employers have an obligation to undertake active measures in order to prevent ethnic discrimination. Those measures are of a collective nature, aiming at creating equal opportunities and equal rights with regard to access to work, conditions of work and possibilities of development in working life. These measures are to be taken in regard to the working environment, ethnic harassment and recruitment (Articles 5,6 and 7). The aim is to prevent discrimination against individuals from occurring as a means of opening up opportunities, rather than to favour disadvantaged groups.

More precisely, within the framework of her or his activities, an employer shall carry out "goal-oriented work" order to actively promote ethnic diversity in working life. Ethnic diversity in working life is defined as equal rights and opportunities in regard to work, employment conditions and other work-related conditions as well as development opportunities in the workplace without regard to ethnic background.

An employer shall carry out such measures which, given due regard to the employer's resources and circumstances, can be required to ensure that the working conditions are suitable for employees without regard to their ethnic background.

An employer shall undertake measures to hinder and prevent any employee from being subjected to ethnic harassment or retaliatory actions due to the submission of a complaint concerning ethnic discrimination.

Finally, an employer shall work to ensure that persons of different ethnic backgrounds are given the opportunity to apply for the employer's available positions.

There are no provisions in the above Act allowing preferences for a job applicant or employee on basis of ethnic background. Such measures are thus presumably not allowed in this field since no such exception was introduced into the law adopted by the parliament.

[12] Article 7 in the Employment Equality Directive.

However, positive actions allowing for preferences on the basis of gender are allowed if they are used to promote gender equality in working life (15 § *andra stycket jämställdhetslagen* (1991:433)/ Article 15, paragraph 2 of the Equal Opportunities Act).

While the government's position is unclear, a number of politicians from different parties have asserted that similar positive actions, allowing for preferences in limited cases, in order to achieve ethnic diversity should be permitted in the field of ethnic discrimination as well. There is also some discussion of requiring the production of ethnic diversity plans by larger employers (10 or more employees) in the same way that gender equality plans are required in accordance with the Equal Opportunities Act. These plans, among other things, require a company to review its gender structure and set up goals to achieve a greater gender balance, if one is lacking. This is where affirmative action concerning gender can come in, if it is part of a structured plan to achieve greater equality. A company could decide, in regard to a particular group of employees, that it will point out in the employment ads that women are underrepresented and are thus particularly invited to apply for the job (in order to expand the pool of qualified candidates). A company could also decide that, between two equally qualified candidates, preference will be given to the underrepresented gender. However, it is probably important to point out that this latter form of positive preference has not been used very much in Sweden. Also, to the limited extent that it has been used, it has usually been a means to increase the number of men in employment situations historically dominated by women, such as day care centres.

Finally, the government has stated that it is planning to introduce the use of anti-discrimination clauses in public contracts, to the extent that the law allows, as an important complement to the anti-discrimination laws (see the Government's recently adopted Action plan against racism/*Nationella handlingsplan mot rasism* – February 2001). This type of measure will presumably be directed at the promotion of full equality rather than compensation for disadvantages linked to ethnic origin. These clauses will presumably apply to each of the different grounds for discrimination.

Article 6[13]

Are there any measures that protect the principle of equal treatment at national level that go beyond the minimum requirements of the Directive?

Article 6 allows Member States to "introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive". A number of the measures discussed above in relation to Article 5 can be said to go beyond the minimum requirements of the directive.

[13] Article 8 in the Employment Equality Directive.

Article 7.1[14]

Are legal procedures available for the enforcement of the obligations under the Directive for those who consider themselves wronged?

Sweden can basically be said to already have the required judicial and/or administrative procedures for the enforcement of obligations required by Article 7.1 of the Directive.

Complaints under the criminal code are dealt with by the police, the prosecutors and the general court system. Claims for damages can be made in the criminal case, through the prosecutor, at the same time as the crime is dealt with.

Complaints under the Act on measures against ethnic discrimination in working life can be made by the trade union of the individual, or by the Ombudsman against Ethnic Discrimination, to the Labour Court, and by the individual to a district court. It can be noted that in the first two cases, the individual bears no legal costs for her/himself and does not risk becoming liable for the legal costs of the opposing party in case he or she loses the case.

Concerning conciliation procedures it can be pointed out that Article 22 of the 1999 Act states that: "The Ombudsman against ethnic discrimination shall in the first instance try to convince employers to voluntarily comply with the rules set out in this law."

Article 7.2[15]

Is it possible for national associations or other legal entities to engage in legal proceedings for the enforcement of rights under the Directive?

Trade unions have a primary role in relation to labour law disputes, including discrimination in working life.

Beyond the special position of trade unions, the possibility presumably exists for associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, to engage themselves on behalf of or in support of the complainant, with his or her approval.

Other than in terms of moral support, this has not been a major issue in Sweden. It is highly possible however that such organisations and interests will develop within the near future. For example, a number of anti-discrimination bureaux have been started in the past few years with the encouragement of the DO and the Swedish Integration Office. These may develop the competence and interest in playing a broader and more direct role in discrimination cases in the future.

[14] Article 9.1 in the Employment Equality Directive.
[15] Article 9.2 in the Employment Equality Directive.

Article 7.3[16]

What time limits apply to the bringing of an action?

Please make precise references to the relevant legal provisions and case law, briefly describing the facts of the case(s) and the judicial arguments involved.

Various time limits are specified in the Act on measures against ethnic discrimination in working life (40-43 §§). Article 41, for example, refers to Articles 64-66 of the Co-determination act (64-66 §§ *medbestämmandelagen*). Various time limits exist within which actions must be submitted to the courts: from within four months after victim obtained knowledge of the discrimination to up to two years after the discrimination occurred.

In a criminal case the police and public prosecutor take action according to the general rules in criminal cases. The regular court system is affected. According to general rules of the criminal code, action has to be taken in court within two years of the crime.

Article 8[17]

Does the principle of the reversal or easing of the burden of proof in cases of racial and religious discrimination exist in national law?

Are there comparable provisions in national law in relation to gender discrimination?

In the field of civil law, the principle of the reversal or easing of the burden of proof in cases of discrimination has been established in regard to working life. As regards direct discrimination in the 1999 Act on measures against ethnic discrimination in working life, although not stated in the provision itself, it is said in the preparatory works that the provisions of the Council Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex should be implemented. This means that the burden of proof shifts to the defendant once the plaintiff has established factual evidence of less favourable treatment caused by apparent discrimination.

This principle is also basically the reason for the wording of § 8 "An employer may not unfairly treat a job applicant or an employee by treating him or her less favourably than the employer treats or would have treated persons with another ethnic background in a comparable situation, *unless the employer shows* that the less favourable treatment has no connection with ethnic background" (emphasis added).

As regards indirect discrimination the relevant provision of the Council Directive just mentioned is meant to be transposed in Article 9, which reads: "An employer may not treat a job applicant or employee less favourably by using a rule, requirement or procedure that seems neutral but which in practice is particularly disfavourable to persons of a particular ethnic background. This does not apply if the purpose of the rule, requirement or procedure

[16] Article 9.3 in the Employment Equality Directive.
[17] Article 10 in the Employment Equality Directive.

can be motivated by rational reasons and the measure is suitable and necessary for achieving the purpose at issue".

In criminal law, traditional rules are applied, meaning that the burden of proof rests with the prosecutor. A reversal of the burden of proof in criminal cases would simply not be in accordance with the general principles of Swedish jurisprudence related to criminal law.
There is a dimension as regards the criminal code provision of unlawful discrimination that should be mentioned. For a person to be convicted of that crime, the rule is unlike that in most other criminal cases; it is not enough for the employer to prove that the act was objectively committed, and that the defendant was aware of what he was doing, i.e. was aware of the fact that he was treating the victim unequally. The prosecutor also has to prove that the decisive intent of the unequal treatment was to treat the person unequally because of her or his ethnic background. In other words the required proof of intent is even higher than in many normal criminal proceedings. It is thus not surprising that this has turned out to be a very difficult task. It seems that this provision could possibly be eased within the framework of the Swedish legal system in order to fulfil the spirit of the Directive.

If, however, the burden of proof is to be shifted in the same way as in the 1999 Act concerning working life, the criminal code provision would presumably have to be transformed into a purely civil law discrimination act.

Gender discrimination

The Equal Opportunities Act (*jämställdhetslagen*) was recently amended to bring it into line with Community law as well as the other anti-discrimination laws adopted in 1999. The amendments introduce the provisions of the directive on burden of proof in gender discrimination cases into that law.

At the same time it can be mentioned that even according to the previous law there was already a shift in the burden of proof when the complainant established certain facts. The problem was that the level of proof required in the case of a job applicant was still too high to meet with EC standards, since the protection against discrimination was given only to a job applicant who was much better qualified than the candidate chosen. Equal qualifications were not enough.

Article 9[18]

Is the Directive's definition of victimisation to be found in national law?

Are there comparable definitions in national law in relation to gender discrimination?

Concerning victimisation reference can be made to Article 12 of the Act on measures against ethnic discrimination in working life, which reads: "An employer may not subject an employee to retaliatory actions due to the employee's submission of a complaint against the employer for ethnic discrimination".

[18] Article 11 in the Employment Equality Directive.

The provision is applicable when an complaint is made directly to the employer or to the trade union. It does not cover job applicants or those assisting in the submission of a complaint. However, shop stewards are covered by regular Labour Law provisions against infringements of the freedom of association.

The criminal code also contains provisions protecting persons involved in making complaints or assisting as witnesses or otherwise in complaints alleging ethnic discrimination under any of the provisions in national legislation protecting against ethnic discrimination before public authorities: such actions can relate to the Ombudsman against ethnic discrimination or the police, or appearing before the prosecutor or in court (*övergrepp i rättssak,* 17 *kap* 10 § *brottsbalken*/interference in a judicial matter, Chapter 17 Article 10 of the Criminal Code).

The Equal Opportunities Act (covering gender discrimination) contains a provision (§ 22) on victimisation that corresponds to the one in the Act on measures against ethnic discrimination in working life.

Article 10[19]

Which steps are necessary to ensure sufficient public awareness of existing laws? What arrangements currently exist to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

Does the government need to act to ensure that by means of information and training, and where necessary by effective sanctions, all officials and other representatives of the public authorities at every level abstain from any racially or religiously discriminatory speech or behaviour in the exercise of their functions?

The current arrangements to ensure sufficient public awareness concerning the anti-discrimination legislation are to a large extent limited to the activities undertaken by the Ombudsman against ethnic discrimination. Out of a budget of approximately 1 million Euros in the year 2000, 125,000 Euros were spent on disseminating written or electronic information. A website is a major tool (www.do.se), along with use of the media as far as possible. The main content of the website, including the texts of the different laws, is available in 14 different languages.

The strategy of the Ombudsman is also to spread information to potential discriminators and victims through handbooks, brochures and other media presentations. The overall strategy is to reach out as far as possible through educating educators with the help of material produced by the Ombudsman. The Ombudsman and her staff continuously take part in discussions, lectures, etc. Individual cases are also used to “give discrimination a face”. Some of the efforts of the Ombudsman are explicitly targeted at the activities of the National Board of Labour and other public authorities.

[19] Article 12 in the Employment Equality Directive, which has the following phrase in addition to Article 10 "for example at the workplace".

The Ombudsman and the Swedish Integration Board have jointly provided support and encouragement to the efforts of the various anti-discrimination bureaux at the local level. This is another means of increasing public awareness. The Swedish Integration Board has also arranged a number of seminars focussing on discrimination and public awareness, directed mainly towards organisations working with anti-racism issues.

More steps however need to be taken. The activities of the Ombudsman and the Swedish Integration Board are by no means enough.

The government has already acted to some extent by requiring government agencies to examine the issue of ethnic diversity within the agencies. This needs to be followed up by means of information and training and, where necessary, effective sanctions. The public sector is not immune from the use of racially or religiously discriminatory speech or behaviour. On the contrary there are clear indications of problems within the public sector. The government has declared in its Action plan against racism (*Handlingsplan mot rasism*, February 2001) that it is important that the government uses its influence over the public sector to ensure that it becomes a model of ethnic diversity. The Ombudsman against ethnic discrimination and the Swedish Integration Board will presumably play a key role in the government's plans.

Article 11[20]

Are there any measures to promote the social dialogue on the issues of the Directives at national level?

There is a social dialogue between the two sides of industry with a view to fostering equal treatment that has been taking place for a few years. A general declaration called "Diversity in working life" (1997) was agreed to by the social partners a few years ago. It was aimed at leading to increased cooperation concerning ethnic diversity in the workplace. Thus far though there seem to have been few concrete results due to the dialogue itself. With increasing awareness of the anti-discrimination legislation as well as greater political pressure to strengthen the laws, a more constructive dialogue should result.

Article 12[21]

Are there any measures to promote the dialogue with non-governmental organisations at national level?

As indicated above, both the Ombudsman against ethnic discrimination and the Swedish Integration Board have been engaged in a dialogue with appropriate non-governmental organisations (NGOs) that are interested in promoting equal treatment and counteracting racial and ethnic discrimination. The government has encouraged this dialogue with NGOs and has underlined the importance of a continuation and deepening of the dialogue with

[20] Article 13 in the Employment Equality Directive.
[21] Article 14 in the Employment Equality Directive.

NGOs in the Action plan against racism. The Action plan outlines a specific role for the Swedish Integration Board in this regard.

Article 13[22]

Is there a specialised body to promote equal treatment, irrespective of race or ethnic origin at national level? If so, what are its powers and duties? Is such a body effective?

If not, would the government need to act in order to give this body such specific powers? What would be the procedure?

There is a government body for the promotion of equal treatment without regard to race or ethnicity. This body is known as the Ombudsman against ethnic discrimination (*Ombudsmannen mot etnisk diskriminering* - DO). The Ombudsman has a broad mandate that ranges from providing advice and support to individuals (including providing legal representation in work discrimination cases) to working with public opinion and key actors, both public and private, in order to counteract ethnic discrimination. If anything, with regard to Article 13 it is presumably necessary to strengthen the Ombudsman's mandate, which is rather weak in areas other than working life.

The office of the Ombudsman has been in existence since 1986. The Ombudsman has been specifically responsible for questions related to ethnic and religious discrimination. The Ombudsman is a state agency. The Ombudsman is appointed by the government for a period of six years. The degree of independence is disputed, since the government can influence the work of the office. The budget is, however, decided on by the parliament.

The DO deals with approximately 1000 cases a year, and is assisted in her duties by a deputy and a staff of 10. The terms of reference are set out in two Acts: The most general ones are found in Articles 2-4 of *Lagen* (1999:131) *om Ombudsmannen mot etnisk diskriminering* (The act (1999:131) on the Ombudsman against ethnic discrimination). They read:

> 2 § The Government appoints an Ombudsman who is to work to ensure that ethnic discrimination does not occur in working life or in other areas of society.
> 3 § The Ombudsman shall through the provision of advice and in other ways assist those subjected to ethnic discrimination to realise their rights. The Ombudsman shall furthermore, through meetings with government authorities, companies and organisations, as well as through the influencing of public opinion, the provision of information and in other similar ways take the initiative in regard to various measures against ethnic discrimination.
> 4 § The Ombudsman shall in particular work against the subjection of job applicants to ethnic discrimination. The Ombudsman shall also in contacts with employers and affected unions promote good relations between different ethnic groups in working life.

[22] There is **no** provision in the Employment Equality Directive corresponding with Article 13 of the Racial Equality Directive on specialised bodies; nevertheless, the mandate of the DO covers discrimination on the basis of religious faith (Article 1)

As regards the mandate in working life, according to Article 22 of the Act on measures against Ethnic Discrimination in working life, the Ombudsman shall in the first instance try to convince employers to comply voluntarily with the rules set out in this law. The Ombudsman shall also in other ways contribute to the efforts to promote ethnic diversity in working life.

There is also a Board against discrimination, whose main task according to Article 23 is to examine applications from the Ombudsman to order an employer, who does not follow the rules on active measures in Articles 5-7, to fulfil her or his duties under penalty of a civil fine.

The Act further states (Article 24) that upon the request of the Ombudsman against ethnic discrimination, an employer has the duty to provide the relevant information concerning the conditions that prevail in the employer's activities that can be of importance in relation to the Ombudsman's supervisory tasks.

According to Article 37 of the Act on measures against ethnic discrimination in working life, the Ombudsman also has the right to bring lawsuits in the Labour Court. This is the case in disputes regarding violations of the different provisions of the Act. The Ombudsman may bring a lawsuit on behalf of an individual employee or a job applicant, if the individual agrees and the Ombudsman finds that a judgement in the dispute would be of importance for the application of the law or there are otherwise special reasons for bringing the case.

If the Ombudsman finds it suitable the Ombudsman may in the same lawsuit also present other claims as the representative of the individual.

However, according to Article 38, when a union has the right to bring a lawsuit on behalf of an individual according to what is further elaborated in Chapter 4, Article 5, of the law (1974:371) on trials in labour disputes (4 *kap* 5 § *lagen* (1974:371) *om rättegången i arbetstvister*), the Ombudsman may bring a lawsuit only if the union refrains from doing so.

As in civil service matters in general, all files are open to the public. If necessary, there are provisions giving a right to exclude facts from public access that could damage any party (2 and 15 *kap. tryckfrihetsförordningen/*Chapters 2 and 15, Instrument of freedom of expression, 9 *kap.* 20 § *sekretesslagen* (1980:100)/Chapter 9, Article 20 of the Act on confidentiality).

The effectiveness of the Ombudsman, just as the effectiveness of the relatively new Act on measures against ethnic discrimination in the workplace, is not easy to assess. One indication however of the increased effectiveness of the law and the Ombudsman is the increasing number of settlements related to discrimination in working life. The Directives are going to lead to a broadening of the anti-discrimination legislation in Sweden. This should in turn lead to a broadening of the Ombudsman's mandate, particularly in fields other than working life. The Ombudsman's effectiveness should thereby increase, even in working life, as many issues are at least related to working life, such as vocational training.

It can also be noted that the government in its Action plan against racism stated that it would soon be considering the combining of several or all of the various ombudsmen against discrimination into one body. Today there are four such bodies – the Ombudsman against ethnic discrimination, the Gender equality ombudsman, the Handicap Ombudsman and the Ombudsman against discrimination due to sexual orientation.

In this context the Swedish Integration Board, established in 1999, should be mentioned. The Board is a government agency that has been assigned three overall goals concerning Sweden's integration policy, by the government and Parliament. The Board has been given the task of getting these goals across to the general public. The goals are:

- Equal rights, obligations and opportunities for all, irrespective of their ethnic and cultural background.
- A sense of community based on diversity in society. Diversity must be reflected both in the shaping of policies and in the way they are pursued.
- A form of community development characterised by mutual respect and tolerance.

The tasks of the Board have been officially defined by the Government and Parliament as follows:
The National Integration Board shall

- - monitor and evaluate developments in society from an integration policy perspective.
- - promote equal rights, obligations and opportunities for all irrespective of ethnic and cultural background.
- - prevent and combat xenophobia, racism and discrimination (where such issues are not dealt with by some other public authority).
- - further ethnic and cultural diversity in the various spheres of public life.
- - seek to ensure that local authorities are properly prepared and equipped to take in people in need of shelter or people granted asylum or residence permits on humanitarian grounds, and where required to help out with municipal settlement.
- - seek to ensure that newly arrived immigrants´ need of support is properly met as well as their need for specially tailored community information.
- - be the decision-making body in respect of government grants to local authorities and county councils.
- - provide funding for organisations active in the integration field.
- - ensure that appropriate statistics are compiled.
- - generally promote a closer understanding of the issues in the integration policy field.

In promoting equal rights, obligations and opportunities the Board works in co-operation with other public authorities, organisations and those active in the community life, in order to spotlight obstacles, anomalies and shortcomings and to seek to eliminate them. The Board collaborates in particular with the DO in relation to structural discrimination, but the DO alone is responsible for dealing with individual complaints.

Article 14[23]

Is action needed to ensure that national law guaranteeing equal treatment between individuals, irrespective of racial or ethnic origin and religion or belief, takes priority over other laws, regulations or administrative provisions?

Do national legislative or administrative procedures provide for declaring null and void those provisions in agreements, contracts or rules that relate to professional activity, workers and employers that are contrary to the principle of equal treatment?

The Government would not need to take any action so that national law guaranteeing equal treatment between individuals irrespective of racial, ethnic origin or religion and belief takes priority over regulations and administrative provisions contrary to the principle of equal treatment. The reason is the general principle of hierarchy of laws and regulations, which means that a law – as decided by the parliament - always takes priority over regulations and administrative provisions that are decided by a government or a public agency. This matter is also dealt with in Chapter 8 of the Instrument of Government.

As regards to the issue of whether national laws guaranteeing equal treatment take priority over other national laws, there is no such general rule, since there is no general constitutional provision providing for protection against discrimination on grounds of racial or ethnic origin or religion or belief.

Chapter 2, Article 15 of the part of the Swedish Constitution called Instrument of Government (IG) (*Regeringsformen* 2 *kap*. 15 §) provides that no person belonging to an ethnic minority may be treated unfavourably, *inter alia*, on grounds of race, colour or ethnic origin in any piece of legislation. The provisions of the IG in principle govern only the relationship between the individual and the state. In regard to employment in the public sector, there is therefore a statutory requirement (*Regeringsformen* 11 *kap* 9 §, Chapter 11 Article 9 of the IG) that decisions regarding an offer of employment shall be based only on objective grounds, such as skills and merits, and it is therefore never justifiable to treat any job applicant unfavourably on the basis of ethnic background or other irrelevant factors. Strictly speaking, these rules do not apply to local government employees. In practice they apply, however, because of the constitutional rule in Chapter 1 Article 9 of the IG (*Regeringsformen* 1 *kap.* 9 §), which states that all exercise of public authority should be grounded on an objective basis. As for the principle of equal treatment laid down in that article, it applies only to authorities responsible for enforcing the law, not to the legislature at either the procedural or substantive level.

Article 2 of Chapter 1 of the Swedish Constitution requires the State to respect "the equal worth of all and the freedom and dignity of the individual". More specifically, paragraph 4 of this provision calls on the public authorities to promote the cultural development of ethnic, linguistic or religious minorities. It should be noted, however, that these requirements have no specific normative force: they are now little more than recommendations to the legislature. They have not been considered as protection against ethnic discrimination.

[23] Article 16 in the Employment Equality Directive.

On the other hand, the various fundamental rights embodied in Chapter 2 of the Constitution such as Article 15 are enforceable in law. This safeguard, which also applies to foreigners (Art. 20, chap. 2), is of only limited effectiveness. A court or an administrative authority may not set aside a law or regulation violating a fundamental right unless the violation is manifest (*uppenbart*).

Whether or not national laws guaranteeing equal treatment would take priority over other national laws would depend on what the outcome of an implementation of the principle of *lex specialis* would be.

In regard to discrimination in working life it is possible to declare null and void provisions in agreements and contracts as can be seen in Articles 14 and 15 of the Act on measures against ethnic discrimination in working life (14-15 §§ *lagen* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*). They read:

> 14 § A contract is void to the extent that it requires or allows any form of ethnic discrimination that is forbidden according to this law.
>
> 15 § If an employee is discriminated against in a manner that is forbidden according to this law through a term in a contract with the employer, the term shall be modified or declared void if the employee requests it. If the term is of such importance in relation to the contract that it cannot reasonably required that the contract shall otherwise remain in effect, the contract can be modified in other respects or be declared void in its entirety.
>
> If an employee is discriminated against in any manner that is forbidden according to this law through the employer terminating a contract or undertaking any other similar legal action, the legal action shall be declared to be void if the employee requests it.
>
> The first and second paragraphs do not apply when the provision for voidability of contracts in Article 14 is applicable.

Protection is only given against the acts of employers.

In other areas of professional activity, where the above-mentioned act is not applicable, general principles of contract law should also make it possible to have a contract declared null and void. However, if, in spite of that, such a provision is in fact implemented it could also fall within the provision on unlawful discrimination in Chap 16 Article 9 of the Criminal Code (*olaga diskriminering*, 16 *kap* 9 § *brottsbalken*). Consequently, every time such a provision is applied, a crime would presumably be committed.

Article 15[24]

Is there a need for further effective and proportionate sanctions, penalties and remedies?

Do equivalent provisions already exist on the national level in other areas?

It is unclear if there is a need for effective and proportionate sanctions, penalties and remedies. Sanctions and penalties exist. Whether or not they are effective and proportionate is questionable.

In criminal cases the defendant can be ordered to pay both pecuniary and non-pecuniary damages, apart from the incurring fines or imprisonment. The level of non-pecuniary damages in case law is low however, less than 500 Euros. The right to damages follows from the provisions of the Tort Damages Act (1972:207) (*skadeståndslagen*).

The sanctions for unlawful discrimination (Chapter 16, Article 9 of the criminal code) are fines or imprisonment for a maximum of one year.

Imprisonment has never been ordered as a sanction and fines are limited to the lower grades of the scale for criminal fines (from 30-150 day fines x 20-1000 SEK, depending on the assets of the defendant; the former often range between 30 and 70).

It can also be argued by studying the preparatory works of the Act on measures against ethnic discrimination in working life that it is uncertain that the sanctions decided by the courts, if they follow these works and current case law, are likely to be effective or proportionate or dissuasive enough.

According to the Act on measures against ethnic discrimination in working life the following sanctions may apply (Articles 14-18 and 20 respectively).

> Voidability of contracts
>
> 14 § A contract is void to the extent that it requires or allows any form of ethnic discrimination that is forbidden according to this law.
>
> 15 § If an employee is discriminated against in a manner that is forbidden according to this law through a term in a contract with the employer, the term shall be modified or declared void if the employee requests it. If the term is of such importance in relation to the contract that it cannot reasonably required that the contract shall otherwise remain in effect, the contract can be modified in other respects or be declared void in its entirety.
>
> If an employee is discriminated against in any manner that is forbidden according to this law through the employer terminating a contract or undertaking any other similar legal action, the legal action shall be declared to be void if the employee requests it.

[24] Article 17 of the Employment Equality Directive.

The first and second paragraphs do not apply when the provision for voidability of contracts is applicable.

Damages

16 § If a job applicant or an employee is discriminated against through an employer's violation of the provisions banning direct or indirect discrimination the employer shall pay damages to the person discriminated against for the violation of integrity that the discrimination involves.
17 § If an employee is discriminated against the employer shall pay damages to the employee also for the loss that arises

18 § If an employee is subjected to retaliatory actions covered by the act, the employer shall pay damages to the employee for the loss that arises and for the violation of integrity that the retaliatory action involves.

If it is reasonable the damages assessed according to the provisions mentioned can be reduced or be completely removed (Article 20). Unintentional indirect discrimination is mentioned in the preparatory works as an example when that provision could be applied.

However: Economic sanctions in cases of termination of employment are limited by law in some cases, which could make it necessary for the government to act.

Where an employer refuses to obey a court decision to rehire a person, who was unlawfully dismissed, the employer has to pay damages. The damages are limited depending on the time worked for the employer. The same applies to the right to economic compensation in other cases as regards periods after the end of an employment (Article 40 of the Act, which refers to Article 38 and 39 of the Termination of employment Act / 38 *och* 39 §§ *anställningsskyddslagen*).

The sanction for stirring up hatred against a population group is imprisonment of up to two years. Recent case law indicates that three months imprisonment can be seen as a common sanction. Also suspended sentences combined with a fine seem fairly common. If the case is "of little gravity", a concept which the criminal code does not define, the penalty is only a fine. Nonetheless, the Supreme Court has ruled that declarations that were not in themselves an expression of scorn came within this category. The case in question was connected with the erection of a signpost designed to keep Roma/Gypsies away from a campsite by the site's owner, who was anxious to reassure his staff and customers.

Article 16[25]

What action (if any) has already been taken in order to comply with the Directives?

Basically the government has thus far only appointed a government enquiry to examine the extent to which Swedish law must be amended in order to ensure compliance with the

[25] Article 18 in the Employment Equality Directive.

Racial Equality Directive and the Employment Equality Directive (dir 2000:106 / *Utredningen om ett vidgat skydd mot diskriminering*, The Enquiry into an expanded protection against discrimination).

The government, as part of its Action plan against racism, has also stated its interest in a broad overview of the various anti-discrimination laws (as well as the related ombudsmen) with a view toward establishing a broad anti-discrimination law that covers all or most of the various discrimination grounds. Various political parties have also been promoting such an approach.

Another government enquiry (*Ett effektivt diskrimineringsförbud - Om olaga diskriminering och begreppen ras och sexuell läggning*, SOU 2001:39 / An effective ban on discrimination – About unlawful discrimination and the concepts of race and sexual orientation) has recently recommended the examination of the possibility of developing an effective civil law damage-based regulation of discrimination that could eventually replace the today's ineffective criminal code ban on discrimination in the provision of goods and services.

It is thus likely that these factors, among others, will result in this enquiry being given an expanded mandate within the near future.

Protocol N° 12

a) Has your government signed Protocol N°12?
b) Does your government intend to ratify Protocol N°12?
c) What are the obstacles to the ratification of Protocol N°12 by your country? Are these obstacles political or legal? In the case of obstacles in national legislation, what are these?

a. The Swedish government has not signed Protocol N° 12.

b. The Swedish government does not currently intend to ratify Protocol N° 12.

c. The obstacles seem to be mainly political. At least there are no obstacles in terms of national legislation. The government does not seem to want a broadened international protection against discrimination. The main objections presented thus far have been relatively formalistic and somewhat contradictory. The Swedish government will probably not sign until it is satisfied that the scope of Protocol N° 12 has been narrowly construed in the relevant case law.

In the statement of the Swedish expert explaining why Sweden abstained from casting its vote, three basic reasons were provided.

"*To begin with, we are in doubt as to whether the adoption of an additional protocol to the Convention will be an efficient means in the very important struggle against discrimination of all kind. As has been stated repeatedly, ever since negotiations began concerning what was to become draft Protocol N° 12, we have expressed ourselves in favour of a separate instrument*."

The second reason given was that "*there is no mention in the operative part of draft protocol N° 12 of positive measures. Our efforts during the negotiations to have a provision which would allow contracting parties to undertake positive measures have not been successful. The idea was not to impose an obligation on states to take such measures in different areas covered by the draft protocol but to make sure that, whenever a state could argue on reasonable grounds that a certain distinction in law or treatment between individuals had its basis in an attempt to promote equality between different groups in society, this would not be considered as an unjustified distinction and therefore be labelled discrimination."* The fact that the preamble basically stated that reasonable positive measures would not violate the agreement was insufficient for the Swedish government.

The third reason was that the possible scope was too broad. "*It is not at all clear to what extent contracting states will be held liable for conduct of individuals, such as landlords, restaurant owners, employers etc, the so-called horizontal effects*."

These reasons plus a concern for the "very heavy workload" of the Court led the Swedish government to its current wait-and-see position. Presumably the development of the case law in the field will determine whether or not Sweden signs and ratifies Protocol N° 12 at some point in the future.

English translations of the following acts have been included here for the reader's convenience.

1. The Act on measures against ethnic discrimination in working life
2. The Act on the Ombudsman against ethnic discrimination
3. Criminal code Article 16:9 – unlawful discrimination

The Act on measures against ethnic discrimination in working life

The following hereby applies.

The purpose of the law

1 § The purpose of this law in regard to work, employment conditions and other work-related conditions as well as development opportunities in the workplace is to promote equal rights and opportunities without regard to ethnic background (ethnic diversity in working life).

Cooperation

2 § Employers and employees shall cooperate in order to promote ethnic diversity in working life. In particular they are to work against all forms of ethnic discrimination.

Definitions

3 § In this law, the term ethnic background refers to the fact that a person belongs to a group of persons who have the same race, skin colour, national or ethnic origin or religious faith.

In this law the term ethnic harassment means behaviour in working life that violates an employee's integrity and has a connection with the employee's ethnic background.

Active measures

"Goal-oriented Work"
4 § Within the framework of her or his activities an employer shall carry out goal-oriented work" in order to actively promote ethnic diversity in working life.

More specific rules concerning an employer's duty according to the first paragraph are found in § § 5-7.

Employment conditions

5 § An employer shall carry out such measures which, given due regard to the employer's resources and circumstances otherwise, can be required to ensure that the working conditions are suitable for employees without regard to their ethnic background.

6 § An employer shall undertake measures to hinder and prevent any employee from being subjected to ethnic harassment or retaliatory actions due to the submission of a complaint concerning ethnic discrimination.

Recruitment

7 § An employer shall work to ensure that persons of different ethnic backgrounds are given the opportunity to apply for the employer's available positions.

The ban against ethnic discrimination in working life

Direct discrimination

8 § An employer may not unfairly treat a job applicant or an employee by treating him or her less favourably than the employer treats or would have treated persons with another ethnic background in a comparable situation, unless the employer shows that the less favourable treatment has no connection with ethnic background.

The ban does not apply if the treatment is justified with regard to an idealistic or other special interest which clearly is more important than the interest in preventing ethnic discrimination in working life.

Indirect discrimination

9 § An employer may not treat a job applicant or employee less favourably by using a rule, requirement or procedure that seems neutral but which in practice is particularly unfavourable to persons of a particular ethnic background. This does not apply if the purpose of the rule, requirement or procedure can be motivated by rational reasons and the measure is suitable and necessary for achieving the purpose at issue.

When the bans apply

10 § The bans against ethnic discrimination i §§ 8 and 9 apply when the employer makes a decision to employ, decides to take in a job applicant for an employment interview or undertakes other measures during the employment process,
2. makes a decision concerning promotion or chooses an employee for an education that will lead to promotion,
3. applies salary or other employment conditions,
4. leads or distributes work or
5. dismisses, terminates, lays off or undertakes other intrusive measures against an employee.

Information about qualifications

11 § A job applicant who has not been employed as well as an employee who has not been promoted or chosen for an education leading to promotion has a right to request and receive written information from the employer about the education, work experience and other qualifications of the person who got the job or the education.

Ban against retaliatory actions

12 § An employer may not subject an employee to retaliatory actions due to the employee's submission of a complaint against the employer for ethnic discrimination.

The duty to investigate and undertake measures against harassment

13 § An employer who receives knowledge that an employee considers herself or himself to have been subjected to ethnic harassment by another employee shall investigate the circumstances concerning the reported harassment and where needed undertake the measures that reasonably can be considered necessary to prevent harassment in the future.

Sanctions

Voidability of contracts

14 § A contract is void to the extent that it requires or allows any form of ethnic discrimination that is forbidden according to this law.

15 § If an employee is discriminated against in a manner that is forbidden according to this law through a term in a contract with the employer, the term shall be modified or declared void if the employee requests it. If the term is of such importance in relation to the contract that it cannot reasonably required that the contract shall otherwise remain in effect, the contract can be modified in other respects or be declared void in its entirety.

If an employee is discriminated against in any manner that is forbidden according to this law through the employer terminating a contract or undertaking any other similar legal action, the legal action shall be declared to be void if the employee requests it.

The first and second paragraphs do not apply when § 14 is applicable.

Damages

16 § If a job applicant or an employee is discriminated against through an employer's violation of the rules in § 8, § 9 or § 10, points 1 and 2, the employer shall pay damages to the person discriminated against for the violation of integrity that the discrimination involves.

17 § If an employee is discriminated against through an employer's violation of the rules in § 8, § 9 or § 10, points 3-5, the employer shall pay damages to the employee for the loss that arises and for the violation of integrity that the discrimination involves.

18 § If an employee is subjected to the retaliatory actions covered by § 12, the employer shall pay damages to the employee for the loss that arises and for the violation of integrity that the retaliatory action involves.

19 § If an employer does not fulfil his or her duties according to § 13, the employer shall pay damages to the employee for the violation of integrity that the failure to act involves.

20 § If it is reasonable the damages assessed according to §§ 16-19 can be reduced or be completely removed.

Supervision

21 § In order to see to it that this law is followed there shall be an Ombudsman against ethnic discrimination and a Board against discrimination. The Ombudsman and the Board are to be appointed by the government.

The Ombudsman against ethnic discrimination

22 § The Ombudsman against ethnic discrimination shall in the first instance try to convince employers to voluntarily comply with the rules set out in this law. The Ombudsman shall also in other ways contribute to the efforts to promote ethnic diversity in working life.

The Board against discrimination

23 § The Board against discrimination has the task of making decisions concerning the issuance of civil fines according to § 26 and examining appeals according to § 33.

The duty to provide information

24 § Upon the request of the Ombudsman against ethnic discrimination an employer has the duty to provide the relevant information concerning the conditions that prevail in the employer's activities that can be of importance in relation to the Ombudsman's supervisory tasks according to § 21. An employer is also under a duty to provide information when the Ombudsman provides assistance to an individual job applicant or an employee concerning a request according to § 11. Employers are not to be unnecessarily burdened by this duty to provide information. If there are special reasons the employer is not under a duty to provide information.

The issuance of an order under penalty of a civil fine

25 § If an employer does not follow a request according to § 24, the Ombudsman can issue an order under penalty of a civil fine according to which the employer is required to fulfil her or his duty.

26 § An employer who does not follow the rules specified in §§ 5-7 can be ordered to fulfil her or his duties through the issuance of an order under penalty of a civil fine. Such an order can be issued by the Board against discrimination on the basis of a request for such an order submitted by the Ombudsman against ethnic discrimination, or if the Ombudsman has declared that it is unwilling to make such a request, or a central union in relation to which the employer has a collective bargaining agreement. Such an order can also be directed at the state authorities as employees.

The submission for an order is to specify the measures the employer should be required to undertake, the reasons that form the basis of the submission and the investigations that have been carried out.

Procedure

27 § An employer shall, subject to the risk that the case can be decided even without a response, be required to respond within a certain period of time to a submission made according to § 26 and provide the information about the circumstances in his or her activities that the Board needs for making its decision.

When a union has made the submission, the Ombudsman against ethnic discrimination shall be provided with an opportunity to comment.

28 § The Board against discrimination shall ensure that the cases submitted to it are investigated to the extent necessary in relation to the individual case.

When necessary the Board shall allow the investigation to be supplemented with additional information. Requests for superfluous investigations may be rejected.

Oral hearings

29 § Cases concerning an order under penalty of a civil fine according to § 26 are to be decided after an oral hearing, unless the Board concludes that such a hearing is unnecessary.

30 § The party that made the submission to the Board against discrimination according to § 29 shall be called to the hearing.

The Board may, under penalty of a civil fine, order the employer or the employer's representative to appear in person.

If necessary for the investigation, the Board may also call others to the hearing.

Deciding the cases

31 § A case concerning the issuance of an order under penalty of a civil fine according to § 26 may be decided even if the employer makes no response concerning the case, does not assist in the investigation or fails to take part in the oral hearing.

If the Ombudsman against ethnic discrimination or the union that made the submission for an order under penalty of a fine does not appear at the hearing, the submission will be considered void.

32 § The Board against discrimination may, in deciding a case concerning an order under penalty of a civil fine according to § 26, order the employer to undertake measures other than those requested in the submission if these measures are not clearly more burdensome for the employer.

In the decision the Board shall specify how and within which time period the measures shall have been initiated or carried out by the employer.

The Board's decision shall be in writing and be communicated to the employer.

Appeals etc.

33 § The Ombudsman's decision concerning an order under penalty of a civil fine according to § 25 may be appealed to the Board against discrimination.

Concerning such appeals cases, §§ 28-30 shall apply.

34 § A decision according to this law by the Board against discrimination cannot be appealed.

35 § A lawsuit concerning the imposition of a fine that has been ordered according to this law is to be brought before the district court by the Ombudsman against ethnic discrimination.

In cases concerning the imposition of a fine in accordance with § 26, the district court has the right to examine the appropriateness of the fine.

The trial

The applicable rules

36 § Cases concerning the application of §§ 8-10 and §§ 12-20 shall be dealt with according to the law (1974:371) on trials in labour disputes.

In this connection a job applicant shall be treated as an employee and the prospective employer shall be treated as an employer.

The second paragraph also applies when the rules concerning dispute hearings in the law (1976:580) on co-determination at work are applied in a dispute according to §§ 8-10 and §§ 12-20.

The right to bring a lawsuit

37 § In a dispute according to § 36 the Ombudsman against ethnic discrimination may bring a lawsuit on behalf of an individual employee or a job applicant, if the individual agrees and the Ombudsman finds that a judgment in the dispute would be of importance for the application of the law or there are otherwise special reasons for bringing the case.

If the Ombudsman finds it suitable the Ombudsman may in the same lawsuit also present other claims as the representative of the individual.

The Ombudsman's decisions on issues involving the first paragraph cannot be appealed.

The Ombudsman's lawsuits according to the first paragraph are to be brought before the Labour Court.

38 § When a union has the right to bring a lawsuit on behalf of an individual according to Chapter 4, § 5, of the law (1974:371) on trials in labour disputes, the Ombudsman may bring a lawsuit only if the union refrains from doing so.

That which is prescribed in the above-mentioned law concerning an individual's position in the trial shall also be applied when the Ombudsman brings a lawsuit.

39 § A lawsuit for damages according to § 16 due to a decision to employ or not employ that has been made by a public employer may not be examined until the employment decision has become legally binding.

Statute of limitations etc.

40 § If a person brings a lawsuit due to a notice of dismissal or firing then § 34, second and third paragraphs, § 35, second and third paragraphs, § 37, § 38, second paragraph second sentence, §§ 39–42 and § 43, first paragraph second sentence and the second paragraph, of the law (1982:80) on employment security shall be applied.

41 § In regard to a situation where some other legal issue is presented than those specified in § 40, §§ 64-66 and § 68 of the law (1976:580) on co-determination at work shall be applied with the difference that the time limit indicated in § 66, first paragraph first sentence, shall be two months.

42 § In regards to a lawsuit for damages as the result of a decision to employ or not employ issued by a public employer, the time limits shall be calculated from the day that the employment decision became legally binding.

43 § A lawsuit that is brought by the Ombudsman against ethnic discrimination is to be treated as if the lawsuit had been brought by the individual employee or job applicant himself.

The Act (1999:131) on the Ombudsman against ethnic discrimination

1 § The purpose of this law is to counteract ethnic discrimination. The term ethnic discrimination means a situation where a person or a group of persons is treated less favourably in relation to others or is in some other way subjected to unfair or offensive treatment due to their race, skin colour, national or ethnic origin or religious faith.

2 § The Government appoints an Ombudsman who is to work to ensure that ethnic discrimination does not occur in working life or in other areas of society.

3 § The Ombudsman shall through the provision of advice and in other ways assist those subjected to ethnic discrimination to realise their rights. The Ombudsman shall furthermore, through meetings with government authorities, companies and organisations, as well as through the influencing of public opinion, the provision of information and in other similar ways take the initiative in regard to various measures against ethnic discrimination.

4 § The Ombudsman shall in particular work against the subjection of job applicants to ethnic discrimination. The Ombudsman shall also in contacts with employers and affected unions promote good relations between different ethnic groups in working life.

Criminal Code, Chapter 16, On Crimes against Public Order

Unlawful discrimination

Article 9

A businessman who in the conduct of his business discriminates against a person on grounds of the person's race, colour, national or ethnic origin or religious belief by not dealing with that person under the terms and conditions normally applied by the businessman in the course of his business with other persons, shall be sentenced for unlawful discrimination to a fine or imprisonment for at most one year.

The provisions of the foregoing paragraph relating to discrimination by a businessman shall also apply to a person employed in a business or otherwise acting on behalf of a businessman and to a person employed in public service or having a public duty.

A sentence for unlawful discrimination shall also be imposed on any organiser of a public assembly or gathering, and on any collaborator of such organiser, who discriminates against a person on grounds of his race, colour, national or ethnic origin or religious belief by refusing him access to the public assembly or gathering under the terms and conditions normally applied to other persons.

A sentence for unlawful discrimination shall also be imposed on any person designated in the first to third paragraphs above who, in the manner there indicated, discriminates against another on the ground that the latter has a homosexual orientation.