Equal treatment for highly qualified labour migrants[a]

by

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Abstract

According to EU-law, third country national labour migrants shall be treated equally to local workers with regard to wages. The aim of this working paper is to clarify whether Swedish law meets this demand with regard to highly qualified labour migrants. The analysis reveals that the combined effect of entry conditions and the content of the collective agreements applicable in the sectors where highly qualified labour migrants work makes it difficult to safeguard that they are treated equally with comparable national workers. The study also demonstrates that Swedish law does not provide highly qualified labour migrants with any robust means to enforce equal treatment. Hence, it is not likely that Swedish law complies with EU law, at least not for those workers employed by an entity in Sweden. For labour migrants intra-corporate transferred or posted to Sweden in other ways the EU law demands are less clear.[c]

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Table of contents

PART 1

1 Introduction

1.1 What is this study about

Highly qualified labour migrants are seldom perceived as victims of exploitation [1] On the contrary, the narrative related to this group – 'wanted and welcome' – easily leads to the assumption that they have a strong bargaining position in the global labour market.[2] These workers, like all labour migrants, should – according to international and EU law – be treated equally with local workers with regard to working conditions.[3] The usual narrative concerning this group of labour migrants might lead one to believe that it is less important to raise questions concerning their equal treatment in law. There are some characteristics of the Swedish system, however, that prompt further analysis of the issue before such a conclusion can be drawn.

In this study the focus will be on the legal requirements of equal treatment with regard to the wages of highly qualified labour migrants in Swedish law and their application. The analysis will be divided into two parts. First, the migration law perspective will be analysed: what are the legal requirements for being admitted into the Swedish labour market? To what extent do the applicable admission rules provide for equal treatment regarding pay (Part II)? Second, the labour and discrimination law provisions and the legal requirements for work performed in Sweden will be analysed. To what extent is it possible for a labour

[1] ILO (2010) 83.

[2] The phrase 'wanted and welcome' is borrowed from the book: Triadafilopoulos (2013); The phrases on competitiveness and race for talents are used widely; see for example in: Linder (2017) http://www.dn.se/debatt/svensk-konkurrenskraft-kraver-arbetskraftsinvandring/; COM (2013)499 1.

[3] ILO Convention No. 97, Migration for Employment (Revised) 1949, article 6 and ILO Convention No. 143, Migrant Workers (Supplementary Provisions) (1975), article 10; UN Convention on the Protection of the Rights of All Migrant Workers and members of their Families (1990), art 25-27; EU Charter of Fundamental Rights, art 15.3; Single Permit Directive (2011/98/EU) art 12; EU Blue Card Directive (2009/50/EC), art 18.

migrant to claim equal treatment on the basis of Swedish labour and discrimination law (Part III)? The EU has been a driving force behind a substantial part of this legislation. Throughout this study the interplay between EU and Swedish law will be discussed. The EU-related questions raised here concern the content of EU law in this context and how Sweden is meeting its obligations.

To complement Part II we perform an empirical study. This will help to bring clarity with regard to the extent to which the legal admission requirements reflect the reality, which in this case means the wages these workers are offered. The empirical study is also helpful for discovering more about the relationships of such workers with the host company in Sweden. This information helps us to raise relevant questions in the third part of this report. The empirical study is based on 300 applications for work permits approved in January 2017.

A range of topics concerning highly qualified labour migrants in the Swedish labour market have been dealt with in studies by non-legal scholars.[4] The working conditions the legal system provides for them have not been the focus of attention, however. Acquiring more knowledge about the legal conditions governing their work in the Swedish labour market is crucial for understanding the terms on which these workers compete with other workers in Sweden. Is the system robust enough to prevent unfair competition between national and third-country workers and to ensure that third-country workers are provided with decent working conditions? Answers to these questions are also important to ensure that the Swedish legal system provides highly qualified labour migrants with the legal guarantees necessary to meet EU-law commitments in this area.

The study reveals that the combined effect of the legal admission conditions and the content of the collective agreements relevant for highly qualified labour migrants makes it very difficult to ensure that they are offered a wage comparable with what national workers would have been paid. Collective agreements give no guidance regarding wage levels due to the individualization of the wage-setting mechanisms for professional groups of this kind. The Migration Agency uses wage statistics from Statistics Sweden to find an acceptable minimum wage level. This is fairly low, but national workers may also receive it. The empirical study indicates that in many cases highly qualified labour migrants are offered a wage above the minimum level applied, more in line with what comparable workers in general are paid. It also indicates, however, that a larger proportion of labour migrants than workers in general are offered wages in the lower wage segments. This may be explained by a number

[4] Axelsson (2017); Krifors (2017; Emilsson (2014*);* Emilsson and Magnusson (2015); Emilsson (2018); Hedberg and Hermelin and Westermark (2014); Frank (2018).

of factors unrelated to discrimination. Nevertheless these explanations do not eliminate the risk that labour migrants may be offered lower wages than comparable local workers. One way of preventing that labour migrants are paid lower wages than comparable national workers is to provide for a right to equal treatment. It turns out that Swedish law does not offer highly qualified labour migrants robust legal means to claim such treatment, however. The situation is likely to be unsatisfactory from an EU-law perspective at least for those labour migrants employed in Sweden. For intra-corporate transferees and other posted workers the EU requirements are less clear.

1.2 Background

More than one-third of labour migrants from third countries coming to Sweden every year are highly qualified.[5] In Swedish law a labour migrant can be granted a work permit only if they have been given a job offer including employment conditions *at least* corresponding to the relevant collective agreement for the sector or customary in the profession or industry.[6] Collective agreements play a crucial role in a Swedish wage-setting context. There is no statutory minimum wage. The content of many collective agreements has undergone remarkable development during the past thirty years, however.[7] Often collective agreements for highly qualified professionals do not contain any specific wage levels and no minimum wage.

Problems reported on and discussed regarding the Swedish labour migration system are related mainly to low skilled labour.[8] Krifors summarizes the narrative thus: 'highly skilled migrants have not been associated with vulnerability but rather privilege'.[9] The debate on highly skilled labour migrants is focused rather on obstacles in attracting them to Sweden.[10] The difficulties the highly skilled labour migrants experience because of the lengthy procedures involved in obtaining a permanent residence permit have been highlighted, as well as the vulnerability they experience in this process or during short periods of adjustment when a job is lost.[11] In recent years also what are regarded as unfair criteria for the extension of work permits and subsequent deportation have been

[5] The definition is discussed in section 1.3.
[6] Ch 6 s 2 Aliens Act (2005:716).
[7] The background to this development is described in Ahlberg and Bruun (2005) 123 et sec.
[8] Governmental Inquiry, SOU 2016:91 Stärkt ställning för arbetskraftsinvandrare, 61.
[9] Krifors (2017) 123.
[10] See for example Berg & Karlsson (2018); Lindberg & Volatire (2017); Lucas (2016); Sand (2015).
[11] Axelsson (2017) 975, 977, 983 et sec.

in focus.[12] Working conditions have not been given so much attention, however. Nevertheless reports give a fairly puzzling picture, indicating that the wage level for some groups of highly qualified labour migrants is surprisingly low.[13] Krifors even identified a complete unwillingness to talk about salaries and working conditions pertaining to the Indian IT workers discussed in her research.[14] In another study by Frank one significant motivation identified for hiring highly skilled workers from India and China is 'to lower labour costs'.[15] This research, together with the fact that many labour migrants work in sectors covered by collective agreements with no fixed wage levels gives rise to questions about how the legal requirement regarding wage levels is applied to this group. How do the new wage-setting structures, for example, fit into the equal-treatment paradigm that is part of the labour migration regime at EU level? What does equal treatment really mean for these workers?

1.3 Highly qualified labour migrants – the personal scope of this study

'Highly qualified workers' can be defined in different ways. In the EU Blue Card Directive (2009/50), which deals with conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, such employment is defined as employment of persons who have the required competences, as proven by higher professional qualifications.[16] Such qualifications can be obtained either through higher education or professional experience.[17] Higher education means post-secondary higher education programmes lasting at least three years.[18] In this study the focus will be on labour migrants categorized by the Swedish Migration Agency in 2017 as: IT architects, systems analysts and test managers, engineering professionals and physical and engineering science technicians. They belong to the more general categories defined as professionals (*yrken med krav på högskolekompetens eller motsvarande*) and specialists (*yrken med krav på fördjupad högskolekompetens*). In 2017 the targeted professional groups represented 44 per cent and 80 per cent, respectively, of the labour migrants admitted in the general categories of professionals and specialists. [19]

[12] Se t ex Person (2018); Berg & Karlsson (2018) 9 et sec.
[13] Emilsson (2014*)* 63; Emilsson & Magnusson (2015:9) 90-91.
[14] Krifors (2017) 131, 145. See also similar results Lundbäck (2010) 43.
[15] Frank (2018) 11.
[16] Art 2 (b) (2009/50/EC).
[17] Art 2 (g) (2009/50/EC).
[18] Art 2 (h) (2009/50/EC).
[19] See section 2.2.3.

This targeted group also accounts for a considerable portion of *all* labour migrants from third countries coming to Sweden every year. It is growing in total and constitute around one third of all labour migrants, with some variations, admitted to Sweden every year, as shown in Table 1.

Table 1 Targeted group of highly qualified labour migrants admitted to Sweden, 2014–2018

	2014	**2015**	**2016**	**2017**	**2018**
IT architects etc.	903+2525[20]	3252	3737	4029	4415
Engineering professionals	178	709	790	1082	1249
Physical and engineering science technicians	335	314	335	431	656
Targeted group of highly qualified labour migrants: total	*3941*	*4275*	*4862*	*5542*	*6320*
All categories of labour migrants: total	12094	13313	12526	15552	20841
TGHQLM: Percentage of total	*33*	*32*	*39*	*36*	*30*

Source: Statistics from the Migration Agency.

Looking at Table 1 in detail, the first three lines cover the three professional groups at the center of this study. Line 1 covers the number of labour migrants categorized as IT architects, systems analysts and test managers admitted during the years 2014–2018. Line 2 covers the number of labour migrants categorized as engineering professionals during the same years and line 3 those categorized as physical and engineering science technicians. Line 4 concerns the total number of persons in the previous three categories. Line 5 presents the total number of all labour migrants admitted in all categories. And line 6 shows the percentage of the targeted groups of highly qualified labour migrants in relation to total labour migrants (in line 5). Applications for extensions or renewals are not covered.

1.4 The legal landscape

1.4.1 The interaction between Swedish and EU law

The Swedish law on labour migration is to a certain degree influenced by EU law. Since 1999 the EU has been fairly active in regulating labour migration from third countries and three of the directives that have been adopted so far affect the Swedish legal requirements applicable to the labour migrants who are the focus

[20] In 2014 the definitions differed from 2018. Here I include computing professionals and IT architects etc.

of this study: the Single Permit Directive (2011/98), the EU Blue Card Directive (2009/50) and the Directive on Intra-Corporate Transferees (2014/66).[21]

The Single Permit Directive is supposed to facilitate the application procedures for labour migrants and includes provisions on a single application procedure for work and residence in the EU, along with a single residence/work permit. Its scope is fairly wide and covers most labour migrants except intra-corporate transferees, seasonal workers and a few other categories.[22] The EU Blue Card Directive and the Directive on Intra-Corporate Transferees include, respectively, *conditions for entry* for highly qualified labour migrants and for intra-corporate transferees.[23] The EU Blue Card and the Single Permit Directive include equal treatment provisions applicable to labour migrants when residing in an EU Member State in respect of employment and social rights.[24] These directives have introduced a new ground of discrimination. Mark Bell describes this ground as follows: 'equal treatment of third-country nationals based on their immigration status'.[25] The scope of the equal treatment provision in the Intra-Corporate Transferees Directive is less clear. We shall discuss this further in Section 6.2.2

The EU directives have been transposed into Swedish law. The provisions on migration law in the EU Blue Card and Intra-Corporate Transferees Directives differ so much from the ordinary Swedish rules that specific chapters in the Aliens Act are devoted to them,[26] while the provisions in the Single Permit Directive to a great extent is implemented through the ordinary provisions in the Aliens Act.[27] The equal treatment provisions are handled in another way. A third-country national admitted to a Member State for the purpose of work or for other purposes but with a right to work shall, according to the Single Permit Directive, enjoy equal treatment with nationals of the Member State regarding a number of rights, including working conditions, pay and dismissal, as well as health and safety at the workplace, when they reside in an EU Member State.[28] A similar equal treatment provision regarding working conditions is part of the EU Blue

[21] For an introduction to the EU legal framework see for example: Guild (2014); Herzfeld Olsson (2014); Friðriksdóttir (2016).
[22] Article 1 (a) and (b) and article 3 (2011/98/EU).
[23] Article 5 (2009/50/EC) and Article 5 (2014/66/EU). On the EU Blue Card see Calleman (2015a) and Cerna (2010 and 2014).
[24] Article 14 (2009/50/EC) Article 18 (2014/66/EU) and Article 12 (2011/98/EU).
[25] Bell (2011) 612.
[26] Ch. 6a, Aliens Act (2005:716).
[27] Government Bill 2013/14:153 Genomförandet av direktivet om ansökningsförfarandet för visa uppehålls- och arbetstillstånd.
[28] Art. 12 (1) (a) (2011/98/EU).

Card Directive. [29] In this study the equal treatment rights related to pay, are of particular importance. Sweden has not adopted any specific provision due to this requirement in the directives. The government's starting point was that the prescribed equal treatment already applied in Swedish law.[30] This particular issue will be further discussed in section 6.2.1.

1.4.2 Introduction of the Swedish regulation on labour migration

The Swedish regulation on labour migration is described as the most open within the OECD.[31] The scheme is purely employer demand-driven. Individual employers decide whether they need to recruit workers from third countries.[32] No labour market tests are done, no skill preferences based on law or quotas apply, and the system is open to all sectors of the labour market.[33] The only requirement that on paper might look like a restriction is the demand that employers respect the principle of European Union preference. In reality, that only means that the vacancy must have been published on the websites of the Swedish Public Employment Service and the European Employment Services for at least ten days.[34] If that is done the employer is free to offer the job to anyone. An important characteristic of the Swedish admittance provisions is also that all labour migrants, beside the EU-based rules on seasonal workers, EU Blue Card holders and intra-corporate transferees introduced in section 1.4.1, are treated in basically the same way

The Swedish provisions on entry and to a certain extent residence for labour migrants are found in the Aliens Act. In order to work in Sweden a third-country national needs a work permit.[35] A residence permit is also needed for stays longer than three months and can be issued on the basis of work in Sweden.[36] The labour migrant needs an offer of employment from an employer and the offer should provide the labour migrant with a certain level of working conditions.[37] Trade unions are given a specific role in the application procedure. The relevant trade union shall be given an opportunity to verify whether the terms laid down in the

[29] Art. 14 (1) (a) (2009/50/EC)
[30] Government Bill 2013/14:153, 31 et sec; Government Bill 2012/13:148, 99-100, 103.
[31] OECD (2011) 67 et sec.
[32] Third countries in this case is used in the EU treaty meaning, i.e. countries outside the EU.
[33] The implementation of the new EU directive on conditions of entry and residence of third-country nationals for the purposes of highly qualified employment and seasonal employment has to a certain extent modifed this uniform approach.
[34] Government Bill 2007/08:147 36 and 40 and Government Bill 2013/14:227 8.
[35] Ch. 2 sec. 7 and 8 c Aliens Act (2005:716). Exceptions apply to different groups, see for example Ch 2 sec 8c Aliens Act (2005:716).and ch 5 ss 1-4 Aliens Ordinance (2006:97).
[36] Ch 2 ss 3 and 5 Aliens Act (2005:716). Exceptions apply to specific groups, see for example in Ch 2 sections 8a and 8b Aliens Act (2005:716).
[37] Ch 6 sec. 2 Aliens Act (2005:716).

offer of employment are in accordance with collective agreements or custom.[38] The Migration Agency makes decisions on work and residence permits.

Some groups of labour migrants are exempted from the requirement to have a work permit, however.[39] Most of these exceptions apply in very specific cases and for periods from two weeks to three months. In these cases practical reasons motivate the exception.[40] One category stands out, however: *Specialists in an international company group who work in Sweden in that capacity temporarily for a total period of less than one year*.[41] Since 1 March 2018, however, the scope of this exception has been limited. This is explained by the transposition of the Directive on Intra-Corporate Transferees into Swedish law. A new chapter in the Alien's Act is devoted to this category, including specific conditions on entry and stay. These provisions will be dealt with separately in the next section.

All work permits are temporary. They are granted for the duration of the employment offered but for a maximum of two years. Work permits may be extended an unlimited number of times but the total period may only exceed four years in exceptional cases.[42] Each extension needs a new offer of employment from an employer.[43] After having worked legally in Sweden for four years within a maximum seven-year period, the migrant worker may be granted a permanent residence permit.[44]

The work permit is tied to a specific employer and to a specific type of work (occupation) for the first two years. After two years it is only tied to a specific type of work.[45] If the migrant worker wants to change employer or type of work, they must apply for a new work permit. That can be done from within Sweden as long as the previous residence permit is still valid.[46]

The work permit and/or residence permit may be revoked if the employment has ceased and shall be revoked if the working conditions applied do not fulfil the requirements in the law; for example if the wage is lower than the wage

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[38] Aliens Ordinance 2006:97, ch 5 s 7a. The form can be found on the Migration Agency's website: http://www.migrationsverket.se/download/18.5e83388f141c129ba6312b76/1485556063117/233011+Fackligt+yttrande.pdf (visited 2019-04-28)

[39] Aliens ordinance ch 5 (2006:97).

[40] Government Inquiry, SOU 2005:50, 203.

[41] Ch 5 s 2 p 10 Aliens Ordinance (2006:97).

[42] Ch 6 s 21 Aliens Act (2005:716).

[43] See the Migration Agency website https://www.migrationsverket.se/English/Private-individuals/Working-in-Sweden/Employed/If-you-are-in-Sweden/Extending-a-permit.html (visited 2019-04-8).

[44] Ch 5 s 5 Aliens Act (2005:716).

[45] Ch 6 s 2a Aliens Act (2005:716).

[46] Migration Agency Website https://www.migrationsverket.se/English/Private-individuals/Working-in-Sweden/Employed/Changing-jobs.html (visited 2019-04-28).

provided for in the relevant collective agreement or the employment has still not begun four months after arrival.[47] Until December 2017 this provision was applied very strictly and any deviation from the prescribed conditions even for a short period led denials of extensions of work permits and of permanent residence permits.[48] In December 2017, however, the Supreme Migration Court changed its position and established that an overall assessment must be made of the circumstances of the case, covering the whole period a labour migrant has been working in Sweden.[49] The law was also amended and the employer is now entitled to make corrections in retrospect under certain conditions.[50] If there are grounds for revocation, to ensure that the migrant worker is not too dependent on the employer, they can stay in Sweden for three or four months to search for a new job if they lose the job that the work permit is connected to.[51]

1.4.3 When will the provisions on Intra-corporate transferees apply

In March 2018 the EU Directive on Intra-Corporate Transferees was transposed into Swedish law. These new provisions are likely to affect a large part of, in particular highly skilled, labour migrants. A new chapter in the Aliens Act is devoted to these provisions.[52] They take precedence over the general provisions on labour migration.[53] If a labour migrant fulfils the definitions for being an intra-corporate transferee then these rules have to be applied.[54] These provisions were not in force when the 300 labour migrants who form our study group applied for a work permit, however.

An intra-corporate transferee within the meaning of the directive is a manager, specialist or trainee employee temporarily seconded from an undertaking established in a third country to an entity belonging to the undertaking or group of undertakings inside the EU.[55] No definition of the categories is part of the Swedish law transposing the directive. The government explains that the meaning shall correspond to the definitions in the directive.[56] According to the directive a manager means a person holding a senior position. The person primarily directs the management of the host entity and receives general supervision or guidance principally from the board of directors or

[47] Ch 7 ss 3 and 7e Aliens Act (2005:716).
[48] MIG 2015:11 and MIG 2015:20.
[49] MIG 2017:24 and MIG 2017:25.
[50] Ch 7 s 7 e para 3; Government Bill 2016/17:212.
[51] Ibid.
[52] Ch 6b Aliens Act (2005:716).
[53] Art 2 (3) (2014/67/EU); Government Bill 2017/18:32 31.
[54] For the background to the directive see Töttős (2018).
[55] Art 2(1) and 3(b) (2014/66/EU); ch 6b s 1 Aliens Act (2005:716).
[56] Government Bill 2017/18:34 38.

shareholders of the business or equivalent. A specialist means a person possessing specialised knowledge essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualifications, including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession.[57] Only in relation to trainees, however, is there a requirement regarding higher education qualifications. This means that a specialist or a manager could work in any kind of business. The important thing is their specific function (manager) or skills (specialist) in the context of a particular business. The business could be a factory producing toys, a construction company or a company in the IT sector or concerned with other advanced technology. Costello and Freedland have accurately described the kind of workers we are talking about here: the 'elite management consultant or IT professional, moving with the corporate entity from global city to global city'.[58]

The directive concerns temporary transfers of workers within a multinational company or group of companies. The possibility to obtain a permit depends on whether the applicant can prove that a relationship to the transferring company was established before the application is made. The worker must have been employed by the company for at least three or up to 12 uninterrupted months prior to the transfer and the third-country national must be bound by a work contract prior to and during the transfer to that company. In order for a permit to be granted, there must be proof that the different entities between which the transfer is to take place belong to the same undertaking or group of undertakings.[59]

It is, however, important to keep in mind that workers assigned by employment agencies, temporary work agencies or any other undertakings engaged in making labour available to work under the supervision and direction of another undertaking are excluded from the scope of the directive.[60] That does not mean that an intra-corporate transferee is prevented from performing certain activities at the sites of clients.[61] One question that arises with no clear answer is whether this means that it might be possible for such a transferee to perform all work done in the host state on the client's site.

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[57] Art 3(e) and(f) (2014/67/EU).
[58] Costello & Freedland (2016) 46, they are referring to Beaverstock.
[59] Art 3 (b) and (c) (2014/66/EU); Ch 6b s 1 Aliens Act (2005:716).
[60] Art 2(2)(e) (2014/66/EU); ch 6b s 3.6 Aliens Act (2005:716).
[61] Preamble Recital 36 (2014/66/EU).

In this study not all conditions required for obtaining an intra-corporate transferee permit will be discussed.[62] The focus shall be the admission conditions related to a specific level of pay.

The admission condition in the Directive on Intra-Corporate Transferees prescribes that Member States shall require that:

> the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member States where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.[63]

The provision transposing the admission condition into Swedish law reads: 'the remuneration [shall] not [be] worse than what is prescribed in Swedish collective agreements or custom within the profession or industry' (author's translation).[64]

1.5 Overview

The remaining of the chapter is organized as follows: Section 2 is on method and material. The study has its basis in legal science but also includes empirical research. In this section we explain how we have applied the different methods and introduces the material used. Section 3 includes descriptive statistics about the 300 labour migrants who are part of the empirical study. These include length of stay and relationship with the entity that employs them in Sweden.

Part II is about the admission conditions related to wages and explores the required wage level and the extent to which it is reflected in the conditions actually offered labour migrants. Section 4 is exploring the legal meaning of the admission condition on pay. Section 4.1 explains why it is important to look at admission conditions when asking about the equal treatment of labour migrants. In Section 4.2 the general admission conditions on pay are presented and in Section 4.3 the new admission provision on intra-corporate transferees is described. Section 4.4 explore the extent to which Swedish collective agreements give guidance on required pay levels. In Section 4.5 the basis on which the Migration Agency decides whether an offered wage corresponds to the legal requirement is explained. Section 4.6 describes the approach taken by two trade unions when they, in accordance with the law, are asked to give opinions on whether the offered pay correspond to Swedish standards. Section 4.7 considers

[62] For further reading see Costello & Freedland (2016), and with regard to the Swedish transposition Herzfeld Olsson (2018a).
[63] Art 5(4)(b) (2014/66/EU).
[64] Government Bill 2017/18:34 9.

the application and interpretation of the concept 'custom' in the Alien's Act and Section 4.8 offers some general reflections on the wage level required. In Section 5, based on an empirical study, we examine the extent to which the required wage level reflects the wages offered. The wage level offered to 300 labour migrants granted a work permit in January 2017 is compared with the wage levels that generally apply in Sweden for comparable professional groups. In section 5.1 some starting points for the empirical study is introduced. In Section 5.2 the results from the empirical study are presented and in Section 5.3 the results are discussed, trying to answer the question, how can they be explained?

Part III is devoted to whether highly qualified labour migrants are provided with any enforceable rights to equal treatment and the extent to which the situation at hand is compatible with EU law. Section 6.1 forms a bridge between Parts II and III and explains the extent to which the admission conditions are helpful in promoting equal treatment. Section 6.2 is divided into three parts based on labour migrants' relationship with the Swedish entity. In each section first it is analysed whether EU law provides for equal treatment on pay and, if that is the case, what that implies. Second the Swedish internal situation is discussed and finally, whether Swedish law fulfils the requirements of EU law. Section 7 presents a summary and some conclusions on the study as a whole.

2 Methods and materials

2.1 The legal part

In this study the legal method called black letter law lies at the centre.[65] The method is used to describe, systematize and interpret the legal material.[66] The approach taken is normative. Interpretation and understanding are crucial.[67] Sandgren's approach is helpful to describe the process: legal interpretation is conducted hermeneutically in terms of the interaction between a legal provision and the context created by the legal system in which the meaning plays out (*meningssammanhanget*) (author's translation).[68] The interpretation is carried out in light of the conditions that form the basis for the legal system or parts of it.[69]

[65] In Swedish, 'rättsdogmatisk metod', see Jareborg (2004) 8 et sec.
[66] Sandgren (1995a) 1035.
[67] Jareborg (2004) 9; Kleineman (2013) 29 et sec.
[68] Sandgren (2006) 547.
[69] Sandgren (2006) 547; Jareborg (2004) 4.

The sources used have specific public recognition; the sources of law. In the Swedish context these sources are: legal acts, case law from the supreme courts, preparatory works and legal doctrine.[70] The recognized sources are not static and differ depending on the legal context.[71] In labour law, collective agreements, for example, play an important role.[72] The hierarchy of the norms is a crucial aspect of the legal method. [73] Legal scholars and those applying the law often use the same material and agree about the hierarchy of the norms.[74]

The normative starting point in this study is EU law. The principles of sincere cooperation, primacy of EU law and direct effect govern the relationship between the EU and the Member States. The Member States are obliged to adopt measures to ensure the fulfilment of obligations arising from EU law. They must also refrain from any measure that might jeopardise attainment of the objectives of the EU.[75] The primacy of EU law means that in cases of conflict EU law prevails over national law.[76] This means that Sweden has to render effective its legal obligations stemming from EU law.[77] The European Union has been very active in regulating labour migration from third countries.[78] EU legal requirements are therefore crucial when analysing Swedish law. The EU legal sources are a little different from Swedish sources of law. In this study primary EU law, like the EU Charter of Fundamental Rights, the general principles of EU law (normally identified by the European Court of Justice, CJEU) and secondary law, such as regulations and directives, are used. CJEU case law is crucial for interpreting this legal material. The CJEU has taken a very active role in the development of principles governing the interpretation of EU law and in developing the relationship between EU law and national legal systems.[79] Doctrine also plays an important role in this study.

[70] Jareborg (2004) 8.
[71] Sandgren (1995) 732. Compare this with general description where the preparatory work is left out: The analytical legal method is the 'analysis of formal legal documents – primarily court decisions and Government materials' Cane and Kritzer (2010) 5. They play a particular important role in the Swedish context where the power of the people is given a strong position.
[72] Sandgren (1995) 732,
[73] Kleineman (2013) 32 et sec.
[74] Sandgren (2006) 545.
[75] Art 4.3 Treaty of the EU. On this theme see Reichel (2013) 112 et sec.
[76] C-26/62, Van Gend en Loos (1963), C-6/64 Costa v E.N.E.L (1964) On this theme see for example Bobek (2017) 141 et sec. and De Witte (2011) 323 et sec.
[77] Art 4.3 TEU.
[78] See section 1.4.1.
[79] Reichel (2013) 115 et sec.

2.2 The empirical part

2.2.1 The qualitative empirical part

As will be shown, the sources of law provide only imprecise answers to some of the research questions related to the wage level required to be granted a work permit in Sweden. To understand how this imprecise level is interpreted in practice, other material had to be consulted. Thus, legal material other than the sources of law is used such as the non-exhaustive statements on how to interpret the law issued by the Migration Agency. Stakeholders with specific responsibilities in the application process were also consulted. These include officials at the Migration Agency taking decisions on work permit applications. Interviews with the official from the Migration Agency were intended to clarify the Agency's practice in these cases. How have they been applying the imprecise requirement in the law? This legal material is empirical in a similar way to some of the sources of law. The main difference is that this legal material does not have the quality required to establish applicable law (*gällande rätt*).[80] The material illuminates the content of the applicable law in its factual meaning.[81] It has been claimed that 'empiricists aim to describe the world as it is, not as it ought to be'.[82] A famous way of describing the difference between black letter law and empirical legal research is Roscoe Pund's distinction between 'law in the books' and 'law in action'.[83] The aim of this study is therefore somewhat amended in this part of the study from establishing the applicable law to establishing the applicable law in its factual meaning.[84] Besides the Migration Agency, trade unions also, as explained, play a role in the application process and their interpretation of the legal wage requirement is also important for learning more about the law in practice. Interviews were therefore also conducted with trade union representatives.

The interviews done for this study correspond, to some extent, to empirical qualitative legal research.[85] A legal scholar's use of this approach can differ from empirical research conducted in other disciplines and the method should be chosen accordingly.[86] The crucial question is whether the research meets the relevant quality criteria.[87] Golafshai asserts that 'reliability and validity are

[80] Jareborg (2004) 9; Kleineman (2013) 38.
[81] Sandgren (1995) 732.
[82] Baldwin & Davies (2005) 886.
[83] Pound (1910).
[84] Sandgren (1995) 734.
[85] Sandgren (1995a) 1042, 1045.
[86] Epstein & Martin (2010) 902.
[87] See for example Golafshani (2003) 601.

conceptualized as trustworthiness, rigor and quality in a quantitative paradigm'.[88] These conditions are useful to ensure quality in this part of the study. The semi-structural method was used for the interviews.[89] The informants were given questions in advance, which were then discussed during the interviews and follow-up questions could be raised. The discussion continued over e-mail. One person interviewed at that time headed the work permit unit at the Migration Agency and other persons interviewed represented the two trade unions involved in giving opinions in work application cases. The persons interviewed were carefully selected in order to obtain reliable data. The position each person held within the organisations governed the selection. The starting point was that an official at this level at the Migration Agency (head of unit) would be able to supply a reliable answer concerning how this unit processes work permit applications. The same applies to the trade union representatives. They were assigned a particular responsibility within their organisations regarding opinions given in the application process. They were also given a chance to look at drafts in which they were cited in order to ensure that there were no misunderstandings. Our particular interest was how they interpret the wage condition in the application process.

2.2.2 The quantitative empirical part

Empirical data were also used to indicate the extent to which the required wage level governs the wages these workers are actually offered and how these correspond to the wage levels of local workers. This material also provides a lot of information about labour migrants in the study group and their relations to Swedish firms. The data are based on 300 work permit applications submitted by labour migrants belonging to the professional groups at the centre of this study and which were approved in January 2017. The decisions on approval are also part of the material. The professional groups are: IT architects, systems analysts and test managers, engineering professionals and physical and engineering science technicians. The *offers of employment* are part of these applications. The offers contain information on the offered wages. This part of the study is intended to explore the extent to which the wages offered are governed by the wage level required by the law and how far the offered wages correspond to local workers' wage levels. The wages offered to these labour migrants were compared to three sets of data containing the wages workers doing comparable work and/or having comparable education earn in Sweden. The first comparison is based on statistics collected by Statistics Sweden for 2016. In the application

[88] Golafshani (2003) 604.
[89] Edwards & Holland (2013) 2 et sec and 29 et sec.

for a work permit the labour migrant is given a specific professional SSYK code.[90] These professional codes refer to specific professions: SSYK code 2145 refers to a civil engineer in chemicals and chemical engineering, SSYK 2149 other civil engineers and SSYK code 2511 systems analysts and IT architects. The question is, how do the wages the labour migrants are offered compare with those of other workers in the same profession? The wage statistics published by Statistics Sweden are also based on SSYK codes and divided into wage levels, based on percentiles; the tenth, first quarter, median, third quarter and ninetieth and above. For example, at the tenth percentile 10 per cent of all workers belonging to this particular SSYK group earn the stated level or below. In the first comparison it is explored how the wages the labour migrants are offered are clustered along these wage intervals. One weakness with this comparison is that the experience factor is not part of the information provided by Statistics Sweden. The results from this comparison are presented and considered to have value, however, because the data from Statistics Sweden – as will be shown in section 4.5 – play a crucial role in whether the Migration Agency decides to approve a work permit application or not.

In order to better capture the experience factor and obtain a result that can give a more accurate picture of how offered wages correspond to the wages paid to comparable workers in Sweden overall a second comparison is made. In this case we turned to statistics from the Swedish Association of Graduate Engineers concerning the wages reported by their members 2016. This is what this trade union takes into account when it gives its opinion on wages offered in the work permit application process. The two trade unions *Unionen* and the Swedish Association of Graduate Engineers both organise workers professionally belonging to the study group. It is the employer who decides which trade union to turn to in the application process. The statistics from the Swedish Association of Graduate Engineers were chosen because in this sample the trade union was asked to give an opinion in 77 per cent of cases.[91] The statistics used from the Swedish Association of Graduate Engineers are from 2016. The statistics can be divided into three educational levels: bachelor of science or engineering (*högskoleingenjör*), masters in science or engineering (*civilingenjör*) or other three-year post-secondary higher education (*annan treårig högskoleutbldning*). The different levels of education reported in the labour migrants' applications fit rather well into these three educational levels. The trade union's wage data can also be divided by graduation year, which is a factor that in most cases is also

[90] SCB (2017), https://www.scb.se/contentassets/9f203b733c2942ec971fb098a7800417/ssyk-2018.pdf (visited 2019-04-28).
[91] See section 3.

reported on in the labour migrants' applications for a work permit.[92] This wage data is also divided into percentiles corresponding to the SCB statistics.

In this comparison the wages offered a labour migrant with a certain educational level and graduation year is compared with the wages for comparable education level and graduation year in general according to the statistics from the Swedish Association of Graduate Engineers. The question raised is where in the general division of wages the labour migrant's offered wage ends up when the factors educational level and graduation year is taken into account. This comparison better captures the experience factor. Nevertheless, there is a one weakness with this comparison: it does not capture the wage differences between sectors.

To grasp the more sector specific situation a third comparison is done with wage levels within the IT sector among the wage reporting members of the Swedish Association of Graduate Engineers. In this comparison 170 labour migrants of the study group were selected who, through the SSYK codes chosen, could be categorised as specialists in IT and with the educational level of bachelor of engineering or science or master of engineering or science and having reported the examination year in the application documents. This time the statistics from 2017 were chosen to better capture the wages corresponding to the level local workers were earning during the same period. In this comparison the wages are only divided into four wage intervals, due to lack of data regarding some wage intervals for some graduation years in the statistics from Swedish Association of Graduate Engineers. Otherwise the principles governing the comparison are the same as in the second comparison.

2.2.3 What does the quantitative part tell us about the applicants?

The quantitative empirical study is based on 300 applications approved for ordinary Swedish work permits.[93] The sample is from January. The question then

[92] This is done in 287 out of the 300 cases. Only 287 applications is therefore part of this comparison.

[93] Why did I choose this group and not other more specific permit opportunities open for highly qualified labour migrants? The obvious alternative could have been labour migrants with an EU Blue card. The empirical study would however in that case have been very limited. In 2017 35 Blue cards were issued. (E-mail correspondence between the author and the Migration Agency (23 April 2018)) This is explained by the fact that the ordinary Swedish process is in most instances less complex and more beneficial. Exception are the provisions in article 16 providing for simplified rules for obtaining an EC long-term residence status for EU Blue Card holders and in article 18 on intra-EU movements, 2009/50/EC. [93] The advantage of an EU Blue Card compared to the ordinary system is that it contains an intra EU movement provision and an additional right to qualify for a long term residence status through stays in different Member States. (Articles 16 and 18 dir 2009/50/EG). A restricting factor is the salary threshold required by the directive. The salary offered must be at least 1.5 times the average gross annual salary in the Member State

arise, can the sample used in this study tell us something about the overall picture? Can the 300 applications looked at be qualified as representative? Could we use the results from this sample to learn about the entire population?[94] The population in this case is all labour migrants admitted to Sweden in 2017 belonging to this study's specific targeted professional groups .

In total, 265 of the labour migrants who form the study group are categorized as specialists (*yrken med krav på fördjupad högskolekompetens*) and the rest as professionals (*yrken med krav på högskolekompetens eller motsvarande*) in the statistics from the Migration Agency. IT specialists, systems analysts and test managers, as well as engineering professionals belong to the group specialists. In 2017 they totalled 5,111 out of 6,235 professionals admitted to Sweden, or around 80 per cent.[95] Table 2 presents the Migration Agency data on how many applications are approved each month corresponding to such general criteria found. During 2017 the number of decisions was fairly stable over the year, with some variations.

concerned. (Art 6.5 (2009/50/EG)). In a Swedish context this salary level is higher than most of the salaries offered to the labour migrants in our study group. In 2017 this threshold was 49 200 SEK. (MIGRFS 2017:13 Migrationsverkets föreskrifter om den lönetröskel som är villkor för att erhålla EU-blåkort). About eleven percent of the workers in the study group for 2017 were offered a wage corresponding to this threshold. The EU Blue Card directive is however renegotiated and the outcome of these negotiations are yet unclear (COM (2016)378 Proposal for a Directive of the European Parliament and of the Council on the Conditions of entry and residence of third-country nationals for the purpose of highly skilled employment). It is proposed to lower the threshold. (COM(2016)378, 15). But, because of the limited impact of the EU Blue Card in the Swedish context so far we will leave that for now. Another alternative could have been to look at those specialists that were exempted from the requirement to have a valid work permit while working in Sweden. The Migration Agency could however not provide any information about this group. It would also require a very different strategy to try to find out which wage level they would have been offered as that fact is not part of the application process for a residence permit which those specialist staying longer than 3 months must apply for. The provisions on Intra Corporate Transferees had not entered into force in 2017, and those specific permits could therefore not be taken into account.

[94] Epstein & Martin (2010) 913.

[95] https://www.migrationsverket.se/download/18.4100dc0b159d67dc6146d3/1514898751037/Beviljade%20arbetstillst%C3%A5nd%202017%20-%20Work%20permits%20granted%202017.pdf (visited 2019-04-28)

Table 2 Number of specialists and professionals admitted each month in 2017

	January	February	March	April	May	June	July	August	September	October	November	December
Specialist	507	401	661	406	522	516	581	735	489	459	486	472
Professional	60	74	89	46	84	99	87	118	88	77	79	81

Source: Migration Agency Statistics.

The average number of specialists admitted each month was 519. In January, for example, it was 507. From that perspective January is likely to be a rather typical month. The same applies to professionals. The subgroup we are looking at in that category, however, is smaller, with 431 persons out of 982 or around 44 per cent.

The 300 applications correspond to almost 6 per cent of the approved work permit applications for these categories in 2017. This is a substantial part of all approved work permits and it is likely that the results from this empirical study can tell us something general about this group. There is no known reason to believe that this sample would not represent the rest of the applicants during the year. But there might be unknown factors that cannot be taken into account. The first aim of this survey, however, is to discover something about the extent to which the required wage level governs the wages offered.[96] The second aim – to figure out whether the labour migrants' offered wages correspond to those of comparable local workers – is more difficult. The major shortcoming in this case is the absence of a completely reliable comparator, as explained above and further discussed in section 5.3. The result, however, corresponds to other studies on the wage levels for this group.[97] It is therefore likely at least to give us an indication of whether there might be a reason to suspect that some of labour migrants earn less than comparable local workers and in that sense the results from this part of the study can lead us to believe that whether the law provides for equal treatment for this group is not only of academic interest but also of practical relevance.

[96] Cf ibid.
[97] Emilsson (2014); Tillväxtanalys PM (2018) 38.

3 Facts about the applicants and their host entities in the study group

The 300 approved applications for a work permit also include other information about the applicants and their host entities in Sweden that are crucial for enabling us to draw conclusions in Part II of this study and raise suitable questions to fulfil the aim of Part III. The empirical study in this sense helps to verify the relevance of the research questions raised.[98] But it also reveals 'facts about the unknown', in this case facts about the labour migrants and their relations with the host entity in Sweden.[99] This has value in itself. The method used in this part is very simple coding and counting.[100] In the end of this chapter most of the descriptive statistics discussed in the following is included in a table, table 3.

The educational level of the labour migrants in the study group is high. Almost half of the labour migrants have a BA in engineering or technology. More than 12 per cent also have an MA in the same field. Ten per cent have a BSc in science or computing and almost 17 per cent have an MSc in the same fields. The rest of the labour migrants reported different combinations of educational attainment and many of them also have an MBA, combined with a bachelor with different focuses. A few did not report any university degree at all.

One thing is the education achieved, another thing the tasks that are to be performed in Sweden. The latter information is indicated through the specification of which SSYK code the work offered correspond to. The aim is to give a clearer picture of the professions the labour migrants are pursuing in Sweden. The labour migrants are through the SSYK codes categorized as specialists in either natural sciences, technology or IT and as technology professionals. The specialists dominate the study group (96 per cent) and among them IT specialists are in the majority.

The labour migrants in the study group are fairly junior. Most of them had some experience before they entered Sweden. Table 3 shows that 57 per cent of labour migrants in the study group are 31 years of age or younger; 87 per cent are 36 years or younger. We can see that 33 per cent graduated 2–6 years ago and 35 per cent 7–11 years ago and only 8 per cent are real newcomers to the labour market.

[98] Sandgren (1995) 737; Cane & Kritzer (2010) 5.
[99] Sandgren (1995) 736.
[100] Cane & Kritzer (2010) 4.

The labour migrants are working at work sites in Sweden of very different sizes. The majority seem to work at small or medium-sized companies.[101] These figures in Table 3 should however be treated with caution. Sometimes it is not clear whether the information in the application for a work permit relates to the whole company group or the entity in Sweden.

A large majority of the labour migrants in the study group intended to stay longer than one year. Previous studies have shown that the majority of highly qualified labour migrants tend to stay less than a year.[102] A recent study looking at permits approved up to 2015 has shown that this has changed.[103] The results from the present study give a similar picture (Table 3). A large part, 36 per cent, are even intending to stay for the maximum application period, 24 months. Something not looked at in this study is the extent to which labour migrants apply for an extension of their work permits. A study from 2016, however, shows that professional engineers and workers in the IT sector belong to the majority (60 per cent) of all approved extensions that year.[104]

Another important factor is the labour migrants' relationship with the host entity in Sweden (Table 3). In the study group it turns out that only 26 per cent are employed by an employer in Sweden. The rest are posted to Sweden from another company in a third country. Half of the labour migrants in the study group were posted by a transnational company and transferred from one entity of the company or company group to another in Sweden. Only 23 per cent were posted to an independent entity in Sweden.

If we consider if the relationship with the host company affects the length of stay it turns out that almost all labour migrants employed by an employer in Sweden apply for work permits lasting longer than twelve months (99 percent). About 63 percent of labour migrants posted to Sweden intend to stay for such a period. In fact the largest amount of workers in all three different kind of relationships with the Swedish entity intends to stay longer than 12 months.

As all work permits are temporary it can be assumed that employment is on a fixed-term basis.[105] However, 22 per cent report that they are offered a permanent contract. The kind of employment is a factor specified in the offer of

[101] The EU Commission's definitions of small and medium size companies take both number of employees and turn over into account. See for example EU Kommissionen, användarhandledning om definitionen av SMF-företag (Ref. Ares(2016)956541 - 24/02/2016 , Europeiska unionens publikationsbyrå, 2015). In this table only the number of employee factor is included in the concept. The terms are only used to give an indication of the size of the company.
[102] Emilsson (2015) 92.
[103] Riksrevisionen (2016) 122.
[104] Riksrevisionen (2016) 123.
[105] According to Swedish law the parties are free to choose a fixed term contract at least up to 24 month, 5 § Employment Protection Act. No particular objective has to be fulfilled for that choice.

employment. All of the labour migrants offered a permanent contract are employed by an employer in Sweden. In only 9 per cent of these cases is the work permit for a period shorter than 24 months and in only one case is it shorter than 1 year. This indicates that in these cases the parties to the employment contract mainly plan a longer stay in Sweden.[106]

Collective agreements play a crucial role on the Swedish labour market and in the work permit application process. It is therefore of interest to know to what extent the workers in our study group are covered by a collective agreement. In 52 per cent of the cases in which a labour migrant is employed by an employer in Sweden they are covered by the collective agreement. A more surprising result is the 8 percent of intra-corporate transferred workers who are, according to the offer of employment, supposed to be covered by a collective agreement. This is surprising as collective agreements concluded by an employer normally does not apply to employees employed by another employer. The definition of a posted worker is normally that they continue to be employed by the sending company.[107] How these companies arrange the employment relationship and the coverage of the collective agreement is not investigated in this study and something that can be looked into in the future. In total, a collective agreement is reported to be applied in only 18 per cent of the cases studied.

A trade union must be offered the opportunity to give an opinion about the offer of employment and its correspondence with the legal requirements for admission. As explained in section 2.2.2 there are mainly two trade unions organising the professional groups part of the study group, the Swedish Association of Graduate Engineers and Unionen. In an absolute majority of cases (77 per cent) the Swedish Association of Graduate Engineers was asked to give an opinion about the working conditions offered in the application process. In almost 60 per cent of those cases the organisation stated that the conditions offered were not worse than the conditions stipulated under collective agreements or practice within the profession or industry. In a number of those cases the trade union added that they could not give an opinion about insurance as no collectively agreed insurance applied. The last option was used mainly in posting situations.[108] Unionen was asked to give opinions in only 18 per cent of cases, all of which they approved. In some cases, Unionen had given a particular company a general approval in advance which they were entitled to use if certain

[106] Risks and opportunities with a permanent contract for labour migrants is discussed in Herzfeld Olsson (2015).
[107] Posted Workers Act (1999:678); ch 6b on Intra corporate transferees in Aliens Act (2005:716).
[108] In a number of cases SAGE abstained from giving opinions. It turned out that those cases were based on a misunderstanding between the local representative giving the opinion and the general union position to always give opinions when possible. Magnus Skagerfält, email, 2018-07-07.

circumstances were met. In a few cases other trade unions were asked to give an opinion. In none of the cases in the data set did a trade union give a negative – indicating that the wage level went below the required standard – opinion.

Table 3 Descriptive statistics

1.	Year of Birth	1981-1985	1986-1990	1991-			
		30 %	41 %	16 %			
2.	Examination year	2006-2010	2011-2015	2016-2017			
		35 %	33 %	8 %			
3.	Length of permit	Less than 6 months	From 6 to 12 months	More than 12 months	24 months		
		13 %	15 %	71 %	36 %		
4.	Relationship with host company	Employed by an employer in Sweden	Intra corporate-posted	Posted to an independent entity in Sweden			
		26 %	50 %	23 %			
5.	Collective agreement	Employed in Sweden	Intra-corporate posted	Posted to an independent entity in Sweden	Total		
		52 %	8,5 %	0 %	18 %		
6.	Kind of Employment	Fixed-term employment	Permanent employment				
		78 %	22%				
7.	Company size, number of employees	≤10	11-50	51-250	251-500	501-1000	≥1001
		5 %	30 %	27 %	2 %	14 %	22 %

8.	Education	Bachelor E/T	Master E/T	Bachelor S/CA	Master S/CA	Other
		49 %	12 %	10 %	17 %	12 %
9.	SSYK - codes	Natural Sciences and technological specialists (21)	IT-specialists (25)	The biggest subgroup of IT-specialists Software and application developers and analysts, (2512)	Technology professionals (31)	
		30 %	64 %	37 %	6 %	

Source: Author's data set. Information taken from the 300 approved applications for a work permit. The facts are either taken from the offer of employment (1, 4, 5, 6, 7, 9) the form of application for a work permit (1, 2, 8) or the decision from the Migration Agency (3).

PART II

4 The admission conditions

4.1 The interaction between migration law and labour law

The main research question in the study is to figure out the extent to which Swedish law provides for equal treatment for highly qualified labour migrants.

As explained the following part of the study is divided into two parts. The first part (Part II) concerns the conditions for being admitted to Sweden. These requirements shape a migrant's entry and stay in Sweden. The second part (Part III) is about the labour and equality law that applies when working in Sweden. The choice to discuss these two sets of laws is explained by the strong interaction between the admission conditions regulated in migration law and the employment conditions applied; in other words, the interaction between migration law and labour law.[109] Migration law can either help or hinder equal treatment of labour migrants in comparison with local workers with regard to working conditions. Admission requirements connected to a certain level of working conditions could help ensure that the prescribed labour law standards are upheld. On the other hand, other aspects of the admission conditions, such as temporariness, a work permit's close ties to the employer and rules leading to the revocation of residence permits if the employer fails to meet the required level of working conditions may counteract such effects. Such rules lead to dependence on the employer, which may discourage labour migrants from seeking to uphold the rule on working conditions. In such cases the priorities of the employer prevail. One question is whether the skills of a particular worker are prioritised or the opportunity to employ a worker at lower cost. Such broader perspective on this topic will not be further examined in this report. Nevertheless, in response to the importance of admission conditions related to pay the next part of this study will look at Swedish migration law in terms of admission conditions related to a specific wage level (the rest of section 4) and the extent to which the required wage level reflects the wage level these workers are offered (section 5).

[109] Anderson (2010) 301; Fudge (2012) 96; Costello & Freedland (2014); Howe & Owens (2016).

4.2 The Swedish admission conditions

In order to be granted a work permit in Sweden, the migrant worker needs to receive an offer of employment from the employer. To ensure that migrant workers do not replace local workers, the offered terms of employment should be similar to those local workers enjoy.[110] The law therefore prescribes that the worker must be offered a wage, insurance and other terms of employment that are not worse than those provided for in the relevant collective agreements or by custom in the occupation or industry.[111]

The Migration Agency has designed a form called an *Offer of Employment* that must be filled in and accompany the application for a work permit.[112] In the *Offer of Employment* form the parties must declare whether the employer is bound by a collective agreement and in that case what the relevant trade union is. They must also specify the wage, working time, applicable insurance, kind of employment (indefinite or temporary) and period of employment. The combined effect of the specified wages and working time is also important for fulfilling the last legal requirement for being granted a work permit. Migrant workers must be able to support themselves, meaning that their total income must be higher than the level of social assistance (13,000 SEK per month, around 1,200 euros).[113]

Trade unions are, as explained, given a specific role in the application procedure. The relevant trade union shall be given an opportunity to verify whether the terms laid down in the offer of employment are in accordance with collective agreements or custom.[114] The trade unions are given this task as they are familiar with the content of agreements.[115] They are not obliged to give their opinion, however, and the Migration Agency is not bound to follow the opinion given. Some trade unions refrain from giving opinions if the employer is not bound by a collective agreement.[116] The argument in such cases is that the trade unions do not have the means to control whether the offered conditions are in

[110] Government Bill 2007/08:147 27.
[111] Chapter 6 section 2 Aliens Act (2005:716).
[112] The form can be found on the website of the Migration Agency https://www.migrationsverket.se/download/18.5e83388f141c129ba6312eab/1473238973457/anst_erbj_232011_sv.pdf (visited 2019.04.28)
[113] Ch 6 s 2 Aliens Act (2005:716) and MIGR 2015:11.
[114] Aliens Ordinance 2006:97, ch 5 s 7a. The form can be found on the Migration Agency's website: http://www.migrationsverket.se/download/18.5e83388f141c129ba6312b76/1485556063117/233011+Fackligt+yttrande.pdf visited 2019-04-28).
[115] Government Bill 2013/14:227 20.
[116] See, for example, statements by the biggest white-collar trade union UNIONEN; https://www.unionen.se/rad-och-stod/yttrande-arbetstillstand.

fact applied if there is no collective agreement.[117] In those cases the Migration Agency must independently verify whether the offered terms are sufficient.[118]

In order to simplify and speed up the application process the Migration Agency applies a certification process for employers fulfilling specific demands.[119] The certification process has, according to the government, been particularly useful for the professional categories part of this study.[120]

The main consideration to keep in mind here is the admission requirement related to pay, namely that the worker must be offered a wage that must not be worse than the one provided for in the relevant collective agreements or by custom in the occupation or industry.[121]

4.3 Admission conditions for Intra-Corporate Transferees

If a labour migrant fulfils the definitions for being an intra-corporate transferee then specific admission rules in the Aliens Act have to be applied.[122] These provisions were not in force when the 300 labour migrants who form our study group applied for a work permit, however. But, they are likely to play an important role in the future and are touched upon here in order to give a more complete picture.

Not all conditions required for obtaining an intra-corporate transferee permit will be discussed.[123] The focus shall be the admission conditions related to a specific level of the working condition pay. The admission condition in the Directive on Intra-Corporate Transferees prescribes that the Member States shall require that:

> the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member States where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.[124]

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[117] The blue-collar trade union for hotel and restaurant workers: https://www.svd.se/hrf-kraver-kollektivavtal-for-att-ge-arbetstillstand

[118] On this issue in other cases see Calleman (2015) 308 et sec.

[119] https://www.migrationsverket.se/English/Other-operators-English/Employers/Employing-people-from-non-EU-countries-/Become-a-certified-employer.html

[120] https://www.regeringen.se/regeringens-politik/migration-och-asyl/arbetskraftsinvandring-och-kompetensforsorjning/

[121] Ch 6 s 2 Aliens Act (2005:716).

[122] Ch 6b Aliens Act (2005:716) For the background to the directive Töttős (2018).

[123] For further reading see Costello & Freedland (2016), and with regard to the Swedish transposition Herzfeld Olsson (2018a).

[124] Art 5.4(b) (2014/66/EU)

The provision transposing the admission condition into Swedish law reads: 'the remuneration [shall] not [be] worse than what is prescribed in Swedish collective agreements or custom within the profession or sector'.[125] The provision builds on the general admission condition for labour migrants but has replaced the word 'wage' with 'remuneration'. It is explained that the concept of 'wage' includes certain additional payments, such as supplements for inconvenient working hours or overtime payments. The concept of 'remuneration' is broader and covers wage as well as other components typically paid to local workers in a similar position. The concept of remuneration is likely to differ between different branches and should therefore be established with the support of the collective agreement or custom in the relevant branch.[126] We will return to an analysis of this transposition in 6.6.2.

4.4 Collective agreements for highly qualified labour migrants

As described in 4.2 and 4.3 the law prescribes that the worker must be offered a wage (remuneration for intra-corporate transferees), insurance and other terms of employment that must not be worse than those provided for in the relevant collective agreements or by custom in the occupation or industry. The issue dealt with in this section is the extent to which the collective agreements relevant for the study group give guidance about the required wage level.

Swedish law does not contain any statutory minimum wage requirements. Wages are set either by collective agreements or by the worker and employer in the employment contract. If the employer is not bound by a collective agreement the parties to the employment contract are practically free to set the wage they want. The only restriction can be found in 36 § Contract Law on unreasonableness.[127] A wage must not be unreasonable.[128] But the Labour Court has considered an agreed wage level unreasonable only on rare occasions.[129] If no wage is agreed the Labour Court establishes what a reasonable wage should be. Guidance in this regard is sought in the most relevant collective agreement or, as a last instance, in what is customary to pay for similar work at the place in question.[130] Trade union density is still very high in Sweden and collective

[125] Government Bill 2017/18:34 9.
[126] Government Bill 2017/18:34 46.
[127] S 36 The Contracts Act (1915:218).
[128] Sigeman & Sjödin (2017) 164: AD 1982 no 142 and 1986 no 78.
[129] AD 1982 no 142; AD 1986 no 76.
[130] Kjellström & Malmberg (2016) 205; B J Mulder & A Adlercreutz (2013) 355; ses also the following judgments from the labour court; AD 2003 no 1, AD 1991 no 26, AD 1983 no 130 och AD 1976 no 65.

agreements cover 90 per cent of the workforce.[131] In the private sector the coverage is a bit lower and about 74–76 per cent of private-sector white-collar workers were covered by collective agreements in 2016.[132]

The collective agreements relevant for the labour migrants in the study group are concluded by the Swedish Association of Graduate Engineers and Unionen. The Swedish Association of Graduate Engineers organises workers with 'either a Master of Science degree in Engineering or a Bachelor of Science degree in Engineering (at least 180 credits).' Standard membership is also available to university graduates with at least a Bachelor-level degree in another technical/science-related area.[133] Unionen organises white-collar workers in the private sector and has concluded collective agreements for the IT industry, a sector in which many of the labour migrants in the study group work.[134] To a certain extent the two trade unions organise workers with the same qualifications.

Since the 1990s the wage setting structures within the collective agreement context have become more decentralised and individualistic.[135] The result of this development has been described as 'organised decentralisation' and both the Swedish Association of Graduate Engineers and Unionen have actively taken part in it.[136] The outcome of this development is different in different collective agreement contexts, however. A distinction must also be made between two aspects of the wage setting structure: the question of the existence of minimum wages must be separated from the organisation of regular pay rises. A number of collective agreements still contain minimum wages, in particular in the blue-collar sectors and in some white-collar collective agreements, such as those concluded by Unionen.[137]

This is not the case, however, for graduate employees covered by collective agreements concluded by a sectoral organisation belonging to the Swedish Federation of Graduate Employees (SACO), such as the Swedish Association of Graduate Engineers. In their collective agreements no minimum wages exist.[138] Hence, the Swedish Association of Graduate Engineers does not use wage tariffs or a fixed minimum wage in their collective agreements. The negotiations

[131] Medlingsinstitutet (2017) 225.
[132] Medlingsinstitutet (2017) 226–227.
[133] https://www.sverigesingenjorer.se/About-us/becomeamember/
[134] https://www.unionen.se/medlemskapet/vem-kan-bli-medlem-och-villkor (visited 2019-04.28)
[135] Ahlberg & Bruun (2005) 117–143; Hansson (2010) 109; Fransson & Stüber (2014) 114.
[136] Rönnmar (2017) 397.
[137] Examples from some blue collar trade unions: https://www.ekonomifakta.se/Fakta/Arbetsmarknad/Loner/ingangsloner/ (Visited 2019.04.28).
[138] https://www.saco.se/press/aktuellt-fran-saco/artiklar/ingangslonen-avgorande-for-din-loneutveckling/ (visited 2019.04.28).

regarding starting wages is something that the trade union does not take part in at all. The wages are negotiated on an individual basis. The trade union only gives their members advice on what to consider during negotiations and recommendations on starting wages.[139] A number of supplements are regulated in the applicable collective agreement, however, such as wage supplements in the event of illness or parental leave, vacation wage and overtime.[140]

The collective agreements concluded by Unionen and its counterparts are constructed slightly differently.[141] The starting point in the collective agreement is that wage setting should be done on an individual basis.[142] But the collective agreement for the IT-sector concluded between Unionen and Almega IT and Telecom includes minimum wages.[143] The minimum wage – called 'the lowest acceptable wage' – is applicable only to workers above 18 years of age and a higher level applies after one year of uninterrupted employment. The collective agreement also provides for a lower wage than the minimum level for a maximum of six months if the worker has no work experience at all. [144] Unionen explains that this wage shall be applied only to inexperienced workers. As soon as a worker has gained some experience the individual wage setting procedure takes over. The minimum wage is rather low and rarely used,[145] as illustrated by the information given by Unionen on reasonable starting salaries in the IT and telecom sectors.[146] That is among other things explained by the high labour demand for people with these qualifications. High demand for a particular skill is one aspect that typically motivates a higher starting wage. Low demand naturally leads to the opposite result.[147]

Regarding the collectively agreed regular pay rises a number of structures exist in the Swedish labour market and the Swedish National Mediation Office

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[139] https://www.sverigesingenjorer.se/Om-forbundet/Sa-tycker-vi/inkomstpolitik/ingangslon1/

[140] The collective agreement: Avtal om lokal lönebildning, IT-företag, giltighetstid 2017-04-01 – 2020-03-31 mellan IT & Telekomföretagen och Civilekonomerna, Jusek och Sveriges Ingenjörer §§ 4–7.

[141] The collective agreement: Förhandlingsprotokoll Avtal om löner och anställningsvillkor 1 april 2017–31 mars 220 Avtalsområde IT, Bilaga 1 Avtal om lokal lönebildning i företagen för avtalsområde IT mellan IT & Telekomföretagen inom Almega, arbetsgivarsektionen och Unionen, § 4

[142] Ibid § 3.2.

[143] ibid § 4.

[144] Ibid.

[145] Interview with Markus Wiberg Unionen 2017-10-27.

[146] Unionen's recommended starting wages: Unionen, Ingångslöner - lönelägen för dig som är ny på arbetsmarknaden från websidan: https://www.unionen.se/rad-och-stod/ingangsloner-lonelagen-dig-som-ar-ny-pa-arbetsmarknaden (visited 2019-04-28).

[147] Unionen explains their structures here: https://www.unionen.se/rad-och-stod/minimilon-och-lagsta-lon; https://www.unionen.se/rad-och-stod/ingangsloner-lonelagen-dig-som-ar-ny-pa-arbetsmarknaden. (visited 2019.04.28)

has identified seven different types of agreement. The agreements most relevant to this study belong to the group with no individual guaranteed pay rise and advanced decentralisation.[148]

The collective agreements concluded by the Swedish Association of Graduate Engineers normally prescribe that individual workers shall have a right to negotiate wages once a year. The sectoral collective agreement on annual pay rises is called a process agreement. Its main function is to set the prerequisites for local negotiations. Individual pay rises are decided at local level [149] There are some variations in the principles governing this process in different collective agreements. For the collective agreement in the IT sector it works as followings.[150] General wage setting principles apply. According to these principles wage setting shall be individual and differentiated and be connected to the companies' goals. Moreover, wage setting and wage structure in the company must be objective and systematic. The wage setting principles must be clear, known and not discriminatory. Arbitrary wage differences shall be eliminated. Workers on parental leave shall be included in the wage revisions. The same evaluation and application of the wage setting principles apply to men and women.[151] Specific pay rise criteria are also included in the sectoral collective agreement. According to these criteria the individual wage and wage development should be based on the needs of the company, the kind of work assignments, requirements, content, complexity and responsibility, individual value for the company and results achieved compared to set goals. Other factors that, according to the collective agreement, can be taken into account are cooperation, judgement, initiative and commitment, economic responsibility, innovation orientation, ability to lead and develop one's own and others' value for the company.[152] More specific criteria should be set by the company and based on market conditions and specific company needs. Regard is paid to individual performance in relation to set goals, skill, education, responsibility and authority. A discussion based on these principles and criteria takes place between the worker and the employer during the wage talks. The annual pay rise mechanism is a tool for achieving the goals of the establishment. Not all workers are guaranteed a pay rise, but each pay rise–related decision must be justified.

[148] The Swedish National Mediation Office (2017) 233-238.
[149] http://www.sverigesingenjorer.se/About-us/salarytalk/
[150]https://www.sverigesingenjorer.se/Loner-avtal-lagar/Kollektivavtal/Avtalskonstruktionerna/Avtal-med-stupstock/
[151] Collective agreement: Avtal om lokal lönebildning, IT-företag, giltighetstid 2017-04-01 – 2020-03-31 mellan IT & Telekomföretagen och Civilekonomerna, Jusek och Sveriges Ingenjörer, § 3.2.
[152] Ibid § 3.2.1.

When the wage talks are completed the employer's wage offer is negotiated with the local trade union and they then adopt an agreement on the new wages.[153] If the parties on the local level cannot agree, a fall-back mechanism laid down in the sectoral agreement can come into play. A certain percentage of a pay rise must then be divided between the members. No individual guaranteed pay rise is part of such a solution.[154]

The sectoral agreement concluded by Unionen for the IT sector is very similar to those concluded by the Swedish Association of Graduate Engineers for the same sectors. It is also a process agreement and stipulates when wage revision shall take place and how the local representatives, the employer and the local trade union shall decide how the principles in the sectoral agreement shall be applied in the company.[155] The employer and the employee shall have annual wage talks. When the wage talks are completed the employer's wage offer is negotiated with the local trade union and they then adopt an agreement on the new wages.[156] If the parties cannot agree on the general scope for the pay rises a fall-back percentage of the pay rise will be applied. In 2017 the fall-back level was 2.0 per cent in total for Unionen's members covered by this particular collective agreement.[157] Still no individual guarantee applies. One difference is that in this collective agreement, in contrast to the one concluded by the Swedish Association of Graduate Engineers, it is stated that that the starting point is that all members of the trade union participate in the development of the company and should therefore participate in wage development. It will thereby be more difficult to deny a member any pay rise. If that happens an activity plan in order to improve the performance in the future has to be adopted. The wage-setting structures must be transparent and systematic. The principles for wage setting must not be discriminatory. Discretionary wage differences are supposed to be eliminated. Individual wage setting shall be based on the needs of the company and the nature, content, level of complexity and responsibilities of work assignments. Individual competences, as well as results in relation to set goals are also taken into account.[158]

The combination of the absence of wage tariffs and individualised process-oriented pay rises mean that sectoral agreements can lead to substantial wage

[153] Ibid § 3.4.
[154] Ibid § 4.
[155] Collective agreement: Förhandlingsprotokoll Avtal om löner och anställningsvillkor 1 april 2017–31 mars 220 Avtalsområde IT, Bilaga 1 Avtal om lokal lönebildning i företagen för avtalsområde IT mellan IT & Telekomföretagen inom Almega, arbetsgivarsektionen och Unionen § 3.1.
[156] Ibid §3.4.
[157] Ibid § 4.
[158] Ibid § 3.2 and § 3.2.1.

differences in the same job. This can be illustrated by the wage statistics from Unionen. The wage interval between the 20th and 80th percentiles for a programmer or a systems analyst born between 1983 and 1987 is more than 800 euro a month.[159]

4.5 The basis for the Migration Agency's assessment

For the labour migrants in the study group it is obvious that the construction of the collective agreements applicable in the discussed sectors is not very helpful with regard to the decision on whether an offered wage level corresponds to the requirements of the Aliens Act. How does the Migration Agency proceed in such cases?

If the trade union has given a positive opinion on the application, meaning that they have stated that the wage level corresponds to the level in the collective agreement or custom, the Migration Agency normally makes no more inquiries, but accepts the trade union's assessment.[160]

In cases where the Migration Agency has to do an independent assessment it turns to Statistics Sweden (SCB), which publishes annual wage statistics, to find a comparator. The comparator used is the 25th percentile for a specific professional group indexed by a SSYK-2012 code.[161] The relevant SSYK -2012 code for the labour migrant's work in Sweden is indicated in the offer of employment. If the offered wage is lower than the maximum level in the 25th percentile the Migration Agency takes facts such as age into account and sometimes asks the employer to explain the situation. The SCB wage statistics cannot be divided into age groups or examination year groups.[162]

The Migration Agency does not see their task as setting an exact wage but ensuring that the offered wage is not below the level considered to be the lowest acceptable level according to the applicable collective agreement or custom for

[159] From the statistics collected by Unionen (Accessable with author) Hämtat från Unionens egeninsamlade lönestatistik från 2017, för yrkesgrupp 62, yrkeskod 621.

[160] Interview with Erik Holmgren, Migration Agency, 2017-10-31. This practice is also recommended in the Handbook from the Migration Agency regarding work permits (version update 2018-06-26). According to a statement by the Migration Agency is the opinion from the trade union of great help for the Migration Agency when doing the assessment: Migrationsverket, Rättsligt ställningstagande från rättsavdelningen angående bedömning av om den lön, inklusive eventuella förmåner, som erbjuds för en anställning är tillräcklig för att uppfylla kraven i 6 kap. 2 § utlänningslagen, SR 52/2016, 3 . See also the preparatory work which have a similar wording: Government Bill 2007/08:147 37.

[161] Interview with Erik Holmgren, Migration Agency, 2017-10-31.

[162] See also the Migration Agency Handbook, headline Informationskällor (version 2018-06-26) where it is referred to webpages at SCB and trade unions as well as direct contacts with trade unions and branch organisations.

the professional group. This means an acceptable level that reflects what normally applies to workers already resident in Sweden. The Migration Agency can, however, not take into consideration that the labour migrant individually could end up on a higher wage level.[163]
When that is established the Agency assesses whether the offered wage is satisfactory.[164] If it is below the accepted minimum level additional allowances and benefits can be taken into account, for example allowances that are supposed to compensate for extra costs related to working in Sweden and free housing.[165]

Taking into account the requirement in the Aliens Act that refers to 'a wage that must not be worse than those provided for in the relevant collective agreement or provided for by custom in the occupation or industry', it is clear that it is not the relevant collective agreement that sets the standard for the Migration Agency.

It should also be kept in mind that companies in the IT sector are less likely than companies in many other sectors to join employers' organisations and conclude collective agreements.[166] In addition it is interesting to note that among the companies that are part of the empirical study very few have concluded a collective agreement. About 18 per cent of the applicants were planning to work in a company with a collective agreement. On top of that it should be noted that posted workers who are in an absolute majority of the workers in the study group are in general not covered by a collective agreement in Sweden.

4.5 Trade union opinions

The two trade unions at the centre of this study have been struggling to find a reasonable approach to their role in the work permit application process. The task of giving opinions in every case is time consuming. It is also performed in relation to workers who are not and in most cases will not become trade union members. The trade union is not financially compensated for performing this task. In the statutes of the trade unions it is clear that their purpose is to promote

[163] SR 52/2016 4; Handbook, headline informationskällor.
[164] SR 52/2016 4.
[165] SR 52/2016 4-5.
[166] See for example: Svenskt Näringsliv in MIG 2017-24 (information from Swedish Confederation of Buisnesses, 75 per cent of the companies in the IT-sector is not bound by a collective agreements. These companies employ around 25 percent of the employees within the sector; Frykskog (2016) Arbetsvärlden, 'IT-företagen vill ha individanpassade lösningar' 2016-10-13 https://www.arbetsvarlden.se/almega-it-foretagen-vill-ha-individanpassade-losningar/ (visited 2019-04-28).

the interests of their members,[167] who, after all, pay a monthly fee to obtain this support.

The relationship between the worker coming to Sweden and the receiving company can take three different forms. The worker can be employed directly by the Swedish employer. The worker can also continue to be employed by a company in a third country and posted to Sweden. Such postings can take two forms: either the posting is part of an intra-corporate transfer, meaning that the two companies involved belong to the same company group, or the worker can be posted to an independent company in Sweden.[168] The two trade unions have applied different strategies in dealing with these different relationships. Unionen only gives an opinion if the employing company in Sweden has a collective agreement with Unionen or if it is an intra-corporate transfer and the receiving company in Sweden is covered by a collective agreement concluded with Unionen.[169] The Swedish Association of Graduate Engineers has a general policy of giving opinions in all cases.[170] In some cases they give a clear approval of applications regarding posted workers. In those examples the receiving company had concluded a collective agreement.[171] When no collective agreement applies – as in most posting situations – however, they only comment on the wages and not on the insurance. One reason for this is that it is very difficult to give an informed opinion on insurance outside the collective agreement context.

In cases in which the trade unions give opinions they also have to turn to other sources than the collective agreement for guidance. The trade unions use their own wage statistics in these cases. The Swedish Association of Graduate Engineers, for example, base their assessment on wage statistics based on reports from their members. The statistics mainly used are broken down by educational level, a three- or five-year engineering qualification or a three-year equivalent qualification, and examination year. They do not look into specific sectors or tasks and base their assessment on what they consider to be a market conformed wages (*marknadsmässig lön*).[172] The starting point is that the trade union is supposed to give an opinion in cases in which they have wage statistics. That is

[167] For example; Bylaws of Unionen § 1.2: https://www.unionen.se/sites/default/files/files/unionens_stadgar_med_anvisningar_2512-2.pdf (visited 2019-04-28).
[168] The division between these three categories in table 3, in section 3.
[169] Unionen, Ansökningar om arbetstillstånd - yttranden från Unionen, https://www.unionen.se/rad-och-stod/ansokningar-om-arbetstillstand-yttrande-fran-unionen (visited 2019-04-28)
[170] Magnus Skagerfält, Sveriges ingenjörer, email 2018-07-08.
[171] Author's data set.
[172] Interview and email from Magnus Skagerfält, Sveriges ingenjörer (2016-08-29: 2017-06-16; 2018-07-06)

the case for professional and specialist engineers. It is sometimes difficult to assess whether the applicants' qualifications are compatible with the requirements. The combined picture given by the information under the heading qualifications/education, profession, SSYK-code is taken into account to make such an assessment.[173]

Unionen uses wage statistics collected from different sources, such as wages collected from their members and statistics they develop together with the employers. These statistics are broken down by professional tasks and year of birth.[174] During 2018 Unionen has developed a more elaborate method for assessing the offered wages.[175] The method intends to reflect the requirements in the law. Unionen puts specific emphasis on the aim behind the legal admission requirements which is that labour migrants admitted to Sweden shall not have worse working conditions than those already applicable on the labour market. The opinion is based on an assessment of whether the offered wages are in line with the applicable collective agreement, its wage setting principles and criteria for wage setting. To be able to do that a number of factors are taken into account to ensure that the offer is not worse than the level applied for local workers, such as, the content of the particular work, the level of responsibility and level of difficulty, the worker's work experience, age and educational level in relation to the wage statistics. In cases of doubt contact can be established with the local trade union representative if there is one. A dialogue with the employer can also take place. If the offer does not meet the level identified by Unionen as the correct one - Unionen gives a negative opinion.[176]

4.6 'Custom' in the context of the Alien's Act

Thus, if we take into account the requirement in the Aliens Act that 'a wage must not be worse than those provided for in the relevant collective agreement or provided for by custom in profession or industry', it is clear that it is not the collective agreement that sets the norm for our study group. Subsequently it should be the other comparator mentioned in the law – custom in the profession or sector – that the Migration Agency is looking for. 'Custom' does not have a specific legal meaning. It could mean different things in different legal contexts. The government gave no specific guidance on how to interpret this concept in this context. The Migration Agency obviously interprets custom in the Aliens

[173] Email from Magnus Skagerfält, Sveriges Ingenjörer (2018-07-04).
[174] Interview with Markus Wiberg, Unionen., 2017-10-27 and below.
[175] Interview and email correspondence with Markus Wiberg, Hedvig Forsselius and Sara Hedman Hallonstén, Unionen, 2018-11-19.
[176] Interview and email correspondence with Markus Wiberg, Hedvig Forsselius and Sara Hedman Hallonstén Unionen, 2018-11-19.

Act context as the 25th percentile of the public wage statistics. This is in line with how the Migration Agency has explained its general interpretation of the wage threshold. When looking for a comparator the Migration Agency explains that at first it tries to establish the *lowest acceptable wage* for the work in question according to the collective agreement or custom in the profession or industry.[177]

Custom, however, is a concept widely used in the Swedish labour law context. It is normally understood as a general rule that is applied in a sector or at a particular workplace.[178] It has been described as established practices on the labour market.[179] Often a provision in an applied collective agreement reflects a custom.[180] Workers not bound by the particular collective agreement, however cannot, if nothing else is agreed on, claim more than the minimum level provided for in the collective agreement.[181] When the Labour Court seeks to establish a reasonable wage in the absence of an agreed wage and of a suitable collective agreement the wage normally paid to persons performing similar tasks at the particular place guides the court – this is also called custom.[182] As the 25th percentile only reflects the level that divides the 25 per cent of the lowest paid workers in a particular profession from the 75 per cent highest paid workers and this wage level is, for example, 700 EUR lower than the median wage for systems analysts in 2016 it may seem that custom in the context of the Aliens Act – or at least the interpretation of it by the Migration Agency – means something different than in labour law.[183] The main difference between how custom is interpreted in the two legal contexts may be that the Labour Court looks for a local comparator, while the Migration Agency takes the whole labour market into account.

4.7 Reflections on the required wage condition

When reflecting on the wages required to be admitted to the Swedish labour market it must be kept in mind that there are local workers that are paid a wage corresponding to the level required by the Migration Agency. Demanding wages higher than those local workers accept can be considered an obstacle in the overall ambition to safeguard the employer's need for third-country national workers. Being able to employ third-country national workers is considered crucial for Swedish competitiveness and suggestions to strengthen the position

[177] Legal statement of the Migration Agency SR 52/2016 4.
[178] See for example AD 2014 no 31, AD 1977 no 218; Sigeman & Sjödin (2017) 41.
[179] Kjellström & Malmberg (2016) 71.
[180] AD 2014 no 31, AD 2007 no 90.
[181] AD 1984 no 79.
[182]AD 1976 no 65.
[183] Statistics Sweden, SSYK code 2511, totally, 2016.

of labour migrants on the Swedish labour market are not welcomed by employer's organisations and other stakeholders eager to facilitate employment of the kind of labour migrants in the study group.[184]

In order to assess the reasonableness of the interpretation of the required wage level in the Aliens Act applied by the Migration Agency the intentions behind this legal requirement might be helpful. The government has explained that the legal system should not make it easier for irresponsible employers to procure labour by offering working conditions that are worse than those applicable to workers already resident in Sweden.[185] The legal demands require that the offered working conditions must not be worse than those applicable to existing workers.[186]

It is important to take the whole Swedish context into account. In a situation in which the collective agreement includes no wage tariffs or minimum wage levels it is in theory possible for the parties to the employment contract to agree on any wage they wish. There are no legal minimum levels, either in the law or in collective agreements. This could mean that any wage level could apply to workers already resident in Sweden as long as it is not unreasonable. From that perspective the required wage level is higher than the wage level required for local workers. The level applied is probably also more in accordance with the intention of the legal requirement to apply a wage level that to a certain extent prevents employers from choosing foreign workers because they accept a lower pay than local workers.

The results from the empirical study indicate that the trade unions in most cases at least have agreed with the Migration Agency that the wage levels offered in those cases correspond to the requirements in the law (section 3). The Swedish Association of Graduate Engineers explain that they assess whether the wage offered is '*market conform*'. The Swedish Association of Graduate Engineers underline that they look at their members' wages as a result of individual negotiations. Their interest is mainly to ensure that the process required in the collective agreement is upheld.[187]

Unionen seems to have, since the period the empirical study is based on, developed its approach in this regard. The trade union claims that the reference to the collective agreement has a value also when the kind of collective agreements it concludes for the IT sector applies. The starting point in those cases is, according to Unionen, the collective agreement in its applied form. This

[184] See for example Sand (2015).
[185] Government Bill 2007/08:147 27.
[186] Government Bill 2013/2014:227 10 and 13.
[187] Interview and e-mail från Magnus Skagerfält, 2016-08-29: 2017-06-16.

means the wage levels applied to the workers governed by the collective agreement. Custom only comes into play when no collective agreement is applicable. The relevant comparator should according to Unionen be the wage levels applied within the applicable scope of the collective agreement, not the wage level Swedish workers accept.[188]

It is of course possible that the trade unions and the Migration Agency can come to different conclusions regarding if an offered wage level corresponds to the requirements in the law. If the Migration Agency approves a level going below the level required by the trade union, there is, however limited legal means available for the trade union to impose their interpretation.[189] Requiring the Migration Agency to do the same analysis as for example Unionen is maybe not reasonable as they hardly can access the knowledge necessary to conduct such inquiry. Unionen's starting point also only applies at workplaces where it has concluded a collective agreement. At such workplaces it is maybe less likely that the conflict will occur. But if it would, it can be asked whether a local worker could work for the same wage as the one the labour migrant is offered. Even if the trade union in such case would seek to compensate for an unreasonable low wage in the future pay raise negotiations it is unclear whether is can question such wage as violating the collective agreement.

Taking the interaction between migration law and labour law/ discrimination law into account, what level of equal treatment does the Swedish admission condition in the Aliens Act promote? The conclusion is that equal treatment in this labour migration context means or at least is applied as the threshold between workers with a wage level within the 25th percentile and the rest paid above that level in a certain industry. This is somewhat surprising, not least if we took the rather heated debate regarding which minimum wage level could be required for intra-EU posted workers into account. The question in the Swedish case was if the minimum wage level required should correspond to the lowest acceptable wage in the collective agreement or to the average level actually paid.?[190]

4.8 Is the admission condition regarding pay in compliance with EU law

The last question raised in this section is if the admission condition in itself is questionable from an EU law perspective. The EU only provides for admission conditions for the individuals covered by this study categorized as intra-

[188] Interview and e-mail correspondence with Hedvig Forsselius, Markus Wiberg and Sara Hedman Hallonstén 2018-11-19.
[189] Ch 14 Aliens Act (2005:716).
[190] Sjödin (2016); COM (2016) 128.

corporate transferees. The admission requirement in the Directive on Intra-corporate Transferees reads:

> the remuneration granted to the third-country national during the entire intra-corporate transfer shall not be less favourable than the remuneration granted to nationals of the Member States where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.[191]

The directive requires that the Member States have to require equal treatment with regard to remuneration with nationals occupying comparable positions.[192] The provision implementing this provision in the directive in the Alien's Act is identical with the general requirement except for replacing the word wages with remuneration.[193] It is not known whether the Migration Agency applies the legal admission condition regarding remuneration differently then what is required for other labour migrants. In the document Offer of employment for ICT-workers the same information regarding wages is required. [194] It is too early to say anything about compliance at this point.

5 The wage offered

5.1 Starting points

Whatever we think about the wage level required by the law and applied by the Migration Agency it is not evident that the required level is the one that is applied in reality. Hence, the next question is: what can be said about the correspondence between the minimum wage level required by the law and the wage offered?

The question about the correspondence between the minimum wage level required and the wage level offered is raised in order to find out whether other circumstances than the legal requirements come into play when the wage is set for this group. It is often claimed that 'global competition for the highly skilled has arisen, in which states vie to lure the best and the brightest'.[195] Shachar explains that

[191] Art 5 .(4)(b) (2014/66/EU).
[192] Lörges (2016) 993.
[193] Ch 6b Aliens Act (2005:716).
[194] Document Offer of Employment:https://www.migrationsverket.se/download/18.5e83388f141c129ba6312eab/1519893956227/anst_erbj_232011_sv.pdf
[195] Triadafilopoulos & Smith (2013) 2.

'[t]he global race for talent entails a competitive, multiplayer, and multilevel scramble among jurisdictions, and, once the race for talent has begun, the pressure to engage in targeted recruitment increases, as no country wants to be left behind'.[196]

Sweden has obviously not yet set out on this road. No specific targeted streams for highly qualified migrants have been adopted.[197] But the economic factor is of course also important when attracting skilled labour migrants even if others – such as citizenship – also play a crucial role.[198] It is also clear that highly skilled migrants nowadays have more destination countries from which to choose.[199] Sachar again:

> 'These individuals have greater opportunities today to select the destination country most suitable to them in terms of earning economic and citizenship rewards in exchange for contributing to the global competitiveness of the receiving nation'.[200]

If we take these international trends into consideration as well as the recurrent demands from Swedish employers and trade organisations for rules that will facilitate employment of highly skilled third-country nationals it seems reasonable to assume that the wage offered to the labour migrants admitted to Sweden would be competitive.[201] The demand for third-country national workers in the IT and telecom industry – in which most of the labour migrants in the study group work – is based on a shortage of available local and EU workers.[202] It is therefore reasonable to assume that the bargaining position of the labour migrants entering Sweden is quite strong. The wage level could even play an even more important role in the Swedish context than in many other countries as Sweden does not offer attractive prospects of fast-track citizenship for this group, a factor that seems to be gaining in importance.[203] It has been claimed, however, that the wages paid even to highly qualified labour migrants

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[196] Shachar (2013) 85
[197] Highly qualified foreign experts are however provided with specific tax exemptions up to three years, see ch 11 ss 22-23 Income Tax Act (1999:1229) (see more on the website of the tax authorities; https://www4.skatteverket.se/rattsligvagledning/edition/2018.13/323980.html#) (visited 2019-04.28)
[198] Shachar (2013) 90.
[199] Shachar (2013) 91.
[200] Shachar (2013) 97.
[201] Berg & Karlsson (2018); Lindberg & Voltaire (2017); Lucas (2016); Sand (2015).
[202] Arbetsförmedlingen prognos 2017: https://www.arbetsformedlingen.se/Om-oss/Statistik-och-publikationer/Prognoser/Prognoser/Riket/2017-02-09-Prognos-Var-finns-jobben-2017.html; (visited 2019-04-28).
[203] Schachar (2013) 85; Sachar & Hirschl (2013) 103 et seq.

is lower than average.[204] Other research suggests that only some of the highly skilled labour migrants that enter Sweden belong to a category whose 'experience could get them a new job anywhere in the world' or at least in Sweden.[205] In order to try to obtain some further insights into the realities we will take a closer look at the wage levels offered to the labour migrants in our study group.

5.2 The empirical study

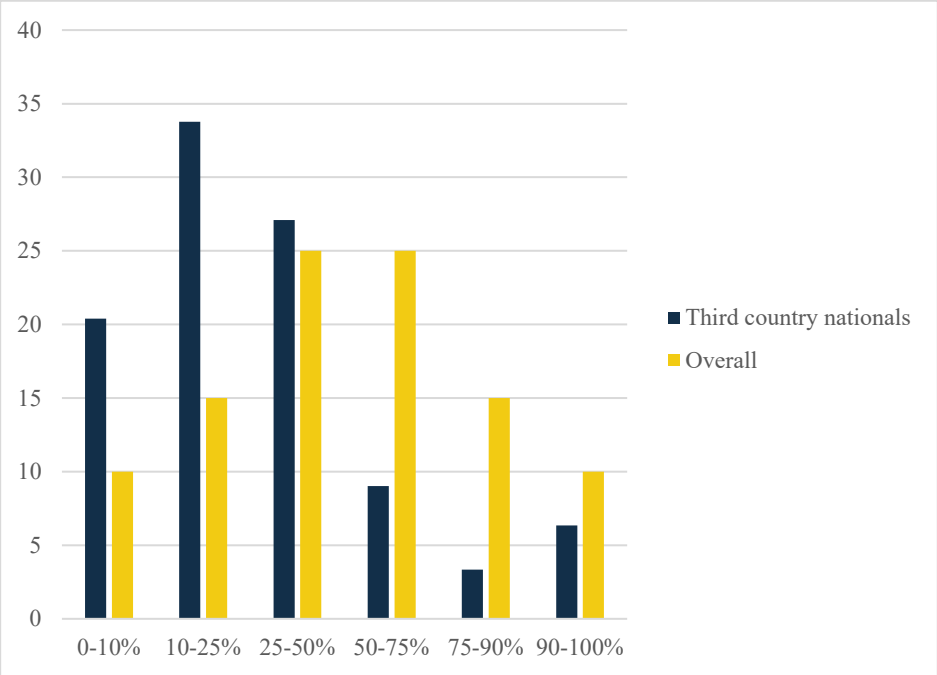
As explained earlier an application for a work permit must be accompanied by an *offer of employment*. In the application and offer of employment a lot of information has to be included. The offered wage level is only one factor. Education and examination year, as well as whether the worker is to be employed in Sweden or by a foreign employer elsewhere should also be specified.[206]

In order to determine whether these labour migrants are using their bargaining power beyond the minimum level applied by the Migration Agency we have to figure out how the wage level offered the labour migrants corresponds to the wages paid to comparable workers in Sweden. To do that we will compare the wage levels offered with the wage statistics produced by Statistics Sweden (SCB). The comparison will be based on 300 applications for a work permit by the professional groups categorized by the Migration Agency in their statistics as IT architects, systems analysts and test managers, engineering professionals and physical and engineering science technicians, approved by the Migration Agency in January 2017. The offered wages will be compared with the SCB wage statistics from 2016 as that is what was available when the decisions were taken by the Migration Agency. The method is further described in Section 2.2.2 and 2.2.3.

Figure 1 shows how the wages offered to the labour migrants in our study group correspond to the general wage levels identified by the SCB. The idea is to figure out the extent to which the wage levels offered are clustered around the minimum level required by the Migration Agency in their interpretation of the Aliens Act (the 25th percentile) or whether their 'attractiveness' is reflected in the wage levels offered.

[204] Emilsson (2014*)* 63; Emilsson & Magnusson (2015) 90-91.
[205] Axelsson (2017) 983-984.
[206] Document Offer of Employment:
https://www.migrationsverket.se/download/18.5e83388f141c129ba6312eab/1519893956227/anst_erbj_232011_sv.pdf

Figure 1 Wages offered compared with the wage data gathered by Statistics Sweden



Source: Author's data set and Statistics Sweden.

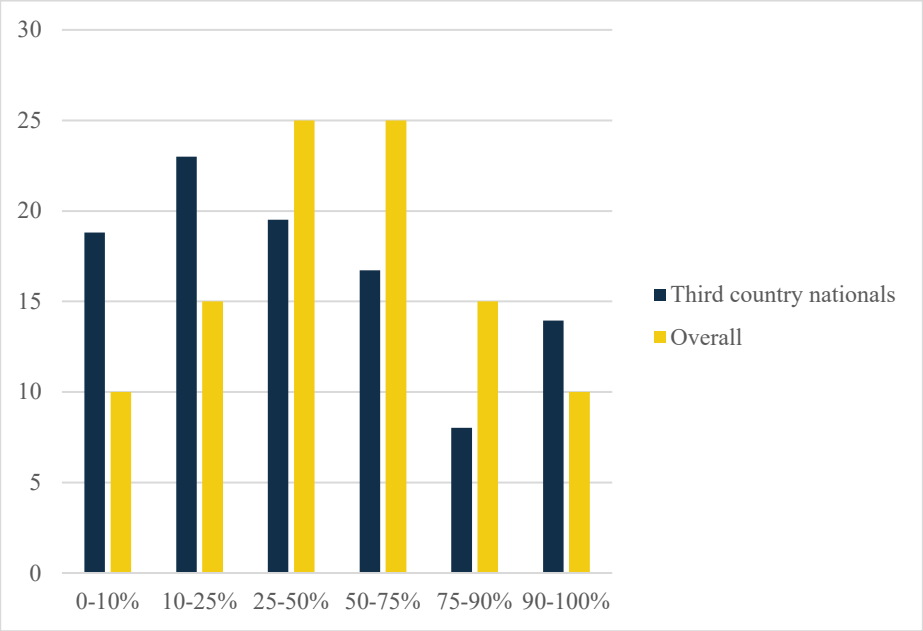
According to Figure 1, the wages offered to the labour migrants in the study group are to a large extent lower than the wages earned by other workers in the same professional group. More than 50 per cent of the labour migrants are offered a wage corresponding to the wage interval in the 25th percentile for all workers in Sweden. The figure, however, gives a slightly mixed answer to the question raised as, even if a much larger part of labour migrants than overall are offered wages in wage intervals below or at the 25th percentile, not all of them are offered wages at that level. Some are offered wages corresponding to the levels in the higher percentiles. These labour migrants are therefore better off than what the Migration Agency requires. However, the entire group of labour migrants is in relative terms worse off compared to workers in general. The figure does not indicate that, in general, these workers are able to take advantage of a strong bargaining position.

One important shortcoming with the statistics from Statistics Sweden, however, is that they do not take age or graduation year into account. In the group we are looking at a high number (around 40 per cent) of the labour migrants

graduated in 2011 or later and thus in many cases they are quite junior. This could be one explanation for the differences in the figure.

In order to try to grasp the experience factor in the wage offers we will look at the statistics from the Swedish Association of Graduate Engineers. Its statistics is divided into graduation year and education and in this comparison the offered wages are compared with the wages for comparable education and graduation year in Sweden (see section 2.2.2.)

Figure 2 Wages offered compared with the wage data gathered by the Swedish Association of Graduate Engineers



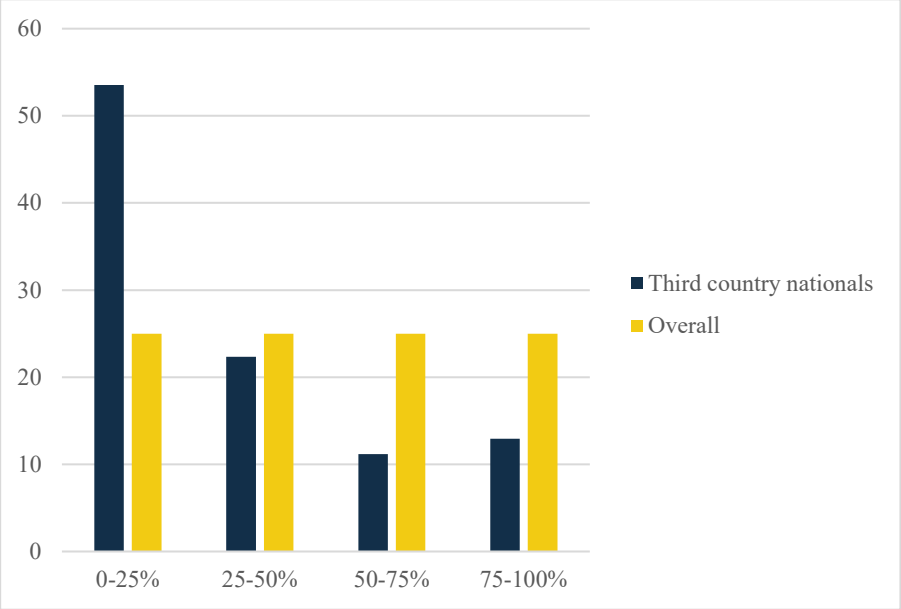
Source: Author's dataset and wage statistics from the Swedish Association of Graduate Engineers.

Figure 2 gives a slightly different picture from Figure 1. The differences between the workers in general and the study group are less significant. Nevertheless, with one exception the offered wages are still lower than the average. In particular it is worth pointing out that 41 per cent of the labour migrants are offered a wage that is below or at the 25th percentile. It is also clear that fewer labour migrants are offered wages corresponding to the higher segments, with one exception. The group of labour migrants offered wages in the highest segment is higher than in general.

One aspect not covered by figure 2 is the differences between different sectors. To better capture that aspect a third comparison is done. In this

comparison only the workers categorized as IT specialists according to the SSYK codes indicating bachelors or masters degrees in engineering or science are included in the sample (170 in total). The wages they are offered are compared with the wage statistics for the sector Data/IT collected by the Swedish Association of Graduate Engineers.

Figure 3 Wages offered compared with the wage data collected by the Swedish Association of Graduate Engineers (Data/IT)



The result of this comparison is striking. It seems that a remarkably high number of labour migrants are found in the lower wage segments. Here experience is taken into account, as the comparison also reflects graduation year.

5.3 How can the results be explained

It is difficult, using quantitative empirical research, to explain why people belonging to two distinct groups do not earn the same amount of money. The difficulty lays in the challenge to know how the group's different characteristics should be measured and taken into account.[207]

The comparison in this study based on the SCB statistics lacks the age and graduation year factors. The SSYK-codes reported in the application process may not reflect the work actually done. Furthermore, the comparisons with the

[207] Epstein & Martin (2010) 906.

statistics from the Swedish Association of Graduate Engineers is based on educational level and graduation year or educational level, graduation year and sector. Nevertheless the reliability of the results or how to interpret them are not obvious. It is difficult to know to what extent foreign qualifications correspond to Swedish ones and to what extent the work conducted in Sweden reflect the worker's educational level. The trade union statistics is based on voluntary reporting from members of the trade union. Not even all members have reported their wages. And the wages non-organised workers earn doing comparable tasks with comparable qualifications are not reflected in the statistics. It is not known if their wages differ from the ones organised workers earn. Still, the result does give some indication of how far the wage level applied by the Migration Agency governs the wage level this group of 300 labour migrants is offered. One conclusion is that the low wage level required by the law as interpreted by the Migration Agency has not been seen as an absolute reference point by the employers in the study group. Large groups of labour migrants are offered wages in higher wage segments than the 25th percentile. Nevertheless it seems that more of the 300 labour migrants are offered wage levels in the lower segments than overall.

The analysis used can be labelled 'pattern matching'.[208] How can we explain that a larger number of these labour migrants belong to the lower segments than average? Why do these workers, who seem to be so in demand on the Swedish labour market, not experience a better economic outcome? Some possible explanations were outlined above. Explanations can also be related to the composition of the labour migration. Deakin has highlighted that markets are constituted and moulded by legal institutions.[209] This approach is labelled the 'legal origins approach'.[210] Previously we have touched on the issue of highly qualified labour migrants' bargaining power. It must be taken into account, however, that only 26 per cent of the labour migrants in the study group are employed by Swedish employers. The rest are employed abroad and posted to Sweden either through an intra-corporate transfer (50 per cent) or to service buyers' premises (23 per cent). Only a minority of the workers in the study group negotiated their own wage with the Swedish company involved. Almost 74 per cent of the labour migrants in the study group are in Sweden on the basis of a transnational transfer. They are posted from a company in their home state and continue to be employed by that company while working in Sweden.

[208] Cane & Kritzer (2010) 4.
[209] Deakin (2010) 312.
[210] Ibid.

Looking at the labour migrants in Figure 3 it turns out that around 90 percent of those in the first quarter were intra-corporate transferred and the rest employed by the entity in Sweden.[211] Among the labour migrants in Figure 1 around 83 percent of the labour migrants in the first decile were either posted or intra-corporate transferred.[212]

In this case, taking Deakin's argument into account, the low wage requirement in combination with the fact that postings are treated in the same way as labour migrants employed by Swedish employers (legal institutions) may have influenced the composition of this workforce. It has created a situation in which certain highly qualified workers have rather low bargaining power.[213] Other legal aspects, such as the temporariness of the work permits and time-consuming application processes, can also shape the composition of the workforce: the most attractive workers, those with the strongest bargaining position, choose destination countries where they in various ways obtain a better and more secure outcome.[214]

As highlighted before the result could also indicate that a large part of this group are assigned to do work which is below their qualifications. If this is part of the explanation the 'race for talent' in this context might mean the -race for qualified people willing to do work local qualified people are not willing to do-. Such a picture would challenge the narrative of this group, at least in the Swedish context.

Another factor that has not been touched upon yet is that an overwhelming majority of the workers coming to Sweden into these sectors come from countries with a lower wage level. That is reflected in the application documents. Almost half of the posted workers are offered a wage divided into two parts. The basic wage (paid at home) plus allowances for extra costs for living in Sweden. Often the allowances in those cases just make the offer pass the minimum wage threshold applied to work permits. From the worker's perspective the new wage at a first glance may seem advantageous.

The results from the empirical study indicate that the narrative used for this group does not really reflect its complexity. Carrera, Guild and Eisele very illuminatingly asked recently whether there was any race (for talent) at all.[215] Raghuram in her research shows that precarity and vulnerability are not limited to the lower skilled.[216] The Swedish system guarantees that the wage offered is

[211] Author's data set.
[212] Author's data set
[213] Section 5.2.
[214] Sachar (2013) 91.
[215] Carrera, Guild & Eisele (2014) 126, 128.
[216] Raghuram (2014) 196.

above a certain minimum threshold. The admission conditions, however, do not safeguard equal treatment between labour migrants and local workers.

PART III

6 Equal treatment for labour migrants

6.1 The interaction between migration law and labour law

So far we have discussed the admission conditions and their application. It is important to remember that the required wage level in the Alien's Act does not necessarily correspond to the level required by labour law for work performed in Sweden. The admission conditions and the applicable labour law are two different things in the Swedish legal context. The admission conditions are an administrative law requirement, while the labour law requirement regarding pay is a private law condition.[217] These two sets of laws have different legal qualities but could of course lead to similar results for the labour migrant. A labour migrant cannot enforce or claim any wage related rights based on the Aliens Act.[218] An employer's failure to apply the admission conditions can lead to a loss of the labour migrant's residence permit and subsequent deportation. No compensation is available for the workers dealt with in this report in that case.[219] The employment and working conditions are governed by statutory labour and anti-discrimination laws, collective agreements (if applicable) and employment contracts. The labour migrant can claim rights established in labour and anti-discrimination law. Section 6 of the study is devoted to the legal requirements on equal treatment applicable to work conducted in Sweden.

6.2 Legal requirements for equal treatment regarding pay

We have learned how the wage admission condition is interpreted by the Migration Agency and that the level prescribed is applied as a minimum. Labour migrants are in many cases offered wages above that level. Nevertheless the empirical study indicates that there is a risk that some of the labour migrants in the study group are paid lower wages than comparable local workers with similar tasks. The question we shall now turn to is whether there are any available means for labour migrants to challenge a wage that is lower than what comparable local workers are paid and thereby discriminatory. The normative starting point is the equal treatment requirement that is part of the EU law governing this field and transposed to Swedish law.

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[217] On this topic see for example Sigeman & Sjödin (2017) 17; Hansson (2010) 40 et sec.
[218] Herzfeld Olsson (2015:9) 418 et sec.
[219] Ch 7 s 7e Aliens Act (2005:716).

The following part of this chapter is divided into three sections based on the labour migrants' relationship with the Swedish company hosting them. This is explained both by the fact that different EU law provisions apply in these cases. The subsections are devoted to the following three categories:

1) labour migrants employed directly by the Swedish company hosting them;
2) labour migrants employed by a company in a third country and posted to a Swedish company belonging to the same company group;
3) labour migrants employed by a company in a third country and posted to an independent company in Sweden.

All three categories are represented in the study group. According to the offers of employment 26 per cent belonged to group 1 and were employed by a Swedish employer, 50 per cent belonged to group 2 and were posted within an intra-corporate transfer, and 23 per cent belonged to group 3 and were posted to independent host companies.

For the workers employed by a Swedish employer it is most likely that Swedish employment law will apply. For the posted workers either the provisions transposing the Directive on Intra-Corporate Transferees will apply or partly the rules in the Posted Workers Act and partly the rules designated by the conflict of law rules in Rome 1, probably involving another jurisdiction than the Swedish. In the following subsections first the EU law obligations will be analysed and then the situation in Swedish law.

6.2.1 Employed by an employer in Sweden

6.2.1.1 EU primary law

As explained in Section 2.1, before we can determine the extent to which Swedish law meets EU obligations we have to figure out what the content of the EU law is.

The legal acts adopted by the EU must respect the rights in the EU Charter of Fundamental Rights (EUCHFR).[220] Otherwise, they can be annulled by the Court of Justice of the European Union CJEU.[221] Also, the Member States have to respect the EUCHFR when they implement EU law.[222] However, different

[220] Art 51.1 EUCHFR.
[221] See for example Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others [2011] ECR I-00773.
[222] Art 51.1 EUCHFR. More on this topic in relation to third country nationals, see Iglesias Sanchez (2013) 142 et sec.

provisions in the Charter have different legal effects.[223] The rights laid down in Article 21.1 on Non-Discrimination, which we shall turn to shortly, have – in relation to a number of discriminatory grounds – been considered sufficient in themselves to confer on individuals rights that they may rely on as such in disputes between them in a field covered by EU law.[224] The EUCHFR therefore gives important guidance on how to interpret both EU and national law.[225]

In the EU Charter of Fundamental Rights there are two substantive provisions in particular that must be further analysed: Article 21 on Non-Discrimination and Article 15.3 that is part of the article on Freedom to choose an occupation and the right to engage in work. Article 21.1 is a general non-discrimination provision prohibiting any discrimination based on any ground 'such as' race, colour, ethnic or social origin, genetic features, religion or belief. The non-discrimination principle has been considered a general principle of EU law since long before the adoption of the EUCHFR.[226] Article 21.1 has been given far-reaching legal implications by the CJEU. The wording of the Court in *Egenberger* and previous judgements indicates that this effect applies to all discriminatory grounds covered by the provision.[227] The Court refers to Article 21 as such in that judgement and merely specifies that only the grounds of religion or belief are at stake when asserting that prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law.[228] The CJEU has explained that Article 21 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.[229] Article 21 in the Charter has mandatory effect, meaning that it prohibits discrimination even when the discrimination derives from contracts between individuals.[230] The national courts are required to ensure within their jurisdiction judicial protection for individuals flowing from Article 21 and to guarantee the full effectiveness of the article by disapplying, if need be,any contrary provision of national law.[231]

[223] C-684/16 Tetsuji Shimizu, 73.
[224] C-414/16 Egenberger, 76.
[225] Costello & Freedland (2016) 52, 55.
[226] C-43/75 Defrenne (No. 2), 39.
[227] Ibid.
[228] C-414/16 Egenberger 76.
[229] C-414/16 Egenberger 78.
[230] C-414/16 Egenberger 77. This effect of the non-discrimination principle has a long history and was established already in C-43/75 Defrenne (No. 2) 39.
[231] Ibid para 79.

Article 21 reads as follows:

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Including nationality as a prohibited discriminatory ground is considered important for establishing equal treatment for migrant workers.[232] Nationality is not explicitly listed in Article 21.1 and so Article 21.2 includes a prohibition against 'any discrimination on grounds of nationality'. The structure of article 21.2 and its wording, however, indicate that it refers to EU citizens and their specific status within the EU legal order.[233] The choice to deal with nationality in a separate provision and narrow it down to the intra-EU context could indicate that nationality is supposed to be excluded from the first part of the provision. Another possibility could be that Article 21.2 is conferred to the specific intra-EU movements, while nationality outside the EU context could be covered by Article 21.1. Kilpatrick argues that Article 21 'in particular its juxtaposition of racial and nationality discrimination, could open up a new textual space for relating more closely to discrimination on these two grounds'. [234] Iglesias Sanchez argues for an extension of the scope of application of the non-discrimination principle based on nationality to third country nationals.[235] In this case, such step could hardly be turned down by the 'lack of competence argument' which the CJEU has used in other cases taking the measures adopted based on the competence derived from Articles 77 - 80 TFEU on asylum and immigration into account.[236]

Article 21 EUCHFR does equally not spell out immigration status as one of the prohibited grounds. This could be another way of safeguarding equal treatment of labour migrants. The two statuses, nationality and migration status, are very closely interrelated. Often it is the immigration status that creates the labour migrant's vulnerability.[237] But as Article 21.1 has an open enumeration

[232] Jeffreys (2015) 9-22, 11.
[233] Kilpatrick (2014) 582, 587.
[234] Kilpatrick (2014) 590.
[235] Iglesias Sanchez (2013) 152.
[236] See more on this topic Ward (2019) 6 et sec.
[237] See section 6.1.

'such as' it can well be argued that such status could be included in the prohibited grounds.[238]

The status based discrimination law has a well established 'EU grammar' that includes the concepts of direct and indirect discrimination, positive action and special burden of proof.[239] Kilpatrick argues that this grammar should be applied to all status grounds covered by Article 21.1, also in relation to those status cases not yet covered by EU discrimination law.[240] This is a reasonable claim and would suggest that if nationality or immigration status was protected by Article 21.1 it should follow that grammar. This argument is supported by the CJEU's ambition to, as far as the wording permits, equalize the way in which discrimination cases are handled, independently, of how the applied equal treatment provision is framed in the law.[241]

An equal treatment principle directly pinpointing third-country national workers is established in Article 15.3 EUCHFR, however. This would seem, like the arguments against including intra-EU nationality in Article 21.1, to point at the exclusion of immigration status from Article 21.1. Article 15.3 is part of Article 15, Freedom to choose an occupation and the right to engage in work. Article 15.3 reads as follows:

> Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

The provision is more limited in scope than Article 21 as it deals only with working conditions. Moreover, the wording indicates that it is not supposed to follow the well-established 'EU grammar' applied to the discriminatory grounds covered by Article 21 EUCHFR. The article talks about 'working conditions *equivalent* to those of citizens of the Union' (emphasis added). The word 'equivalent' does not have the same meaning as 'equal'.[242] The EU grammar on equal treatment is based on the principle that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified.[243] It is hard to squeeze 'equivalent' into that

[238] Kilpatrick (2014) 581, 589
[239] Rönnmar (2017 a) 626.
[240] Kilpatrick (2014) 593, 598.
[241] C- 177/10 Rosado Santana, 65 and 72, 73; C-313/04 Egenberger 33 and the case law cited.
[242] Ashiagbor (2014) 433, see also https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/third-country-nationals (visited 2019-04-28).
[243] C-177/10 Rosado Santana, 65, which refers to, Case C-313/04 *Franz Egenberger*, 33 and the case law cited.

structure. 'Equivalent' could mean more or less the same, but not necessarily the same. This is problematic. It is very difficult to find a rationale for excluding third-country nationals workers from a requirement of strict equal treatment in the Member States. The strong non-discrimination principle for EU workers, derived from article 45 TFEU, cannot be used to justify less equal treatment in this regard for third-country nationals. Such practice could also be challenged by the European Convention on Human Rights. It must be kept in mind that the EUCHFR must not deviate from the level of protection guaranteed by the European Convention of Human Rights (ECHR).[244] It is difficult to find any motive that could justify difference of treatment with regard to working conditions between nationals and third country nationals taking Article 14 ECHR on Discrimination in combination with Article 8 ECHR on Privacy into account.[245]

The explanations to Article 15.3 EUCHFR refer to Article 153(1)(g) TFEU, the article that gives the EU competence to regulate working conditions for third-country nationals residing legally in the Member States. It has been suggested that this reference means that the provision excludes a right to fair remuneration because Article 153(5) TFEU explicitly excludes pay from the competences given in Article 153 TFEU and at the same time highlights that, on the other hand, the reference to Article 19.4 in the European Social Charter would suggest the opposite.[246] Is it likely that the reference to Article 153 TFEU in the explanations to EUCHFR would limit the meaning of the concept 'working conditions' in Article 15.3 EUCHFR to exclude remuneration? Taking a closer look at other EU law provisions both at primary and secondary level providing for equal treatment at work for different groups, the word 'remuneration' is often spelled out.[247] This is explained by a wish to clarify this issue taking Article 153 (5) TFEU into account. Two exceptions can be found in the Fixed-term and Part-

[244] Art 52.3 EUCHFR; Explanations (2007) to art 21 in the EUCHFR.

[245] For an overview of the content of article 14 see Bruun (2013) 370 et seq. Nationality is also considered one of those discriminatory grounds identified as 'suspect discrimination grounds' that require 'weighty reasons' to justify differentiation, even if the scope of that statement might be more limited than other cases. Residence and immigration status has been recognized as discriminatory grounds protected by article 14 ECHR, see more on this theme Arnadóttir (2014) 646, 651, 655 and the referred case law.

[246] Ashiagbor (2014) 433.

[247] Art 45.2 TFEU, Art 7(1) regulation 492/2011 on freedom of movements for workers; art 12 (1) Single permit directive (2011/98/EU); art 14 (1) EU Blue Card (2009/50/EC); art 18 (1) Seasonal workers directive (2014/ 36/EU); Art 14 (1)(c) Equal Treatment (2006/54/EC); Art 3(1)(c) Equal treatment (2000/78/EC); art 3(1)(c) Equal Treatment (2000/43/EC). In the temporary agency directive there is a mixture as the concept working conditions is further explained in the definitions to include pay; Arts 5(1) and 3(1)(f) (2008/104/EC).

time Directives.[248] Whether these non-discrimination principles covered pay was not undisputed.[249] The CJEU has, however, interpreted the definition of working conditions generously, taking the aim of the directives into account, and today it is clear that the prohibition against discrimination in these directives covers pay.[250] It would be challenging to argue that Article 15.3 EUCHFR in contrast to other EU-based equal treatment provisions would be limited by Article 153 (5) TFEU. To put it simply, there is no rationale for limiting this important aspect of working conditions for third-country national workers. The question of whether Article 15.3 EUCHFR covers remuneration or not could be important if the secondary legislation we soon will turn to were amended and the currently existing equal treatment provisions in the directives on third-country national workers were narrowed down. If pay were not covered by Article 15.3 EUCHFR it would not act as a shield against such attempts.[251] But at present these equal treatment provisions explicitly include pay under working conditions. They are also adopted on the bases of the EU competence in Article 79.2 (a) and (b) TFEU and not Article 153.1(g) TFEU. This also supports the argument that Article 153(5) should have no impact on the interpretation of Article 15.3 EUCHFR.

We shall now turn to the provision in secondary EU legislation that is applicable to the first of the three categories of workers, those employed by a Swedish employer.

6.2.1.2 EU secondary law

In the general EU equal treatment *acquis* migration status is discussed in the Directive on equal treatment between persons irrespective of racial and ethnic origin.[252] The aim of that directive is to lay down a framework for combatting discrimination on the grounds of racial and ethnic origin. It applies to employment and working conditions, including pay.[253] In the directive it is stipulated that the directive should be without prejudice to difference of treatment based on nationality or 'to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'.[254] This directive therefore has a limited impact on the research question in this study.

[248] Dir 1999/70/EC (annex clause 4.1) and Dir 1997/81/EC (annex clause 4.1).
[249] See Bercusson & Bruun (1999) 52 et seq.
[250] Case-C-307/05 Alonso, 42 and 47. Joined Cases C-395/08 INPS v Bruno (2010) para 40. It was however subject to some controversy during the adoption of the fixed time directive; Kountouris (2016) 256.
[251] For an introduction to the concepts 'shield' in this context see Herzfeld Olsson (2016).
[252] Directive 2000/43/EC.
[253] Article 1 and 3(1)(c) (2000/43/EC).
[254] Art 3(2) (2000/43/EC). See also preamble 13 in the same directive.

The equal treatment provision in the Single Permit Directive is of greater importance. Article 12.1 (a) reads as follows:[255]

> Third-country workers […….]shall enjoy equal treatment with nationals of the Member State where they reside with regard to:
>
> (a) working conditions, including pay and dismissal as well as health and safety at the workplace;

The equal treatment principle also covers a number of other rights that will not be dealt with here.[256] This directive, together with other directives regulating entry and stay of third-country national workers, have introduced a new discriminatory ground ' immigration status'.[257]

In EU law equal treatment and non-discrimination provisions have been framed differently in different contexts.[258] In some cases both direct and indirect discrimination are prohibited and sometimes no such distinctions are made.[259] In some cases direct discrimination cannot be justified by any legitimate aims, but in other cases it is possible.[260] It is a matter for discussion what category the Single Permit provision belongs to. Bell highlights a substantive difference between EU anti-discrimination law which is based on grounds that 'may not be immutable, but they do stem from individuals' innate attributes' and anti-discrimination based on legal status, such as immigration status.[261] The approach in status cases is 'much thinner than the approach to equal treatment found within the anti-discrimination directives'. Neither direct nor indirect discrimination nor positive action are mentioned, and there is nothing on burden of proof.[262] With regard to what Bell categorizes as the labour law equal treatment provisions, such as those concerning part-time, fixed-term and temporary agency work, Bell argues that 'underneath it reveals the absence of a shared vision concerning what equal treatment means within these instruments or why it should be applied to these categories. Whereas anti-discrimination legislation has, to some extent,

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[255] Art 12(1)(a) (2011/98 /EU).
[256] Ibid arts 12(1) (b-g) and 2-4.
[257] Bell (2011) 612.
[258] For an overview see Rönnmar (2011) 154 et sec.
[259] A distinction between direct and indirect discrimination is for example included in article 2 Directive 2000/78/EC, but not in clause 4 Directive 97/81/EC.
[260] In directive 2000/78/EC can direct discrimination ob the ground of for example religion only be justified if specific cirsumstances are fulfilled while direct discrimination according to clause 4 in Directive 97/81/EG can be justified by objective grounds.
[261] Bell (2011) 623.
[262] Bell (2011) 622 compares the discriminatory provisions related to part-time and fixed time work etc. The argument works in this case as well.

been anchored in a framework of human rights protection, equal treatment within immigration law or labour law lacks this ethical compass'.[263] Bell has described the part-time and fixed-term directives together with the agency work directive as an example of how the principle of equal treatment has been extended 'to certain categories of workers based on contractual status'.[264] These new grounds 'reflect the work rather than the worker'.[265]

It is, however, not clear whether the equal treatment provisions connected to third-country national labour migrants should be interpreted in line with the equal treatment provisions connected to 'innate attribute grounds' such as sex and ethnicity or in line with other legal status grounds, such as part-time work and agency workers or nationality. The major reason not to suggest that the equal treatment on the ground of immigration status should be dealt with like other status based discrimination provisions is the wording of Article 12.1 in the Single Permit Directive. The meaning of this equal treatment principle is not elaborated upon at all in the directive. It might therefore be difficult to include any rule on burden of proof. But on the other hand, there is nothing indicating that discrimination on this ground can be justified.

The CJEU, seems to have a general ambition to include and align the different non-discrimination principles, as far as the wording permits, with the general EU non-discrimination principles.[266] The general EU principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified.[267] The two situations are often identified as direct or indirect discrimination.[268] Direct discrimination can in many cases not be set aside by a general justification clause. [269] However, with regard to the Fixed-Term and Part-Time Directives it is explicitly stated that those equal treatment provisions can be restricted by objective grounds. This is something the CJEU refers to in its judgment *Rosado Santanta*, with the following wording: 'Admittedly, Clause 4 in the framework agreement contains, in relation to the principle of non-discrimination a reservation concerning justification on objective grounds.'[270] It is reasonable to assume that when, such as in the case referred to in *Rosado Santana* the non-discrimination principle is supposed to be

[263] Bell (2011) 625.
[264] Bell (2011) 623.
[265] Bell (2011) 623.
[266] C- 177/10 Rosado Santana, 65;Case C-313/04 *Franz Egenberger* 33 and the case law cited.
[267] Ibid.
[268] Fredman (2011) 166, 177.
[269] Fredman (2006) 48; Kilpatrick (2014) 592
[270] C-177/10 Rosado Santana 57.

interpreted differently from the normal formula this must be clearly spelled out in the legal act, which it is not in the Single Permit Directive. Admittedly, the Single Permit Directive also includes a number of restriction possibilities in relation to other parts of the equal treatment article.[271] However, those do not apply to the equal treatment provision regarding working conditions and pay. This makes it reasonable to assume that this equal treatment principle in the Single Permit Directive means that 'comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified'.[272] The position taken by Iglesias Sánchez that both direct and indirect discrimination therefore should be covered is therefore easy to adhere to.[273] As mentioned, with regard to pay no justifications possibilities are envisaged in the article. This means that this part of the article provides for no justification possibilities with regard to direct discrimination.[274]

6.2.1.3 Swedish law

6.2.1.3.1 How is the equal treatment provision in the Single permit directive transposed to Swedish law?

In the Swedish Discrimination Act discrimination is prohibited on the grounds of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age.[275] All situations connected to working life that can occur between an employer and an employee are covered by the Swedish Discrimination Act.[276] The concept of discrimination covers among other forms of discrimination both direct and indirect discrimination.[277] When explaining how Sweden would transpose the equal treatment requirements regarding wages and other working conditions in the Single Permit Directive the legislator explained that *citizenship* was not covered by the concept of ethnic origin in the Discrimination Act. But, unjustified demands for Swedish citizenship in working life could be considered indirectly discriminatory, as such demands would typically be disadvantageous to people with another ethnic or national origin than Swedish.[278] The legislator also emphasized that there are no applicable provisions specifically dealing with working conditions that make any

[271] Iglesias Sánchez (2016) 920.
[272] For a similar reasoning with regard to art 5 Temporary Agency Work Directive (2008/104), Kountouris (2016) 255.
[273] Iglesias Sanchez (2016) 918.
[274] Iglesias Sanchez (2016) 920.
[275] Ch 1.s 1 Discrimination Act (2008:567).
[276] Ch 2.s 1 Discrimination Act. (2008:567).
[277] Ch 1 s 4 Discrimination Act (2008:567).
[278] Government Bill 2013/14:153, 32 (from Government Bill 2007/08:95 497); Government Bill 2012/13:148 99

distinctions based on the worker's citizenship which could not be justified. The legislator concluded that the equal treatment requirement in the Directive was already protected in Swedish law.[279]

The Swedish legislator discusses citizenship in these preparatory works of transposing the Single Permit Directive. Citizenship must be distinguished from migratory status, however. As explained in the section on the connection between labour law and migration law (Section 4.1) it is in many cases the migration law – which establishes vulnerability – that lays the foundation for discriminatory treatment. Even if it is not a question of vulnerability migration status can govern the pay level for other reasons, such as other preferences. Indeed, migration status has a connection to citizenship as this issue will never come up for individuals with Swedish citizenship. Migration status or the effect of migration law, however, in some cases lead to differential treatment. The right to employment protection, for example, is applicable only if the labour migrant has a valid work permit in Sweden, a fact which the employer can control, as they have to offer the labour migrant new employment after two years.[280] The same might be the case for some of the labour migrants in our case study. The relatively low wages in some cases might be a result of their migration status – because the work is the key to residing in Sweden.It is clear that Swedish labour law does not make any distinctions based on either citizenship or migration status. Equally no such distinctions are known to exist in collective agreements. Conditions with such result can be part of an employment contract, however. What protection can Swedish discrimination law provide in that case? What would happen if any of the labour migrants in our study group found out that the wage he or she receives is lower than the wage paid to Swedish colleagues doing the same kind of job at the same company? What arguments could be used to claim that the labour migrant is facing discrimination based on migration status? The major question in the following is to establish whether there is any prohibition against such discrimination in Swedish law.[281] The result will then be tried against the EU obligations in this regard. Is the Swedish system meeting the EU requirements?

The Discrimination Act, as mentioned earlier, prohibits discrimination on the basis of sex, transgender identity and expression, ethnicity, religion or other belief, disability, sexual orientation and age.[282] The status grounds explicitly

[279] Government Bill 2013/14: 153 22; Government Bill 2012/13:148 99-100.
[280] See Herzfeld Olsson (2017) 269-271.
[281] A second problem not dealt with here is if it would be difficult to find a suitable comparator. The challenges related to so called normless collective agreements has been highlighted in the sex discrimination context See t ex Fransson & Stüber (2014).
[282] Ch 1.s 1 Discrimination Law (2008:587).

mentioned in the Discrimination Act are exhaustive and there is, as explained earlier, no explicit room for integrating citizenship or migration status in the concept of ethnic origin.[283] Migration status is not explicitly discussed in the preparatory work of the Discrimination Act or in any other legal source. Taking into account the EU law on what is to be covered by ethnic ground or not it is perhaps not likely that a Swedish court would expand it to cover migration status either.[284] One thing that could point in another direction, however, is the legislator's silence on Article 3(2) in EU Directive on race and ethnic origin. As discussed, the directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned. This provision explicitly excludes migration status from its scope. But neither when the new Swedish Discrimination law was prepared nor when Directive on race and ethnic origin was transposed into Swedish law was anything spelled out by the legislator on this provision.[285] No provision with a similar content is found in the law. The choice to explicitly exclude these aspects from the scope of the directive indicates that it could otherwise be possible to include them. Accordingly, the Swedish choice not to discuss this exclusion could open up for an interpretation of the concept of ethnic origin covering migration status. That would mean that the Swedish concept of ethnic origin could be wider than the EU directive, a development that would be perfectly in line with the status of the directive as a minimum directive.[286] But, as the government, when transposing the equal treatment provision in the Single Permit Directive, explained that the available discriminatory form in this case would be indirect discrimination it seems that the preparatory works taken together do not support such an interpretation.

Direct discrimination deals with unequal treatment and indirect discrimination with unequal results.[287] The prohibition against direct discrimination can be identified as the core of the prohibition, which the prohibition against indirect direct discrimination broadens further.[288] Collins and

[283] Government Bill 2007/08:95, 111.
[284] Art 3.2 (2000/43/EC); UK Supreme Court has concluded that a particular vulnerable migrations status is not necessarily linked to a characteristic indissociable from race and therefore the discrimination characteristic could not be applied ([2016]UKSC 31 22 June 2016, Judgment Taiwo v Olaigbe and another; Onu v Akwiwu and another.
[285] Government Bill 2007/08: 95 and Government Bill 2002/03:65.
[286] Article 8(1) (2000/43/EC).
[287] Fredman (2018) 31.
[288] Nousianen (2017) 73.

Khaitan suggest that indirect discrimination may also rest on different foundations to that of direct discrimination.[289]

One important difference between direct and indirect discrimination is also that direct discrimination 'usually cannot be justified or is subject to stricter and often legislatively defined justification'.[290] With regard to indirect discrimination 'a broader range of "objective justifications" are generally permitted'.[291] This distinction also applies to Swedish law and is of course of crucial importance when evaluating whether Swedish law fulfils the requirements of the EU directives, a subject to which we will return. Swedish concepts of discrimination are based on EU law.[292]

6.2.1.3.2 Which protection can Swedish law provide?

The question we will answer in the following is what protection a claim based on indirect discrimination can provide a labour migrant with. Indirect discrimination takes place when 'an apparently neutral provision, criterion or practice would put persons having a particular … ethnic origin … at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[293] In order to evaluate the situation in Swedish law a hypothetical example in which the labour migrant is paid less than colleagues at the same workplace will be taken as a starting point. In order to invoke indirect discrimination a neutral provision whose application puts people of a certain ethnic origin at a disadvantage has to be identified. It has to be more difficult for labour migrants in comparison with others to meet the criteria.[294] When indirect discrimination is at hand it is not enough to declare that the labour migrant has been treated badly. It must be shown that when the neutral provision, criterion or practice has been applied the protected group would be at risk of being hit much harder than others.[295] Normally it is required that it be substantially more difficult for the disadvantaged group to meet the criteria. A factual comparison must be made. It is not possible to use hypothetical comparative persons.[296] A difficulty here is to identify a possible neutral

[289] Collins & Khaitan (2018) 5.
[290] Kilpatrick (2014) 592.
[291] Ibid
[292] Government Bill 2007/2008:95 96.
[293] Art 2(2)(b) (2000/43/EC and Discrimination Act (2008:567) ch. 1 sec 4 (2).
[294] Government Bill 2007/08:95: 490.
[295] Government Bill 2007/08:95 490; C-237/94 O'Flynn, 21; Fransson & Stüber (2015) 76.
[296] Government Bill 2007/08:95 490-491.

provision applied in this case. If this cannot be done the claim fails.[297] But in order to proceed, in the hypothetical situation it could be assumed that the neutral provision that is applied is that the worker should not be required to have a work permit for the work to obtain higher wages.

In order to investigate whether this rule can be applied in the Swedish context the labour migrant must prove that, if applied, this rule would lead to an extensive disadvantage for groups with an ethnic origin corresponding to their own in relation to persons belonging to other ethnic origins. People with Swedish ethnicity could never be put in such a situation as they don't need a work permit to work in Sweden (if they have not renounced their Swedish citizenship) and therefore could not be paid less because of migration status. But other migrants in Sweden who are not yet Swedish citizens would also be part of the other group. It seems that it would be difficult to establish two distinct groups related to ethnicity on the basis of migration status. Still it is likely that workers of another ethnicity than Swedish would be hit much harder than workers of Swedish ethnicity if such provision was applied. If the criteria cannot be fulfilled the claim will fail. But, we assume that the criteria for the previous step are fulfilled. The next step is to explore whether the differential treatment has a legitimate aim and whether the means used are appropriate and necessary to fulfil that aim. A legitimate aim is an aim worthy of protection in itself and is important enough for it to be given priority over the principle of non-discrimination.[298] Hellborg explains that it is difficult to decide just like that whether an aim is legitimate or not.[299] She runs through the EU case law on the matter and concludes that the aim can be related to both the needs of the company and society.[300] What could a legitimate aim be in our hypothetical situation? The employer could claim that it takes time to get adjusted to Swedish workplace customs and workers who

[297] The difficulties are illustrated by a UK case from the UK Supreme Court with some similarities. [2016]UKSC 31 22 June 2016, Judgment Taiwo v Olaigbe and another; Onu v Akwiwu and another. Para 32. Two local workers had been treated really bad by their employers. One question was if they were victims of indirect discrimination based on race. It was considered clear in the case that the relevant characteristic was 'vulnerable migrant status´. The court argued that it could not be indirect discrimination as ' no-one can think of a 'provision, criteria or practice' which these employers would have applied to all their employees, whether or not they had the particular immigration status of these employees. The only neutral provision which anyone can think of is the mistreatment and exploitation of workers who are vulnerable because of their immigration status. By definition, this would not be applied to workers who are not so vulnerable. Applying this criterion to these workers cannot therefore be indirect discrimination within the meaning of section 19 of the 2010 Act'.[297] This case is about mistreatment that goes far beyond our example. Still it highlights that it is not self-evident that mistreatment on the basis of migration status can be covered by other discriminatory grounds in the Discrimination Act.
[298] Government Bill 2007/08:95 492.
[299] Hellborg (2018) 323.
[300] Hellborg (2018) 324.

need a work permit normally have less Swedish experience and are therefore paid less. Would such an aim be legitimate? It would be a claim related to the operation of the business. It is also related to the individual worker and prospects related to productivity. Economic factors can be accepted as legitimate aims.[301] For the sake of argument we assume that such an aim would be accepted as legitimate. The next step is to establish whether this neutral norm would be appropriate to fulfil that aim. Would the norm really lead to fulfilment of the aim? In this case lower pay is intended to compensate for lower productivity and it seems reasonable to conclude that it is appropriate. But is the labour migrant really less productive? The next step is to investigate whether the aim can be fulfilled in a less intrusive way. Is it possible to fulfil the aim through another measure that would lead to a less negative effect for the labour migrant? Maybe it could be argued that it would be more efficient to provide new workers with better introduction. In this case it could also be taken into account how long the labour migrant has been present in the Swedish labour market. The measure is less likely to be proportional the longer the labour migrant has been present.

It is clear that it is difficult but maybe not impossible to fulfil the criteria in a claim on indirect discrimination. It might be challenging even to identify neutral provisions; it is perhaps not likely that a neutral provision can be established. In the hypothetical example the norm is probably not likely to be officially applied or applied in a consequent manner. Finding a norm that disadvantaged a considerably higher percentage of workers belonging to another ethnicity may be difficult.[302] In such a case the claim about indirect discrimination is lost already at that point.

If, on the other hand, 'migration status' was a prohibited discriminatory ground such a case as the one in the hypothetical situation could be handled within the structure of direct discrimination. In that instance it would be fairly straightforward to claim that the labour migrant would be treated worse than a comparable worker. The only way to get away with a denial of such claim is if the employer can show that the worker does not have comparable skills. And one starting point in this case is that the skills are comparable. In such a case the employer must come up with an explanation that has nothing to do with the discriminatory ground migration status. [303]

[301] See for example C-157/15 Achbita, 37 and further see the references to case law in Hellborg (2018) 314 et sec, 323 et sec. and Hellborg's reasoning.
[302] Cf Bernard (2012) 279, referring to EUCJ Case C-236/98 Örebo läns landsting (2000) para 50 on sex discrimination.
[303] Hellborg, (2018) 197 et sec.

6.2.1.4 Is Swedish law in compliance with EU law?

Is Swedish law in compliance with EU law? The answer to this question depends on how we choose to interpret the equal treatment provision in the Single Permit Directive. Should it follow the 'EU grammar' Kilpatrick talks about? In that case Swedish law can not be said to meet the demands of EU law. The EU grammar includes protection against both direct and indirect discrimination. In the Swedish case not even the 'EU grammar' based on the other status directives such as those on fixed-term and part-time work is fulfilled. In those cases direct discrimination is part of the prohibition of discrimination.[304] The difference in those cases from the 'innate attribute' discrimination cases is that also direct discrimination can be justified. The only argument that would perhaps support upholding the equal treatment provision in the Single Permit Directive through the Swedish possibility of using indirect discrimination on the basis of ethnicity is Article 15.3 in the Charter and the word 'equivalent'. Swedish discrimination law cannot even provide for protection of equivalent treatment, however, because indirect discrimination does not pinpoint that issue. Besides, the arguments in favour of such a weak interpretation of the equal treatment provision in the Single Permit Directive are not convincing as shown in section 6.2.1.2. The wording in the directive does not support that interpretation and there is no rationale for treating labour migrants workers worse than any other protected group within EU law. It must be kept in mind that one of the aims with the Single Permit Directive was to reduce unfair competition resulting from the exploitation of labour migrants.[305] It is also incoherent to promote equal treatment with only provisions on indirect discrimination. As Nousiainen explains 'direct and indirect discrimination are in fact two faces of a single coin, the difference between them being merely in how the casual relation is proved'.[306] Excluding the side that can be identified as the core of equal treatment law – the formal principle of equality- does not really make any sense at all. [307] The conclusion must therefore be that Swedish law is not likely to comply with EU law.

[304] See the wording of the directives clauses 4.1 and its interpretation in for example: C-313/02 Wippel 58 et sec
[305] Preamble 19 (directive 2011/98/EU); Iglesias Sanchez (2016) 918.
[306] Nousiainen (2017) 74.
[307] On the formal principle of equality see Nousianien (2017) 70 et sec.

6.2.2 Employed by an employer in a third country and posted to a Swedish entity belonging to the same company or company group

The discussion in Section 6.2.1 above is relevant for those labour migrants covered by the Single Permit Directive. The empirical study indicates that a large group of the workers in our study group is excluded from the scope of the directive, however. All posted workers are namely excluded from the scope of the directive, including intra-corporate transferees.[308] The Single Permit Directive does not define what it means to be posted, but it is likely that the concept corresponds to the Posted Workers Directive (96/71), Articles 1 and 2. The relevant parts of the articles in the directive read:

Article 1

Scope

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.[….]

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

4. Undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State.

Article 2

[308] Article 3(2)(c) and (d) (2011/98/EC).

Definition

1. For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.[…]

In Article 1.3 Posted Workers Directive it is made clear that the posting directive covers three situations: the provision of a service case (Article 1.3.a); the intra-corporate transfer case (Article 1.3.b) and the temporary agency workers case (Article 1.3.c). In the Single Permit Directive the Intra-Corporate Transferees are explicitly excluded beside postings. That can be explained by the intention to adopt a specific directive covering the intra-corporate transfer situation. A major difference between the Posted Workers Directive and the cases discussed in this study is that the Posted Workers Directive covers intra-EU postings. This study is about postings from countries outside the EU, so-called 'third countries', to a Member State of the EU. In what follows, we shall first take a closer look at the intra-corporate transfer case and then, as a last example, turn to the other posted workers.

6.2.2.1 EU law

As explained in section 1.4.3 of this study intra-corporate transfers are governed by a specific EU directive. The exclusion of this category from the Single Permit Directive does not mean that EU law has given in in this case. Quite the opposite, the regulation of this group of labour migrants is more developed as, in contrast to the Single Permit Directive for example, it also covers admission conditions. The admission conditions in the Directive on Intra-Corporate Transferees prescribes that the member states shall require that:

> the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member States where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established'[309]

The equal treatment provision in Article 18.1 that applies during the stay refers back to this provision in a rather peculiar way, stating that:

> whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4) intra-corporate transferees shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out.[310]

[309] Art 5.4(b) (2014/66/EU).
[310] Art 18.1 (2014/66/EU).

This provision is ambiguous. Verschueren has soberly concluded that neither Article 5(4)b of the directive nor the wording of the equal treatment provision entitle the intra-corporate transferee to any particular level of remuneration.[311] Including a right to equal treatment is likely to have been the intention of the legislator, according to Verschueren, but that does not follow from the wording of the provisions themselves.[312] On the other hand Lörges claims that '[a]rticle 18 establishes individual rights for ICTs and corresponding duties for Member States as well, with regard to working conditions, for private employers'.[313] This means that the Member States must ensure that this provision can be enforced in courts.[314] The peculiar way of referring to article 5.4.b in article 18.1 can make it challenging to claim that the wage level provided for in article 5.4.b shall be enforceable.[315] The intention behind this reference however, suggests that, if the wage level of intra-EU posted workers provided for in a national context is lower than the level prescribed in the admission condition, the level in the admission condition should prevail.[316] According to the preamble the Member States should require that this equal treatment should be granted during the entire stay. The intention is to protect workers and guarantee fair competition between undertakings established within the EU and those established outside, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage.[317]The admission condition in the Directive on Intra-Corporate Transferees talks about the level of remuneration national workers are granted in comparable situations. What exactly 'comparable' means is not clear.[318] The wage level in the Posted Workers Directive is so far a minimum rate of pay. The crucial question in this case is whether those two levels differ in a Swedish context.

6.2.2.2 Swedish law

The Swedish legislator did not find it necessary to adopt any particular provision transposing the remuneration provision in Article 18.1. The argument was that such a right was already part of Swedish law through the Posted Workers Act.[319]

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[311] Verschueren (2018)39 et sec and 47.
[312] Ibid 47.
[313] Lörges (2016) 1008.
[314] Ibid.
[315] Lörges (2016) 1008
[316] The likeliness that these levels will deviate has probably been reduced by the revised wage provision in the directive adopted revising the posted pf workers directive. Dir 2018/957, art 1(2)(a) These amendments have to be transposed by the 30 July 2020.
[317] Preamble 15 (directive 2014/66/EU).
[318] Verschueren (2018) 40.
[319] Government Bill 2017/18:34 106.

The Posted Workers Act entered into force when the Posted Workers Directive was transposed into Swedish law in 1999. The law is given a wider application than the directive as it applies to all posted workers irrespective of where they are posted from.[320] This law, however, does not provide for any minimum wage. The transposition of the Posted Workers Directive is based on the Swedish labour market model, in which wages are a matter mainly for the social partners through collective agreements.[321] If a reference to minimum provisions on wages were included in the law it would lead to an extension of collective agreements. This would be alien to the Swedish system. Instead the idea was that the posting companies would conclude collective agreements with Swedish trade unions.[322]

This means that in this intra-corporate transferee context there is no explicit provision in the Posted Workers Act providing for any wage level at all. Of course, a Swedish trade union can conclude a collective agreement with the posting company. In an intra-EU situation with the support of collective action can the trade union only demand a wage level in such a collective agreement corresponding to the minimum wage level provided for in Section 5 Posted Workers Act.[323] Trade unions are obliged to send a collective agreement including that minimum level to the Swedish Work Environment Authority.[324] For the IT sectors two such collective agreements are to be found on the website of the Swedish Work Environment Authority. On the trade union side one collective agreement was concluded by the Swedish Association of Graduate Engineers, together with some other professional trade unions, and the other by the white-colour trade union Unionen.[325] The collective agreement of the Swedish Association of Swedish Engineers does not contain any minimum wage provisions. In the document provided by Unionen the wage setting part of the ordinary collective agreement is stated and, for guidance on wage levels for particular professions, it refers to the wage statistics issued by Statistics Sweden.[326] Information about the lowest acceptable wage level is also included in the document. These levels are as low as those in the ordinary collective

[320] S 1 Posting of Workers Act (1999:678).
[321] Government Bill 1998/99:90.
[322] Government Bill 1998/99:90 26-28; Nyström (2017) 178.
[323] S. 5 Posting of Workers Act (1999:678)
[324] s 9 a Posting of Workers Act (1999:678)
[325] Conditions send in to the Work Environment Authority in accordance with the Posting of Workers Act: Villkor inlämnade till Arbetsmiljöverket enligt 9a § Lag (1999:678) om utstationering för arbetstagare för: Anställningsvillkor IT-företag, IT& Telekomföretagen Almega och Sveriges Ingenjörer, Jusek, Civilekonomerna and Villkor enligt 5a 1 utstationeringslagen för utstationerade arbetstagare – hämtade från tjänstemannaavtal träffade mellan IT & Telekomföretagen inom Almega och Unionen.
[326] Ibid Mom 1 Principer för lönesättning.

agreement.[327] To sum up, it would be very difficult, based on the Posted Workers Act, to establish any wage level at all for the kind of workers who are the focus of this study.

It is, however, obvious that the absence of a provision in this case makes it difficult for intra-corporate transferees to base any claims on discriminatory wages on the Posted Workers Act. The act, however, says that the provisions in the Discrimination Act applicable in a case like this should set a minimum standard.[328] This could mean that such a claim could be based on the Discrimination Act instead, on the same premises as for the labour migrants discussed in the previous section. One additional obstacle for the success of such a claim, on top of those discussed in section 6.2.1 is that that the Discrimination Act applies between employees and employers[329] and in this case the host company is not the employer. Nevertheless the law also applies to those who are 'available to perform work or performing work as temporary or borrowed labour'.[330] The responsibility in this case is, however, limited to issues for which the host company has competence. The wage is normally not such an issue, as it is set by the parties to the employment contract.[331] Measures that could be covered include harassment and sexual harassment.[332]

A discrimination claim could also be raised against the employer in the third country. The likeliness that such a claim will be successful is however very small due to the problem to find a comparator. It is unlikely that the comparator should be found in the host state. It has been claimed that the status established through the ICT directive ensures that the status of such workers 'is kept apart from the regulatory structures of the host state'.[333] The Swedish transposition of this directive confirms the pertinence of that statement.

The question arises of whether the admission condition on remuneration will have meaning only at the point when deciding whether or not to approve the application for an intra-corporate transfer. One clue to this question can be found in the provision transposing the withdrawal articles. The failure to apply the remuneration requirement in the admission conditions may lead to a withdrawal, like any failure to apply any admission condition.[334] The word 'may' indicates that a proportionality principle should be applied in this case. This means that an

[327] Ibid Mom 1.1 Lägsta lön. See section 4.4.
[328] S 5 Posting of Workers Act (1999:678).
[329] Ch 2 s 1 Discrimination Act (2008:567).
[330] Ch 2 s 1 p 4. Discrimination Act (2008:567)
[331] Government Bill 2007/08:95, 136-137.
[332] Government Bill 2007/08:95, 137.
[333] Costello& Freedland (2016) 49.
[334] Ch 6 b s 17 Aliens Act (2005:716); Government Bill 2017/18:34 17.

overall assessment of all the relevant circumstances in a particular case must be taken into account before a decision is taken.[335] A lower remuneration than the one prescribed in the admission conditions may lead to withdrawal of the permit. This risk may encourage application of the wage level required in the admission provision also during the stay.

6.2.2.3 Is Swedish law in compliance with EU law?

Is Swedish law in compliance with EU law in this case? It is fairly clear that the Posted Workers Act will provide limited support for an equal rights claim. But the situation does not differ from the one that applies for intra-EU posted workers. The question is whether that is what the Directive on Intra-Corporate Transferees requires. Even though Article 18.1 is unclear it is reasonable to assume that the intention was to ensure that intra-corporate transferees would at least be provided with the wage level provided for in the admission conditions. The interesting thing is that Article 5.4(b) talks about a level of remuneration on a par with what comparable national workers receive. How should the comparator be established in this case? Is it a comparator related to the same company or related to a broader context, like the labour market?

As already described Swedish workers are not granted any level at all, or, as in Unionen's collective agreement, guaranteed only a very low wage level. The wage level is the result of negotiations. The Migration Agency has, however, required a minimum level based on the 25th percentile in the wage statistics from Statistics Sweden. Is it reasonable to assume that the Directive on Intra-Corporate Transferees requires that an intra-corporate transfer should at least be able to enforce that wage level, and otherwise discrimination could be claimed? We do not have a clear answer to that. Here it is also reasonable to take Article 15.3 EU Charter of Fundamental Rights into account. That provision requires that labour migrants from third countries should be provided with equivalent working conditions. The wage level used by the Migration Agency could well be such an equivalent level. At present in the Swedish legal context intra-corporate transferees risk losing their ICT permit if this wage level is not upheld but have no legal means of suing the employer for not providing that wage level. It is unclear whether this situation fulfils the requirements of the Directive on Intra-Corporate Transferees.

[335] Government Bill 2017:18:34 61-62.

6.2.3 Employed by an employer in a third country and posted to a Swedish company independent of that employer

6.2.3.1 EU law – designating the applicable law

Other posted categories of workers, apart from intra-corporate transferees, operate outside EU-based equal treatment provisions. It is although likely that the question of wages will be governed by the conflict of law rules in the Rome I Regulation.[336] Rome I applies in situations involving a conflict of laws to contractual obligations in civil and commercial matters.[337] This means that Rome I also applies to contracts with an international character.[338] The relationship between Rome I and the various equal treatment provisions seems to be somewhat blurred. The majority view seems to be that Rome I and the different equal treatment provisions should apply in parallel.[339] The equal treatment provisions provided for in the Directive on Intra-Corporate Transferees, discussed in the previous section, however, take precedence over the designated law, according to the conflict of law rules.[340]

For some contracts in which one of the parties is considered more vulnerable than the other, such as consumer contracts and individual employment contracts, specific provisions apply in Rome I.[341] We shall look into the provisions on employment contracts. In the cases we are talking about the employer is situated in a third country and the employee is performing the work in an EU country, Sweden. The question in these situations is whether the labour law in the host or the home state should be applied to the employment contract.

The starting point is that the parties can choose which law they want to apply.[342] For employment contracts, however, such a choice must not lead to the employee being deprived of protection afforded by provisions that cannot be derogated from by agreement under the law that would have been designated if the choice had not been made.[343] This means that we always have to look at other provisions that should govern the designated law if no choice had been made. According to the first option, in that case the contract shall be governed by the law of the country in which the employee habitually carries out his or her work

[336] Regulation EC No 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
[337] Art 1.1 Rome 1 (593/2008/EC).
[338] Bogdan (2012)118.
[339] Verschueren (2016) 395; Barnard (2014) 198-200.
[340] Art 18.1 (2014/66/EU).
[341] Art 6 (2014/66/EU) and Article 8 Rome 1 (593/2008/EC).
[342] Art 3 Rome 1 (593/2008/EC).
[343] Art 8.1 Rome 1 (593/2008/EC).

in performance of the employment contract. The country where or from which the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in the other country.[344] The work is considered temporary if the employee is expected to resume working in their country of origin after carrying out the tasks abroad.[345] This provision will in many of the cases in this study lead to the employment contract being governed by the home state and not Swedish labour law. If the parties have chosen Swedish law, which might be natural taking the admission conditions into account, home state laws that cannot be derogated from will continue to apply. This might include minimum wage provisions. In most cases it is possible to agree on a higher wage than the minimum wage but not a lower one.

In some cases it is not possible to determine the applicable law by this first test. If that is the case the employment contract shall be governed by the law of the country in which the place of business through which the employee was engaged is situated. [346] But, where it appears from the circumstances as a whole that the contract is more closely connected to a country other than that indicated in the previous provisions, the law of that country shall apply.

It is, however, clear that if no choice of law is made in these cases it is likely that the home state law will govern the employment contract. In those cases it will be very difficult to raise any claims of discriminatory treatment in Swedish courts based on Swedish law.

There are a number of Swedish provisions that can come into play in such situations, however, namely those having the character of overriding mandatory provisions.[347] To identify them we have to look for provisions compliance with which a country regards as crucial for safeguarding its public interest, such as its political social or economic organization, to the extent they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.[348] Many labour laws have such an overriding character and it seems that the CJEU accepts wide discretion on the part of the Member States when deciding which laws meet these criteria.[349] It is likely that the Swedish Occupational Health and Safety Act, as well as provisions in the Codetermination Act could be considered to have this character.[350] It seems unlikely, however, that the Swedish labour law principles developed by the

[344] Art 8.2 Rome I (593/2008/EC).
[345] Preamble 36 Rome I (593/2008/EC). More on this theme see van Hoek (2014) 158 et sec.
[346] Art 8.3 Rome I (593/2008/EC).
[347] Art 9 Rome I (593/2008/EC).
[348] Art 9 Rome I (593/2008/EC).
[349] van Hoek (2014) 165-166.
[350] Sinander (2017) 275 et seq; AD 2007 no 97.

Labour Court that an individual employment contract may be complemented by a collective agreement are of such a character.[351] It is likely that the Discrimination Act could be another overriding mandatory provision. The claim must in that case be directed towards the employer in the home state. And here we would face the same problems as in the case of intra-corporate transferees; it is difficult to claim discrimination when the employers are not the same.

In this case there is no equal treatment provision in secondary EU law that governs the situation. One remaining question is, whether it would be possible to connect the situation to EU law in a way necessary to invoke the provisions of the EU Charter of Fundamental Rights. According to established CJEU case law the fundamental rights in the legal order of the European Union are applicable in all situations governed by EU law and when the Member States are implementing that law.[352] The EU connection necessary to make the EUCHFR applicable has been identified not only in relation to measures taken explicitly to implement EU law, but also in all situations governed by EU law or falling within the scope of EU law.[353] There is good reason to take Article 1.4 Posted Workers Directive into account. It reads:

> 4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

This provision obviously addresses the situation at hand. It says that companies posting workers from third countries may not be treated more favourably than EU-based companies. If workers posted from third countries are provided with fewer rights than intra-EU posted workers we could well argue that the employer is treated more favourably as it does not have to provide for the same level of protection and can thereby sell the service to a lower price. The provision itself seems to be directed toward the Member States. The important thing here is that it can be argued that it connects the situation to EU law. In that case it could be argued that there must be some mechanism available to ensure that third-country national workers be treated either equivalent (art 15.3 EUCHFR) or equal to national workers (Article 21.1). To what extent these provisions also could apply in situations where workers work at the same work site but employed by different employers is unclear. The EU-formula discussed previously has only been applied in relation to a single employer. The outcome of this analysis will depend

[351] Government Bill 2016/17:107 132.
[352] See for example Association de médiation sociale, C-176/12, EU:C2014:2, para 42 and case law cited and para 43.
[353] C-617/10 Åkerberg Fransson 19.

on whether these provisions require that the labour migrant shall have a right to enforce this equal treatment or whether it is sufficient that the admission conditions require that a certain wage level be offered and upheld.

6.2.3.2 Swedish law

During the worker's stay in Sweden the Posted Workers Act will continue to apply, as explained in the previous section, at least to workers posted within the framework of transnational provision of service. It is reasonable to assume that most workers in the study group would meet this condition. This category of worker is covered by Article 1.3(a) Posted Workers Directive. We have already learned that the Posted Workers Act will not give posted workers any support for an equal rights claim regarding the wage level. If the Posted Workers Act does not contain any minimum wage protection no other legal mean is available in Swedish law.

6.2.3.3 Is Swedish law in compliance with EU law?

The outcome of this analysis will depend on whether art 15.3 EUCHFR provisions require that the labour migrant shall have a right to enforce this equal treatment or whether it is sufficient that the admission conditions require that a certain wage level be offered and upheld or if it contains no enforceable right at all. One alternative way forward could be to draw inspiration from the equal treatment provision in the Temporary Work Agency Directive which, deals with a situation similar to the one at hand.[354] Hired in workers should be provided with the same wage as workers employed by the host company doing comparable duties.[355]

[354] Temporary Agency Work Directive, art 5.1 and 3.1 (2008/104/EC)
[355] Art 5.1 and 3.1 (2008/104/EC)

7 Summary and conclusions

The overarching questions raised in the study concern the extent to which Swedish law provides for equal treatment on pay for highly qualified third-country nationals working in Sweden and how far the situation meets the requirements of EU law in this area. For labour migrants, both admission conditions – part of migration law – and equal treatment provisions applicable to work performed in Sweden are important for answering these questions.

The Swedish labour migration system is based on the principle that it should not make it easy for employers to employ people under working conditions worse than those applying to local workers.[356] The standard way of ensuring this in the Swedish context is to require that the level provided for in collective agreements be upheld. The law therefore prescribes that workers must be offered a wage, insurance and other terms of employment that are not worse than those provided for in the relevant collective agreements or by custom in the occupation or industry.[357]

The study illustrates that the collective agreements applicable to professional groups defined as highly qualified workers do not provide any guidance. The individualization of wage-setting mechanisms for the relevant professional groups allows for wage disparity depending on, for example, the worker's performance and the company's economic situation.[358] Ensuring that labour migrants are not offered wages below a level acceptable to local workers is, accordingly, challenging in this collective agreement context. But besides referring to collective agreements in the admission conditions the law also refers to custom in the occupation or industry. The legislator does not provide any guidance concerning what 'custom' means in this context. The Migration Agency, which applies the legal requirement, uses wage statistics from Statistics Sweden to obtain a reasonable comparator, namely the 25th percentile in the wage statistics connected to a specific professional code (SSYK code). The level applied ensures that labour migrants are not offered wages at the absolute bottom, but rather at a level received by a substantial part of the relevant workforce.

It seems to be difficult for the Migration Agency to require a higher level, taking into account the wage-setting mechanisms applied to local workers. Nevertheless a risk can be identified here. If the employer sees this level as the 'recommended' level then third-country national workers may find themselves

[356] Government Bill 2007/2008:147 28.
[357] Ch 6 s2 Aliens Act (2005:716).
[358] Section 4.4.

paid along the lower wage segments to a higher degree than local workers. If this turns out to be the case there is a risk that comparable workers are paid differently, depending on their migration status. But taking the narrative applied to this group – 'wanted and welcome' – into account this risk is likely to be low. Indeed, this narrative would suggest that these workers have a strong bargaining position on the labour market and that therefore they would at least end up at the same level as local workers. The results from the empirical study partly support and partly deviate from that assumption. It indicates that the minimum level is not interpreted as a recommended level, as the labour migrants are represented in all wage intervals, but that the wage level of a higher number of labour migrants than locals end up in the lower wage segments. This can be explained by a number of factors unrelated to discrimination. Nevertheless these explanations do not eliminate the risk that labour migrants may be offered lower wages than comparable locals. The aim of the admission conditions is not specifically to prevent labour migrants from being offered discriminatory wages in relation to comparable workers. That would be difficult, given the individualized wage-setting mechanisms that apply to the relevant professional groups. The admission conditions are rather based on the principle that employers should not find it easier to employ workers under lower working conditions than those applying to local workers.[359] What is 'applicable' to local workers in these professional groups, however, covers a relatively wide wage range. Setting a threshold at the 25th percentile ensures that a certain minimum level will be upheld. But it will not ensure that labour migrants are not chosen because they accept lower wages than local workers. The risk of such an effect is probably less if the labour migrant is employed by a Swedish employer covered by a collective agreement. If no collective agreement applies to a particular workplace, however, it can be difficult to prevent such a development. Moreover, the admission conditions do not prevent the establishment of companies in Sweden that only employ or hire third-country nationals ready to work for lower wages than local workers.

If, then, the offered wage is lower than that of comparable local workers the labour migrant might not become aware of that until they are in Sweden. The second part of the study reveals that the possibility to claim equal treatment at this stage is very limited and, at least for labour migrants employed by an employer in Sweden, and the situation is not likely to meet the EU-demands. . The analysis in this part of the study is divided into three parts. Besides the situation for labour migrants employed by an entity in Sweden two other situations are analysed. The second looks at the situation for workers posted to

[359] Government Bill 2007/2008:147 28.

Sweden by an entity in a third country belonging to the same company or company group as the host entity in Sweden (intra-corporate transfer). The third part examines the situation in which a labour migrant is posted to Sweden by a company in a third country but independent of the host company in Sweden. In the latter situations no protection whatsoever is provided for equal treatment by Swedish law and it seems that the circumstances in such cases cannot be questioned from an EU law perspective. Whether the enforcement claims available for labour migrants employed by a Swedish employer (the first situation) are taken advantage of, however, depends on the willingness of the labour migrant to pursue a claim against discrimination. The incentive for doing that depends on the labour migrant's alternative options and whether the wage satisfies their needs in other respects.

All things considered, the combined effect of Swedish admission conditions and labour law/equal treatment provisions do not provide for equal treatment of labour migrants with comparable local workers at a particular company in the sense that the law stipulates or provides means to enforce it. The system does, however, ensure that labour migrants are not paid wages below a specific minimum. This minimum guarantees that labour migrants cannot be employed because they accept wages below it, but they can be chosen because they are cheaper than local workers if the level offered is higher than the 25th percentile. Local workers can, within this system, agree to work for wages at a lower level than the 25th percentile. From that perspective the threshold for labour migrants is higher than the threshold for local workers. In Swedish law there is no general principle requiring that workers are entitled to equal pay for equal work.[360] Such a right must be based on a collective agreement applicable to the workplace or in law.[361] In the cases studied the relevant collective agreements stipulate that wages must be set on objective grounds. For workers covered by the collective agreement, this could provide some protection. The trade union representative can use the collective agreement to initiate negotiations with the employer in order to eliminate partial wage differences. For others, only the discrimination laws can provide protection.

As long as the demand for local workers possessing these qualifications is higher than the supply the risk that local workers will be outcompeted by third-country labour migrants because they are cheaper is perhaps not too high. That of course depends on whether the Swedish entity would continuously prefer local workers. The risk may also be higher that the system would lead to a segmented

[360] AD 1984 no 79
[361] Ibid. Ch 1 and 2 Discrimination Act (2008: 567).

labour market also for highly qualified workers, where local workers are found in the higher wage segments and third-country nationals in the lower ones.

To a certain extent this can be prevented by more extensive protection by discrimination law if migration status is included as a discriminatory ground. On the other hand, only 27 per cent, of the study group, is employed by an employer in Sweden; the rest is employed by companies in third countries and posted to Sweden. The employing companies in these cases can continue to take advantage of selling their services at a lower price. It can be argued that these workers only stay for a very short time in the Swedish labour market and therefore can be separated from it. The descriptive statistics, however, suggest that the majority of these workers stay in Sweden for longer than one year. One solution for these groups could be to provide for equal treatment on the same basis as for temporary agency workers. They also only perform duties in the host company for a limited time. According to the Swedish Act on Temporary Agency Workers they should be treated equally wage-wise with comparable employees directly employed by the host company.[362]

A legal system that does not provide for mechanisms promoting equal treatment of labour migrants may not lead to wage dumping in the short term or outcompete local workers because demand for the relevant skills is still high, on the assumption that the available local workers are of sufficient quality. It is not investigated whether low wage requirements threaten local workers'wages. The assumption seem to be that the labour migrants are not chosen because they are cheaper, but because there are no others available. If shortage is the driving force for employing labour migrants a low wage in some instances is maybe not the main aim but rather a bonus for the employer. If the legislator finds it troubling that there are no guarantees that labour migrants will be treated equally with their local colleagues, however, the situation is not satisfactory.

[362] Ss 6 and 5.3, Act (2012:854) on Temporary Agency Work.

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Avtal om lokal lönebildning, IT-företag, giltighetstid 2017-04-01 – 2020-03-31 mellan IT & Telekomföretagen och Civilekonomerna, Jusek och Sveriges Ingenjörer

Villkor inlämnade till Arbetsmiljöverket enligt 9a § Lag (1999:678) om utstationering för arbetstagare för: Anställningsvillkor IT-företag, IT & Telekomföretagen Almega och Sveriges Ingenjörer, Jusek, Civilekonomerna

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