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Fitness Check Report for Sweden

A review of the state of compliance of Sweden's implementation of Directive 2004/38 on residence rights of EU citizens and their family members

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1 Introduction

This Fitness Check Report evaluate the transposition of the Directive 2004/38/EC (the directive) into the Swedish legal system. It provides a description and analysis of the main provisions contained in the Swedish Aliens Act, with particular focus on the practical implementation by national and local authorities.

While the first and second substantive sections provide background information regarding the right to entry, right to reside for up to three months and more than three months, the third does pay particular attention to the notion of "worker" as interpreted by the Swedish courts and national authorities.

The report also investigates another piece of legislation, the Swedish Population Registration Act, which must be taken into account while evaluating the transposition of the directive into the Swedish legal system. In particular, the purpose of the fourth substantive section is to understand and demonstrate the strict link between the assessment of the right to reside and the one-year requirement within the Population Registration Act. In this regard, with specific reference to the practical application of these provisions by the Swedish Tax Agency and its effects on the issuing of social security numbers. The report also provides an evaluation of whether these provisions are in line with the equal treatment principle under EU law.

The fifth section examines the access to social benefits for EU citizens, with particular attention to residence-based benefits and its necessary correlation to the social security number issue. The last section suggests actions to be taken at national and European level in order to solve the incompatible aspects of the Swedish transposition of Directive 2004/38/EC and to remove the practical obstacles faced by EU citizens.

2 Methodology

The report has been compiled on the basis of a desk review of the Swedish Aliens Act (Immigration law) implementing the Directive 2004/38/EC as well as the practical guidelines published by public authorities. Moreover, a legal analysis is provided of the Swedish Courts' case-law on the notion of "worker". The report also covers other relevant legislation in connection with the right of residence, such as the Population Registration Act and the social security frameworks. In addition to primary sources, several subject-specific sources such as the reports published by the Solvit centre and the complaint that was submitted to the European Commission by civil society organisations have been important.

3 The Swedish transposition of Directive 2004/38/EC

Directive 2004/38/EC was transposed into Swedish legislation on April 30th 2006 through proposition 2005/06:77[1]. It was implemented primarily through the Aliens Act[2], the Aliens Ordinance Act[3] but also, in a lesser extent, in national legislation such as the Act on Swedish Citizenship[4] and the Act concerning Special Controls in Respect of Aliens[5].

In 2008 the Commission launched a review of the transposition of Directive 2004/38/EC in Sweden. Within the review the Commission found that the Swedish implementation of the directive contained several inconsistencies[6]. These insufficiencies were also brought to the fore in a review commissioned by the European Parliament in 2009, by which it was concluded that the transposition of the directive was "rather imperfect and could be improved"[7]. In 2014 the Aliens Act was amended in order to correct the errors from the 2006 transposition and several amendments were made in order to comply with the provisions of the directive[8].

This following section goes through a few of the most important errors and the amendments that were being made by the government in order to correct them.

3.1 Registration formalities

When directive 2004/38/EC was transposed into Swedish law in 2006, it was implemented with a registration requirement for union citizens. The government opted for the Swedish Migration Agency as the competent centralized registration authority, reasoning that a centralized registration procedure would safeguard the risk of different agencies making different assessments of the residency rights criteria. Without a registration procedure, the government assumed that different agencies would come to different conclusions on which ground an EU citizen derived residence rights. Due to this reasoning, the government found it suitable to implement a registration formality that, even though registration was not a proof of the right to residence, could be used as an indicative guidance for other agencies when they assessed the residence rights of EU citizens.[9]

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[1] *Travaux préparatoires*, Regeringens proposition 2005/06:77 Genomförande av EU-direktiven om unionsmedborgares rörlighet inom EU och om varaktigt bosatta tredjelandsmedborgares ställning.
[2] The Aliens Act (Utlänningslagen 2005:716).
[3] The Aliens Ordinance Act (Utlänningsförordningen 2006:97).
[4] The Act on Swedish Citizenship (Lag om svenskt medborgarskap 2001:82).
[5] The Act concerning Special Controls in Respect of Aliens (Lag om särskild utlänningskontroll 1991:572).
[6] Report from the Commission to the European Parliament and the Council, on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2008) 840 final, p. 12.
[7] European citizens action service, 2009, Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States, p. 156.
[8] *Travaux préparatoires*, Regeringens proposition 2013/14:81 Uppföljning av rörlighetsdirektivets genomförande.
[9] Ibid., page 106.

All EU citizens who fulfilled the right to reside and intended to stay in Sweden for a period longer than three months were required to register their stay. However such a registration requirement was not to be considered compatible with article 8(1) of the directive, since the provision clearly stipulates that member states only are allowed to oblige EU citizens to register for periods of residence longer than three months and, with reference to article 8(2), the deadline for registration cannot be set at less than three months from the arrival date[10]. In addition, citizens from Norway, Denmark, Finland and Iceland were exempted from registration, with the consequence that citizens from those countries were subjects of a more favorable registration regime[11].

In 2014, when the Aliens Act was amended through proposition 2013/14:81, the government decided to remove the registration requirement for EU citizens[12]. The government motivated the amendment on the ground that the registration formality only had limited practical impact since it neither governed the right to reside in Sweden nor the right to register as resident at the Tax Agency. The Migration Agency who agreed with the government's proposal, raised in their opinion to the amendments that registrations of residence rights were not *de facto* used as an indication for other agencies when assessing the right of residence for union citizens[13]. This view was also supported by the Swedish Board of Trade, the competent authority for the administration of the Swedish national Solvit centre, who advocated in their opinion that the Migration Agency's interpretation of the criteria for the right to reside in Sweden should be given priority even though the registration requirement were to be removed. According to the Swedish Board of Trade, different agencies did indeed interpret the criteria for the right to reside differently, which created obstacles to the free movement of persons and thus limited the possibility for EU citizens to establish in Sweden[14].

3.2 Family members

The government implemented the "any other family member" ground to the family member definition in accordance with article 3 (2)a, which stipulates that any family member who is the dependents or members of the household of the Union citizen who holds the primary right of residence, or where the union citizen holds a responsibility of personal care of the family member, shall be considered a family member for the purpose of the directive.[15]

Furthermore, an amendment was made so as to comply with CJEU's decision in C-291/05 Eind. The scope of the family member definition was broadened in order to include returning nationals of the member state if the applicant had made use of his or her free movement rights, before returning to the first member state, to enforce the right to family reunification under the directive[16].

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[10] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, article 8 (1-2).
[11] Proposition 2005/06:77, p. 15.
[12] Proposition 2013/14:81.
[13] Ibid., pp. 16 – 17.
[14] Ibid., pp. 15 – 16.
[15] Directive 2004/38/EC, article 3 (2)a.
[16] Case C-291/05 Eind, EU:C:2007:771.

Moreover, in the 2006 transposition of article 7(4) of the directive, the government made use of the derogation to the family member definition in article 2(2), concerning who can be a family member for the purpose of reunification to a EU citizen that holds residence rights as a student in the second member state. The derogation was introduced restrictively, including only the spouse of the Union citizen and their children under 21 years old, if they were financially dependent on either the union citizen or the spouse[17]. Following criticism by the European Commission of the implemented measure's compatibility with article 7(4)[18], the government decided to remove the limited family member definition for union citizens residing in Sweden as students. Instead, the provision was implemented in the Aliens Act to not make the family member definition dependent of which ground union citizens derives their rights of residence from[19].

3.3 Expulsion during the first three months

The word "unreasonable" was added to the provision in chapter 8 section 9 of the Aliens Act, the corresponding measure of article 14(1) in the directive. The measure governs under which circumstances an EU citizen can be expelled during the first three months of residence. According to the 2006 transposition of the provision, it was sufficient to become a burden on the social assistance system. This lower threshold for expulsion within the original implementation was due to a discrepancy between the Swedish and the English language versions of the directive, whereas the English version stipulates a higher threshold of an "unreasonable burden" in comparison to the lower threshold of merely "a burden". According to the government, the English language version was considered to be more compatible with the intentions of the directive, that the burden should be of a certain significance, wherefore they found it motivated to amend the provision by adding the "unreasonable" criteria in coherence with that purpose.[20]

4 Rights of residence, a legal analysis of the conditions listed in the free movement legislation

4.1 When the free movement legislation applies

As mentioned in the previous section, directive 2004/38/EC has been transposed into the Swedish system by the Aliens Act (2005:716), which came into force the 30th of April 2006. In this section, the report provides an overview of the preeminent Swedish provisions regulating the rights of residence for union citizens and their family members. With particular focus on the right to stay up to three months, the right of residence for more than three months, rights and obligations for job-seekers and non-economic active persons. The main focus is on the controversial provisions that are transposed incorrectly into the Swedish system and practical application of the provisions by the Swedish authorities.

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[17] Proposition 2005/06:77, p. 14.

[18] Ibid., p. 27, with specific reference to the exclusion of the definitions set out in article 3(2) of the directive.

[19] The Aliens Act, chapter 3a section 4.

[20] *Travaux préparatoires,* Regeringens proposition 2013/14:82, Tydligare regler om fri rörlighet för EES- medborgare och deras familjemedlemmar, p. 56.

4.2 Right to entry

The general rule contained in the Aliens Act[21] does require Schengen or national visa for the person that wishes to enter in Sweden. However, EU citizens, as well as their non-EU family members, are exempted from the visa requirement[22] which means that they will be able to freely move from and to Sweden holding a valid identity card or a national passport. National documents will be issued by competent authorities and show the identity as well as the nationality of the person in question. If the non-EU family member does not hold a residence card issued by another member state, based on article 9 and 10 of the directive, he or she will have to apply for a visa if the law requires so[23]. Moreover, it is necessary to underline that in November 2015, the Swedish government decided to reintroduce border controls at the internal border. This action meant that persons entering Sweden might need to show proof of the right to come and stay in the country, e.g. by providing a passport or national ID-card. Non-EU family members always have to bring with them both the national passport and the residence card. It is not allowed to make any other check in connection with entry other than the one concerning the passport or ID document[24].

The free movement legislation does not permit the Swedish police to ask any other questions to union citizens, such as having sufficient resources or about the purpose of the entry. If there is a concrete suspicion that a person may be a threat to public order and security, the Swedish police might be able to derogate from the legislation mentioned above.

As pointed out in the country report published by the European Parliament in 2016[25], the article 8 section 9 of the Aliens act might not, despite the amendment in 2014, be in line with the directive since it allows the border police to refuse the (re) entry of EU citizens who have been considered an unreasonable burden for the social system. The article 14 of the free movement directive only allows this kind of measure during the so-called "right of residence" up to three months while the national provision seems to introduce the right to refuse the entry if the person has been expelled from the country before.

4.3 Residence rights for up to three months

The right for union citizens to reside in Sweden for the first three months, without any formalities other than the requirement to hold a valid identity card or passport contained in the article 6 (1) of the Directive 2004/38/EC, has not been directly transposed into the national legislation. The Aliens Act does set as a general rule to hold a residence permit issued under national rules if the person wishes to stay for

[21] The Aliens Act, Chapter 2, section 3.
[22] The Aliens Act, Chapter 2, section 8a (1).
[23] The Swedish Government has published the list of the countries when the visa is needed to enter into Sweden on the following link: https://www.government.se/government-policy/migration-and-asylum/list-of-foreign-citizens-who-require-visa-for-entry-into-sweden/.
[24] The Schengen Border Code (regulation 2016/399/EU) is the legal basis for external and internal border control decisions.
[25] Policy Department C: Citizens' Rights and Constitutional Affairs, 2016, Country report for Sweden. Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Sweden.

more than three months[26]. However, EU citizens are exempted from applying for such residence permit[27] if they comply with the conditions for the right of residence, as stated in article 7 of the directive and chapter 3a of the Aliens Act. Thus, even though Sweden has not transposed article 6 of the directive, there are national rules that cater for similar rights to EU citizens who intend to stay for a period up to three months.

4.4 Residence rights for more than three months

Following the 2014 amendments to the Aliens Act, the obligation for union citizens to register with the Migration Agency was removed[28]. This amendment entails that an individual fulfilling the conditions listed in the directive 2004/38/EC and the Aliens Act (e.g. jobseeker, worker or student), will have an automatically recognised right of stay. However, this means in practice that each national or local authority that has to be contacted by EU citizens will assess the right to reside for more than three months. For instance, union citizen must apply for a Swedish social security number (*Personnummer*) in order to be considered as resident in Sweden and access to both public and private services. The responsible authority is the Swedish Tax Agency that does make an assessment about the right to reside beyond the three months and eventually register the person in the national population register. At the same time, the person may need to register with other authorities as well, such as the National Insurance Agency or the Employment office service. In this respect, the framework creates a risk for the applicant to receive several decisions which are based on different assessments. This may have a negative effect on the possibility to settle in Sweden and exercise his or her right to free movement.

In the light of this, the following sections within this chapter bring to the fore such inconsistencies where the review has identified an incorrect transposition of the directive, with particular consideration to the application of public authorities that are not in line with the purpose of EU law.

4.5 Right to reside for job seekers

Job seekers intending to stay longer than three months in Sweden often face barriers because of the incorrect transposition of the case-law of the CJEU. In particular, the job seekers' issue has been clarified in the important Antonissen case[29] where the CJEU stated that the free movement encompasses a right for citizens within the EU to move freely between and reside in the territories of other member states in order to look for work there.

The court also ruled that the national limit of six months is not – in general – to be considered insufficient. The court did, however, state that after the end of such a time, the right of residence is retained if the concerned person continues to seek work and has a real chance of finding employment. In other words, EU citizens looking for a job have the right to reside in Sweden for at least six months without any special

[26] Chapter 2, section 5 of the Aliens Act.
[27] Chapter 2. Section 8b of the Aliens Act.
[28] See for more information in the *travaux préparatoires* , Uppföljning av rörlighetsdirektivets genomförande 2013/14:81.
[29] Case C-292/89, The Queen v Immigration Appeal Tribunal, ex parte Antonissen, EU:C:1991:80.

conditions or formalities. A clear example of a job seeker is a person who is registered at the national jobcentre and actively uses the services offered thereby, for instance, following established action plans and submitting activity reports detailing job applications. Once six months have passed, the job seeker has an extended right of residence if he or she can show that they are actively looking for work and have a real chance of finding employment.

However, the Aliens Act does not seem to be compatible with the principles as stated by the CJEU in Antonissen. EU citizens looking for work have, under the Aliens Act[30], the right of residence if they have a real chance of finding employment. This requirement has appeared to be applied already for the first period of residence (before the six months rule), and this interpretation seems to be confirmed both by the national authorities and national courts. For instance, the First instance Administrative Court and the Administrative Court of Appeal in Jönköping ruled that an applicant, who had been in Sweden for four months, studied the Swedish language for immigrants and had technical qualifications, fulfilled the requirements for the right of residence[31]. The assessment applied by the courts required the applicant to prove the real chance of finding employment requirement during the first six months, which is not in line with the Antonissen case law.
An additional example of how Swedish authorities apply the national provision for job seekers, contained in the Aliens Act, is the Tax Agency's assessment when EU citizens are trying to registrate in the national population register. As clarified in the new internal guidelines published by the Tax Agency in 2018[32], in order to be registered, the person must show that there is a real chance to find employment under the Aliens Act. Moreover, the applicant shall be able to prove that he or she can reside in Sweden for at least one year following article 3 of the Population Registration Act. As a result, an application will be denied systematically for job seekers since it would be not possible for them to fulfil the right to reside requirement with such duration that he or she can be assumed to be living in Sweden for at least one year. Therefore, according to the Tax Agency, a job seeker shall not usually be registered[33].

In this regard, it is necessary to remind that the interpretation adopted by several Swedish authorities is relevant to understand the incorrect transposition of the job seekers' rights in the Aliens Act. As mentioned above, the Migration Agency has not been in charge of registering the right of residence for EU citizens since 2014, thus the responsibility to assess such right is falling under the competence of each national or local authority that EU citizens will have to contact when needed.

[30] The Aliens Act, chapter 3a, section 3, paragraph 2.
[31] Administrative Court of Appeal, Jönköping, Case No 3248-07.
[32] See for more information "Regler och rutiner i folkbokföringslagen" published by Skatteverket on the 26 of February 2018, dnr. 2 04 319440-17/113.
[33] Ibid., p. 46.

4.6 Comments related to the status of pregnant workers in Sweden

According to directive 2004/38/EC and the corresponding national provision in section 3a, paragraph 5 of the Aliens Act, the status of a worker may be retained when the job is lost if:

- The citizen is temporarily unable to work due to illness or accident.
- The citizen suffers involuntary unemployment after having been employed for more than one year and is registered as a job seeker at the local job centre.
- The citizen is involuntary unemployed after completing a fixed-term employment contract of less than a year or who has become involuntary unemployed during the first twelve months and has registered as a job seeker. In this case the status of worker is retained for at least six months.
- The citizen begins a vocational training course. If he or she is not involuntary unemployed, the status of worker shall only be retained if the vocational training course is related to their previous occupation.

However, in this regard it is important to highlight that the CJEU[34] has interpreted the retained worker status broadly, stating that a worker who ceases employment in the context of pregnancy may retain her status as a worker, depending on the circumstances. As the directive 2004/38/EC is silent on this issue, the CJEU held that "*Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking employment, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.*"

Neither the Migration Agency nor any other national authorities seem to have implemented this important principle ruled by the CJEU in the Saint Prix case law, into the Swedish system. This lack of implementation entails that if a pregnant woman is not aware of her rights and she loses the job, there will be a risk that local authorities do decide to refuse some significant benefits connected to her right of residence. Furthermore, by principle this could lead to that the union citizen may be subject to an expulsion measure adopted by the Migration Agency.

4.7 Non-economic active EU citizens, proof of sufficient resources and comprehensive health care requirements

According to Article 7(1)b of the directive, the right of residence of EU citizens is conditional upon having comprehensive sickness insurance and sufficient resources for themselves to ensure that they do not become a burden on the social assistance system of the host Member State during their stay. The provision is correctly transposed by Chapter 3(a) section 1 and 3 of the Aliens Act.

However, the Tax Agency's application of Article 7(1)b has been considered unlawful by several national and European authorities. Firstly, in a report published in 2014, the Swedish Board of Trade clarified the importance of the Swedish social security

[34] Case C-507/12 Saint Prix versus Secretary of State for Work and Pensions, EU:C:2014:2007.

number when a person would try access to public and private services[35]. In its report, it was clarified that the restrictive interpretation of the comprehensive sickness insurance requirement, by the Tax Agency, consisted in refusing the European health insurance card as proof of public sickness insurance. The S1 form was considered the only document able to fulfil the Tax Agency's requirements. As regards private healthcare insurance, the conditions of coverage imposed by the Tax Agency made it practically impossible for any EU citizen to fulfil them. In this respect, it was confirmed that there was no private healthcare insurance product available on the Swedish market that could meet the requirements of the Swedish authorities for this purpose.

Following many complaints submitted by EU citizens[36], the European Commission started a Pilot Procedure[37] requesting the Swedish Government to assess the compliance of the national legislation with the directive and several other legal frameworks related to the right of residence for union citizens[38]. For the matter of the issues connected to the sickness insurance, some improvement has however been made[39]. In 2018, the Tax Agency was requested to change its internal guidelines, including the possibility to submit private health insurance with exemption clauses[40]. However, the use of the European health insurance card as proof for the public comprehensive health insurance requirement is still limited to students. Other non-economic citizens that would try to register with the Tax Agency will be automatically refused as it is stated by the authority in its internal guidelines[41].

This application is in direct contravention of the Commission's guidance on implementation of directive 2004/38/EC[42], which recognises explicitly that "*The European Health Insurance Card offers such comprehensive cover when the EU citizen concerned does not move the residence in the sense of Regulation (EEC) No 1408/71 [now Regulation 883/2004] to the host Member State and has the intention to return, e.g. posting to another Member State.*"

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[35] Kommerskollegium, Moving to Sweden, "Obstacles to the Free Movement of EU Citizens", ISBN 978-91-86575-82-3. Please find on the following link the report in English: https://www.kommers.se/publikationer/Rapporter/2014/Moving-to-Sweden/

[36] Complaints have been submitted both by individuals and organisations advocating for EU rights. In this regard, it would be interesting to know that a collective complaint was filed on the 14th of November 2017 by the EU Rights Clinic and City Mission Gothenburg (Crossroads project). Please see more information on the following link https://ecas.org/free-movement-sweden-complaint/

[37] Pilot procedure Fi2016/03726/S3.

[38] Relevant legislation under assessment is Regulation (EU) nr 492/2011, Directive 2006/123/EG (Services Directive), Directive 2014/92/EU (Payments account Directive) and Regulation 910/2014/EU (eIDAS Regulation).

[39] Solvit, 2018, Den årliga sammanställningen, only available in Swedish on the following link: https://www.kommers.se/Documents/dokumentarkiv/publikationer/2019/Solvit_arsrapport_2018.pdf

[40] See for more information "Regler och rutiner i folkbokföringslagen" published by Skatteverket on the 26 of February 2018, dnr. 2 04 319440-17/113, p. 30, 57 and 58.

[41] Ibid., p. 59.

[42] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

4.8 Waiting time for family members to EU citizens

In accordance with article 10 and 20 of directive 2004/38/EC, non-EU family members also have an automatic right to reside in another member state if they are accompanying or joining the European citizen. For this purpose, the member state where the person moves to must issue a residence card within six months from the day the application was submitted. This rule has been correctly transposed by Swedish law, as stated in Chapter 3a Section 7 of the Aliens Ordinance Act.

Nevertheless, since 2013 there is a systematic failure of the Migration Agency in complying with the six-month deadline. As for the sickness insurance issue, many complaints have been submitted by individuals and organisations to the European Commission reporting an average of waiting time of at least 15 months, given that person submitted an online application with no request of supplement documents and that the family member already lived together with the EU citizen in another country. This information is confirmed by the Migration Agency's website where it is clear that the average time in issuing residence documents to non-EU family members is between 10 to 15 months[43].

To solve this systematic violation of EU and national law, Sweden adopted a new administrative code[44] in 2018 with the purpose to enforce the rights of all individuals that are concerned by a delay during an administrative procedure. This means that if a public authority has not adopted a decision within a six-month deadline, the applicant may submit a request to conclude the case before the same public body that will be obliged to close the case within four weeks[45]. However, this does not seem to eliminate delays in processing applications for residence documents submitted by EU citizens and their families.

Although from a formal point of view the directive seems to have been correctly transposed into the Swedish law, it should be important to recall principle of indirect effect under EU law. Member States' obligation arising from a directive, to achieve the result envisaged by the same legislative instrument and their duty under to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States[46]. The Court has already held that the Commission may ask the Court to find that, in not having achieved, in a specific case, the result intended by a directive, a Member State has failed to fulfil its obligations[47].

[43] It is possible to check the waiting time with an online tool on the following link: https://www.migrationsverket.se/English/Contact-us/Time-to-a-decision.html
[44] The Administrative Procedure Act (Förvaltningslag 2017:900)
[45] Ibid., Article 12.
[46] Case 80/86 Kolpinghuis Nijmegen, EU:C:1987:43, paragraph 12.
[47] Joined cases C-20/01 and C-28/01 Commission v Germany, EU:C:2003:220, paragraph 30.

5 The notion of worker

Even though the notion of" worker" is a fundamental legal concept within the free movement *acquis*, the notion itself is neither defined in Swedish law nor any of the preparatory works implementing directive 2004/38/EC in Sweden. Instead, the notion of worker has been interpreted in Swedish administrative courts' case law as well as in governmental agencies guidelines.

Case law is indeed a source of law within Swedish jurisdiction, but until now the Supreme Administrative Court has not yet ruled on the notion of "worker". The relevant case law has been produced by the Migration Court of Appeal and the Administrative Courts of Appeal. However, the Migration Court of Appeal has ruled on the notion of "worker" in two cases only and this, taking into consideration that the case law by the Administrative Courts of Appeal does not have legal precedence, leads to an uncertainty about the interpretation of the notion of "worker" within Swedish jurisdiction.

For the matter of governmental guidelines, they are not a formal legal source in Swedish jurisdiction. Nevertheless, since there is no centralized registration procedure with regard to the right of residence, the *de facto* interpretation of the notion of "worker" is to a large extent applied at different governmental agencies. Keeping in mind that the amount of precedent case law is quite limited, the agencies' guidelines do have an important practical role for the interpretation of the notion of "worker" within Swedish law.

Therefore, in this chapter the assessment of the notion of worker will, firstly, include the agency guidelines of the Tax Agency, the National Board of Health and Welfare and the National Insurance Agency. These three public bodies agencies are competent on a majority of free movement rights. Secondly, a case-by-case analysis of the Swedish Administrative Courts of Appeal and the Migration Court of Appeal's is provided. This is followed by an overall analysis with regard to both the agencies' guidelines and the courts' case law.

5.1 Governmental agency guidelines

As aforementioned, there is no central registration for the right of residence for EU citizens in Sweden. This leads to that all agencies must make an individual assessment of the right of residence in all errands where EU citizens make claims connected to the free movement rights. Consequently, national agencies do their own assessment of the notion of "worker" and for this purpose the agencies publish internal guidelines that governmental officials should use in the procedures.

5.2 The Swedish tax agency

The Tax Agency has a vital role for the matter of free movement for EU citizens because it holds the competence to register EU citizens as residents. Therefore, the Tax Agency application of the notion of worker is of fundamental importance for an EU citizen worker who is seeking to establish in Sweden. Furthermore, the Tax Agency's interpretation of the notion of "worker" have an impact on other governmental agencies application of the directive.

According to Tax agency's guidelines, a worker is someone who for a period of time does work in return for remuneration. The Tax Agency acknowledges that, with reference to the CJEU's decision in *Genc*[48], it can be enough to work 5,5 hours a week and that the remuneration can be of monetary or, in coherence with the CJEU's decision in Trojani, benefits in kind[49]. However, according to the Tax Agency if an employer is in a difficult financial situation, this can lead to that the future duration of the employment will be questioned. As a result, the agency interprets this as an indication that the EU citizen should not be considered a worker for the purpose of directive 2004/38/EC[50].

Furthermore, according to the Tax Agency's guidelines the employment contract can also affect whether an EU citizen should be considered a worker. This is of particular interest for the matter of destitute EU citizens since they are commonly employed on zero-hour contracts as a first step into the Swedish labour market.

The agency's view is that a zero-hour contract makes it complicated to foresee the duration and amount of the employment relationship. In this context, the agency asserts that if the worker has not yet *de facto* started working on a zero-contract, then the worker cannot be considered a worker for the purpose of the right of residence. In addition, the agency highlights that it is not enough to provide a zero-hour contract only, the EU citizen must also show proof that work has been taken place and proof of guaranteed future work in order to be registered as residing in Sweden. With consideration to the requirement of proof for future employment, it is notable that the zero-hour contracts starts, by law, when the work is *de facto* taking place and ends when the workday finishes. Therefore, such an employment condition will always entail that it is impossible to prove the future amount and duration of employment.

A comparable reasoning is being made by the Tax Agency specifically for contracts with a clause stating "*as long as the assistant assignment lasts*", typically used for employments as personal assistants, cannot be the only proof of work in order to register as a resident in Sweden. Similarly to the zero-hour contracts, the Tax Agency normally requires additional information in order to make future employment presumable.

[48] Case C-14/09 Genc, EU:C:2010:57.
[49] Case C-456/02 Trojani, EU:C:2004:488, para. 22.
[50] Skatteverket, Rättslig vägledning, Uppehållsrätt EES-medborgare, 2019-11-23, https://www4.skatteverket.se/rattsligvagledning/edition/2019.8/330422.html

5.3 The National Board of Health and Welfare

The National Board of Health and Welfare is an expert agency that provides research, reports and guidelines within, among others, the areas of social services, health, medical services and patient safety. The guidelines provided by the board on the notion of "worker" brings forward the criteria set by the CJEU in its case law[51]. The board views the notion of "worker" as constituting of three main characteristics:

- The work must be done for somebody else,
- The work must be done within the context of somebody's else's guidance and,
- The work must be done for remuneration.

Furthermore, it follows from the board's guidelines that the remuneration must not be of a high amount and an internship, an au pair employment and an apprentice can be considered a worker for the purpose of directive 2004/38/EC. The board asserts that the key criteria for the notion of "worker" to be fulfilled are that the work is of such characteristics that it constitutes a normal job-activity on the labour market. Also, precarious contracts, including zero-hour contracts, shall usually fulfill the notion of "worker" criteria according to the board's guidelines.[52]

5.4 The National Insurance Agency

It follows from the National Insurance Agency's guidelines that they only assess residence rights of EU citizens in situations where third-country nationals claim benefits in accordance with regulation 883/2004 as a family member of an EU citizen. Consequently, the guidelines for such assessment are not exhaustive. The agency highlights that the work:

- Must be genuine and effective,
- That the person shall work for a period of time for someone else in return for reimbursement.

Furthermore, the agency asserts that the notion of "worker" is an autonomous EU law concept and must be interpreted extensively. In that respect, an assessment of the worker status must include an examination of all the relevant circumstances, and the fact that the remuneration is so low that the worker needs financial support does not preclude the worker from satisfying the conditions.[53]

[51] C-413/01, Ninnie-Orasche, REG 2004, s. I-3187.
[52] Vägledning för socialtjänsten i arbetet med EU/EES-medborgare, artikelnummer 2017-4-1, p. 15 - 16.
[53] Vägledning 2017:1 Version 7, Övergripande bestämmelser i SFB, unionsrätten och internationella avtal, p. 103 – 104. However, the agency's application of free movement principles is indeed important since the agency is the competent authority on issues that falls within the scope of regulation 883/200453.

5.5 Case-by-case analysis

As described in previous sections, the Swedish case law regarding the notion of worker in upper tribunals are limited and to this day there is no case law defining the notion of "worker" from the Supreme Administrative Court. The national legal authority is primarily the Migration Court of Appeal's landmark case UM 5461-08, which serves as the legal foundation for the interpretation of the notion of worker in the Swedish jurisdiction.

5.5.1 Case law before the Migration Court of Appeal and the Administrative Courts of Appeal

- A Turkish national claimed residence rights as a family member to his Finnish wife who was residing in Sweden and who was working part-time as a seller. The Migration Agency had questioned the right of residence for the EU citizens family member on the ground that the agency considered the number of hours of the employment to be unclear. The Migration Court of Appeal, however, held that the EU citizen family member fulfilled the notion of "worker" even though there was no indicated amount of hours on the contract. According to the court, it was enough that the EU citizen could show that she had been employed part-time for several months.[54]

- The Administrative Court of Appeal in Göteborg did not consider a Romanian couple, who were being reimbursed through rental costs at a camping place for the return of services such as cleaning the camping place's toilets and the public camping space, to fulfill the notion of "worker" for the purpose of EU law. The court did not provide an overall assessment of the employment relationship or a specific analysis of the number of hours the couple worked. Nevertheless, the court concluded that the couple had not shown that the work was not to be considered marginal and ancillary.[55]

- The Administrative Court of Appeal in Göteborg ruled that the social board in the municipality of Karlstad was wrong when they decided not to assess whether a Spanish citizen fulfilled the right to residence as a worker or a job seeker. The EU citizen, who had been working for four months, applied for social benefits eight months after he involuntary lost his work. The social board in Karlstad did not assess whether the applicant had residence rights because in their view an EU citizen's right to social benefits could be denied if the EU citizen would be able to find work in his or her member state of origin. The board's decision had already been overturned in the First instance Administrative Court, who ruled that the social board could not evade responsibility by referring the union citizen back to Spain because the board considered it more likely that the EU citizen would find work there. Nevertheless, the social board appealed this decision by claiming that it was of principle importance that the Administrative Court of Appeal assessed, whether consideration should be made to an EU citizen's possibility of finding work in his or her member state of origin, when deciding on the union citizen's right to

[54] Migration Court of Appeal, 2010-03-24, Case no UM 5461-08.
[55] Administrative Court of Appeal, Göteborg, 2010-06-11, Case no 3177-09.

social benefits. The Administrative Court of Appeal rejected this argument however and stated that there was no reason to make an assessment so wide, of an EU citizen's right to social benefits, so that it included the applicant's possibility of finding work in his or her state of origin. [56]

- The Migration Court of Appeal ruled that a third-country national enjoyed a right of residence because he was married to a Union citizen residing in Sweden. The Migration Agency contested the arguments of the applicant and asserted that, even though the applicant had provided payslips for four months and a contract with a duration for almost two years, the contract did not guarantee a specific amount of work or remuneration and therefore the union citizen could not be considered to enjoy the right of residence. The Migration Court of Appeal reiterated the CJEU's case law in Levin[57] and Raulin[58] and asserted that it is not necessary for a worker to be able to support him or herself and that the work, even though its par-time and low paid, it can be genuine and effective. According to the court the important criteria is that the work is not of such a small amount that it shall be considered marginal and ancillary. In that regard, it was concluded that the provided payslips and contract was sufficient to show that the work was genuine and effective wherefore it fulfilled the notion of "worker".[59]

- A Bulgarian citizen that had involuntary lost his job, after he had been working 80 hours a month for over 12 months, applied for social benefits at the municipality of Upplands Väsby. The social board denied his application stating that he should be considered as a jobseeker rather than a worker and that he did not fulfil that ground for residence. According to the Administrative Court of Appeal in Stockholm however, since he had worked more than 12 months and was registered at the employment office, he should retain his status as a worker.[60]

- The Administrative Court of Appeal in Göteborg did not consider a Romanian citizen, who made 250 - 300 EUR a month from selling magazines on the street, to be a worker. Without any assessment of whether the work was real and genuine the court concluded that this type of work falls outside the scope of the notion of "worker" for the purpose of EU law.[61]

- The Administrative Court of Appeal in Sundsvall ruled that a German citizen who was working as a personal assistant for 25,5 hours a week was to be considered a worker by amending a Tax Agency decision that denied the EU citizen to register as residing in Sweden. The agency denied the applicant to register because of a clause in her employment contract stating that the "*employment ends when the assistant assignment ends*". Such a clause is a standard in the collective agreement applicable for personal assistants in order to safeguard for the situation where a patient does not need the assistant anymore. The Tax Agency argued that this type of

[56] Administrative Court of Appeal, Göteborg, 2010-11-09, Case no 1600-09.
[57] Case C-53/81 D.M. Levin v Staatssecretaris van Justitie, EU:C:1982:105.
[58] Case C-357/89 V. J. M. Raulin mot Minister van Onderwijs en Wetenschappen, EU:C:1992:87.
[59] Migration Court of Appeal, 2013-04-10, Case No. UM 5753-12.
[60] Administrative Court of Appeal, Stockholm, 2014-10-14, Case no 1276-14.
[61] Administrative Court of Appeal, Göteborg, 2015-04-13, Case no 4223-14.

employment was comparable with a zero-hour contract and therefore did not lead to such residence rights which can be used as a ground for registration in Sweden as a residing worker. According to the court however, the employment type, even though it did not fit in to the standard employment type in Sweden, it could not be comparable to a zero-hour. Therefore, it should be considered to fulfill the notion of "worker" and entail residence rights with such duration that she should be registered as residing in Sweden.[62]

- An EU citizen that applied for social benefits and claimed that she had been working for almost three weeks on a strawberry farm was not considered to be a worker by the Administrative Court of Appeal in Jönköping. Even though neither the social board of Olofström municipality nor the First instance Administrative Court questioned that the employment had taken place, the court ruled that there was not enough documentation to support that the applicant had *de facto* been employed. Due to this conclusion, the court reasoned that the applicant could not be considered a worker. [63]

- An EU citizen who had been working for more than 12 months and then involuntary lost her job did not qualify for a retained worker status even though she had registered as a job seeker at the Swedish Employment Agency. The reason for the Administrative Court of Appeal to exclude the applicant from the notion of worker was because, despite she had registered as a job seeker, she had not fulfilled the Employment Agency criteria for registered job seekers[64]. From the courts perspective she could therefore not show that she *de facto* had been looking for new work opportunities after the job was lost and therefore, she could not be considered worker.[65]

5.6 Overall analysis and conclusion

The analysis of the guidelines and the case law does indicate that the lack at national level of a harmonized definition of the notion of "worker" does create differences and inconsistencies in the application of the concept at public agencies as well as in the courts.

The agencies provide for different definitions on the notion of "worker" and even though the National Board of Health and Welfare's and the National insurance agency's definitions are in coherence with EU law, the difference in description, and in relation to the Tax Agency's guidelines, might jeopardize the harmonious application of the notion of "worker". This is also reflected in the case-by-case analysis where the appeal courts in several errands correct quite extensive deviations of the notion of "worker" and of the free movement *acquis*.

Notwithstanding the above, the notion of "worker" is also applied differently and inconsistently by the appeal courts. Even though there is no minimum threshold

[62] Administrative Court of Appeal, Sundsvall, 2015-07-13, Case no 884-15.
[63] Administrative Court of Appeal, Jönköping, 2016-11-03, Case no 1022-15.
[64] A job seeker must report the amount of work he or she has applied on a monthly basis.
[65] Administrative Court of Appeal, Göteborg, 2017-01-10, Case no 4792-16.

concerning hours or reimbursement, it is clear that it is difficult for workers in precarious working conditions and atypical employment contracts to meet the criteria for the notion of “worker”. This might be due to the fact that several cases where the examination of whether an employment is real and genuine, is lacking an overall analysis of all the circumstances in the case relating to the nature of both the activities concerned and the employment relationship[66].

Furthermore, several of the courts’ cases concern applications for social benefits even though the National Board of Health and Welfare’s guidelines on the notion of "worker" is coherent with the directive and with the CJEU case law. This indicates that there is a knowledge gap at local level on how to apply a coherent interpretation of the notion of "worker" and, in that regard, especially concerning precarious employment relationships.

For the matter of the Tax Agency’s guidelines, there are several inconsistencies with the notion of "worker" as stipulated by the CJEU. Firstly, the agency's criteria concerning the employers’ financial situation cannot be considered to be compatible with the notion of "worker" since a requirement on union citizens to provide documentation of the employers financial assets, does not correspond to the objective criteria as stipulated by the CJEU's case- law[67].
Secondly, regarding the agency’s assessment of the zero-hour contracts and the requirement of proof of future work, it must be noted that according to the CJEU in C-357/89 Raulin the nature of the legal relationship between the employee and the employer is not decisive to the fulfilment of the notion of "worker"[68]. According to the Court, member states may not preclude an employee from the notion of “worker” based on the conditions of the employment[69]. Rather, when assessing whether occasional employment is genuine and effective, the nature and duration of the services actually performed shall be taken into account[70].

Thirdly, with regard to the specific requirements on contracts for personal assistant it must be brought to the fore that the *sui generis* characteristics of an employment relationship, for the purpose of national law, cannot affect the notion of “worker” for the purpose of EU law[71]. It must also be reiterated that the Administrative Court of Appeal in Sundsvall has ruled, after assessing the factual nature of such an employment, that it shall be considered to fulfil the criteria for the notion of "worker".

Overall the Tax Agency’s guidelines indicate that the agency’s assessment of the worker definition is a combination of the criteria established by the CJEU’s case law as well as the criteria for the right to register as a resident according to national law. In that regard, the agency seems to apply a dual assessment of the notion of "worker" which consequently leads to uncertainty about whether, and to what extent, the relevant criteria are being examined and assessed. Considering the raised deviations and the dualistic nature of the assessment, the Tax Agency’s application does impede the possibility for workers with short-term contracts to register as residents. Keeping

[66] C-456/02 Trojani, para. 17.
[67] See C-413/01 Ninnie-Orasche, para. 24.
[68] C-357/89 Raulin, para. 10.
[69] Ibid., para. 11.
[70] Ibid., para. 14.
[71] C-456/02 Trojani, para. 16.

in mind that the notion of "worker" has an autonomous meaning within EU law and that it cannot be interpreted restrictively[72], the Tax Agency's dualistic nature of the assessment must be considered as an obstacle to the effective enforcement of the notion of "worker" for the purpose of EU law.

6 The Swedish Population Registration Act and the free movement rights

This chapter provides an overview of the Population Registration Act and the social security number, followed by an analysis of the background of the one-year requirement and the day-to-day rest principle contained in the article 3 of the Population Registration Act, with specific reference to the consequences of its interpretation by the Tax Agency. Finally, the chapter is concluded by an assessment of whether these provisions are compatible with the EU free movement legislation and the CJEU's case law.

6.1 Overview of the legal framework related to the social security number

The Tax Agency is the public authority in charge of tax issues as well as for the national population register[73]. To be registered as resident in the population register, in practice, a person must personally visit one of the Swedish Tax Agency's service offices to make a notification of relocation to Sweden. There, the person fills out a form and submit supporting documents showing that requirements are fulfilled. If the Tax Agency decides that the applicant shall be registered in the population register, he or she must be assigned a social security number that constitutes a unique identification number. Thus, obtaining and possessing a social security number are closely linked to being registered in the population, respectively.

The primary purpose of the Population Registration Act is to determine if and where a person is to be considered a resident[74]. An additional purpose is for the public authority to be able to keep correct and up-to-date personal data of a basic nature[75]. According to the Swedish tax office, the individual records are also considered important in combating and preventing fraud and irregularities[76]. Social security numbers are assigned, among other things, to enable identification of persons and avoid confusion of persons. This function should allow and facilitate information exchange between authorities and organizations.

The registration in the population register and the simultaneous assignment of social security numbers become relevant for two main reasons. One is the birth of the person while the other is her or his immigration to Sweden. In the first case, a child born in

[72] C-456/02 Trojani, para. 15.
[73] Population Registration Act (Folkbokföringslag 1991: 481), section 1, p 3. and Regulation (2017: 154) with instructions for the Swedish Tax Agency, 2 § 1 paragraph.
[74] See for more information the *travaux préparatoires* of the Population Registration Act, 2012/13:120, p. 41.
[75] Proposition, 2012/13:120, the Population Registration in the future that preceded the law change in section 4 in 2014 when a specific condition to prove the right of residence was introduced, p. 35.
[76] This function has been clarified by the Swedish Government in the reply sent to the European Commission during the Pilot procedure started in 2016.

Sweden must be registered if the mother or the father- whose is the guardian- is registered[77]. In the other case, according to sections 3 and 4 of the Population Registration Act, some requirements have to be fulfilled when assessing whether a person who has moved to Sweden should be registered in the population register[78]. When filling the application form the person shall state, among other things, the following information:

- Name, date of birth, country of birth, citizenship, if he/she has a right of residence or residence permit,
- Address in Sweden, which country they last lived in and how long the person intends to stay in Sweden and documents to support the information mentioned [79].

6.2 One-year rule in the Swedish Population Registration Act

The most important requirement that the person has to fulfil in order to be registered in the population register is the presumption to routinely spend his or her leisure time (daily or nightly) in Sweden on a regular basis for at least one year. The regularity that the law refers to is that the person in question should be in Sweden at least once a week or to the same extent but during another time period. This applies regardless of whether the person is a Swedish citizen or EU citizen. The general rule can be found in section 3 p. 1 of the Population Registration Act and may be abbreviated as the one-year requirement or the one-year rule. However, according to section 4, a foreigner, thus a person who is not a Swedish citizen, must have a right of residence, residence permit or otherwise there must be special reasons for being registered in the population register. Hence, it includes EU citizens from another EU member state. According to the legal text, this means that a person is considered to reside if he or she can be assumed to spend the daily rest in Sweden on a regular basis for at least one year. The one-year requirement is linked to the condition of the right of residence in section 4 of the Population Register Act, which only brings obligation for EU citizens while Swedish citizens are exempted from this requirement.

The Tax Agency makes a test of whether the right of residence for a EU citizen has such a duration that it can be assumed that the person will stay in Sweden for at least one year. The Tax Agency assesses the documents that are supposed to prove the right of residence in the future. In its internal guidelines, it has been emphasized that this is an admissibility requirement and no substantiated requirement for a one-year stay. Nevertheless, EU citizen has to prove the duration for his or her right of residence. The proof by documentary evidence of a specific period in the right of residence seems to be a prerequisite for meeting the aforementioned admissibility requirement in section 3 of the Population Register Act. This proves a relatively strong link between sections 3 and 4 that cannot be applied separately by the Tax Agency.

[77] Population Registration Act (Folkbokföringslag 1991: 481), sect. 2.
[78] The formal requirements can be found in the par. 26 and 28 of the Population Registration Act.
[79] Regler och rutiner i folkbokföringsärenden, p. 39.

Moreover, depending on the status of the EU citizen in Sweden (worker, student or non-economic active citizen), the Tax Agency may request that some documents must be presented in order to prove the right of residence, in accordance with section 9 of the Population Register Regulation[80]. Since these documents, that may be requested, are used to assess the residence right condition in section 4 of the Population Registration Act, with its duration requirement, the provision is also relevant for the one-year requirement. It would be interesting to analyse how the Tax Agency relates to the evidence documents mentioned in section 9 of the Population Registration Ordinance. These are likely to be of significance for the assessment of the one-year requirement, although it should only constitute evidence of the right of residence.

This interpretation finds support in the new legal guidance published by the Tax Agency in 2019[81] as well as in its internal guidelines, where it is clear that the EU citizen must be able to show that the conditions for registration in the population register contained in the sections 3 and 4 of the Population Register Act are met. It is also clear from these internal documents that the Tax Agency will reject the notification of relocation to Sweden if the EU citizen cannot prove that his or her right of residence has a sufficient duration. The rejection is then made in accordance with sections three and four regarding the Aliens Act.
In the light of the above, a short overview of the legislative change that took place in 2014[82] must be provided. Before 2014 there was no specific condition in section 4 of the Population Register Act that required EU citizens to have a right of residence to be able to be register. Initially, this meant that the Tax Agency applied only section 3 and its one-year requirement to EU citizens. It was enough to show a passport or national identity card together with a simple statement that they intended to stay in Sweden for at least one year. Normally there was no additional documents or information that were required for EU citizens to provide in order to register in the population register. In addition, there was no examination of whether the applicant fulfilled a right of residence. The assessment made by the Tax Agency was intended to see whether the EU citizen complied with the Population Registration Act at the time of application and not for one year forward. Thus, there was no requirement that the right of residence should last for at least a year or have any duration. Conditions, other than the right of residence, could be taken into account to determine whether the person could be expected to spend his or her daily rest in Sweden for at least one year.

The fact that it became more difficult for union citizens to register with the Tax Agency is supported by the discrepancy between the legal guidance used for the assessment of the right of residence before 2014 and the current one. In the previous document[83], it was stated that assessment must be done partly by the one-year requirement in accordance with section 3 of the Population Registration Act and partly by the residency requirement in section 4. In the legal guidance published in 2019, it says

[80] See for more information the Population Registration Ordinance (Folkbokföringsförordning (1991:749).
[81] Skatteverket Rättslig vägledning, 2019, Uppehållsrätt EES-medborgare.
[82] *Travaux préparatoires* 2012/13:120 "The National Register in the future" that preceded the law change in section 4 in 2014 when a specific condition to prove the right of residence was introduced.
[83] For more information, see the "Folkbokföring av EES-medborgare och deras familjemedlemmar" published on the 6 of May 2013 on the following link: https://www4.skatteverket.se/rattsligvagledning/323636.html?date=2013-05-06

that the Tax Agency, upon notification of relocation to Sweden, will assess whether a EU citizen's right of residence has such a duration that it can be assumed that he or she will stay here for at least one year. Consequently, it is clear that through the introduction of section 4 in the assessment of the one-year requirement the Tax Agency will have to make sure that both criteria are met, and EU citizens must, therefore, demonstrate that the right of residence has a duration so as to meet the one-year requirement. EU citizens such as job seekers or workers with a fixed-term contract of less than one year will be automatically refused to register as a resident in Sweden and by consequence, the issuance of a social security number on this basis.

6.3 What does the one-year rule mean for EU citizens who are economically active?

The Swedish Solvit centre publishes a report every year with statistics regarding the free movement of persons in Sweden and the kind of relevant cases they have to handle with to provide an overview of the internal market situation.

The Swedish social security number has been raised as an issue since 2014 and it has repeatedly been reported as a structural problem by Solvit stating that: The problem is not about incorrect application in individual cases but the fact that the national rules cannot be applied by the competent authority without having consequences for the free movement of people in Sweden[84]. The national rule that Solvit is referring to is the Population Registration Act, and in the report it is highlighted that EU citizens regularly face obstacles when they apply for the social security number, in particular in fulfilling the one-year requirement. The statistics show, without any doubt, that the social security number issue is still well represented as the most recurrent case that Solvit has to handle. In the last report published in 2018[85], there are almost 42 cases related to the social security number and Solvit closes most of them as unsolved, since it is a structural problem that cannot be resolved by the informal cooperation with public authorities.

Complaints received by Solvit do demonstrate that the Tax Agency is often requesting EU citizens to provide additional information or documents with an employment contract in order to fulfil the one-year requirement. The issues have been identified refer to the duration of the employment contract as well as the difficulties to prove that the employer has an economic stability for one-year forward. This is also shown in the analysis on the notion of "worker" above.

In that regard it is clearly stated within the legal guidelines published by the Tax Agency in 2019, that the duration of the employment does play a decisive role in the assessment of the one-year requirement[86]. Consequently, the approval or the refusal of the application does depend on the duration of the employment contract. As regards a permanent work, it should not be a problem to be issued the social security number unless the employer is not able to show that the economic situation can guarantee the payment of the worker´s wage. Documents that have to be submitted by the applicant

[84] SOLVIT Sweden 2016, "Ett urval intressanta ärenden under året", page 4.
[85] SOLVIT Sweden 2018, "*Den årliga sammanställningen*", page 5. http://kommers.se/Documents/dokumentarkiv/publikationer/2019/Solvit_arsrapport_2018.pdf
[86] Rättslig vägledning, Uppehållsrätt EES-medborgare, 2019, section "*Arbetstagare*".

is the employment agreement but, if necessary, the person may need to present additional papers showing that the person is performing the work. Such documents could be, for instance, wage specifications or bank statements showing that salary has been paid[87].

Regrettably, another kind of employment agreement such as fixed-term contract and zero-hour contracts, are common for EU citizens that are new in the Swedish labour market. For this situation, it should be noted that the Swedish Tax Agency´s approach is rigorous stating that such employment forms *per se* are not sufficient to prove that the person has a right of residence with such duration that the stay in Sweden can be assumed to be at least one-year[88]. As a consequence, the refusal, in this scenario, seems to be the praxis unless the person will be able to assure the public authority with additional evidence. An applicant may succeed to demonstrate the right of residence if, for instance, the work has been performed for a period between 3 and 6 months. In such a case, the Tax Agency would consider the possibility for the person who may lose the job after that period to retain his or her status of a worker, under chapter 3a, section 5a of the Aliens Act corresponding to article 7, point 3 of the Directive 2004/38/EC. Once again, this very rigorous evaluation and calculation made by the Tax Agency related to the time of the worker´s performance, does demonstrate that the duration of the employment contract together with the one-year requirement is strictly correlated to the right of residence assessment.

As mentioned above, even the employer financial recourses is relevant in the assessment work accomplished by the Tax Agency. Of course, the public authority will have to make sure that the essential requirements of an employment relationship are fulfilled, as clarified by the CJEU in Lawrie-Blum case law[89]. However, the extent of the investigation seems to go beyond what is necessary in order to assess the employment relationship. The Tax Agency asserts in the internal legal guidance that the company's financial situation can affect the Tax Agency's assessment of whether a person employed by the company has a right of residence[90]. To this regard, it is notable that a complaint was submitted to Solvit Sweden by a Romanian citizen (worker) reporting that the Tax Agency refused the social security number application based on the fact that the employer, could not show financial stability for having a deficit in the tax account. Even though the applicant submitted several documents confirming the payment of the salary the Tax Agency did not change its decision[91].

This interpretation by the Tax Agency is related to the section. 3 and 4 of Population Registration Act which provides that EU citizens must spend at least one year in Sweden to enter in the population register and, consequently, to be entitled a social security number. These provisions should be considered as a clear restriction of the

[87] Ibid., section "*Handlingar som visar att någon är arbetstagare*".
[88] Skatteverket Rättslig vägledning, Uppehållsrätt EES-medborgare, 2019, section *"Timanställning, behovsanställning och assistansanställning".*
[89] C-66/85, Deborah Lawrie-Blum v Land Baden-Württemberg, EU:C:1986:284. The essential feature of an employment relationship can be summarised as follows: 1) Someone 2) who for someone else3) for a certain period of time4) for remuneration5) performs services.
[90] Skatteverket Rättslig vägledning, Uppehållsrätt EES-medborgare, 2019, section "*Handlingar som visar att någon är arbetstagare".*
[91] SOLVIT Sweden 2018, "Den årliga sammanställningen", p. 6.

free movement of persons and workers legislation as well as incompatible with the Aliens Act.

The aim of the directive 2004/38/EC is to simplify the formalities involved in the exercise of the right of free movement. To achieve this objective, the directive attempts to lay down the formalities governing the issue of registration certificates, residence cards and documents attesting to permanent residence[92]. For this purpose, it follows from recital 14 that the Member States are precluded from requiring documents which are not specified in the relevant provisions of the directive, with specific reference to "*the supporting documents required by the competent authorities for the issuing of a registration certificate or a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members*".

In this regard, the discrepancy between the documents that can be used as evidence in accordance with section 9 of the Population Registration Act and article 8 of the directive must be underlined. Keeping in mind that the Tax Agency does investigate the one-year requirement, the right of residence and its duration, by requiring salary specifications, bank statements to the worker or documentation of the employer´s financial situation in the future. This application and the fact that national legislation allows this kind of *modus operandi* by public authorities must be considered questionable for the coherent application of EU law, since it goes beyond what is permitted by article 8 of the EU Directive 2004/38.

Moreover, according to the article 7 of the directive 2004/38 and chapter 3a (section 3) of the Aliens Act, all EU citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they "*are workers or self-employed persons in the host Member State or….*". In addition, primary EU legislation covers the rights and obligations of union citizens who exercise their right to freedom of movement and differentiates between them by reference to whether or not they pursue an economic activity. In particular, article 45 of the TFEU states: "*The freedom of movement of workers shall be secured within the Community*". In addition, the second paragraph adds: "*Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*".

In this regard, the case-law of the CJEU has developed a number of criteria for the application of Article 45 TFEU regarding the short-lived and low-paid nature of the employment relationship. For instance, as concerns the low paid issue, in Levin`s case[93] the Court held that for it to be found that a worker falls within the scope of Article 45 TFEU, that person must be engaged in "*effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary*". In other words, the CJEU established that the decisive factor for the purposes of applying Article 45 TFEU is the nature of the work, viewed objectively, and not the amount of pay received by the worker.

[92] Directive 2004/38/EC, art. 8, 10, 19 and 20.
[93] Case 53/81, Levin.

It is not the duration of the employment relationship, which determines whether it is to be considered genuine and effective. It was first stated in Levin, above-mentioned, that part-time contracts are not excluded from the scope of Article 45 TFEU. Also in the Ninni Orasche`s case[94], it was held that employment for two and a half months was sufficient to confer on the employee the status of Community worker and as long as there is genuine employment, albeit brief or poorly paid, thus the Court has no difficulty in applying Article 45 TFEU. It may, therefore, be inferred from the case-law that there is a tendency to interpret the concept of 'European worker' in Article 45 TFEU broadly, to cover genuine and effective employment relationships of many different types.

6.4 Equal treatment principle and the Population Registration Act

The principle of equal treatment under EU law means that an EU citizen has the right to the same benefits and on the same conditions as the member state's own citizens. All discrimination based on nationality is prohibited. That is, EU citizens shall be treated in the same manner as Swedish nationals as regards, for instance working conditions (such as salary, termination of employment and re-employment), right to further training/education, social benefits, tax benefits and social welfare.

Even if the conditions seem neutral and are applied regardless of nationality, they shall be deemed indirectly discriminatory if there is a risk of an EU citizen finding himself or herself in a less favourable position than would be the case for a Swedish citizen. As clearly stated by article 24 of the directive 2004/38/EC, "*all Union citizens residing based on this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty*".

In the Swedish case, the issue seems to be related to the registration procedure for the issuance of the social security number. Despite the fact that EU citizens fulfil the conditions listed both in article 7 of the Directive and article 3(a) of the Swedish Aliens Act, they are prevented from the access of essential public and private services. *Prima facie*, the one-year requirement contained in section 3 of the Population Registration Act does not directly discriminate EU citizens, as this rule applies to Swedish citizens as well. Given that, even a Swedish citizen returning home and submitting an application to be recorded in the population register will have to show his/her intention to stay in the country for more than one year. Nevertheless, an obligation to prove the right of residence is only put in place for non-Swedish citizens, who include, among others, EU citizens. This means, in practice, that documents such the work contract lasting over a year are not required to Swedish citizens who will need to submit valid passport or national identity card and state in the written application form that they plan to live in Sweden for at least one year[95]. Swedish citizens thus seem to fulfil the eligibility requirement (one-year rule) by only stating that they intend to live in Sweden for at least one year. Therefore, it can be affirmed that the nationality factor plays a significant role in the Tax Agency's assessment of the conditions to be

[94] Case C-413/01, Ninni-Orasche.

[95] On the following link is possible to know the documents needed to register with Skatteverket: https://www.skatteverket.se/privat/folkbokforing/flyttatillsverige/svenskmedborgare/duflyttarensam.4.3810a01c150939e893f31e6.html

registered and there is no doubt that these national rules are applied in a discriminatory manner[96].

Unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect EU citizens more than nationals and if there is a consequent risk that it will place the former at a particular disadvantage. That is true in particular of a measure, such as the Swedish legislation in question, under which a distinction is drawn on the basis of nationality, in that the requirement is liable to operate mainly to the detriment of nationals of other Member States.

Furthermore, these measures are not appropriate to attain the objective which they pursue. As pointed out in the complaint submitted by EU Rights Clinic and City Mission Göteborg to the European Commission in November 2017[97], the national rules pursue the objective in the public interest of ensuring that the Swedish authorities hold the personal details of all persons who are present on its territory. In the particular context of EU residence rights, the Court has recognized that the centralisation of personal data of EU citizens pursues a legitimate aim of contributing to "*the more effective application of that legislation as regards the right of residence of Union citizens who wish to reside in a Member State of which they are not nationals*"[98].

In the complaint is clear that by excluding all EU citizens, who do not work, from registration in the population register, the Swedish authorities are acting contrary to the very objectives of the Population Registration Act and, given that, such an exclusion cannot be considered as contributing to "*the more effective application of that legislation as regards the right of residence of Union citizens who wish to reside in a Member State of which they are not nationals*" within the meaning of the Court of Justice's case law.

Finally, these measures are not capable of objective justification because they go beyond what is necessary in order to attain the objective which they pursue. In this respect, it should be noted that less-restrictive measures other than those set out in the Population Registration Act could be put in place so, for example, as to allow EU citizens who reside in Sweden for less than a year to be registered on the population register. Indeed, this was the very same conclusion reached by the Swedish National Registration Commission in 2009[99].

Likewise, as mentioned in the complaint[100] the directive 2004/38/EC provides a framework that allows member states ample discretion to safeguard the public

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[96] Case C-237/94 O'Flynn, EU:C:1996:206.

[97] Please see more information on the following link https://ecas.org/free-movement-sweden-complaint/

[98] C-524/06 Huber, EU:C:2008:724, para 62.

[99] Slutbetänkande av Folkbokföringsutredningen (SOU 2009:75) (Final report of the National Registration Commission, SOU 2009:75) available on the following link: http://www.regeringen.se/rattsdokument/statens-offentliga- utredningar/2009/09/sou-200975/

[100] Please see more information on the following link https://ecas.org/free-movement-sweden-complaint/

interest. In the first instance, if the Swedish authorities are hesitant to record an EU citizen in the population register because they might lose their right of residence in the future, it should be pointed out that Article 14(2) of Directive 2004/38 provides explicitly for the power of the Swedish authorities to verify that the EU citizen is still meeting the conditions of the directive. Indeed, this is the practice in another Member States that have centralised population registers.

Secondly, if the Swedish authorities are apprehensive of an EU citizen who might abuse their right of residence or acquire it through fraud, article 35 of directive 2004/38/EC provides explicitly for the right of the Swedish authorities to refuse, terminate or withdraw any right of residence that might have been previously recognised[101]. Note also that the Swedish authorities cannot legitimately claim that measures of a general preventive nature are necessary to combat fraud or abuse. It will be recalled that the CJEU has recently held in Case C-202/13 McCarthy that "*In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced … with a high number of cases of abuse of rights or fraud … cannot justify the adoption of a measure … founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself.*"[102]

In view of the above, the rules contained in the Population Registration Act must be considered an obstacle to the free movement of persons, contrary to Article 21 TFEU, which are not capable of objective justification.

7 Access to social benefits, formal requirements and practical barriers

7.1 Overview of the Swedish system

The Swedish system is divided into three general categories of social protection, contributory social security benefits[103] that is based on work, non-contributory social security benefits that are based on residence[104] in Sweden and needs tested social assistance[105]. This chapter focus on the possibility for EU citizens to access these frameworks in order to claim social benefits and assistance, including access to health care[106].

7.1.1 Contributory social security benefits

The Contributory social security benefits comprise 11 kinds of benefits within the following three categories: Parental benefits, Sickness benefits, Old-age benefits and income- based pensions[107].

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[101] Please see again the complaint on the following link https://ecas.org/free-movement-sweden-complaint/
[102] Case C-202/13 McCarthy, EU:C:2014:2450, para 55.
[103] The Social Insurance Code, chapter 6, (Socialförsäkringsbalk 2010:110).
[104] Ibid., chapter 5.
[105] The Social Services Act (Socialtjänstlag 2001:453).
[106] The Health and Medical Services Act (Hälso- och sjukvårdslag 2017:30).
[107] The Social Insurance Code, chapter 6, section 6.

All individuals who work in Sweden are entitled to contributory social security benefits. There is no fixed requirement with regard to the type of employment contract, the amount of remuneration or the number of hours. The main criterion is that the work is conducted on the labour market against remuneration and the National Insurance Agency assesses the overall conditions of the work and the employment relationship. In that respect, the agency examines the services being provided, the type of work, if there is a work contract and if the worker is being remunerated[108].

7.1.2 Non-contributory social security benefits

The non-contributory social security benefits comprise 19 kinds of benefits within the following six categories: Family benefits, benefits for illness and for workers after an occupational injury, special benefits for the disabled, old-age benefits and retirement pensions, survivor benefits and housing support[109].

The criterion for accessing the non-contributory social security benefits is that the beneficiary has his or her genuine residence in Sweden[110]. There is no obligation for EU citizens to show a right of residence in Sweden in order to access the non-contributory social security benefits[111] but there is a requirement to fulfil the resident criteria. For the matter of individuals moving to Sweden, the resident criteria shall be assessed in relation to the *lex specialis* measure in chapter 5, section 3. Accordingly, an EU citizen who has moved to Sweden shall be considered resident for the purpose of accessing non-contributory social security benefits if it is likely that he or she will reside more than a year in Sweden. The National Insurance Agency shall do their own assessment of whether an individual fulfill that criteria[112]. That an individual is registered as a resident at the Tax Agency is a strong indicator that he or she is residing in Sweden but the assessment also includes other indicators such as where the applicant works, if the applicant is registered for taxation, under what conditions the applicant is living in Sweden and where the applicant's family is residing[113].

Nevertheless, the one-year rule in the Social Insurance Code is indeed very similar to the one-year rule in the Population Registration Act and, in accordance with the *travaux préparatoires*[114], the definition of resident for the purpose of the Social Insurance Code shall in principle be the same as the definition the Tax Agency use. This is also supported by the Supreme Administrative Court's decision in case 2785-13 where it was asserted that the resident definition has, by principle, the same meaning as within the Population Registration Act. The Tax Agency's assessment includes a review of, among other, whether the applicant fulfils the right of residence criteria. Such reasoning indicates that the authorities view is that the interest of requiring the right of residence for EU citizens, in order to access the non-contributory social security benefits, is fulfilled since there is a requirement for EU citizens to prove a right of residence in order to register as a resident at the Tax Agency. Moreover,

[108] Vägledning 2017:1 Version 7, p. 70.
[109] Ibid., chapter 5, para. 9.
[110] Ibid., chapter 5, para. 2.
[111] Supreme Administrative Court, case no. 2785-13.
[112] Vägledning 2017:1 Version 7, p. 41.
[113] Ibid., pp. 41 – 42.
[114] Prop. 1998/99:119, p. 86.

considering that the registration procedure at the Tax Agency constitutes a severe obstacle for EU citizens, using that as an indicative precondition to the possibility of enforcing non-contributory social security benefits can obstruct EU citizens to invoke such rights.

7.1.3 Needs tested social assistance

The need tested social assistance, governed through the Social Services Act, has the purpose of providing social assistance to individuals who do not have resources sufficient to meet their own basic needs. It is the local municipality where the applicant is staying or where he or she is residing that is responsible for the social support[115]. EU citizens who enjoy a right of residence do have a right to social assistance under chapter, 4 section 1 of the Social Service Act. This includes EU citizens who obtain residence rights as a job seeker if they can show a genuine possibility of finding work[116].

Notwithstanding the foregoing, if an EU citizen is not registered as a resident at the Tax Agency, even though it is not a formal requirement, it can cause practical issues that impede the enforcement of the right to social assistance. For Swedish citizens, where they are staying and where they are residing is often the same municipality and the applicant's population registration can prove it. For EU citizens who enjoy a right of residence, but without being registered as a resident at the Tax Agency, it is harder to prove which municipality is responsible. Furthermore, without a population registration, EU citizens must prove the right of residence, which, with regard to that the majority of the cases within the case-by-case analysis concerns social assistance, it can prove to be difficult. Due to the practical barriers in accessing to social rights, the person in question may become destitute losing the social protection, which is essential for their life. Finally, EU citizens without the right of residence have the right to emergency aid only, which can include food, accommodation and travel expenses[117].

7.2 Access to health care

Access to health care in Sweden is regulated through the Health and Medical Services Act[118] chapter 8 section 1. The provision stipulates that an individual must be a resident, in the meaning, registered as a resident at the Tax Agency, in order to access the Swedish health care system[119]. Furthermore, EU citizens who are not registered as residents at the Tax Agency can claim a right to health care[120] if they fall within the scope of regulation 883/2004[121].

According to the regulation, an EU citizen who is residing in a member state shall be the subject of that member states legislation with regard to the substantive scope of the regulation[122]. To fulfil this requirement the National Insurance Agency has

[115] Social Services Act, chapter 2a, section 1.
[116] Alien Act, chapter 3a, section 3.
[117] Vägledning för socialtjänsten i arbetet med EU/EES-medborgare, p. 11.
[118] Health and Medical Services Act, (Hälso- och sjukvårdslag 1982:763).
[119] Prop. 1981/82:97, p. 115.
[120] Health and Medical Services Act, chapter 8 section 2, p. 1.
[121] Regulation (EC) no 883/2004 of the European parliament and of the Council of 29 April 2004 on the coordination of social security systems, article 3(1)a.
[122] Ibid., article 11(3)e.

provided for a certificate that validates that an individual is "*residing in Sweden in coherence with regulation 883/2004*". In order to apply for the certificate, the EU citizen must be able to show a negative decision with regard to registration as a resident at the Tax Agency[123]. Unfortunately, the waiting time for a decision could be one year, as Försäkringskassan has to investigate the place of residence of the applicant in accordance with Regulation 883/2004.

EU citizens without a health insurance and who does not fulfil the resident criteria, in accordance with regulation 883/2004, have no right to health care in Sweden. In practice however, emergency health care will be provided but not subsidized.

8 Suggested strategies to overcome obstacles to free movement in Sweden

This fitness check report shows that the free movement legislation for EU citizens in Sweden requires a revision. There are issues relating to the transposition of some provisions, for instance job seekers that need to be immediately addressed by the competent authorities. It is worrying that even national courts are ignoring the fact that the Swedish Parliament advocated a six months rule as a 'rule of thumb' for a right to stay in Sweden searching for a job. As the provision is elaborate today, there will always be a risk that public authorities in charge to assess the right of residence of EU citizens would try to do a restrictive interpretation rather than an extensive one.

As explained in the review of the Swedish Courts' case law, the notion of worker seems to be interpreted by national judges with inconsistency, and often there is a lack of overall analysis of the individual case. Moreover, there is no decision adopted by the Supreme Administrative Court regarding the notion of worker that could be useful to address this issue.

It should be important to remind again that several national authorities are responsible for the assessment of the right of residence, and this situation creates discrepancies and legal uncertainty. To this regard, it would be interesting to note that recently the Swedish Government answered to the European Commission[124] that there are no issues regarding the compatibility of the Population Registration Act with the principle of equal treatment. In particular, the Swedish Government referred to the Supreme Administrative Court´s decision 2017/32 which clarified that there is no obligation for a third- country national to hold a residence permit longer than one year in order to be registered as resident and issued a social security number. The Court affirmed that there is no such requirement in Swedish law[125].

Considering that the Tax Agency is still refusing the issuance of the social security number based on the ground that union citizens do not fulfil the one-year requirement[126], *de facto* violating the Supreme Administrative Court's decision, the

[123] Vägledning 2001:10 Version 15, Vårdförmåner i internationella förhållanden, p. 28.
[124] Letter of formal notice in infringement case n. 2019/4073.
[125] In the answer to the letter of formal notice, Sweden also refers o to another decision issued by the Supreme Administrative Court (2014/6) which affirmed that a decision to refuse a social security number does not have legal effects for the individual.
[126] Skatteverket affirms that the Supreme Administrative Court´s decision does not affect the marge of discretion that the authority exercises when assessing the right to reside and one-year

Swedish Government should take action so that the free movement legislation is applied coherently at public authorities.

This fitness check also showed that the national provisions contained in the Population Registration Act are in violation of the EU law, and it seems that at the national level there is no intention to bring some changes in order to solve these issues on the long-term. The Swedish Government should, therefore, consider to introduce a new provision in the Population Registration Act that would allow the Tax Agency to derogate from the application of the one-year requirement for EU citizens who want to be registered as residents. Similar provisions have already been introduced in the School Act where EU citizens are entitled to access to the language course (right to education) even without being registered in the Population Register[127]. Another example is also the Swedish Ordinance 2015:882[128], which is intended to give access to all categories of EU citizens to Swedish healthcare without further formalities, notably the proof of prior registration for the population purposes. However, it should be noted that there are still issues as concern access to healthcare for EU citizens without a social security number.

The Swedish case has been under assessment for a long time, almost ten years, and the competent authorities have proposed no concrete solutions in order to comply with EU law. Individuals and organizations have submitted many complaints and several Pilot Procedures has been opened in order to investigate if a diplomatic solution could be reached. However, the national rules still constitute an incorrect transposition and application of EU law. Therefore, it would be suitable if the European Commission could open an infringement procedure against Sweden and eventually bring the case before the Court of Justice of the European Union without further delay.

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[127] See for more information Skollagen (2010:800), chapter 22, section 13 and chapter 29, section 2.

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