

The Swedish State, via the Chancellor of Justice
Birger Jarls torg 12
Stockholm

This is a translation of the original Swedish text. Please refer the Swedish original source text for full accuracy in relation to the wording of the petition.

PETITION AND CLAIM FOR COMPENSATION FOR DAMAGES

Claimants	See Appendix 1
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Respondent	The Swedish State, via the Chancellor of Justice
Claim	Claim for compensation for damages

As the legal representatives for the Claimants listed in Appendix 1, we hereby claim compensation for damages from the Swedish State.

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Introduction

Brief summary

1. The Government of Sweden made the decision on 12 November 2015 to reintroduce border controls at Sweden's internal borders. The period of time for the border controls to be conducted have been extended repeatedly. The border controls have been extended most recently on 2 June 2016, to remain in effect until 11 November 2016. The decision to reintroduce internal border controls is based on Article 25 of the rules governing the movement of persons across the Schengen borders, the Schengen Regulation.¹
2. In furtherance of this, since 4 January 2016 bus, train and ferry operators transporting passengers from Denmark to Sweden over the Öresund are required, pursuant to the Ordinance (2015:1074) on the carrying out of Identity Checks in the Event of Serious Danger to Public Order or Internal Security in the Country (referred to herein the "Swedish ID Ordinance"), to check the identity documents (what is known as "carriers' liability"). The Ordinance was adopted based on the Act (2015:1073) on Special Measures in the Event of Serious Danger to Public Order or Internal Security in the Country (referred to herein the "Swedish ID Act"). Most recently on 8 June 2016, the Swedish Government has extended the period of time the Swedish ID Ordinance will remain in effect. Presently, it applies until 4 November 2016.
3. The identity controls significantly decrease the possibilities of commuting between Sweden and Denmark for work in a very intrusive and restrictive manner. The identity controls make the transportation possibilities more difficult and alter the conditions for the integration of the Öresund Region, something which has a detrimental impact on the Region's residents and businesses life.
4. In an implementing decision (EU) 2016/894 of 12 May 2016, the European Council ("The Council") has recommended among other recommendations, that Sweden should maintain proportional occasional border controls, for a maximum of six months following the implementing decision. However, the Swedish ID Act and the ID

¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules Governing the Movement of Persons Across Borders (Schengen Borders Code) (codification), referred to herein as the "Schengen Borders Code."

Ordinance are not encompassed within the reintroduced border controls that are referred to with regard to the Council's recommendations. Instead, the identity controls based on the Swedish ID Act and the ID Ordinance are contrary to the rules and provisions in the Schengen Borders Code and constitute an illegal infringement on the basic rights of the Claimants' and cause them difficulties and harm, which is described in greater detail a bit later in the document.

5. As is described further details in the following, the Swedish ID Act and ID Ordinance are incompatible with
 - (i) the free movement of persons, services and capital as provided under Articles 20, 21 and 77 in the Treaty on the Functioning of the European Union ("TFEU"), and Article 45 in the Charter of Fundamental Rights of the European Union ("Charter of Fundamental Rights");
 - (ii) the free movement of persons and the right to enter into the country where one is a citizen in accord with Articles 2, and 3(2) in the additional Protocol No.4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"); and
 - (iii) the provision in Chapter 2, Section 7 of the Swedish Instrument of Government Act that no Swedish citizen may be prevented from entering the Kingdom of Sweden.
6. The impermissible interference in the fundamental rights and freedoms, and the financial losses that have been caused by the identity controls, gives rise to an entitlement for the Claimants to obtain compensation from the Swedish State on the grounds as described in more detail below. It should be stated to clarify matters that the Claimants' claim for compensation for damages is based on the impermissibility of the identity controls and not on the internal border controls that were reintroduced with the support of the Schengen Borders Code.

The Chancellor of Justice's authority to take a position and express an opinion as to the claims for compensation for damages

7. As provided under § 3 (2) of the Ordinance on the Administration of Claims for Damages against the State, the Chancellor of Justice (referred to herein as the "CJ") handles claims for compensation that are based on an allegation of a breach of the European Union law.
8. This should include claims to compensation based on the violation of the ECHR taking into regard that in Article 6 (3) of the EUF it states that the basic freedoms guaranteed by the ECHR form an integrated part of European Union law as general principles.
9. According to the foundation for the law, the CJ should likewise have the authority to deal with claims for compensation for damages based on an asserted violation of the Instrument of Government Act (see NJA 2014 p. 323). It should be pointed out that such proceedings do not constitute a lawsuit or legal proceeding in accord with Chapter 3, § 2 of the Swedish Tort Liability Act. The prohibition in Chapter 3, § 7 concerning the filing a lawsuit for compensation for damages grounded on an enactment made by the Riksdag (the Swedish Parliament), or a decision of the Swedish Government, if the enactment or decision is not repealed, lacks any application here.

The Claim

10. The Claimants demand that the State be ordered to pay
11. (i) SEK 30,000, plus interest in accord with § 6 of the Swedish Interest Act dated thirty (30) days from the submission of this claim until payment is made to each of the Claimants in No. 1-565 in Appendix 1; and

(ii) the amounts, plus the above interest as stated by the Claimants in the column "Other amounts" in Appendix 1.

General background

The Öresund Region and Öresund Integration

12. The opening of the Öresund Bridge for traffic in 2000 significantly improved the traffic connections between Skåne in Sweden and Själland (Sjælland) in Denmark. This has resulted in increased opportunities for working in one country and living in another. The bridge means a realisation of a coherent labour market region. In connection with this, the Öresund Region, comprising (primarily eastern) Själland and (primarily western) Skåne, has constituted an integrated region in several respects for the past few years. The OECD has designated the Öresund Region as being the most outstanding example of European transborder cooperation. The integrated labour market is the core of the cooperative efforts on and it facilitates the situation where the employers of the Region to be able to find those with the skills they need and makes it easier for those looking for work to find a career position job. This has benefited both growth in these areas Sweden and Denmark by providing employees as well as employers with a larger market to choose from.
13. The residents of the region have been encouraged to take advantage of the what the Region has to offer as a whole, each in their individual way, and successive efforts have been made to reduce the barriers that borders naturally present. The residents of Skåne have been able to take advantage of the larger and more diversified market for their labour in the Copenhagen metropolitan area, higher level of wages, and financial benefits resulting from the differences in taxation. The housing market in Skåne has become more attractive compared to the prices in Copenhagen and its surrounding areas.
14. Nearly 100,000 people travel across the Öresund on an average day, via one of the two routes, either the HH link between Helsingör-Helsingborg or the Öresund Bridge between Malmö and Copenhagen. The travelling time between the urban areas on either side of Öresund (Helsingborg/Helsingör and Malmö/Copenhagen, respectively) has been so short that the commuting time has been comparable with, or shorter than, an ordinary commute from a suburb to similar urban centre in a metropolitan region such as Stockholm.

Prior to the introduction of carriers' liability the travelling time between central Helsingör and central Helsingborg was approximately 15 minutes. It took approximately the same amount of time with the train from the labour-dense areas of Kastrup and Ørestad in Greater Copenhagen to arrive to central Malmö (the Triangle). From central Copenhagen, it took 35 minutes to arrive to central Malmö by train. The entire Öresund Region is connected via train traffic that runs from Helsingör to Helsingborg (and further north) via Copenhagen.

15. During 2015, an estimated more than 16,000 people have commuted daily over the Öresund. Of these, between 8,000 to 9,000 are estimated to have been rail commuters between Malmö and Copenhagen. The commuter traffic goes primarily from residential areas in Skåne to workplaces on Själland.
16. The Öresund train traffic functions as a commuter train between Skåne and Copenhagen, as well as local train in Skåne and in Själland, however also as regional train with distant destinations such as Gothenburg, Kalmar and Karlskrona.
17. The identity controls have primarily affected rail passengers traveling from Denmark to Sweden, via increasing their travelling time, having to change trains more often, having fewer train departures to choose from, experiencing increased delays and increased crowding on the trains. Those who travel internally within Skåne are also impacted by the increased crowding on the Öresund train since the trains often consist of fewer train sets than previously, as the train set-up is utilised to its maximum due to the traffic layup at Kastrup Airport's station, among other reasons.
18. As a result of the identity controls, the capacity of the Copenhagen Airport station corresponds to a single-track station, while there are more trains trafficking the station than previously. The increase in number of Öresund trains is due to that the station is trafficked by six trains towards Sweden per hour during the daytime and evening hours, even though only three of these trains take on passengers, – since three trains are used for transporting the passengers to the airport and three are used to take them the further distance on to Sweden. Some of the trains are operated empty across the Öresund Bridge to Sweden after dropping off passengers at the airport station.

19. Eight train departures from Sweden to Denmark have been removed from the time table during the rush hour period of between 6:00 and 9:00, and ten departures from Denmark to Sweden have been removed between 15:00 and 18:00. This means a total of about 1,700 fewer seats per hour, due to the lower frequency. Where formerly there was 3,800 seats per hour, where now there are approx. 2,100. This further contributes to more crowding during rush hours – in both directions. And the increased crowding on the trains contributes to a poorer travel experience.
20. According to Skånatrafiken's travel planners, the identity controls result in a delay of between 35 and 37 minutes for passengers travelling between Copenhagen Central Station and Lund Central Station.
21. This delay is about the same amount or greater for passengers travelling between Copenhagen Central Station and train stations such as Triangeln/Malmö Central Station (a delay of 40 minutes), Landskrona (a delay of 45 minutes), Eslöv (a delay of 35 minutes) and Höör (a delay of 37 minutes).
22. Approximately 11,600 passengers board the train in Denmark daily before Kastrup Station, and disembark after Hyllie Station on the Swedish side and thus are negatively affected by the full negative impacts of the identity controls.
23. After the introduction of the identity controls, the journey from Denmark to a station in Sweden further than Malmö Central Station also involves two changes of trains with the loss of additional time, as passengers have change trains, which according to the calculation values of the Trafikverket/Swedish Transport Administration, entails a 2.5 times higher sacrifice/price for travellers, compared to normal travel time.
24. The commuters are the group of travellers who are most affected, partly because they are impacted practically every working day and often lack any possibilities to avoid the delays, and partly because they pay for the delay with their own time (as opposed to passengers who travelling on company time).
25. The increased travel time is so significant that it is expected to cause structural impacts in the labour market in the form of that commuters will seek work on the side of Öresund

where they live, and thus are forced to refrain from taking advantage of job opportunities which, prior to the identity controls, were considered to be more attractive than a job located on the side of the Öresund where they resided.

26. The impact of this is that on average the identity controls mean that on an average day the train passengers traveling across the Öresund collectively spent 6,600 additional hours travelling per day. According to Swedish socio-economic models, this corresponds to a cost of SEK 152 million for the first six-months of identity controls.²
27. In addition to this, it relatively frequently occurs that trains from Sweden drive right past Kastrup since there is not sufficient space on the track (the only one, due to the identity controls) that is used for arriving trains. Plus, trains to Copenhagen often pass by Kastrup without stopping, in order to alleviate delays by not stopping at Kastrup. This involves significant delays, even for those travelling from Sweden to Kastrup.
28. The Chamber of Commerce and Industry of Southern Sweden has made an investigation into the financial consequences of the identity controls in the Öresund Region.³ This shows, among other things, that the border controls cause losses for the community as a whole in the amount of SEK 1.5 billion annually, based on the relationship to traffic volumes in 2015. It also shows that the anticipated increased integration will slow down, involving further major losses of economic value.

The Claimants and their activities

29. All Claimants are Öresund commuters, or have previously been Öresund commuters, during the time that the ID controls at the border have been implemented.
30. The Öresund commuters who constitute the Claimants in this petition:
 - (i) have commuted over the Öresund for work for a minimum of two months, with a daily travel time that has increased by at least 30 minutes per day;

² The Öresund Institute, The Common Labour Market over the Öresund is Shrinking – the Consequences of the Introduction of the Identity Controls and Border Controls between Denmark and Sweden, Part 2 July 2016), [Appendix 2](#). Report from the County Administrative Board of Skåne 23/09/2016. [Appendix 3](#) and the "Study from SWECO" 14/10/2016. [Appendix 4](#).

³ The Costs of the Border Controls – Financial consequences of the identity controls in the Öresund Region, [Appendix 5](#).

“With two controls, a bunch of delays/cancelled departures and unsynchronised connections between the Öresund trains/Pågatåg trains, my trip home becomes anywhere from 2 to 5 hours long.”

- (ii) have been refused embarkation by the carrier due to not having presented an acceptable valid identity document;

“The inspectors there (at Kastrup) refused to let me board the train since my valid ID wasn't a passport or driving license. They said that only thing I could do was to wait until the Swedish embassy opened on Monday - and this was Saturday lunchtime!”

- (iii) have been forced to quit their job or have been laid off due to circumstances caused by the identity controls;

“I wasn't able to see the end of the snowball effect that had begun, and I was far too concerned about my own health and well-being, so I took the risk of becoming unemployed and I quit, but without having another job to go to.”

- (iv) have moved to Sweden, or respectively to Denmark, due to the increased travel times to their place of work;

“I had to sell my home in Sweden, in order to buy a more expensive one in Copenhagen. My two children and I have been forced to go through an international relocation, with all the administrative hassle this entails.”

- (v) have been subjected to more expensive commuting costs of at least SEK 1,000 per month due to switching to commuting by automobile or other changes in travel behaviour caused by the identity controls;

“For eight years, I commuted 90 minutes each way, but with the introduction of the identity controls I was forced to change to commuting by car. Also, I had to take out a bank loan to buy a car.”

- (vi) or have been negatively affected in other ways resulting in a right to compensation.

“Sleepless nights, migraines due to tiredness, tears that would be sufficient to fill an entire ocean, early mornings, late nights, anxiety, stress, running with my heart in my throat between the train platforms, frustration at the stations due to delays, the eternal cold in all the waiting.”

Internal border controls travelling into Denmark

31. As has been outlined above, the Öresund Region has thus long functioned as an integrated labour market and region, even though it lies in two different countries. Since the arrival of the Öresund Bridge, commuters have freely travelled across the borders in such a way that is essentially identical as to what occurs in major metropolitan regions which are in a single country, such as the Stockholm region for instance.
32. The situation changed in a first stage on 12 November 2015, via the decision of the Swedish Government that Sweden was to introduce internal border controls for travelling into Denmark.

This internal border controls means that the police check people who come to Sweden at any of the three border crossings that exist on the Swedish side of Öresund (the port of Helsingborg, Lernacken (for motor vehicles going across the Öresund Bridge), and Hyllie station (for trains going across the Öresund Bridge). Decisions to continue internal border controls have been made several times thereafter.

33. Internal border controls within the Schengen area are governed by specific rules (described in more detail below), which means inter alia that controls may only be used in exceptional cases under certain specified conditions, in addition to which, the controls need to be reported to, and in some cases approved by, the European Commission (the “Commission”).

34. As previously discussed, on 12 May 2016 the Council adopted, an implementation decision concerning a recommendation that makes it possible to continue with temporary controls at the internal borders in exceptional circumstances, among other places at the Swedish ports in the South and West Police Regions, as well as at the Öresund Bridge. It states that before a Member State imposes such controls, it should engage in discussions with the neighbouring Member States that will be affected, in order to ensure that the controls at the internal borders are only performed at those parts of the internal border where it is deemed necessary and proportionate pursuant to the Schengen Borders Code.

The introduction of the Swedish ID Act

35. In 2015, more people than ever arrived in Sweden for the purpose of seeking asylum in the country. For this reason, on 17 December 2015 the Swedish Parliament adopted the Act (2015:1073) on Special Measures in the Event of Serious Danger to Public Order or Internal Security in the Country. The Act came took effect on 21 December 2015, and remains in effect for a period of three years.
36. According to § 2 and § 3 of the Swedish ID Act, under certain preconditions the Government of Sweden may issue ordinances concerning identity controls for carriage that is performed by bus, train or passenger ship to Sweden from another State. A prerequisite for the Riksdag's delegation of authority to the Government is the existence of a serious threat to public order or domestic security of the country. Furthermore, such measures may be taken in order to maintain law and order, or to protect domestic security. These measures may remain in force only for six months at a time.

37. The Swedish ID Act (§ 3) contains a delegation of authority to the Government, or the authority designated by the Government, to issue ordinances concerning identity controls at the carriage by bus, train or passenger ship to Sweden from another State. It states in § 4, that the Government's possibility to delegate to lower public authorities does not apply to ordinances concerning the supervision and monitoring of identity controls or sanctions (fines or administrative penalties).
38. The Swedish ID Act has been amended by SFS 2016:724 with the effect that a provision in § 6 concerning an interim period of 14 days with the extension of the applicability of the ID Ordinance is repealed. The ID Ordinance was amended by SFS 2016:723, whereby the Swedish Police Authority is empowered to exempt certain categories of persons under the age of 18 years from the requirement needing to have identity documents.

The Ordinance which mandates compulsory identity controls to be conducted by transportation carriers

39. On the day following the Swedish Parliament's decision on 18 December 2015, the Government of Sweden issued the Swedish ID Ordinance. Section 3 of the Ordinance reads:

A carrier must verify that the passengers that the carrier transports to Sweden from Denmark by bus or by train hold an acceptable valid identity document with a photograph. The requirement to hold a valid identity document with a photograph does not apply to individuals under 18 years of age when traveling accompanied by a parent who can produce a valid identity document with a photograph.

The first paragraph also applies to the transportation with passenger ships undertaking voyages which are 20 nautical miles or less.

40. According to § 4 of the ID Ordinance, the Swedish Police Authority is to verify that the carrier has fulfilled its obligation to conduct identity controls. An administrative financial sanction (a fine) in the amount of SEK 50,000 per transport occasion will be levied against the carrier if it is unable to show that it has fulfilled its obligations to

implement the identity controls (§§ 5-6). The Swedish Transport Agency hears matters relating to administrative financial sanctions (§ 4).

41. According to § 15 of the ID Ordinance, the Swedish Police Authority may issue more detailed ordinances concerning its own checks according to § 4. However, this delegation of authority should not be in effect due to that the Government may not delegate the right to issue such ordinances to a public authority pursuant to the Swedish ID Act. If the Swedish Police Authority were to issue such ordinances, these consequently would be invalid. As described below, the Police have also refrained from issuing ordinances concerning the checks according to § 15 of the ID Ordinance.
42. The carriers who are required to carry out the identity controls will not be given any right to financial compensation for this in either the ID Act or the ID Ordinance.
43. The ID Ordinance took effect on 4 January 2016. This Ordinance has been extended, as stated above, presently to 4 November 2016.

Concerning the legislative process

44. The Swedish Government has an obligation pursuant to Chapter 7, Section 2 of the Instrument of Government Act to seek the requisite information and opinions from the relevant public authorities, and to the extent needed from municipalities, associations and organisations, and individuals. The consultation period should be for a reasonable period of time so as to provide the consultative instances a genuine opportunity to familiarise themselves with the proposal, consider it, and draft a consultation response.⁴ With reference to that, certain circumstances relating to the preparation that preceded legislation concerning the identity controls should be emphasised.
45. The Government's report for the preparation of this matter in the Government Bill for the Swedish ID Act (Prop. 2015/16:67) does not give the impression that the process was remarkable or unusual in any way. The Government states (p. 2) *inter alia* that in connection with the Council on Legislation's statement of opinion, comments have

⁴ Refer to the Council on Legislation's Statement of Opinion and Comments 2012/13; KU20

been obtained from the Chancellor of Justice, Court of Appeal in Stockholm, Swedish Police Authority, Swedish Migration Board, Swedish Civil Contingencies Agency (MSB), Swedish Transport Agency, Swedish Coast Guard, Swedish Customs, Swedish Association of Local Authorities and Regions (SALAR), Skånetrafiken, Association of Train Operating Companies and Carriers via the Swedish Bus and Coach Federation. It also states that the Swedish Transport Administration and SJ AB have submitted comments.

46. A completely different description of the preparatory work is apparent from the Council on Legislation's statement of opinion on the draft law concerning special measures in the event of serious threat to public order or domestic security of the country, Appendix 6. In the Council on Legislation's statement of opinion, it is clear that the draft law has been prepared in haste and that the consultation period was exceptionally short. It can be seen from the statement of opinion that was received that the draft proposal was received 30 November 2015, with a request for a response by 2 December 2015. It is also apparent, somewhat surprisingly, that a number of very important respondent consultative bodies, including the Swedish Police Authority, Swedish Migration Board, Swedish Transport Agency and Swedish Association of Local Authorities and Regions, have been unable to formulate a written opinion in the extremely short period of time that was available to them. With a closer examination of the consultation procedure, it is clear that the only one of the above consultative bodies that has successfully managed to provide a written consultation response is the Chancellor of Justice (Opinion 02/12/2015, Appendix 7) and the Court of Appeal in Stockholm (Opinion 02/12/2015) together with SJ AB who without being asked submitted their comments on 02/12/2015. The views of the Swedish Police Authority, Swedish Migration Board, Swedish Civil Contingencies Agency, Swedish Transport Agency, Coast Guard, Customs Service, Swedish Association of Local Authorities and Regions, Skånetrafiken, the Association of Train Operating Companies, Swedish bus companies and Swedish Transport Administration have been obtained, according to the Council on Legislation, through telephone calls with anonymous government officials at the Ministry of Enterprise and Innovation. The comments that have been submitted have been summarised in the form of memoranda and notes, which as far as can be inferred were prepared by the anonymous government officials who conducted the conversations. The Swedish Bus and Coach Federation has also submitted a written

statement on 01/12/2015, where in which it states very peculiar odd that Svensk Kollektivtrafik – The Swedish Public Transport Association is not present as a consultative body.

47. In addition to the bodies set out in the Council on Legislation's comments, observations have also been received from the Chamber of Commerce and Industry of Southern Sweden, National Board of Trade, Swedish Shipowners' Association and UNHCR, although, as it is understood, they have not been consultative bodies which have received a request from the Government to comment. In its opinion (06/12/2015) the Swedish Red Cross stated that the association not been involved in the preparatory procedure, even though it specifically asked about this between 24 November 2015 and 4 December 2015. In the Swedish Red Cross' opinion, it also noted the lack of consultations with any stakeholders from the civil society.
48. What has been said above implies that the Government failed to request consultation responses from governmental agencies and individuals who should have been given the opportunity to comment, pursuant to Chapter 7, § 2 of the Administrative Procedure Act." It should be noted in particular that this includes the National Board of Trade. There should be no doubt that a public authority that has the responsibility for matters relating to foreign trade, the EU's internal market and EU trade policy, in addition to the promotion of the proper application of EU law in Sweden and the promotion of free movement, is a relevant authority concerned with the matter according to Chapter 7, § 2 of the Administrative Procedure Act, concerning the legislation with the present approach. Furthermore, the consultation bodies have been given an extremely short period of time to familiarise themselves with the relevant legislative proposal and draft law, something which involves complex legal issues, and subsequently they did not even know to whom they were to submit their comments to. No real possibility was provided for them to be able to familiarise themselves with legislative proposal and draft law, to consider it, and then submit a consultation response.
49. The Government's exclusion of the National Board of Trade as a consultation body in and of itself constitutes, whether it is due to negligence or a deliberate exclusion of a public authority that could be expected to criticise the proposal from the aspect of European Union law, compelling evidence that the preparation of the Swedish ID Act

and ID Ordinance does not fulfil the requirements of the Swedish Instrument of Government Act. As mentioned above, the National Board of Trade submitted its statement of opinion, on its own initiative, on 7 December 2015 ([Appendix 8](#)). The statement indicates that the National Board of Trade lacked an assessment of how the proposal relates to the Schengen acquis and Sweden's obligations pursuant to other international conventions. Furthermore, in a study dated 21 December 2015 ([Appendix 9](#)), the National Board of Trade found that the introduction of the ID controls constitutes an obstacle to the free movement of goods, services and people.

50. Despite this, and that the Council on Legislation expressed concerns, along with several respondents, about the legislation in relation to inter alia European Union law, the Government's analysis in the Government Bill of its compatibility with European Union law is limited to three sentences:

“The EU legal framework respects that the Member States must have a space within the framework of the Treaty to take the measures necessary to maintain law and order and to safeguard domestic security. Therefore the EU legal framework does not constitute an obstacle to an authorising law such as that being proposed. If the Government decides to issue ordinances on the basis of such a law, EU law must of course be respected. The ordinances must also be designed so that they do not conflict with other international obligations, such as the Geneva Convention.”⁵

51. The above means that with the preparation of the Swedish ID Act and the ID Ordinance, it is contrary in several respects to the requirements for preparation as laid down in the Swedish Instrument of Government Act. This conclusion is shared by the Council of State in its Opinion which noted that the draft law was based on an unsatisfactory preparatory basis. This was particularly serious according to Council on Legislation due to that the proposal included legislating an exemption similar to a derogation and, among other things, a restriction on personal freedom. The Council on Legislation had a negative opinion concerning the legislative proposal and draft law. Likewise, the Chancellor of Justice, who was given the opportunity to comment on the Council on Legislation's statement of opinion, expressed a negative opinion concerning

⁵ Prop. 2015/16:67 p. 10.

the implementation of the draft law and stated that the implementation of a statute that gives the Government sweeping and vaguely defined powers should be preceded by a far more detailed analysis.

The Schengen Acquis

52. The starting point under the current law is that no border controls are to take place within the Schengen area. The only possible legal basis for Sweden to derogate from this general rule is the Schengen Borders Code. The identity controls that have now been established via the adoption of the Swedish ID Act and the ID Ordinance can hardly be seen as anything other than an integral part of the border controls as it means a *de facto* inspection at an international border decided upon by a Member State where people are permitted to cross the border only under certain prerequisites.
53. Furthermore, the requisite condition of a “serious threat to public order or domestic security” in the Swedish ID Act and ID Ordinance corresponds to the requirements that lays the ground for the right to reintroduce border controls at the internal borders as provided under Article 25 of the Ordinance. The legal basis for the introduction of the identity controls is therefore in this respect, as explained further below, the Schengen Borders Code, which establishes the general EU framework for border controls.
54. Pursuant to Article 4, Member States must act in accordance with relevant European Union law, including the Charter of Fundamental Rights, when applying the Schengen Borders Code.
55. If there is a serious threat to public order or internal security in an area without internal border controls, pursuant to Article 25 the Member State may reintroduce border controls for a limited period of time. If a Member State decides to reintroduce border controls at internal borders, Article 32 of the Schengen Borders Code stipulates that the relevant provisions of Title II shall be applied.
56. Title II concerns the external borders and according to its Article 6 (1) border controls must be carried out by border guards in accordance with the provisions of the Schengen Borders Code and in accordance with national law. Article 2 (14) defines a border

guard “as a public official who, in accordance with national law, works at a border crossing point or along the border, or in the immediate vicinity of that border, and who pursuant to this Ordinance and the national legislation of each Member State, conducts border controls.

57. Therefore, border controls must be performed, according to the Schengen Borders Code, in accordance with the provisions in Title II above. These provisions mean that the controls are to be carried out at the border and by special border guards. This does not extend to or encompass the identity controls that the passenger transportation carriers have been required, by the Swedish ID Act and ID Ordinance, to conduct. For that reason alone, the identity controls are not within the border controls which may be permitted to be performed pursuant to Title II.
58. It can be mentioned that Sweden and Denmark (SÖ 2000:15) have entered into an agreement concerning law enforcement cooperation in the Öresund region with the aim to take measures against threats to public order and security as well as for the preventing and taking of legal measures against crime (Article 1). This cooperation also exists in the event that any of the contractual parties temporarily resume the control of persons at the border. There is thus a possible scheme for Sweden to carry out the control of persons in cooperation with Denmark, instead of passing the responsibility for this on to the private sector via carriers’ liability. By means of such cooperation, the identity controls could have been implemented in a manner that would have minimised the negative effects on the Öresund’s commuters.

The Identity Controls

The passenger transportation carriers’ identity controls

59. The description above shows that the legislation concerning the identity controls was implemented without the legislative matter being prepared in the procedure as stipulated in Chapter 7, § 2 of the Instrument of Government Act. This inadequate preparation has, as noted above, meant that the proposal’s compatibility with European Union law, with Sweden’s international obligations or Swedish superior legislation has not been reviewed. This has led to that the ID law and ID Ordinance has been adopted

despite the ordinances, in such essential aspects, are contrary to the aforementioned ordinances. As described in this petition nor has the legislation been drafted in a manner that satisfied the quality requirements normally imposed on Swedish legislation.

60. The obligation of passenger transportation carriers to conduct the identity controls came into force on 4 January 2016, as mentioned above, seven working days after the ID Ordinance was approved and it was decided upon and announced to the carriers. Even with regard to this, the passenger transportation carriers did not have the possibility to establish the identity controls pursuant to the ordinances.

Furthermore, according to information available, the carriers reportedly have found it to be exceptionally difficult to assess how the ID Ordinance is to be applied. The text of the statute suffers from serious shortcomings in respect to what the carrier's obligations are in actuality. Nor have any rules been issued on identity controls from any public authority, probably partly due to the very scarce time available, but above all, as stated above, due to the fact that the ID Ordinance – as envisaged in the ID Act – does not authorise the police or other public authority to issue such ordinances.

61. The Police have indeed published (and several times revised) a document regarding the application of the ID Ordinance where the Police state its “interpretation” of the Ordinance, Appendix 10 a-d. It is unclear, however, if one can rely on this interpretation, as it was not issued via an Ordinance (and nor does it fall within any delegation of authority for such ordinances) and explicitly is addressed only to the police employees (see the preamble of the Appendix).
62. Furthermore, it is the Swedish Transport Agency - and not the Police - who makes decisions on fines or other administrative penalties. The Swedish Transport Agency has not stated, as far as is known, its interpretation of the ID Ordinance or otherwise in any manner indicated the perception of when the fine must be imposed. According to information in the press on 30 March 2016, the Swedish Transport Agency has written off 25 out of 26 instances of notified cases involving administrative fines. We have repeatedly sought information from the Swedish Transport Agency concerning pending cases, without yet obtaining any information from the Agency. Nor can one expect

rulings for the guidance of the correct application of the legislation in question from the Agency.

63. What has been said above has led to a situation where the carriers have been forced to interpret their obligations under the ID Ordinance on their own. Given the ambiguous text of the Ordinance and the threat of administrative fines – millions of Swedish kronor per day for the major carriers if one interprets any fundamental rule incorrectly – most carriers appear to have chosen to interpret the sanctioned area extensively. In other words; in case of doubt they have chosen not to accept uncertain documents as acceptable identity documents. Moreover, this approach appears essentially shared by the Police in the written interpretation of the ID Ordinance that they have produced.
64. A large majority of the passengers whom the carriers have been forced to reject appear to be Swedish citizens and other EU citizens who have the right to enter Sweden (in the case of Swedish national, even a right protected by the ECHR and the Instrument of Government). According to the formal communication from the Swedish Police, the carriers must refer these people to travel either on the Oresund Bridge in a private vehicle (presumably taxi) or contact the Swedish Embassy in Copenhagen. The Police and prosecutors have made statements that any party transporting an individual without a valid identity document to the Swedish border risk being suspected of human smuggling. This has led to a situation where taxi drivers are refusing to accept passengers who do not have identity documents. Furthermore, the fact that it concerns a highly questionable interpretation of the Swedish Aliens Act (2005:716) and its judicial precedent means that the situation becomes a sort of “Catch 22” for those lacking identity documents.

Double controls – the transportation carriers’ identity control is followed by a control conducted by the police

65. As mentioned above, what generally occurs is that the Swedish police perform internal border controls on individuals who are entering Sweden by way of Denmark. What this in practice means is that individuals traveling from Denmark to Sweden first get their identity documents checked by the transportation carriers. For train travel, that means that travellers must get off the train at Copenhagen Airport in Kastrup and take the next

or the next train after that one (depending on how long the queue for the identity control is). When the passengers (10-15 minutes later with rail and ferry traffic) arrive at Hyllie station, their identity documents are again inspected, but this time by the police within the framework for the internal border controls.

66. At peak times, the duplicate controls mean further delays, queues and overall, a much longer journey time. In a study presented in June 2016, [Appendix 11](#), where one in ten rail commuters traveling across the Öresund strait participated, 64 percent stated that they are impacted by increased stress ever since the identification and border controls were introduced. Seventy percent of the train commuters were greatly impacted by not being able to know when they would arrive. Fifty-nine percent have begun to travel at other times, 23 percent take their car more often and 12 percent have started carpooling.

Carriers' liability cannot be introduced with the temporary reintroduction of border controls at internal borders

67. The existing rules in the Schengen acquis concerning carriers' liability are only applicable in relation to third countries. The Schengen Convention's Article 26 of and Council Directive 2001/51/EC (see Annex V, Part A, 2 (a) of the Schengen Borders Code) stipulates that Member States undertake to introduce penalties for carriers who transport aliens who do not hold the necessary travel documents from a third country to their territory, by air or by sea.. Within the Schengen acquis, carriers' liability includes the obligation for carriers to arrange the return travel for passengers who are refused entry.
68. According to Article 32 of the Schengen Borders Code, it is the provisions contained in Title II of the Schengen Borders Code that are applicable if temporary border controls are reintroduced at internal borders. As above stated, section II does not establish carriers' liability when performing the identity controls. As stated above, the Schengen Borders Code does not give a Member State, in this particular case Sweden, the possibility to introduce the obligation for carriers to perform the identity controls at international borders.

69. It should be mentioned in addition that in a report from 2010 from the Commission to the European Parliament and the Council on the application of Chapter III (border controls) in Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code, [Appendix 12](#)), it states that the internal borders may be crossed at any point without any border check being carried out, irrespective of the individual's nationality. It is expressly pointed out (p. 3) under the heading Abolition of Border Control at Internal Borders (Article 20) that the transport carrier's liability to arrange for return travel for passengers who have been transported by land, air or sea is not applicable to traffic connections within the Schengen area. Later under the heading Applicable Law (p. 9), it is stated that carriers' liability is not applicable with the reintroduction of border controls.

70. Even an infringement procedure initiated in 2012 by the Commission clearly confirms that carriers' liability should not be present within the Schengen area. In a case concerning the Czech Republic, the Commission has stated the following in what is referred to as a "Letter of Formal Notice" [Appendix 13](#): *"Any imposition of carriers' liability in the context of intra-Schengen flights is in breach of the provisions of Title III of the Schengen Borders Code (abolition of border control at internal borders, reintroduction only temporarily in specific exceptional circumstances). Carriers' liability with regard to intra-Schengen flights would mean a clear circumvention of these provisions in the sense that Member States would have the possibility to establish an obligation for carriers to carry out systematic checks on the territory of another Member State on persons crossing the internal borders similar to those which only travellers on flights crossing external borders of the Schengen area are subject to. The provisions of the Chicago Convention that are mentioned by the Czech authorities in their reply are not relevant in this context since they explicitly refer to situations in which travellers must be controlled, unlike the situation described above when crossing internal borders."*

71. It has additionally been stated in the document:

"Also, carriers' liability does not apply when border control is temporarily reintroduced at the internal borders of the Member States pursuant to Article 23 and

following of the Schengen Borders Code, as stated by the Commission in its report on the application of Title III (Internal Borders) of the Schengen Borders Code (Report from the Commission to the European Parliament and the Council on the application of Title III (Internal Borders) of the Schengen Borders Code, COM (2Q 10) 554 final)”

72. The matter has since been followed up by the Commission by means of a Reasoned Opinion, where the Commission requested that the Czech Republic should amend its legislation so that sanctions are not imposed on carriers when they transport aliens lacking appropriate travel documents on flights within the Schengen area. In this connection, the Commission stated the following in 2014 pursuant to a “Memo” from the Commission dated 20 February 2014, Appendix 14, p. 5-6:

“Schengen: Commission asks Czech Republic to bring its national law on carriers’ liability in line with EU rules.

The Commission has today formally requested the Czech Republic to amend its legislation to ensure that penalties are not imposed on carriers when transporting foreign nationals without the relevant travel documents on intra-Schengen flights. The Commission has issued a reasoned opinion asking the Czech Republic to review its national legislation in this area. If the Czech Republic does not inform the Commission within two months of measures taken to ensure full compliance with their obligations under the Directive, the Commission may decide to refer the country to the European Court of Justice.

According to EU law (Convention implementing the Schengen Agreement of 14 June 1985 as well as Council Directive 2001/51/EC), carriers are liable that persons whom they bring into the territory of the Member States are in possession of the necessary valid travel documents and should be imposed sanctions when transporting insufficiently documented passengers. However, this only relates to situations in which carriers transport third-country nationals into the territory of the European Union. Carriers’ liability is therefore not applicable to internal flights within the Schengen Area or to EU citizens. Imposing such rules in the context of intra-Schengen flights means that carriers are obliged to carry out systematic checks on persons crossing the

internal borders similar to those that only travellers on international flights are subject.”

73. With a query to the Commission, the Commission has made notification that the above matter was closed as follows:

“The Commission closed the case by a Decision taken on 16 October 2014. The reason for the closure has been that new legislation was passed and entered into force in Czech Republic (Act No. 101/2014) specifying that the carriers’ liability applies only in case when a carrier transports undocumented passengers on non-Schengen flights.”

74. Furthermore, it can be finally noted in this context that in response to a query from the European Parliament on 29 July 2015 on behalf of the Commission the current EU Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, again expressed the above assessment that carriers’ liability is impermissible within the Schengen area ([Appendix 15](#)).
75. The Commission has thus repeatedly made the assessment that carriers’ liability cannot be imposed on intra-Schengen transportation. The Commission has also expressly stated that carriers’ liability may not be introduced on the temporary introduction of internal border controls under the Schengen Borders Code. The ID Act and the ID Ordinance which introduces carriers’ liability with the temporary imposition of internal border controls is therefore contrary to the Schengen Borders Code.
76. As stated in the foregoing, on 12 May 2016 the Council adopted a recommendation, in accordance with the Schengen acquis, on temporary checks at the internal borders in exceptional circumstances that pose a risk to the overall functioning of the Schengen area. The border controls in Sweden recommended by the Council corresponds to the border controls which the Swedish Police Authority carried out in pursuant to the previous Governmental decision. It should be particularly emphasised that the recommendation expressly states that it permits border controls relating to the border controls that are carried out under Article 29 of the Schengen Code and as Sweden is concerned in the Swedish parts of the South Police Region and the West Police Region, as well as at the Öresund Bridge. The recommendation thus does not represent an any

change to the above-described position that carriers' liability is impermissible with internal border controls.

The grounds for the claims

The identity controls seriously harm the Claimants

77. The Öresund commuter constituting the Claimants in this petition have been negatively affected by the identity controls in a variety of different ways. Each Claimant in this petition has described the inconveniences which arose for him/her as a consequence of the identity controls. Their stories have been attached to this petition. Against the background of these stories, the Claimants fall within one or more of the following categories: (i) to (vi).

78. *Increased travel time*

- (i) These commuters have commuted over the Öresund for work for at least two months, with a daily travel time that has been increased by at least 30 minutes per day, which additional travel time has been brought about by the identity controls;

Been refused embarkation

- (ii) Commuters in this category have been denied embarkation by the carrier due to that they have not held a valid identity document;

Have quit their job

- (iii) Commuters in this category have been forced to quit their work or have been laid off due to circumstances caused by the identity controls;

Moved their residence from Sweden to Denmark or from Denmark to Sweden

- (iv) Those in this category have been forced to move to Sweden, or to Denmark respectively, due to being subjected to increased travel times to arrive to their place of work;

Commuting expenses have increased

- (v) These commuters have been subjected to more expensive commuting costs, in an amount of more than SEK 1,000 per month, due to switching to commuting by car or other changes in travel behaviour caused by the identity controls; or

Other individuals

- (vi) have been negatively affected in other ways as further described in the attached stories that should give a right to compensation.

The ID Act and the ID Ordinance are contrary to and in breach of the EDF, TFEU, the Schengen Borders Code and the Charter of Fundamental Rights, and may provide grounds for a right to compensation for both financial and non-pecuniary damages

Generally

79. Free movement of persons within the EU is the cornerstone of European citizenship. The legal basis is found in Article 3.2 of the EDF, Articles 20 and 21, and Article 77 of the TFEU and Parts IV and V of the TFEU.⁶ The treaties constitute primary law in the EU and in principle have direct effect. The Schengen Borders Code develops the Schengen and clarifies EU law in respect to freedom of movement. EU regulations have general application and are binding in their entirety and directly applicable in all Member States. The rules of the regulations may be invoked before a national court, in a similar manner to national law, without the requirement that a Member State has adopted any implementing measures. The ID Act and ID Ordinance hinders the free

⁶ TFEU (Article 56) and the European Court's case law also state that restrictions on the right to provide services within the EU as a starting point is prohibited. This applies not only to discriminatory restrictions, but also that any restrictions on the freedom to provide services in a Member State other than the one they are established in is impermissible, i.e. even if they affect economic operators in the same manner. The freedom to provide services is also applicable to economic operators within their own country if they provide services directed towards nationals in another Member State. Several carriers that are negatively affected by the ID Ordinance are established in both Sweden and Denmark, and are providing a service that involves transportation between the two countries to customers who are primarily Danish and Swedish citizens. Based on the reasons stated above, the ID Act and ID Ordinance means a serious limitation of the carrier's provision of this service. This may mean that the State may have a liability, based on European Union law, due to the injury caused to the carriers as a consequence of the ID Act and ID Ordinance.

movement of persons as guaranteed by the EDF and the TFEU, and is contrary to the regulations in the Schengen Borders Code.

The Francovich Principle

80. The public breaches of EU law in Sweden have primarily been assessed pursuant to what has become known as the Francovich Principle of state liability. This concerns minimum criteria for the State's liability for compensation for damages, which has been developed by the European Court of Justice since the 1990s. According to the Francovich Principle, in order for liability for compensation for damages to exist, in addition to causality it is necessary that the breach has been related to a rule intended to confer rights on individuals and that it involved a "clear" violation.⁷ In order for a legislature to be held responsible for a legislative failure, a serious breach of the discretionary scope is required to enact laws within the framework that European Union law allows. A liability for compensation for damages may be present if, for instance, the legislature approves a security or protective statute that hinders the free movement of goods in such a manner which clearly goes beyond what is necessary.⁸ In some cases, the legislature's infringement may be due to a misinterpretation of the limits of the discretionary scope, for example with the implementation of a Directive. In such a case, liability is dependent upon if the misinterpretation appears excusable or not.⁹
81. It should be apparent from the above description of the inadequate preparation of the legislative matter, the consultation responses received, the Council on Legislation's Opinion and the background information presented above regarding the Commission's attitude to carriers' liability with the reintroduction of temporary internal border controls, that the ID Act and the ID Ordinance results in that the legislation's shortcomings are "clear" and nor can it be described as "excusable."

The Charter of Fundamental Rights of the European Union

82. The Charter of Fundamental Rights of the European Union is intended as a European "Bill of Rights" and since the entry into force of the Treat of Lisbon on 1 December

⁷ See the ECJ judgment of 5 March 1996 in the joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, EU: C: 1996:79.

⁸ See the ECJ's judgment above.

⁹ See the ECJ's judgment of 26 March 1996 in Cases C-46/93 and C-392/93 *British Telecommunications*, EU:C:1996:131. EU: C: 1996:131

2009, it has the same legal status as the fundamental treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union, and Article 45, Freedom of Movement and of Residence, states that every citizen has the right to move and reside freely within the territory of the Member States. According to the established case law of the European Court of Justice, the Charter of Fundamental Rights with the European Union law's approach is superior to national constitutional law, in other words, it is superior even to the Swedish Instrument of Government Act.

83. The Charter of Fundamental Rights is directed at the Member States when they are applying European Union law. National courts must ensure that the rights in the Charter of Fundamental Rights are given full effect and, if necessary, refrain from applying national legislation and rules which are contrary to the Charter of Fundamental Rights. No requirement of clear support in the Charter of Fundamental Rights or the European Court of Justice's case law may be imposed.¹⁰
85. According to the explanations relating to the Charter of Fundamental Rights (2007/C303/02), the rights which are guaranteed by Article 45 is the same as that which is guaranteed by Article 20.2 in the TFEU (see the explanation to Article 45).
84. It has been assumed that not all of the rights of the Charter of Fundamental Rights can constitute grounds for a liability for compensation for damages liability. It should be assumed however that the basic principles of the internal market's function, such as the free movement of individuals which is guaranteed by primary law, is of such importance that the violation thereof by the State gives rise to liability for compensation for damages. In addition, the basic prerequisites for the internal market's functioning has been given a special status in EU law. One example is that competition law has been perceived to have such importance for the establishment of the internal market that the rules concerning anti-competitive practices in the TFEU have the status of "public policy doctrine."¹¹ It has been argued by prominent commentators that European Union law's fundamental freedoms should be given a corresponding dignity.¹² Under all circumstances, freedom of movement for persons should be of such

¹⁰ NJA 2013, p. 502 and Åkerberg Fransson. C-617/10, Decision 26 February 2013, ECR 2013:105.

¹¹ Case C-295/04 *Manfredi Judgment* (2006) ECR, I-6619 par. 31: "Moreover, it should be recalled that Articles 81 EC and 82 F.C are a matter of public policy which must be automatically applied by national courts."

¹² 2 Jean Monnet Professor of EU Law George A. Berman, in his article "Navigating EU Law and the Law of International Arbitration," in *International Arbitration*, Vol. 28 (3) (2012), p. 419, states the following: "public policy may also be ascribed to those liberal economic values deemed essential to the functioning of the integrated market that is the EU's very cornerstone." In this connection, Berman refers to Peter F. Schlosser, *Arbitration and the European Public Policy*, in *Arbitration and European*

a fundamental character within European Union law that an infringement of this can give rise to liability for the State to provide compensation for damages.

86. The rule concerning the right to an effective legal remedy in accordance with Article 47.1 of the Charter of Fundamental Rights corresponds to the rights conferred by Article 13 of the ECHR. As explained above, the provisions apply above all rights guaranteed by European Union law. In Article 52 (3) of the Charter of Fundamental Rights it states that to the extent the Charter of Fundamental Rights contains rights which correspond to ECHR's protection of rights, they shall have the same meaning and scope as the ECHR. In the event the Francovich Principle would lead to a less favourable right to compensation for damages than that provided by the ECHR in this context, an individual can therefore, plead the judicial precedents developed by the European Court of Human Rights regarding the possibility of compensation for damages.¹³

National law

87. Another very significant factor is the Member States' national law. The Member States are not allowed to make the right for claims for compensation dependent upon any preconditions that go beyond those applicable under the Francovich Principle. However, in accordance with the principle of equivalence, the Francovich Principle's preconditions may need to be set aside if it appears that the possibility of compensation for damages is more advantageous with the application of national law, which in all Member States also include the ECHR.
88. What this means for Sweden is that the Swedish Supreme Court's case law concerning the rights in the constitutional Instrument of Government and the ECHR may have implications for the issue of compensation for damages the ground of European Union law. In this context, it is of interest that the Swedish Supreme Court introduced a State liability for compensation for damages for breach of the Instrument of Government Act in a decision it rendered (NJA 2014 p. 323). In this case, the Swedish Supreme Court

Law, Reports of the International Colloquium of CEPANI, April 25, 1997. pp. 81-96. this article states that: "The very essence of the European Communities has always been to create and to develop the five big freedoms of the citizens of the community: the freedom of transnational trade, the freedom to provide services, the freedom of movement of capital, the freedom of movement of workers and the freedom of establishment; if anything these five freedoms are the culmination of European public policy. Therefore it is conceivable that an arbitral award or a court Judgment is against European Public Policy should it have disregarded one of these freedoms."¹³ See Karin Ahman, RF Chap. 2, Europakonventionen och EU:s Stadga om grundläggande rättigheter – en jämförelse (The ECHR and the EU's Charter of Fundamental Rights – a comparison), SvJT 100 yr. p. 460 ff.

did not establish any requirement that the violation of the Instrument of Government must be “clear” or “obvious” or a similar qualification for the right to recover damages to exist. According to the EU legal principle of equal legal protection, the provisions of EU law may not provide less favourable protection than what would apply in similar national situations. This should result in that the Francovich Principle’s requirement that infringements of European Union law must be “clear” in order for a liability to pay compensation for damages to exist, will no longer be imposed.¹⁴

Non-pecuniary damages

89. Any remedy other than compensation for damages in order to compensate the Claimants should not be befitting. The Swedish Supreme Court has stated, in several court cases (the most recent in NJA 2015 p. 899), that even without legislative support, the Swedish Government bears a liability for compensation for damages if its obligations pursuant to the ECHR have not been fulfilled (see e.g. “*Fondmäklaren på Alfred Berg*” NJA 2003 p. 414, “*Finanschefen på ICS*” NJA 2005 p. 462 and “*Den långsamma tingsrätten*” NJA 2012 p. 211 I). In the case “*Kommunens olaga frihetsberövande*” (The municipality’s unlawful deprivation of liberty) NJA 2009 p. 463, the Court found that a municipality could be required to pay damages if this would be required in order for Sweden to comply with its obligations pursuant to the ECHR.
90. It is likewise clear from the cases NJA 2005 p. 462, NJA 2007 p. 295, NJA 2007 p. 584, and NJA 2009 p. 463, that compensation for non-pecuniary damages may be required to be paid in the event of infringements.
91. The provision in Article 47 in the Charter of Fundamental Rights concerning the right to an effective legal remedy corresponds, as stated above, to the right conferred by Article 13 of the ECHR. It may be presumed, against this background, that likewise non-pecuniary damages may be required to be paid for infringement of the Charter of Fundamental Rights if this is required for Sweden to live up to its commitments in this context.

¹⁴ See Mörk and Hermansson, “En enhetlig skadestandsordning vid överträdelser av grundläggande rättigheter?” (A uniform liability scheme for breaches of fundamental rights?), SvJT 2014 p. 507.

The amount of compensation for non-pecuniary damages

92. With regard to the level of compensation, the Swedish Supreme Court has referred to the European Court of Human Rights' case law and practice in the awarding of damages under Article 41, with the addition that the differing national conditions may result in that what is considered to be a reasonable amount of compensation varies from one country to another. Furthermore, it has been stated that the principles in accordance with Swedish law for compensation for breaches can, to a large extent, be applied in determining compensation for non-pecuniary damages for breaches of the ECHR.
93. While in principle compensation for pecuniary damage requires evidence of losses, compensation for non-pecuniary damage is based on an equitable assessment. Non-pecuniary damages encompass compensation for both physical and psychological harm and/or pain and suffering as a consequence of the breach of the Convention. Various types of negative feelings, sensations, and/or experiences can be compensated under non-pecuniary damages, under the precondition that there is a causal relationship between the experiences and the violation/breach. For example, frustration, worry, anxiety, sadness, discomfort, humiliation, harm to one's reputation or career prospects, and in especially severe cases trauma, are some of the harm that falls within this concept. In certain cases, non-pecuniary damage has also been regarded to encompass a type of "loss of procedural possibilities."¹⁵
94. The regulation of the situation via the ID Act and ID Ordinance constitutes a significant restriction of movement and a significant interference with an individual's private sphere, via, among other aspects, the extent and duration that the controls have had. The seriousness of the violation provides grounds for additional compensation for non-pecuniary damages, beyond compensation for financial loss (see NJA 2013 p. 842). Based on the legal decisions of the European Court of Human Rights and compensation for non-pecuniary damages from Swedish courts and the Chancellor of Justice, non-pecuniary damages should amount to a minimum of SEK 30,000 for each Claimant, over and above the financial damages that has been alleged.

¹⁵ SOU 2010:87; Skadestånd och Europakonventionen (Compensation for Damages and the European Convention on Human Rights), p. 229.

Compensation for financial damages, i.e. pecuniary damages

95. In order to estimate the financial damage the unlawful identity controls have caused Öresund's commuters, a comparison should be made with how the course of events would have developed without the introduction of the identity controls. Each of the Öresund commuters has indicated on their petition/application forms the additional costs that have been caused by the identity controls. The financial damages stated in each connection corresponds to the amount claimed.
96. In NJA 2005 p. 462, it was stated that there are grounds to make the individual's evidentiary requirements less stringent in this type of case. In at least most of the cases the actual financial damage should be compensated to the extent that it appears more likely than not that the violation of the Convention has contributed to cause this. This can also be expressed in that if overriding grounds support the position that the breach of the Convention constituted a necessary circumstance – albeit not necessarily the sole or a sufficient one – for the occurrence of an actual confirmed financial harm, compensation for the damage must be made. The Swedish Supreme Court also stated that in certain other situations, such as when it cannot be established conclusively that the injured party suffered a pecuniary damage, the of an obligation to provide compensation for damages may be considered. That may be the case if it is clear that the unduly lengthy time required meant that the injured party lost considerable opportunities and it can be assumed that this contributed to cause financial harm to him or her.
97. Against this background, the Claimants should likewise be awarded compensation for financial damages as requested.

The ID Act and the ID Ordinance is contrary to and in breach of the ECHR

98. The ECHR has been incorporated into Swedish law and exists in order to ensure individual citizens' rights and freedoms. Freedom of movement is defined as a fundamental freedom enshrined in Article 2 of Protocol No. 4 to the ECHR. Furthermore, according to Article 3 (2) of Protocol No. 4, no person may be deprived of the right to enter the territory of the State of which he is a national. The

aforementioned provisions under Article 6 are applicable as a supplement to the ECHR and must be applied accordingly.

99. With reference to what is stated above concerning the impermissibility of the identity controls in relation to other EU law, it is likewise alleged that these are in breach of and infringe upon the freedom of movement under the Additional Protocol No. 4 to the ECHR.
100. The ID Act and ID Ordinance constitute an obstacle to entering Sweden from Denmark. The legislation leaves no room for an individual to prove their identity, other than via the presentation of an acceptable valid identity document with a photograph. The legislation thus means that Swedish citizens who are unable to present an acceptable valid identification document with a photograph are prevented from entering Sweden from Denmark.
101. The requirement of “a valid identity document with a photograph” in and of itself is a restriction of the Swedish citizens’ right to enter Sweden, since there is no latitude for alternative ways to prove one’s identity. It has also been shown in practice that Swedish citizens who have lost identity documents during a stay in Denmark, or have forgotten to bring their identity documents with them, have been refused return travel by the carriers who enforce the ID Ordinance. This also applies to a Swedish citizen who has obtained, after visiting the Swedish Embassy in Copenhagen, evidence that they are a Swedish citizen. The simple fact is that the Swedish Embassy in Copenhagen does not issue temporary passports, but rather only provides a copy of the passport with a stamp of the Swedish Embassy. Therefore even with this, the Swedish citizen lacks “an acceptable valid identity document with a photograph.” The ID Act and ID Ordinance is contrary to and in conflict with a Swedish citizens’ right to enter into the Kingdom even if the embassy had issued temporary passport, as having the right to enter the Kingdom only during regular office hours (or the Embassy’s opening hours) is hardly compatible with this absolute right.
102. Against this background the identity controls are likewise in breach of and infringe upon the ECHR’s prohibition of Protocol No. 4 prohibiting a State to deny its citizens the right to enter.

103. In a series of decisions, the Swedish Supreme Court has held that individuals have a right to compensation for non-pecuniary damages if and when their rights under the ECHR have been violated. Reference to the following decisions is provided as examples: NJA 2005 p. 462, NJA 2010 p. 363, as well as NJA 2012 p. 211 (I-II).
104. This development is based on the requirement of Article 13 of the ECHR that anyone in the ECHR whose rights have been violated must have access to an effective legal remedy. In the absence of other legal remedies, it has been regarded that a possibility of non-pecuniary damages must be available for the individual. The possibility of obtaining compensation for non-pecuniary damages for a breach of the ECHR has been affirmed by the Swedish Supreme Court (NJA 2005 p. 462). The possibility of obtaining compensation for damages has furthermore been confirmed and expanded by NJA 2007 p. 295 and NJA 2007 p. 584. This can now be said to apply to all of the rights in the ECHR.¹⁶

The ID Act and the ID Ordinance is contrary to and in breach of the Swedish Instrument of Government Act

105. According to Chapter 2, Section 7 of the Instrument of Government Act, no Swedish citizen may be prevented from entering the Kingdom. This right is absolute and therefore cannot be restricted by law.
106. With reference to what has been stated above, the ID Act and ID Ordinance constitute violations of the provisions of the Instrument of Government Act.
107. Individuals whose constitutionally protected rights have been violated may be entitled to non-pecuniary damages according to the principles of the Supreme Court's decision in NJA 2014 p. 323. Regarding the amount of compensation, reference is made to what has been discussed above.

Other matters

¹⁶ See Mörk and Hermansson. "En enhetlig skadestandsordning vid överträdelse av grundläggande rättigheter?" (A uniform liability scheme for breaches of fundamental rights?), SvJT 2014 p. 507.

108. If additional information or documentation concerning the claimed compensation for damages is regarded necessary, upon request from the Chancellor of Justice the Claimants will supplement this petition.

109. It is referred to the legal research paper on the matter by Professor Joakim Nergelius, (see Appendix 16).

Malmö, 20 October 2016

Finn Madsen

Jerker Kjellander

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Appendix 8	The National Board of Trade Sweden’s Opinion, dated 07/12/2015
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Appendix 10 a-d	The Swedish Police Authority’s statement concerning the application of the ID Ordinance
Appendix 11	The Øresund Institute, New everyday life for commuters traveling across the Öresund (June 2016)
Appendix 12	Report from the Commission on the Schengen Borders
Appendix 13	The Commission’s “Letter of Formal Notice”
Appendix 14	The Commission’s “Memo,” dated 20/02/2014
Appendix 15	Dimitris Avramopoulos’ response, dated 29/07/2015
Appendix 16	Statement of Opinion from Professor Joakim Nergelius