

Chapter 9. Equal pay and the impact of the European Union

Tanja Olsson Blandy

Introduction

Sweden is often not only highlighted as a forerunner in gender equality, but also as a Member State which has had a significant impact on the development of the EU's equal treatment policy. Therefore, we would expect the EU's equal treatment to have had only a minor impact in Sweden. However, in order to comply with EU legislation, Sweden has modified its Equality Act several times (Bergqvist and Jungar, 2000; Fransson, 2001). In addition, there is still a discrepancy between the EU's equal pay principle, with its strong laws emphasising individual rights and non-discrimination, and the collective understanding in Sweden that equal pay is best regulated in collective agreements between the social partners, not by legislation (Borchorst, 1999; Nielsen, 1996). Consequently, there is a low level of individual protection and anti-discrimination provision concerning equal pay in the Swedish Equality Act. Instead, active measures and collective bargaining rights are emphasised as the primary means of regulating equal pay.

One assumption in this work is that the misfit between the EU's equal pay principle and the corporatist tradition in Sweden, via which equal pay is regulated, has created a 'window of opportunity'¹ for the Swedish Equal Opportunities Ombudsman (*Jämställhdhetsombudsmannen* in Swedish), hereafter referred to as *Jämo*, to enforce the equal pay principle in Sweden. The significance of government structures to furthering gender equality is a well-established research topic in feminist studies (Mazur, 1999). For example, Mazur and Stetson (1995) have shown that actors who work within equality agencies are often key players in the advancement of gender equality. The question raised in this work is how *Jämo* has responded to the misfit between the EU and domestic levels.

Most of the literature on the impact of the EU's gender policy on the Member States focuses on the possible effects of European law on the everyday lives of women and men in the EU states (see Hantrais, 2000; Hobson, 2000; Meehan, 1994). More recently, however, an emerging literature has focused on *how* the process of European integration in general affects policy process and domestic structures in the Member States. In a comparative study of the UK, France and

¹ I use Kingdon's definition of window of opportunity as 'opportunities for advocates of proposals to push their pet solutions, or to push attention to special problems', Kingdon (2003, p. 165).

Germany, Sabrina Tesoka demonstrates that there is rising awareness among a range of public and private actors, eg equality agencies and trade unions, with regard to the potentials of Community Law. Consequently, inter-country differences with regard to the existence of mediating factors might explain the differential impacts of EU politics in the three member states considered by Tesoka (1999). In another comparative study of the UK and France, Caporaso and Jupille argue that one important explanation for the successful implementation in the UK of the EU Equal Pay and Equal Treatment directives was the presence of the British Equal Opportunity Commission, which was a facilitator of change. In France, on the other hand, there was neither the same adaptational pressure nor the same array of public agencies (Caporaso and Jupille, 2001).

These results confirm that national equality agencies are concerned with EU policies and that they increasingly develop national strategies in order to profit from the EU opportunity structure. However, as these studies are concerned with impacts on national outcomes, they both treat equality agencies as mediators, and little attention is paid to processes or strategies. Featherstone and Radaelli argue that many studies of Europeanisation make this ‘leap in analysis’, linking strategies to outcomes without being much concerned with means. Consequently they tend to conclude that there has not been much empirical consideration of how actors activate and interpret the process and how strategies become effective (Featherstone and Radaelli, 2003, p. 336).

In addition, it is also important to distinguish between policy outcomes and the policy process Radaelli (2003, p. 50). Since it is difficult to assess the contribution of a single independent EU variable to domestic change, studies of outcomes run the risk of risk prejudging the significance of independent variables, at least according to Radaelli.² He therefore suggests that, instead of focusing on outcomes, political scientists should be more interested in questions of *processes* and of the co-evolution of domestic and EU structures (ibid, p. 52). Another interesting argument for studying actors, presented by Gerda Falkner, is that it avoids overlooking the importance of the effects of individual actors, since these can be a useful indicator of potential change at national level, albeit at a later point in time (Falkner, 2003, p. 17).

In this chapter, I will therefore use Radaelli’s definition of Europeanisation as a process of the construction and diffusion of rules and norms that are first defined and consolidated in the making of EU public policy, and then incorporated into the logic of domestic discourse and political structures (Radealli, 2003, p. 30). Then, I will focus on the actors and their roles in the policy process. How has Jämo activated and interpreted the process of Europeanisation? Can Jämo be identified as a *norm entrepreneur* of the EU’s equal pay principle? I will define a

² In order to analyse the outcomes of EU policy, any research design would need to control for alternative or complementary explanations (see Radaelli, 2003, p. 50-51).

norm entrepreneur as an actor with an authoritative claim to knowledge and with a normative agenda (Haas, 1992, p. 3-4). In the process of norm diffusion, such actors can reconsider their own preferences, or they can persuade others to get involved in the processes of socialisation and learning (Börzel and Risse, 2003, p. 66). The strategies they can use in their mission to diffuse new norms are identified as *proposing special policies* to decision makers, *legitimizing* new norms and ideas by moral argument, or adopting a key role in the *framing* of policies (Hass, 1992, p. 15; Finnemore and Sikkink, 1998, p. 897).

In this chapter, it is argued that the strategies adopted by Jämo to enforce the EU's equal pay principle are partly in contradiction with the traditional Swedish corporatist model. By taking several wage discrimination cases to the Labour Court, which is a specialised court that handles disputes over employment issues and where the social partners are represented, Jämo has not only questioned the traditional role of the social partners to regulate equal pay in collective agreements but also even the standing of the Court itself. Although there has been a lot of opposition of and criticism aimed at Jämo's strategy of taking wage discrimination cases to the court, it is suggested that this development might result in a changed role for the social partners in the future regulation of equal pay and wage discrimination.

I will proceed in the following steps. First, I briefly present the theoretical framework of Europeanisation and norm entrepreneurs. Second, I develop the empirical question and identify the misfit in Sweden. Finally, I analyse the strategies deployed by Jämo to promote the EU's equal pay principle.

Europeanisation and domestic change

The point of departure in my analysis lies in the three-step framework proposed by Cowles and colleagues. First, it is important to identify the Europeanisation process, or the 'formal and informal rules, regulations, procedures and practices' (Cowles et al., 2001, p. 3) at EU level that demand change at domestic level.

Second, the degree of misfit between the Europeanisation process and domestic structure needs to be identified. This determines the extent to which domestic policy has to change in order to comply with European norms and rules. Here, we can distinguish between *institutional misfit* and *policy misfit* (Börzel and Risse, 2003, p. 59-69). The former indicates a discordance between European rules and regulations, which can challenge not only national policy goals and standards but also the instruments or strategies used to achieve the goals. A policy misfit, on the other hand, is less direct than an institutional misfit, since it not only challenges domestic rules and procedures but also the collective understandings attached to them (ibid, p. 59-60). However, it is often emphasised that a misfit, or incompatibility, between the EU level and the domestic practices is a necessary, but not sufficient, condition for domestic change in response to

Europeanisation. The second condition is that various facilitating factors, actors or institutions, respond to the adaptational pressures that the EU imposes (Cowles et al., 2002, p. 9; Börzel and Risse, 2003, p. 60-62).

The third step therefore consists of how actors and/or institutions respond to the adaptational pressure. Börzel and Risse (2003) suggest that a misfit can be conceptualised in two different pathways, which they draw from March and Olsen's (1998) account of rationalist and sociological institutionalism. They do not mean that one perspective is better than the other in explaining domestic change. Rather, they argue that the two logics stress different factors that facilitate, or prohibit, domestic adaptation in response to Europeanisation (Börzel and Risse, 2003, p. 61).

Table 9.1 Different logics of domestic change, as presented by Börzel and Risse (2003).

Logic	Facilitating change	Prohibiting change	Domestic change
Rationalist institutionalism	Formal institutions using material and ideational resources	Multiple veto points	Resource distribution and differential empowerment
Sociological institutionalism	Norm entrepreneurs and/or Political culture and informal institutions		Socialisation and learning

From a *rationalist logic*, a misfit is described as an opportunity structure that can empower actors whose interests are positively affected by European integration. Actors are perceived as rational and goal oriented, operating on given and fixed preferences. From this perspective, a factor that can explain domestic change is the existence of formal institutions. If there are supporting formal institutions that have the capacity to exploit new possibilities, the EU opportunity structure may offer some domestic actors material or ideational resources to exert influence, while constraining others. However, whether changes in opportunity structures lead to a domestic redistribution of power does not only depend on the capacities of the actors to exploit these opportunities. Multiple veto points in a country's institutional structure can effectively empower actors with diverse interests and impede domestic adaptation. The more power that is dispersed across the political system and the more actors have a say in political decision-making, the more difficult it is to avoid constraints leading to change (ibid, p. 63-65).

By contrast, a *sociological logic* emphasises that actors follow the 'logic of appropriateness', guided by a collective understanding of what constitutes proper action. Instead of maximising their preferences, actors strive to fulfil social expectations. From this perspective, a misfit can result in the internalisation of new norms and ideas, provided that one of the following two mediating factors are present. The first is described in terms of 'change agents' or norm entre-

preneurs, who mobilise at the domestic level – persuading policy-makers to initiate change. This is an agency-centred version of sociological institutionalism that theorises the internationalisation of new norms and collective understanding.³ The second potential explanation for domestic change is more structuralist, and focuses on the political culture and other informal institutions. It suggests that informal institutions entail a collective understanding of appropriate behaviour that influences the way in which actors respond to Europeanisation.

Rational actors and learning institutions – a fruitful distinction?

Even though Börzel and Risse stress that the different logics of rationalist and sociological institutionalism are not mutually exclusive and often work simultaneously, they argue that the rationalist perspective follows a logic of empowerment if there are supporting formal institutions, and that a sociological perspective instead emphasises learning and norm change, if there are norm entrepreneurs or a political culture and other informal institutions which are conducive to consensus-building. However, I argue in this chapter, although tentatively in a theoretical sense, that the two-actor centred explaining factors, ie *formal institutions* and *norm entrepreneurs*, are not so easily distinguished when empirically tested. Hence, the difference between them may not be as important as it first appears.

First, Börzel and Risse stress that, from a rational logic, domestic change can be explained as a process of empowerment and redistribution of ‘material and ideational resources’ (ibid, p. 65). Hence, empowerment is not only understood in terms of material resources, but actors can also use ideas emerging from the Europeanisation process. Although it is wise not to separate material and ideational resources, it becomes problematic – as Börzel and Risse also argue – that from a sociological logic, Europeanisation is understood as the emergence of

‘new rules, norms, practices, and structures of meaning to which the member states are exposed and which they have to incorporate into their domestic practices and structures’ (ibid, p. 66).

If we interpret ideas as not so different from, or even as the same thing as, new rules, norms and practices, then the distinction between formal institutions and norm entrepreneurs seems less evident. The definition of formal institutions as using ideas emerging from the European structure is then close to the description of norm entrepreneurs as ‘change agents’.

Instead, the main difference between the two actor-centred explaining factors, as described by Börzel and Risse, is probably best understood in terms of preferences and how action is explained. Actors, from the rational logic, are treated as

³ Börzel and Rises draw here on the work of Finnemore and Sikkink (1998) and Checkel (1999).

goal-oriented with given preferences, while the sociological logic instead emphasises that the ‘logic of appropriateness’ influences the way in which actors define their goals. Norm entrepreneurs are viewed as not maximising their preferences, but acting in accordance with that which constitutes socially adapted behaviour in a given rule structure (ibid, p. 65).

We would then expect that, from a sociological logic, change would be described as a process of learning and interaction. In other words, whereas formal institutions have given preferences, norm entrepreneurs redefine their own interests. However, Börzel and Risse suggest that norm entrepreneurs not only can be involved in a process of socialisation, learning and redefining their *own* interests, but that they also can persuade *other* actors to reconsider their goals and preferences. If a definition of norm entrepreneurs does not have to entail that actors themselves redefine their interests, but only that they persuade others to initiate change, then we cannot exclude the possibility that norm entrepreneurs are also driven by rational goals. For example, norm entrepreneurs may have given preferences, but if these are not part of the ‘socially accepted behaviour’ in their environment, they might not express them. If then, for example, the European opportunity structure presents new possibilities to pursue ideas (new for the collective understanding of what constitutes appropriate behaviour in that environment, but not necessarily new for the norm entrepreneurs), norm entrepreneurs might then use the EU to persuade other policy-makers to redefine their interests, engaging them in a process of socialisation and learning.

In other words, it is very difficult to distinguish rational behaviour from what is considered to constitute proper, socially accepted behaviour. I agree then with Finnemore and Sikkink (1998, p. 888), who state that

‘rationality cannot be separated from any politically significant episode of normative influence or normative change, just as normative context conditions any episode of rational choice’.

The standpoint that it is not fruitful to separate different behavioural logics, however, does not help us identify a norm entrepreneur when we see one. Let us proceed to the operationalisation of norm entrepreneurs and the strategies they can use.

Norm entrepreneurs diffusing new ideas and norms

One assumption in the work described in this chapter is that a misfit can create a ‘window of opportunity’ that offers some actors additional resources to exert influence domestically. Kingdon (2003, p. 175) defines such a window of opportunity as something that enables policy entrepreneurs to push their pet solutions, or to direct attention to special problems. The window normally opens under shock or crisis, but it can also open under conditions of uncertainty. Decision-

makers might then need to consult policy entrepreneurs who can provide advice about the likely results of various courses of action (ibid, p. 176).

Also, Haas (1992, p. 3-4) emphasises that uncertainty, not least in international policy coordination, tends to stimulate demands for particular forms of information, and that entrepreneurs are possible providers of these sorts of information and advice. He distinguishes though between policy and norm entrepreneurs. According to Haas (ibid, p. 3), they can both be defined as specialised knowledge groups focusing on administrative empowerment, but the difference is that the latter are guided by normative and causal beliefs. Whereas Kingdon's policy entrepreneurs can advocate all kinds of 'pet' solutions (to promote their own values or personal interest), Haas defines norm entrepreneurs as having a normative objective. Norm entrepreneurs are, according to Haas,

'professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area' (ibid, p. 3).

Rather than acting within a professional code or just operating to preserve their missions and budgets, norm entrepreneurs apply their knowledge to a policy enterprise subject to their normative objectives. In this chapter, I will therefore define norm entrepreneurs as actors with an authoritative claim to knowledge and with a normative agenda. In the process of norm diffusion, they can reconsider their own preferences, *or* they can persuade others to become involved in the process of socialisation and learning.

In their mission to diffuse new norms and ideas, norm entrepreneurs may use different strategies. First, under conditions of uncertainty, they can use their knowledge and *propose special policies* or give advice to decision-makers about the likely results of various courses of action (ibid, p. 15). In order to secure the state actors' endorsement of new norms, entrepreneurs may also supply them with important facts and information, using arguments of effect, empathy and morality (Finnemore and Sikkink, 1998, p. 900).

Second, norm entrepreneurs not only try to persuade decision-makers to redefine their interests, but they often also engage in intense debates with regard to *legitimate new norms* (Börzel and Risse, 2003, p. 67). Haas stresses that their claim to knowledge is their primary power source, which not only accords them a great degree of influence over policy debates, but may also lead to a refinement of their own ideas (Haas, 1992, p. 17; Finnemore and Sikkink, 1998, p. 900). This clearly illustrates how entrepreneurs either persuade others to engage in the process to redefine their interests and/or how they can reconsider their own preferences. In addition, Finnemore and Sikkink (ibid, p. 897) point out that norms never emerge in a normative vacuum, but instead enter a contested normative space where they must compete with the standards of 'appropriateness' defined by prior norms. In order to challenge existing logics of 'appropriateness',

they argue, norm entrepreneurs might therefore need to be explicitly ‘inappropriate’. This is an additional argument for not separating the rational and socio-logic logics of behaviour.

Third, the construction of cognitive frames is an essential strategy for norm entrepreneurs, who have an important role in the *framing* of policies (Haas, 1992, p. 15). Finnemore and Sikkink (1998, p. 897) stress that entrepreneurs are ‘critical for norm emergence because they call attention to issues or even “create” issues by using language that names, interprets, and dramatizes them’ (ibid, p. 897). If they are successful, the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues (ibid, p. 897).

The Europeanisation of equal pay – adaptational pressure and misfit in Sweden

How can we understand all the abstract concepts just discussed? Below, I develop the empirical question and identify the Europeanisation process as the introduction of the EU’s equal pay principle at domestic level. Then, I evaluate the policy and institutional misfit in Sweden and present Jämo as a potential norm entrepreneur of EU policy. Finally, I describe the dependent variable as change within Jämo.

The Europeanisation of equal pay

The right of women to equal pay with men for the same work was stipulated in the Treaty of Rome in 1957 (Article 119). Although treaties have direct effect, and are the strongest source of law in the EU, the Council passed the Equal Pay Directive in 1975 in order to facilitate the implementation of equal pay in the Member States.⁴ Directives are part of secondary legislation and they are drawn up to ensure the application of the treaties in national law and practice. They are binding, just as articles in the treaties, but they are important because they explain more clearly what duties are placed on the Member States. In addition, Directives also serve as an additional means of control for the Commission since they indicate a precise time limit for when they must be implemented. They only indicate minimal standards. It is possible for a Member State to introduce more favourable rules, and also to decide how to implement a Directive, for so long as the purpose and scope of it is assured.

The Equal Pay Directive not only defined the meaning of *pay* and *equal work*, but also widened it. While the Treaty of Rome implied a narrow definition of equal pay for the same work, the Directive extended the meaning of equal pay for

⁴ There was growing criticism in the parliament that, although Article 119 had been legally binding for many years, it had been implemented to only a very limited extent. See Ellis (1998, p. 147).

work of *equal value*, allowing comparison across jobs as assessed by job evaluation schemes (Ostner, 2000, p. 28; Hantrais, 2000, p. 118). In addition, the Directive outlaws all forms of discrimination on ground of sex, direct as well as indirect. The Equal Pay Directive was the first within the EU's equal treatment legislation, but it was followed by various directives concerning discrimination on ground of sex. The points common to them all are that they focus on women in their capacities as workers and that they are anti-discriminatory.

Mazur defines anti-discrimination policies as punishing both intended and unintended employment discrimination. On her definition, they often include equal pay and equal treatment laws that 'essentially set up legal norms and procedures for trying cases in courts of law' (Mazur, 2002, p. 82). The possibility of making an individual claim is also an important feature of EU law. This can be illustrated by the Burden of Proof Directive (97/80). Its aim is not only to ensure that the measures in the Equal Pay Directive, as well as in some of the other equal treatment directives, are made effective, but also to enable people who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process. In such case, the claimant only needs to put forward facts from which it may be presumed that there has been direct or indirect discrimination, and it is up to the respondent (the employer) to prove that there has been no breach of the principle of equal treatment.⁵

Consequently, EU law focuses strongly on the individual's legal rights (Ellis, 1998, p. 320; Nielsen, 1996, p. 20-22). However, the principle of anti-discrimination is a narrower concept than the promotion of sex equality or of positive action. While the anti-discrimination principle gives rights to individuals, positive action policies focus instead on the structure and functioning of the labour market (O'Connor, 1999, p. 55; Mazur, 2002, p. 92). Although EU law has often been criticised for concentrating solely on banning sex discrimination and not dealing with positive action (Hoskyns, 1996), it must be emphasised that the anti-discrimination principle can be considered as a very strong law in EU policy, not least since equal pay for equal value has been introduced in the Amsterdam Treaty.

Institutional and policy misfit in Sweden

Since the EU's equal pay principle, as described above, consists in strong laws with an anti-discrimination approach, adaptational pressure in this context refers to the way in which Sweden's equal pay principle coincided with or deviated from the EU standards at the time Sweden became a member of the EU. I will stress that there was an institutional as well as a policy misfit. The *institutional*

⁵ Council Directive 97/80/EC on the Burden of Proof in cases of discrimination based on sex, Article 1-4.

misfit indicates the means and instruments by which equal pay is regulated in Sweden, while the *policy* misfit specifies normative and cognitive understanding of equal pay. First though, it is necessary to give a brief account of the corporatist tradition in Sweden, which is crucial in understanding how the labour market in general, and equal pay in particular, is regulated.

Sweden has often been described as a typical corporatist state (Rothstein, 1991). This means that the major pressure groups – represented by the union, employer and farmer organisations – have been involved, together with the state, in the formulation and implementation of public policy. However, in contrast with many other states with corporatist features, when it comes to the regulation of the labour market, the Swedish partnership process has not been a traditional tripartite agreement. Instead, in a historic compromise called the ‘Swedish model’, the major union and employer organisations agreed to keep the state out of regulation of the labour market. This resulted in a minimal interference from the state, especially in the fields of working conditions and wage regulation.

Regarding working conditions, since the social partners had a common interest in minimal interference from the state, they not only resolved conflicts without state intervention but they also settled agreements in various fields, eg gender equality, job training or education. Consequently, the government has been parsimonious in issuing legislation in this field, and issues have mainly been settled by collective bargaining (Nyström, 2003, p. 309). In addition, much of the labour legislation is semi-discretionary, which means that the social partners can derogate the law in collective agreements. However, it is in wage regulation that the power of the major union and employer organisations has been most remarkable. For a long time, Sweden witnessed a strongly centralised collective bargaining system, and the social partners were considered as having the main responsibility for wage regulation (Petersson, 1991, p. 174). Although there were considerable changes in the 1990s, both towards a more decentralised collective bargaining system and by virtue of the fact that the Swedish Parliament and government have started to play an increased role in the legislation of working conditions, the tradition of the social partners’ power over labour market issues remains strong in Sweden (Nyström, 2000, p. 306).

But this is in breach of EU law. When entering the EU, Sweden was well aware of the misfit between weak laws in Sweden and strong EU law, which is influenced by the continental and Anglo-Saxon tradition, where labour policy is mainly regulated by legislation.⁶ Consequently, when negotiating Swedish membership, both the major union and employers organisations (LO, TCO and SAF), as well as the government, tried to obtain guarantees that the ‘Swedish model’ and its system of regulating labour policy in collective agreements would not be influenced by EU membership (Ahlberg, 2003, p. 22). This clearly illustrates the

⁶ See Nielsen (1996) for the misfit between Nordic and EU labour law.

important misfit Sweden faced in the field of labour market regulation. On the other hand, in Sweden as well as in the EU, gender equality legislation is regarded as a labour market issue; that is, the legislation only covers the situation of women and men in the workforce and it is not applicable outside the labour market. But, as we will see, as a consequence of the special role of the social partners in Sweden, there was nevertheless a significant misfit in the field of equal pay when Sweden became a member of the EU.

Further, turning to the *policy misfit* between EU law and the Swedish Equality Act, Sweden faced a considerable misfit as a result of its corporatist tradition. Whereas the EU's equal treatment legislation may be described as an anti-discrimination policy focusing on individuals' rights, in the Swedish Act there is a strong emphasis on positive action. Whereas individuals' rights are central to the first approach, positive action is concerned with the structure and functioning of the labour market and the implications of this for employment practices (O'Connor, 1999, p. 55). Positive action measures do not first and foremost protect individuals' rights. Instead, they recognise women and men as groups on the labour market, emphasising their collective rights.

Examples of active measures in the Swedish Act are the obligation for both employers' and workers' organisations to take active measures to promote wage equality. Further, employers with more than ten employees have a duty to establish annual plans with wage statistics to eliminate wage differentials between women and men. Until 1994 the duty to take active measures did not apply cases where the social partners had included the promotion of gender equality in their collective agreements. Following growing criticism of the social partners for not fulfilling what was expected of them in the Act, their possibility to derogate the law by collective agreement was eliminated in 1994, and the duty to pursue active measures was further strengthened (see Prop 1990/91:113 p. 78, Prop. 1993/94:147). Although the Act also takes account of anti-discrimination policy, as discussed above, it is still not clear how this approach should be interpreted regarding equal pay.

The fact that there have been so few wage discrimination cases in the Court might indicate that unjust wage differentials are not so common in Sweden. As a matter of fact, Sweden has the smallest average differential between women's and men's earnings in the EU.⁷ On the other hand, it has also been stressed that Swedish law imposes a heavy burden of proof on anyone who considers themselves discriminated against (Andersson, 1997, p. 120; Ahlberg, 1997/06), which may give another explanation for why so few cases have been taken to the Labour Court. In the EU, the burden of proof operates proactively; the individual

⁷ The average earnings of women employed full-time in industry and services in the EU were only 75 percent of those of men in 1995; in Sweden, women's average earnings were 88 percent (Clarke, 2001, p. 1).

only needs to put forward facts from which it may be presumed that there has been direct or indirect discrimination, but it is up to the employer to prove that there has been no breach of the principle of equal treatment. In Sweden, on the other hand, the individual not only needs to initiate a complaint that there has been discrimination, but she/he also has to demonstrate that the work is equal, or of equal value, to the job it is compared with.

Table 9.2 Models of equal pay policies.*

	The EU	Sweden
Institutions	Strong laws, formal structure. Individuals' legal rights, implemented by legislation.	Weak laws, informal structure. Employer-union negotiated collective bargaining rights.
Policy	Anti-discrimination policy. Individual rights. Proactive.	Positive action. Collective rights. Complaint based.

* Adopted and modified according to the model 'National Approaches to Sexual Harassment' by Kathrin Zippel (2003, p. 178). The model refers to equal pay policies at the time Sweden became a member of the EU, prior to the revision of the Swedish Equality Act in 2000.

In sum, while the EU law has been described as promoting anti-discrimination policy and individuals' rights, the Swedish Act is instead characterised by positive action and collective rights. These two approaches are often described as representing different models of regulating gender equality in general (Loven-dusky, 1989, p. 251; Mazur, 2002, p. 82; Zippel, 2003, p., 176), and equal pay in particular (O'Connor, 1999, p. 55). Kathrin Zippel (2003, p. 80), who has analysed collective and individual strategies in sexual harassment, argues that an ideal model would be one that handles individual complaints while also taking organisational, economic and cultural gender inequality into account. Some have argued that the discrepancy between collective and individual rights could result in the development of a stronger emphasis on individuals' rights in Swedish Labour law (Nyström, 2000, p. 321). According to our theoretical framework though, whether the Swedish principle of equal pay will be influenced by the EU depends not only on the capacities of national actors to exploit the new opportunities the EU is presenting, but also on whether there are institutional structures that can empower veto players with diverse interests and impede domestic adaptation. As we have seen, the social partners have hitherto been negative towards the introduction of provisions in the field of equal pay in the Equality Act. Let us proceed to the capacities of the national actor, Jämo, with regard to use of the tougher laws the EU is endorsing.

Jämo as a norm entrepreneur

With the introduction of the Equality Act in 1980, Jämo was established as an independent state agency to oversee enforcement of the Act. Even though the

government appoints the Ombudsman, who is the head of the agency, its formal authority is nevertheless strong.

In its law-enforcing role, Jämo has primary two functions. First, after the obligation of the social partners to actively pursue gender equality was established in law in 1994, the Ombudsman now has the power to enter all workplaces and carry out inspections. Second, the Ombudsman also has the authority to bring cases involving sexual discrimination before the Labour Court, if the trade union that represents the worker decides not to do so. Between 1980 and 1994, the Ombudsman brought several cases before the Labour Court (eg cases regarding sexual harassment), but no single case raised the issue of wage discrimination. This is most likely partly a result of the collective understanding in Sweden that legislation should not be the primary means of achieving equal pay, since – as mentioned above – there have only been two wage discrimination cases in the Labour Court prior to Swedish membership of the EU.

For the Ombudsman, who is responsible for the enforcement of the Equality Act, it is equally important that the equal pay principle was weak in the Act prior to the revisions of 1992 and 1994. It was not so common that work assessments between the social partners actually took place. The fact that there needed to be an existing work assessment in the collective agreements between the social partners, in order to compare equal work or work of equal value, limited the opportunity for Jämo to bring these cases to the Court.

In sum, there are two main reasons for analysing Jämo as a potential norm entrepreneur with regard to the EU's equal pay principle. First, since Jämo is responsible for the enforcement of the provisions of the Equality Act, it is logical to examine the role of the Ombudsman if we want to know in which ways domestic actors interpret and act in response to the Europeanisation process. Further, since there actually are indications that Jämo has perceived Swedish membership of the EU as an opportunity structure to endorse more individual rights, it makes it even more interesting to analyse the actions of the Ombudsman. For example, anticipating Swedish membership of the EU, Jämo initiated a study in 1990 to analyse what changes Sweden would need to make in order to fulfil its obligations in the field of equal treatment legislation. Regarding equal pay, it was concluded that, in the way the relevant provision was defined in the Equality Act, Sweden would face considerable criticism if it were not changed before entering the EU (Nielsen 1990, p. 7). The question is then what strategies the Ombudsman has deployed hereafter and what results it has had in the domestic policy process.

Terminologically, I will alternate between use of 'Jämo' and 'Ombudsman' – the first indicating the Equality Agency in general, the second signifying more precisely the Ombudsman as head of the Equality Agency. During the time period of this analysis, starting with the first wage discrimination case that Jämo took to the Labour Court in 1994, and ending in 2001 when several such cases

were settled in the court, there were two Ombudsmen. Lena Svenaeus was Ombudsman from 1994 until 1999, after which Claes Borgström replaced her. They both have backgrounds as lawyers, and they are not involved in party politics.

This study applies the method of ‘process-tracing’, which is a technique used by many policy analysts to unfold a particular set of events over time. It builds on three fundamental assumptions (Bennet and George, 1997). First, case studies deal only with certain aspects of the case, which should be of well-defined theoretical interest and have a common focus. Second, the approach requires a ‘systematic structure’ in data collection as well as in the questions that are asked in relation to any one case. Third, it is important to establish the ‘sequence of events’. Hence, by focusing on one particular actor, Jämo, I will limit the analysis to the theoretical issue of whether Jämo can be identified as a norm entrepreneur of the EU’s equal pay principle. In order to answer this question, the primary sources that will be used are communications that Jämo annually sent to the government between 1994 and 1999, and the pleas Jämo issued in wage discrimination cases. By using primary sources we obtain a good overview of the different strategies employed by Jämo. However, since no interviews were carried out, the study will not be able to say anything about the motives of the actors. Finally, in order to establish the ‘sequence of events’, we will pay particular attention to the actions Jämo has taken prior to and after Swedish EU membership.

Dependent variable – Change in institutions and policy within Jämo

Thus far, the questions of how the EU can be expected to influence domestic matters, and in what way Jämo is envisaged to be the potential actor of Europeanisation, have been answered. It is now time to specify not only how domestic policy can change, but also at what level it can change.

Following the definition of misfit in this paper, we can expect change, on the one hand in the *institutions* and on the other in *policy*. First, as was discussed in the introduction, an institutional misfit does not only challenge national policy goals and standards, but also the instruments or strategies used to achieve the goals. The question that will be analysed here is how Jämo employs the EU’s equal pay principle in the domestic policy process. By analysing the strategies and activities used by Jämo, can we identify the Ombudsman as a norm entrepreneur of EU policy? In other words, is Jämo legitimising new norms, framing policies or proposing special policies to decision-makers in order to persuade them to redefine their interests? In addition, according to rational logic, Europeanisation may empower actors whose interests are positively affected by European integration. The question is then not only if the EU’s equal pay principle has empowered Jämo, but also how we operationalise ‘empowerment’. As discussed above, Jämo’s role in the policy process can be divided into the formal

and the informal (European Commission, 2002, p. 95). With regard to its formal role, Jämo's statutory rights and legal functions are analysed. Besides resources (in manpower or finance), Jämo's formal role can also take the form of active participation in planning, drafting or commenting on legislation. Jämo's informal role in the process focuses instead on the consultative role often possessed by equality agencies. Such agencies are often represented in advisory committees in order to provide guidance on the preparation of legislative initiatives and to comment on draft legislation, or just to provide expert guidance and input into the process of developing new approaches or legislation (ibid, p. 94). In sum, if the EU has altered the strategic position of Jämo, in what way has Jämo's formal or informal role in the policy process changed?

However, according to sociological institutionalist logic, Europeanisation should affect not only formal political structures, but also the values, norms and discourses prevalent in the Member States, ie the *policy*. The question is then if the policy logic behind the EU's equal pay principle, which was defined as focusing on anti-discrimination policy and individual rights, has affected the discourse and the content of the policy agenda of Jämo. How are the interests, norms and beliefs defined by Jämo to promote equal pay in Sweden?

Role of the Ombudsman

– developing old and new strategies to enforce EU law

Below, I discuss how Jämo has employed the EU's equal pay principle in the domestic policy process. I concentrate on institutional change, ie the strategies and activities used by the Ombudsman, but I also briefly discuss the ways in which institutional misfit has led to a policy change and how the Ombudsman has framed the ensuing discourse.

Taking wage discrimination cases to the Labour Court

Shortly after Sweden joined the EU, Jämo initiated a strategy that was to attract a lot of attention in the media. With the support of Article 119 and the Equal Pay Directive, Jämo started to take wage discrimination cases to the Labour Court to compare women's and men's wages.

Jämo had never taken any wage discrimination case to the Labour Court prior to Sweden joining the EU. But, between 1994 and 1999 the Ombudsman took six cases to the Court, which indicates that Jämo perceived EU law as an opportunity structure. In addition, when bringing the first case to the Court, the Ombudsman, Lena Svenaeus, stated that it was the adaptation of the Swedish Equality Act to EU law that now permitted wage cases in the Court. Further, she claimed that it was not possible to rely any more on the Swedish model for wage differentials between men and women to disappear, since there was a considerable risk that existing pay differentials would only be carried forward from year to year if no

specific action was taken to address wage discrimination (Göteborgs-Posten, 17 October 1995).

All the six cases concerned female nurses or midwives working in state hospitals. Jämo explicitly argued that, besides the duty to investigate wage discrimination, it was also important to get some guiding principles for the social partners. According to Jämo, all these cases illustrated wage differentials that depended on the divided labour market in the medical sector, where a ‘woman’s job’ is paid less than its male equivalent (Jämo press release, 16 June 1999). As we will see, although Jämo relied on EU law by referring to it in all the cases, Jämo won only the first of them, while in all the succeeding cases the Labour Court consistently ruled against the female workers represented by Jämo.

The first case, the only one that Jämo actually won, concerned two civil servants at a municipality office where a female employee was paid less than her male colleague for performing almost *identical* jobs. The Ombudsman referred to Article 119 of the Equal Pay Directive, claiming that EU rules and regulations now were directly applicable in Sweden (AD 1995, no. 158, p. 1124). This illustrates what Kingdon (2003, p. 175) calls ‘seizing an opportunity’. Although Sweden was not even a member of the Community at the time, Jämo took the case to the Labour Court (1994); the agreement on the European Economic Area (EEA) had been signed, and the Labour Court judged in favour of the woman, maintaining that the two employees were performing work of equal value (AD 1995, no. 158, p. 1145). According to Kingdon (2003, p. 175), when a window opens, entrepreneurs must be prepared. They not only sense an opportunity and rush to take advantage of it, but sometimes they even anticipate the opportunity.

However, while the Labour Court accepted Jämo’s comparison between two almost identical jobs,⁸ the Court was not disposed to accept the second principle of the Equal Pay Directive. This concerned the principle of comparing *work of equal value*, which was central to the second wage discrimination case that Jämo took to the Labour Court. This was a case that would not only be long lasting, but would also receive much attention in the media. This time, it was not the same *kinds* of work that were compared; instead, the Ombudsman sought to convince the Labour Court that the work of a midwife was of *equal value* to that of two male technicians working at the same clinic whose wages were higher than the wage of the midwife (Jämo, *plaint, stämningensansökan*, 1995).

The case was meant to be a test case, and – by using a system for job evaluation – Jämo wished to show that it would now also be possible to compare work of equal value (Ahlberg, 1997). In Sweden though, in order to prove that discrimination might be presumed, the employee first has to establish that her

⁸ Although the Court ruled in favour of the woman, it did not reach a unanimous verdict. According to two of the seven representatives, it was Jämo who had the burden of proof, and they were of the opinion that Jämo had not been able to prove that the woman and the man were performing equal work (AD no. 158/1995, p. 1162).

work is equal to, or at least of equal value to, the work of the man she is comparing herself with. Only once this is established does the burden of proof revert to the employer, who has to show that wage differentials are not due to any discrimination on ground of sex. The Labour Court was however critical of the job evaluation presented by Jämo, and decided that it was not proved that the employees were performing work of equal value. Consequently, the employer never had to present evidence that this was not a question of sex discrimination (AD 1996, no. 41).

Two years after this defeat, Jämo took again the same case, which came be known as ‘the second midwife case’, in the Court. The Ombudsman presented a renewed and even more comprehensive job evaluation, in which another two midwives claimed that their wages were discriminatory (Jämo, *plaint, stämningensansökan*, 1997a). It was evident that Jämo was critical of the Labour Court’s previous ruling. First, Jämo accused the Labour Court of not taking into consideration the revision and the adaptation of the Swedish Equality Act to EU law. Instead, according to Jämo, the Court had relied on preparatory government bills, not on the modified Equality Act itself (Jämo, 1997a, p. 5). Jämo’s main criticism was that the Labour Court required too heavy a burden of proof on the part of those who considered themselves discriminated, which – according to the Ombudsman – was in breach of EU law. In addition, since the Court had not approved the last work evaluation presented to the Court, Jämo now demanded that the Court appoint an external expert for the evaluation of the new assessment Jämo was presenting (*ibid*, p. 7-8).

This demand was rejected, and the Court decided instead to refer the question to the European Court of Justice (ECJ), so as to obtain guidance on how to compare the wages of people in different positions. This was not a demand of the Ombudsman, but of the employer (a Swedish county council), which insisted on knowing what should be included in a work comparison.⁹ Jämo, on the other hand, emphasised that there had already been a similar case in the ECJ, and that there consequently was no need to refer the question to it.¹⁰ When the ECJ ruled in favour of the Ombudsman, the Swedish Court approved the use of the job evaluation, and also the legitimacy of the comparison of wages between the midwives and the technicians. But, the Ombudsman nevertheless lost the case because the Labour Court found that the technician had a higher wage as a result of market circumstances and also due to his age. The case could therefore not be regarded as sex discrimination, according to the Court (AD. no. 13, 2001). Although the case was lost, Jämo considered it an important ruling because it

⁹ The employer argued that midwives’ additional pay for inconvenient working hours, and also the value of the reduced working time that midwives enjoyed because they worked on a three-shift system, should be added to their total wage when compared with technicians.

¹⁰ According to Jämo, there was a case in the ECJ (the Barber Case – C-262/88) where this question had already been answered (AD no. 66, 1998, p. 403).

was now, for the first time, explicitly clear that it was possible to compare different jobs. For this reason, Jämo regarded the verdict as a partial victory (Jämo press release, 21 February 2001). As a result, in this case, it is easy to see the EU as an opportunity structure for Jämo. Had it not been for the ECJ's ruling, it is very uncertain how the Labour Court would have ruled in this case.

Before this ruling, which took three years, the Ombudsman had already taken three similar cases to the Labour Court, all concerning female nurses in the medical sector earning less than their male counterparts. However, when a subsequent case was lost because the Labour Court again accepted an argument based on market circumstances, the Ombudsman (now represented by Mr Borgström) decided to withdraw the remaining cases. He argued that, for so long as the Labour Court accepted the employer's argument regarding market wages, the financial stakes were too high to pursue legal action (Berg, 2001).

To sum up, it is clear that the Ombudsman perceived the EU legislation as an opportunity to take wage discrimination cases to the Labour Court. In addition, the Ombudsman used what Haas has identified as norm entrepreneurs' primary power resource, ie their claim to professional expertise and knowledge, as a criticism of the Court. Lena Svenaeus (the first Ombudsman) accused it of not applying EU rules and regulations, which can be interpreted as a claim to a superior professional knowledge than the Court. Since Jämo won only one case, albeit one further in part, the persistent strategy of pursuing several similar cases, which demanded a lot of time and resources, did not result in the empowerment that Jämo had hoped for.

According to some researchers, this illustrates the conflict between the Swedish tradition of leaving the question of wages to the social partners and the anti-discrimination approach of individual rights in the EU (see, eg, Fransson, 2001, p. 378). In its rulings, the Labour Court has also stated that the fact that a wage has already been settled in collective agreements is not irrelevant in the judgement of wage discrimination cases (AD no. 13, 2001, p. 34). Since the Labour Court seems reluctant to believe that there are no gender gaps built into collective agreements, and that it is up to the social partners to take care of the wage setting, it has effectively constrained the Ombudsman's intention to introduce more individual rights into the Swedish equal pay principle. Consequently, the Ombudsman has – in different ways – accused the Labour Court of hindering the implementation of EU law in Sweden. As we have seen, the Ombudsman has both questioned the competence of the Court, and also accused it of not applying EU rules and regulations. Below, we will see that this strategy was complemented by yearly communications to the Minister of Employment and Equality, as well as in the media.

Communications to the Minister of Employment and Equality

In order to bring the government's attention of the discrepancy between Swedish law and EU law on the one hand, and on the other, of her criticism of the Labour Court, the Ombudsman initiated yearly communications to the Minister of Employment and Equality. This illustrates how Jämo as a norm entrepreneur proposed specific policies to decision makers, with facts, information and moral arguments. Further, the yearly communication also shows how Jämo created a new instrument in order to secure the support of state actors.¹¹ The first communication was sent in August 1996, shortly (four months) after the first lost case in the Labour Court. Once every subsequent year in August, a new communication was sent, up until 1999 – the last year Lena Svenaeus held the post as Ombudsman.

Starting the criticism of the Labour Court, which is composed of representatives of employers and trade unions, the Ombudsman questions the suitability of the Court to judge in wage discrimination cases. Her main criticism was that wage discrimination in the workplace should not solely be regarded as a work-related issue. Instead, she argues, gender discrimination has to be compared with discrimination on grounds of race, religion or disability, and should therefore be regarded as an issue of *human rights* (Jämo, 1996:1-2; 1998:4-5; 1999:2). Wage discrimination is thus a different and a much wider question, which goes beyond the collective labour law disputes the Court is supposed to settle. In ordinary disputes, the Ombudsman argues, it is unproblematic to define the different interests of the employer and the trade union. In wage discrimination cases though, it becomes clear that the dividing line is no longer between the employer's and the trade union's interests, but between different norms regarding gender relations. Since the social partners have already agreed on the wage in collective agreements, neither of their representatives in the Court wants to declare the agreement invalid. In addition, if the Court judged in favour of the plaintiff, it would risk annulling the whole collective agreement, which – according to the Ombudsman – illustrates the common interest of the social partners (Jämo, 1996:2; 1998:4; 1999:2). As a result, Svenaeus declares the procedural rules at the Labour Court as unsuitable for wage discrimination cases, and advocates new rules for such cases.

The first suggestion concerns, not unexpectedly, the *composition of the court*. In order to minimise the risk of a biased court, the Ombudsman recommends that the composition of the Court be changed. Out of the seven members of the Labour Court, the employers' and the trade unions' organisations have two representatives each. The Chairperson and the Vice Chairperson are members with experience as judges and do not represent the social partners. The third member

¹¹ For analysis of the communications to the Minister of Employment and Equality, see also Carlsson (2002).

is supposed to be an expert on the labour market. Since the social partners control the Court, the Ombudsman suggests a new composition in which they no longer have a majority.¹² Moreover, she emphasises that male dominance in the Court is a problem, and recommends a more equal gender representation (Jämo 1996:3).

Second, the *competence of the Court* is also questioned. One of the rationales for a specialised Labour Court is that labour law is complicated, and therefore requires representatives with expert knowledge. However, the Ombudsman states that competence in labour law does not necessarily mean that members of the Court have the necessary knowledge in anti-discrimination law, or even in EU law (Jämo, 1997b:1-2). Therefore, she suggests that only representatives with special knowledge of discrimination issues should be elected to the Court (Jämo, 1996:4). In addition, she recommends that the third ordinary member, the expert in labour law, also has an adequate education in EU-law because it is

‘not reasonable to demand that the members should, on their own, keep à jour with case law from the EU-court or the comprehensive “soft-law” which also is guiding for the Labour Court’ (Jämo, 1997b:4).

In sum, the Ombudsman indicates that a majority of the members of the Labour Court should be lawyers with a special competence in discrimination law and human rights.

Turning to the *discrepancy between EU law and Swedish law*, the Ombudsman repeatedly points out that EU law is more comprehensive than national law on several issues.¹³ The subject of equal pay was not raised until 1997, when Jämo had already lost two cases in the Labour Court. Very much the same arguments are emphasised here as in the plea to the Court. The Ombudsman recommends two changes in the Swedish Equality Act. First, it is suggested that the burden of proof should change and, second, that it should be explicitly stated in the Equality Act that it is possible to compare two different jobs in order to prove equal pay for work of equal value. Thus, Jämo can be considered as using dual strategies in order to attract the attention of decision-makers to the need to amend the Equality Act again. However, as we will see below, not everyone agreed with her criticism of the Labour Court.

¹² The suggestion is that either the number of ordinary members of the Court should be increased or the number of the representatives of the social partners should be reduced (Jämo, 1996:4).

¹³ The Ombudsman maintains that Sweden needs to incorporate EU legislation on sexual harassment into national law, since EU law is more comprehensive than Swedish law in this respect (Jämo, 1996:4-10). Also, regarding the Equal Treatment Directive (76/207/EC), it is claimed that national legislation does not live up to more inclusive EU law (Jämo 1996,11-12; 1997:2).

Debate in the media

Jämo's strategy of taking wage discrimination cases to the Labour Court received considerable attention in the Swedish media. Never before have any cases in the Labour Court been so much scrutinised as these cases. In the debate, which was held in the daily newspapers as well as in the specialist Swedish labour law journal *Lag & Avtal*, representatives from the social partners as well as lawyers and other academics participated. The debate reached peaks in 1996 and 2001, in relation to the first and last case comparing work of equal value, and it was clear that the subject evoked malicious dispute. Some of the critics of the use of legal measures in wage discrimination cases accused the Ombudsman not only of demolishing the Swedish model but also of a lack of competence, and hence demanded her dismissal.¹⁴ Although the most critical opinions came from the employers' organisation, not even the nurses' union supported the cases, which they argued breached Swedish tradition.¹⁵ This clearly illustrates the widespread collective understanding in Sweden that legal measures should not be used to achieve equal pay. In addition, according to Eva R. Andersson, who analysed the debate until 1997, the discussion focused more on the social partners' right to settle wage issues, the potential risks for the economy if the nurses should win, and not least the competence of the Ombudsman, than on the issue of wage discrimination (Andersson, 1997, p. 112). The same line of argument can also be found in relation to the cases after 1997 (see *Lag & Avtal* special edition 2001-2002).

Turning to the position of the Ombudsman, she was also a frequent contributor to the debate in the media throughout the period. Some of her contributions were just responses to criticism. Nevertheless, she also used the media further to develop her critical standpoint on the same issues as in the yearly communications. Following her retirement as Ombudsman in 2001, a year during which a series of wage discrimination cases were settled in the Labour Court, Ms Svenaeus went even further in her criticism of the Court.

It was 'the second midwife case', in which the Labour Court had confirmed that two female nurses were not victims of sex discrimination, although earning less than a male medical technician for performing the same work, that set off a lively debate in the media. Shortly after this ruling, Svenaeus wrote an article in response to one of the critics of the use of legal measures in wage discrimination

¹⁴ See Myrdal (SAF) in *Dagens Nyheter*, 20 March 1996, 'Dismiss Jämo' (Ge Jämo sparken); Popova and Söderkvist in *Dagens Nyheter*, 26 March 1996, 'The myth of sexual harassment' (Mytspridning om sextrakasserier).

¹⁵ The nurses' union did though support Jämo during the first two wage discrimination cases, until 1997, when Eva Fernvall (chair of the nurses' union) announced that the union did not find Jämo's strategy productive. Going to the court would not solve discriminatory wages, according to Fernvall, who declared that the nurses union' from now on instead would work for an individual wage system. See Fernvall in *Dagens Nyheter*, 29 October 1997, 'Vårdfacket tar avstånd från Jämo', and in *Lag & Avtal*, 2001, 'Ansvaret vilar på parterna'.

cases. Svenaeus argued that, according to conventions of human rights, gender discrimination cases must be held in courts that meet the requirements of impartiality and independence stipulated in the European Convention. Since the Swedish Labour Court is the court of the social partners, it does not fulfil this criterion, according to Svenaeus. Instead, she continues, it rules according to the norms held by the social partners, and not according to EU law, as it should (*Lag & Avtal* no. 4, 2001:6).

Svenaeus was heavily criticised in the media for taking wage discrimination cases to the Court, and many probably believed that the succeeding Ombudsman, Claes Borgström, would be less radical than she had been. However, when Mr Borgström took over the post as Ombudsman, he followed the same line of arguments as Svenaeus. Borgström also spoke of wage discrimination as an issue of human rights and, like Svenaeus, he was critical of the composition of the Labour Court (*Lag & Avtal* no. 9, 2001). In addition, after the lost cases in the Court, he went even further in his criticisms. Now, he argues that wage discrimination cases should not be held in the Labour Court at all, since there is no right of appeal against the decisions of the Court; therefore, he would prefer to take the cases to the public courts instead (Borgström, 2001; 2002).

Conclusion

The point of departure in this chapter was that the misfit between the EU's equal pay principle and the corporatist tradition in Sweden of regulating equal pay in collective agreements has created a 'window of opportunity' for the Swedish Equality Ombudsman (Jämo) to enforce more individual rights and anti-discrimination policy in the regulation of wages. More specifically, the question posed is in what way Jämo has activated and responded to this Europeanisation process. Can we identify Jämo as a norm entrepreneur of EU policy?

The empirical findings show that the Ombudsman used the misfit between EU and domestic levels as an opportunity structure in her law enforcing function. Before 1994, only two wage discrimination cases had been taken to the Labour Court, none by Jämo. So, when the Ombudsman took her first case to the Court she claimed that it was EU law that now made it possible to bring wage discrimination cases in the Court. In addition, by analysing the activities deployed by Jämo, we can identify several of the strategies that norm entrepreneurs use.

First, a repeated strategy in order to *legitimise new norms* has been the Ombudsman's claim to superior knowledge in EU law. This strategy was used in the plea to the Court, in the communications to the Minister of Equality and Employment as well as in the debate in the media. More precisely, she both accused the Court of not applying EU law, and also pointed to some measures in the Swedish Equality Act that, according to her, still needed to be modified in order to comply with EU law.

With the first lost case in 1996, the Ombudsman initiated yearly discussions with the Minister. The aim of the discussions was, on the one hand, to call attention to her criticism of the Labour Court and, on the other, to point out the discrepancy between EU law and Swedish law. By *proposing special policies* the Ombudsman tried to persuade the Minister to change the composition of the Labour Court as well as to make changes regarding equal pay in the Swedish Equality Act. Further, the discussions were a new idea, and they show how national actors can introduce new strategies in response to the Europeanisation process. Finally, by referring to equal pay as a question of human rights, the Ombudsman tried to *frame the discussion*, arguing that it is inappropriate to regulate issues of human rights in the Labour Court.

While Jämo has actively responded to the Europeanisation process, there has been considerable domestic opposition to the Ombudsman's strategy of introducing more individual rights in the regulation of wage discrimination. Although domestic adaptation to EU rules has introduced strong laws emphasising individual rights in the Swedish Equality Act and made it possible now to bring wage discrimination cases to the Labour Court, the Ombudsman has not won any case brought to the Court where different jobs were compared. Instead, the Labour Court has acted as a veto player and obstructed the implementation of EU law. This clearly illustrates the conflict between the EU equal pay principle and the collective understanding in Sweden that equal pay is best regulated by the social partners and not by legislation. In addition, the representation of the social partners in the Labour Court also demonstrates, as suggested by the theoretical framework, that the more power is dispersed across the political system, the more difficult it is to avoid constraints leading to change.

Hence, any answer to the question of whether the EU has empowered Jämo is ambiguous. On the one hand, the facts that changes in the Equality Act and the cases brought to the Labour Court have not resulted in a more formal structure and strong individual rights concerning equal pay must be disappointing to Jämo. On the other hand, the EU provides the Ombudsman with new arguments and tools in the domestic policy process. As we have seen, the Ombudsman frequently refers to EU law when proposing policies to decision-makers, as well as when legitimising new norms. In addition, the supremacy of the European Court of Justice over national Courts can also be regarded as a valuable tool that the Ombudsman used in argumentation.

I therefore argue that this chapter also has theoretical implications for the understanding of the difference between the rational logic, which explains change as a resource distribution effected by rational actors, and the sociological logic, which instead explains change as a result of actors who learn to use new norms. I believe that they are not as important and easily distinguished as suggested by Börzel and Risse. Instead, the empirical evidence illustrates that empowerment does not have to be in terms of material resources, but that it can

also be in terms of new ideas and ways of framing issues. In addition, since the criticism of the Labour Court, and also Jämo's ambitions to influence the Equal Opportunities Act, is not new, I would describe Jämo as a *rational* actor that has *learned* how to use EU politics in the national policy process.

Finally, although the Labour Court has hindered the implementation of EU law in the domestic process, there are signs that its future role in the regulation of wage discrimination might change. In 2003, when the government appointed a committee with the mission to oversee the discrimination laws in Sweden, the committee was also assigned to assess the future role of the Labour Court in wage discrimination cases. In my translation:

‘From time to time there has been a debate over court procedures in discrimination cases, *primarily in the arena of wage discrimination*, where the criticism has been raised that such cases are determined by a court in which the parties to the labour market constitute a majority’ [italics added] (Directive 2002:11).

This suggests that Jämo's strategy of taking wage discrimination cases to the Labour Court has prompted criticism of the Court. If, however, the committee finally proposes that wage discrimination cases should be held in ordinary courts, it would represent a breach of the Swedish model, where the social partners traditionally have had the main power in wage regulation.

References

- Arbetsdomstolen 1995 no. 158, Jämställdhetsombudsmannen mot Kumla kommun.
- Arbetsdomstolen 1995 no. 66, Jämställdhetsombudsmannen mot Örebro läns landsting.
- Arbetsdomstolen 1996 no. 41, Jämställdhetsombudsmannen mot Örebro landsting.
- Arbetsdomstolen 2001 no. 13, Jämställdhetsombudsmannen mot Örebro landsting.
- Andersson, Eva, R. (1997) *Fem mål för värdiga löner: Om fem lönediskrimineringsmål i Arbetsdomstolen*, Arbetslivsinstitutet.
- Ahlberg, Kerstin (2003) ‘Principerna och Praktiken: om de svenska aktörernas hållning till direktiven om deltids- och visstidsarbete’, in Sören Kaj Andersen (ed.) *EU og det nordiske spill om lov og avtale*. SALTSA, Arbetslivsinstitutet.
- Bennet, Andrew and Alexander L. George (1997) ‘Research Design Tasks in Case Study Methods’, <http://www.georgetown.edu/bennett> (2004-08-11).
- Borchorst, Anette (1999) ‘Gender equality law’, in Christina Bergqvist et al. (eds), *Equal Democracies? Gender and Politics in the Nordic Countries*. Scandinavia University Press.
- Borchorst, Anette (1999) ‘Equal status institutions’, in Christina Bergqvist et al. (eds) *Equal Democracies? Gender and Politics in the Nordic Countries*. Scandinavia University Press.

- Bergqvist, Christina and Ann-Cathrine Jungar (2000) 'Adaptation or diffusion of the Swedish gender model?' in Linda Hantrais (ed). *Gendered Policies in Europe: reconciling employment and family life*. pp. 160-79, Macmillan.
- Borgström, Claes, 'Diskrimineringsmål bör prövas i allmän domstol', in *Lag and Avtal*, 2001.
- Borgström, Claes, 'Ingen ska behöva stå ensam', in *Lag and Avtal* 2001.
- Borgström, Claes, 'Takhöjden oväntat låg', in *Lag and Avtal* 2002.
- Börzel, Tanja A. and Thomas Risse (2003) 'Conceptualising the Domestic Impact of Europe', in Featherstone, Kevin and Claudio M. Radaelli (eds), *The Politics of Europeanisation*. Oxford.
- Caporaso, James, Green Cowles, Maria and Thomas Risse (eds) (2001) *Europeanisation and domestic change*. Ithaca, NY: Cornell University Press.
- Caporaso, James and Joseph Jupille (2001) 'The Europeanization of Gender Equality Policy and Domestic Structural Change', in Caporaso, James, Green Cowles, Maria and Thomas Risse (eds) (2001) *Europeanisation and domestic change*. Ithaca, NY: Cornell University Press.
- Caporaso, James A, and Joseph Jupille (2002) 'Integrating Institutions: Theory, Method, and the Study of the European Union'. *Arena papers on line* 2003.06-18.
- Carlsson, Görel (2002) *Mer makt genom EU? En fallstudie av Jämo som en inhemsk aktör*. Thesis presented at the Department of Government, Uppsala University.
- Clarke, Steve (2001). 'Earnings of men and women in the EU: The gap narrowing but only slowly'. Statistics in focus- population and social conditions, Theme 3-5 /2001. Eurostat.
- Direktiv 2002:11, En sammanhållen diskrimineringslagstiftning.
- Ellis, Evelyn (1998), *EC Sex Equality Law*. Clarendon Press.
- European Commission (2002), 'Special bodies to promote equality and/or combat discrimination'. Final report by PLS Ramboll management. http://europa.eu.int/comm/employment_social/fundamental_rights/public/arcg_en.htm.
- Falkner, Gerda (2003) 'Comparing Europeanisation Effects: From Metaphor to Operationalisation'. Paper for the ECPR General Conference, Marbourg, 18-21 September 2003.
- Fernvall, Eva in *DN* 960326 'Vårdfacket tar avstånd från Jämo'.
- Fernvall, Eva in *Lag and Avtal* (2002) 'Ansvaret vilar på parterna'.
- Featherstone, Kevin and Claudio M Radaelli (2003) 'A Conversant Research Agenda', in (eds) Featherstone, Kevin and Claudio M. Radaelli, *The Politics of Europeanisation*. Oxford.
- Finnemore, Martha and Kathryn Sikkink, (1998) International Norm Dynamics and Political Change. *International Organisation* vol. 52, no. 4. pp. 887-917.
- Fransson, Susanne (2001) *Lönediskriminering*. Iustus förlag.
- Haas, Peter M, (1992) Introduction: epistemic communities and international policy coordination. *International Organization* vol. 46, no. 1 p.1-35.

- Hantrais, Linda (2000) *Social Policy in the European Union*. McMillian Press Ltd.
- Hantrais, Linda (2000) (ed) *Gendered Policies in Europe: reconciling employment and family life*. Macmillian.
- Héritiér, Adrienne et.al. (2001) *Differential Europe: The European Union Impact on National Policymaking*. Rowman and Littlefield publishers, inc.
- Hobson, Barbara (2000) *Gender and Citizenship in Transition*. London: Macmillian.
- Hoskyns, Cathrine (1996) *Integrating Gender: women, law and politics in the European Union*. Verso.
- Jämställdhetsombudsmannen, (1995) Stämningensansökan JämO/Örebro läns landsting (1995-07-06).
- Jämställdhetsombudsmannen, (1997a) Stämningensansökan JämO/ Stockholms Läns Landsting (1997-09-30).
- Jämställdhetsombudsmannen (1997b) Stämningensansökan JämO/ Örebro Läns Landsting (1997-09-30).
- Jämställdhetsombudsmannen (1996-08-29) 'Begäran om översyn av jämställdhetslagen'.
- Jämställdhetsombudsmannen (1997a-08-19) 'Begäran om översyn av jämställdhetslagen'.
- Jämställdhetsombudsmannen (1998-08-24) 'Brister i diskriminerings-lagstiftningen'.
- Jämställdhetsombudsmannen (1999-08-24) 'Översyn av diskriminerings-lagstiftningen'.
- Jämställdhetsombudsmannen (1999) JämO till AD med nytt sjukvårdsmål, Press release 1999-06-16.
- Kingdon, John W (2003) *Agendas Alternatives and Public Policies*. Longman.
- Knill, Christoph and Dirk Lehmkuhl (2002) The national impact of European Union regulatory policy: Three Europeanization mechanisms. *European Journal of Political Research* 41:255-280.
- Lag and Avtal* 'Jämo föreslår ny kompromiss' 22 June 2001.
- Lag and Avtal* 'Processordningen i diskrimineringsmål mm. Special issue 2001-2002.
- Lovenduski, Joni (1986) *Women and European Politics: Contemporary Feminism and Public Policy*. Wheateheaf.
- Mazur, Amy G (2002) *Theorizing feminist policy*. Oxford.
- Mazur, Amy G (1999) 'Feminist Comparative Policy: A New Field of Study'. *European Journal of Political Research*, 35:483-506.
- Mazur, Amy and Dorothy M Stetson (1995) (eds) *Comparative State Feminism*. (Sage).
- Myrdal, Hans Göran in DN 960320 'Ge Jämo sparken'.
- Nyström, Kerstin (2000) 'Regleringsformernas och aktörernas ställning vid normeringen av framtidens svenska arbetsmarknad' in Ann Numhauser-Henning (ed) *Normativa Perspektiv, Festskrift till Anna Christensen*. Lund: Wallin and Dahlström.

- Nielsen, Ruth (1990) Den svenska jämställdhetslagstiftningen i europeiskt perspektiv. Rapport utarbetad för Jämo maj 1990.
- Nielsen, Ruth (1996) *Employers' Prerogatives: in a European and Nordic Perspective*. Handelshögskolens förlag.
- Nielsen, Ruth and Erika Szyszczak (1997) *The Social Dimension of the European Union*. Handelshögskolens förlag.
- O'Connor, Julia S (1999) 'Employment Equality Strategies in Liberal Welfare States', in Diane Sainsbury (ed) *Gender and Welfare State Regimes*. Oxford University Press.
- Ostner, Ilona (2000) 'From Equal Pay to Equal Employability'. In (ed) Mariagrazia Rossilli, *Gender Policies in the European Union*. Lang p. 25-42.
- Popova, Susanne and Söderkvist in DN 960326 'Mytspridning om sextrakasserier'.
- Proposition 1990/01:113, Olika på lika villkor om en ny jämställdhetslag, m.m.
- Proposition 1993/94:147, Jämställdhetspolitiken. Delat makt delat ansvar.
- Petersson, Olof (1991) Democracy and Power in Sweden. *Scandinavian Political Studies*, vol. 14. no. 2.
- Rothstein, Bo (1992) State Structure and Variations in Corporatism: The Swedish Case. *Scandinavian Political Studies*, vol. 14, no. 2.
- Radaelli, Claudio (2003) 'The Europeanisation of Public Policy', in Featherstone, Kevin and Claudio Radaelli (eds) *The Politics of Europeanisation*. Oxford.
- Svenaesus, Lena (1995) 'Hur värderas olika arbeten?' in Göteborgs Posten 1995-10.17.
- Svenaesus, Lena (2002) 'Omöjlig uppgift för AD', in *Lag and Avtal*.
- SOU 1993:7, Löneskillnader och lönediskriminering. Om män och kvinnor på arbetsmarknaden.
- Tesoka, Sabrina (1999) The Differential Impact of Judicial Politics in the Field of Gender Equality Politics. Three National Cases under Scrutiny. European University Institut, Working Paper RSC No. 99/18.
- Zippel, Kathrin (2003) Practices of Implementation of Sexual Harassment Policies: Individual Versus Collective Strategies. *Review of Policy Research*. 2003 20-1.