

Internal market (free movement) law and welfare services

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The subproject on Internal market (free movement) law will focus on two aspects:

1. Free movement as a constraint upon public and private actors in the Danish welfare state/market

1.1. Problem

This part of the subproject examines mainly the first research question set out in section 2.1. of the main project description.

As the main rule direct and indirect nationality discrimination and restrictions on the free movement are prohibited. Member States can, however, according to the case law of the ECJ to a certain extent put limitations on the free movement if the restrictions are applied in a non-discriminatory manner and are justified by imperative requirements in the general interest.¹ The principle of proportionality must be observed. There is also case law² according to which EU fundamental rights must be respected in order for a restriction to be justified, see the subproject on fundamental rights and non discrimination aspects.

The project will identify elements in Danish welfare law which may be an unlawful discrimination³ and/or restriction on free movement and discuss to what extent they may be justified and used to uphold basic traits of the Danish welfare state.

Originally EU law on free movement applied solely to nationality discrimination/restrictions by the Member States not by private actors on the market. Over the years, ECJ case law has expanded the coverage of free movement law in the private sector. The issue, to what extent EU internal market law and fundamental rights, values and principles related to it are directly binding for private individuals and businesses has been discussed in

¹ See the Gebhard case C-55/94, ECR 1995I-4165.

² Case C-260/89, ERT.

³ This is a reference to nationality discrimination, not discrimination on other grounds such as sex, ethnicity, religion, age, etc. These other grounds are dealt with in another subproject.

legal literature⁴ and been the object of adjudication for a number of years. It is, however, still controversial. In the debate on European contract law some authors speak of ‘constitutionalisation of contract law’ in this context.⁵

The project will contribute to clarify the ban on nationality discrimination/restriction as a constraint upon private actors in the welfare market.

1.2. Theory and method

The legal material analysed in the first part of the project will mainly be Danish legislation in a broad sense and ECJ case law. The legal material analysed in the last part of the project will mainly be ECJ case law and legal literature.

Generally the project will use the theory and method outlined in the main project description.

2. Expansion of Danish welfare services to cover EU migrants as a matter of EU law

2.1. Problem

This part of the project concerns the second research question set out in section 2.1. of the main project description regarding the integration of welfare functions into EU law.

The right to free movement for persons, in particular workers (Article 39 EC) and European citizens (Article 18 EC), includes certain rights to receive welfare services from the host country in order to prevent obstacles to their free movement.

Some aspects of social security for migrant workers are dealt with in detail in Regulation 1401/71. Regulation 1612/68 on freedom of movement for workers contains a provision in Article 7(2) requiring equal treatment of EU migrant workers as compared with workers with host country nationality with regard to tax and social advantages. The ECJ has interpreted both workers and social advantages so broadly that Regulation 1612/68 covers not only what would be considered within the scope of employment law, but also a number of welfare services. In addition to the

⁴ See further Neergaard, Ulla of Ruth Nielsen: EU Ret, Copenhagen 2005 Chapter 6 with further references.

⁵ Study Group on Social Justice in European Private Law: Social Justice in European Contract Law: a Manifesto, European Law Journal 2005 p 653.

specific welfare aspects covered by the above Regulations the ECJ's case law on European citizens and migrant workers establishes some welfare rights. There have been no Danish cases of this kind before the ECJ. The case law is thus developed on the basis of other variants of welfare states than the specific Danish one. It is therefore a matter for interpretation to what extent their results can be applied to Danish welfare services.

The project will examine in detail which elements of Danish welfare services migrant workers and European citizens are entitled to on the basis of the above regulations and the EC Treaty, in particular Articles 18 EC and 39 EC. It will also look into the question to what extent Denmark has limited access for both Danish citizens and other EU citizens to welfare services to avoid a politically undesirable extensive use of the Danish welfare state by foreigners.⁶

2.2. Theory and method

The theory and methods outlined in the general project description will be applied. The main focus will be on analysing case law.

(4647 keystrokes)

⁶ As an example parental leave legislation may be mentioned, see in particular Act no 135 of 2004 and its preparatory works which refer to fears of excessive use by Eastern European workers.