

## Bilag 1c

Sub-project: Towards a European Legal method in EU Anti-Discrimination Law

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### 1. Presentation of the problem

The subject of this subproject is the question of whether a distinctive European legal method can be identified in EU anti-discrimination law. Anti-discrimination law is the body of law that prohibits discrimination on certain specified grounds, e.g. sex, race, ethnic origin, religion, in specified areas of social life, e.g. employment, education, access to goods and services. This subproject seeks to provide answers to the three research questions set out in section 2 of the general project description in the specific area of anti-discrimination law.

The relevance of this subject and its relationship to the three research questions arises from three main factors.

First, EU anti-discrimination law is one of the most developed areas of EU law, as it has evolved from a single provision on equal pay for equal work in the 1957 Treaty establishing the European Economic Community (Article 119 EEC) to encompass directives prohibiting discrimination in areas other than work and on grounds other than sex.

Second, much of EU anti-discrimination law's development is a direct result of the ECJ's case law in this area. Much of this case law is based on unwritten general principles of law, such as non-discrimination and respect for fundamental rights.<sup>1</sup> The ECJ's approach to legal analysis and interpretation in a number of these cases is generally regarded as being highly instrumental and pragmatic, quite at odds with the predominantly dogmatic and positivistic method and theory of traditional European legal culture.<sup>2</sup> This lack of fit between the ECJ's legal method and the prevailing method and theory of European legal culture may threaten the legitimacy of EU anti-discrimination law.

Third, much of the development of EU anti-discrimination law since 1999 has occurred as the result of the adoption of directives based on Article 113 EC, which was inserted into the EC Treaty by the 1997 Amsterdam Treaty. Hesselink has argued that the EU's use of directives as an instrument of European harmonization has introduced an approach to private law (broadly understood as the law regulating relationships between private individuals) that challenges a number of assumptions of the European formal-dogmatic legal culture.<sup>3</sup> For example, directives have an instrumental, rather than a formal-dogmatic approach. They deal with specific subjects (e.g. employment discrimination) which are merely part of a broader subject (e.g. labour law) in the national legal systems. Further, these broader subjects of national law may be systematically connected with other subjects in the national legal systems.

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<sup>1</sup> See Besson, S. "Gender discrimination Under EU and ECHR Law: Never Shall the Twain Meet?", 8 Hum. Rts. L. Rev. 647, 655 (2008)

<sup>2</sup> See Hesselink, M. "The New European Legal Culture" (Kluwer 2001).

<sup>3</sup> *Id.*, at 38.

Consequently, directives are often perceived by national legal actors as disrupting the coherence of the national legal system.<sup>4</sup>

This project aims to determine whether legal actors' perceptions of EU law's incoherence may be explained by currently prevailing or alternative theories of law.

## 2. Theory and Method

The project will address the three questions in the general project description according to the method and theory outlined there.

With regards to the first research question, this project will focus primarily on the published judgments of the ECJ and the Danish high courts in the area of anti-discrimination law from the last 10 years. The judgments will be read and analysed in order to identify how Article 234 EC, Article 10 EC, and the teleological method of interpretation affect these courts' interpretations of EU law.

These judgments will also be examined with regards to the second question, on how and to what extent the three kinds of legal sources mentioned – soft law, fundamental rights and general principles, and preparatory works for legislation – are used.

With regards to the third question, the results from the analyses of the foregoing research questions will constitute the primary basis of analysis. Here literature from both European and American legal literature on legal theory will be used. Special attention will be given to critical and realist theories of law, as they directly address the issue of lack of coherence that EU law is thought to introduce into the national legal systems.

(Keystrokes: 4735)

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<sup>4</sup> Id., at 41. See also Joerges, C., "The Impact of European integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", *European Law Journal* (1997), 378-406.