

Annex 3

Fundamental rights and EU non-discrimination law

1) The Problem

This subproject relates primarily to the second research question set out in section 2.1 of the general project description. The project will shed light on the question: to what extent EU non-discrimination law has ensured the provision of core welfare services free from unjustifiable discrimination? Nationality discrimination is not included within the scope of this subproject as it concerns primarily free movement issues and is the subject of another subproject.

The right to equal treatment regardless of certain specified characteristics (e.g. sex, race, ethnic origin) is a general principle of EU law and a fundamental right.¹ Since non-discrimination is a fundamental right, all Member States must respect the principle of non-discrimination when acting to enforce or implement Community rules.² Furthermore, when a Member State justifies national rules that hinder the exercise of free movement rights, it must not only show that the national rules fall within the Treaty exceptions (public policy, public security and public health) but also that the national rules are consistent with fundamental rights, including the principle of non-discrimination.³

Despite the fact that the funding and organisation of national welfare systems are regarded as a subject of national, rather than EU law, two EU Regulations concerning free movement⁴ and three Directives⁵ prohibiting discrimination apply to a series of national welfare services. Although the EU Regulations are expressly directed at preventing only nationality discrimination in the provision of welfare services, the Member States are bound to respect the general principle of non-discrimination when acting within the scope of those regulations. The Directives, on the other hand, expressly prohibit discrimination in welfare services with regards to race, ethnic origin, and sex, and apply to both private and public actors.

This subproject will distinguish between free movement situations, which are covered by the general principle of non-discrimination, and purely internal situations, which are covered by the specific Directives, and examine the legal consequences of this distinction. For example, in situations involving EU migrants, a restriction on welfare services that hinders free movement must be justified according to both free movement rules and EU fundamental rights, including non-discrimination. Since the general principle of non-discrimination may include age discrimination, this principle would apply, for example, to health services. But the Discrimination Directives do not provide a legal basis for prohibiting discrimination in the area of welfare services on grounds other than race, ethnic origin, and sex. The question arises, then, whether age discrimination, which

¹ Case C-13/05 Chacon Navas July 11, 2005, not yet published in ECR, para 56.

² See *id.*

³ See Case C-260/89 ERT.

⁴ Regulation 1408/71 on national statutory social security schemes, Regulation 1612/68 on social advantages for EU migrant workers and their families.

⁵ Directive 79/7 on equal treatment of men and women with regards to social security, Directive 2000/43 prohibiting discrimination on grounds of race or ethnic origin, and Directive 76/207, as amended by Directive 2002/73, on equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions. The latter Directive applies to some welfare subjects, such as services for the unemployed and maternity leave and benefits.

may be included in the general principle of non-discrimination, in health services is prohibited with regard to EU migrants but allowed in purely internal Danish situations.

To summarise, this subproject will:

- a) examine the extent to which EU non-discrimination law applies to Danish welfare services in the context of
 - i. situations related to free movement issues and
 - ii. situations that are purely internal to Denmark, that is, situations that have nothing to do with free movement of persons, services or goods.
- b) and identify those elements in Danish law concerning welfare services, which may not conform to EU non-discrimination law.

2) Theory

The theory outlined in section 3 of the general project description will be applied.

3) Method

The main focus in this subproject will be on analysing the case law of both Danish courts and the ECJ and interpreting secondary legislation. Danish legislation will be examined in light of the requirements of Regulation 1612/68, Regulation 1408/71, Directive 79/7, Directive 2000/43, and Directive 76/207 as amended by Directive 2002/73, and the ECJ's case law interpreting the provisions of these rules as well as on fundamental rights.

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