

REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT
Denmark
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State of affairs up to 8 January 2007

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

According to the Danish Constitution (1) Denmark is a Kingdom consisting of Denmark, Greenland and the Faroe Islands. Antidiscrimination legislation enacted by the Danish Parliament does not become the law in the Faroe Islands or Greenland, unless similar legislation is enacted there.(2) The Faroe Islands and Greenland are not members of the European Union, and consequently under no obligation to transpose the Race Equality Directive or the Employment Framework Directive(3). When it comes to legislation in Denmark (including anti-discrimination legislation), all legislation is made by the Danish Parliament. There is no division of legislative powers between Parliament and regional or local bodies.

The legal system is a continental legal system following primarily German legal traditions. The important legal principles are laid down by the Constitution the constitutional rules are expounded by laws, while detailed regulation is provided by governmental and ministerial decrees. In contrast to the German legal system, however, Denmark has no Constitutional Court. The Danish Supreme Court has traditionally been very reluctant to use its power to annul statutes that may be in contradiction with the Danish Constitution. This is due to the democratic principle that laws made by a majority of members of Parliament are the will of the nation, and (even Supreme Court) judges should not compromise such rules. Within the last decade, however, some Supreme Court decisions seem to represent a more active role being taken by the Supreme Court in order review legislation that may violate the Constitution. (4) This new tendency is very important when it comes to the enforcement of minority rights that may be protected by the Constitution or International standards. If, or when, a majority of members in the Parliament enact legislation violating such minority rights it is crucial that the Danish Supreme Court annuls any such statute that is in contradiction with the Constitution or International Conventions ratified by Denmark.

The legal system is structured into legal fields (Criminal law, civil law, labour law, administrative law etc.), and anti-discrimination laws are represented in the different legal fields.

¹ Act No. 169 (1953) Danmarks Rige Grundlov (The Constitution of the Danish Kingdom, hereafter The Constitution 'Grundloven').

² Act No. 374 (2003) Lov om etnisk ligestilling (Act on the prohibition against unequal treatment due to race and ethnicity, hereafter Ethnic Equal Treatment Act.), section 12 states that the Act only applies in Greenland and Faroe Islands if all or parts of the provisions are made applicable by Royal Decree. During 2005 discussions took place on the Faroe Islands concerning the Bill that would prohibit discrimination in the labour market, however the law was not passed. This was mainly due to intense discussions about the ban on discrimination due to sexual orientation.

³ Race Equality Directive No. 2000/43/EU and Framework Directive No. 2000/78/EU (hereafter "the Directives" or if mentioned separated "The Race Equality Directive" and "The Framework Directive").

⁴ Danish Law weekly 1996, p. 1300 (the so-called Maastricht case)/UfR 1996 1300 H (Maastricht)

For example “Hate speech” is prohibited by criminal law⁵, as is the denial of access to public places, like bars and restaurants etc.⁶. It is important to notice that criminal law was chosen due to the recommendations of a Commission of experts established in 1966 by the Ministry of Justice. This Commission had to consider whether Denmark needed to enact further legislation in order to ratify the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). In 1969 the Commission published a report⁷ (White paper), stating that in order to meet the requirements of Article 4 and Article 5 of ICERD, Denmark had to enact further anti-discrimination legislation. This legislation was passed by the Danish Parliament in 1971 as criminal law. Since then almost every court case on hate speech or discrimination in other areas has made reference to the Commission of Experts and their Report from 1969 as the main travaux préparatoires of the anti-discrimination legislation in Denmark. The Report had in fact a major impact on the interpretation and the (lack of) enforcement of the (criminal) anti-discrimination legislation.

This observation is extremely relevant in relation to the transposition of the Race Equality Directive, because on June 8, 2001, the Ministry of the Interior appointed the “*Committee on implementation in Danish law of the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Equal Treatment Committee)*.”

In September 2002 this Committee published their more than 300 page long report (White paper) on: “*The implementation in Danish law of the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.*”⁸ (henceforth: “the White paper”), including proposals for amendments to the present anti-discrimination legislation in Denmark. These amendments are mainly in the form of civil law supplementing the existing criminal law.

It is crucial to understand that the findings of the Equal Treatment Committee and the statements included in the 2002 Whitepaper are now the main source as the travaux préparatoires in relation to the new civil anti-discrimination legislation in Denmark. This “2002 White paper” may have a similar great impact as the 1969 Report has had on the criminal law based anti-discrimination legislation.

When it comes to anti-discrimination legislation in the employment field, the 1969 Report did not suggest legislation, but rather to respect the “division of powers” between Parliament and other social partners. The Danish private and public labour market is dominated by the so-called ‘Danish model’, that is, regulation of the labour market is generally based on collective agreement between the labour market social partners. The collective agreement is based on the so-called ‘Hovedaftale’ (‘Main agreement’) between LO (the employees umbrella organisation) and DA (the employers umbrella organisation) of 31 October 1973, modified on 1 January 1993(9). The Danish labour law is broadly speaking governed by these collective agreements and a specific “labour court” is established in order to solve conflicts between the social partners. Anti-discrimination is also to some degree covered by the collective agreements, for example the question of “equal pay”, and the Report from 1969

⁵ Section 266b of the Criminal Code (Straffelovens § 266b)

⁶ Act on Prohibition against Differential Treatment on Grounds of Race etc, (Lov om forbud mod forskelsbehandling pga. Race m.v.) Act from 1971 but changed by Act no. 357 of 3 June 1987, It prohibits discrimination due to race, colour, national or ethnic origin, religion and sexual orientation

⁷ Commission of Experts report no. 553/1969

⁸ Report No. 1422/2002, henceforth the White paper

⁹ “Arbejdsmarkedets regler” (2001) Ole Hasselbalch.

recommended that the social partners should handle problems relating to discrimination in the labour market by collective agreements.

This tradition of labour market rules made by collective agreements is, however, in many areas supplemented by a number of statutory provisions, such as those for safety in the workplace, made by the Danish Parliament. (10) One major difference between those conflicts in the labour market covered by collective agreements and those covered by civil law, is the mandate of the courts. As mentioned above, areas covered by collective agreements are the mandate of the “labour courts” while areas covered by civil law are the mandate of the ordinary courts.

Since 1971, however, no collective agreements have been made in the field of anti-discrimination and the Danish Parliament finally made rules supplementing the (lack of) protection given by collective agreements. Since 1996, Denmark has had a civil law protecting against discrimination due to race, colour, national or ethnic origin, religion and political opinion.(11) According to the Labour Market Discrimination Act, provisions in this Act may be replaced by similar provisions reached by collective agreements (12). In other words the statutory provisions of this civil law Act only cover those parts of the labour market which are not already covered by collective agreements. And if new Anti-discrimination rules are made by collective agreements in the future, these rules may preside over the civil Labour Market Discrimination Act. Consequently, victims of discrimination must use the labour courts instead of the civil courts.

In order not to lower the standards, collective agreements are only applicable if they provide the same or even better protection against discrimination than the statutory provisions made by law, and, in fact, no such collective agreements are yet in place.

0.2 State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

By the end of year 2004 the transposition of the Race Equality Directive and the Framework Directive appeared to be in place in most aspects in Denmark.

In some areas the implementation did not take place on time, thus affecting the rights of victims of discrimination in the period from the deadline until the transposition did take place (A).¹³ In such a case the injured party might have a claim for compensation from the state.¹⁴

¹⁰ Act No. 784 (1999) Arbejdsmiljø beskyttelsesloven (Act on the protection of labour market environment).

¹¹ Act No. 459 (1996) Lov om forbud mod forskelsbehandling på arbejdsmarkedet, m.v. (Act on the prohibition against unequal treatment in employment and occupation etc. – hereafter: Labour market Discrimination Act). This Act was amended two times in 2004 in order to transpose parts of the two Directives.

¹² Race Equality Directive Recital 27 and Framework Directive Recital 36

¹³ For example, a Muslim man was fired from his cleaning job in a private Christian organisation in February 2004. The employer argued, that until the amendment of the Danish Labour Market Discrimination Act in April 2004, it was not illegal to fire the employee because of his (non Christian) religion. Consequently, this case is now pending at the City Court of Copenhagen. If the transposition of the Framework Directive had been made on time (December 2003), the employer could not argue in this way.

¹⁴ State liability was found in the “Francovich case”; C-6/90, Francovich [1991] ECR I-5357

In other areas it is a matter for debate whether the implementation did take place fully and in a correct manner (B).

Finally changes took place in 2006 and are going to take place in 2008 in the field of age discrimination (C)

A) Transposition delayed.

Race and Ethnicity

On July 1, 2003 a new Ethnic Equal Treatment Act¹⁵ came into force covering the **non-employment** aspects of the Race Equality Directive, including non- discrimination due to race and ethnicity in the fields of social protection, access to goods and services, education and housing. A body¹⁶ was designated to assist victims of discrimination in these fields as foreseen by Article 13 of the Directive.

- On 19 July 2003 (deadline for transposition of the Directive) Denmark did not meet the requirements of the Race Equality Directive **in the area of employment** in relation to the need for new provisions concerning the burden of proof Article 8, discriminatory instruction Article 2 (4) and victimisation Article 9 etc.(in the non employment area the Ethnic Equal Treatment Act includes provisions on these issues)
- Further more no body was designated to assist victims of racial discrimination in the **employment** area.
- On January 2002 the Danish Government withdraws funding for the legal aid programme for victims of racial discrimination and from January 2003 the Danish Board for Ethnic Equality was dismantled. Consequently Denmark did not have any official implementation of the Race Equality Directive Article 13 from January 2003 until July 2003.¹⁷

Implementation of the employment aspects did take place the following year 2004, see Ad b.

Religion and Belief

- On December 3, 2003 (deadline for the transposition of the Framework Directive) no parts of the Framework Directive were implemented by Denmark. Victims of discrimination due to religion or belief in the area of employment did not have protection against victimisation Article 11, discriminatory instruction Article 2 (4) etc. Legislation dating back to 1996, however protects against direct and indirect discrimination due to religion.
- Partial transposition of the Framework Directive took place in April 2004. In the period from December 2003 until April 2004 victims of discrimination due to belief, suffered from lack of any protection against discrimination in the labour market which

¹⁵ See footnote 2

¹⁶ Act No. 4116 (2002) Lov om Institut for internationale studier og menneskerettigheder (Act on the Institute for International Studies and Human Rights), also the Ethnic Equal Treatment Act section 12 states that the Institute for Human Rights is designated to receive complaints about racial discrimination and to promote equal treatment.

¹⁷ On 22 November 2005 ECJ made a ruling against Germany in the case of age discrimination, (C/144/04 Mangold case) stating that even though Germany did not transpose on time Directive 78/2000/EF has direct effect.

the Danish state was obliged to prohibit according to the Framework Directive.¹⁸ Victims of discrimination due to religion was protected by the 1996 law, however they suffered from lack of protection against victimisation, discriminatory instruction and they could not benefit from the shifting of the burden of proof.

Sexual orientation

- On December 3, 2003 (deadline for the transposition of the Framework Directive) no parts of the Framework Directive were implemented by Denmark. Victims of discrimination due to sexual orientation in the area of employment did not have protection against victimisation Article 11, discriminatory instruction Article 2 (4) etc. Legislation dating back to 1996, however protects against direct and indirect discrimination due to sexual orientation
- Partial transposition of the Framework Directive took place in April 2004. In the period from December 2003 until April 2004 victims of discrimination due to sexual orientation, suffered from lack of protection against discrimination in the labour market which the Danish state was obliged to prohibit according to the Framework Directive

Age

Denmark took advantage of the option to defer implementation of the Framework Directive in relation to age. The deadline for transposition (December 3, 2003) was postponed for one year, after approval from the EU Commission. It was the intention of the Danish Government that implementation should take place by collective agreements between the social partners.

When the social partners failed to reach agreement, the implementation did take place on December 28, 2004, when Act. No. 1417 amending the 1996 Labour Market Discrimination Act came into force.

- Victims of discrimination due to age in the period from December 3 until December 28, 2004 thus suffered from lack of any protection against discrimination in the labour market which the Danish state was obliged to prohibit according to the Framework Directive, as no such legislation existed prior to 2004.¹⁹

Disability

Denmark also took advantage of the option to defer implementation of the Framework Directive in relation to disability. The deadline for transposition was postponed for one year, after approval from the EU Commission. It was the intention that implementation in this field should take place by collective agreements between the social partners. When this failed the implementation did take place on December 28, 2004, when Act. No. 1417 amending the Labour Market Discrimination Act came into force.

- Victims of discrimination due to disability in the period from December 3 until December 28, 2004 thus suffered from lack of any protection against discrimination in

¹⁸ As described by the example in footnote 13.

¹⁹ For example, several job advertisements were published in this period including requirements that applicants must meet age requirements like: "between 20 - 30 years" etc.

the labour market which the Danish state was obliged to prohibit according to the Framework Directive, as no such legislation existed prior to 2004.

B) Lack of Transposition still today in January 2007

Race and ethnicity

Denmark did have antidiscrimination legislation on the grounds of race and ethnicity, however, in order to fully transpose the Race Equality Directive a number of amendments were needed. The amendments to the Labour Market Discrimination Act (April 2004) and the Ethnic Equal Treatment Act (July 2003) transposed those provisions of the Race Equality Directive that were not already covered by Danish legislation before 2000. This included “shared burden of proof” Article 8, discriminatory instructions Article 2 (4), victimization Article 9, and a body to assist victims of discrimination Article 13.

- When it comes to the Race Equality Directive Article 13, however, the transposition did not take place in a correct manner. In violation of non-regression principle Article 6 (2) and Recital 25 of the Directive, the resources and assistance for victims of discrimination is less after the transposition than before.
- Also the decision not to change legislation in order to give interest groups legal standing as prescribed by Article 7 (2) is a lack of implementation of this provision of the Race Equality Directive.

Religion and belief

Denmark did have antidiscrimination legislation on the grounds of religion, but not on the grounds of belief. In order to fully transpose the Framework Directive a number of amendments were needed, including protection on the grounds of belief. The amendments of the Labour Market Discrimination Act (April 2004) secured in general a full transposition of the Directive in respect of religion and belief.

- In connection with the Framework Directive Article 9 (2) however no change of Danish legislation was made in order to give religious or other interest groups legal standing in cases of discrimination due to religion or belief.²⁰

Sexual orientation

Denmark did have antidiscrimination legislation on the grounds of sexual orientation. In order to fully transpose the Framework Directive a number of amendments were needed, amongst them the inclusion of protection against victimisation, discriminatory instructions etc. The amendments to the Labour Market Discrimination Act (April 2004) secured in general a true transposition of the Directive in respect of sexual orientation.

²⁰ According to the rules of the private Christian organization mentioned in footnote 13 and 18, only members of the Evangelical-Lutheran Church, which is the National Church of Denmark, can be hired for positions in the organisation. In such cases other non Lutheran religious communities, interest groups for atheism etc. do have a legal interest in challenging such a rule on behalf of their members, whether or not individuals of these groups are directly affected.

- As regard Framework Directive Article 9 (2) no change of Danish legislation was made in order to give interest groups legal standing in cases of discrimination due to sexual orientation.

Age

Denmark had no general antidiscrimination legislation on the grounds of age. In order to transpose the Framework Directive all provisions relating to the prohibition of age discrimination had to be implemented by collective agreement or by legislation.

The amendments to the Labour Market Discrimination Act (December 2004) secured in general a true transposition of the Directive in respect of age.

- In connection with the Framework Directive Article 9 (2) however no change of Danish legislation was made in order to give interest groups legal standing in cases of discrimination due to age.
- Another problem is collective agreements which allows for age discrimination (see C)

Disability

By Act no. 55 of 29 January 2001 on compensation to persons with disabilities, and Act no. 577 of 19 June 2003 on the integration of disabled persons into the job market, some protection existed for persons with disability. However, none of these Acts implemented the Framework Directive and consequently further transposition was needed.

The amendments to the Labour Market Discrimination Act (December 2004) secured in general a true transposition of the Directive in respect of disability.

- In connection with the Framework Directive Article 9 (2) however no change of Danish legislation was made in order to give interest groups legal standing in cases of discrimination due to disability.

C. Transposition in relation to age discrimination reversed in relation to young people under 18.

In relation to the transposition of Directive 2000/78 the Danish Government pointed to the possibility that the Danish model including the Danish collective agreements can form parts of the transposition according to recital 27. On 28 December 2004 transposition, however, took place in respect of age discrimination including non-discrimination of young people by amending the Labour Market discrimination Act. Too late, however, the Government realised that a number of collective agreements includes specific low wages for youngster below the age of 18, and the right to lay off these youngsters when they reach the age of 18 (when they would be entitled to higher wages, if they were not being sacked). Consequently the Danish Government proposed a Bill in order to allow employers to discrimination youngster under the age of 18, if this is part of a collective agreement. The Danish Parliament, adopted the new legislation as Act No 240 on March 27, 2006, which entered into force on April 1, 2006.

After the non discrimination provision being in force for more than one year (since December 2004) it seems unjustified to withdraw protection that people under the age of 18 have had during this period of time. With the amendments of the legislation, it is made possible to require a minimum or a maximum age of 18 years for certain positions, and also to pay young people less than people above the age of 18, even though the value of the work may be the same.

If a young person now takes out legal action against unequal treatment in the labour market due to age, it is difficult to see how such differential treatment could be justified in court, whether or not this is part of a collective agreement. This constitutes a breach of Article 8 in Directive 2000/78/EF.

Further more on 20 December 2006 the Danish Parliament adopted changes to the Labour Market discrimination Act. According to this amendment the age limit of 65 as set up I section 5 a, subsection 4, is going to be change to a age limit of 70 years as from January 1, 2008.

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

- a. Name of the court
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

Eastern High Court decision 27 January 2005 (Mr. X vs. St. Dannebo)

A decision of the Eastern High Court from January 2005²¹ seems to narrow the scope of what is considered as coming within the definition of work in relation to sheltered workshops.

For a certain length of time the claimant represented by Attorney Henrik Karl Nielsen lived in a sheltered home St. Dannebo, while he was receiving social benefits. During his stay he also worked in St. Dannebo's sheltered workshop. Next to his social benefit he received a so-called "working reward" of Euro 1 ½ an hour (DKK 11,87 pr. Hour). On this basis, he asked for a work contract, which according to Danish law is an obligation for all employers to issue to employees within one month of commencing work (including provisions on working conditions, working hours etc).

The Municipality argued that this was not real work and refused to issue the contract. Consequently, he brought a claim for compensation for a failure to supply a work contract under the Act on Work Contracts, because he had not received the contract one month after he started to work.

The Eastern High Court held that the main purpose of his stay at St. Dannebo was not to work but to provide him with shelter and care. The amount of money he received in the sheltered workshop was only pocket money and not a real salary but rather a "work reward". If he did

²¹ See Weekly law review year 2005 page 1429 / U2005.1429

not show up for the work, he could not be fired and the production was not income generation. Even though he did pay tax on this so-called work reward the High Court concluded that this did not constitute conditions of employment but this was rather an offer to benefits his social skills and consequently he did not have the right to a work contract.

Even though the claimant was not disabled, by analogy it could be argued that those **disabled** persons who are working in the (same) sheltered workshops are not protected by the employment laws, because such activities are considered outside of the scope of the definition of what is considered work. In relation to the Directive 78/2000/EU, this may limit the protection under this Directive in that employment does not include sheltered workshops.

City Court of Copenhagen decision 1 September 2005 (Mr. X vs. Christian Cross Army)²²

On 9 February 2004 Mr. X was dismissed from his cleaning job in a private Christian humanitarian organisation (the Christian Cross Army). In a written notice he was told that he was being dismissed because he was not a member of the National Lutheran Church. According to the rules of the organisation all staff members must be members of the National Church.

When the case went to court assisted by DACoRD, the Christian Cross Army argued that according to section 6 of the Act prohibiting discrimination in the labour market (from 1996) they, as an employer, had the right to demand membership of the National Lutheran Church.

On the other hand they also admitted that Article 4 of Directive 2000/78 no longer permitted such a requirement for a cleaning position. Denmark, however, did not transpose Directive 2000/78 on time, as this was delayed until April 2004. Consequently the organisation argued that as a private employer they were under no obligation to follow the Directive 2000/78 in February 2004 and that for this reason the dismissal was not illegal under Danish law.

In November 2004 the case went to court and the claimant demanded Euro 8000 in compensation on the basis of a violation of the Act prohibiting discrimination in the labour market, ILO convention 111 and Directive 2000/78.

On 1 September 2005 the City Court of Copenhagen started the hearing of the case. However, contrary to the former position of the Christian Cross Army, expressed by their lawyer, it agreed to pay compensation of Euro 8000 without further discussion. The City Court consequently made a verdict awarding the claimant this amount.

Eastern High Court decision (Mr. X vs. Copenhagen Technical School)²³

On 29 November 2005 the City Court of Copenhagen heard the first case brought under the new Ethnic Equal Treatment Act (Transposing parts of the Race Equality Directive). First, the Court established that the issue at stake concerned education rather than the labour market (it took place on a technical school). Second, in contrast to the Complaints Committee, the Court did not find that the claimant had established proof of discrimination. –Despite the existence of a note written by the teacher which stated that an employer did not want a P - which the teacher at the technical school admitted was used to indicate “Perker” which is Danish slang for Pakistani and Turkish - the Court was of the opinion that the teacher, who made this note, would not use it to discriminate in connection with the allocation of pupils to this company as

²² Has not been published in the Weekly law review

²³ Has not been published in the Weekly law review

trainees. The City Court furthermore noted that the complainant had not been one of the pupils entitled to a traineeship as the pupil at the time in question had not completed his main educational training and therefore could not begin traineeship before having passed a test of aptitude. Consequently the Court did not find any proof of a violation of the legislation.

It seems that the City Court of Copenhagen has not applied the shifting of the burden of proof. The written note seems to constitute a prima facie evidence, as no other form of proof could be stronger than this. This is also why the Complaints Committee in this case - as the only case out of a total of 142 cases in the period from July 2003 until July 2005 - considered this to be a violation. Consequently the case was granted free legal aid in the city court, however, the decision of the Complaints Committee do not amount to also providing free legal aid for appeal.

The Eastern High Court made a ruling on 27 June 2006 stating that the claimant was not eligible for the position due to his lack of qualifications. Consequently he was not discriminated at the time when the training position was allocated to a native born Danish trainee.

As appeal for the Danish Supreme Court was denied, a communication has been forwarded to the UN Committee on Elimination of all Forms of Racial discrimination (CERD) On 5 January 2007 CERD informed the claimant that the case is now under consideration by the UN and has been forwarded to the State Party for comments.

City Court of Copenhagen decision 3 January 2006 (X vs. Int. Office Supply)²⁴

In a weekly newspaper published on 28 January 2005 a job advertisement asked for manpower aged 18 to 30 years old. The company International Office Supply located in Copenhagen needed 10 new staff members for positions. It was also stated that the employees had to be Danish.

On March 1, 2005 this job advertisement was reported to the police by the Documentation and Advisory Centre on Racial Discrimination (DACoRD) according to section 5 of the Danish Act on equal treatment in respect of employment and occupation, which partly implements the Employment Equality Directive 2000/78.

On 21 July 2005 the Copenhagen Metropolitan Police informed the complainant that the investigation of the case was complete and they imposed a fine on International Office Supply for violating section 5 of the Act on equal treatment in respect of employment and occupation, which prohibits discriminatory job advertisements. As this fine was never paid the case went to court and on the 3 January 2006 the court upheld the fine of Euro 450 for discrimination due to race/ethnicity and as well due to age. The fine of Euro 450 has the same level as fines only due to race, even though it ought to reflect that two forms of discrimination took place.

Eastern High Court decision 10 January 2006 (X vs. Berendsen)²⁵

Two women age 55 and 60 years old had been working for the same company - Berendsen – one for 18 years the other for 21 years. When the company was down sizing its staff in May 2003 both women were laid off while younger colleagues kept their jobs.

²⁴ Has not been published in the Weekly law review

²⁵ Has not been published in the Weekly law review

Traditionally employees who have been working for more than 25 years in the same company are protected in such situations. With the support of the Trade Union (HK) the two women however started legal proceedings. The City Court and the Eastern High Court awarded the two women about Euro 10.000 in compensation, even though they had not been working for 25 year but only for 18 and 21 years. These decisions may be appealed to the Supreme Court by the company.

City Court of Aarhus decision 13 July 2006 (Mrs. X vs. Orange)²⁶

In September 2003 the claimant was hired by the telephone company Orange. Since 2000 she suffered from multiple sclerosis, however, the company was not informed about this until 2004. From July 2004 her full time jobs was reduced to part time (25 hours a week), and her wage was also reduced partly due to the nature of the contract. Her salary was calculated due to the number of bookings she made each working day. Due to agreement with the local municipality, however, she now received 2/3 of her salary in the form of a wage subsidy according to section 69 of the Act on occupational effort. In other words her wage was still the same with part time work as previously with full time work due to the wage subsidy.

By the end of 2004 the numbers of so-called “attacks” (illness attacks) increased and she was not working from mid February until the end of February 2005. From February 2005 Orange was, however, taken over by another company and the number of bookings was reduced significantly. On 28 February she was informed that her performance within the last three months was not sufficient and she would be sacked by 31 May 2005. With the support of her Labour Union HK the case went to the City Court in Aarhus. It was argued amongst other that the employer did not fulfil the duty to secure reasonable accommodation according to section 2 a of the Labour Market discrimination Act. On the contrary it was argued that this duty was secured already in July 2004 when her fulltime job was changed into a part time job.

The City Court did not see any violation of the Labour market discrimination Act. Instead of considering the issue of reasonable accommodation, the Court stated that multiple sclerosis is not in any case to be considered as a form of disability. According to all the medical facts of the case it is the opinion of the Court, that it can not be established, that she was disabled, within the scope of the definition in section 1 of the Labour market discrimination Act (which since 2005 also covers age and disability). Further more no other facts in the case indicated that the motive behind the decision to sack her was in violation with that Act. This decision has been appealed.

City Court of Frederiksberg decision 1 December 2006 (Mr. A vs. HVL- Group)²⁷

On 23. October 2005 the company HVL Gruppen (HVL Group) published a job advertisement in a newspaper asking for a new employee, Age 17-45. Mr. A. who is 50 years old applied for the job. He was interviewed for the position, but rejected without any reasons. Consequently Mr. A filled a complaint with the police according to the Act prohibiting unequal treatment on the labour market section 5, for discrimination in the job advertisement. Further more his attorney started a civil case according to the same Act section 2 demanding compensation for damage according to section 7. In this connection it was also noticed, that

²⁶ Has not been published in the Weekly law review

²⁷ Has not been published in the Weekly law review

according to the same Act section 7 (a) there is a shared burden of proof, and the fact that the job advertisement openly state Age 17-45, shifted the burden of proof to the employer.

Decision of the Court: The Court stated that it was undisputed that HVL Group violated section 5 (by advertising for manpower age 17-45 years old), and that this circumstance is a fact that establish that the burden of proof is now on the employer, according to section 7 (a) of the Act prohibiting unequal treatment on the labour market. However Mr. A included his age in his application and was never the less called for an interview. Further more the employer has testified about the age composition of his labour force and consequently established facts that the rejected of Mr. A was not because of his age.

City Court of Randers decision 20 December 2006 (Mr. M. vs. Post Denmark)²⁸

A refugee in Denmark used to work as a postman in the Former Yugoslavia. He was thus employed as an unpaid trainee with Post Denmark, from May 2002 till November 2002, simultaneously he attended language school. From December 2002 he was employed as a substitute postman on Saturdays. In July 2003 he was employed at the post centre in an activation position financially supported by the local Municipality. In the letter of employment from July 2003 the plaintiff was hired on a contract without any time limitation or any other conditions for the employment (and no support from the Municipality). In December 2004 the plaintiff was however dismissed from his job, and the redundancy notice stated that the reason was his lack of language qualification. The employment ended on 1 April 2005.

Based on the presentation of the evidence, such as the redundancy notice, and the fact that the plaintiff had not given evidence to his language qualifications during the hearing of the case, the Court ruled that the reason the plaintiff was dismissed was that his language qualifications were insufficient for him to discharge the job as postal worker satisfactory after two and a half years of employment, and that the demand for language qualifications were sufficiently objectively motivated, and that the demand were proportional to the purpose in the concrete job situation, and the Court did therefore not find that the plaintiff had been indirectly discriminated against, and that the dismissal therefore did not violate section 1 (2), cf. section 2 (1) of the Act on the Prohibition against unequal treatment on the Labour Market.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

The Danish Constitution²⁹ does not contain a general provision prohibiting discrimination as such. Denmark had its first democratic Constitution in 1849. The Danish Constitution has been changed and amended in 1866, 1915, 1920 and 1953. The latest revision of the constitution took place after the Second World War and was naturally very much influenced

²⁸ Has not been published in the Weekly law review

²⁹ Act no. 169 (1953) The Constitution.

by what the Danish people experienced during the Nazi occupation in 1940-45. A proposed amendment for a specific provision to secure the rights and freedom of individuals, without discrimination on the basis of race, colour, sex, language, political or other beliefs, national or social origin, financial circumstances, birth or other social position, was rejected. A majority of the members in the Commission that suggested amendments to the Danish Constitution in 1953 rejected such a general provision. Consequently, only one of the grounds mentioned in the Race Equality Directive or the Framework Directive is directly covered by the protection of the Danish Constitution. This is religion which is covered by a number of specific provisions.

According to section 67 of the Danish constitution *"Citizens shall be at liberty to form congregations for the worship of God in a manner according with their convictions, provided that nothing contrary to good morals or public order shall be taught or done."*

According to Article 69 of the Danish Constitution, *"Rules for religious bodies dissenting from the Established Church shall be laid down by statute."* Nevertheless, no statute has ever been enacted on the recognition of religious communities in Denmark and the legal framework foreseen in the Danish Constitution covering these communities is yet to come.

The Constitution Article 70 states that: *"no one on the ground of belief or descent can be deprived of his or her political or civil rights, and that no one relying on his or her belief or descent can refuse to complete his or her duties as a citizen in Denmark"*.

Discrimination on grounds of race or ethnic origin may be covered by the prohibition against discrimination on grounds of descent, but no case law exists clarifying this issue.

Further Article 71 of the Constitution reads that personal freedom is inviolable, a sentence that has been read more as a political statement than a legal rule³⁰. Furthermore, art. 71 states that no one can be imprisoned in any way because of his or her political or religious belief or due to his or her descent.

Article 75(1) of the Constitution completes the constitutional framework by stating that 'to promote the public good [the State] shall try to ensure that every able-bodied citizen has a possibility to work in a way that secures his existence'.

The Principle of Equality in administrative law.

Even if non-discrimination clauses are not to be found, one can ask if the lack of such rules is partly compensated for by other rules, for instance, the principle of equality within administrative law.

Danish administrative law covers an area where there are no special statutes, but where there are unwritten principles, which over time have been deduced from case law and the practice of the Danish Parliamentary Ombudsman.³¹

According to Article 63 of the Danish Constitution, the courts can legitimately review any question concerning the limits of administrative authority. Such judicial review can take place during both civil and criminal cases encompassing both legal questions and the limits of discretionary decisions.

³⁰ Karnov (2001), p. 11, note 195.

³¹ Jens Garde m.fl. (1997), p. 210 and Hans Gammeltoft Hansen (1994) p. 236 and p. 251.

Danish Constitution Article 63, control of executive power:

"(1) The Courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power. However, a person who wants to query such authority shall not, by bringing the case before the courts of justice, avoid temporary compliance with orders given by the executive power.

(2) Questions bearing upon the scope of the authority of the executive power may be referred by Statute for decision to one or more administrative courts. Provided that an appeal from the decision of the administrative courts shall lie to the highest court of the Realm. Rules governing this procedure shall be laid down by statute.

Further more the Constitution from 1953 introduced the office of the Parliamentary Ombudsman with power to investigate the administration.

The lack of non-discrimination rules are to some extent compensated for by the principle of equality within administrative law. When an administrative authority is exercising discretionary power it is obliged to treat citizens equally. This means that citizens can only be treated differently if there is a legitimate reason to do so, and here the burden of proof lies, generally speaking, with the administration.

These general principles shall - unless otherwise provided by an individual special act -be applied by all administrative authorities in all types of cases. If the rules in a special area are not complete, they are supplemented by the principles of general administrative law. Likewise an act of Parliament is normally interpreted in the light of the general principles of administrative law.

In a society like the Danish, the principles of administrative law are based on a balancing of different principles, which may sometimes be of opposing character: For instance the public interest, including the interest of an effective public administration, on the one hand, and on the other hand, the consideration of the individual citizen and his legal rights.

The leading and fundamental principles of Danish administrative law are, among others:

- The principle of legality, or the rule of law.
- The principle of proportionality, and
- The principle of equality.

In this connection the principle of equality is of special interest. When an administrative authority is exercising discretionary power it is obliged to treat citizens equally. This means that the citizens can only be treated differently if there is a legitimate reason to do so.

For example, if a couple apply for permission to adopt, it may be legitimate for the public body making the decision to include information about the age of the man and/or the woman in order to make an assessment of what is in the best interest of the child, and consequently whether the adoption is permitted. In this case "age" may be a legitimate reason for differential treatment.

Another situation could be of a child born to a couple where one of the parents is an elderly person receiving a pension. If this couple applies for public day care, it would constitute a violation of the principle of administrative equality to disallow such an application solely

because the one parent is no longer in the labour market, and can take care of the child at home. In this case “age” would not be a legitimate reason for differential treatment of this family.

Statutes are often formulated in a way that leaves some discretion to the administration. It is characteristic of Danish administrative regulations that they are relatively brief, and consequently leave more detailed regulations to the administration. It is traditionally a much debated issue in Danish jurisprudence what degree of freedom various authorities have when they have been left with administrative discretion.

If an administrative authority makes use of discretionary power vested with it in a way that is discriminatory, for instance by denying persons with disabilities the same rights as other citizens to make use of publicly provided goods or services, this would no doubt be declared invalid when brought to court according to the Constitution Section 63, or by the Ombudsman. Depending on the evidence, the result would be the same if the discrimination was indirect.

When it comes to the authority exercising discretionary power as an employer, the same principle applies. The Danish Parliament’s Ombudsman has stated³² that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant who is the most qualified, thus ruling out the possibility of giving preference to applicants of a certain sexual orientation, ethnic or religious background etc.

This is also the case when it comes to promotion of public employees, salary and other job conditions. It is the qualification of the employee that counts and not e.g. age and disability or any other grounds.

This principle also applies when the public sector acts as a job exchange, or is engaged in labour market education, and any other labour market related activity.

When it comes to private employers, however, administrative law does not apply.

Non discrimination in international law

During the last twenty years human rights in general have been playing an increasingly prominent role in Danish law. When the European Convention on Human Rights in 1992 was incorporated and made an integral part of Danish National Law, the influence of the convention became very strong, much stronger than was foreseen. The courts have made good use of the convention in a great number of cases, and practice in many different fields has been remarkably influenced by its rules.

It has been said that the European Convention on Human Rights has had more influence in the last 10 years than the Danish Constitution in 50 years. From 1992 to 2001 the European Convention on Human Rights was cited in more than 150 cases published in the leading legal periodical, Danish Law weekly (Ugeskrift for Retsvæsen). Lower courts, the two courts of appeal, and the Supreme Court, have all welcomed the possibilities and chances which the European Convention on Human Rights gives the judge to examine all cases in the light of human rights including the non-discrimination provisions in ECHR Article 14, ILO Convention 111, CCPR Article 26, ESCR Article 2 and ICERD.

³² Annual report of the Parliaments Ombudsman 1987 p. 107 ff. (FOB 1987, s. 107)

b) Are constitutional anti-discrimination provisions directly applicable?

As mentioned in the start of this report the Supreme Court judges have traditionally been very reluctant to annul legislation made by a majority of members in the Danish Parliament. Any individual may sue the State in connection with legislation which violates his/her right to freedom of religion according to the Constitution section 70. Until now the chances of winning such cases were very small, but within the last decade the tendency is changing.

For example, a group of members of the Catholic Church has sued the Danish state for violation of the Constitutional Right to freedom of religion and non-discrimination on grounds of faith, because the legislation on burial grounds is in favour of members of the dominant Lutheran Church in Denmark.

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

No.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The following Acts include a number of protected grounds:

Act 169 (1953) Danmarks Riges Grundlov. Article 70 of the Constitution states, no one can be deprived of any civil or political rights on grounds of faith or descent.

Article 71 (1) states no Danish citizen can be deprived of personal liberty on grounds of political opinion, faith or descent.

Act No. 626 (1987) *Lov om forbud mod forskelsbehandling på grund af race m.v.* (Criminal Act on the prohibition against discrimination due to race etc.), (originally *Lov* nr. 289 of 9 June 1971 and changed by *Lov* nr. 357 of 3 June 1987) It covers race, colour of skin, national or ethnic origin, religion and sexual orientation.

Act No. 960 Section 266b of *Straffeloven* (The Danish Penal Code, provision against hate speech, hereinafter 'the Penal Code'), which covers the following grounds: race, colour, national or ethnic origin, religion, and sexual orientation.

Act. No 459 (1996) amended by Act No. 253 (2004) and further amended by Act No. 1416 (2004) and presently published as Act. No. 31, (2005) *Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v* (Civil Act on prohibition against discrimination in respect of employment and occupation etc, henceforth 'Labour Market Discrimination Act'), It covers the following grounds: race, colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin.

Act No.374 (2003) *Lov om etnisk ligebehandling* (Civil Act on the prohibition against unequal treatment due to race and ethnicity), henceforth Ethnic Equality Act.

Act No. 553 (2002) *Ligestillingsloven* (Act on the prohibition against unequal treatment due to sex).

The protected grounds according to various Acts are thus race, colour, national or ethnic or social origin (descent), sex, sexual orientation, religion, faith (belief), age, disability and political opinion.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

Definition of race and ethnicity

“Race” or “ethnic origin” is not defined in Danish law, or practice. The anti-discrimination legislation from 1971, however, was enacted in order to ratify the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and consequently the definition of “racial discrimination” in article 1 of the ICERD is also relevant in a Danish legal context, courts cases, public administration etc.

In recent years, race or racial origin are terms hardly ever used. They have been replaced with ethnic or ethnic origin/ethnic minority. These terms are used as the dominating terms for the visible minorities in Danish society of today, whether they are Danish citizens or not, and whether they (or their parents) originally came as migrants or refugees to Denmark. Also in a legal context ethnic is used instead of race, for example, in the Act from 1993 establishing the Board for Ethnic Equality.³³ Further more a Council for Ethnic Minorities was made part of the Act on Integration from 1998.³⁴ Same goes with the Act on Equal Ethnic Treatment from 2003.³⁵

The term “National minority” is only used about the German minority in Denmark.

Definition of Religion

There is no legal definition of religion in Danish legislation. Indirectly a definition may be found due to practice of the Danish authorities in relation to approval of religious communities. See further about the definition of “religious communities” under section b.

Definition of belief

It is stated in the Danish Constitutional Act (as of 1849, present wording as of 1953), section 70, that no one can be deprived of any civil or political rights on the grounds of faith or

³³ Amended in 1997 as Act No. 408, June 10, 1997. By the end of 2002 the Board was closed.

³⁴ Please note that the “Board” and the “Council” mentioned here differs from the two Committees mentioned several times in this report, namely the Equal Treatment Committee and the Complaints Committee.

³⁵ The preparatories of the Act states that ethnic origin generally is understood as the affiliation to a group of persons, who are defined on the basis of a common history, common traditions, common culture or cultural background, language, geographical origin etc. but there is no similar definition of Race.

origin. Section 71 states that no Danish citizen can be deprived of personal liberty, on the grounds of political opinion, faith or origin. Apart from these general provisions, there are no specific anti-discrimination provisions in the Danish Constitution.

A proposed Constitutional amendment made in 1953 for a more specific provision to secure the rights and freedom of individuals, without discrimination on the basis of race, colour, sex, language, political or other beliefs, national or social origin, financial circumstances, birth or other social position, was rejected by a majority of the members in the Commission that suggested amendments to the Danish Constitution in 1953.³⁶

On the other hand, the so-called Maxim of Equality in the public sector may include a prohibition against discrimination due to belief in connection with employment in the public sector. The Danish Parliament's Ombudsman has stated that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant with the best qualifications, thus preventing the possibility of giving preference to applicants of a certain religious background or to discriminate against applicants holding a specific belief (whether this belief is of a political or religious nature).⁽³⁷⁾

Further more Denmark has signed the UN Convention on Civil and Political Rights (CCPR). According to General Comments No. 22 (para. 2) it is the opinion of the UN Human Rights Committee, that: Article 18 of the CCPR protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. This interpretation is also relevant for the interpretation of the definition of "belief" in connection with the protection against discrimination in the public sector.

In the private sector (private employers, organisations etc.) however, there is a need for legislation in order to protect victims from discrimination in seeking jobs etc. In this connection the legal definition of CCPR article 18, is not of much help.

Definition of "Person with a Disability."

In Denmark we have no legal definition of disability or of the concept of 'persons with a disability'. Persons with disabilities are not registered as such but only in special relations for instance as pensioner, persons with an impairment in need of special sorts of medication or medical treatment, vocational training, or severely disabled persons with a personal assistant paid for by the municipality etc.

A common way of describing disability, which is used by the disabled people organisations, has been formulated as: *A person is considered to have a disability if he has a permanent, usually lifelong functional limitation that is significant, be it of mental, sensorial or physical nature. A functional limitation is significant if a function is impaired or completely lost so that the person is unable to do or perform what other persons of the same age and gender belonging to the same cultural group can do or perform. A functional limitation is not to be considered permanent if it is amenable to treatment and cure within a foreseeable period of time.*

³⁶Report from the Commission on amendment of the Danish Constitution, 1953, p. 24, 39-40, 77.

³⁷ The Danish Parliaments Ombudsman, Annual report 1987, p. 107 ff. (FOB 1987, s. 107)

This seems to correspond to some degree with the definition made by the European Court of Justice:³⁸ “.. a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”

Disability is often seen by doctors and health professionals as an intrinsic feature of the person, while rehabilitation experts and disabled persons themselves usually consider disability as the function of an interaction between the person and his environment.

Perceived but totally unfounded disability, e.g. a person with a facial disfigurement, is usually not what would be included in the concept of disability in Denmark. One could perhaps here instead talk about a socially generated handicap because of prejudices among ordinary citizens and employers which might have a similar effect as disability, especially when it comes to non-integration.

So far the first case law on disability seems to indicate that the definition described above is not followed by the Danish courts. The Aarhus City Court decision from 13 July 2006 stated that multiple sclerosis is not in any case to be considered as a form of disability. This case however is under appeal.

Definition of Age

No definition was provided in Act no. 1417 amending the Labour market Discrimination Act when including the prohibition against age discrimination. See further about the definition of age, in relation to young people, under section c.

Definition of sexual orientation.

In the existing Danish law the term ‘sexual orientation’ is used, which means homo- and heterosexual relations and other kinds of lawful sexual inclinations (like transvestism)³⁹. It is important to note that the implementation of the Directive has not changed the current notion.

Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation;

A person's sexual preference (be it secret or not) as well as sexual behaviour (secret or not) is covered by the Act on Discrimination.

Discrimination against groups, organisations, events or information of/for/on lesbians, gays and/or bisexuals;

This topic is not mentioned directly in the Labour Market Discrimination Act – but Article 2 reads: ‘An employer may not use differential treatment between employees and between applicants to vacant jobs in relation to employment, dismissal, transfer, promoting or in relation to payment or working conditions’. There is no practice in relation to this topic but in my opinion, it would be a breach of the Act if an employer denied homosexual employees the right to inform their colleagues of homosexual social events if the employer allowed heterosexual employees to do so.

Discrimination on grounds of a person's refusal to answer, or answering incorrectly, a question about sexual orientation;

³⁸ European Court of Justice in case C-13/05, Chacón Navas,

³⁹ See *Anti-diskrimination Lovgivningen med kommentarer* p. 59 and Karnov 2001 p. 4464 note 2

In Denmark it is illegal to ask for information about a candidate's sexual orientation. The Labour Market Discrimination Act Article 4 reads: 'An employer is not allowed, in connection with or during the employment of an employee, to request, make inquiries about, or receive and use information about his or her race, colour of skin, religion or belief, political belief, sexual orientation, or national, social or ethnic origin.' Since it is illegal to ask for information about a candidate's sexual orientation, the candidate is not obliged to give a true answer.

Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent;

The problem of discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without a heterosexual equivalent is of no relevance in Denmark.

The ban on homosexuality was repealed in 1930⁴⁰, but the penal code still distinguished between homo- and heterosexual relations in e.g. prostitution, age of consent etc.⁴¹

In 1976 the same age of consent was introduced for both hetero- and homosexual relations⁴².

In 1981⁴³ the same penalty was introduced for sex crimes involving persons of the same sex as applicable for sex crimes involving persons of a different sex⁴⁴ and from then on there was complete equality between homo- and heterosexuals in the Penal Code.

The author has not seen cases reported where foreign judgements have led to discrimination in Denmark.

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?

"Religion" is not directly legally defined in Denmark. Indirectly a definition may be found due to the practice of the Danish authorities in relation to the recognition of: "religious communities".

This recognition takes place in order to allow recognized communities to perform marriage ceremonies with legal validity. On the other hand, a number of communities are not recognised by the state, and consequently not a "religious community" in a legal sense.

The Constitution guarantees the religious freedom of, and non-discrimination against religious faiths other than the national Church of Denmark according to article 67-70. The question of recognition of religious communities may influence the definition of what is discrimination due to religion in the labour market field. For this reason the recognition procedure will be described.

Religious communities in Denmark may be grouped into four categories: According to section 4 of the Danish Constitution ('Grundloven'), the Evangelical-Lutheran Church is the National Church of Denmark. The status as national church is associated with certain rights, which distinguish the legal position of the Danish national church markedly from that of other religious communities.

⁴⁰ Lov nr. 126 of 15 April 1930.

⁴¹ See Steffen Jensen, Recognition of sexual orientation: The Scandinavian Model (1998, 2 – 3).

⁴² Lov nr. 195 of 28 April 1976, *der ophævede Straffelovens* art. 225, stk. 2.

⁴³ Lov nr. 256 of 27 May 1981.

⁴⁴ See Steffen Jensen, Recognition of sexual orientation: The Scandinavian Model (1998, 2 – 3).

The second category of religious communities comprises the so-called recognised religious communities. Before 1970, 11 religious communities were recognised by a Royal Decree following the recommendation of the Minister of Ecclesiastical Affairs. The Royal Decree grants full recognition of the religious community concerned and the right to celebrate religious ceremonies with legal effect according to civil law, such as baptisms and marriages, the right to maintain its own ministerial records and the right to issue certificates. A total of eleven religious communities have been recognised by Royal Decree.

The third category consists of religious communities with only limited recognition. The coming into force of the Danish Formation and Dissolution of Marriage Act in 1970 changed the policy of the Ministry of Ecclesiastical Affairs with regard to the recognition of religious communities. Section 16 of the said Act empowers the Ministry to take administrative action to afford limited competence to ministers of religion, imams, and other spiritual leaders of newly arrived religions, to celebrate marriage ceremonies with legal effect, according to civil law. The fact that a minister of religion or an imam has authority to celebrate marriages implies that the religious community in question has obtained a certain degree of recognition. In addition to the authority to perform marriage ceremonies, this limited recognition makes it possible for the religious community to obtain permission to establish its own burial ground, and aliens who are ministers of religion or missionaries of the religious community concerned may obtain a residence permit.

A Committee on Religious Communities set up under the Minister of Ecclesiastical Affairs has drawn up a set of indicative guidelines as a basis for advising the Minister. The guidelines provide a basis for the Committee's consideration of applications for recognition of religious communities. The Committee decides, in accordance with the guidelines, what constitutes a religion, and what constitutes a religious community, and the Minister of Ecclesiastical Affairs subsequently approves the Committee's recommendation. Presently 56 Christian Church communities are approved, as well as 38 non Christian religious communities⁴⁵.

The fourth category comprises non-recognised religious communities, which are religious communities that either cannot or do not wish to obtain recognition, and therefore do not enjoy the same rights as the religious communities with full or limited recognition.

The policy of the Ministry of Ecclesiastical Affairs with regard to recognition/approval of religious communities has given rise to a historically conditioned and inappropriate distinction between the fully recognised religious communities that deviate from the Danish National Church, and the other religious communities that have (only) obtained authority to perform marriage ceremonies, etc. Religious communities such as the Roman-Catholic Community and the Mosaic Community are fully recognised in Denmark, whereas, for example, the Islamic and Hindu are religious communities with only limited recognition (approval).

c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

Yes, According to the travaux préparatoires of the 2004 Act⁴⁶, it is stated that in the best interest of a child/young person, an employer may have good reasons to restrict the right to seek employment for such young people. In other words people of any age are protected, but

⁴⁵ www.km.dk

⁴⁶ Proposal for a Bill amending the Labour Market discrimination Act in order to include Age and disability, September 23, 2004

in some cases unequal treatment may be justified. Children may formally be inside the scope of protection, but in fact they may not be protected and this leaves in effect children less than 13 years old outside the definition of age.

Further more on 18 January 2006 the Danish Parliament had the first reading of the Bill L 98, which allows differential treatment of young workers age 13 till 18⁴⁷. Since the 2004 Act entered into force this Act has prohibited all discrimination on grounds of age in relation to recruitment of staff including job advertisements, level of salary, and other employment related issues especially in relation to dismissal of staff.

During 2005 which was the first year Act No. 31 was in force, it became clear that many collective agreements between the social partners in the Danish labour market included specific provisions for salaries of young people under the age of 18. Consequently, amendments to Act No. 31 were introduced in January and finally approved by the Danish Parliament at the end of March 2006.

According to the new section 5 A, paras 5 and 6, young people age 13 till 18 years are no longer protected against discrimination on the grounds of age, if collective agreements allow for differential treatment.

In relation to the transposition of Directive 2000/78 and 2000/43 the Danish Government pointed to possibility, that the Danish model including the Danish collective agreements can form parts of the transposition according to recital 27, instead of using the law making tool. As the social partners did not succeed in relation to creating such agreements, transposition, took place by amendment of the legislation taking effect on 28 December 2004 in respect of age discrimination including non-discrimination of young people. After this ban on age discrimination by law being in force for more than one year, it seems unjustified to withdraw the protection, that people under the age of 18 have had during this period of time. If a young person now takes out legal action against unequal treatment in the labour market due to age, it is difficult to see how such differential treatment could be justified in court, whether or not this is part of a collective agreement. This constitutes a breach of Article 8 in Directive 2000/78.

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

Legal plans

In October 2006 the Danish Government announced an up-coming Bill which will establish a complaints board including all protected grounds in the labor market anti discrimination legislation (sex, race, religion, age, sexual orientation, disability etc.). The Danish government has plans for adoption of the legislation in spring 2007, and thus entering into force in 2008, however at the cut of date for this report no bill had yet been presented in the Danish Parliament.

Case law

On 28 January 2005 a job advertisement asked for manpower aged 18 to 30 years old. The company International Office Supply located in Copenhagen needed 10 new staff members for positions. It was also stated that the employees had to be Danish, and consequently this was a situation of multiple discrimination.

On March 1, 2005 this job advertisement was reported to the police by the Documentation and Advisory Centre on Racial Discrimination (DACoRD) according to section 5 of the

⁴⁷ Bill L 98 refers to article 6 in Directive 2000/78/EEC which allows for differential treatment on the grounds of age if the conditions laid down in provision is met.

Danish Act on equal treatment in respect of employment and occupation, which partly implements the Employment Equality Directive 2000/78.

On 21 July 2005 the Copenhagen Metropolitan Police informed the complainant that the investigation of the case was complete and they imposed a fine on International Office Supply for violating section 5 of the Act on equal treatment in respect of employment and occupation, which prohibits discriminatory job advertisements. As this fine was never paid the case went to court and on the 3 January 2006 the court upheld the fine of Euro 450 for discrimination due to race/ethnicity and as well due to age. The fine of Euro 450 has the same level as fines only due to race, even though it ought to reflect that two forms of discrimination took place.

Complaints board and case law

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.

The Equal Treatment Committee proposed that persons experiencing unequal treatment on the grounds of perceived racial or ethnic origin should be protected. The Act on Ethnic Equality (2003) and the amended Labour Market Discrimination Act (2004) do not directly state this in the text, but according to the travaux préparatoires (the White paper) this situation is included in both Acts. So far no caselaw shows whether this is applied in this way by the courts or not.

b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

The Equal Treatment Committee proposed that if a person experience unequal treatment on the grounds of a third person's racial or ethnic origin, this person should be protected by the prohibition of unequal treatment. The Act on Ethnic Equality (2003) and the amended Labour Market Discrimination Act (2004) do not directly state this in the text, but according to the travaux préparatoires this situation is included in both Acts. So far no case law shows whether this is applied in this way by the courts or not.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

There is no general prohibition and definition of direct and indirect discrimination in the Danish Constitution.

Until 1996 Denmark only had criminal law regulations covering anti-discrimination. The Act on the Prohibition against Discrimination Based on Race etc covers intentional discrimination in relation to access to public places, housing, goods and services etc. Consequently, this Act has been used in connection with direct discrimination, but never in connection with indirect discrimination.

In 1996, however, Denmark introduced civil anti-discrimination legislation in the labour market field. The Labour Market Discrimination Act was the first Act which covered both direct and indirect discrimination on the grounds of race, colour, political opinion, national or ethnic origin, sexual orientation and religion. Since December 2004 this Act also protects

against discrimination due to age, disability and belief according to the Framework employment Directive

The exact meaning of direct and indirect discrimination in the labour market is not defined in the Act. According to the travaux préparatoires of the Act, the concept of discrimination should be interpreted in accordance with the Danish legislation on gender equality. The concept in this act, however, is “unequal treatment” rather than “discrimination”

It is stated by the Equal Treatment Committee in the 2002 White paper, that according to Article 2(2)(a) of the Race Equality Directive, direct discrimination occurs where one person is treated less favourably than another is, has been, or would be treated, in a comparable situation on grounds of racial or ethnic origin.

All members of the Committee propose that a provision corresponding to the provision in the Race Equality Directive on direct discrimination be inserted in the text of the new Danish legislation implementing the Directive.

The Committee also considered whether Danish legislation should use the concepts of direct or indirect unequal treatment, or the concepts of direct and indirect discrimination. In Danish, both ‘forskelsbehandling’ (unequal treatment) and ‘diskrimination’ (discrimination) can be used to describe the situation when one or more persons are treated less favourably than others. The Danish version of the Race Equality Directive uses the term ‘forskelsbehandling’ rather than ‘diskrimination’.

A majority of the Committee members (the chairman and the representatives of the Ministry of Employment, the Ministry of Economic and Business Affairs, the Ministry of Integration, the Ministry of Justice, the Ministry of Social Affairs, the Ministry of Education, as well as of the Council of the Danish Bar and Law Society (Advokatrådet), the Danish Employers’ Confederation (Dansk Arbejdsgiverforening (DA)) and the Danish Confederation of Trade Unions (Landsorganisationen i Danmark (LO)) found it most expedient to use the concept direct ‘unequal treatment’, particularly as this is used in the Danish version of the Directive and is in general widely used in Danish legislation.

A minority of the Committee members (the representatives of the Danish Centre for Human Rights (Dansk Menneskerettighedscenter), the national association of ethnic minorities ELO (Etniske Minoriteters Landsorganisation), the National Association of Local Authorities in Denmark (Kommunernes Landsforening), the Board for Ethnic Equality (Nævnet for Etnisk Ligestilling) and the Council for Ethnic Minorities (Rådet for Etniske Minoriteter)) found it most expedient to use the concept direct ‘discrimination’, particularly because this term is widely used in the other Member States and so seems to accord well with the general development in the international community.

The Bill (L no. 152) presented by the Government on January 29, 2003 suggesting amendments to the Labour Market Discrimination Act, uses the concept of direct “unequal treatment” in line with the majority of Committee members. Concerning the use of the terms “unequal treatment” vs. “direct discrimination” it seems to be that the minority of Committee members is using the best argument. As the Race Equality Directive and the Framework Directive standards are used in all member states it is important to use the same terminology in order to allow the Court of Justice to provide a common interpretation of this term, which is “discrimination”. The term “direct unequal treatment” , however, was approved by the

Danish Parliament, and thus came into force as Act no. 253, (7 April 2004) which is now replaced by Act No. 31, 2005. According to this Act Section 1(2):

Direct unequal treatment occurs where one person on grounds of race, colour, religion or belief, political opinion, sexual orientation, age, handicap or national, social or ethnic origin is treated less favourably than another is, has been, or would be treated in a comparable situation

This definition covers the direct unequal treatment in the labour market. When it comes to the non-employment aspects of the Race Equality Directive the Danish Act on Ethnic Equality (2003) Section 3 (2) stipulates that:

Direct unequal treatment occurs where one person on grounds of race or ethnic origin is treated less favourably than another is, has been, or would be treated in a comparable situation

b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

In general direct unequal treatment can not be justified, however, when it comes to differential treatment due to religion or belief (and political opinion) it may be justified in some cases. Also in connection to differential treatment due to age and disability direct unequal treatment may be justified. By way of example according to section 1 A of the Act the armed forces are allowed to differentiate because of age and handicap. This is further described below, see chapter 4 on exceptions).

Please note Bill L 98, from January 2006 which will allow direct discrimination due to age – under the age of 18 years old. This Bill was introduced in order to amend Act No. 31 from 2005 on prohibition against discrimination in respect of employment and occupation, which prohibits discrimination in this sector on the grounds of age, disability, race and ethnicity, sexual orientation and religion and belief. Since the beginning of 2005 Act No 31 has prohibited all discrimination on grounds of age in relation to recruitment of staff including job advertisements, level of salary, and other employment related issues especially in relation to dismissal of staff.

During the first year Act No. 31 was in force however, it became clear that many collective agreements between the social partners in the Danish labour market included specific provisions for salaries and other work related issues of young people under the age of 18. Consequently, amendments to Act No. 31 were introduced in January and finally approved by the Danish Parliament at the end of March 2006, which entered into force on April 1, 2006..

According to the new section 5 A, paras 5 and 6, young people under 18 years are no longer protected against discrimination on the grounds of age, if collective agreements allows for differential treatment.

c) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

No.

2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*

Situation testing has been used in relation to discrimination in night life. In January 2005 a television programme followed two groups of youngsters trying to enter night clubs in Copenhagen with hidden camera. One group of the majority population youngsters were allowed to enter while a group of minority young were refused entry into a number of places. Doormen from 3 different night clubs have consequently been sentenced due to the evidence from this situation testing session by the City Court of Copenhagen. These cases were criminal cases according to the 1971 Act and the situation testing was invoked as evidence, but there are no specific procedural requirements.

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

No, there is no reluctance to use situation testing.

- c) *Outline important case-law within the national legal system on this issue.*

Three court cases in the beginning of 2006 / See 2.2.1.a

- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

Situation testing has been used several times by NGO's and journalists in order to prove the practice of discrimination in housing agencies, taxi companies and e.g. public and private job agencies who are willing to follow discriminatory demands for "Danish manpower" etc.

Such tests were used for publication in newspapers in order to create awareness of the forms and extend of racial discrimination in Danish society.

Situation testing has also been used as part of scientific research in order to map out discrimination in the labour market. Most comprehensive was the situation testing carried out in 1997 according to the ILO situation testing methods invented by Professor Frank Bovenkerk, showing that ethnic minorities where the victims of racial discrimination in one out of three attempts to access the Danish labour market. None of this testing has been used in court cases, about discrimination in the labour market.

In connection to access to bars and disco's etc. situation testing has been used lately and also invoked in courts – see above 2.2.1.a.

2.3 Indirect discrimination (Article 2(2)(b))

- a) *How is indirect discrimination defined in national law?*

As with direct discrimination it should be noted that the Danish legislation uses the term "unequal treatment". The Act on Ethnic Equality Section 3 (3) reads:

Indirect differential treatment is if a provision, a criteria or a praxis which apparently is neutral will leave persons of a specific race or ethnic origin in an inferior position to other persons, unless the above mentioned provision, criteria or praxis is objectively justified by a factual purpose, and the means to fulfil it are appropriate and necessary. (Covering the non employment aspects of the Race Equality Directive)

The Act on Discrimination in the Labour Market Section 1 (3) reads: 'Indirect differential treatment is if a provision, a criteria or a praxis which apparently is neutral will leave persons of a specific race, colour of skin, religion or belief, political belief, sexual orientation, or

national, social or ethnic origin, age or disability in an inferior position to other persons, unless the above mentioned provision, criteria or praxis is objectively justified by a factual purpose, and the means to fulfil it are appropriate and necessary.

Indirect unequal treatment occurs when a formally neutral condition has in practice a disproportionate effect on e.g. certain ethnic groups, unless this condition is objectively justified by work performance. These Acts do not cover unequal treatment due to citizenship. However, discrimination in the labour market on account of citizenship must not indirectly reflect discrimination due to, for instance, national origin. Even though the Act is not as detailed as the Directives, the definition of direct and indirect unequal treatment in the labour market can be interpreted to be in accordance with the Directives.

This may also be confirmed by reference to the existing case law interpreting the definition of indirect unequal treatment.

The Danish High Court made on August 10, 2000⁴⁸ an assessment of “indirect unequal treatment” according to the Act on Labour Market Discrimination (1996) in connection with the dismissal of a Muslim woman, who was rejected for employment by the department store named “Magasin” for the sole reason that she was wearing a headscarf. The department store stated that this was not intentional discrimination, but simply the company enforcing their clothing guidelines on all applicants for jobs as well as on the staff members. They had to dress “business-like”. High Court found that the dismissal of the plaintiff, solely on the grounds that – based on her religious convictions – she wore a headscarf, is an expression of indirect unequal treatment of the plaintiff. The emphasis is thus on the fact that enforcing the clothing guidelines, as happened here, will typically affect a specific group with the same religious background as the plaintiff. Consequently the High Court ruled that:

"The High Court does not find that the defendant – whose clothing guidelines admit of certain amplitude – has demonstrated conditions at the company such that the dismissal of the plaintiff can be regarded as objectively justified. Pursuant to section 7 of the Act, cf. sections 2 and 3, the plaintiff is entitled to damages..."

This High Court case from year 2000 has been the leading case on the interpretation of indirect unequal treatment, however another case decided by the Supreme Court January 2005 has to some extent change this interpretation.

b) What test must be satisfied to justify indirect discrimination?

The test, whether the requirement is “objectively justified” has also been invoked in other Court cases after the High Court decision in year 2000, for example in a High Court decision from March 2001. In this case two out of 3 judges found the clothing guidelines justified due to health and safety requirements. One judge did not consider the guidelines justified, and under the appeal to the Danish Supreme Court the parties made an out-of-court settlement including the changing of the clothing guidelines of that company.

In January 2005, however, the Supreme Court⁴⁹ open up for the interpretation that justification may include employers including clothing guidelines in order to create a religious neutral workplace. With such guidelines Sikhs, Jews or Muslims may be excluded from job opportunities in firms that invoke such guidelines.

⁴⁸ Weekly Law Review year 2000 page 2350 / U2000.2350Ø

⁴⁹ Weekly Law review year 2005, page 1265 / U2005.1265H

c) Is this compatible with the Directives?

No, the decision from January 2005 creates serious doubt about the interpretation of justification of indirect unequal treatment in relation to religion, and it may also create doubt about the interpretation of indirect unequal treatment in relation to the other discrimination grounds like age, disability, race/ethnicity and sexual orientation.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

No

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.

National law does not permit the collection of data on race or ethnicity, religion or belief and sexual orientation. Consequently, it is not possible to use such data in a court case because it does not exist. Also collection of health information is restricted under Danish law, thus making it impossible to provide data on the numbers of disabled working in a work place. On the contrary collecting information about age is possible and can be invoked as statistical evidence in court.

b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?

See answer to section 2.3.1.a and the situation is not influenced by other countries.

c) Please illustrate the most important case law in this area.

In relation to sex discrimination the landmark decision of ECJ in the so called Danfoss case is an example of a Danish case where statistical evidence played a crucial role as evidence. In relation to race, religion, sexual orientation etc. see answer to section 2.3.1 a.

d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.

See answer to section 2.3.1. a.

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

b) Is harassment prohibited as a form of discrimination?

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

Until 2004 in the labour market there was no direct prohibition of harassment on account of race, ethnic origin, as well as the other protected grounds.

As regards the Race Equality/Framework Employment Directives provision of Article 2(3) on harassment, the Equal Treatment Committee stated in the White paper from 2002 that a

corresponding provision should be inserted in new Danish legislation, because existing legislation did not fully meet the requirements of the directives.⁵⁰ At one point, however, the provision should be specified so that, according to circumstances, the creation of a threatening climate for the person subjected to harassment would suffice.

As regards the prohibition of harassment, the Equal Treatment Committee states that no prohibition of ethnic harassment among employees can be inferred from the Directive, and therefore the Committee has considered whether rules to this effect should be laid down. The Committee members agree that new legislation should not cover harassing conduct between employees, particularly in view of the provisions of the Directive on the burden of proof. In this respect, the Committee finds that the question, against which any claim for breach of the prohibition of unequal treatment should be brought, should be decided under the general Danish law of damages, and therefore no rules to this effect should be laid down.

The new Bill (L no. 152) presented by the Government on January 29, 2003 suggesting amendments to the Labour Market Discrimination Act, included a more explicit prohibition against harassment in section 1, subsection 4. Also the Bill on Ethnic Equality included a similar provision. These provisions came into force in 2004 by Act No. 253 and Act. No. 1416, and by Act no. 374 on Ethnic Equality from 2003 (protection against harassment outside the labour market field)

The proposal from the Equal Treatment Committee and the implementation by the Parliament of corresponding provisions to Article 2 (3) of the Directive in the new Danish legislation is welcomed. This has clarified the definition of harassment in connection with the labour market field, and extend the scope to those areas not previously protected (age and disability) and also extended the scope to other areas than the labour market (e.g. education) which are also covered by the Race Equality Directive.

However, the proposed scope of the protection against harassment might be too narrow. The provision states, that “the concept of harassment may be defined in accordance with the national laws and practice of the Member States”, however, this is not to say for example that: “no prohibition of ethnic harassment amongst employees can be inferred from the Directive.” First of all, the White paper seems to make a narrow interpretation of the Directive Article 2 (3) by arguing that ethnic/religious harassment amongst employees can not be inferred from the Directive.

Secondly, the White paper does not make an assessment of the scope of the existing legislation and practice in connection with the protection against racist harassment e.g. between employees, from clients, patients and in other service users. The White paper has no information on Danish practice in connection with this subject. It can be mentioned, however, that a Danish court⁵¹ did not consider the employers calling of an employee -*Arabic pig* - to amount to harassment, because this was a single statement. In other words, according to case law prior to the transposition harassment must be more than one racist act that creates a pattern of threatening climate.⁵²

When the Bill (L no. 152) was presented to the Danish Parliament, there was no mentioning of the existing case law in relation to racist harassment, but it was stated that the prohibition against harassment is to be interpreted in accordance with the courts interpretation of sexual

⁵⁰ White paper 1422/2002 page 38 and p. 169

⁵¹ City Court of Randers, 27 June 2003.

⁵² A criminal case according to section 266 b of the penal code was also unsuccessful. The case was rejected by the police because the statement “Arabic pig” was not made with intent of a wider dissemination/propaganda.

harassment. This includes a duty for the employer to provide work conditions free of harassment, whether this is harassment from the employer or from other employees. If the employer fails to stop harassment from other employees, the person subject to harassment may claim compensation from the employer.

No comments are made in relation to the question of whether the employer is also responsible in relation to harassment coming from clients, patients, etc. This may, thus be up to the Danish courts to interpret.

So far no case law has made an interpretation of the situation after the transposition of the Directives and it is consequently not possible to analyse whether Danish Courts will continue to consider harassment as a pattern of more than one act, or whether they would in the future considered by way of example the single act of calling the employee “Arabic pig” as mentioned above, harassment according to section 1 subsection 4 of the labour market discrimination act.

All the above mentioned comments made by the Equal Treatment Committee also applied in regards to harassment in areas outside the labour market. Consequently, it was proposed in the Whitepaper from 2002 that a bill on Ethnic Equal treatment was to be included such a prohibition against harassment in education, goods and services and the other non-employment aspects of the Race Equality Directive. This Act entered into force in 2003⁵³ and covers race and ethnicity, but not age and the other protected grounds in the Labour Market Directive.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

According to section 23 in the Danish Criminal Code, the penalty of an offence is applicable to any person who has contributed to the execution of an offence by instigation, advice or action. Until 2004 prohibition against discriminatory instructions was never directly part of the Danish anti-discrimination legislation. However, incitement or pressure to racial discriminatory speech according to section 266 b in the Penal Code has been criminalised since 1995, according to either subsection 2 on propaganda, or according to the provisions on the assistance to, or the attempt to, discriminate in the Criminal Code Sections 23 and 21 (compare section 266b). The purpose of the amendment of subsection 2 was to extend the enforcement of the provision to prevent Denmark from becoming a sanctuary for the dissemination of Nazi and racist propaganda.

There seem to be only very few court cases on Section 266b, subsection 2. The case most known deals with a politician who on a TV programme had accused Muslim people of being criminals and of wanting to kill and castrate the Danish population. The politician was sentenced to 7 days of ordinary imprisonment by the city court⁵⁴, which was upheld by the High Court and the Supreme Court⁵⁵.

Incitement and instruction to racial or ethnic discrimination in regard to the provision of goods, facilities and services is equally prohibited according to the provisions on the

⁵³ Act no. 374 entered into force on 1 July 2003

⁵⁴ Utrykt afgørelse fra Københavns Byret nr. 851-98 af 23. marts 1998. Decision by the Court of Copenhagen from March 23. 1998.

⁵⁵ Ugeskrift for Retsvæsen 2000. 2234 H. Danish Law Weekly 2000, page 2234.

assistance to, or attempt to, discriminate in the Criminal Code Sections 23 and 21 (compare the Act on Prohibition against Differential Treatment on Grounds of Race etc.)

Incitement to racial discrimination in the labour market, or in the public sector or in any other area covered by civil law, was not directly prohibited prior to the transposition of the Directives. Consequently, it is stated by the Committee making the White paper⁵⁶ a provision should be inserted in new legislation prohibiting an instruction to treat someone unequally due to the protected grounds, which would correspond to Article 2 (4). Further it is considered whether “incitement” (in Danish: “opfordring”) to racial discrimination is covered by the Race Equality Directive. In the opinion of the Committee incitement is not covered, but it was discussed whether this form of discrimination should be covered by Danish legislation. The Committee concluded that there was no need for this, as it may already be covered by the Danish legislation on “Torts”.

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – discriminatory instructions have now become illegal.

In the labour market field a similar prohibition came into force in April 2004 stating that *‘An instruction to differential treatment of a person on the grounds of race, colour of skin, religion or belief, political belief, sexual orientation, national, social, or ethnic origin is differential treatment’ and is therefore unlawful.*⁵⁷

Since December 2004 the above mentioned provision also includes age and disability amongst the protected grounds.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

A rule about reasonable accommodation has been adopted with the amendment of the Labour Market Discrimination Act in 2004. The new concept of reasonable accommodation in section 2 a, obliges the employer to adapt the workplace in order to accommodate the employment of disabled persons, unless this will place an disproportionate burden on the employer.

Even if it is a new concept in Danish law, the application as such is not going to be especially difficult. The evaluation of opposing parameters, principles or phenomenon, to strike a balance or come to a result which is compatible with a principle of proportionality, is a known legal mechanism in Danish law. However, coming to the right decisions when a case depends on whether certain measures are considered to be, or not to be, reasonable accommodations will give rise to court cases, which may have to make the interpretation of this concept.

⁵⁶ White paper 1422/2002 p.39 and p.174

⁵⁷ Lov om forbud mod forskelsbehandling på arbejdsmarkedet, Lov nr. 31, 2005 Section. 2.

When it is considered whether the accommodation measures are disproportionate or not, it will be a major issue whether the employers can have such measures sponsored by the state or not. In other words the availability of financial assistance will be a major issue in assessing whether it is a disproportional burden or not.

b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

Yes according to section 2 A of the Act, failure to meet the duty to accommodate accounts to discrimination unless this duty would place an unreasonable burden on the employer.

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

No, the only protected ground included in section 2 A is disability.

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?

Yes, in newly established buildings these are obliged to build in a disability accessible way; however this applies in relation to providing goods and services (restaurants), which is not covered by Directive 2000/78. In such a place, however a disabled job applicant may have a prima facie discrimination case if the employer in that restaurant has not constructed the place in a disability accessible way and refuses to do so in relation to section 2 A of the Act, concerning reasonable accommodation. In this case the disabled job seeker may argue that rebuilding the place may be expensive but the employer is under a duty to do this anyway in relation to customers.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?

b) Would such activities be considered to constitute employment under national law?

Danish Law Weekly published the decision of the Eastern High Court (UfR. 2005 p. 1429), which seems to narrow the scope of what is considered as coming within the definition of work in relation to sheltered workshops.

For a certain length of time the claimant lived in a sheltered home St. Dannesbo, while he was receiving social benefits. During his stay he also worked in St. Dannesbo's sheltered workshop. Next to his social benefit he received a so-called "working reward" of Euro 1 ½ an hour (DKK 11,87 pr. Hour). On this basis, he asked for a work contract, which according to Danish law is an obligation for all employers to issue to employees within one month of commencing work (including provisions on working conditions, working hours etc). The Municipality argued that this was not real work and refused to issue the contract. Consequently, he brought a claim for compensation for a failure to supply a work contract under the Act on Work Contracts because he had not received the contract one month after he started to work.

The Eastern High Court held that the main purpose of his stay at St. Dannesbo was not to work but to provide him with shelter and care. The amount of money he received in the

sheltered workshop was only pocket money and not a real salary but rather a “work reward”. If he did not show up for the work, he could not be fired and the production was not income generation. Even though he did pay tax on this so-called work reward the High Court concluded that this did not constitute conditions of employment but this was rather an offer to benefits his social skills and consequently he did not have the right to a work contract.

Even though the claimant was not disabled, it may be concluded that those **disabled** persons who are working in the (same) sheltered workshops are not protected by the employment laws, because such activities are considered outside of the scope of the definition of what is considered work. In relation to the Directive 78/2000/EU, this may limit the protection under this Directive in that employment will not include sheltered workshops.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

Regarding criminal liability the Danish criminal code distinguishes between natural and legal persons. The special condition for liability for legal persons are laid down in section 25-27 in the criminal code.

As regards the protection of legal persons, the Committee on the transposition of the Race Equality directive found that Danish law already had a rather comprehensive protection against unequal treatment of legal persons, and therefore they found no reason to extend the prohibition of unequal treatment to a prohibition of unequal treatment of legal persons.

It seems however that the issue of protection of “legal persons” needs to be clarified, as well as the limits of what is considered “private” and thus outside of the scope of the legal protection against discrimination.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)?

Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

As a general rule an employer is responsible for what his employees do when they act in his service. Within section 25-27 in the Danish criminal code an employer can be held criminal liable for his employees violations of the Act on Prohibition against discrimination on the Basis of Race etc. – by way of example when a doorman rejects a person because of race or ethnicity.

According to Danish law an employer is responsible not only for his own negligence and faults, but also for faults committed by his employees acting on his behalf. If a sub-contractor is an independent legal entity, person or company, the responsibility lies with the sub-contractor and not with the contractor.

Peer-workers and other workers as well who are employed by a firm belong to its personnel. Faults committed by such staff are the employer's responsibility if (new) statutory rules do not lead to another result. Harassment by such personnel is not a part of their job performance, and will not therefore be considered to be included in, or to be a part of, the employer's responsibility, unless he has neglected his duty to instruct or correct his personnel as a good employer ought to do to avoid harassment among the employees.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

Article 3(1) of the Directive reads: 'This Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) 'Condition for access to employment, to self-employment or to occupation, including selection criteria and recruitment condition (...)'.

All these demands, with the exception of self-employment, are covered in section 2 (1) of the Labour Market Discrimination Act. Self-employment is covered in section 3 (3) of the same Act.

Discrimination in the exercise of a professional activity, whether salaried or self-employed, is also prohibited according to section 3, sub section 3. Section 2 of the Labour Market Discrimination Act states that the prohibition of differential treatment applies to anybody laying down rules, or makes decisions on access to, or the exercise of independent business or trade. Discrimination in the exercise of a salaried professional activity is prohibited by section 2 of the Labour Market Discrimination Act. This protection covers all the grounds race, colour, national or ethnic origin, sexual orientation, age, disability religion and belief are covered by this Act.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

Is the public sector dealt with differently to the private sector?

According to the Labour Market Discrimination Act race, colour, national or ethnic origin, sexual orientation, age, disability religion and belief are protected (see 3.2.1)

In the public sector “Danish citizenship” may be a selection criteria for the police, judges etc. while in the private sector such requirements may be considered indirect unjustified discrimination due to national or ethnic origin. If however, a private company may have subcontracted with the Danish state – e.g. for the printing of Danish passports or bank notes etc. – this company may be obliged by the contract only to hire Danish citizens. In such cases it may not be unjustified for the private company. The justification may stem from the same principle as within the public sector, that in all those tasks relating to the sovereignty of the state, the citizenship requirement may be justified.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

Article 3 (1) (c) of the Directive states that employment and working conditions, dismissals and pay are included in the protection of the Directive.

These requirements are met in section. 2 (2)⁵⁸ of the Labour Market Discrimination Act and covers all the protected grounds (see 3.2.1).

Further more section 6 (a) in the same Act corresponds to the wording of article 6, 2 of the framework directive.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

Section 2 of the Labour market discrimination act prescribes equal treatment in respect of salary, which includes the right to occupational pension, however section 6 a allows for a age requirement in relation to such pension schemes.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?

⁵⁸ Art. 2(2) of the Act on Discrimination states: 'Discrimination in relation to payment conditions is, if equal salary is not offered for the same job or for jobs which are regarded as having the same value'.

According to section 3 (1) (b) of the Labour Market Discrimination Act, ‘access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience’ are covered in section 3(1) of the Act.

There is one case concerning adult vocational training (AMU) which in a Danish context is considered to be similar to paid work. A participant was subject to religious/racial harassment from other participants while he was praying in the corridor at the AMU-centre. Consequently the AMU-centre decided to dismiss him, as he provoked the other participants by his act of prayer.

The court passed judgement in favour of the AMU-centre with the argument that the dismissal was justified by the need to keep order. The decision was upheld by Supreme Court.⁵⁹

In the case of race discrimination a technical school⁶⁰ it was decided by the city court and approved by the High Court, that this situation was not covered by the Labour Market Discrimination Act but rather by the Danish Act prohibiting unequal treatment in goods and services (from 2003). By considering a technical school as a form of education covered by the provision on goods and services, race discrimination is covered anyway, but the problem seems to be in relation to the other protected grounds. By this decision the Danish court has excluded students at the Danish technical schools from protecting against discrimination due to age, disability, sexual orientation, religion and belief (as no provisions exists against discrimination on these grounds in the field of goods and services).

A similar problem rises with University students, who are protected against race discrimination, but not against discrimination on the other grounds. In this relation the situation differs however, because most Universities in Denmark are public institutions, and thus under an obligation not to discriminate on any ground due to the Constitutional “principle of equality”. On the contrary technical schools are mainly private institutions.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

These demands are met in a new section 3(4) of the Labour Market Discrimination Act and covers all the protected grounds (see 3.2.1).

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

The 1971 Criminal Antidiscrimination Act section 1(1) warrants penalties for differential treatment of persons on the ground of colour of skin, national or ethnic background, belief

⁵⁹ Danish Law Weekly 2001 page 83. UfR 2001, 83 H

⁶⁰ Eastern High court 27 June 2006

and sexual orientation in a number of areas of life including social security and healthcare. Age and disability is not included.

Any public or private health services or social security services open to the public, whether it is commercial or non profit must be offered on an equal footing on the same terms as others according to the 1971 criminal antidiscrimination Act. It is also an offence to refuse a person admittance on the same terms as others to a place, hospital, clinic, or the like that is open to the public, if the refusal is based on one of the protected grounds, mentioned above. In practice this criminal act has been very difficult to use in the area of social protection and healthcare.

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – both direct and indirect unequal treatment in the area of social protection and healthcare are now protected. Also with the new provision on shared burden of proof the possibility of victims of discrimination to bring successfully cases to court may increase in the future. This Act was not extended to other grounds than ethnicity, leaving amongst other age and disability outside of the scope of protection.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

The 1971 Criminal Antidiscrimination Act section 1(1) warrants penalties for differential treatment of persons on the ground of colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life including social advantage.

Any public or private leisure facilities etc. open to the public, whether it is commercial or non profit must be offered on an equal footing on the same terms as others according to the 1971 criminal antidiscrimination Act. It is also an offence to refuse a person admittance on the same terms as others to a social centres, or the like that is open to the public, if the refusal is based on one of the protected grounds, mentioned above. In practice this criminal act has been very difficult to use in the area of social advantage.

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – both direct and indirect unequal treatment in the areas of social advantages is now protected. Also with the new provision on shared burden of proof the possibility of victims of discrimination to bring successfully cases to court may increase in the future. This Act was not extended to other grounds than ethnicity, leaving amongst other age and disability outside of the scope of protection.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

The 1971 Criminal Antidiscrimination Act section 1(1) warrants penalties for differential treatment of persons on the ground of colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life including schools and other forms of education. Age and disability is not included.

Any public or private schools open to the public, whether it is commercial or non profit must be offered on an equal footing on the same terms as others according to the 1971 criminal antidiscrimination Act. It is also an offence to refuse a person admittance on the same terms as others to a school or training place, or the like that is open to the public, if the refusal is based on one of the protected grounds, mentioned above. In practice this criminal act has been very difficult to use in the area of education, however one headmaster of a school was fined when he told the parents that their adopted son of colour was not welcomed at the school.⁶¹

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – both direct and indirect unequal treatment in the area of education is now protected. Also with the new provision on shared burden of proof the possibility of victims of discrimination to bring successfully cases to court may increase in the future. This Act was not extended to other grounds than ethnicity, leaving amongst other age and disability outside of the scope of protection in relation to education.

The local municipality of Elsinore has since 2002 set up segregated classes for Romani children. The official explanation for these segregated classes was the need to make sure that the children would show up at school in the morning. This was not believed to be an objective justification by the European Commissioner for Human Rights⁶² and the Complaints Committee of the Institute for Human Rights, which consequently stated that the segregation of Romani children was illegal.

In 2006 the municipality has thus decided to dismantle the Romani classes and allowing the children back in the ordinary classes in public schools in Elsinore. More information about the issue of Romani classes in Denmark may be found on the homepage of the European Roma Rights Centre.⁶³

Until now similar forms of school segregation of other ethnic minority groups than Romani has not been observed.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

The 1971 Criminal Antidiscrimination Act section 1(1) warrants penalties for differential treatment of persons on the ground of colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life including the supply of goods and services. Age and disability are not covered.

⁶¹ CERD/C/48/add 2 March 20, 1979 p. 3

⁶² Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

⁶³ www.errc.org

Any public or private supply of goods and services open to the public, whether it is commercial or non profit must be offered on an equal footing on the same terms as others. It is also an offence to refuse a person admittance on the same terms as others to a place, restaurant, shop, or the like that is open to the public, if the refusal is based on one of the protected grounds in the criminal Act section 1, which do not included age and disability. In practice this criminal act has been very difficult to use in the area of goods and services, however some doormen has been fined for violation of the criminal Act in relation to denial of access to restaurants, night clubs etc.⁶⁴.

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – both direct and indirect unequal treatment in the area of the supply of goods and services are now protected. Also with the new provision on shared burden of proof the possibility of victims of discrimination to bring successfully cases to court may increase in the future.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions?

The Act on the Prohibition of Differential Treatment on Grounds of Race etc. warrants penalties for discrimination in public services, establishments and at events open to the public. It is thus an offence to refuse, in connection with commercial or non-profit business, to serve a person on the same terms as others because of his or her race, colour, national or ethnic origin, religion or sexual orientation. It is also an offence to refuse a person admittance on the same terms as others to a place, performance, exhibition, meeting or the like that is open to the public. The Act has a penal law character, and do not protect disabled and elderly people.

Discrimination in housing is generally prohibited according to the Act on the Prohibition of Differential Treatment on Grounds of Race etc. and in relation to public housing it is furthermore prohibited according to the Principle of Equality in Administrative Law.

As a main rule, the rental of public dwellings is done in accordance with a waiting list. In 1997, it was approved by the Danish Parliament to experiment with the rental and assignment of public dwellings. The intention was to attract applicants from a broader segment of the population to troubled areas. From 1997 until April 1999 the experiments departing from the waiting list included more than 43,000 residences. When priority is given to certain stronger groups in an experiment (e.g. priority for those with jobs is priority for the non discriminated in the labour market), other weaker groups (those who are discrimination in the labour market and now also discriminated in the housing sector) get limited access to the pertinent residential area. This approach may thus result in the discrimination against ethnic or religious minorities.

With the adoption of the Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Equality Directive – both direct and indirect unequal treatment in the area of housing is now protected. With the new provision on shared burden of proof the possibility of victims of discrimination to bring successfully cases to court may increase in the future.

⁶⁴ Danish Law Weekly 2003 page 2438 The owner of a restaurant denied access for or German and French nationals

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Article 4 of the Race Directive and Article 4 (1) and (2) of the Framework Directive authorises the Member States to grant an exception from the prohibition of unequal treatment if a genuine and determining occupational requirement requires this. The authority to make exceptions as a consequence of occupational requirements constitutes an exception from the prohibition of unequal treatment in the labour market.

Section 6(1) and 6(2) of the Labour Market Discrimination Act (1996), contains two exceptions to the prohibition of discrimination in the labour market.

According to the exemption in section 6(1), the Act does not apply to employers whose establishments have the aim of promoting a certain political or religious point of view (for example a Church that wants to hire a priest can exclude all applicants of another faith, because religion in this case is a bone fide occupational requirement). The same applies to organisations with a specific ethos, for example, private schools established on the basis of a specific religion.

Bill no. 152 presented by the Danish Government on January 29, 2003 suggesting amendments to the Labour Market discrimination Act from 1996, includes a proposal for amendments to section 6 (1) and (2). **The principle of proportionality is now included in both subsections**, in order to secure that those employers who demand a certain faith amongst applicants can objectively justify that this is due to a legitimate aim, and that the means of achieving that aim are expedient and necessary. These changes entered into force in April 2004.

4.2 Employers with an ethos based on religion or belief

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

The amended section 6(1)⁶⁵ of the Act on Discrimination includes only three exceptions to the general ban on discrimination. Two of these three exceptions are religion or belief. The wording of section 6(1) from 1996 was in contradiction to art. 4 (2) of the Framework Directive, because it did allowed employers to discriminate according to all the grounds covered by the Act. Now discrimination is only allowed on grounds of religion and belief and only where the employer or principal has a legitimate interest in doing so (e. g. a Catholic school has a legitimate right in protecting its wish to employ Catholic teachers when they teach Catholic doctrine (and only then) as opposed to geography, where such discrimination is not allowed).

⁶⁵ Section. 6(1) of the Labour Market Discrimination Act reads: 'The ban on differential treatment on the ground of political belief, religion or belief does not include employers whose company/organisation has a goal to promote a certain political or religious point of view or belief, and where the employee's political view or religious belief (objectively) is of importance for the company/organisation'.

Furthermore it is important to note that this exception does not give the churches the right to discriminate on other grounds like e.g. political opinion or sexual orientation, which was possible according to the wording of section 6(1) from 1996

b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?

A young person was dismissed in February 2004 from his cleaning job in a Christian humanitarian organisation (the Christian Cross Army). In a written notice he was told that he was being dismissed because he was not a member of the National Lutheran Church. According to the rules of the organisation all staff members must be members of the National Church.

When the case went to court, the Christian Cross Army argued that according to section 6 subsection 1 of the Act prohibiting discrimination in the labour market (from 1996) they, as an employer, had the right to demand membership of the National Lutheran Church.

On the other hand they also admitted that Article 4 of Directive 2000/78 no longer permitted such a requirement for a cleaning position. Denmark, however, did not transpose Directive 2000/78 on time, as this was delayed until April 2004. Consequently the organisation argued that as a private employer they were under no obligation to follow the Directive 2000/78 in February 2004 and that for this reason the dismissal was not illegal under Danish law.

In November 2004 the case went to court and the claimant demanded Euro 8000 in compensation on the basis of a violation of the Act prohibiting discrimination in the labour market, ILO convention 111 and Directive 2000/78.

On 1 September 2005 the City Court of Copenhagen started the hearing of the case. However, contrary to the former position of the Christian Cross Army, expressed by their lawyer, it agreed to pay compensation of Euro 8000 without further discussion. The City Court consequently made a verdict awarding the claimant this amount.

4.3 Armed forces and other specific occupations

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

Yes, according to the new section 1a the Labour Market Discrimination Act,⁶⁶ the Ministry of Defence can make exceptions for combat troops, in relation to age and disability. The Ministry does this mostly after a dialog with the social partners involved in this area.

Another provision may also provide the possibility for exception do to age. The new section 9 a of the Labour Market discrimination Act allows for age requirements invoked in other legislation, if this requirements can pass the proportionality test (the requirements must be objective and so on). In other words age requirements within the armed forces set by law by the Ministry of Defence can be upheld if such a requirement meets the proportionality test.

⁶⁶ Act no 38, 2005

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

Section 1 a, mentioned above only applies to the armed forces and not the police or other services. The exception mentioned in connection to section 9 a, however, also applies to the police, prison and emergency services.

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination?

In the public sector “Danish citizenship” is a selection criteria for the police, judges etc. This is established by law. These are functions related to the core of Danish sovereignty while public employees in other sectors like teachers are not required to be Danish citizens.

In the private sector such requirements may be considered indirect unjustified discrimination due to national or ethnic origin. In general it can not be justified.

If however, a private company has been subcontracted by the Danish State – e.g. for the printing of Danish passports or bank notes etc. – this company may be obliged by the contract only to hire Danish citizens. In such cases it may be justified for the private company. The justification may stem from the same principle as within the public sector, that in all those tasks relating to the sovereignty of the state, the citizenship requirement may be justified.

The Danish Parliament passed a bill in 1997, bill no. 329 of 14th May 1997, according to which only persons of Danish nationality, and persons from EU member countries in the future, could obtain a license as taxicab owner. A taxicab owner of foreign nationality was according to the above mentioned bill denied a license for another taxicab. He disputed the validity of this new rule because it was incompatible with art. 14 of the European Human Rights Convention and art. 26 of the UN Convention about Civil and Political Rights.

While the High Court upheld his contention, the Supreme Court came to the opposite decision,⁶⁷ granting Parliament a right to judge if nationality could be an appropriate criterion to make use of, because it was not considered out of proportion to the legitimate aim of the bill.

This decision has been criticised by some legal experts. The bill was changed in 1999 so that Danish nationality is now no longer a condition that shall be fulfilled to obtain a license as a taxicab owner.

In other words it is possible to set up citizens requirements but only by law and only as long as it is considered proportionate and have legitimate aim. It seems that the Danish Supreme Court will allow the Danish Parliament a wide margin of appreciation in respect of considering what is proportionate and legitimated, as it is difficult for an outstanding person to understand why this requirement is proportionate and legitimated in the case of taxi company owners. .

⁶⁷ Danish Law weekly 2002 page 1789 Supreme Court (UfR. 2002. 1789.H).

b) Are there exceptions in anti-discrimination law that seeks to rely on Art 3(2)?

No, there are no exceptions relying on Art 3(2).

4.5 Work-related family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

National law does not include provisions on whether private employers can provide benefits to married couples or not.

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

Discrimination between married and registered couples:

There is no legal discrimination in the field of employment between married and registered couples⁶⁸, with one exception. There is no right for the ‘social mother’ to have parental leave when her registered partner becomes a mother. This right is exclusively for the father of the child.

It is true that Danish legislation allows homosexuals to adopt their registered partner's biological child three months after birth, and that once adoption is granted, so are employment benefits concerning parental leave and others of a similar nature. These may be afforded to gay or lesbian employees on an equal footing with heterosexual employees. However, in the case of a child born in a registered partnership the law does not provide for the automatic establishment of a filiations link between the child and the partner of his or her biological parent. The requirement posed by an employee of being the legal parent – albeit neutral on its face – is particularly disadvantageous for same-sex registered couples because one partner must first go through a costly, lengthy and uncertain adoption procedure. This, between the moment of birth and the moment of adoption, would amount to an example of indirect sexual orientation discrimination.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

⁶⁸ It should be noted that in Denmark registered partnership is only available to same-sex couples, whilst marriage is only available to different-sex couples.

No provision directly provides such an exception in relation to disability. If requirements do not allow turban or beards for health or safety reasons this may constitute indirect unequal treatment due to religion. In this case the requirements are only justified if it can pass the proportionality test.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78?

Yes, section 5 a, subsection 3 and 4 of the Labour Market Discrimination Act allows for direct discrimination due to age. It is stated in subsection 3 that the existing collective agreements setting up age requirements for certain professions can be maintained, only if such an age requirements is objective, reasonable based on a legitimate reason, and within the ambit of national legislation and that this requirements is necessary in order to achieve the objectives. (proportionality test).

Subsection 4 further states that collective agreements that prescribe the termination of employment at the age of 65 years can be maintained. In subsection 4, however, it is not mentioned that such provisions in collective agreements must meet the proportionality test, as was the case in subsection 3. In other words direct discrimination due to age before the age of 65 (in existing collective agreements) can be maintained if the proportionality test is meet. From the age of 65 direct discrimination do not need to meet the proportionality test, if it is part of collective agreement.

Further more section 9, subsection 3, in the Danish Act on prohibition of differential treatment in the labour market provides for access to positive action to older workers with a view to promote employment of elderly people

According to section 9, subsection 4 of the Labour Market discrimination Act also allows for age requirements invoked in other legislation, if such a requirement is set up in order to protect children and young people.

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

Yes, see a.

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?

Yes according to section 6 a of the labour market discrimination act ages requirements can be set up for the admission of occupational pension schemes – such requirements may however not result in sex discrimination.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

Yes, according to section 9, subsection 3 any special conditions set by law for older workers in order to promote their vocational integration.

People with caring responsibilities are not protected in the labour market because of their caring responsibility.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training?

When the Bill on age discrimination was passed on 22 December 2004 there were no age requirements in the law. Indirectly however the minimum requirements were 13 years, as children under this age are not allowed to take up paid work and employers are consequently not allowed to hire them.

On 1 April 2006, however, the law was amended. According to the new section 5 A, paras 5 and 6, young people under 18 years are no longer protected against discrimination on the grounds of age, if collective agreements allow for differential treatment.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

The official state pension age is 65 years for men and woman.⁶⁹ It is possible to continue to work after the age of 65 and collect stated pension at the same time.

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

⁶⁹ The so called Folkepension is a general allowance (pension) for any citizens in Denmark from the age of 65, whether he or she has previously been working or not. Next to the state pension scheme individuals may have additionally private pensions related to their previous working life, savings etc.

At the age of 62 men and woman who have paid their contribution for early retirement (in Danish called “Efter løn” can stop working and receive an allowance. They can also continue by working part time, and then have a reduced allowance.

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

There is no general state imposed retirement age however, in some areas retirement ages are set by collective agreements for certain professions. These agreements include both men and women on an equal footing.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

Yes, the so-called “Danish model” allows collective agreements that require workers to retire when they reach a certain age. By way of example in the banking sector such collective agreements are very common, and these rules apply for both men and women.

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?

For these above questions, please indicate whether the ages are different for women and men.'

No such rights are not lost, if a man or a woman continues to work after the pension age.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

No, but national law does permit to offer seniors specific bonus if they leave before they are obliged to leave due to the collective agreements requirement (In other words, “carrots are permitted, sticks are not”).

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

See above 4.7.5 a)

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

No provision directly provides such an exception in relation to any of the mentioned reasons, public security, and public order. If requirements, however, do not allow for the covering of the head because there is a need to identify people this may constitute indirect unequal treatment due to religion. In this case the requirements is only justified if it can pass the proportionality test that the identification is need for reasons of public security or public order

etc. (the requirements must be objective and so on). One recent example was the requirements related to pictures taken for ID cards.

4.9 Any other exceptions

The Ministry for Justice has issued a circular, which allows Sikh men not to use helmet when they drive a motorcycle.

5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

Race and ethnicity

There is no general provision for special or positive measures in Danish law.

The general presumption in Danish public law is against positive measures giving preferential treatment to persons due to race or ethnic origin in relation to the labour market.

An exemption is section 9 subsection 2 of the Danish Act on prohibition of differential treatment in the labour market. This section states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation or national, social or ethnic origin, age or disability by virtue of other legislation, provisions by virtue of rules with a different legal basis or other public measures.

This right to take special measures does not apply to private employer who wants to improve employment opportunities for persons with, for instance a different ethnic background. The protection of the principle of prohibition against discrimination is considered by the authorities to be best ensured if it is only by means of legislation or other public measures that the possibility of improving employment opportunities for persons of a different ethnic origin is made possible. According to the Act section 9, such special measures thus require legal authority and are primarily to be taken by the minister in the course of public projects.

The Labour market discrimination Act thus makes it not possible for private companies to take affirmative measures in order to allow ethnic minorities who are under represented into the work place, not even if they are sub-contracting tasks for the state.

According to section 9, subsection 3, however it is possible to allow private employers to take positive measures in relation to age and disability.

Disabled

On the contrary private employers do have the possibility to apply affirmative measures in relation to disabled according to the Labour market discrimination Act section 9, subsection 3. Section 9 Subsection 3 also applies to age, but NOT to race and ethnicity, religion and belief or sexual orientation. This means that if two applicants are equally qualified the private employer may choose the disabled instead of the non disabled from the perspective that disabled persons are under represented on the Danish labour market.⁷⁰ . By way of example this is the case in relation to work in the area of taxidiving in this area preferential treatment can be granted due to disability, but not due to ethnicity.⁷¹

⁷⁰ A similar provision exists in the Act against sex discrimination

⁷¹ A similar provision exists in the Act against sex discrimination

Next to section 9, sub section 3, further more section 9 subsection 2, also applies in relation to disability and age, allowing for a number of legislative or public measures that promotes the employment opportunities of elderly and disabled. Denmark has no quota schemes for employment of disabled persons on the labour market, and never had. Even if the employment rate for persons with disabilities is much lower than the employment rate for the non-disabled, quotas were given up beforehand. A government committee made a report 15 years ago in which the issue of quota schemes was analysed. The conclusion was negative towards quota schemes. Quotas were not considered to be an effective instrument. Neither the organisations of employers, the unions, nor the organisations of disabled people wanted quota schemes. So the government dropped the idea. But the problem of the integration of persons with disabilities in the labour market unfortunately remained unsolved. Even disabled persons with high education often have difficulties in finding a job, especially a first job.

By act of Parliament no. 55 of 29th January 2001 on compensation to persons with disabilities in jobs, the integration of disabled persons in the job market has been promoted. This Act is about how compensation for impairments is best given in the labour market, and has been supplemented by a new Act of Parliament, no 577 of 19th June 2003. The general rules about how to promote and enhance employment for persons with (special) difficulties finding a job is now described in this, and among them are also some measures aiming at creating better job possibilities for persons with disabilities. The two Acts are not alternatives, but supplementary to each other.

The general aim of these Acts is to enhance the integration of persons with disabilities in the labour force by means of affirmative action and various other compensatory measures.

The philosophy is that if you compensate a person who is disabled for his/her impairment in relation to a certain job, in a specific workplace, then there should no longer be any barriers that should prevent such a disabled person from working.

Positive Action on disability under current Law.

The rules about the equalization of job opportunities and positive differential treatment in the labour market for persons with disabilities were compiled in the act of Parliament on the promotion of employment for persons with disabilities, Act no. 55 of 29th January 2001, cf. and Act no 577 of 19th June 2003, cf. page 9.

The aim is by means of affirmative action to enhance the integration of persons with disabilities in the labour market.

The main elements in this Act are the following:

- Priority in relation to certain jobs:

Persons with disabilities shall be given preferential treatment as applicants for certain jobs in public service, to stalls and stands in a marketplace, and to a license as a taxi driver if the disabled person is as equally qualified as the non-disabled applicants.

- Personal assistance.

A disabled person can be granted a personal assistant on the job for up to 20 hours a week paid by the public. Personal assistance is also offered to disabled persons during supplementary and in-service and on job training.

- "The Icebreaker Scheme":

When a disabled person has finished an education qualifying him/her for a job on the labour market and therefore is entitled to unemployment insurance, but cannot find a job, an employer who is willing to take the disabled person on is entitled to wage compensation- 50% of the wage up to 11.000 kr. a month approximately 1.600 Euro - for 6 months, in special cases 9 months.

The idea is that the disabled person shall be able to prove that he/she is able to perform a job on the labour market and have a job-reference and recommendations for his/her next job-application.

- Technical aids:

Technical aids are free of charge for the disabled in Denmark. Usually technical aids are granted by the municipality. Technical aids which are needed on the job can however be granted by disability consultants (advisors) in the local job assignment centres. The idea is that this should make the administrative procedure and decision making more simple and swift.

- Adaptation of the workplace:

If special tools, technical aids, changes at the place of work are needed for a disabled person to perform a job such equipment and adaptations can be paid for by the municipality. It applies also to specially designed tools, work chairs, installations of grab handles, widening of doorways, installation of ramps and accessible toilets and lifts. Not surprisingly very expensive adaptations like a lift and an accessible toilet can be quite difficult to obtain.

- Wage subsidy:

If a disabled person's capacity to work is so reduced that he/she cannot get an ordinary job, a wage subsidy scheme might be applied. A so-called "flex job", a job with flexible working hours and other arrangements, should be offered to the disabled by the municipality. In practice it will however quite often depend on the initiative of the disabled to find an employer who is willing to take him/her on. The employer, public or private, will pay full wages for the job performed to the disabled but 1/2 or 2/3 of the wages will be reimbursed by the government depending on how many hours the disabled person is able to work. The wage depends on the qualification of the employee.

- A mentor scheme.

If a disabled person needs more instruction or on the job training for a longer time than other employees, a special mentor scheme can be applied. The mentor can be another employee, or a consultant hired from outside to do the job. All costs for such a scheme are paid by the government.

There is at present no clear legal distinction between social security measures and affirmative actions in relation to the labour market. Social security measures are the responsibility of the ministry of social affairs and encompass general compensatory regulations in favour of all persons with disabilities, while the specific positive action measures aimed at the labour market are the responsibility of the ministry of labour.

Affirmative action measures are not seen as exceptions to the principle of equal treatment but as necessary compensation enhancing equal opportunities.

Sexual orientation

As mentioned above there is no provision that allows for positive action with respect to sexual orientation by private employers. Nowadays it is common that a number of public institutions in their advertisements write that they recommend people on the list of the Act on Discrimination to apply for jobs.

6. REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?

Once again the ‘Danish model’ plays an important role. According to this model the players in the labour market have set up a special court (*Arbejdsretten*), which rules in matters dealing with the interpretation of collective agreements⁷².

But it is also possible to agree on leaving a dispute to arbitration. See the Act on Arbitration.⁷³

Finally it is important to note that the labour court only deals with the interpretation of the collective agreements, and not with e.g. a breach of the Act on Discrimination.

Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

A person who considers himself discriminated against or subject to unequal treatment because of disability has only limited legal remedies at his disposal until Council Directive 2000/78/EC comes into force. The Directive is, even before it is implemented in Danish law, an integral part of international, European law, which shall be taken in consideration when Danish courts have to interpret Danish law in accordance with international obligations which the Danish government has to respect. Against a private employer a disabled person at the moment can do nothing, or only little. Against a public employer he can start administrative procedures because the principle of equality has been infringed, and finally ask the Parliamentary Ombudsman to intervene. Such a case can also be brought to court against a public employer.

In the White paper the Equal Treatment Committee is considering whether there is a need for new legislation with a view to satisfying the requirement of Article 7 of the Directive that “judicial and/or administrative procedures” must be available for the enforcement of obligations under the Race Equality Directive.

The Committee finds that this requirement has been satisfied by the general rules of Danish law on judicial review and the availability of an administrative control of the activities of public authorities, and therefore there is no reason to lay down in new legislation any specific rules on the availability of a judicial review.

The Equal Treatment Committee also finds in the White paper that there is no need for new legislation enforcing the obligations under the Directive to the effect that the Member States must ensure that anybody who feels wronged may complain, and that associations,

⁷² For more details see *Lov om Arbejdsretten*, lov nr. 183 of 12 March 1997.

⁷³ *Voldgiftsloven*, lov nr. 181 of 24 May 1972.

organisations and other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with the provisions of the Directive, may engage, either on behalf of the complainant, or with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive.

Consequently a new Complaints Committee was established in July 2003, as a supplement to the Danish Courts and the labour courts. This Committee, however, is only mandated to receive complaints about discrimination due to race or ethnicity.

b) Are these binding or non-binding?

The decisions by the Courts and the labour courts are binding, but the statements by the complaints committee are non-binding. Please find further information in section 7 about this issue.

c) Can a person bring a case after the employment relationship has ended?

Yes, that would be the normal procedure.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) associations in support of a complainant

Apart from rules of Danish civil procedure on intervening in a lawsuit (according to which the person or association has to show a *legal* interest in becoming a party to the case), the standing of interest groups that have a *legitimate* interest in ensuring the enforcement of the Directive has not been tackled by the Bill.

With all probability the government considers existing rules of civil procedure to be enough. However, the Framework Directive refers not only to the possibility of acting in support, but also ‘on behalf’ of the victim, without specifying whether the choice between the two options belongs to the government or to the interest groups.

If the latter interpretation is to be preferred, then the lack of action of the government must be seen as failing to properly implement the Directive.

The Committee who wrote the White Paper found that there was no need for new legislation enforcing the obligations under the Race Equality Directive to the effect that the Member States must ensure that anybody who feels wronged may complain, and that associations, organisations and other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with the provisions of the Directive, may engage, either on behalf of the complainant, or with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Race Directive.

It is difficult to assess whether, for example, NGO’s would be provided a legal standing without the need for an identified individual victim of discrimination. The statement that only NGO’s with a legitimate interest in ensuring compliance with the provisions of the Directive, may engage, either on behalf of the complainant, or with his or her approval, seems to suggest that one individual is involved in the case. In order to challenge more institutionalised forms

of discrimination it would, however, sometimes be necessary to challenge this practice by taking legal action without any individual being involved.

The situation is similar when it comes to the possibility of legal standing for NGOs in the field of combating discrimination due to age, disability or sexual orientation.

b) Cases on behalf of one or more complaints

According to Danish law class actions are not possible.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

The Ethnic Equality Act (2003) and the amended Labour Market discrimination Act (2004) introduced the principle of dividing the burden of proof⁷⁴. This means that the person who feels that he or she has been discriminated against has to show evidence of possible discrimination, whereas the employer has to prove that no discrimination has taken place. This divided (and not a total shift) burden of proof is in line with the (Danish version) of recital number 31 and article 10 of the Directive.

To live up to the Directives, a shared burden of proof generally has to be introduced in cases of racial and ethnic discrimination, as well as discrimination due to religion and belief, age, disability and sexual orientation.

In the White paper the Equal Treatment Committee found it most expedient that a new statutory provision on shared burden of proof in cases concerning ethnic/religious discrimination is worded in accordance with the description of how the burden of proof is shared in Danish legislation on discrimination on grounds of gender. For this reason the Committee found that the word “establish” of Article 8 must be replaced by “prove”.

This amended wording does not imply any deviation from the requirement on the sharing of the burden of proof which can be inferred from the Directive. The principle of shared burden of proof also applies in cases concerning ethnic and religious harassment and cases concerning unlawful instructions to treat unequally.

Bill no. 152 presented by the Government on January 29, 2003 suggested amendments of the Labour Market discrimination Act, including a new section 7 (a) for shared burden of proof. Section 2, subsection 4 included already a shared burden of proof in connection to unequal treatment in respect of payment, however, this section is now replaced by section 7 (a). This new provision entered into force in April 2004.⁷⁵ Section 7(a) also applies to the other protected grounds that were included into the Act on 28 December 2004.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that helps the victim of discrimination to present a complaint)

⁷⁴ The Ethnic Equality Act section 7 and Labour Market discrimination Act section 7 a.

⁷⁵ Please see an example of case law applying the principle of the burden of proof – section 0.3 Case law Copenhagen City Court decision 5. December 2005

A) The Labour Market Discrimination Act in its old text said nothing about protection against victimisation on account of a complaint about discrimination, but a new section 7 subsection (2) reads that,

the person who has met with disparaging treatment or unfavourable consequences because he or she has asked for equal treatment, as mentioned in section. 2 to 4, can be given compensation [by the court].

When the protection applies, the comments of the Bill from 2004 read: *‘Protection against victimisation applies in cases where a formal letter of complaint has been filed with a court of justice or another public authority, as well as in cases where a certain incident is criticised verbally at the place of work, or where the employee has contacted his or her trade union and related the circumstances to the union.’*

It is of course a prior condition, that a causal link can be established between the victimisation and the employee’s request for equal treatment.

Victimisation on account of race, religion, sexual orientation, age or disability in the workplace as well as in all other areas was neither defined nor directly prohibited in Denmark. Victimisation is only prohibited in the Act on Equal Payment for Men and Women Section 3. The Committee found in the White paper from 2002 that a prohibition of victimisation corresponding to the provision of the Directive should be inserted in new legislation.

The Committee also found, that in order to ensure correct implementation of the Directive, that no special requirements should be fixed as to which complaint or proceedings an individual must have submitted or instituted, except that the complaint or proceedings must be submitted or instituted to ensure compliance with the principle of equal treatment. This protection thus applies both in relation to an application to a court or another authority, and to a complaint lodged directly with the private enterprise claimed to have committed unequal treatment.

Victimisation is not a kind of unlawful discrimination, and therefore the principle of shared burden of proof does not apply in this respect. As the special considerations which have formed the basis for the application of the special rules on burden of proof in cases concerning unequal treatment do not apply to the same extent to proceedings concerning victimisation, the Committee finds that no special rules on the burden of proof should be laid down for such cases.

According to Act. No 31 of 2005 section 1, subsection 4 victimisation due to all the protected grounds are prohibited and according to section 7 subsection 2 the person who are met with disparaging treatment or unfavourable consequences because he or she has asked for equal treatment, as mentioned in section. 2, 3 and 4 of the same Act, can be given compensation by the court.

It is not possible to know whether protection against victimisation extend to persons other than the complainant, as such a situation is not mentioned any place at all.

B) It is not possible to know whether protection against victimisation extend to persons other than the complainant, as such a situation is not mentioned any place at all. What is mentioned however is the situation that someone who is entitled by law to complain on behalf of a victim of discrimination may be covered by the protection against victimisation. It is also mentioned that it is not common (to have such a right to complaint on another’s behalf), and if the

complainant do not have the right to complain on behalf of the victim then the complainant is not protected against victimisation.⁷⁶

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

A) The Equal Treatment Committee found that the entitlement to compensation for non-pecuniary damage in case of breach of the prohibition of unequal treatment on grounds of racial or ethnic origin or the prohibition of victimisation should be inserted in new legislation.

Unequal treatment of a person on grounds of his or her racial or ethnic origin constitutes a special infringement of his or her person, and furthermore there might be a reason to improve the entitlement to compensation for non-pecuniary damage in relation to section 26 of the Liability in Damages Act (erstatningsansvarsloven) so that any breach of the prohibition of unequal treatment and the prohibition of victimisation should normally trigger payment of compensation. The amount of the compensation for non-pecuniary damage must be fixed on the basis of an overall assessment of the specific circumstances of the individual case, and importance must be attached to the nature of the torts acts and the infringement deemed to have been committed against the individual. The Committee finds that attempts should be made to ensure that the amount of the compensation corresponds to the amount of the compensation safeguarded according to the legislation on equal treatment for breaches of a similar personal nature.

The victim may also claim compensation for any financial loss according to the general principles of Danish law on damages, provided that the general conditions for such compensation have been satisfied. Therefore the Committee finds that there is no need for laying down special provisions to this effect.

The Equal Treatment Committee is considering whether to introduce criminal sanctions for breach of the prohibition of the Directive of unequal treatment on grounds of racial or ethnic origin. According to the opinion of the Committee, compensation would be an efficient sanction and have a deterrent effect, and efficient civil sanctions in the form of compensation would furthermore give the victim the possibility of having established whether he or she has been subjected to unequal treatment and, in the affirmative, of seeking redress through financial compensation. The Committee also finds that compensation as a sanction may work more efficiently than a criminal trial, which might result in acquittal due to the special requirements applying to criminal cases, and seldom leads to the victim being awarded compensation in practice. Furthermore, the victim may institute proceedings for compensation, even if the prosecutor chooses not to pursue a criminal trial. The Committee finds against this background that no criminal sanctions should be introduced for violation of the prohibition of unequal treatment laid down in the Directive.

The suggested regime of civil sanctions will not affect the existing criminal sanctions following from other legislation, including in particular the Act on Prohibition Against Discrimination Based on Race etc.

⁷⁶ Whitepaper page 194.

Discrimination in the labour market may result in a pecuniary compensation and discriminatory advertisements may result in a fine. So far there are only 6 or 7 court cases dealing with the *Act on Prohibition of Differential Treatment in the Labour Market etc.* One person has been granted compensation and one fine has been issued.⁷⁷

Persons who have been discriminated against in the labour market may now be awarded compensation in pursuance of Section 7 of the *Act on Prohibition against Differential Treatment in the Labour Market etc.* The compensation covers non-pecuniary damages. In addition, the individual may claim compensation for pecuniary damages according to the ordinary rules on damages.

Furthermore, in case of discrimination e.g. in regard to access to public goods and services and to a public place in violation of the *Act on Prohibition against Differential Treatment on Grounds of Race etc.*, it may be possible to bring a civil action before the courts according to Section 26 of the *Act on Torts*.⁷⁸ So far there has only been one written case on tort compensation according to Section 26 for a violation of racial discrimination. The case dealt with the refusal of entry at a discotheque of a person with an ethnic minority background. In a criminal case, the doorman had previously been convicted and fined for violation of the *Act on Prohibition against Differential Treatment on Grounds of Race etc.* In this civil case, the victim was denied compensation because the refusal took place in accordance with the normal procedures of the discotheque (there were already 10 foreigners in the discotheque). Furthermore, the High Court stated that the refusal occurred “quietly and politely”. The offence against the honour of the person “was not of such grossness and did not involve such a humiliation that there was a basis for claiming compensation for tort from the door man.”⁷⁹ The case was taken to the CERD Committee. In its opinion on the case, the Committee stated that a victim is not necessarily entitled to compensation, in addition to the criminal sanction of the perpetrator, under all circumstances. However, according to the Committee a humiliating experience may merit economic compensation. In spite of this, the Committee did not find a violation of the ICERD Convention in the concrete case.⁸⁰

As illustrated in this case it was not possible to be awarded compensation for an incident of racial discrimination that, according to the court, constituted a breach of the Act on Prohibition against Differential Treatment on Grounds of Race etc. It therefore seems less likely that a person will be compensated for discrimination, which has not even been declared a criminal offence in a previous criminal court case. The access to civil proceedings and compensation seems less accessible in cases regarding access to goods and services.

This discotheque-case regarding compensation for a racial discriminatory offence is the only one that has been dealt with so far. This illustrates that, at least in practice, the Danish legal system does not live up to the Race Directive.

It is very positive that the existing criminal sanctions are to be supplemented by civil law, due to the implementation of the Race Directive. This will allow a victim to get more easy assess

⁷⁷ 1) BS 3-1211/97: unpublished decision from the city court of Lyngby of December 22, 1998. The decision was upheld by the Eastern Division of the High Court in an unwritten decision of September 27, 1999.

2) NS 1999/35/91: unpublished decision from the Supreme Court.

3) B-2732-97: unpublished decision from the Eastern Division of the High Court of October 21, 1998. The judgment was upheld by the Supreme Court in Ugeskrift for Retsvæsen 2001.83 H, Danish Law Weekly 2001, page 83.

4) 23450/97: unpublished decision from the city court of Copenhagen of April 14, 1999.

5) Ugeskrift for Retsvæsen 2000.2350 Ø. Danish Law Weekly 2000, page 2350.

6) Utrykt afgørelse fra Østre Landsret nr. B-0877-00 af 5. April 2001. Decision by the Eastern High Court of April 5, 2001.

⁷⁸ Act on Torts section 26 (*Erstatningsansvarsloven* § 26)

⁷⁹ Ugeskrift for Retsvæsen 1999.920 Ø. Danish Law Weekly 1999, page 920.

⁸⁰ UN document: CERD/C/56/D/17/1999 (5 April 2000). Opinion on Communication No. 17/1999, B.J. vs. Denmark.

to bring a lawsuit against the perpetrator, because prior a supplementary civil lawsuit was not possible. But now it is no longer the public prosecutor who alone has the mandate to make such decisions about whether or not the case goes to court. Criminal sanctions only apply in the field of race discrimination in the field of goods and services.

The only criminal sanctions that apply to all protected ground (age, disability etc.) are the prohibition against discriminatory job advertisements.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

There is no ceiling on the maximum amount for compensation that can be awarded.

c) Is there any information available concerning:

- the average amount of compensation available to victims

- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

The criminal sanctions are usually fines between Euro 150 and 400. This seems not to be effective or dissuasive. In cases where individuals are awarded compensation, this amounts to Euro 1500 and up to 10.000, which can be considered more effective and dissuasive than the criminal sanctions.

7. SPECIALISED BODIES

Does a specialised body or bodies exist for the promotion of equal treatment irrespective of racial or ethnic origin.

A) Specialised bodies / race and ethnicity

The Danish Centre for Human Rights was established as the first Danish Human rights body by a parliamentary decision on 5 May, 1987. The objective of the Centre was to gather and develop knowledge about human rights nationally, regionally, and internationally. The work of the Danish Centre for Human Rights includes research, information, education and documentation relating to Danish, European, and international human rights conditions. In 1993, the UN General Assembly encouraged all countries to establish a National Human Rights Institute (NHRI) with a mandate clearly set forth in a constitutional or legislative text, specifying its composition and its independence. Much of DCHR's work was directed towards conditions outside of Denmark. However, DCHR has also produced statements on the implications of new and present Danish law with regards refugees, immigrants and ethnic minorities vis-à-vis international conventions. The Human Rights Centre was closed according to an agreement between the Liberal and Conservative Government (that came into power in 2001) and the Danish Peoples Party.

The Danish Board for Ethnic Equality (the Board) was set up in 1993 as a specialised body and its position was strengthened in 1997. Even though the Board according to the new act from 1997 has a more independent secretariat, it is still connected with the Danish Ministry of the Interior (after November 2002 the Ministry of Integration) and its independence may be questioned. Furthermore, it did not have the power to deal with individual complaints of racial discrimination. The Board had a statutory right to make general statements and may thus issue

recommendations, publish reports and give opinions on general issues of racial discrimination. As described below the Board was closed by the end of 2002.⁸¹

The Documentation and Advisory Centre on Racial Discrimination (DACoRD) is a non-governmental independent organisation. The Centre was founded in 1993 and is today entrusted to a board of trustees comprising of 15 persons of whom many are leading experts in Denmark on issues pertaining to discrimination, and of whom 8 have an ethnic minority background. With its foundation in international human rights conventions, the DACoRD documents racially motivated discrimination in Denmark, and provides free legal advice to victims of, or witnesses to, racial discrimination. In the absence of an official complaints commission in Denmark to deal with complaints of racial discrimination, the DACoRD has in many ways performed this function on behalf of the State. This was recognized by the State in that the Centre received 80% of its budget from a fund under the Ministry for the Interior. Further more one of the trustees was an employee from the Ministry for the Interior. The present government has however decided that the Centre will not have its grant reissued, as part of an agreement with the Danish Peoples Party. Also the member of the board has been withdrawn.

The Danish government thus needed to create a new independent specialised body according to article 13, in order to replace these bodies, which are now closed or no longer receiving public funding⁸².

The creation of a new body, however, was a real problem for the governmental coalition which consists of the Liberal Party and the Conservative People's Party, because the government is depending on the Danish People's Party. The Danish People's Party is the party that supports in its party program the removal of section 266b on hate speech from the Danish criminal code and the withdrawal of the Danish ratifications of international human rights conventions. On 31st December 2001 the Danish People's Party made the ultimate conditional demand for voting for the government's national budget that a whole row of organisations working with issues such as integration, anti-discrimination and human rights be systematically dismantled. The Danish People's Party named specifically the Board for Ethnic Equality, the Danish Centre for Human Rights, the DACoRD, DAMES (Danish Centre for Migration and Ethnic studies) and the Council of Ethnic Minorities, as those organisations to go.

In his New Year's Day speech to the nation, the newly elected Prime Minister, Anders Fogh Rasmussen (the Liberal Party), confirmed that a whole row of advisory boards, committees, and centres would indeed be closed and/or have their funding removed. He justified his decision by labelling these bodies and organisations, plus the people working for them, as the judges of taste (*smagsdommere*), accusing them of being so-called experts (meant negatively), of being "politically correct", of having the "correct opinions" and of attempting to "repress the public debate with their expert tyranny".

On the 11th January 2002 the government issued the so-called "death list" containing the names of the advisory bodies and governmental funds that would be affected by these cutbacks in the coming Budget. The list contains a whole range of organisations from

⁸¹ According to the EU Commission study Promoting Diversity - 21 Bodies promoting diversity and combating discrimination in the European Union (May 2002) the Board and DACoRD were listed as the two specialised bodies in Denmark working against ethnic discrimination.

⁸² EU Commission study Promoting Diversity - 21 Bodies promoting diversity and combating discrimination in the European Union (May 2002)

different specialist areas, including the Centre for Human Rights, the DACoRD and many others.

However, by Act No. 411 of 6 June 2002 the Government established a new Danish Institute for International Studies and Human Rights. The Institute of Human Rights which has been designated as the new body to carry out the tasks mentioned in Article 13 of the Directive.

A Bill was presented to the Danish Parliament on March 21, 2002 by the Minister of Foreign Affairs, stating that the new The Institute for Human Rights, consisting of the activities previously placed within the Danish Center for Human Rights.

According to section 2 the Institute is to promote the equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, by providing independent assistance to victims of discrimination in pursuing their complaints about discrimination without prejudice to the right of victims and of associations, organizations or other legal entities, by conducting independent surveys concerning discrimination, by publishing independent reports and by making recommendations on any issue relating to such discrimination.

This section also insures that the Institute for Human Rights receives the responsibility for realizing the obligations stipulated in article 13 of the Council's directive, 29th June 2000, on the implementation of the principle of equal treatment of all persons no matter their racial or ethnic origin (EU Law Journal no. L 180, 19/07/2000 page 0022-0036).

That included the establishment of a so called complaints committee that was mandated to receive complaints about racial discrimination in all areas outside the labour market area

When the Committee started its work in July 2003 it rejected all complaints in the labour market field because of lack of legal mandate.

The Ministry of Labour however published a Bill No. 40 as of 2003/2004. The first reading of this Bill took place on November 3, 2003 together with an alternative proposal from the Social Democratic opposition party. According to this proposal (Proposal for Bill no. 39) the burden of proof, discriminatory instruction and victimisation should be implemented in order to transpose the directive. However, the proposal from the Social Democratic party also includes the establishment of a Complaints Commission for labour market cases. Due to the fact that the Institute for Human Rights did not have the mandate to receive individual complaints from victims of discrimination in the labour market field, such a proposal was added.

The two proposals (from the government and from the opposition) were then being considered by the Parliament's Committee on labour market issues. The Committee forwarded some questions to the Ministry of Labour, amongst others question 9 (19.11.2003 L 40 bilag 13). According to the answer it is the opinion of the Minister for Labour that the Institute for Human Rights has a mandate to assist victims of racial discrimination in the labour market field. According to this interpretation there is no need for the establishment of a Commission (the proposal from the Social Democratic party), and the Government concludes that article 13 of Directive 2000/43/EU is already fully transposed with the establishment of the Institute for Human rights.

The opposition (the Social Democratic Party) made their own proposal, that a new Board - headed by a Judge – should have the mandate to consider cases of racial discrimination in the

labour market field. The Government strongly opposed this proposal, saying amongst other things that there was no need for such a body: It was stated by the Minister in an answer to the Danish Parliament on November 26, 2003 that:

“In my opinion the Institute for Human Right has the mandate to assist victims of unequal treatment in the labour market in order to forward cases, if there is no collective agreement and if the worker is not organised in a trade union. <..> It is not correct, as stated by DRC, that the Government’s proposals do not secure the minimum transposition of the Race Directive.”

It is not clear how the Minister has reached the conclusion that the Institute already has this mandate. However, in a letter dated February 6, 2004 firstly the Complaints Committee had to refuse to assist a victim, because discrimination in the labour market field is not part of their mandate. Secondly a new letter dated February 13, 2004 to the Institute for Human Rights asking for any other forms of assistances for the victim. On March 12, 2006 the Director for the Institute for Human Rights Mr. Morten Kjerum rejected any form of assistance because the Institute do not have such a mandate! Consequently DACoRD applied for free legal aid for the victim and took the case to court, without the assistance of the Complaints Committee or the Institute for Human Rights.

In March 2004 the Minister seemed to realize the fact that the Institute did not have this mandate and consequently forwarded a new proposal for the amendment of the Act on the Labour Market Discrimination Act, including a new section 8a and the additional mandate to the Institute for dealing with labour market discrimination due to Race and Ethnicity. This new proposal is supported by the Social Democratic Party and was approved and adopted by all the parties in the Danish Parliament in April 2004, apart from the Danish Peoples Party.

Since April 2004 the Complaints committee has thus been able to receive cases in the labour market field.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

On 1st January 2003 the Institute for Human Rights was established by law, cf. act no 411 of 6th June 2002, as a step towards fulfilling the obligation of article 13 of the directive.

The Complaints Committee for ethnic Equal Treatment was established in the summer of 2003, under the Institute for Human Rights, as an actual implementation of article 13, paragraph 2.

The object of the Complaints Committee is to review complaints of discrimination on grounds of race or ethnic origin. Furthermore, the Complaints Committee reviews complaints in which a person has been victimised as a reaction to the person’s complaint of discrimination on grounds of race or ethnic origin.

The Complaints Committee can decide whether there has been a violation of the Act on Ethnic Equal Treatment’s prohibition against discrimination or against victimisation. The Committee cannot impose any sanction on the respondent or award the complainant any kind of damages as a result of discrimination. In cases where the Complaints Committee finds that there has been a violation of the prohibition against discrimination or against victimisation, the Committee can recommend granting free legal aid at the courts. Furthermore, the

Complaints Committee can on its own initiative conduct independent surveys concerning discrimination, publish reports, and make recommendations.

The committee has since the establishment in June 2003 and until July 2005 examined 142 cases, but has decided for the complainant's case one time only. (By the end of 2005 new numbers have been communicated and the committee has now in total examined 165 cases and decided for the complainant 6 times, two of which has been recommended for free legal aid). The committee has itself stated that this low percentage of finding for the complainant does not mean that there has been no discrimination in other cases. The low percentage is a result of the narrow mandate of the committee.

The committee cannot recommend free legal aid if the evidence of discrimination based on race or ethnicity can be contested or is not as clear as a bell. The committee does not have the mandate to hear witnesses or otherwise examine the facts of a case, and many cases have to be dismissed on this unfortunate ground.

The committee has in a letter dated 5th July 2005 to the Ministry of Refugee, Immigration and Integration Affairs stated that as article 13 of the directive regulates that victims of discrimination are provided assistance in a way that effectively secure the enforcement of the directive, the committee would suggest that the legislation are amended so that the committee are given the mandate to recommend free legal aid, in cases the committee has to reject, because the cases demand presentation of evidence in the form of testimonies from parties or witnesses, but where the committee assess that the complainant has a reasonable case, which ought to be tried in court.

Based on this statement from the committee and the statistics on its complaints and decisions it is questionable if the legal situation in Denmark complies with article 13 of the directive.

The effectiveness of the committee is quite poor according to the committees own figures. Victims can consequently not expect to get the assistance they hoped for due to lack of mandate. Further, the resources put into the committee are very limited, and it is the unfortunate experience that it may be a more reasonable procedure for a victim to have applied directly for free legal aid at the state, without referring the case to the committee for examination first. The review time in the committee is not proportional to the time it takes DACoRD to present a case before the state county and for the county to make a decision on free legal aid. As an example DACoRD has referred two cases⁸³ to the committee in which the committee eventually has found a breach of the equal treatment legislation, and then has recommended free legal aid. In both cases the time of review was longer than a year. In two other cases⁸⁴ falling under the committee's mandate, DACoRD decided to apply directly for free legal aid at the state county, without referring the case to the committee beforehand. In both situations DACoRD received a positive decision from the state county within two months.

Obviously it would be preferable if a case had been decided by the committee before it was taken to court, as a statement from the committee, saying that it has found that discrimination has occurred or that it believes that the victim has a reasonable case, would be a strong support for the victim. DACoRD therefore hopes that the committee's mandate will be expanded and that the sufficient resources will be allocated to it in order to secure effective assistance and thereby compliance with the directive.

⁸³ DACoRD case numbers sa1375 (case on education) and sa1500 (case on labour market)

⁸⁴ DACoRD case numbers sa1563 (case on access to discos) and sa1611 (case on labour market)

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

According to section 2, sub section 2, the provision that governs the mandate of the institute, it follows that:

”..the Institute is to promote the equal treatment of all persons without discrimination on the grounds of **racial or ethnic origin**, by providing independent assistance to victims of discrimination in pursuing their complaints about discrimination without prejudice to the right of victims and of associations, organizations or other legal entities, by conducting independent surveys concerning discrimination, by publishing independent reports and by making recommendations on any issue relating to such discrimination.”

d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

It is not correct to say that the Complaints Committee provides **assistance** to victims of discrimination. The Complaints Committee is set up as a tribunal/quasi court with the competence to give independent opinion on whether discrimination did take place.

According to the mandate the Committee must be independent in relation to both parties of the case, and can not be seen as a body assisting either part in the conflict. The Complaints Committee can, however, on its own initiative (without complaints) initiate investigations

Further more the Complaints Committee has no power to demand information from the accused and it can not hear witnesses. If the accused will not answer or the accused dispute the version given by the claimants the Complaints Committee can not progress the case. In a letter dated July 5, 2005 it is stated that it follows from Council directive 2000/43/EF article 13, that victims of racial discrimination should be assisted effectively, however, the Complaints Committee would like to suggest to the Ministry that the legislation is changed, in order to allow the Committee to plea for free legal aid in those cases that they have to reject because the accused do not answer or due to lack of proofs. In the same letter to the Ministry for Integration the Complaints Committee inform that in the period from July 2003 until July 2005 they received a total of 142 cases. Out of these 142 complaints the Committee only succeeded in one case to establish an opinion that the legislation was violated.

Directive 2000/43 Article 6 establishes that the implementation of the directive may not lead to a reduction in the level of protection against discrimination already afforded by member states in the fields already covered by this directive.

Reduction in actual practical level of protection:

Until the end of 2001 the non-governmental organisation the Documentation and Advisory Centre on Racial Discrimination (DACoRD) received government funding in order to fulfil its targets to collect documentation and to support victims of racial discrimination, among other places in the labour market, by offering free legal aid. After the cut off from state support the level of assistance for victims decreased drastically, as DACoRD had to cut back in the number of staff.

The cut off from financial state support was caused by a change of Government in Denmark.

This change also led to the closure of the specialised public body, the Board for Ethnic Equality at the end of 2002.

The closure of the board for Ethnic Equality and the stop for financial state support to DACoRD caused a vacuum in protection until the summer of 2003. In the summer of 2003 the Complaints Committee for Ethnic Equal Treatment was established, and victims of racial and ethnic discrimination could subsequently file complaints with the committee. However, the committee did not have the mandate to handle complaints about discrimination in the labour market until the spring of 2004.

In the opinion of DACoRD the above mentioned closure and removal of financial state support did in fact lead to a reduction of the level of protection against racial and ethnic discrimination in Denmark in 2003 and 2004.

On 1st January 2003 the Institute for Human Rights was established, cf. act no 411 of 6th June 2002, as a step towards fulfilling the obligation of article 13 of the directive. The establishment of the institute however, cannot change the fact, that there was no longer any access to assistance for individuals suffering racial discrimination, as the institute did not offer assistance. The institute did also not initiate independent surveys.

As mentioned above the Complaints Committee for Ethnic Equal Treatment was established at the Institute for Human Rights in the summer of 2003. The establishment of the committee seemed at first hand as a positive instrument to re-establish the access to individual assistance for victims of racial discrimination however the practise of the committee has shown that few victims actually receive the help they hoped for.

Since the establishment of the committee in June 2003 and until July 2005 the committee has examined 142 cases, but has decided for the complainant's case one times only. (By the end of 2005 new numbers have been communicated and the committee has now in total examined 165 cases and decided for the complainant 6 times). The committee has itself stated that this low percentage of finding for the complainant does not mean that there has been no discrimination in other cases. The low percentage is a result of the narrow mandate of the committee. The committee cannot recommend free legal aid if the evidence of discrimination based on race or ethnicity can be contested or is not as clear as a bell. The committee does not have the mandate to hear witnesses or otherwise examine the facts of a case, and many cases have to be dismissed on this unfortunate ground.

Economical indicators of reduction of the level of protection:

The amount of money allocated by the Danish state party to the work focused on combating racial discrimination has been reduced drastically since the directive was passed in 2000.

In 1993 the Board for Ethnic Equal Treatment was established by law. In 2000, 2001, and 2002 the Board for Ethnic Equality was granted 6.1 million Danish Kroner per year to fulfil its job to promote ethnic equality in Danish society. The Board was closed at the end of 2002.

In 2000 and 2001 DACoRD was granted 1.8 million Danish kroner per year to fulfil its job to support victims of racial discrimination. In 2002 it was granted 0.15 million Danish Crowns, as a gesture from the state party to make sure that DACoRD had the necessary funds to pay salary to its employees in their term of termination. After the election in November 2001 the government had entered an agreement with the Danish People's Party to remove the funding for DACoRD, which meant that DACoRD had to lay down most positions.

The Danish Centre for Human Rights had been working in the human rights area in Denmark and internationally for more than a decade when it was replaced by the Danish Institute for Human Rights in 2003. The primary funding of the centre was provided by the Danish Ministry of Foreign Affairs, and the centre has had racism as a focus area for a long time.

In 2003 The Danish Institute for Human Rights (DIHR) was established by law. In 2003 the institute used 2.4 million Danish Kroner on statutory equal treatment, which amounted to 21 per cent of the use of fundings for professional and equal treatment activities granted by the state. In 2004 the amount was 4.9 million Danish Kroner, which amounted to 40 per cent of the use of funding for professional and equal treatment activities granted by the state. In this connection it must be pointed out that the equal treatment activities are not earmarked for ethnic equal treatment and combating racism, but are used in a broad equal treatment perspective, including combating discrimination on the grounds of handicap, religion, age, and sexual orientation.

Public funding for equal treatment and the fight against racism 2000-2004 can be listed as:

	2000	2001	2002	2003	2004
The Board for Ethnic Equality	6.1	6.1	6.1	0	0
DACoRD	1.8	1.8	0.15	0	0
The Danish Centre for Human Rights	?	?	?	0	0
DIHR	0	0	0	2.4	4.9
Total	7.9	7.9	6.25	2.4	4.9⁸⁵

It paints a clear picture that the funding in the area has decreased since the directive was passed in 2000 as a result of the change of government in Denmark in 2001. In the opinion of DACoRD this reduction of funds constitutes a breach of article 6 of the directive, as it in fact has lead to a deterioration of protection against racism and ethnic discrimination.

As a response to DACoRD's application for operational subsidies for 2002 the Ministry of Refugee, Immigration and Integration Affairs stated in a letter dated 15th July 2002 that it found that DACoRD had performed a useful function in many areas, but that the coming establishment of the Institute for Human Rights would cover the need, as the institute would take over these functions. However, DACoRD finds this argument hollow in relation to the fulfilment of the directive. Firstly, the Institute was not established until January 2003; secondly, the complaints committee under the institute was not established until the summer of 2003; thirdly, the committee was not given the mandate to examine cases in the labour market until 2004; and fourthly, the casework of the committee demonstrates that the committee's weak mandate, does not secure the necessary protection against discrimination on the grounds of race and ethnicity, as was the case when DACoRD was the publicly funded body offering support to victims of racial and ethnic discrimination in Denmark.

⁸⁵ Same amount was allocated for 2005 and 2006.

Reports and independent recommendations

Next to the work of the complaints Committee the National Department of the Institute for Human rights conducts surveys and publishes reports in issues relation to discrimination due to race and ethnicity. The National department also works with issues of discrimination due to age, disability and sexual orientation.

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

No.

f) Is the work undertaken independently?

According to the mandate the Committee must be independent in relation to both parties of the case, and can not be seen as a body assisting either part in the conflict. The Complaints Committee can, however, on it own initiative (without complaints) initiate investigations

A real concern is the fact that employment conditions of those employees are comparable with civil servants, which in a Danish context do not mean much. By way of example when the Danish Board for Ethnic Equality was dismantled the staff members / who where civil servants where sacked. All of the staff members were civil servants employed by the Ministry of the Interior, however, when the Board was closed, these employees where not guarantied work in other parts of the public administration.

This also means that if the Institute for Human rights is dismantled / and the article 13 mandated handed over to another institution, members of the present staff are to be sacked.

In the new catalogue of legislation intended too be proposed in the coming parliamentary year is a bill scheduled to be proposed in parliament ultimo February 2007. The Governmental bill contains a proposal to abolish the Complaints Committee on Ethnic Equal Treatment which was established as part of the Institute for Human Rights after the adoption of the Act no. 374 of May 28, 2003 on Ethnic Equal Treatment. This was also part of the transposition of the Race Equality Directive.

The purpose of the Complaints Committee was to give access to complaints about unfounded differential treatment based on race or ethnic origin in the labour market, education, housing and other areas of life. Also the the Gender Equality Board will be closed and made part of the new structure.

The new equality body will be called “ Det Fælles Klagenævn for Ligebehandling”, in English (unofficial translation) – The Common Complaints Board for Equal Treatment. It should be able to deal with all grounds of discrimination, including race, ethnicity, nationality, gender, disability, religion, sexual orientation, age, social origin, and political orientation. The model for the new equality body will be structure and the mandate and powers of the Gender Equality Board, which will comply with article 13.

As a point of departure, depending of the resources allocated to The Common Complaints Board for Equal Treatment and the exact structure of the institution – this is a positive development, because only race and ethnicity has been covered by a specific complaints body.

The Danish Ministry for Labour has also as part of the EU year announced an upcoming Bill on a new complaints body to combat discrimination due to race, age, disability, gender, sexual orientation and religion.

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Danish government has taken no such initiative however the independent complaints body has created a homepage and distributed flyers etc.

The Ministry of Employment will organise an opening conference for the local employment boards established 1 January 2007.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

No such actions (b or c) were taken by the state. Especially in connection to the reporting process the State did not include any comments from NGO's in relation to directive 2000/43. By letter of 12th May 2005 the Commission wrote to the Danish state regarding the state party's obligation to provide the Commission with all necessary information on the application of Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

In the summer 2005 the Danish state party took steps to respond to the Commissions request for information on the application. However in the process, the state party did not request any information from the non-governmental organisations in Denmark, which is considered regrettable. Especially in relation to the Documentation and Advisory Centre on Racial Discrimination (DACoRD), on an EU-level is considered a specialised body promoting equality and combating racism⁸⁶. DACoRD is providing legal advice to victims of racism and ethnic discrimination, and has been doing so for more than 10 years. In this regard DACoRD offers telephone assistance and advice, but it also has a free legal advice service, where people can come and receive practical assistance in pursuing their claims etc. In matters that need to be heard in court DACoRD will prepare the case, apply for free legal aid, and then refer the case to a law firm that will deal with the actual litigation.

In other words it would be a natural thing to include information from all NGO's working in this field, as well as information from the Danish Trade Unions would have been very relevant for the reporting to the EU Commission.

⁸⁶ http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/arce/equalitybodies_final_en.pdf (10.01.2006)

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

No

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

Yes, by way of example collective agreements on forced early retirement in some legal professions

9. OVERVIEW

Since World War II elderly people and disabled amongst other groups, have been able to secure a more decent standard of life. General pension scheme and other programmes targeting social weak groups in the Danish society has become an integrated part of the Scandinavian welfare model. It was acknowledged that disadvantaged groups in society should be compensated by the state or local municipality in order to create equal opportunities, however very little focus was on equal rights and non-discrimination. When other groups during the same period have increased the standard of life very much, some of the social weak groups, however, started to lack behind. Consequently, more and more focus is now the right to equal treatment and how to enforce these rights. The transposition of the Labour Market Directive is a major step in the direction of providing legal protection against discrimination due to age and handicap in Denmark.

Legal protection against sex discrimination has been in force for many years, and it was discussed whether similar legislation on discrimination due to race, religion or other grounds should be enacted. In response the social partners in the labour market rejected in the 70ties such legislation with the argument that Denmark has a tradition for collective agreements in the labour market instead of legislation. According to this so-called Danish model the social partners would make agreements prohibiting racial or religious discrimination if this was going to be a problem in the labour market. As no such collective agreements were enacted, victims of discrimination due to race, ethnicity, sexual orientation, and religion were not protected until 1996, when legislation was finally enacted in these fields. With the transposition of the Race Equality Directive the 1996 Act has been changed in some areas. When it comes to the enforcement however it still seems to be the perception, that's this is responsibility of the social partners. Firstly, the Danish Government denied the new specialised body according to article 13, the mandate to receive complaints in the labour market field. Secondly, the new body has a very limited mandate to make nonbinding statements.

Finally, it should be noticed that even though the mandate of the new body is very limited, the situation is however better with respect to race and ethnicity, than with respect to those grounds covered by the Labour Market Directive, which have no specific complaints mechanism. This places the social partners in a key role, when it comes to the enforcement in

these areas. The role of enforcing minorities rights is quite new to the social partners in Denmark (woman is not a minority), and the possible results are expected with great interest

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

With respect to the Race Equality Directive, the Ministry for Integration is responsible for dealing with or coordinating issues regarding anti-discrimination, however the Ministry for Foreign affairs is responsible for the Danish Article 13 Body.

When it comes to the Framework Directive other Ministries are also responsible, for example, the Ministry for Labour and the Ministry for Social affairs is especially responsible for aged and disabled. There is no central authority responsible for the coordination for all grounds.

For the Year 2007 for equal opportunities it is the Ministry for social Affairs which is coordinating the activities, during the year.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: **Denmark**

Date: **January 2007**

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope).	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Act No. 960 (2004) <i>Straffeloven 266 b</i> (The Danish Penal Code, section 266 b) www.retsinfo.dk	1939	Race, colour, national or ethnic origin, religion and sexual orientation	Criminal law	Hate speech in public life	Direct discrimination
Act No. 626 (1987) <i>Lov om forbud mod forskelsbehandling på grund af race m.v.</i> (Act on the prohibition against race discrimination), www.retsinfo.dk	1971	Race, colour, national or ethnic origin, religion and sexual orientation	Criminal law	Access to goods and services, housing, education, social service etc.	Direct discrimination
Act No. 31 (2005) <i>Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.vt</i> (Act on prohibition against discrimination in respect of employment and occupation)	1996	Race, colour, national, social or ethnic origin, religion, belief, age, disability, sexual orientation and political opinion	Civil law	Labour market (public and private employment)	Direct and indirect discrimination
Act No. 374 (2003) <i>Lov om etnisk ligestilling</i> (Act on the prohibition against unequal	2003	Race and ethnic origin	Civil law	Access to goods and services, housing,	Direct and indirect discrimination

treatment due to race and ethnicity) www.retsinfo.dk				education, social service	
Act No. 411 (2002) Lov om institut for internationale studier og menneskerettigheder (Act on the institute for international studies and human rights) www.retsinfo.dk	June 2002	Race and ethnic origin	Civil law	Access to goods and services, housing, education, social service and labour market	Creation of a specialised body

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: **Denmark**

Date: **January 2007**

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	yes	yes	no	yes	incorporated
Protocol 12, ECHR	no	no	no	no	no
Revised European Social Charter	yes	yes	no	Ratified collective complaints protocol? no	no
International Covenant on Civil and Political Rights	yes	yes	no	yes	Yes (but not incorporated and thus weak compared to ECHR)
Framework Convention for the Protection of National Minorities	yes	yes	Only applied on the German minority	no	Yes (but not incorporated and thus weak compared to ECHR)
International Convention on Economic, Social and Cultural Rights	yes	yes	no	no	Yes (but not incorporated and thus weak compared to ECHR)
Convention on the Elimination of All Forms of Racial	yes	yes	no	yes	Yes (but not incorporated and thus weak compared to

Discrimination					ECHR)
Convention on the Elimination of Discrimination Against Women	yes	yes	no	yes	Yes (but not incorporated and thus weak compared to ECHR)
ILO Convention No. 111 on Discrimination	yes	yes	no	no	Yes (but not incorporated and thus weak compared to ECHR)
Convention on the Rights of the Child	yes	yes	no	no	Yes (but not incorporated and thus weak compared to ECHR)