



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

COUNTRY REPORT 2008

DENMARK

BIRGITTE KOFOD OLSEN

State of affairs up to 31 December 2008

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:

human european consultancy
Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

the Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the website of
the European network of legal experts in the non-discrimination field:
<http://www.non-discrimination.net/en/law/NationalLegislation/country-reportsEN.jsp>

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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.

The legal system

The basic law of the State is the Constitution [*Danmarks Riges Grundlov*]¹ adopted by referendum in 1953. This is the successor to the 1849 Constitution. The Constitution sets out the essential rules governing the most important institutions of the State, the Government, the Parliament and the judiciary, and the relationship between these institutions. The Constitution recognises the existence of associations and thereby also political parties, which are the fundament of a pluralistic democracy. It also defines the structure and powers of the courts and outlines the fundamental rights of citizens.

National legislative authority rests with the Government and the Parliament jointly. The Government and any Member of Parliament can propose bills of law. All laws passed by Parliament must conform to the Constitution. The power to impose taxes and to distribute tax receipts rests solely with the legislator, which can use this power only when adopting an annual Financial Act. The Constitution prohibits delegation of powers relating to taxes. Parliament legislates with responsibility to the electorate in all matters.

Denmark joined the European Community in 1973 and is now a member of the European Union. Part of its legislative power therefore rests with the European Union. European legislation includes regulations which are legally binding and directly applicable in all member countries. It further includes directives which are binding as regards the result to be achieved upon each Member State to which they are addressed, but allow national parliaments to choose the form and method of implementation. Denmark's membership of the European Community does not include the Faroe Islands and Greenland.

No bill can be finally passed before having been read three times in Parliament. At its first reading only the main points of the bill are discussed. Before its second reading the bill is generally scrutinised by a standing committee that produces a report. The report forms the basis of the second reading during which the bill is debated in its entirety and possible amendments are moved. The bill is passed during the third reading, which requires the presence of at least 50 per cent of the Members of Parliament (90 members). A bill passed by Parliament can only become law when signed by the Government and the monarch within 30 days. The Government is responsible for the promulgation of laws and their entry into force.

Rules are laid down in the Constitution governing the organisation of the courts and the functioning of the legislature. The current rules are contained in the Administration of Justice Act of 1916 [*Lov om Rettens Pleje*] with later amendments.

¹ Act no. 169 (1953).



Judges of the lower courts are primarily recruited from the Ministry of Justice [*Justitsministeriet*] and from among deputy judges. A limited number of judges are recruited from among teachers at university law faculties and practising lawyers. The Constitution guarantees judges complete independence in the exercise of their duties, stating that they are to be guided solely by the law. It is laid down as a general rule that judges cannot be transferred against their wishes. They can be dismissed only by a judgement of the Special Court of Indictment and Revision [*Særlige Klageret*], consisting of three professional judges: one from the Supreme Court [*Højesteret*], one from a high court and one from a lower court. Judges in Denmark retire at the age of 70. The remuneration of judges may not be reduced at any time while they hold office.

The Constitution sets out as a general rule that decisions of the administration can be brought before the general courts. The possibility to review administrative decisions safeguards the principle of legality. The courts are empowered to deal with the constitutionality of laws and legislation.

Only professional judges sit in ordinary civil cases. In areas of civil law where special expertise is considered valuable, the court may be assisted by lay judges with a special background, e.g. child psychology in juvenile cases. Lay judges participate on a wide scale in criminal proceedings, both as jurors for serious crimes and as assessors for minor criminal offences. Furthermore, experts participate in certain civil and criminal cases requiring specific knowledge, e.g. commercial or maritime affairs.

All general cases (i.e. civil, criminal and administrative actions) come under the jurisdiction of the ordinary courts: the district courts [*Byret*], the high courts [*Landsret*] and the Supreme Court. By means of appeal a case can generally be tried at two levels, although leave to appeal from the Ministry of Justice may be required in minor criminal and civil cases.²

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

The legal system is a continental system following primarily German traditions. Fundamental legal principles are laid down by the Constitution in very general terms. Constitutional rules are expounded by laws, while detailed regulation is provided by administrative orders (delegated/secondary legislation). In contrast to the German legal system, however, Denmark has no Constitutional Court. The Supreme Court has traditionally been very reluctant to use its power to annul statutes that may contradict the Constitution. This is due to the democratic principle that laws are made by a majority of democratically elected Members of Parliament, and judges should be reluctant to interfere into this process.

Preparatory Works

On the interpretation of legislation the preparatory works are considered important sources for interpretation of Acts and other regulation [*retskilder*] and the intention of the legislative powers.

² Source of information: Core document forming part of the reports of the States Parties: Denmark. 29/06/95. HRI/CORE/1/Add.58. (Core Document)



The Constitution [*Danmarks Riges Grundlov*]

Some of the provisions of the Danish Constitution contain prohibitions against discrimination: Section 70, for example, on equality of treatment regardless of creed or race, and Section 71 on personal liberty. Public authorities are governed by the principle of equality that is applicable under general administrative law, which means equal matters must be treated in full equality before the law.

Criminal legislation

Section 266b of the Criminal Code [*Straffeloven*]³ prohibits the dissemination of statements or other information by which a group of people is threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation.

Section 81 of the Criminal Code has the following wording (in extract):

“In determining the penalty it shall generally be considered as an aggravating circumstance,
i)-v) ...
vi) that the offence is based on others’ ethnic origin, faith, sexual orientation or the like,
vii)-xi) ...”

The general scope of Section 81 of the Criminal Code is not limited to crimes or instances where the motive of the perpetrator is to threaten, insult or degrade a person or a group of people. For instance, depending on the circumstances, Section 81 is also applicable to economic crimes committed to support a racist organisation of which the perpetrator is a member.

Criminal Act No. 289 of 9. June 1971 on the Prohibition of Discrimination due to Race etc. as amended by Act. no. 433 of 31 May 2000 (*Lov om forbud mod forskelsbehandling på grund af race m.v.*). It covers the following grounds: race, colour of skin, national or ethnic origin, religion and sexual orientation. The Act contains a prohibition against discrimination in two areas: the provision of goods or services, and access to certain places or events. With respect to the aim of eliminating all forms of racial discrimination or similar types of discrimination or less favourable treatment, the Danish Parliament adopted the Act on the Prohibition against Discrimination on the Grounds of Race in 1971. The Act partly implemented the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, which Denmark has ratified, as it prohibits any differential treatment on the ground of race, colour, national or ethnic origin, religion or sexual orientation in the performance of commercial or public activity. Under the Act, criminal sanctions of up to six months’ imprisonment can be sentenced by the courts.

Protection against discrimination at work is left to the social partners in the labour market (see below).

³ Act no. 1068 of 6 November 2008



Civil Legislation

The Danish private and public labour market is dominated by the so-called “Danish model”, that is, the labour market is generally regulated by collective agreements between the labour market social partners.⁴ A specialised “Labour Court” [*Arbejdsret*] exists to resolve conflicts between the social partners. Anti-discrimination is also to some degree covered by collective agreements, for example on the question of equal pay.

These labour market rules made by collective agreements are, however, supplemented by statutory provisions in many areas, such as safety in the workplace, passed by the Parliament.⁵ One major difference between conflicts in the labour market that are covered by collective agreements and those covered by civil law is the jurisdiction of the courts. As mentioned above, areas covered by collective agreements fall within the jurisdiction of the “Labour Court”, while areas covered by civil law are dealt with by the ordinary courts.

Since 1996, Denmark has had a civil law protecting against discrimination. According to Civil Act no. 1349 of 16 December 2008 on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*], provisions in this Act may be replaced by similar provisions specified by collective agreements.⁶ In other words, this law covers only those parts of the labour market which are not already regulated by collective agreements. The Act covers the following grounds: race, colour, religion, political opinion, belief, sexual orientation, age, disability, and national, social or ethnic origin. In order not to lower standards, collective agreements are only applicable if they provide the same or better protection against discrimination than the statutory provisions made by law.

The other civil law in the field of discrimination is Civil Act no. 374 of 28 May 2003 on Ethnic Equal Treatment [*Lov om etnisk ligebehandling*] as amended by Act no. 554 of 24 June 2005 and Act no. 387 of 27 May 2008. It covers race and ethnic origin only. It prohibits discrimination on the grounds of racial and ethnic origin as regards access to social protection, including social security and health care, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. The Act also prohibits harassment on the grounds of race and ethnic origin. Furthermore, the Act prohibits victimisation, thus protecting individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. The Act includes provisions on the shared burden of proof, ensuring that the principle of equal treatment is applied effectively. The shared burden of proof implies that when there is a *prima facie* case of discrimination, the burden of proof in court cases shifts back to the respondent when evidence of such discrimination is established. The Act stipulates that victims of discrimination are entitled to compensation for non-pecuniary damages.

⁴ , i.e. employers’ organisations and employees’ organisation.

⁵ Act no. 784 (1999) on the Protection of the Labour Market Environment [*Arbejdsmiljø beskyttelsesloven*]

⁶ Racial Equality Directive Recital 27 and Framework Directive Recital 36

In June 2002 the Danish Institute for Human Rights (DIHR) [*Institut for Menneskerettigheder*] was given a mandate according to Act no. 411 on the Establishment of the Danish Centre for International Studies and Human Rights [*Det Danske Center for Internationale Studier og Menneskerettigheder*]. Specific powers have been assigned to the DIHR for protecting ethnic minorities and specific funding allocated to the Institute for this purpose.

The DIHR is therefore the Danish body for the promotion of equal treatment as required by Article 13 of the EU Directive on Racial Equality concerning the prohibition of racial discrimination outside the labour market (2000/43/EU). In accordance with the requirements of Article 13 of the Directive, the Institute has been given the power to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination. In this regard the Institute replaces the former Board for Ethnic Equality [Nævnet for Etnisk Ligestilling]. The DIHR has been allocated DKK 6.0 million on a yearly basis to perform the above-mentioned tasks.

0.2 Overview/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.

Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?

This Section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The DIHR is designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive. In accordance with the requirements of this article, the DIHR has been given the mandate to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination. The DIHR takes a horizontal approach to discrimination and also has a broad human rights mandate. The DIHR therefore also publishes reports on other grounds of discrimination, e.g. disability and sexual orientation.



By the end of 2004 the transposition of the Racial Equality Directive and the Employment Equality Directive was complete, ensuring legislative protection of all grounds in the labour market as well as protection against discrimination due to race and ethnicity outside the labour market. Protection against discrimination outside the labour market on grounds of race and ethnicity is ensured via Civil Act no. 374 of 28 May 2003 on Ethnic Equal Treatment [*Lov om etnisk ligestilling*] dealing with the prohibition against unequal treatment due to race and ethnicity. Protection in the labour market is ensured via Civil Act no. 1349 of 16 December 2008 on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*].

The option to defer implementation of the Employment Equality Directive was taken up in relation to age and disability. The deadline of 3 December 2003 for transposition was postponed for one year, following approval from the EU Commission. Implementation was ensured by the entrance into force on 28 December 2004 of Act no. 1417 amending the Act on the Prohibition of Discrimination in the Labour Market etc. of 1996.

Effective implementation of Article 9 (1) of the Employment Equality Directive may be questioned in relation to access to judicial and/or administrative procedures in individual cases:

- In the sphere of employment relations, trade unions possess the legal capacity to initiate legal proceedings on behalf of their members in cases of discrimination before the specialised Labour Court or as part of labour arbitration.
- Access to the civil judicial system or the administrative procedure is dependent on the trade union's decision *not* to engage in an individual complaint. The Board of Equal Treatment [*Ligestillingsnævnet*] will hence refrain from engaging in a case if a trade union enters into legal proceedings.
- As regards employment relations, only persons who are not members of a trade union have direct access to civil judicial and administrative procedures.⁷ Outside the labour market, trade union membership has no impact on direct access to the Equal Treatment Board or other judicial procedures.

Application and interrelated nature of the Directives

Described below is the Eastern High Court decision (Mr X vs. Copenhagen Technical School) of 27 June 2006. The case gives rise to questions of the correct application and interpretation of the two Equality Directives and the interrelated nature of the Directives. The courts involved (Copenhagen City Court and the Eastern High Court) chose to apply the Act on Ethnic Equal Treatment (implementing the Racial Equality Directive and only covering race and ethnicity) instead of the Act on the Prohibition of Discrimination in the Labour Market etc. (implementing the Employment Equality Directive and covering sexual orientation, age, disability and religion as well as race and ethnicity). This interpretation and approach excludes grounds other than race and ethnicity from protection in the educational system.

⁷ See also Section 6.1 of this report.



Definition of the term “handicap”

When interpreting the term “handicap” the Western High Court in its ruling of 11 October 2007 (see below) referred to the preparatory works to the Act on the Prohibition of Discrimination in the Labour Market etc. where a person with a handicap is described as someone with a “physical, psychological or intellectual impairment who must be compensated in order for that person to function on an equal level with other citizens in a similar situation”. It could be argued that the Danish concept of “handicap” is narrower than the definition given by the ECJ in its *Chacón Navas* judgment.

0.3 Case-law

Ground of discrimination: disability

Name of the court: Eastern High Court of Denmark [*Østre Landsret*]

Date of decision: 5 March 2008

Name of the parties: A vs. the Heritage Agency of Denmark

Reference number: Weekly Law Journal (U.2008.1450Ø)

A visually impaired architect, A, was employed at the Danish Heritage Agency. Because of his impairment A was unable to carry out inspections on his own. In 2005 A was dismissed due to budget reductions and A claimed that the dismissal was in violation of the Act on the Prohibition of Discrimination in the Labour Market etc. The Eastern High Court found that in the light of the budget reductions, it was permissible for the Heritage Agency to prioritise employees who were able to perform assignments on their own. Judging employees based on their flexibility was therefore an objective criterion pursuing a legitimate aim. The issue of reasonable accommodation was considered by the courts. The High Court found that A would need assistance from an architect in order to carry out inspections and that this would impose a disproportionate burden on the employer. A dissenting judge in the Eastern High Court was of the opinion that providing A with reasonable accommodation to the required extent was not a disproportionate measure for the employer.

The High Court found in its final judgment that there was no violation of the Act on the Prohibition of Discrimination in the Labour Market, since this was a requirement for disproportionate measures of reasonable accommodation.

Ground of discrimination: disability

Name of the court: Western High Court [*Vestre Landsret*]

Date of decision: 11 October 2007

Name of the parties: A vs. O

Reference number: Weekly Law Journal (U.2008.306V)

A was employed in the company O and suffered from multiple sclerosis. Because her illness worsened, O agreed to hire A for 25 hours a week with flexible working hours. Later A requested that her working hours be reduced to 15. O could not oblige this request and decided to dismiss A. A claimed that O had violated the Act on the Prohibition of Discrimination in the Labour Market etc.

The Western High Court found that A’s illness, which caused sclerosis-fatigue, sensory impairment and memory and concentration difficulties, constituted a disability. However, the Court did not find that the disability constituted a handicap according to the Act on the Prohibition of Discrimination in the Labour Market etc. (cf. Section 2.1.1 of this report).



In its interpretation of the term “handicap”, the Western High Court referred to the preparatory works to the Act on the Prohibition of Discrimination in the Labour Market etc. where a person with a handicap is described as someone with a “physical, psychological or intellectual impairment who must be compensated in order for that person to function on an equal level with other citizens in a similar situation”. Since the only compensation A needed was a further reduction of working hours, the Court found that her condition did not fall within the term “handicap”. The Court therefore found that no violation had occurred.

On 12 October 2007, the Western High Court decided in another case that post-traumatic stress syndrome could not be considered a disability as covered by the Act on the Prohibition of Discrimination in the Labour Market.

Ground of discrimination: religion

Name of the court: Maritime and Commercial Court [*Sø- og Handelsret*]

Date of decision: 28 January 2008

Name of the parties: F vs. COOP Denmark A/S

Reference number: Weekly Law Journal (U.2008.1011S)

F, who was working as a supermarket cashier, called a co-worker wearing a religious headscarf a “black-headed gull”. F was dismissed without notice by the management for having referred to a co-worker in a racist and derogatory manner. The Court found that in general, using the term as F did was derogatory. In this specific case, however, the Court emphasised that F’s conduct in the workplace had never before been improper and should be considered thoughtless rather than spiteful. The dismissal was therefore not justified, even though the remark was uttered in the presence of a customer. F was awarded compensation of DKK 123 750.42 (approximately EUR 16 500). F’s trade union conducted the case on behalf of F. The compensation was based on F’s claim, against which the employer had not objected. The claim consisted of compensation for unjust dismissal (DKK 47 587.02), compensation for damages equal to pay during the normal notice period (DKK 53 535.40) and agreed severance pay (DKK 22 628.00). There is no information concerning whether the person wearing a headscarf brought a complaint.

Ground of discrimination: religion

Name of the court: Eastern High Court

Date of decision: 14 January 2008

Name of the parties: A vs. B

Reference number: Weekly Law Journal (U.2008.1028Ø)

The applicant had been working as a temporary worker and during Ramadan had been fasting. The institution worked with small children who experienced difficulties at home. The employer argued that it was essential for the applicant to eat lunch with the children, and therefore her contract was terminated. The Court found direct differential treatment based on religion, i.e. a violation of the Act on the Prohibition of Discrimination in the Labour Market etc., and awarded compensation of DKK 25 000 (EUR 3 500). The Complaints Committee for Ethnic Equal Treatment dealt with the case in 2005.⁸

⁸ Complaints Committee for Ethnic Equal Treatment/ Journal no. 810.2/Decision of 5 December 2005. The Complaints Committee found sufficient proof that the termination by an institution of the applicant’s long term contract was based on illegal indirect differential treatment based on ethnicity and therefore a violation of the Act on Ethnic Equal Treatment.



Ground of discrimination: religion

Name of the court: Supreme Court [*Højesteret*]

Date of decision: 5 November 2007

Name of the parties: A versus the Ministry of Ecclesiastical Affairs

Reference number: Weekly Law Journal (U.2008.342H)

The Supreme Court decided that a Catholic's duty to report births to the registry of the Danish National Evangelical Lutheran Church was not a violation of the ECHR since the registration of births is an administrative task with no religious content. The person in question did not have to personally show up at the office and the birth certificate was not stamped by the Church. Furthermore, the Supreme Court concluded that it is not a violation of the ECHR that the national church receives a government subsidy paid from state tax revenues since there is no direct link between the amount of taxes paid by a citizen and the government subsidy. Some of the national church's expenses are incurred through its performance of non-religious tasks.

Ground of discrimination: ethnicity

Name of the court: Eastern High Court

Date of decision: 27 June 2006

Name of the parties: Mr. X vs. Copenhagen Technical School (Unpublished)

The applicant of an other ethnic origin than Danish was a carpentry student at Copenhagen Technical School at the time of the events. As part of the syllabus, students were offered traineeships in private companies. On 8 September 2003, the applicant accidentally saw a note in a teacher's hands where the words "not P" appeared next to the name of a potential employer requesting trainees to work in his company. When asked what the note meant, the teacher explained to him that the P stood for "perkere" ("Pakis") and that it meant that the employer in question had instructed the school not to send Pakistani or Turkish students. That same day, the applicant complained orally to the school inspector, arguing that the school was collaborating with employers that did not accept trainees of a certain ethnic origin. The inspector stated that it was the school's firm policy "not to accommodate requests from employers only to accept ethnic Danes as trainees" and that he was not aware of cases where this had happened. On 10 September 2003, the applicant filed a written complaint to the school management board and in court he subsequently claimed that as a result of this he was treated badly by school staff and students and was assigned to projects which he would normally not be expected to carry out at the school.

The Complaints Committee examined the case and exchanged correspondence with the school. In the correspondence, the school admitted that unequal treatment based on ethnicity might have occurred in isolated cases, but that this was not the school's general practice. In its decision of 1 September 2004, the Complaints Committee considered that, in this particular case, a staff member of the school had followed discriminatory instructions and thus violated Section 3 of the Act on Ethnic Equal Treatment. It specified, however, that the school itself had not committed a violation. The Committee further considered that Section 8 of the Act (prohibiting retaliation for complaints aimed at enforcing the principle of equal treatment) did not appear to have been violated, although it noted that it did not have the competence to interrogate witnesses where evidence was lacking. It concluded that this issue was for the courts to decide and recommended that free legal aid be granted for the case to be brought before a court.



A civil claim was filed to the City Court of Copenhagen [Københavns Byret], seeking compensation of DKK 100 000 (EUR 13 500 approximately) for moral damages incurred as a result of ethnic discrimination. On 29 November 2005, the City Court considered that the evidence produced did not prove that either the school or its staff members were willing to carry out discriminatory requests from employers and that there was no reason to set aside the inspector's statement. It further found that the applicant was not among the students to whom a traineeship was to be allocated on 8 September 2003 as he was undergoing an aptitude test between 1 September and 1 October after having failed the first main course and could only subsequently be considered for a traineeship, which he obtained on 6 October 2003. It concluded that the applicant could not be considered to have been subjected to differential treatment on the basis of his race or ethnic origin, nor was he a victim of retaliation by the defendant because of the complaint filed by him. The applicant contended that, under the Act on Ethnic Equal Treatment, the burden of proof should have been on the staff member and not on him.

The applicant appealed the City Court's judgement to the Eastern High Court. He did not obtain legal aid to appeal the case and the Documentation and Advisory Centre on Racial Discrimination (DACoRD) [Dokumentations- og Rådgivningscenter om Racediskrimination] subsequently assisted him. One of the witnesses called before the High Court was a school staff member in charge of contacts between the school and potential employers. He stated that he had chosen not to send a student of an ethnic origin other than Danish to the company because "the school had previously received negative feedback from students of other ethnic origins who had trained with the company. They had felt maltreated because employees at the company had used abusive language." The school argued that the complainant had not experienced retaliation as a consequence of his complaint, but that he simply was not qualified enough to be sent for training. In the applicant's view, this argument was irrelevant since the school had already admitted to not sending students of an ethnic background other than Danish to certain employers. The High Court decided that it had not been proved that the complainant had been subjected to discrimination or had experienced retaliation as a consequence of his complaint and confirmed the judgement of the City Court. According to the complainant, the High Court based its decision on the school's statement that the complainant did not have the necessary qualifications to be sent on training. The school was acquitted and the complainant was required to pay procedural costs amounting to DKK 25 000 (EUR 3 300 approximately).

Under Danish law, a case can only be tried twice before national courts. If the case is of significant importance, it is possible to apply for leave to appeal to the Supreme Court. After the judgement of the Eastern High Court, the complainant did indeed apply for leave to appeal, but on 5 December 2006 his application was dismissed.

The written note made by the technical school seemed to constitute *prima facie* evidence, as no other form of proof could be stronger than this. This is why the Complaints Committee in this case – alone out of a total of 142 cases between July 2003 and July 2005 - considered that a violation had taken place. Consequently the complainant was granted free legal aid to take the case before the City Court. However, the Complaints Committee did not provide legal aid for the appeal.



This case could theoretically raise a problem for university students, who, following the Courts' decision to apply the Act on Ethnic Equal Treatment rather than the Act on the Prohibition of Discrimination in the Labour Market etc, are protected against race discrimination but not against discrimination on other grounds. In practice most Danish universities are public institutions and thus under an obligation not to discriminate on any ground under the Constitutional principle of equality. However, technical schools are mainly private institutions.

The case was taken to the UN Committee on the Elimination of Racial Discrimination as an individual complaint and the Committee found with regard to the applicant's allegation that the State party had failed to provide effective remedies within the meaning of Article 6 of the Convention. The Committee noted that both national courts had based their decisions on the fact that the applicant did not qualify for an internship for reasons other than alleged discriminatory practice against non-ethnic Danes - namely that he had failed a course. It considered that this did not absolve the State party from its obligation to investigate whether or not the note "not P" written on the employer's application and reported to be a sign recognised by a teacher as implying exclusion of certain students from a traineeship on the basis of their ethnic origin, amounted to racial discrimination. In the light of the State party's failure to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place, the Committee concluded that Articles 2, Paragraph 1 (d), and 6 of the Convention had been violated. In the circumstances, the CERD was of the opinion that the facts as submitted revealed a violation of Articles 2, Paragraph 1 (d); 5, Paragraph (e) (v); and 6 of the Convention by Denmark.⁹

Ground of discrimination: ethnicity

Name of the court:

The Complaints Committee for Ethnic Equal Treatment (administrative decision)

Date of decision: 24 October 2006

Reference number: Decision (j.nr. 740.22)

A person of ethnic minority origin was refused entrance to a nightclub with the explanation that he was not able to show a membership card. His wife, also of ethnic minority origin, was at first allowed entrance without showing a membership card, but when the doorman discovered that the two were together, she was also turned away.

The Complaints Committee for Ethnic Equal Treatment found in relation to the man a violation of Section 3 (1) of the Act on Ethnic Equal Treatment. In relation to the wife the Committee also found a violation of Section 3 (1) of the Act on Ethnic Equal Treatment based on the fact that she was rejected based of the ethnic origin of her husband. The Complaints Committee could not require either the complainant or the respondent to give their opinion or reveal the factual circumstances of a case. Moreover, the Complaints Committee could not demand that the parties produce documents or other material to further elucidate a case. The case is an example of the fact that neither the Act on Ethnic Equal Treatment nor the Act on the Prohibition of Discrimination in the Labour Market. provided the Complaints Committee with powers to enforce the disclosure of the material facts of a case. When the body does not possess any means to encourage the parties to cooperate, this limits the possibility to obtain the relevant information to base a decision upon.

⁹ CERD/C/71/D/40/2007 of 8 August 2007



However, the Committee found in both cases that the practice was a violation of the Act on Ethnic Equal Treatment and the prohibition of direct differential treatment on the ground of race or ethnic origin contained in Section 3 (1). The Complaints Committee suggested that free legal aid should be granted.

Ground of discrimination: national origin

Name of the court: Maritime and Commercial Court (unpublished)

Date of decision: 12 April 2007

In a judgment of 12 April 2007, the Maritime and Commercial Court examined whether the plaintiff's dismissal due to his language skills was a violation of the Act on the Prohibition of Discrimination in the Labour Market etc. The employee was of Dutch origin and employed as a project consultant dealing with sales. The Court found that the language requirement constituted indirect discrimination on the ground of national origin but stated that it must be up to the employer and not a court to determine whether an employee speaks well enough to hold the job.

Ground of discrimination: sexual orientation

Name of the court: Western High Court [*Vestre Landsret*]

Date of decision: 22 February 2008

Name of the parties: A vs. B

Reference number: Weekly Law Journal (U.2008.1353V)

In summer 2005 an apprentice at a bakery chose to announce that he was homosexual. From that moment his employer began to systematically harass him. He slandered the apprentice in front of other employees and customers, and called homosexuals the most disgusting people he knew. Furthermore he stated that homosexuals were mentally ill. The apprentice reported sick in February 2006. A medical certificate stated that the cause was a poor psychological working environment.

The apprentice made contact with his trade union, who tried to resolve the case at a mediation meeting. The trade union asked the employer for compensation equivalent to one year's salary. The employer refused to admit having slandered the apprentice and the trade union took the case to court.

The injured party (the apprentice) claimed that he had been discriminated against on the ground of his sexual orientation and been harassed with reference to the Act on the Prohibition of Discrimination in the Labour Market etc.

The Western High Court upheld the judgment appealed from the District Court [Retten i Hjørring]. The employer was ordered to pay DKK 100 000 (EUR 13 210) to the injured party.

Trends and patterns in cases involving Roma/Travellers

Complaints Committee for Ethnic Equal Treatment Case no. 780.19

The Complaints Committee for Ethnic Equal Treatment became aware that a number of individuals with a Roma background felt they were experiencing racial or ethnic discrimination by the municipality of Elsinore. It appeared that the municipal project "Fælles Indsats" ("Joint Effort") to promote the integration of Roma into the labour market had referred citizens to two specific counsellors because of their ethnic origin.



The Committee found that the project could only be undertaken if it complied with Article 4 of the Act on Ethnic Equal Treatment concerning specific measures aimed at “preventing or ameliorating disadvantages based on race or ethnic origin.” The Committee found that a specific measure according to Article 4 of the Act on Ethnic Equal Treatment could only be initiated if an individual or a group of individuals were offered extraordinary support focusing on that individual or group’s life situation and particular needs. The measure should be beneficial to the individual and could not amount to a forced arrangement. The Committee found that the municipality of Elsinore had been pursuing legitimate aims in the project in question, i.e. strengthening integration of individuals with a Roma background into the labour market and reducing or removing inequalities encountered by such individuals. However, the Committee also found that the measure in question entailed an automatic referral of individuals with a Roma background to the two particular caseworkers if such individuals required a particular kind of attention.

The Complaints Committee found that the municipality of Elsinore’s project and its referral of two individuals with a Roma background to two particular counsellors was a violation of the Act on Ethnic Equal Treatment’s prohibition of direct discrimination based on race or ethnic origin. Unlike case 730.7 (cf. Section 3.2.8 below) there was no issue of educational segregation in the “Joint Effort” case.



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?*
- b) *Are constitutional anti-discrimination provisions directly applicable?*
- c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The Danish Constitution does not contain a general provision prohibiting discrimination as such. Denmark had its first democratic constitution in 1849, and it was changed and amended in 1866, 1915, 1920 and 1953. One of the grounds mentioned in the Racial Equality Directive and the Employment Equality Directive is directly covered by the Danish Constitution – namely religion, which is covered by a number of specific provisions.

The Danish Constitution

Section 71 (1) of the Constitution provides that “No Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent”. As a point of departure the Section only covers Danish citizens, but the liberty of foreigners is to some extent protected by Section 70. This states that “no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty.”

Section 68 of the Constitution provides that “No one shall be liable to make personal contributions to any denomination other than the one to which he adheres.”

Section 67 of the Constitution provides that “Citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.”

The principle of equality in administrative law

Public authorities are governed by the principle of equality applicable under general administrative law, which means that equal matters must be treated in full equality before the law.

In general this means that situations should be treated equally unless there are objective and reasonable grounds present for different treatment. This is a limitation of the powers of the public authorities. Whether a criterion is objective and reasonable depends on the interpretation of the relevant legislation and the implicated public authorities deciding the case and the context of a specific case. The principle of equality applied by public authorities in case handling supplements the regulation as stipulated in the relevant act and is often also supplemented by the unwritten principle of proportionality.



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 citizens can only be treated differently if there is a legitimate reason to do so.

When it comes to an administrative authority exercising discretionary power as an employer, the same principle applies. The Danish Parliamentary Ombudsman [*Folketingets Ombudsmand*] has stated¹⁰ 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 the promotion of public employees, salary and other employment conditions. It is the employee's qualifications that count and not, for example, age and disability or any other grounds.

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

When it comes to private employers, however, administrative law does not apply. Private employers are bound by the Criminal Act on the Prohibition of Discrimination on the Grounds of Race and the Civil Act on the Prohibition of Discrimination in the Labour Market etc. (see below).

¹⁰ Annual report of the Parliamentary Ombudsman 1987 p. 107 ff. (FOB 1987, s. 107) [*Folketingets Ombudsmand – Årsrapport 1987*]



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.

Grounds of discrimination covered in Danish law are the following: race, skin colour, religion or belief, political opinion, sexual orientation, age, disability, national, social or ethnic origin and gender.¹¹

The Constitution

Section 70 of the Constitution (1953) stipulates that no one can be deprived of any civil or political rights on grounds of faith or descent.

Criminal law

Section 266b of Act no. 1068 of 6 November 2008 (the Criminal Code) prohibits hate speech. It covers the following grounds: race, colour, national or ethnic origin, religion, and sexual orientation.

Criminal Act no. 626 of 29 September 1987 on the Prohibition of Discrimination due to Race etc., as amended by Act no. 433 of 31 May 2000 [*Lov om forbud mod forskelsbehandling på grund af race m.v.*] covers the following grounds: race, colour of skin, national or ethnic origin, religion and sexual orientation.

Civil Acts

Civil Act no. 1349 of 16 December 2008 on the Prohibition against Discrimination in the Labour Market [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*] covers the following grounds: race, colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin.

Civil Act no. 374 of 28 May 2003 on Ethnic Equal Treatment as amended by Act no. 554 of 24 June 2005 and Act no. 387 of 27 May 2008 [*Lov om etnisk ligebehandling*] covers race and ethnic origin.

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”?

¹¹ This report will, however, not focus on gender.



Firstly it must be emphasised that the terms only are vaguely defined in Danish legislation.

Race or ethnic origin

Anti-discrimination legislation was passed in 1971 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.

Religion

The term “religion” is not defined in the legislation.

Belief

“Belief” is assumed to protect a wider area than religion.

Disability

Danish legislation does not contain a definition of “disability” and the preparatory works are relatively vague in this respect. The term used in the Act on the Prohibition of Discrimination in the Labour Market etc. is “handicap” and not “disability”. According to the preparatory works, a “handicap” occurs where a person with a “physical, psychological or intellectual impairment must be compensated in order for that person to function on an equal level with other citizens in a similar situation.” However the preparatory works also state that “it is not a requirement for protection against differential treatment on the grounds of disability that there is a *specific* need for compensation.”¹² This means that the Act on the Prohibition of Discrimination in the Labour Market etc. protects against discrimination on the ground of disability when a disabled person is in need of specific reasonable accommodation in order to carry out a job as well as situations where the disability has no influence on the ability to carry out a specific job.¹³

The need for compensation covers various services and facilities with the purpose of limiting the consequences of the disability. Compensation can, for instance, take the form of providing a wheelchair, hearing aid, personal assistance etc. Compensation can also consist of the provision of parallel services, for instance publishing written material as well as an audio tape.¹⁴

It should be noted that the Danish version of the Employment Equality Directive also uses the term “handicap” and not “disability”.

In a recent judgement (U.2008.306V), the Western High Court confirmed that a handicap in the sense of the Act on the Prohibition of Discrimination in the Labour Market etc. requires “a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal footing with other citizens in a similar situation in life”.

¹² Proposal L92 of 11 November 2004, ‘4.1. Handicapkriteriet’ and ‘Bemærkninger til de enkelte bestemmelser’, ‘Til nr. 2’

¹³ U.2008B.302, Pia Justesen, Handicap og diskrimination på arbejdsmarkedet, p. 2

¹⁴ Handicap og Ligebehandling – et refleksionspapir, Det Centrale Handicapråd (2001) p. 11



The Western High Court established in this judgement that A, who suffered from multiple sclerosis and who as a result experienced tiredness, reduced concentration and memory capacity as well as sensory impairment did have a disability, but the High Court did not find grounds to establish that the disability - as it was at the time of dismissal, and which only required an additional reduction in working time as compensation – constituted a handicap in the sense of the Act on the Prohibition of Discrimination in the Labour Market etc. Contrary to the preparatory works to the Act, the Western High Court would thus require that a person had a specific need to be compensated in order for him/her to be considered “handicapped”.

It is hence unclear what is needed in order to be covered by the term “handicap” under Danish law. The reference to “situation in life” could indicate that the disability in question must cause limitations in everyday life and not merely in working life. This contrasts with the *Chacón Navas* judgment, where the ECJ stipulated that 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. It could hence be argued that the Danish concept of “handicap” is narrower than the ECJ’s.

Moreover, the reference to a need for compensation indicates that the limitation must be closely linked to the individual’s disability. It seems that a limitation which occurs as a result of, for example, negative attitudes towards disability cannot qualify as leading to a need for compensation.

It is hence unclear whether the Danish definition of disability is broad enough to live up to Danish obligations under the Employment Equality Directive.

Sexual orientation

In existing Danish law the term “sexual orientation” is used, which means homo- and heterosexual relations and other kinds of lawful sexual orientation such as transvestism.¹⁵ It is important to note that the implementation of the Directive has not changed the current terminology.

- 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’; or a “disability”, sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

The term “religion” is not legally defined in Denmark. A definition may be found indirectly through the Danish authorities’ practice of approving “religious communities”.

Religious communities are approved by the Ministry of Ecclesiastical Affairs [*Kirkeministeriet*] in accordance with the Marriage Act [*Ægteskabsloven*]. This approval has nothing to do with religion - instead, it is based on the administrative law view that approval as a religious community (which authorises the community to conduct marriages) constitutes a delegation of executive power.

¹⁵ See *Anti-diskrimination Lovgivningen med kommentarer* p. 59 and Karnov 2001 p. 4464 note 2



Since 1998, the standing advisory committee re. religious communities [*Det Rådgivende Udvalg vedr. Trossamfund*] has been appointed to assess whether the conditions for approval as a religious community are fulfilled. The Committee is independent of the Ministry of Ecclesiastical Affairs and has expertise in religious sociology, religious history, law and theology. The Committee has prepared guidelines for approval as a religious community.

Religious communities that have not sought approval for various reasons and societies that are not eligible (philosophical communities and societies, etc.) exist under the general freedom of religion and association without any requirement for public registration.

The Committee uses a minimal definition of religion, understanding it as a specifically formulated belief in the human being's dependence on a power over the human race and the laws of nature and a belief that provides guidelines for human ethics and morality.¹⁶

Recital 17 of the Employment Equality Directive is not directly reflected in legislation. It is, however, stated in the preparatory works to the Act on the Prohibition of Discrimination in the Labour Market etc. that an employer can only choose an applicant with a disability if the applicant is just as qualified as an applicant without a disability. When comparing the qualifications, the disabled person is to be judged according to his or her capacity to carry out the essential functions of the post after reasonable accommodation is made.

From the preparatory works to the Act, it follows that age or handicap cannot justify employment at the expense of a more qualified younger or non-disabled person and it is not permissible to have a recruitment policy where disabled or older persons are always preferred. There is no known case law clarifying this issue, but if the prohibition mentioned in the preparatory works is to have effect, it must be assumed that a "more able" person subject to differential treatment would be able to bring a claim of discrimination.

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)?

As a starting point the Act on the Prohibition of Discrimination in the Labour Market protects both the elderly and the young. There are, however, a number of exceptions.

According to Section 1(a), the Minister of Defence can decide to except armed forces in active duty from the prohibition against differential treatment due to age and handicap (see Section 3 (4) of the Directive).

According to Section 5(a) (3), the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, presuming that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary (see Article 6 of the Directive).

¹⁶ Vejledende retningslinjer udarbejdet af det rådgivende Udvalg vedr. Trossamfund, 2. rev. udgave, januar 2002, available at http://www.km.dk/fileadmin/share/dokumenter/Vejledende_retningslinier_1_.rtf (in Danish) (12.03.09)



Furthermore, it is not prohibited to make either individual or collective arrangements that state that employment stops when the employee turns 70 years old, cf. Section 5(a) (4) of the Act.

It is also not prohibited to have provisions in collective agreements regarding special rules on payment etc. for young people under the age of 18, cf. Section 5(a) (5) of the Act.

Finally, the prohibition against differential treatment due to age does not apply in regard to employment, conditions of pay and dismissal for young people under the age of 15, since their employment is not regulated by a collective agreement.

This means that differential treatment is allowed against people under both 18 and 15 years old under certain circumstances.

- 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. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

On 1 January 2009 the newly established Equal Treatment Board [*Ligebehandlingsnævnet*] began functioning. The Board covers all protected grounds, (sex, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability and national, social or ethnic origin). The Board was established by Act no. 387 of 27 May 2008. The various discrimination grounds are not defined in the Act. The Equal Treatment Board has only dealt with a few cases so it remains to be seen how it will treat multiple discrimination cases.

In this respect, it would be preferable for the concept of multiple discrimination to be introduced directly into Danish anti-discrimination legislation, which is not the case today.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

On 28 January 2005 a job advertisement asked for workers 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 1 March 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 the Prohibition of Discrimination in the Labour Market, which partly implements the Employment Equality Directive.



On 21 July 2005 the Copenhagen Municipal 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 the Prohibition of Discrimination in the Labour Market etc., which prohibits discriminatory job advertisements. As this fine was never paid, the case went to court and on 3 January 2006 the court upheld the fine of EUR 450 for discrimination due to race/ethnicity and due to age. The fine of EUR 450 was the same as a fine for racially motivated discrimination, even though it should have reflected the fact that two forms of discrimination took place.

To our knowledge there was no case law regarding multiple discrimination in the years 2006 to 2008.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

In the commentary to the Act on Ethnic Equal Treatment that implements parts of the Racial Equality Directive, it is stated that the prohibition against differential treatment is applicable irrespective of whether the actual race or ethnic origin of the victim is as assumed by the perpetrator or not. Discrimination based on a perception or assumption of who a person is, is therefore prohibited.

Such a statement is, however, not included in the commentary to the Act on the Prohibition of Discrimination in the Labour Market etc. But our view is that discrimination based on assumed characteristics in the labour market is also prohibited.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

It follows from Section 3(1) of the Act on Ethnic Equal Treatment that no person may subject another person to direct or indirect discrimination on grounds of the latter's or a third party's race or ethnic origin.

Again, no such article appears in the Act on the Prohibition of Discrimination in the Labour Market etc. But it is our view that differential treatment in the labour market based, for example, on a third party's sexual orientation is prohibited. However, it would be preferable if this was explicitly mentioned by the Act on the Prohibition of Discrimination in the Labour Market etc. in the same manner as in the Act on Ethnic Equal Treatment.

In case 740.22 (cf. Section 0.3 above) a person of ethnic minority origin was refused entrance to a nightclub with the explanation that he was not able to show a membership card.



His wife, also of ethnic minority origin, was at first allowed entrance without showing a membership card, but when the doorman discovered that the two were together, she was also refused entry.

The Complaints Committee for Ethnic Equal Treatment found in relation to the man a violation of Section 3 (1) of the Act on Ethnic Equal Treatment. In relation to the wife, the Committee also found a violation of Section 3 (1) of the Act on Ethnic Equal Treatment based on the fact that she was rejected because of the ethnic origin of her husband.

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

a) *How is direct discrimination defined in national law?*

Definition of direct discrimination: direct discrimination is deemed to occur 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, cf. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3 (2) of the Act on Ethnic Equal Treatment.

b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Discriminatory statements or discriminatory job vacancy announcements are capable of constituting direct discrimination in national law, cf. Section 5 of the Act on the Prohibition of Discrimination in the Labour Market etc. For instance the company International Office Supply was fined EUR 450 in a court judgment of 3 January 2006 because of a job advertisement which constituted direct discrimination. The job advertisement asked for Danish workers aged 18 to 30 years old. For more details of the case, see Section 2.1.1. above.¹⁷

c) *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).*

The starting point is that direct discrimination is never legal. See, however, Section 4.7.1. of this report on justification in some areas.

d) *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?*

The law does not specify how a comparison should be made in relation to age discrimination.

¹⁷ City Court of Copenhagen, Judgment of 3 January 2006



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?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

Situational testing is not prohibited, and no limitations on its use apply. Tests have been used to examine discrimination in night life. In January 2005 a television programme followed two groups of youngsters trying to enter night clubs in Copenhagen with a hidden camera. One group of youngsters belonging to the ethnic majority were allowed to enter while a group of ethnic minority youngsters were refused entry into a number of places. Doormen from three different night clubs were subsequently sentenced by the City Court of Copenhagen based on this evidence. These were criminal cases under the 1971 Act and the situation testing was invoked as evidence, but there were no specific procedural requirements for its use.

- 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)?*

The use of situational testing as sole evidence for discriminatory practice would probably encounter some scepticism at court. However, the results of situational testing could support a case of discrimination against a victim who in reality had been rejected at, for example, a specific nightclub known for discriminatory practices exposed in situational testing. No domestic case law indicates the influence of European strategic litigation using situational testing.

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

*Press Council [Pressenævnet] no. 2003-6-148 (Decision of 6 April 2004)*¹⁸

A taxi company made a complaint about articles published in a newspaper dealing with the issue of whether customers could call and order a taxi with a “white or Danish driver”.

The Press Council found that the question of whether discrimination against taxi drivers of ethnic origin other than Danish took place was of significant interest to society. The Press Council concluded that it was acceptable for a journalist, during the course of research, to call a taxi company and order a “white or Danish driver” without introducing him- or herself as a journalist, since it must be assumed that the information on whether the company complied with customers’ discriminatory requests would be impossible to get in other ways.

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

Typically journalists and NGOs have used situational testing as a way of exposing discriminatory practices, especially by private businesses or in specific sectors of society.

¹⁸ KEN nr 9698 af 06/04/2004.



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

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

Definition of indirect discrimination: Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of e.g. a particular racial or ethnic origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, cf. Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(3) of the Act on Ethnic Equal Treatment.

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

A Supreme Court judgment¹⁹ accepted a supermarket's wish to be politically and religiously neutral as a legitimate aim and found that a clothing requirement as a means to achieve that aim was appropriate and necessary. The Supreme Court found that A's dismissal for having worn a head scarf for religious reasons in opposition to the rules on clothing did not amount to illegal differential treatment. The clothing rules in the supermarket applied to every employee and the rules were consistently enforced. The Court recognised that the prohibition of wearing a head scarf when having direct contact with customers would mainly affect Muslim women but found that differential treatment was objectively justified in the performance of the work. The Court did not find that the clothing rule was in breach of Article 9 of the European Convention on Human Rights.

c) *Is this compatible with the Directives?*

It is difficult to conclude whether Danish case law is compatible with the Directives since there have been very few judgments as yet concerning indirect discrimination. In the judgment mentioned above, the Supreme Court's reasoning is very similar to the wording of the Directives. The Supreme Court judgment furthermore refers to the preparatory works to the Act on the Prohibition of Discrimination in the Labour Market etc., where the question of employers' clothing regulations was considered.

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

The law does not specify how a comparison is to be made in relation to age discrimination.

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

¹⁹ U.2005.1265H



A case from the Maritime and Commercial Court examined whether the plaintiff's dismissal due to his language skills was a violation of the Act on the Prohibition of Discrimination in the Labour Market etc.

The Court found that the language requirement constituted indirect discrimination (probably on the ground of nationality – it was not mentioned explicitly) but stated that it must be up to the employer and not a court to determine whether the employee speaks well enough to hold a job.²⁰ The judgment has been appealed to the Supreme Court.

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.*

According to the preparatory works to the Act on Ethnic Equal Treatment, the assessment of whether criteria etc. will place persons of a certain race or ethnic origin at a particular disadvantage can be made on the basis of statistical material which shows that the criteria actually place the group of persons proportionately at a particular disadvantage to other persons. Furthermore, it is stated that if it is not possible to produce statistical material, the assessment can be made in any other way which demonstrates that the criteria etc. are likely to have this effect.

The same statement regarding statistical material and indirect discrimination is not found in the preparatory works to the Act on the Prohibition of Discrimination in the Labour Market etc.

- b) *Is the use of such evidence widespread? 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?*

Statistics have only been used in cases of gender discrimination, but not yet in cases of discrimination on other grounds. There have been no debates or developments regarding their use and admission in court.

Statistics on the place of birth of immigrants and their descendants have been used to support arguments of indirect discrimination in media coverage of cases where, for example, people living in certain streets or neighbourhoods were denied access to insurance schemes.

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

No published court cases on discrimination are available that illustrate the use of statistical evidence.

²⁰ Judgment from the Maritime and Commercial Court[Sø- og Handelsretten] of 12 April 2007.



- d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Certain restrictions on data collection arise from legislation on personal data protection. Danish law²¹ does not permit the collection of data on race or ethnicity, religion or belief and sexual orientation.

Concerning data on ethnicity, data collated on country or region of birth of immigrants and their descendants may be used to indicate or prove patterns of discrimination in the labour market, in education and in geographical areas, e.g. neighbourhoods.

Data on age may be retrieved from official surveys on the population as a whole or on sectors or branches of industry from Statistics Denmark [*Danmarks Statistik*]. Data on age may also be compiled by labour market organisations or employers.

Positive measures have been initiated within both public authorities and private entities as part of diversity management programmes or recruitment programmes aiming at achieving better representation of ethnicity and gender among staff members.

A tool to collect data on the ethnic composition of staff and show trends in recruitment has been developed by the Ministry of Employment in cooperation with the Danish Institute of Human Rights. It is based on data retrieved via the so-called CPR number – a personal number consisting of birth-date and a four digit code – that allows Statistics Denmark²² to collect data on country of birth, parents' country of birth and citizenship. To avoid revealing the personal data of identifiable persons, information is provided in a format that ensures individual data protection, e.g. by showing benchmark numbers for a sector or a group of entities.

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.*

Definition of harassment: Harassment shall be deemed to be discrimination when conduct related to race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. the main Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3 (4) of the Act on Ethnic Equal Treatment.

²¹ Act on Personal Data, no. 429 of 31/05/2000 [*Persondataloven*] and Act on Statistics [*Lov om Danmarks Statistik*] nr. 1189. of 21 December 1992.

²² Publication on Registration of the Ethnic Origin of Employees [*CPR-opgørelse af medarbejderstabens oprindelse, Beskæftigelsesministeriet og Institut for Menneskerettigheder*].



b) *Is harassment prohibited as a form of discrimination?*

It follows from the national legislation that harassment is deemed discrimination.

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

There are no additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case-law) prohibit instructions to discriminate?

If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

An instruction to discriminate against persons on grounds of race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin shall be deemed to be discrimination, cf. the main Section 1 (5) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3 (5) of the Act on Ethnic Equal Treatment.

Persons who are subject to discrimination can be awarded compensation, cf. Section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. Legal persons can be liable for discrimination. Furthermore, Section 2 states that employers are prohibited from differential treatment of employees.

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 people with disabilities? 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? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

Reasonable accommodation for people with disabilities (cf. Article 5 of the Employment Equality Directive) is implemented through Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. Section 2(a) obliges the employer to adapt the workplace in order to accommodate the employment of people with handicaps, unless this will place a disproportionate burden on the employer.



The duty of reasonable accommodation applies only when the handicapped applicant has the necessary qualifications to do the job if accommodations are made. When evaluating whether the burden placed on the employer is disproportionate, it is taken into consideration whether the public administration will cover some or all of the expense. National law does not define what would be a disproportionate burden. In the end it will be for the courts to decide. Furthermore the term “disabilities” in Section 2(a) of the Act is subject to the interpretation of the term in Danish law, see Section 2.1.1 above. Hence, according to the preparatory works, which play a central role in the interpretation of Danish legislation, a “handicap” occurs where a person with a “physical, psychological or intellectual impairment must be compensated in order for that person to function on an equal level with other citizens in a similar situation. It is not a requirement for protection against differential treatment on the grounds of disability that there is a *specific* need for compensation.”²³ It is unclear whether the Danish definition of disability is broad enough to live up to Danish obligations under the Employment Equality Directive.

The use of the term “handicap” indicates a narrow definition of the protected group and the Danish courts operate with a narrow definition requiring “a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life”. It would seem that according to Danish jurisprudence, applicants must establish before the courts that the extent of reduced functional capacity is significant in their concrete case. Otherwise they probably fall outside the definition of the Danish interpretation of the term “handicap” and are therefore excluded from the right to reasonable accommodation.

The definition of a handicap for the purposes of claiming reasonable accommodation is the same as for claiming protection from discrimination in general.

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

The duty to provide reasonable accommodation only applies in the labour market.

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

If an employer refuses to provide reasonable accommodation and this is not justified, it will constitute indirect discrimination.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

²³ Proposal L92 of 11 November 2004, ‘4.1. Handicapkriteriet’ and ‘Bemærkninger til de enkelte bestemmelser’, ‘Til nr. 2’



There is no general duty to provide reasonable accommodation for grounds other than disability. However, Section 81(5) of the Road Traffic Act²⁴ and Paragraph 2 of a government circular (Bkg 1998 No. 518) state that male Sikhs are exempted from wearing a crash helmet when riding a motorbike since they are obliged to wear the turban outside at all times. There are no known exceptions concerning other grounds.

There have been examples both in the labour market and in the education sector where reasonable accommodation has been granted in order, for example, to allow Muslim students or employees the opportunity to pray in a room reserved for this purpose.

Another example from the field of sport is that some municipalities reserve swimming pools at certain times for women so that Muslim women can use the facilities without meeting men.

- e) *Does the national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

According to Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc., the burden of proof shifts if the claimant is able to present factual circumstances which give reason to assume that differential treatment has occurred. Thus the provision does not entail a total shift of burden of proof, but a divided burden. This also applies in cases of denial of reasonable accommodation.

- f) *Does national law require services available to the public, 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 2000/78?*

According to a regulation from 2004 regarding accessibility in connection with the rebuilding of existing buildings, a number of accessibility measures are to be taken such as providing disabled access to at least one level of a building. The regulation covers all publicly accessible buildings and commercial buildings for services and administration.²⁵ Failure to comply could probably also be a violation of the Act on the Prohibition of Discrimination in the Labour Market under certain circumstances.

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

No general obligation exists.

- h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

²⁴ Consolidated Act 2005-11-14 no. 1079 Færdselsloven.

²⁵ Regulation no. 1250 of 13 December 2004



There are various acts that concern persons with disabilities outside the area of anti-discrimination legislation. Two examples are the following:

*The Act on Compensation for Persons with Disabilities in the Labour Market [Lov om Kompensation til Handicappede I Erhverv mv.]*²⁶

This act aims to allow persons with disabilities the same opportunities in the labour market as persons without disabilities through accommodation. The Act was passed in 1998 and was subsequently amended. In accordance with the Act, people with disabilities who wish to work can be given reasonable accommodation such as personal assistance, etc. Expenses under such schemes are covered by the state.

*The Act on Active Employment Effort Lov om Aktiv Beskæftigelsesindsats*²⁷

This act has introduced a range of measures for municipalities and the employment services, e.g. a wage subsidy by local authorities and financial support for teaching materials, equipment in the workplace and personal assistance. The tools are to be applied when job offers are made to, for instance, newly qualified persons with disabilities and persons with a permanent reduced working capacity who are in receipt of an early retirement pension and who are not able to get or hold a job with shorter hours on normal conditions

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 workers with disabilities?*
- b) *Would such activities be considered to constitute employment under national law?*

The *Weekly Law Review Ugeskrift for Retsvæsen* published a decision of the Eastern High Court (reference No. UfR. 2005.1429Ø), which seems to narrow the scope of what is considered as work in relation to sheltered workshops.

For a certain length of time the claimant (who was not disabled) lived in the St. Dannesbo sheltered home while he was receiving social benefits. During his stay he also worked in St. Dannesbo's sheltered workshop. On top of his social benefits, he received a so-called "working reward" of EUR 1.5 an hour (DKK 11.87 per hour). On this basis, he asked for a work contract, which under Danish law all employers must 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 a contract. The claimant therefore brought a claim for compensation for failure to supply a work contract under the Act on Work Contracts.²⁸

The Eastern High Court held that the main purpose of his stay at St. Dannesbo was not to work but to receive shelter and care.

²⁶ Act No 727 of 7 July 2009.

²⁷ Act No 1074 of 7 September 2007.

²⁸ Act No. 240 of 17 March 2010 om arbejdsgiverens pligt til at underrette lønmodtageren om vilkårene for ansættelsesforholdet



The amount of money he received in the sheltered workshop was only pocket money and not a real salary. If he did not show up for work, he could not be fired and the items produced did not generate income. 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 was rather an offer of a service to benefit his social skills. Consequently he did not have the right to a work contract.

Even though the claimant was not disabled, it may be concluded that disabled persons who are working in the (same) sheltered workshops are not protected by employment law, because such activities are considered outside the scope of “work”. This may limit protection under the Employment Equality 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?

All individuals within Danish jurisdiction regardless of their status, whether they have a permanent or time-limited residence permit or are illegal migrants, and irrespective of citizenship and nationality, are protected from discrimination according to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc. that transpose 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?

Danish law distinguishes between natural persons and legal persons and states that only natural persons are protected against direct or indirect discrimination on grounds of his/her race or ethnic origin or a third party's race or ethnic origin.²⁹

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?

Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc. contains a prohibition against harassment and Section 1 (5) provides a prohibition against instruction to discriminate. This prohibition applies both in situations where the employer is the one exercising the harassment as well as in situations where he or she gives an instruction to other employees to discriminate, e.g. in a recruitment situation where the employer tells the personnel manager to avoid hiring employees with an ethnic minority background.

The guidelines to the provisions³⁰ state that the employer is also liable for any harassment or other discriminatory behaviour exercised by other employees as the employer has to take the necessary measures to ensure a harassment-free working environment.

²⁹ Act on Ethnic Equal Treatment Article 3 (1).

³⁰ Vejledning om forskelsbehandlingsloven VEJ nr 9237 af 6 januar 2006 - Chapter 5 Page 13.



This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of *Danske Lov*, which dates from 1683. According to this principle, 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.

Faults committed by employees are the employer's responsibility if (new) statutory rules do not lead to another result. However, as harassment is not part of performing a job, harassment will not be considered to be included in, or to be part of, the employer's responsibility, unless he has neglected his duty to instruct or correct his personnel as a good employer should to avoid harassment among employees.

Similarly, a trade union is liable if an employee of the trade union discriminates against a member of the trade union, but this liability is restricted to the actions of employees and not of other members.

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?

The provisions of national law apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, and holding statutory office (Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc.). All the grounds, i.e. race, skin colour, national or ethnic origin, sexual orientation, age, disability, religion and belief are covered.

Section 3 (3) of the Act on the Prohibition of Discrimination in the Labour Market etc. states moreover that the prohibition against differential treatment also applies to anyone that makes rules or decisions on access to, or the exercise of, independent business or trade.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

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?

Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. covers all aspects of discrimination in relation to access to employment, to self-employment and to occupation, including selection criteria, recruitment conditions and promotion.



In the public sector, Danish citizenship may be a selection criterion 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 has subcontracted with the Danish state – e.g. for printing Danish passports or bank notes etc. – this company may be obliged by the contract to hire only Danish citizens. In such cases it may not be unjustified for the private company to discriminate against people who are not Danish citizens. This stems from the same principle as within the public sector, namely that in all tasks relating to the sovereignty of the state, a citizenship requirement may be justified.

The law does not differentiate between the public and the private sector.

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

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

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 covered by the Directive. These requirements are met in Section 2 (2)³¹ of the Act on the Prohibition of Discrimination in the Labour Market etc., according to which an employer is prohibited from exercising differential treatment in connection with recruitment, dismissal, transferral, promotion, and work and pay conditions. The prohibition covers all the protected grounds (see 3.2.1 above). Occupational pensions are not mentioned specifically in the Act. However, occupational pensions are probably covered by the term “pay conditions” in Section 2 (2) of the Act.

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, or such as adult life long learning course?

The Act on Ethnic Equal Treatment Section 2 (3) states that the Act shall not apply to areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. Vocational training outside the labour market is, however, dealt with by the Act on Ethnic Equal Treatment.

³¹ Art. 2(2) of the Act on the Prohibition of Discrimination in the Labour Market etc states: “Discrimination shall be deemed to have occurred in relation to payment conditions if an equal salary is not offered for the same job or for jobs which are regarded as having the same value”.



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 on the Prohibition of Discrimination in the Labour Market, etc.

There was 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. The AMU centre decided to dismiss him, as he provoked the other participants by praying. 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 the Supreme Court.³²

In a case of race discrimination at a technical school³³ it was decided by a city court and confirmed by the Eastern High Court that this situation was not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. but rather by the Act prohibiting unequal treatment in goods and services (the Ethnic Equal Treatment Act of 2003). By considering a technical school as a form of education covered by the provision on goods and services, race discrimination was covered, but a problem potentially exists in relation to the other protected grounds: through this decision the Danish court excluded students at technical schools from protection against discrimination due to age, disability, sexual orientation, religion and belief (as no provisions exist against discrimination on these grounds in the field of goods and services).

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))

According to Section 3 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc., the prohibition against discrimination also covers 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. The Act covers the following grounds: race, colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin.

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 exception has not yet been applied. The exception is not directly repeated or implemented in the Act on the Prohibition of Discrimination in the Labour Market.

³² Danish Law Weekly 2001 page 83. UfR [Ugeskrift for Retsvæsen] 2001, 83 H. For a full description of this case, see section 0.3 above.

³³ Eastern High Court [Østre Landsret] 27 June 2006



With the adoption of the Act on Ethnic Equal Treatment in 2003 – covering the non-employment aspects of the Racial Equality Directive – both direct and indirect unequal treatment in the area of social protection (including social security) and healthcare are now prohibited, cf. Section 2 of the Act.

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.

With the adoption of the Act on Ethnic Equal Treatment in 2003 – covering the non-employment aspects of the Racial Equality Directive – both direct and indirect unequal treatment in the areas of social advantages is now protected, cf. Section 2 of the Act. In addition, the new provision (Section 7) on the shared burden of proof may help more victims of discrimination to successfully bring cases to court in the future. This Act was not extended to other grounds than ethnicity, leaving age and disability, amongst others, outside of the scope of protection.

Complementary to this protection is Section 1(1) of the 1971 Criminal Act on the Prohibition of Discrimination quoted above, according to which penalties are warranted 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 advantages. Any public or private leisure facilities etc. open to the public, whether on a commercial or non profit basis, must be offered on equal terms to everybody. Under the 1971 Act it is also an offence to refuse a person admittance on the same terms as others to social centres, or similar facilities open to the public, if the refusal is based on one of the protected grounds.

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 and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.

Danish anti-discrimination law prohibits discrimination on race and ethnicity (cf. the Act on Ethnic Equal Treatment); and race, skin colour, national or ethnic origin, belief and sexual orientation (cf. Act on Prohibition against Discrimination on grounds of Race etc.). The legislation applies to all aspects of education including university education and all types of schools. There are no provisions explicitly mentioning Roma children.



The municipality of Elsinore set up segregated classes for Roma children from 2002. 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 Council of Europe Commissioner for Human Rights³⁴ and the Danish Institute for Human Rights' Complaints Committee for Ethnic Equal Treatment,³⁵ which consequently stated that the segregation of Roma children was not in accordance with the law. In 2006 the municipality thus decided to cease the Roma classes and allow the children back into the ordinary classes in state schools in Elsinore.

Similar forms of school segregation of ethnic minority groups other than Roma have not been observed.

Discussions on segregation were absent from public debate in 2008. Since there are only a few examples, the only pattern we can see is the intention of the authorities to introduce special measures for Roma children to improve their education and school attendance. Segregation has hence been perceived as a tool for targeting this group and providing teachers and staff with knowledge and experience of this particular group.

The point of departure in Danish legislation concerning education is that all children are educated in schools or at home by parents. Children who require special support (for instance, disabled children) which cannot be achieved by differentiating teaching within the framework of ordinary education are offered special education and other types of special educational assistance.

The purpose of special educational assistance is to enhance the development of children with special needs so that the children can, among other things, continue their education or take up employment. It includes, for instance, provision of advice to teachers, parents and other relevant persons, special educational materials and facilities, education specially focusing on the learning ability of the child, personal assistance, special activities focusing on relieving a disability etc., cf. Section 2 of the Administrative Order on Special Education.³⁶

The relevant factor when selecting the type of education is not the child's diagnosis but an estimation of how the child will profit most from education. If a child is able to retain a connection to normal teaching and classes while receiving special educational assistance, this will be preferred. If the child cannot profit from participating in ordinary education, he or she may be given the opportunity to attend a special class at a state school or at a special teaching facility, cf. Section 9 of the Order.

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

- a) *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.*

³⁴ Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

³⁵ Decisions of 5 December 2005, 730.7.

³⁶ Bekendtgørelse om folkeskolens specialundervisning og anden specialpædagogisk bistand No. 1373 of 15 december 2005.



Section 1(1) of the Criminal Act on the Prohibition of Discrimination on grounds of Race [Lovbekendtgørelse om forbud mod forskelsbehandling på grund af race mv.,]

etc. 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.

Any public or private supply of goods and services open to the public, whether it is commercial or non profit, must be offered on the same terms as to 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 grounds protected by Section 1 of the Criminal Act [Straffeloven], which does not include age and disability. In practice the Act has been very difficult to use in the area of goods and services, although some doormen have been fined for denying access to restaurants, night clubs etc.

The Act on Ethnic Equal Treatment covers all public and private activity concerning social protection, including social security and healthcare; social benefits; education and access to goods and services, including housing, available to the public. It also covers membership of organisations whose members carry out a specific profession and the benefits that the members of such organisations receive, cf. Section 2 of the Act.

b) Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?

The law allows for differences in treatment on the grounds of age and disability if the service is not related to the labour market. The law imposes no limitations on how age or disability should be used in this context.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Act on Ethnic Equal Treatment applies to public and private housing companies that rent houses, and to real estate companies. The term “available to the public” should be interpreted in a broad sense, but the Act does not apply to private persons sub-letting a room in their own home.

Discrimination in housing is, moreover, prohibited under the Act on Ethnic Equal Treatment and in relation to public housing it is furthermore prohibited by the principle of equality in administrative law.



Various initiatives have been introduced to avoid segregation and promote integration. As a rule, public housing is assigned according a waiting list, but in 1997, the Danish Parliament approved experiments with assigning and letting public housing using criteria other than length of time on a waiting list. The intention was to attract applicants from a broader segment of the population to troubled areas, and between 1997 and April 1999 such experiments involved more than 43,000 homes. This approach may result in discrimination against ethnic minorities, since they have a higher unemployment rate than ethnic Danes. From the year 2000 it has been an option to prioritise students, commuters or people in jobs instead of people on the waiting list. However, at least 10 per cent must be let according to these lists. Discrimination based on ethnic origin, for example, is prohibited.

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

Municipalities are obliged to offer housing which is fit for permanent residence to disabled persons who are in need of accommodation, cf. Section 108 of Act no. 979 of 1 October 2008 on Social Services [*Lov om social service*]. Furthermore, they must offer accommodation for older people with a need for housing no later than two months after they have applied, cf. Section 192a of the Act.



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?

Sections 6(1) and 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. contain two exceptions to the prohibition against differential treatment 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 an occupational requirement). The same applies to organisations with a specific ethos, for example, private schools established on the basis of a specific religion.

According to Section 6(2), if it is of crucial significance that a person has a particular race, political opinion, sexual orientation or national, social or ethnic origin, has a particular skin colour, age or disability or belongs to a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the work in question, the minister concerned can, after having obtained a statement from the Ministry of Labour, deviate from the prohibition against differential treatment.

This seems to comply with the Directives in question.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

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?

As stated above, Section 6(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. contains an exception to the prohibition against differential treatment. According to this Section, 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 an occupational requirement). The same applies to organisations with a specific ethos, for example private schools established on the basis of a specific religion. The provision explicitly states that the requirement has to be of crucial *significance or importance*. There hence has to be a case by case assessment, and organisations with a religious ethos are as a point of departure bound by the Act.

Case law

A young person was in February 2004 dismissed from his cleaning job in a Christian humanitarian organisation Dan Church Social [*Kirkens Korshær*].



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 organisation's rules, all staff members had to be members of the National Church.

When the case went to court, the Dan Church Social argued that according to Section 6 (1) of the Act on the Prohibition of Discrimination in the Labour Market etc. 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 the Employment Equality Directive no longer permitted such a requirement for a cleaning position. Denmark, however, did not transpose the Employment Equality Directive 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 Employment Equality Directive 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 EUR 8000 in compensation on the basis of a violation of the Act on the Prohibition of Discrimination in the Labour Market etc., ILO Convention 111 and the Employment Equality Directive.

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 as expressed by their lawyer, it agreed to pay compensation of EUR 8000 without further discussion. The City Court consequently awarded the claimant this amount.³⁷

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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)

According to an act of 1978 regarding deviation from equal treatment of men and women in regard to occupation etc. when it comes to occupation as a clergyman, such positions in the Danish National Evangelical Lutheran Church and other similar positions within religious communities are excepted from the scope of the law (the Act on Equal Treatment between Men and Women).³⁸

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

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)?

According to Section 1(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., the Ministry of Defence can make exceptions for the armed forces in relation to age and disability.

³⁷ City Court of Copenhagen 1 September 2005 (unpublished) [Københavns Byret]

³⁸ Bekendtgørelse af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v. LBK nr 734 af 28/06/2006.



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

According to Section 5(a) (3) of the Act on the Prohibition of Discrimination in the Labour Market etc., the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, presuming that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary. This exception applies to the police, prisons and emergency services.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

There are no cases regarding whether religious institutions can select people on the basis of their religion. According to Section 6(1) of the Act on the Prohibition of Discrimination in the Labour Market etc., such a selection is, however, legal. Selection requirements must be in accordance with the principle of proportionality.

4.4 Nationality discrimination (Art. 3(2))

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

- a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well)?

The Act on the Prohibition of Discrimination in the Labour Market etc. does not cover all types of discrimination based on nationality. Discrimination based on citizenship is not covered by the Act. Demanding a certain citizenship can, depending on the circumstances, constitute indirect differential treatment based on ethnic origin.³⁹ Since specific citizenship is not covered by the Act, it must be assumed that the same goes for stateless persons.

In the public sector "Danish citizenship" is a selection criterion for the police, judges etc. This is established by law as these are functions related to the essence of Danish sovereignty. However, public employees in other sectors, such as teachers, are not required to be Danish citizens.

³⁹ Preparatory works to Act no. 459 of 12. June 1996 on Prohibition against Differential Treatment in the Labour Market.



In the private and public sector (but taking into consideration the limitations mentioned above) such requirements may be considered indirect unjustified discrimination due to national or ethnic origin.

The Danish Parliament passed a bill, Bill no. 329 of 14 May 1997, according to which only persons of Danish nationality and persons from EU member countries could obtain a licence as a taxicab owner. According to the Bill, a taxicab owner of foreign nationality would be denied a licence for another taxicab.

In a court case a taxicab owner disputed the validity of this new rule as being incompatible with Art. 14 of the European Human Rights Convention and Art. 26 of the UN Convention on Civil and Political Rights. While a high court upheld his contention, the Supreme Court came to the opposite decision,⁴⁰ arguing that the applicant did not have a legal claim for an additional, (besides the 6 he already possessed) license. The aim of the restriction was to have identical requirements for a license to public transportation which was considered an important part of the infrastructure of the country and the Supreme Court was of the opinion that the Parliament was better placed to assess whether this was the situation in this case. Finally the Supreme Court found Denmark did not violate CERD article 5 and ICCPR article 26 by making differential treatment between people with Danish nationality and foreigners.

This decision was criticised by some legal experts. The Bill was changed in 1999 so that Danish nationality is now no longer a condition of obtaining a licence as a taxicab owner.

It is hence possible to set citizenship requirements but only by passing a law and only as long as they are considered proportionate and have a legitimate aim.

In its concluding observations, the UN ICERD Committee on Denmark of 2006 welcomed the municipalities' obligation to offer teaching in their mother tongue to bilingual students coming or originating from the European Union and European Economic Area as well as from the Faroe Islands and Greenland, but regretted that in 2002 the municipalities' obligation to do so for bilingual students from other countries was repealed and that municipalities no longer received financial support for such purposes. The Committee recommended that the State party reviewed its policy, taking into consideration its obligation under the Convention not to discriminate against persons on the basis of their national or ethnic origin or against any particular nationality. The Committee recalled that differential treatment based on nationality and national or ethnic origin constituted discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.⁴¹

Generally, concerns have been raised in surveys and by international monitoring mechanisms with regard to the Nationality Act [Lov om Statsborgerskab], the Integration Act [Integrationsloven] and the Aliens Act [Udlændingeloven] and whether the restrictions introduced during the last few years have had a disproportionate impact on the ability of members of minority groups to acquire Danish citizenship, to benefit from spousal and family reunification and to have access to social protection.

⁴⁰ Danish Law weekly 2002 page 1789 Supreme Court (UfR. 2002. 1789.H).

⁴¹ CERD/C/DEN/CO/17 August 2006.



b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

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

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

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 (e.g. Case C-267/06 Maruko) 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. A registered partnership has the same legal effect as a marriage with a few exceptions, cf. Section 3 of the Act on Registered Partnerships.⁴² It would therefore be unlawful for an employer to treat a married employee more favourably than an employee in a registered partnership.

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

No case law is known. It seems that such a practice would be a violation of the Act on the Prohibition of Discrimination in the Labour Market etc.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

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.)?

Public authorities are governed by the principle of equality applicable under general administrative law, which means that equal matters must be treated in full equality before the law.

⁴² Act no. 938 of 10 October 2005 on Registered Partnerships (*om registreret partnerskab*)

The only known exception is found in Section 81(5) of the Road Traffic Act [Færdselsloven]⁴³ and § 2 of Government Circular Bkg 1998 518, which states that male Sikhs are exempted from wearing a crash helmet when riding a motorbike, since they are obliged to wear the turban outside at all times. There are no known exceptions concerning other grounds.

Judgment by the Eastern High Court of 24 October 2006 (U.2007.316Ø)

A Sikh carried a kirpan knife as a religious symbol in a public space. The Court found that there was no exception in the Act on Small Arms [Våbenloven]⁴⁴ in relation to religious symbols. The Court therefore held the kirpan to be a knife and consequently there had been a violation of the Act. The kirpan was confiscated, but a fine was annulled because the Court considered the reason for wearing the kirpan as mitigating circumstances. The Court did not find the sanction to be a violation of Article 9 of the ECHR. The Danish courts made no reference to any ECtHR decisions or judgments.

The issue of reasonable accommodation was not as such argued in the case. This example shows that there are no religious exceptions in relation to the Act on Small Arms.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

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, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Subsection 3 and 4 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. allow for direct discrimination due to age. It is stated in Subsection 3 that the existing collective agreements setting age requirements for certain professions can be maintained only if such an age requirement is objectively and reasonably justified by a legitimate aim within the scope of national legislation and that the means of achieving that aim are appropriate and necessary.

Subsection 4 further states that collective agreements that prescribe the termination of employment at the age of 70 years can be maintained. However, Subsection 4 does not mention that such provisions in collective agreements must meet the proportionality test, as is the case in Subsection 3. In other words, direct discrimination due to age before the age of 70 (in existing collective agreements) can be maintained if the proportionality test is met. From the age of 70, direct discrimination does not need to meet the proportionality test, if it is part of a collective agreement.

On 17 April 2009 the Eastern High Court awarded compensation of DKK 50 000 (approximately EUR 6 500) each to three 64-year-old head cabin attendants.

⁴³ Consolidated Act 2005-11-14 no. 1079 Færdselsloven.

⁴⁴ Lovbekendtgørelse 2009-06-22 No.. 704 om våben og eksplosivstoffer



The Court found that the employees had been victims of direct discrimination because of age as their employer Scandinavian Airlines (SAS), had not paid pension contributions for them for approximately three years, after they had turned 60 years. This was in violation of Subsection 2 of Section 1 and Section 2 of the Civil Act on the Prohibition of Discrimination in the Labour Market etc. The case was a test case since several other employees in SAS are in the same situation.

Furthermore, Subsection 3 of Section 9 of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regards to senior workers to promote the employment of elderly people.

Subsection 4 of Section 9 of the Act on the Prohibition of Discrimination in the Labour Market etc. also allows for age requirements imposed by other legislation, if such requirements are established 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?

See above in this section, under answer 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) ?

According to Section 6(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., age requirements can be set for admission to occupational pension schemes – such requirements must, 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.

As mentioned above, Subsection 3 of Section 9 of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regards to senior workers with a view to promoting the employment of elderly people.

According to Subsection 4 of Section 16 of Act no.734 of 28 June 2006 on the Equal Treatment of Men and Women regarding Occupation etc., the burden of proof is reversed when a person is dismissed during pregnancy or maternity leave. In these situations the employer must prove that the dismissal was not motivated by these reasons.

According to Subsection 5 of Section 16, a person dismissed during pregnancy or maternity leave has the right to receive a written and thorough explanation of the reasons for the dismissal.



There are no special conditions set by law for younger workers.

According to Section 41 of Act no. 979 of 1 October 2008 on Social Services [*Lovbekendtgørelse om social service*], the *kommunalbestyrelsen* [the municipal council] is under an obligation to contribute to the reimbursement of additional costs necessary for the homecare of children under the age of 18 with a permanently reduced functional capacity. It is a requirement that the extra costs are caused by the reduced capacity.

According to Section 42 of the Act on Social Services, municipal councils must reimburse a portion of the earnings lost by persons who support an underage child at home with a permanently reduced functional capacity. It is a requirement that it is necessary to take care of the child at home because of the reduced functional capacity and that it is most suitable that the child is cared for by the mother or the father.

According to Section 43 of the Act, municipal councils must provide an additional payment for up to 3 months to unemployed persons who receive a reimbursement under Section 42.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

It is not prohibited to have provisions in collective agreements regarding special rules on payment etc. for young people under the age of 18, cf. Subsection 5 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

According to Subsection 6 of Section 5(a), the prohibition against differential treatment due to age does not apply in regard to employment, conditions of pay and dismissal for young people under the age of 15, since their employment is not regulated by a collective agreement.

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).

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

- 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 retirement pension is an age-determined pension payable to persons of 65 years and over.⁴⁵

⁴⁵ See the Act on Social Pensions, Lov nr. 484 of 29. May 2007 [Lov om Sociale Pensioner].



The pension remains payable even if the pensioner works. The pension will, however, be reduced on the basis of the recipient's income.

If a person is entitled to a retirement pension, he or she can postpone the payment of the pension to a time after he or she has turned 65 if he or she chooses to postpone retirement.

Persons who are age 60 or more and who do not qualify for social pensions under the eligibility rules are offered a special rate of social assistance corresponding to the amount payable to a married old-age pensioner (Section 27 of the Act on Active Social Policy [Lov om Aktiv Socialpolitik]).⁴⁶

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?

Occupational pension schemes and other employer-funded pension arrangements are not regulated by law, but are either a part of collective agreements or individual arrangements. There are different age limits in the different agreements/arrangements.

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. Furthermore, there is an age limit for public servants according to which they are dismissed from the end of the month where they turn 70.⁴⁷ However, there is a proposal to abolish the 70-year rule.⁴⁸

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?

National legislation provides for a retirement age of 70 years. According to Subsection 4 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., the provision regarding differential treatment due to age does not apply to provisions regarding age limits laid down in or agreed upon in collective agreements when the employee has reached the age of 70.

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)?

⁴⁶ See also Act on Public Servants, (Tjenestemandsløven, Lov nr. 597 of 24. Juni 2003). See bill L 175, act amending the Act on public servants etc., Forslag til lov om ændring af lov om tjenestemænd og forskellige andre love (ophævelse af den generelle pligtige afgangsalder på 70 år m.v.)

⁴⁷ See Act on Public Servants, (Tjenestemandsløven, Lov nr. 597 of 24. Juni 2003).

⁴⁸ See bill L 175, act amending the Act on public servants etc., Forslag til lov om ændring af lov om tjenestemænd og forskellige andre love (ophævelse af den generelle pligtige afgangsalder på 70 år m.v.)



This area is covered both by legislation and by collective agreements. For instance, a worker's rights are not lost because he or she is still employed late in life as long as the person is covered by the Salaried Employees Act [*Lov om retsforholdet mellem arbejdsgivere og funktionærer*]. A person not covered by this act will often be covered by a collective agreement. It does not make a difference whether the person is a man or woman.

4.7.5 Redundancy

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

According to the Act on the Prohibition of Discrimination in the Labour Market etc., it is forbidden to take age into consideration in selecting workers for redundancy. There are, however, exceptions in section(a) of the Act. See Section 4.7.1. of this report for exceptions. In practice, seniority has been accepted as one among other considerations when going through budget-related dismissal procedures.⁴⁹ It must, however, not be a cover for dismissing someone because of their age.

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

If the redundancy is judged illegal, workers can be awarded compensation according to national law. The Dismissal Board [*Afskedigelsesnævnet*] has developed a 25-year rule in its case law, meaning that an employer has an obligation, if possible, to refrain from dismissing a person who has been employed for 25 years or longer. If an employee with seniority of 25 years or more is dismissed, the burden of proof shifts to the employer, who has to prove that there were strong reasons for dismissing this particular person. There is, however, to our knowledge no case law indicating that the age of the worker has an influence on the size of the compensation awarded.

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)

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

No provision directly implements Article 2(5) of the Directive. However, special requirements regarding age, for example, do exist.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

No other exceptions are found in Danish legislation.

⁴⁹ See Judgment U.1995.177.H



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

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

There is no general provision for special or positive measures in Danish law embracing all discrimination grounds.

An exception is subsection 2 of section 9 of the Act on the Prohibition of Discrimination 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, rules other than legislation and other public measures.

This right to take special measures does not apply to private employers who want 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 improving employment opportunities for persons of a different ethnic origin is made possible only by legislation or other public measures. According to Section 9 of the Act, such special measures thus require legal authority and are primarily to be taken by the minister through public projects.

Hence, Section 9 of the Act is primarily directed at the public sector and projects improving the qualifications and integration of ethnic minorities. A private employer needs a specific legislative foundation to carry out such measures.

However, according to Subsection 3 of Section 9, it is possible to allow private employers to take positive measures in relation to age and disability.

Race and ethnic origin

In the guidelines to the Act on the Prohibition of Discrimination in the Labour Market etc., lawful public positive measures encompass projects initiated by the different ministries as part of national integration schemes, including projects with the aim of improving the qualifications of persons with an ethnic minority background.

The guidelines underline that only public programmes with the aim of improving access to employment are possible, and not private or public employment initiatives preferring specific groups of persons, e.g. persons with an ethnic minority background.

Article 5 of the Racial Equality Directive has been transposed into Section 4 of the Act on Ethnic Equal Treatment, which states that the Act does not prevent the maintenance or adoption of specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. The preparatory works to the Act state that there has to be an *actual* disadvantage linked to racial or ethnic origin in order for specific measures to be initiated. It is also stated that it is possible for public authorities and private organisations and entities to initiate specific measures. The Act only covers equal treatment outside the labour market.



Age and disability

A prohibition against differential treatment on grounds of age and disability was inserted into the Act on the Prohibition of Discrimination in the Labour Market etc. in 2005. If the persons have the same qualifications, according to Section 9 (3) of the Act it is possible for an employer to prefer the one with the disadvantage.

This means that if two applicants are equally qualified, a private employer may choose the disabled person instead of the non-disabled person. The rationale is that disabled persons are under-represented in the Danish labour market. The definition of the term “disability” in Danish law is explored in Section 2.1.1. of this report.

Furthermore, Subsection 2 of Section 9 also applies in relation to disability and age, allowing for a number of legislative or public measures that promote the employment opportunities of the elderly and disabled.

No public positive measures were initiated in 2007 with this aim.

Act No. 55 of 29 January 2001 on Compensation for Persons with Disabilities in the Labour Market promotes the integration of disabled persons into the job market. This act focuses on how compensation for impairments in the labour market is best provided, and was supplemented by an additional act, no. 577 of 19 June 2003. This act sets out general rules on how to promote and enhance employment for persons with (special) difficulties in finding a job and includes some measures aiming at creating improved job opportunities for persons with disabilities. The two Acts are not alternatives, but supplement each other.

The general aim of these acts is to enhance the integration of persons with disabilities into the labour force by means of affirmative action and various other compensatory measures. There is at present no clear legal distinction between social security measures and positive actions in relation to disability and age in 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 Employment.

Religion or faith

There are no provisions in Danish law allowing for positive measures on grounds of religion or faith.

Sexual orientation

There are no provisions in Danish law allowing for positive measures on grounds of sexual orientation.

- b) *Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*



As mentioned above, provisions in Danish anti-discrimination legislation make it possible to take certain positive action measures both inside and outside the labour market, although there are different criteria for initiating such measures.

It should be mentioned that initiatives in this respect are mostly broad social policy measures in the labour market. Quotas and preferential treatment are not lawful, unless the person preferred with, for example, an ethnic minority background has the same professional qualifications as the person not preferred. Examples of positive measures existing in Denmark are as follows:

Race and ethnicity

An example of a public positive measure initiated for the labour market in accordance with section 9 (2) of the Act on the Prohibition of Discrimination in the Labour Market etc. is the establishment of five knowledge centres to help people with an ethnic minority background to clarify their competencies and their possible use in the labour market. Other examples are mentorship and trainee programmes etc.

There are no specific measures aimed at the Roma.

As an example of a specific measure taken on the basis of section 4 of the Act on Ethnic Equal Treatment, a one-year preparatory course offered to people with a migrant background at state teacher training colleges should be mentioned. The Danish School of Journalism also offers a preparatory course where students are equipped with tools to overcome possible cultural and linguistic barriers they might encounter at the school. Such courses illustrate willingness to adopt positive measures as part of the struggle against discrimination.

Other examples are recruitment campaigns for nursing colleges and the Police Academy which specifically target ethnic minorities.

Religion or faith

There are no provisions that permit positive measures on grounds of religion or faith. However, in the areas of employment and education, rooms have sometimes been set aside to allow Muslim employees and students the opportunity to pray. In addition, some municipalities reserve swimming pools for women at certain times in order to Muslim women with the chance to swim without meeting men.



6. REMEDIES AND ENFORCEMENT

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

In relation to each, of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.

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

City courts, the high courts, the Maritime and Commercial Court and the Supreme Court hear cases which involve provisions of the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc., which transpose the Racial Equality Directive and the Employment Equality Directive.

It is important to note that the Labour Court and labour arbitration bodies only interpret collective agreements and cases concerning violations of collective agreements. They do not deal with, for example, cases concerning violations of the criminal legislation on discrimination or the civil legislation on discrimination.⁵⁰ However, subsection 6 of section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not apply if equal protection is provided by a collective agreement. Trade unions engage in judicial procedures before the Labour Court on behalf of their members in cases concerning the violation of a prohibition against discrimination in a collective agreement. It is also the trade unions that decide whether or not they wish to bring a case. If an individual covered by a collective agreement wishes to initiate a case concerning the violation of collective agreements, the case must be tried at the ordinary courts and the individual must provide proof that his trade union has no intention of pursuing the matter before the Labour Court.⁵¹

The newly established Equal Treatment Board [*Ligebehandlingsnævn*] started functioning on 1 January 2009. The Board has a mandate to hear individual cases on all discrimination grounds in the labour market and in sectors outside the labour market equivalent to those covered by the Racial Equality Directive. The Equal Treatment Board issues binding decisions and can order compensation to be paid. As a consequence of the establishment of the Board, the Complaints Committee for Ethnic Equal Treatment (and the Gender Equality Board) has been closed down.⁵²

⁵⁰ See Act no. 106 of 26 February 2008 on the Labour Court and Labour Arbitration [*Lov om Arbejdsretten og faglige voldgiftsretter*]

⁵¹ See Act no. 106 of 26 February 2008 on the Labour Court and Labour Arbitration [*Lov om Arbejdsretten og faglige voldgiftsretter*]

⁵² See Act no. 387 of 27 May 2008 on the Equal Treatment Board [*Lov om Arbejdsretten og faglige voldgiftsretter*]



The Equal Treatment Board cannot require the parties to produce documents, give their opinion, or reveal the factual circumstances of a case. The Board secretariat can, however, request that the parties contribute to the elucidation of the case. If a party does not comply with this request within the stated time period, a new deadline will be set. If the party still does not respond, the Board can choose to decide the case based on the existing evidence, cf. Section 5 of the Act on the Equal Treatment Board [*Lov om Ligebehandlingsnævnet*]. The Board can also procure expert evidence for use in specific cases, cf. Section 7 of the Act. The newly established Equal Treatment Board is not the specialised equality body – the Danish Institute for Human Rights has maintained this status, even though the mandate for handling administrative complaints on discrimination was transferred to the Equal Treatment Board as of January 2009.

b) *Are these binding or non-binding?*

The above-mentioned procedures are legally binding.

According to Subsection 2 of Section 12 of the Act on the Equal Treatment Board, the Board must bring a case to court if a decision or settlement that it makes is not followed. The Board started functioning on 1 January 2009, and so far there are no known examples of cases being brought before the courts by the Equal Treatment Board.

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

A person can file a complaint even after the employment relationship has ended. There is hence no deadline for filing a complaint, but practical difficulties can arise in relation to collecting evidence.

No official statistics on cases concerning discrimination brought before the Danish courts exist. Statistics on cases brought to the city courts and Maritime and Commercial Court are not available as they are not registered or published in the Weekly Law Gazette [*Ugeskrift for Retsvæsen*].

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

Please list the ways in which associations may engage in judicial or other procedures

a) *in support of a complainant*

NGOs do not have legal standing before domestic courts of law in relation to alleged human right violations and cases of discrimination. The NGOs need a victim in order to pursue a case.

The Administration of Justice Act allows for persons or associations to support a complainant or intervene in a lawsuit if they have a *legal* interest in becoming a party to the case.⁵³

⁵³ Section 252.



It may be questioned whether the requirement of a legal interest fulfils Article 9 (2) of the Employment Equality Directive, which uses the term *legitimate* interest. However, it can be assumed that the courts would allow NGOs to intervene as third parties

b) on behalf of one or more complaints (please indicate if class actions are possible)

As we said above, the Administration of Justice Act allows for persons or associations to represent a complainant if they have a *legal* interest in becoming a party to the case.⁵⁴ Section 124 of the Act furthermore allows associations, interest groups etc. to represent their members in legal proceedings in cases within the scope of the organisation's field of interest.

Class actions are possible. Multiple cases may be submitted and heard as part of the same court application⁵⁵ and organisations, associations and other legal persons may appear in court as group representatives.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The Act on Ethnic Equal Treatment (2003) and the amended Act on the Prohibition of Discrimination in the Labour Market (2004) introduced the principle of dividing the burden of proof.⁵⁶ This means that a person who feels that he or she has been discriminated against has to show evidence of possible discrimination, whereas the employer, shop owner, landlord etc. has to prove that no discrimination has taken place. This divided (and not totally shifted) burden of proof is in line with the (Danish version) of recital number 31 and Article 10 of the Employment Equality Directive.

The Danish courts have to a larger extent to apply the a shared burden of proof in cases of racial and ethnic discrimination, as well as discrimination due to religion and belief, age, disability and sexual orientation. The shared burden of proof is to be applied in cases of direct and indirect discrimination, harassment and instruction, but not in cases regarding victimisation. Still relevant case law is limited so this particular field and the courts application of the shared burden of proof needs to be monitored closely in the nearest future.

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 help the victim of discrimination to present a complaint)

⁵⁴ Section 252.

⁵⁵ Act on the Administration of Justice, chapter 23 a.

⁵⁶ The Act on Ethnic Equal Treatment Section 7 and the Act on the Prohibition of Discrimination in the Labour Market Section 7 a.



National law prohibits subjecting a person to any adverse treatment or adverse consequence as a reaction to a complaint or to any type of proceedings aimed at enforcing compliance with the principle of equal treatment.

Subsection 2 of Section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. states that:

“a person who has met with adverse treatment or unfavourable consequences because he or she has asked for equal treatment, as described in Sections 2 to 4, can be granted compensation.”

Where protection applies, the commentary to the 2004 Bill reads:

“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.”

The protection applies to a person who files a complaint regarding differential treatment of her/himself and to a person who files a complaint of differential treatment of another person.

It is a prior condition that a causal link can be established between the victimisation and the employee's request for equal treatment. Adverse treatment is not considered as a violation of the prohibition against discrimination in the Directives.⁵⁷ The burden of proof is therefore not reversed in this instance.

According to Subsection 4 of Section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc., victimisation on all the protected grounds is prohibited, and according to Subsection 2 of Section 7 a person who meets with negative treatment or unfavourable consequences because he or she has asked for equal treatment as described in Sections 2, 3 and 4 of the same Act can be granted compensation by the court.

Section 8 of the Act on Ethnic Equal Treatment also contains a prohibition of adverse treatment as a reaction to a complaint concerning discrimination because of race or ethnic origin.

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.*

Discrimination in the labour market may result in pecuniary compensation and discriminatory advertisements may result in a fine.

⁵⁷ Cf. the preparatory works to Act no. 253 of 7 April 2004 amending the Act on Prohibition against Differential Treatment in the Labour Market



So far there have been only six or seven court cases dealing with the Act on the Prohibition of Discrimination in the Labour Market etc. One person has been granted compensation and one fine has been issued.⁵⁸

Persons who have been discriminated against in the labour market may now be awarded compensation pursuant to Section 7 of the Act on the Prohibition of Discrimination 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.

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

There is no ceiling on the maximum amount of 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?*

Case law from recent years gives the example of compensation of DKK 10 000 awarded to a Muslim girl who was rejected as a trainee by a department store due to her headscarf.⁵⁹

However, in a case heard by appeal by the Western High Court in February 2008 on discrimination on the ground of sexual orientation where an employee became ill due to harassment based on homosexuality, the Court awarded the applicant DKK 100 000 (approximately EUR 13 500) in compensation.⁶⁰

⁵⁸1) BS 3-1211/97: unpublished decision of the City Court of Lyngby of 22 December 1998. The decision was upheld by the Eastern High Court in an unwritten decision of 27 September 1999.

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

3) B-2732-97: unpublished decision of the Eastern High Court of 21 October 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 of the City Court of Copenhagen of 14 April 1999.

5) Ugeskrift for Retsvæsen 2000, s. 2350. Danish Law Weekly 2000, p. 2350.

6) Unpublished decision of the Eastern High Court of April 5, 2001.

⁵⁹ Eastern High Court judgment of 10 August 2000, (U.2000.2350Ø)

⁶⁰ See the case details in section 0.3 above.



7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

The Danish Institute for Human Rights (DIHR) was established by Act no. 411 on the Establishment of the Danish Centre for International Studies and Human Rights [Lov om etablering af Dansk Center for Internationale Studier og Menneskerettigheder, Lov nr. 411 af 6. juni 2002]. It is designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive. The DIHR takes a horizontal approach to discrimination and has a broad human rights mandate. The DIHR therefore also publishes reports on other grounds of discrimination e.g. disability and sexual orientation.

In accordance with the requirements of Article 13 of the Directive, the Institute has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination.

The Complaints Committee for Ethnic Equal Treatment was closed on 1 January 2009 as a result of the establishment of the new Equal Treatment Board. The Equal Treatment Board consists of a president, two vice-presidents and nine additional members.

When handling a complaint, the president or a vice-president participates together with two additional members. In complaints concerning matters of principle, the president can decide that four additional members participate instead of two.

The president and the vice-presidents must be judges and are appointed by the President of the Court.⁶¹ Both genders must be represented in the presidency. The additional members must hold a degree in law and possess knowledge of Danish anti-discrimination legislation. The Minister for Refugee, Immigration and Integration Affairs [Ministeren for flygtninge, indvandrere og integration] and the Minister for Gender Equality [Ministeren for Ligestilling] each nominate three of the additional members, and the Minister of Employment [Beskæftigelsesministeren] appoints the additional members.

In 2008 the Complaints Committee for Ethnic Equal Treatment received 23 concrete complaints and conducted one investigation on its own initiative without a complaint being filed.

⁶¹ According to the Act on Administration of Justice [Lov om rettens Pleje] section 47 a (3) it should be the relevant President of the Court.



The concrete cases were distributed between the following areas:

Social benefits:	3
Health:	2
Education:	1
Goods and services:	5
Other:	4
Labour market – dismissal:	4
Labour market – employment:	1
Labour market – salary and working conditions:	3

The case taken up on the Committee's own accord was outside the labour market – it concerned segregation at a Danish state school.

- 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.*

The DIHR assists victims of discrimination by examining individual complaints and expressing its opinion as to whether the prohibitions of discrimination and victimisation have been violated under Act no. 374 on Ethnic Equal Treatment of 28 May 2003 and Consolidated Act no. 31 on the Prohibition of Discrimination in the Labour Market etc. of 12 January 2005. In June 2003 the DIHR set up a Complaints Committee for Ethnic Equal Treatment to examine such complaints, but this was disbanded on 1 January 2009.

The Institute has been allocated DKK 6 million (EUR 800 000) on a yearly basis to perform its duties as a specialised equality body. It is established by law as an independent institution. Its board members are appointed by various institutions, namely the University of Copenhagen, the University of Aarhus, the employees of the DIHR, the Danish Council for Human Rights [*Rådet for Menneskerettigheder*] and the Danish Conference of Rectors [*Rektorkollegiet*]. The Equal Treatment Board is not represented on the DIHR's board.

- 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 subsection 2 of section 2 of Act no. 411 on the Establishment of the Danish Centre for International Studies and Human Rights [Lov om etablering af Dansk Center for Internationale Studier og Menneskerettigheder, Lov nr. 411 af 6. juni 2002].:

“..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 of discrimination without prejudice to the right of victims and of associations, organisations 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 independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*



The DIHR provides general information to the public on human rights, courses, seminars and other promotional activities as well as surveys, reports and analyses on all grounds of discrimination, e.g.:

Reunification of spouses in Denmark: An analysis of the requirements set out in the Aliens Act and their compliance with the right to family life and prohibition of discrimination. Report no. 1, the Danish Institute for Human Rights 2004.

Equal treatment - the current status and future perspectives: An analysis of the need to amend Danish legislation. Report no. 2, the Danish Institute for Human Rights 2005.

Persons with disabilities in Denmark: An analysis of the need to amend Danish legislation as regards international obligations. Report no. 3, the Danish Institute for Human Rights 2005.

Effective protection against discrimination: An analysis of the protection and promotion of equal treatment and the proposed body for handling complaints on all discrimination grounds. Report no. 5, the Danish Institute for Human Rights 2007.

In 2008, the EU Fundamental Rights Agency (FRA) published a report entitled *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - the Social Situation*. The data and information contained in the report were provided by COWI (a large Danish consultancy firm) and the DIHR. The responsibility for the conclusions and opinions lies with the FRA.⁶²

The Danish national expert in FRAlex (the Fundamental Rights Agency group of Legal Experts) is employed by the DIHR⁶³. She submitted the national report on Denmark, hence providing input to the report *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (30/06/2008).⁶⁴

The DIHR published a book entitled *Rejsen til landet med lige muligheder* – a travel guide to the Land of Equal Opportunities.⁶⁵

In relation to the 2007 European Year of Equal Opportunities for All, the Equal Treatment Department of the Ministry of the Interior and Social Affairs [Ligestillingsafdelingen] and the DIHR launched a joint information campaign entitled *Diskrimination gør ondt*⁶⁶ [Discrimination Hurts].

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

⁶² The reports are available at:

http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_0608_en.htm (15-06-09)

⁶³ Birgitte Kofod Olsen, Vice-director of the DIHR, national expert until 1.08.2009.

⁶⁴ The reports are available at:

http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_0608_en.htm (15-06-09)

⁶⁵ Can be ordered at: <http://www.saxo.com/dk/item/rejsen-til-landet-med-lige-muligheder-haefdet.aspx> (15-06-09)

⁶⁶ More information, video clips and DVDs available at: <http://www.discrimination-hurts.com/> (15-06-09)



The DIHR has no explicit legal standing, but in principle it may intervene in a case heard by the courts if a legal interest in the matter at issue can be proven. The Equal Treatment Board hears cases concerning discrimination. If a decision by the Board is not respected, the Board must bring the case before the courts at the request of the complainant pursuant to Section 12 of the Act on the Equal Treatment Board.

- f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

The DIHR no longer makes decisions in cases of differential treatment.

- g) *Is the work undertaken independently?*

The DIHR is independent and under no instructions from public authorities or the Government.

- h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

No. Initiatives have been taken (visiting Roma and explaining the complaints procedure), but it has not been possible to actively include Roma organisations as partners or participants. Reports have been made in which Roma issues have been addressed (for example the annual status report on the human rights situation in Denmark and reports on Roma issues to international monitoring committees).



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)*

As part of the information campaign conducted under the European Year of Equal Opportunities for All, the Ministry of Welfare [Velfærdsministeriet] undertook a number of initiatives, including:

- Publication of books and informational material;
- Publication of education material;
- Organisation of theatrical performances;
- Publication of a website.

The DIHR serves as a specialised equality body as required by the Racial Equality Directive and a body handling complaints under the Employment Equality Directive on issues of race and ethnicity only (the DIHR's mandate was expanded in 15 April 2004 to also partly cover the Employment Equality Directive).

The DIHR disseminates information about discrimination and equal treatment via:

- Books, reports, articles and notes on discrimination and equal treatment;
- Pamphlets, brochures and guidelines;
- Tools for assessing the compliance of recruitment, promotion and dismissal practices in companies and tools for diversity management;
- Information campaigns (posters, postcards etc.);
- TV clips on discrimination and diversity broadcast by Danish television and disseminated via websites, including www.youtube.com, www.facebook.com and www.myspace.com;
- Poster competition for children and young people;
- The diversity award (the MIA Prize), to companies serving as models of good practice in diversity management;
- DIHR websites: www.menneskeret.dk www.mangfoldighed.dk www.humanrights.dk;
- Educational programmes at the Police Academy;
- Public seminars;
- Seminars, workshops and lectures for trade unions, the legal sector, primary and secondary schools, civil society, and public and municipal authorities;
- Platforms for dialogue and debate among stakeholders in the field of anti-discrimination.

- 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*



The Danish steering committee for the “2007 – Equal Opportunities for All” campaign was established by the Ministry of Welfare and comprised members of public authorities, the DIHR and NGOs.

After the implementation of the EU Directives on equal treatment and the framework directive into Danish national law, the DIHR recognised the need to develop a national strategy to combat discrimination in all areas inside and outside the labour market. As a consequence, the DIHR started to develop a national strategy to combat discrimination together with 22 NGOs represented on the DIHR Board (the institute’s governing body) that covered the areas of race and ethnicity, gender, disability, age, sexual orientation, religion and belief.

A platform for NGOs was therefore created that served and continues to serve as a forum for sharing knowledge, experience and good practice with each other, thus building capacity and competences as well as developing a common strategy.

As a result of this process, in 2007 the DIHR hosted a conference, the outcome of which was a consensus declaration signed by all the NGOs represented and subsequently presented at a hearing at the Danish Parliament where members of parliamentary political parties were present.

- 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)*

The DIHR has been active in encouraging labour market partners (i.e. employers and employee’s organisations) and employers to implement the principles of equal treatment in their personnel and business practices. The DIHR annually holds special seminars and conferences on diversity management for trade union representatives and employees.

In cooperation with employers, the DIHR has developed a tool for implementing equal treatment and non-discrimination principles in the workplace.

- d) *to specifically address Roma and Travellers*

No initiatives addressing the Roma population in Denmark were taken in 2008.

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).*

The rules of *lex specialis* and *lex posterior* apply as part of Danish law.



Moreover, it is a general principle of Danish law that a person cannot sign away or agree to be placed in a less favourable position than that prescribed by law. A person cannot therefore waive his or her right not to be subjected to differential treatment through a contract or agreement with his/her employer.

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

No.

The official state pension age is 65 years for men and woman. There is no general state-imposed retirement age, but retirement ages are set by collective agreements for certain professions.

Subsection 3 and 4 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. allow direct discrimination on grounds of age. It is stated in Subsection 3 that the existing collective agreements setting age requirements for certain professions can be maintained only if such an age requirement is objectively and reasonably justified by a legitimate aim within the scope of national legislation and that the means of achieving that aim are appropriate and necessary.

Furthermore, it is not prohibited to make either individual or collective arrangements that state that employment stops when the employee turns 70 years old, cf. Section 5(a) (4) of the Act.

So far, no complaints regarding forced retirement are known.



9. 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?

The Ministry of Welfare, the Ministry of Employment, and the Ministry of Integration conduct a variety of activities with the purpose of protecting and promoting equal treatment and non-discrimination. Hence, the Ministry of Welfare coordinated Danish activities during the 2007 European Year of Equal Opportunities for All. The Ministry of Welfare has, for instance, also published materials for schools on equal opportunities. The material seeks to promote debate concerning rights, tolerance, and equal opportunities for all irrespective of age, sex, disabilities, ethnic origin, sexual orientation, religion or belief. The Ministry has also published an information folder on equality in Denmark. The folder contains information on marriage, sexual rights of women, divorce and parental custody and it is addressed primarily to women with ethnic backgrounds other than Danish.

The Ministry of Integration - and to some extent also the Ministry of Employment – launches action plans, programmes, reports and information for the purpose of combating discrimination. For instance, the Ministry of Integration published the Danish Government's action plan to promote equal treatment and diversity and to fight racism. According to the 2007 Government Platform "Society of Opportunities" [Mulighedernes samfund], the action plan is to be updated, and a new and revised plan is to be released by the end of 2009.

The specialised equality body designated in accordance with the Racial Equality Directive is the Danish Institute for Human Rights, which seeks to coordinate Danish NGOs working with discrimination and equal treatment, see above.

In order to provide citizens with an effective remedy against differential treatment, section 10 (2) of the Act on Ethnic Equal Treatment authorises the the new Ethnic Equal Treatment Boardn [Ligebehandlingsnævnet] to handle complaints concerning discrimination on the grounds of sex, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

The Danish Institute for Human Rights [Institut for Menneskerettigheder] is in section 10 (1) given the mandate to assist victims of discrimination based on race and ethnicity..



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: 29 April 2009

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 the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate and creation of a specialised body
Consolidated Act no. 626 of 29 September 1987 on the Prohibition of Discrimination due to Race etc. https://www.retsinformation.dk/Forms/R0710.aspx?id=59249	09/1987	race, colour, national or ethnic origin, religion and sexual orientation	Criminal law	Occupational or non-profit activities	Prohibition of discrimination
Act no. 374 of 28 May 2003 on Ethnic Equal Treatment. https://www.retsinformation.dk/Forms/R0710.aspx?id=28938	05/2003	Race, ethnic origin	Civil	Outside the labour market (e.g. health care; social advantages; education; supply of goods and services; housing, access to restaurants, etc.)	Prohibition of direct and indirect discrimination, instruction to discriminate, harassment, retaliation, mandate of a specialised body to handle complaints.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Act no. 1349 of 16 December 2009 on the Prohibition of Discrimination in the Labour Market. https://www.retsinformation.dk/Forms/R0710.aspx?id=122522	01/2005	race, colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin	Civil	in the labour market (e.g. employment, dismissal, transfer, and promotion, pay and working conditions, vocational out-of school education etc.)	Prohibition of direct and indirect discrimination, instruction to discriminate, harassment, retaliation, mandate of a specialised body to handle complaints.
The Danish Constitution of 5 June 1953 § 70 and § 71 https://www.retsinformation.dk/Forms/R0710.aspx?id=45902	06/1953	Political opinion, faith or descent	Constitutional	Civil and political rights Deprivation of personal liberty (Danish citizens only)	Prohibition of discrimination based on faith or descent in relation to enjoyment of civil and political rights. Prohibition of deprivation of personal liberty in relation to political or religious conviction (Danish citizens only)
Act no. 1095 of 19 September 2007 on Equality for Men and Women https://www.retsinformation.dk/Forms/R0710.aspx?id=20929	09/2007	Gender	Civil	in the labour market (public administration, private businesses, occupational or non-profit activities)	Prohibition of direct and indirect discrimination, harassment, creation of a specialised body



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Act no. 1068 of 6 November 2008 the Danish Criminal Code Sections 266 b and 81 (1) (6) https://www.retsinformation.dk/Forms/R0710.aspx?id=113401	10/2008	race, skin colour, national or ethnic origin, religion or sexual orientation	Criminal law		Prohibition of degrading or threatening remarks or statements. Racism as a motivation for a crime considered an aggravating circumstance
Act no. 411 of 6 June 2002 on the Establishment of the Danish Centre for International Studies and Human Rights https://www.retsinformation.dk/Forms/R0710.aspx?id=22966	01/2003	Race, ethnic origin	Civil	assisting victims	Promote equal treatment, creation of a specialised body
Act no. 387 of 27 May 2008 on the Equal Treatment Board. https://www.retsinformation.dk/Forms/R0710.aspx?id=117192	01/2009	Sex, race, skin colour, religion or faith, political opinion, sexual orientation, age, handicap or national, social or ethnic origin	Administrative	handling complaints	Establish administrative complaints mechanism for cases concerning direct or indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Denmark

Date: 29 April 2009

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	Yes
Protocol 12, ECHR	No	No	No	No	No
Revised European Social Charter	Yes	No	Yes	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
Framework Convention for the Protection of National Minorities	Yes	Yes	The Convention only covers Germans in Southern Jutland (part of Denmark), not for example Greenlanders, the Faroese and the Roma population	Yes	Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes	The Convention only covers the German language in Southern Jutland.	Yes	Yes

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?
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention no. 111 on Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Rights of the Child	Yes	Yes	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	Yes	No ⁶⁷	No	No	No

⁶⁷ The Convention is planned to be ratified in 2009