Appendix 1. General Project description

Blurring Boundaries: EU Law and the Danish Welfare State

1. Project Relevance

In Nordic societies the provision of welfare services through the welfare state has been a key element for a number of years and there has been considerable political consensus on the desirability of preserving the welfare state.[1] Liberalisation and privatisation which is generally promoted at the economic and social level through the development of the Internal Market in the EU may put pressure on welfare states and create tensions between the EU and Member States in matters of welfare.

The project examines the ongoing Europeanisation of welfare functions and its impact on Danish law. It throws light from a strictly legal perspective on the sustainability of the Danish welfare state in an EU context and on the integration of welfare functions into EU law. The specific legal aspects of the development of the specific Danish welfare state in interaction with EU law has not hitherto been the object of detailed study.[2] The project will therefore bring important new knowledge and understanding of the legal system and some of its basic characteristics.

2. Problem formulation

2.1. Research questions

The project aims to answer two main research questions:

- Does EU law put constraints upon Danish law on core welfare services, and if yes, how, to what extent and what is the trend in the development?

- Is EU law ensuring the provision of core welfare services, and if yes, how, to what extent and what is the trend in the development?

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[1] Christiansen, Niels Finn: The Nordic Model of Welfare, Copenhagen 2006.

[2] See for a multi-disciplinary study from various scientific perspectives (political science, law, sociology and public policy) of welfare states in general de Búrca, Grainne (ed): EU Law and the Welfare State. In search of solidarity, Oxford 2005.

We use the term welfare services in a broad sense as covering health related services, education, social services and services of general interest within the meaning of Article 86(2) EC. Social services include schemes which provide protection in case of motherhood and parenthood, sickness, invalidity, old age, unemployment and poverty in general. Services of general interest within the meaning of Article 86(2) EC are different from ordinary services because the public authorities view their provision as essential even though the market does not have sufficient motivation to secure their provision. Typical examples of such services exist within the sectors of public transportation, telecommunications, and energy. In the present legal system, the border line between the two above sub-categories of welfare services is not very clear-cut.[3]

We subdivide welfare services into market services and state services. Market services are services within the meaning of Article 50 EC, i.e. they are normally provided for remuneration. The same service, e.g. health care will in a welfare state often be provided by the state outside the market and not for remuneration, i.e. not as a market service but as a state service.

Traditionally, the following traits have been basic for the classic Danish welfare state: public-owned infrastructure; tax financed welfare services in the form of state services; high quality and high level state services and an interplay between state services and the labour market resulting in flexicurity, i.e. a high degree of flexibility in employment combined with a fairly high degree of income security and a guaranteed minimum living standard.

The EU is, according to Article 6 EU, founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (Rechtsstaatlichkeit in German, l'État de droit in French), principles which are common to the Member States.

In the 'Rechtsstaat' as it was developed at national level in the second half of the 19th century there was a sharp separation between the public sphere of constitutional rights and the private sphere of market relations, including private contractual relations.

The Danish welfare state from the 20th century extended the public sphere but was still built on a fairly sharp distinction between public and private.

As Community law stands at present there is an increasingly blurred line between state and market. On the one hand, there is a wave of liberalisation and privatisation which is changing the traditional way of organising welfare services. Where private operators provide welfare services,

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[3] Cf COM(2006)177, Implementing the Community Lisbon programme: Social services of general interest in the European Union.

Member States may decide to support the market to ensure that certain objectives of general interest are met. In so doing, they must respect Community law, in particular the Internal Market law on free movement. At the same time certain basic values and principles, e.g. non-discrimination, equality, social inclusion, and access to essential services are increasingly being pursued not only by the state but also in the market place, elevating fundamental rights, values and principles from being restrictions solely on state action to becoming general principles of law binding for both the state and private actors on the market.

The term 'blurring boundaries' in the project title refers both to the increasingly blurred line between the welfare state and the market for welfare services, between public and private law in regard to welfare services and to the blurring boundaries between EU law and national law on this subject. It can also refer to blurred boundaries of relevant concepts, e.g. discrimination, systematizations and law on the one side and morality and political views on the other, and between law as a normative phenomenon (institutional fact) and law as a social fact.[4]

The research questions (or aspects of them) will be studied in detail in subprojects. EU law impacts upon the Danish welfare state mainly through its free movement provisions[5] which prohibit discrimination on grounds of nationality and restrictions on the free movement, through its bans on discrimination on grounds of sex, race, religion, age, etc. and through Article 86(2) EC on services of general interest. There are subprojects on the following topics:

Internal Market (free movement) law and welfare services
Fundamental rights and non-discrimination law
Services of general interest within the meaning of Article 86(2) EC

In all these areas, the interaction of Danish law and EU law poses challenges and a trend towards more blurring boundaries is discernible. The project aims at clarifying this development.

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[4] See on the difference between law as a normative fact and as a social fact MacCormick, Neil: Norms, Institutions, and Institutional Facts, Law and Philosophy 1998 p 301.

[5] Article 18 EC (free movement of Union citizens), Article 28 EC (free movement of goods), Article 39 (free movement of workers), Article 43 EC (freedom of establishment) and Article 56 (free movement of capital).

2.2. Internal market (free movement) law and welfare services

Responsible researcher: professor, dr jur Ruth Nielsen

The subproject on Internal Market law (free movement) is related to both of the two research questions set out in section 2.1. It will focus on two aspects: 1) EU provisions on free movement of goods and services and freedom of establishment as constraints upon public and private actors in the Danish welfare state/market and 2) expansion of Danish welfare services to EU migrants as a matter of EU law in order to prevent obstacles to their free movement.

The project will identify elements in Danish welfare law which may be an unlawful discrimination[6] and/or restriction on free movement and discuss to what extent they may be justified and used to uphold basic traits of the Danish welfare state and will contribute to clarify the ban on nationality discrimination/restriction as a constraint upon private actors in the welfare market. It will also examine which elements of Danish welfare services migrant workers and European citizens are entitled to as a matter of EU law.

2.3. Fundamental rights and non-discrimination law

Responsible researcher: Associate professor, PhD Lynn Roseberry

The right to equal treatment regardless of certain specified characteristics (e.g. sex, race, ethnic origin) is a general principle of EU law and a fundamental right.[7] Accordingly, all Member States must respect the principle of non-discrimination when acting to enforce or implement Community rules.[8] Furthermore, when a Member State justifies national rules that hinder the exercise of free movement rights, it must not only show that the national rules fall within the Treaty exceptions (public policy, public security and public health) but also that the national rules are consistent with the principle of non-discrimination as well as other fundamental rights.[9]

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

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

[8] See id.

[9] See Case C-260/89 ERT.

Community law regulates the provision of national welfare services to EU citizens exercising their free movement rights. Regulation 1408/71 provides rules regarding which Member State's national statutory social security schemes apply to EU migrants, and Regulation 1612/68 provides rules regarding other social advantages for EU migrant workers and their families. Accordingly, Member States must respect the general principle of non-discrimination with regard to all national welfare services covered by these regulations.

EU law also specifically prohibits discrimination on grounds of race, ethnic origin, and sex as regards national welfare services in situations not involving any cross-border element and they apply to both the public and private actors. Directive 79/7 mandates equal treatment of men and women with regards to social security, Directive 2000/43 prohibits discrimination on grounds of race or ethnic origin in respect of, inter alia, social protection, including social security , healthcare, and education, and Directive 76/207, as amended by Directive 2002/73, on equal treatment of men and women, has been interpreted by the ECJ to prohibit sex discrimination in respect of a more limited range of welfare services, for example public employment centres' services for the unemployed and maternity leave.

This project relates primarily to the second research question and it will examine the extent to which EU non-discrimination law applies to Danish welfare services in the context of free movement as well as in purely internal situations, and identify those both public and private elements in Danish rules on welfare services, which may not conform to EU non-discrimination law.

2.4. Services of general interest within the meaning of Article 86(2) EC

Responsible researcher: Associate professor, PhD Ulla Neergaard

In the classic model of the Danish welfare state traditionally state-owned infra-structure has played an essential role. However, waves of liberalisation and privatisation are in these years changing the traditional way of setting up services of general interest. The pressure on the traditional set-up and provision of these services originate, among others, from EU-competition law including state aid, and the internal market law.

The sub-project is related to both of the research questions set out in Section 2.1. Focus is largely on analysing to which degree market values are given priority over non-market considerations. If the analysis results in the finding that a large degree of priority is given to market values, it implies that Member State competence in this field has diminished dramatically.

3. Theoretical Foundation

The project is a legal, dogmatic analysis of the intersection of Danish law and EU law in the areas examined. With regard to legal theory we have chosen critical legal positivism[10] as theoretical foundation for the project. Critical legal positivism is a further development of legal positivism.[11] It builds on other theories such as Kelsen's Pure Theory of Law (Reine Rechtslehre),[12] Hart's theory of law[13] and the institutional theory of law.[14]

In critical legal positivism law and its changes are examined on three levels: the surface level of the law; the legal culture; and the deep structure of law.[15]

The surface level of the law comprises various pieces of legislation as well as court and administrative decisions in individual cases. Standpoints in legal dogmatical writing are also placed at this level.

The legal culture constitutes the middle or mediating level of law. One may distinguish between the expert legal culture and the general legal culture of ordinary citizens. The expert legal culture includes the general principles of law and its basic concepts as well as various rules used in interpreting norms (such as analogy and e contrario) and solving norm conflicts (such as lex superior, lex specialis and lex posterior). In addition, a central element of the expert legal culture consists of patterns of argumentation.

The term deep structure of law is used to name the common core of a distinct historical type of law, e.g. modern law. This is the most inert part of

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[10] See further Tuori, Kaarlo: Critical Legal Positivism, Aldershot 2002.

[11] See for an oveview of relevant legal theories Nielsen, Ruth and Christina D Tvarnø: Retskilder & Retsteorier, Copenhagen 2005, part III.

[12] Kelsen, Hans: Introduction to the Problems of Legal Theory (A Translation of the First edition of Reine Rechtslehre 1934), Oxford, 1992.

[13] Hart, H L A: The Concept of Law, Oxford, 1994.

[14] See furher MacCormick, Neil and Ota Weinberger: An Institutional Theory of Law. New Approaches to Legal Positivism, Dordrecht 1986, Weinberger, Ota: Law, Institution and Legal Politics, Fundamental Problems of Legal Theory and Social Philosophy, Dordrecht, 1991, Bengoetxea, Joxerramon: Institutions, Legal Theory and EC Law, Archiv für Rechts- und Sozialphilosophie, 1991, s 195 and MacCormick, Neil (ed): Constructing Legal Systems. "European Union" in Legal Theory, Dordrecht, 1997.

[15] See further on the levels of law Tuori, Kaarlo: Critical Legal Positivism, Aldershot 2002 chapter 6. See also Tuori, Kaarlo: Towards a Multi-Layered View of Modern Law, in Aarnio, Aulis et al (eds): Justice, Morality and Society, Lund 1997.

law as to its development and change. EU law represents a late stage in the stabilisation of modern law (and not the emergence of post-modern law).[16]

Viewed in this way, the legal development starts at the surface level and then gradually over a number of years settles down as deeper layers of law. The present project focuses on the interaction of Danish law and EU law in the areas examined at the medium level of the expert legal culture.

Law can be seen as a legal order, i.e. a set of legal norms, and as legal practices. In this project we will look at the law in both ways. As regards legal practices we will focus on legislative practice, adjudication and legal science.

Legal positivism focuses on existing law, in principle irrespective of its moral quality, while natural law focuses on justice or moral issues. There is, however, also a critical potential in legal positivism, see the following:[17]

> The "archaeology" of modern law demonstrates that even this type of law includes a critical reflexive instance which can fulfil the function of natural law; modern, positive law possesses resources for its own normative critique, provides yardsticks for an immanent critique which does not depart from the solid ground of positivity. Thus, for example, an individual statute or an individual decision by a court can be submitted to immanent , inter-subjectively controllable criticism in light of legal principles located at the level of the legal culture or the deep structure of law.

The project is meant as a piece of basic research (Grundforschung). Generally, we think it is the primary task of legal science of this kind to develop the law as a system, in particular its basic concepts and general principles.[18] In this project we aim to contribute to clarifying the relevant legal concepts related to the integration of the Danish welfare state in the EU and the Internal Market and to establishing the general principles emerging in this context, not least from the case law of the ECJ.

If nothing to the contrary is stated in the project descriptions of the subprojects they build on critical legal positivism as theoretical foundation.

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[16] Tuori, Kaarlo: EC Law: An Independent Legal Order or a Post-Modern Jack-in-the-Box? in I. Cameron and A. Simoni (eds) Dealing with Integration, vol 2, Perspectives from seminars on European Law 1996-1998 p 225 et seq, Uppsala 1998.

[17] Tuori, Kaarlo: Towards a Multi-Layered View of Modern Law, in Aarnio, Aulis et al (eds): Justice, Morality and Society, Lund 1997 p 441.

[18] See for a similar view Wilhelmsson, Thomas: Social Contract Law and European Integration, Dartmouth 1995.

4. Method

The primary method used in the project is legal, dogmatic analysis, i.e. the *traditional legal method* is applied.[19] If nothing to the contrary is stated in the project descriptions of the subprojects this method is used. It is concerned with a textual analysis of authoritative sources of law, e.g. legislative acts, judgments, etc. There are some characteristic differences between the pattern of sources of law in Danish law and in EU law. In the project the focus will be on EU law.

As EU law has certain specific characteristics compared to national law, attention to this will be taken.[20] Under all circumstances, there will be an emphasis on the interpretation of legal texts and case law. In other words, it will be written by a lawyer and in so far as the law is built with words, legal science will begin with them which is why legal science is largely about hermeneutics.[21]

A major part of the analyses will be put on the decisions of the ECJ. An *evolutionary approach* will be taken. As EU law largely is a case law-based system the approach is suitable in order to thoroughly analyse the individual cases in order to provide a synthesis of the interpretational guidelines which may be deduced. By this approach it will be possible to achieve the best foundation for understanding the development of the creation of the law in force today as well as the law itself. Also, as the ECJ seldom explicitly over-rules previous decisions, the approach will be helpful in detecting the more implicit changes over times.

At the same time, a more *critical approach* will be applied as the analyses are not intended solely to be of a descriptive character. On the one hand, it is necessary as a point of departure to start an analysis with the ECJ's formal argumentation so that the state of law may be deducted through the traditional legal method adjusted to the EU law, whereby the internal logic of the analysed decisions is sought. On the other hand, it has to be accepted that behind the formal argumentation other important layers of meaning may be hidden. As it has been pointed out in legal theory regarding EU law:

> Formal reasoning may be necessary (for example, to secure certainty and equality under the law), but it is no longer sufficient. Because formal arguments no longer

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[19] See further Nielsen, Ruth og Christina D Tvarnø: Retskilder & Retsteorier, Copenhagen 2005, part II; or Ross, Alf: Ret og Retfærdighed, Copenhagen 1953.

[20] See *e.g.* Rasmussen, H., *EU-ret i kontekst* (Forlaget Thomson, 2003) 155 and 158.

[21] See *e.g.* Baquero Cruz, J., *Between Competition and Free Movement. The Economic Constitutional Law of the European Community* (Hart Publishing, 2002) 4.

> provide all the legal answers, a justification based on formal arguments is, in many cases, no longer legitimate justification. Judicial neutrality, with reference to an ideal "robot-court", associated with syllogistic reasoning in the application and interpretation of law, does not correspond to the present complexity of the judicial process and the exercise of discretion it entails. This is by now a non-contentious assertion. The exercise of judicial discretion requires a "second-order justification" involving "justifying choices; choices between the rival rulings which are possible".[22]

The project is a mono-disciplinary one in the sense that it is a legal dogmatic analysis and not a multi-disciplinary analysis. Law, EU and the welfare state is an object of interest not only to legal science but also to other social sciences, e.g. political science, economy and sociology.

We focus on the analysis of legal texts in order to find out what the answers to our research questions are on the basis of the legal material interpreted in accordance with a professional, legal standard. This 'narrow' methodological approach also adds to the projects originality since no such legal analyses exist whereas there are multi-disciplinary studies of EU Law and the welfare state.[23] The project will show whether a pure legal analysis results in a different picture from that obtained by a mixed multi-disciplinary study.

5. Account of division of labour between project participants.

We seek funding for the following types of research: partial release from current positions, phd-grants and hosting of conferences.

5.1. Who does what?

The work will be carried out as a combination of individual and collective research including integration of PhD-students into the projects.

Ruth Nielsen is responsible for the subproject on internal market law and will serve as coordinator of the whole project including responsibility for the organisation of the conferences. Lynn Roseberry is responsible for the subproject on fundamental rights and non-discrimination and for active participation in the whole project including contributing to the project conferences. Ulla Neergaard is responsible for the subproject on services of general interest within the meaning of Article 86(2) and for active

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[22] Maduro, M. P., *We, the court. The European Court of Justice & the European Economic Constitution* (Hart Publishing, 1998) 20.

[23] See for a multi-disciplinary study de Búrca, Grainne (ed) EU Law and the Welfare State. In search of solidarity, Oxford 2005 which contains articles about EU law from the perspectives of sociology, political science, law and public policy.

participation in the whole project including contributing to the project conferences.

The allocation of the funding for release from current positions is shown in the detailed budget. Partial release from current positions is necessary for the realisation of the project because of its collective character which requires extra time to develop the synergy between the subprojects. In this context there is a need for larger blocks of uninterrupted research time. As indicated in the detailed project we will also put research time paid by the Copenhagen Business School into the project.

The PhD-grants applied for will be allocated to the subprojects on the internal market and taxation.

5.2. Time schedule for conferences hosted by the project

We will arrange 3 international research seminars/conferences as part of the project. They will be about the following themes:

Autumn 2007: Impact of EU law upon the Danish Welfare State
Autumn 2008: Integration of Welfare Functions into EU Law
Autumn/winter 2009: Final Results from the project.

At the conferences we will use our individual research networks to bring together leading international researchers on the subject.

5.3. Synergies between the individual subprojects

The subprojects will contribute to a better understanding of different legal aspects of the same general developments such as globalisation, liberalisation and privatisation and the resulting blurring boundaries. The basic EU rules on the Internal Market have a bearing upon all the subprojects. They will add inputs to answering the two main research questions stated in Section 2.1 above. We will take advantage of the possibilities for synergy through joint seminars/conferences and joint publications.

5.4. Project descriptions for each subproject

Descriptions of the individual subprojects are attached.

6. Expected Outcome of the Project

Research results from the sub-projects will be published in books (including theses) and journals. Each of the conferences will result in publication of a

book with contributions from the speakers at the conference. The final conference in 2009 and the book resulting from it will contribute to developing a synthesis of the different answers offered by the sub-projects to the main research questions examined in the project.