

NOTE

on the implementation of EU Directives in Danish law

1. Competence

If legislation is required to implement a Directive, the competence lies with legislator (Government and Folketing jointly).

The Government will only be able to implement a Directive by delegated legislation if authorised to do so by an Act.

If certain actions are to be punishable according to a Directive, the authority for delegated legislation must specify that a punishment may be laid down for violation of the provisions in the provisions issued.

One of the factors of importance to the assessment of the extent of the authority to be given, if at all, for implementation by delegated legislation, is consideration of the control of legislative development exercised by the Folketing, cf. EU-Karnov, 1993, p. 16 on this issue.

The courts have no formal role in connection with implementation, but implementing acts may, however, be submitted to the courts for hearing before being introduced in the Folketing, if they concern matters of special relevance to the courts. Normally, however, the Supreme Court (Højesteret) is not heard.

Neither the decentralised government administration nor the municipal administration has any independent competence in connection with implementation of Directives.

2. Manner of implementation

1. When an EU Directive is implemented in Danish law, in principle the Government has the same possibilities as when a treaty is implemented.

Either the Directive may be transformed, or it may be incorporated by reference to the Directive in national law (an Act or delegated legislation authorised by an Act).

In 'EU-ret', 3rd edition, Copenhagen 1995, Claus Gulmann and Karsten Hagel Sørensen have described these options as follows :

'Both methods have their advantages and disadvantages. The most important advantage of the transformation method is that it permits retention of the systematics of a legislation and of the legal language to which citizens and the law-applying authorities are used. At the same time it is possible to leave out provisions not to be implemented in national legislation, or of interest only to other countries, and likewise, options ... can be utilised and any obscurities may be removed. The disadvantage of the method is that it is work-consuming and involves a risk that the implementation becomes defective.'

In practice, there is an increasing tendency in Denmark to choose incorporation wherever possible.

Clause 89 in the guidelines from 1987 of the Ministry of Justice on the preparation of delegated legislation, considers the general attitude to the question. The guidelines state, among other things:

'If the Directive concerns a judicial field presumably of relevance mainly to public authorities or a restricted circle of citizens, and if the provisions are reasonably precise, it should be considered to limit the implementing order to very few provisions and to incorporate the Directive as a schedule.'

This method does not exclude references being made in the implementing provision to individual provisions in the Directive.

Further elucidation of the problem may be obtained in the comments of the Ministry of Justice in connection with implementation of Council Directive No. 76/308 of 15 March 1976 on mutual assistance for the recovery of claims resulting from certain Community operations.

The preparatory works of the Act (Folketingstidende 1977-78, addendum A, column 1765), state, among other things:

"... The Bill refers to the Council Directive so that the Act in general contains only the substantive provisions required by the Directive to be prescribed in the individual countries. A condition for using this method is normally that the international text satisfies the requirements to clarity required of a Danish judicial text. Although this cannot fully be said to be the case with the Directive, it has been found proper to use the method proposed. This is due to the fact that the Directive can only be expected to be applied to a limited extent, and that it chiefly addresses the authorities. Furthermore, considerable importance must be attached to the fact that like other Community acts the Directive will be subject to the right of interpretation of the Community courts so that a transformation of the Directive might give rise to both practical and legal problems. '

If transformation is chosen for the Directive, efforts are made for the implementing rules to use the same forms of words as the Directive to the extent possible, even although they may give rise to doubts of interpretation, as any such doubt may be brought before the Court.

Furthermore, often a combination of the two implementing methods described is used. If so, the Act or the Order contains a transformation of certain parts of the Directive - typically the citizen-oriented parts - and at the same time the rest of the Directive is implemented by incorporation.

Finally, according to circumstances, harmony of norms between a Directive and national law may exist. In this situation, national law need not be laid down by an Act or Ministerial Order, but may also have found expression in an established court practice, for example. If harmony of norms is estab-

lished, it is unnecessary to change the national state of law.

2. Examples of an implementing order being limited to only few provisions and the Directive being incorporated as a schedule are, among others, Order No. 94 of 15 March 1979 on Community attorneys' activities in this country and Order No. 727 of 22 December 1982 on Community citizens' access to carrying out activities as a midwife in Denmark.

An example of a transformation staying as close to the original text as possible is, for example, Act No. 1098 of 21 December 1994 on amendment of Act on contracts and other agreements in the field of property law and certain other Acts (unfair terms in certain consumer contracts, etc.), whereby Denmark implemented Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

A transformation which subsequently gave rise to difficulties was the one implementing Council Directive 75/117/EEC of 10 February 1975 on the application of the principle of equal pay for men and women, 75/117/EC.

The Directive was implemented in Denmark by transformation in Act No. 32 of 4 February 1976 on equal pay for men and women (in the non-unionised sector). It was left to the social partners to handle the unionised sector through collective agreements.

Section 1 of the Act obliges an employer solely to grant the same pay for the same work. According to Article 1 of the Directive, the equal pay principle also involves equal pay to be paid for work of equal value. The memorandum to the Bill states that the expression 'equal pay for equal work' has the same scope as the expression 'equal work or work of equal value' of the Directive.

The Commission brought treaty violation proceedings against Denmark pursuant to Article 169 of the EC Treaty. The EC Courts stated in case 143/83 that Member States may certainly

leave the realisation of the equal pay principle to the social partners, but that option does not release them of the obligation to ensure through suitable enactment or delegated legislation that all Community workers may enjoy the protection of the Directive to its full extent.

However, the Court did not find that the statement in the preparatory works of the Act sufficiently ensured implementation of the Directive in the non-unionised field. It was not sufficient to ensure appropriate information of the persons involved who - as the non-unionised area was the one to be regulated - must be expected to be in a particularly weak situation.

As a follow-up of the judgment, the Act was amended by Act No. 65 of 19 February 1986, inserting the expression 'equal work or work of equal value' in the text of the Act itself.

An example of a combined transformation and incorporation for implementation of Directives is Act No. 291 of 8 May 1991 on the access to exercising certain professions in Denmark for citizens of the European Communities and the Nordic countries.

The Act applies, for example, to 'professions regulated by law and comprised by the European Community Directives on the introduction of a general system for the recognition of diplomas awarded for professional education and training', cf. Section 1(1). Thus, the Act may (also) serve as a framework for the incorporation of future Directives in this field. According to Section 2 of the Act, European Community citizens who satisfy the conditions in the Directives have access to exercising a profession regulated by law in Denmark as a self-employed person or an employee on the same conditions as those applying to Danish citizens. Pursuant to Section 5 of the Act, the Danish Commerce and Companies Agency must lay down detailed provisions with a view to complying with the Directives.

Pursuant to the Act, Ministerial Order No. 292 of 8 May 1991 on the access to exercising certain professions in Denmark for European Community citizens holding a higher-education diploma awarded on completion of professional education and training of at least three years' duration has been issued. This Order expressly refers to the Diploma Directive and otherwise provides certain rules concerning the competence and processing of the national authorities. A schedule listing regulated professions has been annexed to the Order.

It has been doubtful whether articulated clerks are comprised by the Diploma Directive. On the background of a declaration by the European Commission it must probably be presumed that articulated clerks are not covered by the Diploma Directive. Owing to the chosen combination of Act and Order in connection with the incorporation, Danish legislation can be adapted to this interpretation of the Diploma Directive merely by an amendment of the Schedule to the Order listing the regulated professions.

An example of the establishment of harmony of norms is Directive 80/987 on the protection of employees in the event of the insolvency of their employer. The Directive was deemed complied with through the applicable Act on the Employees' Guarantee Fund (Lønmodtagernes Garantifond).

3. The annex to this note provides a comment on Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, cf. the supplementary note of 14 December 1995 by the spokesman.

3. The effects of the Directive

Concerning the importance of a Directive before expiry of the term for implementation, reference must be made to EU law as developed through the Court's practice. Reference can thus be made to the decisions in cases 148/78, Ratti, and 80/86, Kolpinghuis. If the implementation in Danish law was effected before expiry of the term for implementation, it must thus be

presumed that Danish courts have a duty to include the Directive in connection with interpretation of the Act or Order implementing the Directive.

Also after expiry of the term for implementation it must be presumed that the wording of the Directive is of importance to interpretation of the implementing provisions.

This accords with the general principle according to which a Danish rule of law in force, giving rise to doubts of interpretation, must be interpreted by the law-applying authorities in a manner which is best suited to bring the rule into accordance with Denmark's international obligations ('the rule of interpretation' ('fortolkningsreglen')).

If the provisions of the Directive are immediately applicable, and there is a discrepancy between them and the implementing provisions, or no implementation has been effected under Danish law, a Danish court will base its decision on the provisions of the Directive, cf. Gulmann and Hagel-Sørensen, loc.cit. p. 203. However, the state of law might conceivably be different where it is obvious that the discrepancy is intended on the part of the legislator. In such a situation, the Danish courts would hardly summarily put aside the Danish provision, but would be expected to submit the matter to the European Court for interpretation of the provisions of the Directive. However, this situation has never arisen at any time since Denmark's entry into the Community on 1 January 1973.

This accords with the general principle according to which a conflict between an international rule and a subsequent Danish rule of law ought to be solved by the Danish rule being construed in accordance with the international rule, unless there are grounds for presuming the opposite, even though the Danish rule is clearly contrary to the international rule ('the rule of assumption' ('formodningsreglen')).

In this situation citizens can thus rely on the legal position laid down in the Directive.

This also accords with the fact that - in case of a preliminary submission - the Danish authorities will be bound by the Court's interpretation of the Directive.

An example of the importance of a Directive to the interpretation of national Danish rules of law is the following:

Council Directive of 14 February 1977 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 77/187/EEC, was implemented by Act No. 111 of 21 March 1979 on the legal position of employees in case of transfer of enterprises. According to section 2 of the Act, the transferee in a transfer of an undertaking immediately enters into 'the rights and obligations existing at the time of transfer' pursuant to collective agreements and contracts, among other things. The provision aims at implementing Article 3 (1) of the Directive, according to which 'the transferor's rights and obligations pursuant to a contract for work or a work relationship existing at the time of transfer ... pass to the transferee owing to this transfer.'

During an appeal case before the Western High Court (Vestre Landsret) initiated by three plaintiffs against a bankruptcy estate, the plaintiffs claimed compensation for unjustified dismissal and holiday compensation due to be acknowledged as preferential claims in the estate. The High Court requested the European Court pursuant to Article 177 of the EC Treaty to give a preliminary ruling on the question, whether the Directive obliges Member States to implement rules according to which the transferee of the enterprise enters into the holiday and compensation obligations to employees not employed by the enterprise at the time of transfer. The Court gave a negative answer to this question, cf. case 19/83, *Wendelboe* etc.

Thus, the wording of the Act was too comprehensive and has subsequently been given a restrictive interpretation, cf. the Western High Court judgment in a subsequent case reported in *Ugeskrift for Retsvaesen* 1986, page 581 f.

It follows from EU law that the non-implementation of a Directive may in certain circumstances inflict a liability for damages to a citizen on the Danish authorities, cf. the principle in the Francovich judgment. The Danish procedural rules enable such a claim to succeed.

Annex concerning Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

1. Implementing procedure

Can implementation be effected by delegated legislation, or will it be necessary to adopt a new Act or amend existing legislation, perhaps even change the Constitution?

New legislation. It is not necessary to amend the Constitution.

Will the administrative legislative council or the supreme administrative court play a certain role in connection with the process of transfer?

Such bodies do not exist in Denmark, and with regard to those that might correspond to them, the question may be answered in the negative.

2. Content of implementing measures

Will there be grounds for restricting certain of the guarantees achieved by the citizen pursuant to applicable valid national law with a view to avoiding restriction or prohibition of the free movement of data (Article 1 (2))?

NO.

Will it be necessary to adapt certain concepts in national legislation to the definitions of the Directive (Article 2)?

Yes.

Does the field of application for the national legislation correspond to the field of application of the

Directive, especially as with regard to the non-automated processing operations (Article 3 (1)) and the processing operations the purpose of which are public security, defense, national security or areas of criminal law (Article 3 (2))?

NO.

Do the principles relating to the 'quality' of the data, as the principles are worded in the Directive (Article 6), add anything to national legislation?

No.

Does national legislation permit the processing of data in other cases than the cases at which the Directive is aimed (Article 7)?

NO.

Are the terms used in the Directive to describe these cases sufficiently precise, or do they have to be 'translated' into more precise terms from national legislation?

They need not necessarily be 'translated'.

Does national legislation concerning 'sensitive' data, including health data and data concerning the relationship to the judicial system and the police correspond to the requirements of the Directive (Article 8 (1)-(6))?

No.

Are there grounds for introducing suitable guarantees? Will it be necessary to 'translate' the terms of the Directive into more precise terms?

Not necessarily.

Does national legislation contain a set of rules relating to a national identification number or other identifier of general application (Article 8 (7))?

Yes.

Does national legislation provide for exemptions or derogations for the benefit of journalists or artists (Article 9)?

Yes.

Do the conditions enjoined by national legislation with regard to informing the data subject involved in connection with the collection of data from him/her, correspond to those of the Directive (Article 10)?

No.

The same question with regard to the information given to the data subject when the data concerning him/her have not been obtained from the data subject himself or herself (Article 11 (1))?

NO.

Does national legislation contain appropriate safeguards concerning processing for statistical purposes or for the purpose of historical or scientific research (Article 11 (2))?

Yes.

Does national legislation recognise a right of access on the same conditions as mentioned in the Directive (Article 12)?

Yes.

Does national legislation permit exceptions in the right of access beyond those permitted by the Directive (Article 13)?

No.

Does national legislation give the data subject a right of objection on the same conditions as those mentioned in the Directive (Article 14)?

No.

Does national legislation contain rules concerning individual decisions made solely on the basis of automated processing of data (Article 15)?

No.

Does national legislation order measures to be taken with regard to the confidential nature and security of the processing operations (Articles 16 and 17)?

No and yes.

Does national legislation have the same criterion relating to the security level as mentioned in the Directive (second clause of paragraph 1 of Article 17)?

No.

Does national legislation provide for a provision on notification of processing operations to a supervisory authority (Article 18 (1))?

Yes, in the case of certain operations.

Does national legislation provide for a simplified notification procedure or exemption from this obligation?

Yes, in the remaining cases.

In the affirmative, are such operations then within the limits laid down in the Directive (Article 18 (2))?

Yes.

Does national legislation provide for prior checking of certain processing operations, either of an individual nature or of general nature (Article 20)?

Yes.

Does national legislation provide for public inspection of processing operations, particularly via a public register of notified processing operations (Article 21)?

Yes.

How can citizens complain, via the administrative system or via the courts, in case of infringement of the rights guaranteed to them by national legislation on the protection of data (Article 22)?

Complaints may be submitted to a special independent supervisory authority, and the matter - including the decisions of the supervisory authority - may likewise be brought before the national courts.

Does national legislation provide for damages as a consequence of an unlawful processing operation (Article 23)?

No, the matter depends on the general rules for damages.

What sanctions does national legislation prescribe in case of violation of the rules on protection of data (Article 24)?

Recommendations, mandatory orders, prohibitive orders and fines.

Is the existence of codes of conduct recognised in national legislation (Article 27)? If so, what normative value do these codes possess?

No.

Is there an independent supervisory authority in the national legal system (Article 28)?

What are its powers and functions?

Reference is made to the two Acts in force, enclosed in an English translation.

Do they correspond to the powers and functions mentioned in the Directive?

No.