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Is the horizontal application of general principles *ultra vires*? Dialogue and conflict between supreme European courts in *Dansk Industri*

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# Is the horizontal application of general principles *ultra vires*? Dialogue and conflict between supreme European courts in *Dansk Industri*\*

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**Abstract:** The evolution of the case law on the principle of non-discrimination (*Mangold* and *Küçükdeveci*) has shown a clear trend towards its application to litigation between private parties. This contribution aims to discuss one of the latest developments in the case law of the Court of Justice, *Dansk Industri*, and its subsequent application by the Danish Supreme Court, the national Court which requested the preliminary ruling. The joint analysis of the decisions of the Court of Justice and of the Danish Court reveals that this trend towards the horizontal application of the principle of non-discrimination has been rejected, and that even fundamental elements of the EU constitutional legal order cannot escape the *ultra vires* review of national Supreme Courts. Will the Court of Justice follow – for the future – the line of the defence of horizontal direct effect of the principle, or will it choose a more inclusive solution akin to the *Taricco II* judgement?

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The direct effect of general principles<sup>1</sup> and the *ultra vires* review<sup>2</sup> of some<sup>3</sup> of the Supreme and Constitutional Courts of the Member States are long-standing issues within European Union law. One

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\* Peer reviewed.

<sup>1</sup> D. EDWARD, *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations in Scritti in onore di Giuseppe Federico Mancini*, Milan, 1998, p. 423. EDITORIAL COMMENT, *Horizontal Direct Effect – A law of diminishing coherence?*, in *Common Market Law Review*, 1/2006, p. 1. B. DE WITTE, *Direct Effect, Primacy and the Nature of the EU Legal Order*, in P. CRAIG - G. DE BURCA (eds) *The Evolution of EU law*, Oxford, 2011, p. 323. P. CABRAL and R. NEVES, *General Principles of EU law and Horizontal Direct Effect in European Public Law*, 3/2011, p. 437.

<sup>2</sup> For a classic example of *ultra vires* review, see: German Constitutional Court, decision of 6 July 2010, 2 BvR 2661/06 (the *Mangold* Urteil), precisely on the compliance of the *Mangold* decision with the principle of conferred powers. E.g. M. PAYANDEH, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9.

<sup>3</sup> Some aspects of the *ultra vires* review can be understood as opposed to the approach of openness that some Constitutional Courts had towards the Court of Justice. On this see G. MARTINICO, *Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance* in *Yearbook of European Law*, 2016, p. 318.

could accordingly question why *Danske Industri*<sup>4</sup> and the decision of the Danish Supreme Court<sup>5</sup> in which the preliminary ruling was requested are worth further reflection. In *Danske Industri* the Court of Justice is presented with the opportunity to reaffirm the horizontal direct effect of general principles and to clarify the theoretical difference between the application of horizontal direct effect and consistent interpretation; the Danish Supreme Court opposes a strong refusal, declaring horizontal direct effect of general principles as *ultra vires*. The history of direct effect of provisions of EU law dates back to *Van Gend en Loos*,<sup>6</sup> when the Court held for the first time a provision of the Treaties to be enforceable between a State and a private party (vertical direct effect) and in *Defrenne*,<sup>7</sup> where the Court found that a provision of the Treaties was applicable to litigation between two private parties (horizontal direct effect).<sup>8</sup> Later the Court extended the application of direct effect to all other EU legal acts (regulations and decisions). Directives however represent a specific case, as they are primarily binding on the Member States, who are obliged to attain the results which are specified in the legislative act.<sup>9</sup> The Court has repeatedly maintained that, because of their particular nature, directives are not directly applicable to litigation involving private parties,<sup>10</sup> leading to interpretative gaps and doubts concerning the consistency of the doctrine of direct effect.<sup>11</sup> Scholars of European Union law have extensively debated the specific nature of the direct effect of directives, and advocated both against and in favour of the full horizontal direct effect of directives.<sup>12</sup> More recently, when the Court has found a legal act (in most cases a directive) to be lacking one of the

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<sup>4</sup> CJEU, judgement of 19 April 2016, case C-441/14, *Danske Industri (DI)*. See the comment by E. GUALCO–L. LOURENÇO, *Clash of Titans – General principles of EU law: balancing and horizontal direct effect*, in *European Papers*, 2016, pp. 643–652 and E. GUALCO, *La Cour de justice retourne sur l'effet direct du principe de non-discrimination en raison de l'âge: (encore) beaucoup de bruit pour rien?* in *Federalismi.it*, 18/2017, although in particular the last article adopts a slightly different perspective.

<sup>5</sup> Danish Supreme Court, decision n. 15/2014 of 6 December 2016.

<http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf> (Accessed January 25, 2018).

<sup>6</sup> CJEU, judgement of 5 February 1963, case 26-62 *Van Gend & Loos*.

<sup>7</sup> CJEU, judgement of 8 April 1976, case 43-75, *Defrenne v Sabena*.

<sup>8</sup> The distinction between horizontal and vertical direct effect was first clearly articulated in CJEU, 5 April 1979, case 148-78, *Ratti*.

<sup>9</sup> Art. 288 (3) TFEU.

<sup>10</sup> See e.g. CJEU, judgment of 26 February 1986, case 152-84, *Marshall v Southampton*; CJEU, judgment of 12 July 1990, case C-188/89 *Foster and others*; CJEU, judgment of 14 July 1994, case C-91/92, *Faccini Dori*, on which see the early critics in doctrine: T. TRIDIMAS, *Horizontal effect of directives: a missed opportunity*, *European Law Review*, 1994, p. 621; E. TURNBULL, *The ECJ Rejects Horizontal Direct Effect of Directives*, in *European Business Law Review*, 1994, p. 230. More recently see: CJEU, 24 January 2012, case C-282/10, *Dominguez*, para 37; CJEU, judgment of 15 January 2015, case C-30/14, *Ryanair Ltd v PR Aviation BV*.

<sup>11</sup> Defined by an authoritative voice as “an infant disease of European Community law”. See P. PESCATORE, *The Doctrine of Direct Effect: An Infant Disease of Community Law* in *European Law Review*, 8/1983, p. 155.

<sup>12</sup> E.g. P. CRAIG, *The Legal Effect of Directives: Policy Rules and Exceptions* in *European Law Review*, 3/2009, p. 349; A. ALBORS-LLORENS, *The Direct Effect of Directives: Fresh Controversy or a Storm in a Teacup?*, in *European Law Review*, 6/2014, p. 850.

conditions triggering direct effect,<sup>13</sup> it has decided to apply general principles, and in particular the principle of non-discrimination, to litigation between private parties. This is what the Court of Justice maintained in *Mangold*<sup>14</sup> and in *Kücükdeveci*,<sup>15</sup> the two main decisions which anticipate *Dansk Industri* in this line of case law. Both decisions have to do with the horizontal direct effect of general principles, albeit with some differences. Whilst in *Mangold* the Court acknowledged the existence of a general principle of non-discrimination, in *Kücükdeveci* the Court decided to apply the same principle to litigation between private parties. Another important decision, *Bartsch*,<sup>16</sup> appeared to change this line of case law, with the Court finding the principle of non-discrimination to be inapplicable since the deadline for implementation of the directive at national level had not passed; consequently, it was lacking one of the conditions for the triggering of direct effect.<sup>17</sup> As *Kücükdeveci* reaffirmed the horizontal direct effect of general principles, reducing the impact of *Bartsch*, it is increasingly difficult to notice a difference between the horizontal direct effect of directives and of general principles. In *Dansk Industri* the Court aims to let some light into the foggy room of horizontal direct effect, explaining when the general principle is applicable and when, on the contrary, the national Court should interpret the national law consistently with EU law.

### **1. The background of the case and the questions raised by the Danish Supreme Court**

The proceedings in *Dansk Industri* concern the dismissal of a Danish worker (Mr. Rasmussen) by his employer. According to the legislation in force in Denmark,<sup>18</sup> dismissed workers are entitled to a severance allowance of 1, 2 or 3 months of salary when the working relationship is terminated early, after respectively 12, 15 or 18 years. However, the same allowance is not due where the worker has subscribed to a pension scheme before the age of 50 and, according to the pension scheme, will receive upon dismissal an old-age pension from the employer.<sup>19</sup> Having been employed since 1 June 1984, Mr. Rasmussen was entitled under Paragraph 2 a (1) to the severance allowance but at the same time, being

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<sup>13</sup> In order to be directly effective, a provision of a directive should be unconditional and sufficiently precise. Cf. CJEU, judgment of 15 April 2008, case C-268/06, *Impact* 2008 at para 57.

<sup>14</sup> CJEU, judgment of 22 November 2005, case C-144/04, *Mangold*. See e.g. the comment by D. SCHIEK, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation in Industrial Law Journal*, 2006, p. 329.

<sup>15</sup> CJEU, judgment of 19 January 2010, case C-555/07, *Kücükdeveci*. See the comment of G. DI FEDERICO, *Le discriminazioni in base all'età nella più recente giurisprudenza della Corte di Giustizia: da Mangold a Georgien...e oltre in Studi sull'integrazione europea*, 3/2011, p. 585.

<sup>16</sup> CJEU, judgment of 23 September 2008, case C-427/06, *Bartsch*.

<sup>17</sup> In order for a directive to be directly effective, the time-limit allowed to the Member State concerned for transposing the directive should have passed. See *Bartsch* (C-427/06) [2008] at [17] and [25].

<sup>18</sup> Paragraph 2 a (1) of the Law on legal relationships between employers and employees.

<sup>19</sup> Paragraph 2 a (3) of the Law on legal relationships between employers and employees.

over 60 years old and benefiting from another pension scheme, under Paragraph 2 a (3) he was not entitled to the same allowance. The Court of Justice, however, has already been called upon to interpret the provision of Paragraph 2 (a) of the Danish Law, in *Ingeniørforeningen i Danmark*.<sup>20</sup> In this judgment the Court of Justice had no difficulty in admitting that the above-mentioned provision was in conflict with Directive 2000/78/EC.<sup>21</sup> However, that decision involved a dispute between an individual and a public administration, whereas *Dansk Industri* involves a private employer and its employee, a detail which excludes the horizontal application of Directive 2000/78/EC. Accordingly, the Danish Supreme Court is asking the Court of Justice how to interpret the national legislation, given that pursuant to the doctrine on direct effect a directive should not, in principle, produce effects between two private parties.<sup>22</sup> This does not exclude the application of the general principle of equal treatment, which notably includes the principle of non-discrimination on the ground of age. On the other hand, this does not preclude the legitimate expectations of the employer, which, in *bona fide*, relied on the national legislation to avoid paying at the same time the pension scheme and the severance allowance.<sup>23</sup> Legitimate expectation and legal certainty are both general principles of EU law. The question forming the basis of the request for a preliminary ruling can be summarised in two points: 1) whether the principle of non-discrimination on the ground of age has a broader scope of application than Directive 2000/78/EC itself, to the extent that it is applicable to a case involving two private parties; 2) how to balance the principle of non-discrimination on the ground of age with the principles of legal certainty and legitimate expectations, particularly when it is not possible to apply national legislation consistently with EU law. The Danish Supreme Court also makes it clear that the employee can seek compensation from the Danish State for the incorrect application of EU law.<sup>24</sup>

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<sup>20</sup> CJEU, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark v Region Syddanmark*.

<sup>21</sup> Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303/16.

<sup>22</sup> See P. CRAIG, “The legal effects of directives...” *op. cit.*, p. 376.

<sup>23</sup> It should be noted however that in this case Mr. Rasmussen promptly found another job, thus was not entitled to the old-age pension. On legitimate expectation and legal certainty in EU law see P. CRAIG, *EU Administrative Law*, Oxford, 2012, p. 550; E. SHARPSTON, *European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom?* in *North Western Journal of International Law and Business*, 1990-1991, p.87; E. SHARPSTON, *Legitimate expectations and economic reality in European Law Review*, 2/1990, p. 103.

<sup>24</sup> *Dansk Industri (DI)*, *cit.* para 19.

## 2. The solution proposed by the Advocate General

According to the understanding of general principles in international law,<sup>25</sup> general principles have traditionally been labelled as principles of interpretation.<sup>26</sup> Within EU law, however, general principles have evolved towards something similar to the principles which are enshrined in the national Constitutions. This, however, has not occurred without a certain debate within the Court of Justice. It can be said that within the Court there is an ongoing confrontation between a more traditional approach, which seems to reflect more the doctrine of general principles in international law (the consistent interpretation approach)<sup>27</sup> and an approach that tends to consider general principles as autonomous sources of rights (the constitutional approach).<sup>28</sup> While the latter is characterised by the consideration that the principle might be applicable ‘as such’,<sup>29</sup> the consistent interpretation approach attempts to reconcile the interpretation of national legislation with EU legislation, without triggering the general principle. The Opinion of the AG and the judgment of the Court seem to reflect these two approaches. Whereas (as it will be seen in the next paragraph) the structure of the judgment of the Court is divided into two parts (part I on the scope of application of the principle and part II on the balance), the AG attempts to answer a single (albeit quite complex) question: whether and how Paragraph 2 a (3) may be interpreted in line with the provisions of Directive 2000/78/EC. The AG centres his analysis on the precedent in *Ingeniørforeningen i Danmark*, where the Court had already declared Paragraph 2 a (3) of the Danish law to run counter to Directive 2000/78/EC, thus representing a direct discrimination.<sup>30</sup> However, as it has already been noted, *Ingeniørforeningen i Danmark* is a case which involved a private and a public party, representing a hypothesis of ‘vertical direct effect’. In this case Directive 2000/78/EC was held to be applicable, as directives are binding on the States and their internal administration. In contrast, the judgment at stake involves the relationship between an employee and its employer, making it a case of horizontal direct effect. *The Marshall-Dominguez* case law, however, clearly states that directives cannot represent a source of obligations for individuals, excluding the application of Directive 2000/78/EC to

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<sup>25</sup> See Art. 38 1 (c) of the Statute of the International Court of Justice.

<sup>26</sup> See G. GAJA, *General Principles of Law*, in R. WOLFRUM (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2013, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410> (Accessed January 25, 2018).

<sup>27</sup> Good examples of the use of consistent interpretation within the scope of application of the principle of non-discrimination are cases CJEU, judgment of 12 December 2013, case C-267/12, *Hay* and CJEU, judgment of 3 September 2014, case C-201/13, *Deckmyn*.

<sup>28</sup> E.g. *Mangold* (C-144/04) *cit.*; *Kücükdeveci* (C-555/07) *cit.*; CJEU, judgment of 7 March 2014, case C-176/12, *Association de médiation sociale (AMS)* and the present Judgment.

<sup>29</sup> *Association de médiation sociale (AMS)* (C-176/12) *cit.* para 47.

<sup>30</sup> *Ingeniørforeningen i Danmark* (C-499/08) *cit.* para 49.



private parties' litigation.<sup>31</sup> The shifting point of the Opinion of the AG is where he appears to disagree with the national Court as to whether it is possible to interpret Paragraph 2 a (3) according to the EU secondary legislation.<sup>32</sup> The AG agrees that, when it is not possible to interpret national legislation according to EU law, then reference should be made to the principle of non-discrimination.<sup>33</sup> The point at which the paths followed by the AG and by the Court diverge is however the possibility to interpret the national legislation according to EU law, making use of the instrument of consistent interpretation, also defined as 'indirect effect'.<sup>34</sup> Whereas the Court opts not to concentrate on the possibility to interpret the Danish legislation according to EU law, the AG focuses almost exclusively on this point. As paragraph 40 of the Opinion states: "The obligation upon national courts to interpret national law in conformity with the content and objectives of directives means that directives may have an indirect effect in such disputes". The AG considers that the Court has already emphasised that in similar instances precedence should be given to the obligation to interpret national legislation according to EU law<sup>35</sup> as recourse to the principle in order to resolve inconsistencies between EU and national law should be an exception and a last resort<sup>36</sup>. In this sense the AG opines that the Court should provide guidance to the national courts as to the reasons justifying the refusal to use consistent interpretation invoking the fact that it could be *contra legem*.<sup>37</sup> In this particular case, the approach of the AG is substantiated by the fact that the *contra legem* interpretation which in the wordings of the national Court is precluding consistent interpretation is given by a national case law which interpreted Paragraph 2 a (3) in a way that treated those who would actually receive an old-age pension from their employer in the same way as those who were merely eligible for such a pension.<sup>38</sup> According to the AG, in fact, the literal interpretation of Paragraph 2 a (3) does not contradict the Directive, but it needs to be interpreted in a way that it does not exclude from the severance allowance those workers who have opted out from the pension benefit because they decided to stay on the labour market.<sup>39</sup> The AG also held that national case law cannot be regarded as a limit to consistent interpretation because it is not equivalent to a "national provision whose

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<sup>31</sup> *Dominguez* (C-282/10) *cit.* para 37.

<sup>32</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* para 38.

<sup>33</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* para 50.

<sup>34</sup> See S. PRECHAL, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in C. BARNARD (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford, 2007, p. 35.

<sup>35</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* para 47.

<sup>36</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* para 48.

<sup>37</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* paras 53 and 54.

<sup>38</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* paras 27 - 32 - 66.

<sup>39</sup> Opinion of AG Bot, *Danske Industri (DI)* (C-144/14) *cit.* para 65.

very wording is irreconcilable with a rule of EU law”.<sup>40</sup> If the existence of conflicting national case law would be enough to make the interpretation of the national legislation according to EU law *contra legem*, this would be able, according to the AG, to diminish the potential of consistent interpretation in conflicts between EU and national law.<sup>41</sup> The AG also places an important emphasis on the fact that interpreting national law in such a way as to render it consistent with EU law does not place any obligation on individuals (going against the *Marshall-Dominguez* case law) as this obligation was already present within the national legislation.<sup>42</sup> The AG suggests that the situation does not match the ‘exceptional circumstances’ required to trigger the direct effect of the principle of non-discrimination.

### **3. The Court of Justice and the restatement of the horizontal direct effect of the principle of non discrimination on the ground of age**

The argument of the Court is divided into two main parts. In the first part the Court of Justice tackles the issue of the scope of application of the principle of non-discrimination against the Directive 2000/78/EC. The Court departs from the traditional definition of the principle of non-discrimination as a general principle of EU law,<sup>43</sup> which find its roots in the constitutional traditions common to the Member States and finally in the Charter of Fundamental Rights, mentioning the leading case law in *Mangold* and *Kücükdeveci*. The Court also emphasises that “the scope of the protection conferred by the directive does not go beyond that afforded to the principle”,<sup>44</sup> which appears to confirm that the principles of EU law have a scope of application which is broader than that of the directive. However the Court stresses that in order to apply the principle the case should fall within the scope of the prohibition of discrimination in Directive 2000/78/EC.<sup>45</sup> The Court finds that the case falls within the scope of the above-mentioned prohibition as it regards the dismissal of a worker within the meaning of Art. 3(1) (c) of Directive 2000/78/EC. As a consequence, the principle of non-discrimination on the ground of age should be applied to the dispute, which involves two private persons.<sup>46</sup> In the second part of its argument, the Court of Justice has been asked by the national Court how to balance the principle of non-discrimination, found to be applicable, and the principle of legal certainty and legitimate expectations, justified, according to the national court, by the impossibility of interpreting the national

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<sup>40</sup> Opinion of AG Bot, *Dansk Industri (DI)* (C-144/14) *cit.* para 72.

<sup>41</sup> Opinion of AG Bot, *Dansk Industri (DI)* (C-144/14) *cit.* para 73.

<sup>42</sup> Opinion of AG Bot, *Dansk Industri (DI)* (C-144/14) *cit.* para 76.

<sup>43</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 22.

<sup>44</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 23.

<sup>45</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 25.

<sup>46</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 26.



legislation according to EU law.<sup>47</sup> The Court accordingly provides the national court with the guidance necessary in order to discern between consistent interpretation and the horizontal application of a general principle. This is a substantial difference between the reasoning of the Court and the one of the Advocate General, which is centred on the attempt to ensure consistent interpretation of the national legislation. On the contrary, the Court suggests that it is for the national court to evaluate the conditions under which the interpretation of the national legislation can be regarded as *contra legem*.<sup>48</sup> At the same time, however, this implies the disapplication of the national provision and the application of the principle of non-discrimination.

The judgment tackles two relevant issues which makes it worthy of in-depth analysis. It represents an answer from the Court of Justice to some of the criticism which has been put forward either on the suitability of the horizontal application of the principle of non-discrimination on the ground of age<sup>49</sup> or on the theoretical systematisation of the doctrine of direct effect, clarifying the distinctive character of horizontal direct effect and of consistent interpretation.<sup>50</sup> In both ambits the judgment is to be warmly welcomed, as it consolidates and expands the horizontal application of the principle of non-discrimination and provides a clearer indication of the differences between horizontal direct effect and consistent interpretation.<sup>51</sup>

*a. The scope of application of the principle of non-discrimination and of Directive 2000/78/EC*

The previous case law, in particular *Mangold* and *Kücükdeveci*, introduced a new perspective within the application of the doctrine of direct effect to general principles and secondary EU legislation. The usual understanding of their relationship has been, before these two seminal decisions, that general principles were not enjoying a scope of application broader than the legal instrument to which they were linked. As to the nature of the legal instrument involved, this has not represented an issue for regulations as well as for decisions, in as much as their scope of application is not limited by the Treaties. But, as it is quite trite

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<sup>47</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 29.

<sup>48</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 43.

<sup>49</sup> Criticism towards the horizontal application of general principles has been developed at different levels. In doctrine, see T. PAPADOPOULOS, *Criticizing the horizontal direct effect of the EU general principle of equality* in *European Human Rights Law Review*, 4/2011, p.437. However, some of the fiercest challengers of the horizontal application have been Advocate Generals of the Court of Justice. See, for instance: CJEU, Opinion of AG Ruiz-Jarabo Colomer in case C-397/01, *Pfeiffer*, para 46 and in joined cases C-55/07 and C-56/07, *Michaeler et al.* para 22; Opinion of AG Kokott in case C-321/05, *Kofoed v Skatteministeriet*, para 67; Opinion of AG Trstenjak in case C-282/10, *Dominguez cit.* paras 127 - 128. AG Trstenjak in particular maintains that the horizontal application of general principles would be in contrast with the limits towards the application of fundamental rights included in Art. 51 (2) of the Charter.

<sup>50</sup> See, for instance, the traditional case law on consistent interpretation, where the principle of legal certainty is expressly regarded as a limit towards consistent interpretation. For a relatively recent restatement of this case law, see *Impact* (C-268/06) *cit.* paras 100 – 101.

<sup>51</sup> See E. GUALCO and L. LOURENÇO, *op. cit.* p. 643.

EU law, directives are binding “only as to the results to be achieved” by the Member States.<sup>52</sup> This has limited the direct application and enforcement of EU law by the national jurisdictions to decisions involving litigation between the State administration and the citizens (vertical direct effect). Again, the problem arises when the judgment involves two private parties, as directives may only confer rights upon individuals – not generate obligations which are binding upon them. The direct application of the content of a directive in front of a national Court would rather lead to the imposition on individuals of obligations which should have been dealt with by the State. A similar issue was posed in the past in the notorious *Defrenne* case law,<sup>53</sup> where the Court accepted that a Treaty provision (former Art. 118 EEC, now Art. 157 TFEU), which affirms the principle of equal pay for equal work between men and women, was applicable to litigation between private parties. According to Lenaerts, however, it is clear from the reasoning of the Court in *Defrenne* that the source of the direct effect is not the Treaty provision involved but the principle of equal treatment, the specific importance of which has conferred direct effect also upon the provision of the Treaties.<sup>54</sup> The reasoning of the Court in *Dansk Industri*, accordingly, attempts to reorder the rules on the application of the above-mentioned principle to litigation involving private parties. The Court undertakes a similar reasoning: it clarifies that the principle of equal treatment finds its roots in various international instruments as well as in the constitutional traditions common to the Member States. It also mentions the Charter, which is recognised as the shrine of the general principle.<sup>55</sup> Up to this point, the legal reasoning looks consistent with the earlier reasoning in *Mangold* and *Kücükdeveci*. The Court of Justice, however, seems to go a few steps further. First, it tackles directly and with a systematic approach the issue of the scope of application of the Directive and of the principle, clearly stating that “the scope of the protection conferred by the directive does not go beyond that afforded by the principle”.<sup>56</sup> It is actually the first time that the directive is linked to the principle and not the contrary. In *Bartsch*, for instance, the Court was, on the contrary, linking the scope of application of the principle with that of the directive, with the effect that the principle was applicable on the condition that the Directive itself was applicable.<sup>57</sup> In this decision, on the contrary, the Court appears to define the principle while putting it into relationship with the Directive. The Court, however, to apply the principle refers to the “scope of

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<sup>52</sup> Art. 288 (3) TFEU.

<sup>53</sup> *Defrenne v Sabena (II)* (43/75) *cit.*

<sup>54</sup> K. LENAERTS, *The Principle of Equal Treatment and the European Court of Justice* in *Il Diritto dell'Unione Europea*, 2013, p. 461 in part. p. 470. K. LENAERTS and J. GUTIERREZ FONS, *The Constitutional Allocation of Powers and General Principles in EU law* in *Common Market Law Review*, 2010, p. 1629 in part. p. 1648.

<sup>55</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 22.

<sup>56</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 23

<sup>57</sup> In *Bartsch* the Court found that there was no “link” between the facts of the case and EU law, as the term for implementation of the Directive 2000/78/EC was not yet expired for Germany: see *Bartsch* (C-427/06) *cit.* para 21. See also K. LENAERTS and J. GUTIERREZ FONS, *op. cit.* p. 1643.

the prohibition of discrimination” granted by the Directive, which is a definition broader than that in the previous case law, which seems to define the principle in relationship with the Directive.<sup>58</sup> As a consequence, the principle of non-discrimination can be applied if the situation falls within “the scope of the prohibition of non-discrimination” of the Directive. However, it can be maintained that “the scope of the prohibition” is wider than the “scope of application” of the Directive, otherwise we should assume that in this case the Directive itself would be applicable, contrary to the doctrine of direct effect.<sup>59</sup> The Court of Justice here perhaps refers to the scope of the Directive “*ratione materiae*”, as the decision is about the dismissal of a worker pursuant to Article 3(1)(c) of Directive 2000/78/EC.<sup>60</sup> This reasoning however seems to represent a step further, as it consolidates the case law in *Mangold* and *Kücükdeveci*, but appears to progressively detach the principle from the Directive. The Court then moves towards the apex of its reasoning, where it openly recognises that the principle of non-discrimination holds a specific, distinctive place within the constitutional legal order of the EU. At paragraph 26 of the judgment, the Court maintains that, given that the applicability of Directive 2000/78/EC to the Danish legislation in force has already been found in previous case law, the same “applies with regards to the fundamental principle of equality, the general principle prohibiting discrimination on grounds of age being a merely specific expression of that principle”.<sup>61</sup> It is worthy to note that Lenaerts theorised a similar approach, which envisages the fundamental role of the principle of non-discrimination within the EU constitutional order, pointing out that “general principles of EU law enjoy a ‘constitutional status’”.<sup>62</sup> The doctrine is not unanimous on this assumption, as other authoritative voices have raised different views in the past.<sup>63</sup> This cannot however undermine the potential of the innovation that the Court is supporting by opening to the use of general principles (and in particular of the principle of non-discrimination) when EU secondary legislation is not applicable.

*b. Towards a clearer theoretical systematisation of the difference between horizontal direct effect and consistent interpretation?*

One relevant objection that advocates of the horizontal direct effect of general principles face when arguing in its favour is that the *effet utile* of the directive can be equally ensured through the consistent

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<sup>58</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 24: “in order for it to be possible for the general principle prohibiting discrimination on grounds of age to be applicable to a situation such as that before the referring court, that situation must also fall within the scope of the prohibition of discrimination laid down by Directive 2000/78”.

<sup>59</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 25.

<sup>60</sup> The Court uses the expression: “The national legislation at issue falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on the ground of age”. *Dansk Industri (DI)* (C-441/14) *cit.* para 25.

<sup>61</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 26.

<sup>62</sup> K. LENAERTS, *op. cit.*, p. 470. K. LENAERTS and J. GUTIERREZ-FONS, *op. cit.* p. 1647.

<sup>63</sup> See, inter alia, V. SKOURIS, *Effet utile Versus Legal Certainty: The Case-law of the Court of justice on the Direct Effect of Directives in European Business Law Review*, 2006, p. 241, in part. p. 254.

interpretation of the national legislation.<sup>64</sup> Consequently, as AG Bot maintained in his Opinion, principles should be applied only if there is no other way to interpret national legislation consistently with the Directive.<sup>65</sup> In *Dansk Industri*, however, the Court of Justice seems to suggest a clearer definition of the difference between direct effect and consistent interpretation and, most importantly, appears to enlarge the number of cases in which the principle can be used, representing another exception to the doctrine of consistent interpretation.<sup>66</sup> In this case the Court of Justice affirms that the principle of non-discrimination can be balanced and can prevail over the competing principles of legal certainty and legitimate expectations.<sup>67</sup>

The second question posed by the national Court can be partitioned in two different parts. The first part pertains to the possibility to interpret *contra legem* national legislation when this interpretation can conflict with the interpretation of a national court. In this part of its reasoning the Court of Justice gives a clear indication to the national Court as to the approach to be taken when a settled national jurisprudence is openly in conflict with EU law. For the Court of Justice, while there is an extensive case law on the limits of consistent interpretation,<sup>68</sup> the national Courts are under an obligation to change their established case law should it enter into conflict with EU law.<sup>69</sup> This consideration can be regarded as an obvious corollary of the principle of primacy of EU law over national law, but it also pertains, importantly, to the relationship between EU law and national Courts and, ultimately, the role of national judges as the very last interpreters of EU law.<sup>70</sup> Logically, the impossibility of interpreting national legislation in compliance with EU law because of the existence of conflicting national case law implies, for the Court, the disapplication of the conflicting national provision.<sup>71</sup> The Court of Justice appears to justify this move on the ground of the *sui generis* status of the principle of non-discrimination, which, in *AMS*, was openly recognised as a justiciable general principle.<sup>72</sup> The Court of Justice went on to say that “the principle prohibiting the discrimination on the ground of age, confers on private persons an individual right which

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<sup>64</sup> E.g. T. PAPADOPOULOS, *op. cit.*; M. DE MOL, *Küciikdeveci: Mangold Revisited - Horizontal Direct Effect of a General Principle of EU Law in European Constitutional Law Review*, 2010, p. 293 in part. p. 302.

<sup>65</sup> Opinion of the AG Bot in *Dansk Industri (DI)* (C-441/14) *cit.* para 64.

<sup>66</sup> See P. CRAIG, “The Legal Effect of Directives...”, *op. cit.* p. 357.

<sup>67</sup> See, for instance, C. BARNARD and S. PEERS (eds), *European Union Law*, Oxford, 2014, p. 157.

<sup>68</sup> See in particular: *Impact*, (C-268/06) [2008], *Dominguez* (C-282/10) [2012], *Association de médiation sociale (AMS)* (C-176/12) [2014].

<sup>69</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 33.

<sup>70</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 34.

<sup>71</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 35.

<sup>72</sup> *Association de médiation sociale (AMS)* (C-176/12) *cit.* para 47.

they may invoke as such”.<sup>73</sup> In *AMS*, in fact, the Court reads *Küçükdeveci*<sup>74</sup> in a very extensive way, raising the point of the independent application of the principle of non-discrimination and, departing from its reasoning in the first part of the decision and in the previous case law, holds that the principle can be invoked “as such”<sup>75</sup>, suggesting that only a very limited link with EU law might be necessary to trigger its application. This consideration also raised the question of the “preferential treatment” which is accorded to the general principle of non-discrimination (more specifically, on the grounds of age). From the same judgment we also know that this condition is not necessarily shared by other principles embodied in EU legislation as well as in the EU Charter of Fundamental Rights. Apparently, the Court of Justice justifies the horizontal application of the principle of non-discrimination by reference to its “fundamental” nature, as this principle is clearly the source from which most of the rights and principles embodied in the Treaties draw their source. This is another confirmation of the fact that the principle of non-discrimination, as Lenaerts has consistently held, is to be regarded as a constitutional principle of EU law.<sup>76</sup>

In the last part of its judgment, the Court solves the remaining two requests put forward by the Danish Supreme Court. First, the balance between the competing principles: on one side, the principle of non-discrimination, and on the other side, the principles of legitimate expectations and legal certainty. The Danish Supreme Court relies on the fact that these two principles are equally general principles of EU law, which should have the same value, *in abstracto*, as the principle of non-discrimination. Accordingly, it is asking the Court of Justice how to solve this apparent conflict. The Court of Justice, however, gives a predominantly procedural answer, refraining from going in depth into the analysis of the conflict of the two principles. The argument of the Court is based on the fact that the application of the principle of legal certainty would limit the temporal application of the Directive to situations which have taken place after the judgment.<sup>77</sup> The Court seems to avoid recognising a conflict between the two principles, limiting itself to considering the practical outcome should the legitimate expectations of the employer prevail. Second, the Court explains why the justiciability of the principle of non-discrimination is necessary, it not being a sufficient guarantee for those who have had their rights violated to be able to pursue damages in front of a national or European Court.<sup>78</sup> This substantiates the thesis that the principle of non-

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<sup>73</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 36.

<sup>74</sup> In *Association de médiation sociale (AMS)* (C-176/12) the Court does not quote a specific Paragraph of the judgment in *Küçükdeveci*, but makes reference to the decision as a whole.

<sup>75</sup> *Association de médiation sociale (AMS)* (C-176/12) *cit.* para 47.

<sup>76</sup> K. LENAERTS and J. GUTIERREZ-FONS, *op. cit.*, p. 1647. See also G. Martinico, *op. cit.*, p. 335.

<sup>77</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 40.

<sup>78</sup> *Dansk Industri (DI)* (C-441/14) *cit.* para 42: “[I]t should be noted that the fact that it is possible for private persons with an individual right deriving from EU law, such as, in the present case, employees, to claim compensation [...]

discrimination holds a special place within the general principles, as the Court in *AMS* has already maintained that not all the principles which are embodied in primary EU legislation can be enforced in front of a Court.<sup>79</sup>

#### 4. The non-application of the judgment of the Court of Justice by the Danish Supreme Court

The solution given by the Court of Justice in *Dansk Industri* represents an important systematisation of the case law on the principle of non-discrimination. Notwithstanding that, the Danish Supreme Court decided not to follow the indication provided for by the Court and decided not to apply the principle of non-discrimination. The Danish Supreme Court maintained that it was not possible to interpret Danish law in conformity with EU law, otherwise, as anticipated in its question for preliminary ruling, this would have been regarded as a *contra legem* interpretation.<sup>80</sup> The main reason for refusing the application of the preliminary ruling as resulting from the reasoning of the Danish Court can be summarised as follows: the principle of conferral does not allow the Court of Justice to claim the power to apply the principle of non-discrimination to a litigation between private parties.<sup>81</sup> In particular, the Danish Court says that the Danish Accession Agreement to the European Union of 1973 (as well as the Preparatory Works of the Danish Parliament) does not contain any legal basis to confer upon an unwritten EU principle the right to prevail over a provision of national law.<sup>82</sup> This restrictive and literal interpretation of the principle of conferred powers is not surprising as this is not the first case in which a national Supreme or Constitutional Court refuses to follow the indications received by the Court of Justice.<sup>83</sup> However, the argument used seems not to take into account the fact that the reasoning of the Court of Justice on primacy and direct effect is based on unwritten principles. Should it accordingly be assumed that this

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cannot alter the obligation the national court is under to uphold the interpretation of national law that is consistent with Directive 2000/78 or, if such an interpretation is not possible, to disapply the national provision that is at odds with the general principle prohibiting discrimination on ground of age”.

<sup>79</sup> *Association de médiation sociale (AMS)* (C-176/12) *cit.* para 45: “It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law”.

<sup>80</sup> It is worthy to note that the Advocate General was convinced of the opposite. See the Opinion of AG Bot in *Dansk Industri (DI)* (C-144/14) *cit.* paras 63 - 64.

<sup>81</sup> S. KLINGE, *Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle in EU Law Analysis*, 13 December 2016, <http://eulawanalysis.blogspot.it/2016/12/dialogue-or-disobedience-between.html> (Accessed January 25, 2018).

<sup>82</sup> Danish Supreme Court, decision of 6 December 2016, n. 15/2014 p. 40, <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf> (Accessed January 25, 2018).

<sup>83</sup> See CJEU, 22 June 2011, case C-399/09, *Marie Landtová*. On this point see generally O. POLLICINO *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?* in *Yearbook of European Law*, 2010, p. 65.



decision of the Danish Supreme Court is a challenge to the primacy of EU law over national law? Perhaps the real meaning of the judgment is that the Danish Court wants the Court of Justice to withdraw from its *Kücükdeveci* and *Mangold* case law and to go back to its *Dominguez* decision.<sup>84</sup> In that judgment the Court openly recognised that it is for the national Court to decide if it is possible to apply national law in conformity with EU law, without imposing the horizontal application of the principle of non-discrimination.<sup>85</sup> The *Dominguez* decision represents however a step back in the process of constitutionalization of EU law through general principles which the Court has strongly upheld in the recent past, and which is clearly reflected by the approach taken in *Danske Industri*. The refusal of the Danish Supreme Court to follow the preliminary ruling of the Court of Justice in *Danske Industri* is not however sufficient to reduce the impact and the importance of its decision. The authority of the decisions of the Court of Justice does not depend simply on their implementation at national level. Other national Courts can equally apply the judgment and at the same time other private parties can rely on the principle of non-discrimination in front of national Courts, provided that it is not possible to interpret national legislation according to EU law.

## 5. Conclusion

Despite the refusal of the Danish Supreme Court, the road towards the “fundamental” role of general principles appears better paved after this judgment.<sup>86</sup> There are however two (final) considerations that the decision raises and that the Court of Justice will have to address in the future. The first is the differentiation that the Court of Justice is operating between the different grounds of protection afforded by the principle of non-discrimination.<sup>87</sup> The analysis of the present judgment strongly reaffirms, six years after *Kücükdeveci*, that the principle of non-discrimination on the grounds of age can be triggered in front of national Courts and between private parties. The principle of non-discrimination on the grounds of age is however one of six grounds of discrimination protected by the Treaties,<sup>88</sup> and one of fifteen grounds of discrimination included in the Charter.<sup>89</sup> It is accordingly not misplaced to wonder whether the same approach is to be applied with all the different grounds of discrimination, or if it is restricted to

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<sup>84</sup> CJEU, 24 January 2012, case C-282/10, *Dominguez*.

<sup>85</sup> *Dominguez*, *cit.*, para 44.

<sup>86</sup> L.S. ROSSI, *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon* in *Yearbook of European Law*, 2008, p. 65.

<sup>87</sup> Noted also by T. PAPADOPOULOS, *op. cit.* p. 446.

<sup>88</sup> Art. 18 and 19 TFEU protect the discrimination on the grounds of nationality, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

<sup>89</sup> Art. 21 of the Charter of Fundamental Rights of the EU protects a wider range of grounds of discrimination: nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

certain grounds. However, as Lenaerts suggests, the “constitutional status” of general principles means that whether a general principle produces direct effect is a matter to be established by the Court of Justice.<sup>90</sup> This analysis is inevitably carried out on a case-by-case basis. We should not however be surprised by the fact that in this way the Court of Justice appears to introduce a difference in treatment between the protected grounds, as this is intrinsic to the relational character of the equality principle.<sup>91</sup> The second consideration contextualises the open *ultra vires* declaration by the Danish Supreme Court in the overall relationship between the Court of Justice and national Constitutional and Supreme Courts. The *ultra vires* review and the identity review<sup>92</sup> operated by the Constitutional and Supreme Courts of the Member States represent a challenge for the Court of Justice. The case law of the Court of Justice on national constitutional identities shows that the Court has accepted that the principle of equal treatment and its corollaries (the fundamental freedoms) can be limited by the rights that are embodied in national constitutions.<sup>93</sup> The national Courts, on the contrary, have not as yet shown a similar openness towards fundamental elements of EU law, or, at least, they are showing an increasing diffidence.<sup>94</sup> This fact can bring about important shortcomings, also in light of the consideration that the Court of Justice seems to increasingly regard the principle of non-discrimination on the ground of age as a distinctive character of the EU constitutional legal order, up to the point that it could be added to an hypothetical and *de jure condendo* EU constitutional identity.<sup>95</sup> In *Danske Industri* the Court of Justice reminds its national counterparts of the importance of the principle of non-discrimination to the EU constitutional legal order, and the Danish Supreme Court refuses its application. Will this lead to a stronger defence of the

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<sup>90</sup> K. LENAERTS, *op. cit.* at p. 469.

<sup>91</sup> One of the first comprehensive books about the principle of non-discrimination elaborates an analysis of this character of the equality principle which remains still actual. See M. BENEDETTELLI, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità Europee*, Milan, 1989, p. 18.

<sup>92</sup> German Constitutional Court, order of 8 December 2015, 1 BvR 99/11.

<sup>93</sup> The latest example has been the so called second *Taricco* decision, CJEU, 5 December 2017, case C-42/17, *M.A.S. and M.E.B.* CJEU, 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, CJEU, 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*.

<sup>94</sup> See, i.e. Italian Constitutional Court, judgment of 14 December 2017, n. 269/2017. In this decision, the Italian Constitutional Court, in an *obiter dictum*, appeared to restrict the possibility for national judges to disapply, although in very specific circumstances, national norms conflicting with EU law, ordering instead to uphold a preliminary ruling to the Court of Justice. On this point see the comments of L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter 'creativi' (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea* in *federalismi.it*, 3/2018 and F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, in *federalismi.it*, 4/2018.

<sup>95</sup> E.g. F.X. MILLET, *L'Union européenne et l'identité constitutionnelle des États membres*, Paris, 2013; L.S. ROSSI, *Fundamental Values, Principles and Rights After the Treaty of Lisbon: The Long Journey Towards a European Constitutional Identity*, in AA . VV. *Europe(s), Droit(s) européen(s), Liber Amicorum en l'honneur du Professeur Vlad Constantinesco*, Brussels, 2015, p. 511 ; L. BOURGOGNE-LARSEN (eds), *L'identité constitutionnelle saisie par les juges en Europe*, Paris, 2011. See also the considerations made in the Opinion of AG Wathelet in *Bogendorff von Wolffersdorff*, *cit.* paras 92 - 108.



principle of non-discrimination by the Court of Justice or, in the future, will the Court of Justice follow a more inclusive (although criticised)<sup>96</sup> style alike to the one in the *MAS and MEB(Taricco II)*<sup>97</sup> decision?

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<sup>96</sup>See e.g. D. BURCHARDT, *Belittling the Primacy of EU Law in Taricco II* in *Verfassungblog*, 7 December 2017, <https://verfassungblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/> (accessed 25 January 2018).

<sup>97</sup> *M.A.S. and M.E.B* (C-42/17), *cit.*