DANISH SUPREME COURT INFRINGES THE EU TREATIES BY ITS RULING IN THE AJOS CASE

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1. INTRODUCTION

This article discusses the rulings of the CJEU[1] and the Danish Supreme Court[2] in the *Ajos*-case. This case is about the general principle of prohibition of age discrimination. The dispute concerned two private persons – an employer and an employee – who disagreed on the payment of a severance allowance. The main legal issue in the case is how EU law is to be applied by the national courts in the context of disputes between private persons. The *Ajos*-case is a Danish example of the reception of the CJEU's judgments in *Mangold*[3] and *Kücükdeveci*[4] in national courts, see these cases and the reception of them by the German Bundesverfassungsgericht below in section 5. In its judgment in the *Ajos*-case, the CJEU upheld its findings in *Mangold* and *Kücükdeveci*. The Danish Supreme Court defied the CJEU and did the opposite of what the CJEU had held it was obliged to do.

The structure of this article is as follows: in section 2, we give a short description of the relevant facts and law in the *Ajos*-case. In section 3, we analyse the roles of the CJEU and the national courts in light of the theories of monism and dualism. Section 4 deals with interpretation. Section 5 looks into supremacy and direct horizontal effect of general principles of EU law, including the *Mangold* and *Kücükdeveci* case law and the horizontal effect of the Charter of Fundamental Rights. Section 6 discusses state liability for non-compliance with EU law. Section 7 discusses whether infringement proceedings can and should

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1 *Ajos*-case, C-441/41, EU:C:2016:278, opinion of the advocate general EU:C:2015:776.

2 2 Judgment of 6. December 2016 in case 15/2014, available in Danish at the Supreme Court's website www.hoejesteret.dk.

3 *Mangold*-case C-144/04, EU:C:2005:709.

4 *Kücükdeveci*-case C-555/07, EU:C:2010:21.

be taken against Denmark because of the Supreme Court's ruling. In section 8, we summarise the conclusions which we draw from the analysis undertaken in the previous sections.

2. PRESENTATION OF THE *AJOS*-CASE

The *Ajos*-case concerns a horizontal dispute and the consistent interpretation of general EU principles, and thus, not the consistent interpretation of directive articles.[5] The Danish Supreme Court asked two preliminary questions to the CJEU and the CJEU judgment came April 19, 2016. The Danish Supreme Court did not follow the CJEU in its ruling on December 6, 2016. This section will present the facts in the *Ajos*-case.

The *Ajos*-case concerned a dispute between two Danish private parties Ajos (the employer) and the legal heirs of the employee (Rasmussen). The dispute concerned the employer's refusal to pay the employee a severance allowance.

Rasmussen had been employed by Ajos since 1 June 1984 and was dismissed by Ajos on May 25, 2009, at the age of 60. Rasmussen was, in principle, entitled to a severance allowance equal to three months' salary under section 2a(1) the Act on Salaried Employees (Funktionærloven), which at that time provided that:

> **Section 2A**
> 1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.
> …
> 3. No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50.
> …

The Danish Supreme Court had established a settled legal practice on the interpretation of section 2a(3) of the Salaried Employees Act in its judgments of October 4, 1973,[6] December 7, 1988,[7] February 14, 1991,[8] May 9, 2008,[9] and January 17, 2014.[10] In those cases, the Supreme Court ruled that an employee was not entitled to severance payment if the employee upon his resignation was

[5] EU consistent interpretation on a directive cannot in itself impose obligations on an individual in horizontal cases, see below and the *Ajos*, paragraph 23.
[6] UfR 1973.898.
[7] UfR 1989.123 and UfR 1989.126.
[8] UfR 1991.314/1 UfR 1991.314/2 and UfR 1991.317.
[9] UfR 2008.1892.
[10] UfR 2014.1119.

entitled to a retirement pension from the employer, regardless of whether the employee had chosen to make use of the right to pension.

Rasmussen was entitled to an old-age pension payable by the employer which, due to the previous interpretation of section 2a(3), barred his entitlement to the severance allowance, even though he remained on the employment market after his dismissal from Ajos. Hence, his trade union brought an action on behalf of Rasmussen claiming that Ajos should pay a severance allowance equal to three months' salary, in accordance with section 2a(1) of the Danish Salaried Employees Act.

2.1 The Danish Maritime and Commercial Court

The Danish Maritime and Commercial Court (the first instance) ruled that Ajos should pay compensation. The Danish Maritime and Commercial Court referred to the *Mangold*-case and the *Kücükdeveci* in which the CJEU had concluded that the principle of non-discrimination on the grounds of age was a general principle of EU law and that the national court in horizontal disputes must ensure that the principle of non-discrimination on the grounds of age is respected. Therefore, national courts cannot apply any national measure which is contrary to this principle. The Maritime and Commercial Court also referred to the *Ole Andersen*-case[11] in which the CJEU ruled that the Danish Supreme Court's interpretation of section 2a(3) was in violation of the Equal Treatment in Employment and Occupation Directive. The Ole Andersen-case concerned a vertical relation (public employer). Hence, in the *Ajos*-case, the Danish Maritime and Commercial Court found that the previous national interpretation of section 2a was inconsistent with the general EU principle prohibiting discrimination on grounds of age.

2.2 The preliminary question by the Danish Supreme Court

Ajos appealed to the Danish Supreme Court, stating that an interpretation similar to the judgment in the *Ole Andersen*-case, in a horizontal case as the *Ajos*-case would be *contra legem* in the present case. The Danish Supreme Court found it relevant to ask a preliminary question to the CJEU in order to determine the content and scope of the direct effect of the general EU principle prohibiting discrimination on the grounds of age in horizontal cases, and if so, which principle would take precedence: the general EU principle prohibiting discrimination on the grounds of age or the principle of legal certainty and the protection of legitimate expectations. Furthermore, the Danish Supreme Court

[11] *Ole Andersen*-case C-499/08, EU:C:2010:600.

questioned whether a claim of compensation from the Danish State on the account of the incompatibility of Danish law with EU law might be taken into account when the balancing exercise is carried out.[12]

2.3 The CJEU judgment in the *Ajos*-case

In CJEU's reply to the first question, on whether the general principle prohibiting discrimination on grounds of age is to be interpreted as precluding national legislation in a dispute between private persons in the present case, it is noted (with references to *Mangold* and *Kücükdeveci*) that "*the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States*".[13] In regard to the first question, the CJEU concluded[14] that the general principle of prohibiting discrimination on the grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as applicable in horizontal cases, and thus, in disputes between private parties as in the present case.

The CJEU firmly stated that Directive 2000/78 does not in itself lay down the general principle of prohibiting discrimination on the grounds of age. The directive gives concrete expression to this principle in relation to employment and occupation. Hence, the scope of the protection conferred by the directive does not go beyond that afforded by that principle.[15] Furthermore, the CJEU stated that it is required that the dispute falls within the scope of the directive to apply the general principle of prohibiting discrimination on the grounds of age, which was the case due to the judgment in the *Ole Andersen*-case.

In the second question, the Danish Supreme Court had asked whether EU law, in a horizontal dispute, is to be interpreted as permitting a national court where it is established that the relevant national legislation is at odds with the general principle prohibiting discrimination on the grounds of age, in order to balance this principle against the principles of legal certainty and the protection of legitimate expectations in favour of the latter principle, whilst taking into account that the Member States are under a duty to compensate for any harm suffered by private persons as a result of the incorrect transposition of a directive, such as Directive 2000/78.[16] In regard to the second question, the CJEU emphasised the previous rulings in the *Pfeiffer*-case[17] and the *Kücükdeveci*-case,

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12 Ibid., paragraphs 16–19.
13 *Ajos*, paragraph 29, *Mangold*, paragraph 74, and *Kücükdeveci*, paragraphs 20 and 21.
14 *Ajos*, paragraph 27.
15 Ibid., paragraph 23.
16 Ibid., paragraph 28.
17 *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584.

and stated that the fulfilment of the Member States obligation arising from a directive to achieve the result envisaged by that directive is binding on all the authorities of the Member States, including the courts.[18][19]

Furthermore, the CJEU concluded that the fact that it is possible for private persons with an individual right deriving from EU law to claim compensation[20] from a Member State, cannot alter the obligation to apply EU consistent interpretation. Hence, the CJEU stated that if an EU consistent interpretation is not possible, the national court must disapply the national provision that is at odds with the general principle of prohibiting discrimination on ground of age.

2.4 The Danish Supreme Court's judgment in the *Ajos*-case, December 6, 2016

The Danish Supreme Court did not follow the judgment of the CJEU in the *Ajos*-case and reversed the ruling of the Danish Maritime and Commercial Court. The Danish Supreme Court emphasised the established legal practice by the Supreme Court in which the Supreme Court ruled that an employee was not entitled to severance payment if the employee, upon his resignation, was entitled to a retirement pension from the employer, regardless of whether the employee chose to make use of the right to pension.

The Danish Supreme Court recognised the CJEU's jurisdiction to determine questions on the interpretation of EU law according to article 267 TFEU. In regard to the interpretation of general principles in EU law, the Supreme Court stated that the impact of EU rules on Danish law depends on the Act on Denmark's Accession to the European Economic Community from 1972 with later amendments.[21] In regard to the *Ajos*-case, it is the amendment of the Accession Act in 1993 in connection with Denmark's ratification of the Maastricht Treaty that is most important. The Danish Supreme Court concluded, on the basis of the preparatory works, that it was assumed in the bill which proposed the Maastricht amendment to the Accession Act that Article 6(3) TEU on general principles (including the principle of non-discrimination on the grounds of age) was not part of the conferral of power from Denmark to the EU. It is therefore a matter for Danish law and the Danish Supreme Court, as the highest Danish court, to decide whether the principle of non-discrimination on the grounds of age has a direct effect in Denmark with primacy over opposing

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18 *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26 and *Kücükdeveci* paragraph 47.

19 *Ajos*, paragraph 29, *Marshall*, 152/84, EU:C:1986:84, paragraph 48; *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 20; and *Pfeiffer and Others*, paragraph 108.

20 *Francovich,* C-6/90 and C-9/90, EU:C:1991:428, paragraph 33, and *Brasserie du pêcheur/ Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 20.

21 Act no 447 of October 11, 1972.

Danish law in a horizontal dispute, see further below in section 3. The Supreme Court also generally stated that Denmark had not conferred power over the EU to make the Charter of fundamental Rights directly applicable in Denmark, see on the principle of conferral below in section 3.1.3. and on the legal effect of the Charter section 5.2.3.

2.5 Legal developments since the *Ajos*-case

The Supreme Court's judgment in the *Ajos*-case concerns a dismissal made on 25 May 2009. The legal basis is greatly changed since this date. From 02.01.2015, the Salaried Employees Act is amended so that the former section 2a(3) no longer exists. From 1.12.2009, when the Lisbon Treaty entered into force, the EU's Charter of Fundamental Rights, which in Article 21 codifies the general principle of prohibiting discrimination on any ground, i.e. age, acquired treaty rank, see Article 6(1) TEU.

3. THE ROLES OF THE CJEU AND THE NATIONAL COURTS – MONISM AND DUALISM

The terms monism and dualism are doctrinal concepts which are often used in a vague meaning varying from author to author. In general, dualism refers to the idea that domestic law and international law are independent legal orders. In contrast, monism refers to the belief that domestic and international law are both components of the same legal system.

Most continental European countries are predominantly monistic. Before the EC membership, Denmark – like Sweden, Norway and UK – adhered to the dualistic theory. In proceedings before the Danish courts' sources of law of Danish origin took precedence over the sources of law adopted at international or European level.

In practice, the distinction between dualistic and monistic countries is not as sharp as in theory. Many countries are using elements from both theories.

In the *Ajos*-case, the Danish Supreme Court took a radical dualist view. It held that whether an EU provision can acquire the effect in Danish law, which the EU law requires, depends on the Danish Accession Act.[22] The Danish Supreme Court, not the CJEU, has the competence to interpret this Act. Thus, the Supreme Court attributed the role as final interpreter of the EU law's effect in Denmark to itself.

[22] See p. 40 in the judgment. The Danish original reads: 'Om en EU-retlig regel kan tillægges den virkning i dansk ret, som EU-retten kræver, beror i første række på loven om Danmarks tiltrædelse af Den Europæiske Union.'

The Danish Supreme Court is far from being alone in criticising the CJEU's judgments in *Mangold* and *Kücükdeveci,* but it has gone further than other critics in claiming that it has the competence to censure the CJEU, see below in section five on the German Bundesverfassungsericht's acceptance of the *Mangold* judgment. In our view, the Danish Supreme Court goes beyond its competence.

In Denmark, the dualistic approach has for a long time been modified by a rule of interpretation and a rule of presumption. Danish law is, as far as possible, to be interpreted in accordance with international rules Denmark has acceded to, and there is a presumption that the Danish legislature did not want to break an international obligation which Denmark has undertaken. The Danish law takes precedence only if the Danish legislature clearly and consciously breaks an international obligation.

The Supreme Court ruling in the *Ajos*-case is therefore only in line with the Danish dualistic tradition, if it can be assumed that the Danish Government and legislature (when ratifying the Maastricht Treaty in 1993) clearly and consciously sought to act in contravention of the Treaty on European Union (TEU). In our view, this cannot be assumed.

3.1 Monistic and dualistic elements in constitutional sources of law adopted at EU level

The proper functioning of the internal market and the EU require a high degree of uniformity in the way EU law is perceived and understood in the Member States. If each Member State could decide for itself what implications EU law has in the given Member State, the EU would be at risk of fragmentation. It is therefore useful from an EU point of view to have a certain unity of the national laws and EU law within the scope of EU law.

3.1.1 The foundational judgments of the CJEU on supremacy and direct effect

EU law started with the Rome Treaty, which entered into force on 1 January 1958 in a public international law form, but already in *van Gend en Loos* from 1963 and *COSTA/ENEL* from 1964,[23] the CJEU stated that the EEC Treaty (unlike ordinary international treaties) has introduced a special (*sui generis*) law which is integrated into national legal systems and is to be used by their courts as creating rights and obligations – not only for Member States – but also for their citizens and businesses, i.e. has a direct effect in Member States both verti-

[23] *van Gend en Loos*-case 26/62, EU:C:1963:1 and Costa/ENEL-case 6/64, EU:C:1964:66.

cally and horizontally and takes precedence over national sources of law. CJEU stated (emphasis added):

> By contrast with ordinary international treaties, the EEC Treaty has *created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply*.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally *the terms and the spirit of the Treaty*,[24] make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in *Article 5(2) [now Article 4(3) TEU]* and giving rise to the discrimination prohibited by Article 7 [now Article 18 TFEU].

Thus, the CJEU took a monistic approach 10 years before Denmark's entry into the EC, now EU. This is not surprising. Before Denmark's and UK's accession, as of 1 January 1973, all judges in the CJEU came from countries where the legacy of Hans Kelsen's Pure Theory of Law[25] was – and to a considerable extent still is – strong. In the book *Reine Rechtslehre*[26] from 1934, Kelsen defined the legal system as a hierarchical system of legal sources (Stufenbau). Kelsen assumes that the criterion for a norm's validity is whether it is created in accordance with a higher-ranking norm in the hierarchy of the sources of law, in the last resort the Basic norm (Grundnorm), and not whether the norm corresponds to an empirical fact or complies with a moral or political norm. Kelsen assumed that international and national sources of law are part of a single, monistic system which constitutes a single normative hierarchy, where the sources of law adopted at international level took precedence over national sources of law.

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[24] See on the role of the Spirit Ulla Neergaard and Ruth Nielsen: Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union in Ulla Neergaard, Ruth Nielsen & Lynn Roseberry (eds.): European Legal Method – Paradoxes and Revitalisation, Copenhagen 2011.

[25] See H.L.A Hart: Kelsen's Doctrine of the Unity of Law in S.L. Paulson and B.L. Poulson (eds.): Normativity and Norms. Critical Perspectives on Kelsenian Themes, Oxford 1998 p. 553 et seq., Alexander Somek: Kelsen Lives in European Journal of International Law, 2007 p. 409 et seq. and Marcus Klamert: The Principle of Loyalty in EU Law, chapter 4, part 2, Oxford 2014. This book is an open access publication, freely available on the internet.

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

3.1.2 Duty of loyalty, Article 4(3) TEU

Provisions on loyalty have been a constant element in the various EU Treaties.[27] In the Rome Treaty, the main provision on loyalty was found in Article 5 EEC. By the Maastricht Treaty, it was renumbered and became Article 10 EEC, and by the Lisbon Treaty, it achieved its current form in Article 4(3) TEU. The wording of these provisions has barely changed since the 1950s and is thus very similar to what is currently stated in Article 4 (3) TEU. In EU law scholarship, Article 4(3) is usually seen as a very important provision with a close connection to the principle *pacta sunt servanda* which is *jus cogens* in public international law.[28] As appears from the above quotation from *COSTA/ENEL,* the CJEU referred to Article 5 EEC (now Article 4(3) TEU) as legal basis for the principle of supremacy. It is also the legal basis for EU consistent interpretation of national law, see further below in section 4.

The Danish Supreme Court does not mention the duty of loyalty provided for in Article 4(3) TEU in its ruling in the *Ajos*-case. In our view, it clearly fails to fulfil its obligations under this provision when assuming that Denmark, one-sidedly by the Danish Accession Act, can decide the effect of EU law in Danish law, see below on the principle of conferral.

3.1.3 The principle of conferral, Article 5 TEU

EU law is based on the principle of conferral. Article 5(2) TEU provides (emphasis added):

> 2. Under the principle of conferral, the Union shall act only within the limits of the competences *conferred upon it by the Member Statesin the Treaties* to attain the objectives set out therein. Competences *not conferred upon the Union in the Treaties* remain with the Member States.

As appears from the wording of Article 5 TEU, the scope of the competence transfer from Denmark to the EU, in matters of fundamental rights, depends on what is provided in the Treaties. In contrast, the Danish Supreme Court took the view in its ruling of the *Ajos*-case that the Member States one-sidedly by national legislation can decide what competences are transferred to the EU, and that the Danish Accession Act does not confer competence to the EU with regard to Article 6(3) TEU and the Charter on fundamental rights which

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[27] Including the European Coal and Steel Community (ECSC) Treaty from 1951, see Article 86 of that treaty. See for a detailed discussion of Article 4(3) TEU Klamert, Marcus: The Principle of Loyalty in EU Law, Oxford 2014.

[28] See John Temple Lang: Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty, Fordham International Law Journal 2003 p. 1904 and Marcus Klamert: The Principle of Loyalty in EU Law, Oxford 2014.

according to Article 6(1) TEU has the same legal value as the Treaties (TFEU and TEU). That is in our view mistaken.

In matters of procedural law, only limited competence has been transferred from the Member States to the EU in the Treaties. In Denmark, there is for example no constitutional court and no administrative courts, as both are under the principle of conferral a purely national matter. The same applies to the division of cases between the courts.

Børge Dahl, who was president of the Supreme Court from 2010–2014, states in an essay entitled 'Hvad skal vi med Højesteret'[29] that the Danish Supreme Court during the last 30 years has developed from mainly being an appeals court to mainly being a court that creates precedents. This development is not within the scope of EU law. Danish authorities have retained sole competence on this development, because the Treaties do not confer competence on the Union in these matters, and not because the Danish Accession Act has not transferred sovereignty in regard to this issue to the EU. The potential of the Supreme Court judgment in the *Ajos*-case as a future precedent is limited by the legal development that has taken place since the dismissal in the *Ajos*-case, see on the legal developments above in section 2.5. The statutory provision – the former section 2a(3) in the Salaried Employees Act which was at issue in the *Ajos*-case – no longer exists. The Supreme Court does, however, go further than just deciding the case. It also states, as an *obiter dictum*, that the Charter of Fundamental Rights does not have direct effect in Denmark. This is contrary to EU law, see below in section 5.2.3. If the judgment is accepted as a precedent, it represents a potentially important restriction on the ban of discrimination in section 21 of the Charter. In our view, the judgment is not suited to become a precedent, see for arguments below in sections 3–5.

3.1.4 Preliminary rulings under Article 267 TFEU

The CJEU's judgment in the *Ajos*-case is a preliminary ruling under Article 267(3) TFEU.

3.1.4.1 General remarks

The main purpose of Article 267 TFEU on preliminary questions to the CJEU is to give national courts, which are in doubt about the interpretation of EU law, the opportunity to be assisted by the CJEU. This is supposed to contribute to a uniform understanding of EU law throughout the EU. Courts of the last

[29] See Børge Dahl: Hvad skal vi med Højesteret, in Michael Hansen Jensen, Søren Højgaard Mørup & Børge Dahl (eds.): Festskrift til Jens Peter Christensen, Copenhagen 2016.

instance have an obligation to ask questions to the CJEU unless the case is *acte clair*. In our view, the relevant EU law in the *Ajos*-case was *acte clair*. After the *Mangold* and *Kücükdevici* judgments, there was no doubt what the law was, see below in section 5.

3.1.4.2 Judicial activism by lower courts under Article 267(2) TFEU

The integration of EU law in Danish law takes place both at the initiative of EU legal actors and at the initiative of Danish legal actors, including courts at all levels. Article 267(2) TFEU gives all courts in the EU countries the competence to ask preliminary questions to the CJEU. The legal development around the former Danish Salaried Employees Act section 2a, which has occurred during the past 10 years, was started by the Western High Court which in the *Ole Andersen* case chose to use Article 267 (2) TFEU to ask the CJEU whether the former section 2a(3) in the Danish Salaried Employees Act, as interpreted in settled Supreme Court case-law, was in accordance with EU law. The events surrounding the former section 2a(3) of the Salaried Employees Act is a clear example of the integrative impact of Article 267(2) TFEU.[30]

3.1.5 The double role of the national courts within the scope of EU law

Within the scope of EU law, national courts have a double role when applying EU law in national cases. They serve both as a national court and a Community courts which have to comply with the above-mentioned duties under EU law. In the *Jongeneel Kaas*-case[31] the Advocate General stated (emphasis added):

> The national court wishes to ascertain whether that principle is directly applicable in a case such as that pending before it. The answer to that question must be in the affirmative. The general principles elicited by the Court from the primary and secondary provisions of Community law, and in particular from those fundamental values which are common to the legal systems of the Member States, form part of the Community legal order and may therefore be relied by individuals before *the national court which, as is well known, is also a Community court.*

In our view, the Supreme Court does not pay sufficient attention to its role as a Community court in the *Ajos*-case.

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[30] See on Article 267(2) TFEU Christina D. Tvarnø & Ruth Nielsen: Retskilder og Retsteorier, Copenhagen 2017, Chapter 3, and Ruth Nielsen: Judicial aktivisme i EF-arbejdsretten, Retfærd 1989 number 4, p. 14.

[31] *Jongeneel Kaas*-case 237/82, EU:C:1984:44.

3.2 Monistic and dualistic elements in Danish constitutional law

3.2.1 The Danish Constitution

Under section 3 of the Danish Constitution, the power of the State in Denmark is divided into *legislative power* which is vested in the parliament, *executive power* which is vested in the Government and *judicial power* which is vested in the courts. Under section 19, the Government acts on behalf of the state of Denmark in international affairs. It can only enter into obligations of major importance with the consent of Parliament. Section 20 of the Constitution provides that powers vested in Danish authorities may be delegated to international authorities' set-up by mutual agreement with other states for the promotion of international rules of law and cooperation. For the enactment of a Bill dealing with the above, a majority of five sixths of the Members of Parliament is required. If this majority is not obtained, whilst the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda. Denmark used section 20 of the Constitution when ratifying the Rome-Treaty in 1972, the Maastricht-Treaty in 1993, and the Amsterdam-Treaty in 1998. The other amendments to the Treaties have been ratified using section 19 of the Constitution. There was a referendum in 1972 in connection with Denmark's entry into the EEC and in 1992 and 1993 in connection with the ratification of the Maastricht-Treaty and the entry into the European Union, which was established by the Maastricht-Treaty.

3.2.2 Denmark's ratification of the Maastricht-Treaty – The Accession Act

The Maastricht Treaty of 1992 entered into force on 1.11.1993 after being ratified by all at the time 12 Member States of the Community. The ratification by Denmark was decided under sections 19 and 20 of the Constitution and also included the parliament's adoption of three laws and two referenda in 1992 and 1993. On the 2nd of June 1992, a majority of 50.7 per cent of the Danish electorate rejected the Maastricht Treaty.

After that, a so-called 'national compromise' was reached[32] and an agreement between Denmark and the other EU Member States (the Edinburgh Agreement) was concluded. It allowed Denmark to ratify the Maastricht Treaty with four reservations concerning citizenship, common defence policy, the third stage of the EMU (European Monetary Union, the Danish reservation is only a reservation against the single currency; the Euro), and cooperation on justice and home affairs. There was no fifth reservation stating that Denmark would

[32] Participants in the compromise were all the political parties represented in Parliament except Fremskridtspartiet.

not respect the fundamental rights in Article 6(3) TEU. Denmark's ratification of the Maastricht Treaty happened at national level through the adoption of three legislative proposals:

> L 176 Bill amending the Accession Act.
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> L177 Bill on Denmark's accession to the Edinburgh-decision and Maastricht Treaty.
>
> L 178 Bill on a referendum on the draft law on Denmark's accession to the Edinburgh Agreement and the Maastricht Treaty.
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> On 18 May 1993, a referendum on the L 177 was held. It resulted in a 'yes' to the Edinburgh agreement and the Maastricht Treaty: 56.7 per cent voted yes, 43.3 per cent no. Afterwards, Denmark ratified the Maastricht Treaty which then entered into force on 1.11.1993. The Accession Act of 1972 provides:[33]
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> § 2. Powers conferred upon Danish authorities by the Constitution may, to the extent provided for in the treaties, etc. listed in section 4, be exercised by institutions of the European Communities.
>
> § 3. Provisions provided for in the treaties, etc. listed in section 4 are put in force in Denmark to the extent they according to Community law are directly applicable in Denmark.
>
> 2. The same applies to legal acts adopted by the Community before Denmark's accession to the Communities and published in the Official Journal.
>
> § 4. The provisions of section 2 and section 3 apply to the following treaties etc.: …

In section 4 of the Accession Act, there is a list of a number of EU legal sources of law. By the amendment of the Act in 1993, the Maastricht Treaty with the limitations (the four Danish EU reservations), resulting from the Edinburgh Agreement, was added in section 4.

It is important to note that Denmark in the Accession Act section 3 leaves it to EU law to determine the extent to which the EU treaties listed in section 4 have supremacy over and direct applicability in Danish law. In spite of the wording of the Danish Accession Act, the Supreme Court chooses (on the basis of remarks in the preparatory works to the Act) to interpret it as not giving direct applicability to general principles covered by Article 6(3) TEU; and to the extent that it follows from the EU law – in casu the *Mangold/Kücükdeveci* case law – that they are directly applicable.

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[33] Our Translation. The Danish original reads:

> § 2. Beføjelser, som efter grundloven tilkommer rigets myndigheder, kan i det omfang, det er fastsat i de i § 4 nævnte traktater m. v., udøves af De europæiske Fællesskabers institutioner.
>
> § 3. Bestemmelserne i de i § 4 nævnte traktater m. v. sættes i kraft i Danmark i det omfang, de efter fællesskabsretten er umiddelbart anvendelige i Danmark.
>
> Stk. 2. Det samme gælder de retsakter, der er vedtaget af Fællesskabernes institutioner inden Danmarks tiltrædelse af Fællesskaberne og offentliggjort i De europæiske Fællesskabers Tidende.
>
> § 4. Bestemmelserne i § 2 og § 3 vedrører følgende traktater m.v.: …

The weight which the Supreme Court puts on the preparatory works of the Danish Accession Act is contrary to the ECJ's ruling in *Björnekulla*, see on that judgment below in section 4. The Danish Supreme Court states on page 40 in its judgment in the *Ajos*-case that:[34]

> Such general principles are, however, according to the Accession Act not directly applicable in Denmark, and they can therefore not be invoked in litigation between private parties. In this context reference can be made to the current provision in Article 6(3) TEU according to which fundamental rights… (here follows a reproduction of the text of Article 6(3) TEU). This provision was originally adopted in connection with the Maastricht-Treaty … it was in that connection by the amendment of the Accession Act assumed that this provision [i.e. Article 6(3) TEU] was not included in the provisions covered by section 2 on transfer of competence and section 3 on direct applicability … (reference to the preparatory work to the Danish Accession Act.)'

And on p. 42:

> 'It follows from the foregoing that principles that have been developed or established on the basis of Article 6(3) TEU according to the Accession Act have not been made directly applicable in Denmark. Similarly, under the Accession Act, provisions in the Charter including Article 21 on non-discrimination have not been made directly applicable in this country.'

4. CONSISTENT INTERPRETATION

Before the Danish Supreme Court, Ajos argued that the application of a rule, as clear and unambiguous as this which was laid down in Paragraph 2a(3) of the Salaried Employees Act, could not be precluded on the basis of the general principle of EU law prohibiting discrimination on the grounds of age without jeopardising the principles of the protection of legitimate expectations and legal

[34] Our translation. The Danish original reads: 'Det er endvidere velkendt og også forudset i tiltrædelsesloven, at EU-Domstolen kan udvikle og fastslå generelle principper, der har deres oprindelse i Den Europæiske Menneskerettighedskonvention og tilsvarende traktater og i medlemsstaternes fælles forfatningsmæssige traditioner. Sådanne generelle principper er imidlertid efter tiltrædelsesloven ikke umiddelbart anvendelige i Danmark, og de kan således ikke påberåbes i tvister mellem private. Der kan herved henvises til den nugældende bestemmelse i artikel 6, stk. 3, i Traktaten om Den Europæiske Union (TEU), hvorefter de grundlæggende rettigheder, som er garanteret ved Den Europæiske Menneskerettighedskonvention, og som de følger af medlemsstaternes fælles forfatningsmæssige traditioner, udgør generelle principper i EU-retten. Bestemmelsen blev oprindeligt vedtaget i forbindelse med Maastricht-Traktaten (som artikel F i afsnit I om fælles bestemmelser i Traktaten om Den Europæiske Union), og det blev ved ændringen af tiltrædelsesloven i den forbindelse lagt til grund, at bestemmelsen ikke hørte til de bestemmelser, der var omfattet af tiltrædelseslovens § 2 om overladelse af beføjelser og af § 3 om traktatbestemmelser mv., der er umiddelbart anvendelige i Danmark (Folketingstidende 1992–93, tillæg A, sp. 6698 smh. sp. 6467).

certainty,[35] and questioned to what extent an unwritten principle of EU law may preclude a private-sector employer from relying on a provision of national law that is at odds with that principle.[36]

In its settled case law on EU consistent interpretation of directives, the CJEU refers to both Article 4(3) TEU on the duty of loyal cooperation and Article 288(3) on the binding effect of directives. Hence, the obligation for EU consistent interpretation under Article 288(3) TFEU applies only to the directives, while the obligation for EU consistent interpretation under Article 4(3) TEU applies to any legal source under EU law,[37] e.g. the general EU-law principle on non-discrimination on the grounds of age. Thus, the national courts have a duty to protect the rights of citizens and business obtained, due to the EU rules, as a national court may suspend the enforcement of a national rule contrary to an EU law.[38] The CJEU referred in paragraph 29 of the *Ajos*-case to both the *Pfeiffer*-case and the *Kücükdeveci*-case, in which the CJEU stated that:

> "It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective."[39]

and

> "…the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to European Union law, the Court has held that it is for the national courts to provide the legal protection which individuals derive from the rules of European Union law and to ensure that those rules are fully effective."[40]

The Danish Supreme Court did not mention the *Pfeiffer*-case in the final verdict in the *Ajos*-case. In the *Ajos*-case, the CJEU stated in paragraph 30 that while it is true that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon against an individual (see the *Marshall*-case, the *Faccini Dori*-case and the *Pfeiffer*-case),[41] the fact remains that the CJEU has also consistently held that the fulfilment of the Member States' obligation arising from a directive to achieve the result envisaged by that directive is binding on all the authorities of the Member States, including the courts.[42]

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35 *Ajos*-case, paragraph 14.
36 Ibid., paragraph 15.
37 See further Christina D. Tvarnø og Ruth Nielsen, Retskilder og retsteorier, Copenhagen 2017 chapter 3.
38 *Factortame*-case.
39 *Pfeiffer and Others*, paragraph 111.
40 Kücükdeveci, paragraph 45.
41 *Marshall*-case 152/84, EU:C:1986:84, paragraph 48; *Faccini Dori*, paragraph 20; and Pfeiffer and Others, paragraph 108.
42 See von Colson and Kamann paragraph 26 and Kücükdeveci paragraph 47.

The national courts' obligation to the EU consistent interpretation requires that the courts consider the whole body of rules of the law and apply methods of interpretation that are recognised by those rules, in order to interpret it, as far as possible, in the light of the wording and the purpose of the directive concerned to achieve the result sought by the directive and, consequently, comply with the third paragraph of Article 288 TFEU",[43] subject to the principle of *contra legem*.[44]

The CJEU makes it quite clear that the obligation to EU consistent interpretation requires, due to the judgment in the in *Centrosteel*-case,[45] that national courts must change the established case-law, if it is based on an interpretation of national law incompatible with the objectives of a directive, and thus, the CJEU rejects the argument that an established national case-law (incompatible with EU law) is prior to EU consistent interpretation. Hence, the CJEU firmly stated that the Danish Supreme Court is under an obligation to ensure the legal protection which individuals derive from EU law and to ensure the full effectiveness of this law, disapplying any provision of national legislation contrary to the general principle prohibiting discrimination on the grounds of age.[46]

The interpretation provided by the CJEU in accordance with Article 267 TFEU, clarifies and defines the meaning and the scope of the EU law as it must be, or ought to have been, understood and applied from the time of its entering into force.[47]

4.1 Contra legem and general principles in horizontal cases

EU law principles are primary EU law. The *Ajos*-case concerns EU consistent interpretation of the national laws in conformity with primary EU law (the general principle of prohibition of age discrimination) and not (only) in conformity with an EU directive. When weighing the general principle of prohibition of age discrimination against the general principle of legal certainty, it is important whether the prohibition against discrimination in the hierarchy of the sources of EU law ranks as a directive, or whether it has the higher rank of primary law. In both the verdicts, and in the preliminary questions, The Danish Supreme Court did not consider the hierarchy of the EU legal sources. The Court refers in its arguments in favour of legal certainty to EU-case law,

[43] *Ajos,* paragraph 31, *Pfeiffer,* paragraphs 113 and 114, and *Kücükdeveci*, paragraph 48.
[44] *Impact*, C-268/06, EU:C:2008:223, paragraph 100; *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25; and *Association de médiation sociale*-case, C-176/12, EU:C:2014:2, paragraph 39.
[45] *Centrosteel,* C-456/98, EU:C:2000:402, paragraph 17.
[46] *Ajos,* paragraph 35, *Kücükdeveci*, paragraph 51 and *Association de médiation sociale*, paragraph 47.
[47] *Ajos,* paragraph 40.

but refers unsystematically to previous EU-cases, some of which only concerns directives, others that concern primary law, or both.

Since the *Kolpinghuis*-case,[48] there has been a general understanding that the obligation of EU consistent interpretation does not imply a duty to interpretation *contra legem*. With the *Ajos* judgment, for the first time, the CJEU defines what is meant by *contra legem* interpretation. According to the *Ajos*-case, *contra legem* means interpretation that is incompatible with the wording of the national legislative text.

In earlier case-law, the Danish Supreme Court has treated *contra legem* interpretation as meaning interpretation contrary to the wording of legislation, but in the last few years, the Danish Supreme Court has developed a new perception of *contra legem* interpretation including not only interpretation contrary to a legislative text, but also interpretation contrary to other sources of law, including settled case-law. Hence, according to the order for reference in the *Ajos*-case, it would be *contra legem* to interpret section 2a(3) of the Salaried Employees Act in a way which can bring it into line with the Employment Directive, as interpreted by the CJEU in the *Ole Andersen*-case.

The Advocat General Kokott stated in the *Ole Andersen*-case that an EU consistent interpretation of the former section 2a(3) was possible and that the strict application of the derogatory provision contained in the former section 2a(3) in the Danish Act was only based on the established case-law. Kokott stated that "Its wording ('[i]f the employee will – on termination of the employment relationship – receive an old-age pension …') could also be interpreted as meaning that it covers only persons who will actually receive their old-age pension, without necessarily including persons who merely may receive an old-age pension."

In regard to interpretation *contra legem,* the CJEU noted in the *Ajos*-case that the requirement to EU consistent interpretation entails an obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive.[49] Hence, the CJEU concluded that the Danish Supreme Court could not claim that the EU consistent interpretation of national law is impossible, based on the fact that the Supreme Court consistently has interpreted the provision in a manner that is incompatible with EU law.[50] Thus, the EU Court overrules the Supreme Court's interpretation of *contra legem*. Therefore, in regard to the definition of the EU consistent interpretation' limitation by *contra legem,* the source of law connected to *contra legem* is only black letter law and is thus not including established case-law as a source of law.

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48 *Kolpinghuis Nijmegen*-case, 80/86, EU:C:1987:431.

49 *Ajos*, paragraph 33. The CJEU also referred to *Centrosteel*, C-456/98, EU:C:2000:402, paragraph 17.

50 *Ajos*, paragraph 34.

Consequently, in a horizontal dispute, a national court cannot rely on the principle of the protection of legitimate expectations in order to continue to apply a rule of national law that is at odds with the general principle prohibiting discrimination on the grounds of age, as laid down by Directive 2000/78. In the *Ajos*-case, the Supreme Court ruled contrary to the CJEU's judgment and dismissed the private employer (Ajos) from complying with the general EU-law principle prohibiting age discrimination.

4.2 EU Consistent interpretation of the Act on Denmark's Accession to the European Union

In the final verdict, the Danish Supreme Court stated that the impact of EU rules in Danish law depends on the Accession Act from 1972 and due to the purpose of the act, as described in the preparatory works, the Danish Supreme Court would act outside the limits of its judicial power if it disapplied the former section 2a(3) as interpreted in established Supreme Court practice.

In this regard, it should be considered that the Danish Supreme Court is obliged to an EU consistent interpretation of the Accession Act. The wording of the Accession Act is in conformity with EU law. It is therefore easy to interpret the Accession Act EU consistent in such a way that general EU principles is part of the Treaties mentioned in section 3 and 4 in the Accession Act. The argument from the Danish Supreme Court that the preparatory works prohibit an EU consistent interpretation must be seen in light of the *Björnekulla*-case.[51]

The *Björnekulla*-case concerned the discrepancy between the wording in a directive and a Swedish preparatory work regarding the national act implementing the directive in a horizontal case. In the *Björnekulla*-case, the CJEU stated that national courts are required to conduct EU consistent interpretation "*as possible, in the light of the wording and the purpose of the directive in order to achieve the result*" of the directive, "*notwithstanding any contrary interpretation which may arise*" from the preparatory works implementing the national rule.[52] Hence, the Danish Supreme Court cannot rely only on the preparatory works to avoid an EU consistent interpretation of the Accession Act. Section 3 in the Accession Act refers to the Treaties of the EU, and thus, an EU consistent interpretation of section 3 in the Accession Act leads to the conclusion that general principles of EU law as defined by the CJEU should apply in Danish law with direct effect to the extent they have direct effect according to EU law, see on this question below in section 5.2.3. The conclusion presented by the Danish Supreme Court is not correct in regard to an EU consistent interpretation of the Accession Act.

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51 *Björnekulla*-case, C-371/02, EU:C:2004:275.
52 *Björnekulla*, paragraph 13.

5. SUPREMACY AND HORIZONTAL DIRECT EFFECT OF GENERAL PRINCIPLES IN EU LAW AND OF THE CHARTER

5.1 Supremacy

The principle of supremacy of EU law was well established before Denmark joined the European Economic Community in 1973. The principle of supremacy was established by the CJEU in 1964 by the decision in *Costa/ENEL,* and thus, EU law has precedence over national Danish law. Although the principle of primacy is not explicitly mentioned in the text of the Treaties, it follows from Declaration 17, which refers to EU case-law, that the principle of supremacy is one of the main principles of EU law. In this declaration, it is stated that:

> "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. Furthermore, the Opinion of the Council Legal Service of 22 June 2007 was explicitly mentioned in the Lisbon Treaty:[53]

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1]) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

The national courts must, according to footnote 1 in the legal opinion,[54] consider the principle on primacy:[55]

> "…that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

Thus the principle of supremacy was in effect both before and after the Lisbon Treaty. It implies that a national rule, which is contrary to the Treaties and the fundamental rights and general principles of law, must be disapplied. The Danish Supreme Court did not mention Declaration 17 in its reasoning in the

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53 Final Act. The Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

54 The Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

55 Ibid. and *Costa/ENEL.*

judgment, even though the declaration 17 states that the law stemming from the treaty cannot be overridden by national law.

5.2 Direct effect

Since the CJEU judgment in 1963, in the *Van Gend en Loos*-case, the principle of direct effect has been a fundamental principle of EU law amongst the principle of supremacy. Treaty provisions that are clear, precise and unconditional have a direct effect both in the vertical relation between citizens or businesses and the state, but often also in the horizontal relations between individuals, see the *Defrenne-II* case.[56] Directives have direct effect in the vertical relations, e.g. in the relationship between an employee and a public sector employer, if they are clear and precise, but directives do not have direct horizontal effect, see the *Dori*-case.[57] It is therefore crucial in the *Ajos*-case whether the general EU-law principle prohibiting age discrimination has horizontal direct effect in Danish law.

5.2.1 The Mangold and Kücükdeveci case law

The *Mangold*-case concerned a reference for a preliminary ruling in a horizontal German case concerning an interpretation of the Directive on fixed-term contracts[58] and the Equal Treatment in Employment and Occupation l Directive.[59] The CJEU concluded that it was the responsibility of the German court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, and that the German court should set aside any provision of national law which may be in conflict with the EU law.[60]

The *Kücükdeveci*-case concerned a reference for a preliminary ruling in a German horizontal case on the interpretation of the principle of non-discrimination on the grounds of age and of the Equal Treatment in Employment and Occupation l Directive. The CJEU concluded that the national court must ensure that the principle of non-discrimination on the grounds of age, as given expression in Directive 2000/78, is complied with. Hence, the national court must disapply any contrary provision of national legislation.[61]

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56 *Defrenne-II*-case 43/75, EU:C:1976:56.
57 *Faccini Dori*.
58 1999/70/EC.
59 2000/78/EC.
60 *Mangold*, paragraph 78.
61 *Kücükdeveci,* paragraph 56.

5.2.2 The reception in Germany of the Mangold and Kücükdeveci case law

When comparing the Danish Supreme Court's judgment in the *Ajos*-case with the Bundesverfassungsgericht's in the *Honeywell/Mangold* case, it is remarkable that the German Constitutional Court followed the CJEU and set aside the German national rule contrary to the general EU principle prohibiting age discrimination. Thus, the German Constitutional Court rejected the claim raised by Honeywell that the CJEU had exceeded its powers in the *Mangold*-case. The German Constitutional Court held that:

> "Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences."[62]

Opposite to the Danish Supreme Court, the German Constitutional Court recognized the CJEU's ruling in the Honeywell-case in regard to the horizontal direct effect of the general EU-law principle prohibiting age discrimination. In the *Kücükdeveci*-case, the CJEU concluded that the principle of non-discrimination on the grounds of age was a general principle of EU law. Therefore, it is for the national court to ensure that the principle of non-discrimination on the grounds of age, as expressed in the employment Directive, is complied with when hearing a dispute between individuals, and if necessary, the national court must disapply any conflicting national provision. The German Labour Court recognised the CJEU conclusion.

5.2.3 Direct horizontal effect of the Charter

Fundamental rights (human rights) are in Europe regulated in two different regional schemes – the EU law and the ECHR (European Convention on Human Rights).[63]

In the Rome Treaty, there were no provisions on fundamental rights. The CJEU began its case-law on fundamental rights in the early 1970's. In the Maastricht Treaty, the CJEU case law on fundamental rights was codified in Article 6 TEU.

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[62] BVerfG, Beschluss des Zweiten Senats vom 06. Juli 2010, – 2 BvR 2661/06 – Rn. (1-116), http://www.bverfg.de/e/rs20100706_2bvr266106.html.

[63] See Guy Harpaz, 'The European Court of Justice and its Relations with the European Court of human Rights: The Quest for Enhanced balance, Coherence and Legitimacy', Common Market Law Review 2009 p. 105 and Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', Common Market Law Review 2006 p. 629.

The EU's fundamental rights must be respected internally in the EU as a condition for the validity of secondary EU-legislation.[64] EU fundamental rights must also be respected in national law when a Member State is implementing EU law. In the *Wachauf*-case,[65] the CJEU stated (our emphasis):

> … would be incompatible with the requirements of the *protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules*, the Member States must, as far as possible, apply those rules

There is no doubt that the state of Denmark in the exercise of state power (legislative, executive, and judicial) in subject matters within the scope of EU law has an obligation to observe the fundamental rights. The scope of this obligation is, however, still – even after the Charter obtained treaty rank by the Lisbon Treaty – controversial. In our view the Charter has direct horizontal effect.[66]

6. STATE LIABILITY

In several cases,[67] the CJEU has stated "*the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty*.[68] Furthermore, the CJEU has held that this principle applies independently regardless of which authority of the Member State is responsible for the breach.[69] Furthermore, the CJEU stated that the full effectiveness of the rights established by EU law would be weakened if individuals were precluded from obtaining compensation when their rights were affected by an infringement of Community law, due to a decision of a court of a Member State adjudicating at last instance.[70] Hence, The CJEU has ruled that the principle of state liability

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64 See as an example *Test-Achats*-case, C-236/09, EU:C:2011:100, where the CJEU struck down Article 5(2) of directive 2004/113/EC on equal treatment of women and men in the access to and supply of goods and services which allowed use of gender specific actuarial data in pensions and insurance because it violated the general principle of prohibition against sex discrimination which is codified in Articles 21 and 23 of the Charter on fundamental rights.

65 *Wachauf*-case, 5/88, EU:C:1989:321, paragraph 19.

66 See Ruth Nielsen og Christina P. Tvarnø: Præjudikat eller ikke præjudikat – Om Chartrets retsvirkning i dansk ret efter EU-Domstolens og Højesterets avgørelser i Ajos-sagen, TfR nr. 2, 2017 and Eleni Frantziou: The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality, European Law Journal 2015.

67 *Francovich and Others*, paragraph 35; Brasserie du Pêcheur/Factortame, paragraph 31 and *Haim*-case C-424/97 EU:C:2000:357, paragraph 26.

68 *Köbler*-case, C-224/01, EU:C:2003:513, paragraph 30.

69 *Brasserie du Pêcheur and Factortame*, paragraph 32; *Konle*-case, C-302/97, EU:C:1999:271, paragraph 62 and *Haim,* paragraph 27.

70 *Köbler,* paragraph 34.

applies in all cases, where a Member State breaches the EU law, whichever organ of the State's act or omission was responsible.[71]

Three conditions must be met if a Member State has to compensate loss and damage caused to individuals as a result of the courts' breach of Community law for which the State is responsible: "*the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties*."[72]

The concept of "the State" is a functional concept. The State liability covers the responsibility for all institutions including regulators, courts, and administrative authorities. Thus, due to the principles derived from the *Francovich*-case, the Danish state can be held liable for the infringement of the EU law in the *Ajos*-case, if the Danish Supreme Court evidently has breached the applicable law.[73] In our view, this is the situation of the *Ajos*-case. If the employee cannot reach this result in Denmark, he can bring the case before the European Court of Human Rights. According to Article 41 ECHR, the Court can award damages for violations of human rights protected by the Convention. There is no prohibition against age discrimination in the ECHR, but there is protection against violations of the right to private property in Article 1 of Protocol 1 to the ECHR. When the employee (because of age discrimination) has not received the money he was entitled to, this is also a violation of his right to private property.[74]

7. INFRINGEMENT PROCEEDINGS AGAINST DENMARK

By virtue of Article 258 TFEU, the EU Commission can initiate infringement proceedings against Denmark, as a consequence of the Supreme Court's ruling in the *Ajos*-case. The Commission has already brought infringement proceedings against a Member State because of the conduct by a national court. This was the case in 2003, when Italy was convicted of failure to fulfil, because of the Italian Supreme Court's (Corte Suprema di Cassazione) misinterpretation of EU law.[75]

In 2004, the EU Commission submitted a reasoned opinion to the Swedish Government, which is the first step in an infringement process, because the

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71 *Brasserie du pecheur/Factortame*, *Francovich*, and *Konle*.
72 Köbler, paragraph 51 and paragraph 52.
73 Köbler, paragrapf 53.
74 See Ruth Nielsen: Statsligt erstatningsansvar for Højesterets fejlfortolkning af EU-retten in Festskrift til Peter Møgelvang-Hansen, Copenhagen 2016. The article is available in full text at the Nordic Arbetsrättsportal, http://arbetsratt.juridicum.su.se/
75 *Commission v Italy*-case C-129/00, EU:C:2003:656.

Swedish courts, especially the Swedish Supreme Court, were reluctant to ask preliminary questions to the CJEU pursuant to Article 267 TFEU.[76] Consequently, Sweden adopted a legislative amendment due to which the Swedish courts should justify a refusal to put a preliminary question. The EU Commission then stopped the infringement proceedings.[77]

Even though the Supreme Court's ruling is not likely to end up as an infringement case before the CJEU, we think that the Commission should send a formal notice to the Danish Government. This would put pressure on the Government to state publicly that it does not regard the Supreme Court's interpretation of the Danish Accession Act as a valid expression of Danish law. This would be useful for the public debate in Denmark.

8. CONCLUSION

In the preceding sections, we have shown that the Supreme Court in its judgment in the *Ajos*-case has violated EU law. Measured by the EU law requirements, it has committed serious errors. It has failed to fulfil its duty to interpret Danish law in conformity with EU law. This results in an interpretation of the Danish Accession Act which builds on the view that Denmark can accede to the TEU, which provides for fundamental rights, and according to EU law have a direct effect in the Member States on certain conditions and at the same time consider it a purely domestic Danish matter to decide the effects of EU law in Danish law.

This could give rise to infringement proceedings against Denmark and employees, who have lost money on the account of the misinterpretation by the Supreme Court, can sue Denmark and claim state liability. It also means that the judgment of the Supreme Court in the *Ajos*-case should not be accepted as a precedent in future cases, e.g. on the direct applicability of the Charter of fundamental rights in Denmark.

[76] Commission case number. 2003/2161, C(2004) 3899, 13. October 2004.

[77] See Ulf Bernitz: Förhandsavgöranden av EU-domstolen. Svenska domstolars hållning och praxis. Sieps 2010:2 http://www.sieps.se/sites/default/files/620-2010_2.pdf.