Common Market Law Review **55**: 17–54, 2018.

FROM COOPERATION TO COLLISION: THE ECJ'S *AJOS* RULING AND THE DANISH SUPREME COURT'S REFUSAL TO COMPLY

RASS HOLDGAARD, DANIELLA ELKAN and
GUSTAV KROHN SCHALDEMOSE*

Abstract

The article analyses the Ajos case and seeks to explain what led the Danish Supreme Court to refuse to comply with the judgment of the ECJ. The reasoning of the ECJ and the Danish Supreme Court are examined from the points of view of, respectively, the EU legal order and Danish law. It is argued that the judgments of the ECJ and of the Danish Supreme Court are both legally sound and understandable when read from each courts' legal perspective. However, regrettably, both courts failed in carrying out a judicial dialogue in the spirit of good faith. Instead, the preliminary reference procedure was used in a way that gradually built up tensions and ended in a clear clash. The article finally examines the significance of the lacunae that the case has left between Danish law and EU law

1. Introduction

On 6 December 2016, for the first time in Danish legal history, the Danish Supreme Court (SCDK) decided to disregard a judgment from the ECJ, handed down as a result of a preliminary reference from the SCDK itself.[1] A majority of eight (out of nine) judges found that the Danish Accession Act does not allow unwritten general EU law principles, such as the prohibition

* Kammeradvokaten, Law Firm Poul Schmith. We would like to thank the anonymous reviewers, Nina Holst-Christensen, Karsten Hagel-Sørensen and Luigi Lonardo for their valuable feedback. All errors are ours.

1. Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S* v. *the estate left by A*, Judgment of the Danish Supreme Court of 6 Dec. 2016. The SCDK's judgment is reported in the official Danish gazette: UfR 2017.824 H. UfR refers to the Danish Weekly Law Report. The judgment is available in an unofficial English translation : <www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>, (last visited 27 July 2017). In this article, we have made our own translation into English based on the original Danish judgment; there may therefore be minor linguistic discrepancies between our quotations, translated by us, and the unofficial English translation available on the SCDK's homepage. The ECJ judgment is Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S* v. *Estate of Karsten Eigil Rasmussen,* Judgment of the Court (Grand Chamber) of 19 April 2016, ECLI:EU:C:2016:278.

against discrimination on grounds of age, to be applied directly and take precedence over national law in a dispute between private parties. Moreover, in an *obiter dictum*, the SCDK held that the same applies to all EU Charter provisions.

This is not the first time that a national court has expressed its dissatisfaction with the ECJ. However, it is, to our knowledge, the first time in recent EU law history that the highest national court in a Member State so openly and in such general terms declared that it is unable – within its mandate as a court of law – to comply with an ECJ judgment. Overall, the judgment sends a clear message to the ECJ about how the SCDK perceives the rule of law and the role of judiciaries.

At first sight, the *Ajos*[2] case unfolded as a textbook example of an orderly judicial dialogue carried out within the confines of the preliminary reference procedure in Article 267 TFEU. However, a closer look at the exchange reveals that the process gradually enhanced frictions and ended in disagreement and collision. Not surprisingly, the case has given rise to much debate in the Danish legal community.[3] Some welcome the judgment of the SCDK as a sound and much needed defence of the Scandinavian legal method and of the rule of law and the principle of legal certainty. Others criticize it. In our view, it is, first and foremost, regrettable that the two courts were unable to find common ground, i.e. to listen genuinely, to explain properly, and to seek compromises. The judicial dialogue in *Ajos* is permeated with uncompromising language on both sides. Such language, coming from the highest courts themselves, is now spreading and coagulating in Danish EU law groupings and beyond. As a result, the Union legal order has become less

2. In the Danish legal community, the case is commonly abbreviated as the "*Ajos*" case (not the "*Dansk Industri*" case). Likewise, we will, in this article, generally refer to it as the "*Ajos*" case or just *Ajos*.

3. See e.g. Nielsen and Tvarnø, "Ajos-sagens betydning for rækkevidden af EU-konform fortolkning i forhold til det almindelige EU-retlige princip om forbud mod aldersdiskrimination", UfR 2016 B.269; Kristiansen, "Ajos-dommen og Højesterets dilemma", UfR 2016 B.301; Holdgaard, Elkan and Schaldemose, "Højesteret har sagt fra over for EU-Domstolen", 1 *Advokaten* (2017), 32–37; Kristiansen, "Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – Om Højesterets dom i Ajos-sagen", UfR 2017 B.75; Madsen, Palmer Olsen and Sadl, "Competing supremacies and clashing institutional rationalities: The Danish Supreme Court's decision in the *Ajos* case and the national limits of judicial cooperation", 23 ELJ (2017), 140–150; Sadl and Mair, "Mutual disempowerment: Case C-441/14, *Dansk Industri, acting on behalf of Ajos A/S* v. *Estate of Karsten Eigil Rasmussen* and Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S* v. *The estate left by A*", 13 EuConst (2017), 347–368; Nielsen and Tvarnø: "Præjudikat eller ikke præjudikat: Chartrets retsvirkning i dansk ret efter EU-domstolens og Højesterets afgørelser i Ajos-sagen", 130 *Tidsskrift for Rettsvitenskap* (2017), 218–246; Spiermann, "En højesteretsdom om EU-tiltrædelsesloven", UfR 2017 B.297. Neergaard and Sørensen, "Activist infighting among courts and breakdown of mutual trust? The Danish Supreme Court, the CJEU, and the Ajos Case", (2017) YEL, 1–39.

uniform and effective, and the legitimacy of the EU legal order has received a blow. Perhaps most paradoxically, and contrary to the intentions of SCDK and the ECJ, legal certainty for individuals in Denmark may now be reduced.

In this article, we first explain what happened, and then explore the significance of *Ajos* from the perspectives of EU and Danish law, covering a number of issues.

2. The factual and legal background to the *Ajos* case

Karsten Eigil Rasmussen was dismissed by Ajos A/S in May 2009. In June, he left his job and was subsequently employed elsewhere.

Mr Rasmussen was, in principle, entitled to severance allowance corresponding to three months' salary according to Paragraph 2a(1) of the Law on salaried employees. However, by way of exception, paragraph 2a(3) of the law provided: "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."[4] Mr Rasmussen had reached the age of 60 and was entitled to such an old-age pension from Ajos A/S under a scheme he had joined before reaching the age of 50. According to well-established Danish case law, the term "will receive" in subparagraph 3 covered situations in which the employee was *entitled* to old-age pension, but did not actually receive this pension, for instance because he or she continued to be on the labour market. Thus, Mr Rasmussen did not receive severance allowance from Ajos A/S when he left the company in June 2009.

On 12 October 2010, the ECJ delivered its judgment in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen*, which had been referred from the Western High Court in Denmark.[5] In that case, Mr Andersen claimed a right to severance allowance when he was dismissed by his *public* employer. The ECJ ruled that a provision such as paragraph 2a(3) of the law on salaried employees was contrary to the prohibition of discrimination on grounds of age contained in Articles 2 and 6(1) of Council Directive 2000/78, establishing a general framework for equal treatment in employment and occupation.[6] By precluding dismissed workers who were eligible for an old-age pension from the right to severance allowance *also* when these workers intended to continue their

4. Our translation. Emphasis added.

5. Case C-499/08, *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen* v. *Region Syddanmark*, EU:C:2010:600. The short name of this case on the Curia website is *Ingeniørforeningen i Danmark.*

6. Council Directive 2000/78/EC of 27 Nov. 2000, O.J. 2000, L 303/16.

career and thus do not actually receive the old-age pension, subparagraph 3 discriminated directly on grounds of age.[7]

After the judgment in Mr Andersen's case, paragraph 2a(3) was accordingly amended by the Danish Parliament, but only with effect for situations arising after 1 February 2015. However, Mr Rasmussen's claim for severance allowance concerned a situation arising *before* 1 February 2015. After *Ingeniørforeningen i Danmark, on behalf of Ole Andersen*, Mr Rasmussen brought an action against Ajos A/S claiming his right to severance allowance regardless of his entitlement to old-age pension. The Danish Maritime and Commercial Court ruled in favour of Mr Rasmussen.[8] The Court held that Danish law was contrary to Directive 2000/78 and thereby also the general principle of non-discrimination on grounds of age, and that this general principle can be relied upon in cases between *private* parties.

Ajos A/S appealed to the SCDK. After the oral hearing in June 2014, the SCDK decided to stay proceedings and make a preliminary reference to the ECJ.

3. The SCDK's reference for a preliminary ruling

As opposed to some other Member State courts, Danish courts generally never express their own opinions when referring preliminary questions to the ECJ. The SCDK departed from this practice in, for Danish standards, a remarkably detailed and reasoned preliminary reference.[9] The SCDK, first, noted that paragraph 2a(3) of Danish law on salaried employees had been consistently interpreted by Danish courts, including by the SCDK itself, to the effect that an employee was not entitled to a severance allowance if the employee was *entitled* to an old-age pension from the employer, irrespective of whether the employee opts to receive that pension, because he or she may continue to pursue a professional career. For that reason, that is to say a consistent body of national case law, the SCDK assumed that it would be *contra legem* to interpret paragraph 2a(3) in conformity with the way the ECJ interpreted

7. Following Case C-499/08, *Ingeniørforeningen i Danmark*, the SCDK on 17 Jan. 2014, decided a case brought by a number of employees against their *public* employers (reported in UfR 2014.1119 H). In this judgment, the SCDK held that the employees could rely *directly* on Arts. 2 and 6(1) of Directive 2000/78.

8. Mr Rasmussen died while the case was pending, and his estate subsequently took over his case.

9. See decision of 22 Sept. 2014, Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S* v. *the estate left by A*. The full text of the preliminary reference is – rather unusually – published on the SCDK's homepage and in the official gazette: UfR 2014.3667 H. Parts of the preliminary reference (points 6.1–6.12) are translated into English in the unofficial translation of the SCDK's judgment, cited *supra* note 1, at 1–5.

Directive 2000/78 in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen*.[10]

Under these circumstances, according to the SCDK, it was necessary to decide whether Mr Rasmussen could invoke the general principle of EU law prohibiting discrimination on grounds of age directly against Ajos A/S as a basis for his claim for severance allowance regardless of the conflicting provision in paragraph 2a(3) of the law on salaried employees.

Before formulating its questions to the ECJ, which referred to *Mangold*[11] and *Kücükdeveci*,[12] the SCDK described at length its problems with giving direct effect to the general principle prohibiting discrimination on grounds of age in a situation involving two private parties.

In its reference, the SCDK acknowledged the *Mangold* and *Kücükdeveci* cases, but recalled that this line of case law had to be balanced against the principle of legal certainty, which is also recognized by EU law. Note, in this respect, that it seems to have been of little interest to the SCDK that the precise scope of *Mangold* and *Kücükdeveci* has been discussed intensively in academic literature. In *Mangold*, the ECJ for the first time held that the principle of non-discrimination on grounds of age must be regarded as a general principle of EU law, and instructed a national court to set aside a national conflicting provision in a dispute between two private individuals. In *Kücükdeveci,* the ECJ confirmed this position. One reading of the cases suggests that *Mangold* and *Kücükdeveci* do not *per se* establish direct horizontal effect of the general principle of non-discrimination on grounds of age, but less dramatically simply establish that the principle can be used to *set aside incompatible national law* in disputes between private parties.[13] Another reading suggests that the ECJ has in fact established *direct horizontal effect of the general principle*.[14] The SCDK did not deal with these subtle differences.[15] It appears that, to the SCDK, irrespective of whether one adopts

10. Ibid., point 6.5 of the preliminary reference.

11. Case C-144/04, *Werner Mangold* v. *Rüdiger Helm*, EU:C:2005:709.

12. Case C-555/07, *Seda Kücükdeveci* v. *Swedex GmbH & Co. KG*, EU:C:2010:21.

13. See e.g. Dougan, "In defence of *Mangold*", in Arnull, Barnard, Dougan and Spaventa (Eds.), *A Constitutional Order of States, Essays in EU Law in Honour of Alan Dashwood* (Hart, 2011), pp. 219–244, at pp. 224–226.

14. See e.g. Spaventa, "The horizontal application of fundamental rights as general principles of Union law" in Arnull et al., op. cit. previous footnote, pp. 199–218, at pp. 209–210 and 215–216.

15. In fact, traces of both readings can be found in the SCDK's reference. Point 6.6 of the preliminary ruling suggests the first reading: "The main issue in this case then becomes whether an EU law principle prohibiting discrimination on grounds of age can be used as a basis for requiring the private-sector employer Ajos A/S to pay a severance allowance, even though it is not obliged to do so under paragraph 2a(3) of the law on salaried employees. The case thus raises issues of *whether an unwritten EU law principle can preclude an individual or*

a broad or a narrow interpretation of the ECJ's case law, private parties such as Ajos A/S will in some situations be subject to obligations which are directly enforceable even when such obligations are contrary to national law. To the SCDK, this *outcome* – whether it arises in all situations or only in cases where national legislation is set aside – gave rise to concerns in light of the principle of legal certainty and the protection of legitimate expectations. The SCDK expressed this concern for the principle of legal certainty and protection of legitimate expectations by quoting at length Advocate General Trstenjak's Opinion in *Dominguez*, which was critical of *Mangold*.[16] The SCDK recalled that in her Opinion, Advocate General Trstenjak had argued that the ECJ on numerous occasions has emphasized that the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. Furthermore, the SCDK emphasized those parts of the Advocate General's Opinion in which she argued that with *Mangold* and *Kücükdeveci*, it will never be possible for a private individual to predict when an unwritten general principle will set aside national law, and that this creates an uncertainty comparable to the situation which would exist if directives were given horizontal direct effect.[17]

The SCDK then asked two questions: first, did the unwritten EU law principle prohibiting discrimination on grounds of age have the same content and scope as the prohibition of discrimination on grounds of age in Directive 2000/78, or did the Directive perhaps stipulate a protection with a broader scope? (If it could be concluded that the EU law general principle prohibiting discrimination on grounds of age did not cover the type of discrimination which the ECJ had established with reference to Directive 2000/78 in

private-sector business from relying on a national legislative provision" (emphasis added). Point 6.12, on the other hand, suggests the second reading: "The question then arises as to the direct application of the principle in relations between individuals (so-called horizontal direct effect). Following the EU Court's judgment in Case C-144/04, *Mangold*, EU:C:2005:709 (particularly paras. 77 and 78), and Case C-555/07, *Kücükdeveci*, EU:C:2010:21 (particularly paras. 51 and 53), it must be assumed that *EU law requires that the prohibition of discrimination on grounds of age covered by that principle is to be applied directly by the national courts in cases between individuals as well*" (emphasis added).

16. Judgment of Danish Supreme Court, cited *supra* note 9, paras. 4.7 and 6.9, citing Opinion of A.G. Trstenjak in Case C-282/10, *Maribel Dominguez* v. *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, paras. 96, 116, 125–126, 145–147, 152–157 and 164–168.

17. Para 6.9 of the preliminary reference, cited *supra* note 9, with reference to para 164 in A.G. Trstenjak's Opinion in Case C-282/10, *Dominguez.*

Ingeniørforeningen i Danmark, on behalf of Ole Andersen, it would be possible to avoid applying the general principle in this horizontal dispute).[18]

Secondly, the SCDK sought guidance on the dilemma that – according to the SCDK – would arise if paragraph 2a(3) was in fact contrary to the general EU law principle prohibiting discrimination on grounds of age. The SCDK asked the ECJ whether it would be consistent with EU law to weigh the general principle of EU law prohibiting discrimination on grounds of age against the principle of legal certainty and the principle of the protection of legitimate expectations *and* to conclude on that basis that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age.[19]

For the Danish legal community, it was immediately clear that the SCDK had made an unusual preliminary reference, and that the SCDK hesitated to give full effect to the *Mangold* jurisprudence in Danish law.[20] However, nothing in the SCDK's referral suggested that it would have a problem giving full effect to the answers it would receive from the ECJ. Also the Danish Government understood that something important was at stake with the reference. In its written and oral submissions to the ECJ, it explained at length that it shared the SCDK's concerns about giving direct effect to general legal principles of EU law in horizontal disputes. The Danish Government argued, *inter alia*, that it ought to be in accordance with EU law in specific situations to let the principle of legal certainty and the principle of the protection of legitimate expectations take precedence over the principle prohibiting discrimination on grounds of age.[21] The SCDK in this respect suggested taking into account that individuals under certain circumstances are entitled to receive compensation for damages caused by Member State violations of EU law.

The concerns and criticism of the SCDK and the Danish Government did not go unnoticed at the hearing before the Grand Chamber on 7 July 2015. During the hearing, the Danish Government reportedly came under heavy fire from the Advocate General and several judges, who did not appear to share any of the Danish concerns. There was, however, to our knowledge, no discussion of the possibility that Denmark would not be able to comply with a judgment that merely confirmed the *Mangold/Kücükdeveci* case law.

18. Ibid., paras. 6.5 and 6.11–6.12 of the preliminary reference.

19. Ibid., para 6.6–6.12.

20. See Kristiansen, "Når dansk ret (måske) er uforenelig med EU-retten", (2015) *Juristen*, 225–235, at 232 and 234.

21. See, for a summary, Note of 18 Dec. 2014, Folketingets Europaudvalg, 2014–2015, EUU Alm. Del, bilag 219, available at <www.ft.dk/samling/20141/almdel/euu/bilag/219/1439465.pdf>, (last visited 30 July 2017).

4. Advocate General Bot's Opinion in *Ajos*

In his Opinion, Advocate General Bot did not directly answer the fundamental question referred by the SCDK on the application of the general principle of EU law prohibiting discrimination on grounds of age.[22] Instead, the Advocate General disagreed strongly with the premise of the SCDK that it would be *contra legem* to interpret paragraph 2a(3) in conformity with Directive 2000/78. After recalling at length the importance of the duty of consistent interpretation, he recognized that, in the end, "the interpretation of domestic law is a task that falls exclusively to national courts".[23] However, because the SCDK had relied only on established national case law in its conclusion that an EU consistent interpretation of national law would not be possible, the Advocate General noted that the ECJ had jurisdiction to "clarify the precise parameters" of when an interpretation would be *contra legem*.[24] On that basis, he argued that "a *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue", and – using that standard – "the referring court is very clearly not in that sort of situation".[25] According to the Advocate General, if the SCDK changed its case law it would "in no way obliging it to overstep the bounds of its jurisdiction."[26]

In arriving at this conclusion, the Advocate General primarily relied on the judgment in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen,* and the Opinion of Advocate General Kokott in that case. As noted by Advocate General Bot,[27] Advocate General Kokott stated that "it seems to me to be perfectly possible to interpret [paragraph 2a(3)] in conformity with [Directive 2000/78]".[28] In support of that view, Advocate General Bot, citing Advocate General Kokott, pointed out that "the current strict application of the derogatory provision contained in [paragraph 2a(3) was] based only on its interpretation by the Danish courts. Its wording could also be interpreted as meaning that it covers only persons who will actually receive their old-age pension, without necessarily also including persons who merely *may receive* an old-age pension".[29] Advocate General Bot further pointed to the fact that in its written statements in *Ajos*, the Commission too argued that the

22. Opinion of A.G. Bot of 25 Nov. 2015 in Case C-441/14*, Ajos,* EU:C:2015:776.
23. Ibid., paras. 41–52.
24. Ibid., para 53.
25. Ibid., paras. 68–69.
26. Ibid., para 71.
27. Ibid., para 61.
28. A.G. Kokott's Opinion in Case C-499/08, *Ingeniørforeningen i Danmark,* EU:C:2010:248 para 84.
29. Ibid.

interpretation which emerged from Danish case law did not necessarily follow from the wording of paragraph 2a(3) of the law on salaried employees.[30] Finally, according to the Advocate General, in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen,* the Danish Government appeared to have taken the view that it would not be impossible to interpret the Danish provision in line with the Directive 2000/78.[31]

The Advocate General added that ECJ's judgments are declaratory, and that only in exceptional circumstances can the ECJ under certain conditions limit the temporal effects of its judgments. It would thus be contrary to case law from the ECJ if the SCDK with reference to a principle of legal certainty were to limit its obligation of consistent interpretation.[32]

After that, the Advocate General did not reply to the questions asked but, instead, concluded that the SCDK was obliged to interpret national law in conformity with EU law and, presumably, on this basis eliminate the misconceived conflict in the specific case.

5. Judgment of the Court of Justice in *Ajos*

The ECJ confirmed the Advocate General's basic point on the duty of consistent interpretation, but chose also to answer the questions referred by the SCDK.

In addressing the first question, the Court recalled *Mangold* and *Kücükdeveci* noting that the general principle prohibiting discrimination on grounds of age must be regarded as a general principle of EU law.[33] Next, the Court noted that the prohibition of discrimination on grounds of age in Directive 2000/78 gives concrete expression to that general principle in relation to employment and occupation. For that reason, the scope of the protection conferred by the Directive does not go beyond that afforded by that principle.[34] The Court had already established in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen* that the Directive precluded a provision like paragraph 2a(3) of the law on salaried employees, and thus the general prohibition of discrimination on grounds of age likewise precluded such a national provision.[35]

On the second and more fundamental question, the ECJ's reasoning can be split into four steps: first, and most elaborately, the ECJ noted that the SCDK

30. A.G Bot's Opinion in C-441/14, *Ajos*, para 62.
31. Ibid., para 63.
32. Ibid., paras. 79–82.
33. Case C-441/14, *Ajos*, para 22.
34. Ibid., paras. 22–23.
35. Ibid., paras. 25–27.

got the duty of consistent interpretation wrong. As the Advocate General had explained at length, the SCDK cannot merely rely on its own consistent case law when concluding that a certain interpretation would be *contra legem*.[36] The ECJ – like the Advocate General – held that "the requirement to interpret national law in conformity with EU law entails the 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 …"[37] Thus, the SCDK "could not validly claim that it was impossible to interpret the national provision at issue in conformity with EU law by the mere reason that it had consistently interpreted that provision in a manner incompatible with EU law."[38] With this clarification of the scope of the duty of consistent interpretation, the ECJ left it to the SCDK to decide on this issue.

Second, the ECJ recalled briefly that according to well-established case law, if the SCDK finally concludes there is a *contra legem* situation, the SCDK *is* obliged to disapply the conflicting national provision – also in a dispute between individuals.[39]

Third, the ECJ made it clear that a "national court cannot rely on [the principle 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 grounds of age".[40] This was for two reasons: first, "the application of the principle of the protection of legitimate expectations as contemplated by the referring court would, in practice, have the effect of limiting the temporal effects of the Court's interpretation because, as a result of that application, such an interpretation would not be applicable in the main proceedings."[41] Second, with reference to *Defrenne*[42] and *Barber,*[43] the Court noted that the protection of legitimate expectations could not "in any event" be relied on for the purpose of denying an individual – who has brought proceedings culminating in the Court interpreting EU law to preclude the national provision – the possibility of relying on the Court's interpretation subsequently.[44] Fourth and finally, the ECJ noted that the doctrine of State

36. Ibid., paras. 30–34.
37. Ibid., para 33, citing Case C-456/98, *Centrosteel* v. *Adipol,* EU:C:2000:402, para 17.
38. Ibid., para 34.
39. Ibid., paras. 35–37.
40. Ibid., paras. 38–39.
41. Ibid., para 39.
42. Case 43/75, *Gabrielle Defrenne* v. *Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56.
43. Case C-262/88, *Douglas Harvey Barber* v. *Guardian Royal Exchange Assurance Group*, EU:C:1990:209.
44. Case C-441/14, *Ajos*, para 41.

liability for breaches of EU law could not alter the SCDK's obligation to disapply the conflicting national provision.[45]

Thus, the ECJ did not accept the SCDK's long invitation to reconsider the *Mangold/Kücükdeveci* case law or find a compromise. It rejected this outright and gave the SCDK two options to arrive at the same result, i.e. that Ajos A/S was required to pay the severance allowance to Mr Rasmussen: the SCDK could arrive there either by interpreting Danish law in accordance with EU law or – if such an interpretation would be *contra legem* – it could allow Mr Rasmussen to invoke the general principle prohibiting discrimination on grounds of age directly against Ajos A/S and thus set aside the conflicting national legislation.

6. The judgment of the Danish Supreme Court

In its subsequent judgment, the SCDK rejected both options.[46] First, the SCDK maintained that it could not interpret Danish law in a manner consistent with the Directive. It should be recalled that, in its preliminary reference to the ECJ, the SCDK had only referred to well-established national case law to support its conclusion that it would be *contra legem* to interpret Danish law consistently with EU law. In its judgment, in light of the ECJ's instructions, the SCDK re-examined the question in light of its own consistent case law *and* the wording of paragraph 2a(3) of the law on salaried employees and the relevant preparatory works. The SCDK stressed that the preparatory works[47] showed that the Danish legislature, in connection with a revision of the law on salaried employees in 1996, had been aware of how the relevant provision was interpreted in case law and did not correct the Danish courts' interpretation of the provision. Under these circumstances, according to the SCDK, "the applicable law is clear", and it would not be possible, applying the principles of interpretation recognized in Danish law, to arrive at an interpretation of paragraph 2a(3) of the law on salaried employees which could bring it in line with Directive 2000/78 as interpreted by the ECJ in *Ingeniørforeningen i Danmark, on behalf of Ole Andersen*.

The SCDK then considered the possibility of giving Mr Rasmussen his right to severance allowance *directly* on the basis of the unwritten EU law principle prohibiting discrimination on grounds of age regardless of the conflicting Danish provision.

45. Ibid., paras. 41–42.
46. SCDK, Case 15/2014, *Ajos*. Unofficial translation.
47. Folketingstidende 1995–96, Annex A, L 180, p. 3537.

On this point, the SCDK was divided: the majority of eight out of nine judges concluded that it was *not* possible to give Mr Rasmussen this right under Danish law. The majority began with a clear affirmation of the Danish legal system's dualistic approach to international law, including EU law: the SCDK noted that the ECJ, *according to EU law*, has competence, pursuant to Article 267 TFEU, to decide whether an EU law rule has direct applicability with precedence over national law, including in disputes between private parties. However, "whether a rule of EU law can be given direct effect in Danish law, as required under EU law, depends first and foremost[48] on the [Danish Accession Act]".[49]

The SCDK then recalled the main structure of the Danish Accession Act: Section 2 confers *competences* on the EU institutions to exercise those powers which follow from the EU treaties listed in Section 4 and which would otherwisen according to the Danish Constitution belong to Danish authorities.[50] Section 3(1) provides that the provisions in the EU treaties listed in Section 4 enter into force in Denmark to the extent that EU law requires that they are *directly applicable* in Denmark, and Section 3(2) provides the same for secondary EU legislation which had entered into force prior to Denmark's accession. Section 4 then exhaustively lists all EU treaties to which Denmark has acceded – from the Rome Treaty to the Lisbon Treaty.

With reference to the ECJ's judgments in *Mangold*, *Kücükdeveci* and the present *Ajos* case, the majority then assumed that the principle prohibiting discrimination on grounds of age is a general principle of EU law, which, according to the ECJ, is derived from various international instruments and the constitutional traditions common to the Member States. The SCDK noted that the ECJ does not in these judgments refer to those Treaties listed in Section 4 of the Accession Act as a basis for the principle.

A situation whereby such an unwritten principle, without any basis in a specific provision of the EU Treaties listed in Section 4 of the Act, produces

48. Presumably, the SCDK with this qualification ("first and foremost") indicates that the Danish Constitution (particularly Section 20) may also set limits to the applicability of EU law in Denmark. The SCDK, however, did not consider these constitutional limits in the case.

49. SCDK judgment, p. 45.

50. Conferring such competences on the EU requires compliance with a special procedure in Section 20 of the Danish Constitution, which reads:

> "1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.
> (2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas 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 laid down in section 42." The English translation of the Danish Constitution cited here is available at <www.legislationline.org/documents/section/constitutions> (last visited 30 July 2017).

direct effect and has the same legal value as the EU Treaties in disputes between private parties is not foreseen in the Accession Act.

This conclusion was substantiated by the SCDK through an in-depth analysis of the preparatory works of the Accession Act leading to Denmark joining the EU in 1972 and the subsequent amendments to the Act. In particular, the SCDK noted that, while it was well-known already in 1972 that the ECJ could develop general principles on the basis of international human rights law instruments and the common constitutional traditions of the Member States, such general principles are not foreseen to have direct applicability in disputes between private parties. In this respect, the majority traced the history of the (current) Article 6(3) TEU, which codifies this ECJ case law. It was adopted with the Maastricht Treaty, and at that time, according to the SCDK, it was assumed in the Accession Act that Article 6(3) TEU was merely a codification, and not among those provisions which were covered by Section 2 and 3 of the Act. The SCDK then noted that the general principle prohibiting discrimination on the grounds of age can now also be found in Article 21 of the Charter. The SCDK further noted that according to Article 6(1) TEU, the Charter has the same legal value as the Treaties, and that the Charter does not confer new competences on the EU but is, according to Article 51 of the Charter, addressed to the Union institutions and the Member States when they implement EU law. "In accordance with this",[51] the SCDK said, the Ministry for Foreign Affairs in its report to the Danish Parliament explained that the Charter does not confer new competences on the EU. Moreover, in connection with the Accession to the Lisbon Treaty, in a reply to a question (no. 209) from the Danish Parliament about whether the Charter would produce legal obligations for individuals, the Minister for Foreign Affairs said: "No, the Charter is directed at the EU institutions and the Member States when they implement EU law."[52]

On that basis, the majority of the SCDK held that, under the Accession Act, principles developed or established on the basis of Article 6(3) TEU have not been made directly applicable (in horizontal relations)[53] in Denmark.

This conclusion could not, in the view of the majority, be changed by the fact that *Mangold*, in which the ECJ established the principle for the first time, was delivered in 2005 and thus existed when the Accession Act was amended

51. SCDK judgment, p. 47.
52. Ibid., p. 27 and p. 47.
53. The formulation "directly applicable" is used throughout the reasoning of SCDK. However, it is clear from the context of the judgment – and also confirmed by one of the SCDK judges at academic events – that the reference to "directly applicable" should be understood as directly applicable *in conflicts between private parties*, that is, horizontal direct effect.

in 2008 to implement the Lisbon Treaty. The majority noted that the *Mangold* judgment is *not* mentioned in the preparatory works to the Act of Accession to the Lisbon Treaty, and that the ECJ had not at that time ruled on whether general EU law principles on legal certainty and protection of legitimate expectations under certain circumstances could exclude direct applicability in disputes between private individuals.

On this basis, the majority concluded that the Accession Act does not, in a dispute between private individuals, contain a legal basis for allowing an unwritten principle prohibiting discrimination on grounds of age to be directly applied and take precedence over paragraph 2a(3) of the law on salaried employees insofar as the latter is contrary to the former.

In a final salute – perhaps alluding to Section 3 in the Danish Constitution[54] on the separation of powers and the different interpretative methods of the SCDK[55] and the ECJ – the SCDK held: "The Supreme Court would be acting outside the scope of its powers as a judicial authority if it were to disapply the provision [paragraph 2a(3)] in this situation."[56] Thus, Ajos A/S prevailed and could rely on paragraph 2a(3) of the law on salaried employees.

The dissenting Judge Scharling made clear that she understood the legal question as one of conferral of competence: "The question is whether the principle prohibiting discrimination on grounds of age, which according to EU law has direct applicability, and which is developed in the [ECJ's case law], is based on an application of the Treaty, which falls within the competences conferred to the EU by [the Danish Accession Act]."[57] She noted that *Mangold* makes it clear that this general principle applies in horizontal disputes, that *Mangold* is the result of the ECJ's law-making activities, that the SCDK on several occasions has accepted that the ECJ in its interpretations accords weight to other factors than the wording of a provision, including its purpose, and that this was known when Denmark acceded in 1973. She also noted that *Mangold* had been delivered *before* the amendment to the Accession Act, which implemented the Lisbon Treaty, and that the Danish legislature had made no (explicit) reservation about the horizontal direct effect in Denmark of the principle pronounced in *Mangold*. In other words, Judge Scharling's default position was that the Danish legislature had intended to implement EU law fully, including the *Mangold* judgment, and therefore she interpreted the silence in the preparatory works to the Lisbon Treaty

54. Section 3, on the separation of powers, in the Danish Constitution reads: "Legislative authority shall be vested in the King [i.e. the executive] and the Folketing conjointly. Executive authority shall be vested in the King. Judicial authority shall be vested in the courts."

55. See also Madsen et al., op. cit. *supra* note 3, at 142.

56. SCDK judgment, p. 48.

57. Ibid., p. 48.

Accession Act as confirmation that the Act provides a sufficient legal basis for Danish courts to give full effect to the *Mangold* judgment.

The merits of the *Mangold* approach have been discussed extensively elsewhere. It is not the purpose of this article to revisit the legal foundations of that case law. We simply note that the ECJ on several previous occasions has confirmed it, and that it did so again in *Ajos*. On that basis, we proceed to analyse the two courts' judgments from two perspectives: first, we explore whether each of the two judgments' reasoning is convincing in its own right, and what implications it may have. Secondly, we venture to speculate on how each court's judgment could possibly have been perceived by the other court. As we shall see, each court's reasoning is – from its own perspective and legal order – legally justified. Still, it is understandable, even likely, that each court's reasoning – from the perspective of the other court – was considered unnecessarily impervious and confrontational and thus incited a sharper reaction.

7. The duty of consistent interpretation and its limits: The question never asked by the SCDK

The SCDK never intended the *Ajos* case to be about the limits of the duty of consistent interpretation of national law. In its preliminary reference, the SCDK in passing indicated that consistent interpretation was not a possibility, since established Danish case law showed that such an interpretation would be *contra legem*.[58] Therefore, the SCDK did not ask the ECJ to rule on that point.[59] The SCDK did not even mention to the ECJ that the Danish legislature in a subsequent legislative amendment had confirmed this case law. This is standard practice in preliminary procedures, and considering that Danish courts already had several opportunities to decide on this issue after *Ingeniørforeningen i Danmark, on behalf of Ole Andersen*, it was only natural for the SCDK to be brief. It is clear from both the Advocate General's Opinion and the ECJ's judgment that they took the view that the SCDK had not tried

58. In fact, the SCDK had already indicated in UfR 2014.1119 H, cited *supra* note 7, that it would be *contra legem* to interpret Danish law consistent with the ECJ's interpretations in Case C-499/08, *Ingeniørforeningen i Danmark*.

59. Preliminary reference in *Ajos,* cited *supra* note 9, paras. 6.5–6.6, where the Court states that it would be *contra legem* to interpret the national provision in line with Directive 2000/78, and that "the main issue in this case then becomes whether an EU law principle prohibiting discrimination on grounds of age can be used as a basis for requiring the private-sector employer Ajos A/S to pay a severance allowance, even though it is not obliged to do so under paragraph 2a(3) of the law on salaried employees".

hard enough to interpret consistently. They quite clearly expected that the SCDK, in a sensitive case like this, would be able and willing to solve the case with an uncontroversial EU consistent interpretation of Danish law instead of creating an unnecessary conflict.

From an *EU law perspective*, the Advocate General's and the ECJ's handling of the duty of consistent interpretation is a notable further development in the long line of ECJ cases. As is known, the duty of consistent interpretation, first established in the *Von Colson* case[60] and based on the principle of loyal cooperation in (now) Article 4(3) TEU, resembles the principle of "public international law consistent" interpretation of national law, which is known in many domestic legal orders.[61] However, the EU law duty of consistent interpretation is different from the traditional notion of public international law consistent interpretation, because it is imposed on the national legal systems by the EU legal order itself – and not by the recipient Member State legal orders. This entails that the structures and limits of the duty are determined by EU law (the ECJ). The ECJ has normally been careful to frame, as a matter of principle, the duty as a "best endeavour" obligation. The duty basically entails that in their daily application of national law, national courts (and other authorities) should be as loyal to the EU legal order as possible. However, it is, ultimately, the national legal methodology, which determines how far national legal sources and interpretative techniques can be stretched before the result becomes *contra legem*. In numerous cases, the ECJ has put flesh on the bones of these basic tenets. For our purposes, it is worth recalling two strands in this jurisprudence: in one group of judgments, the ECJ has clarified *the scope of application* of this EU law duty of consistent interpretation: the duty applies also to national law adopted *prior* to the adoption of Union legislation;[62] it applies to some extent also *before* the implementation deadline of a directive expires; it applies also, where Union law applies, for mixed international agreements,[63] and so on. In another line of case law, the ECJ has clarified *the specific interpretative requirements,* i.e. *the content, in the duty of constructive interpretation* in various ways. Though always accepting as a matter of principle that it is the national court, which determines when a specific interpretation is *contra legem* by "applying the

60. Case 14/83, *Sabine von Colson and Elisabeth Kamann* v. *Land Nordrhein-Westfalen*, EU:C:1984:153.

61. Betlem and Nollkaemper, "Giving effect to public international law and European. Community law before domestic courts: A comparative analysis of the practice of consistent interpretation", 14 EJIL (2003), 569–589.

62. Case C-240/98, *Océano Grupo Editorial* v. *Rocío Murciano Quintero,* EU:C:2000:346, para 30.

63. Case C-431/05, *Merck Genéricos*, EU:C:2007:496, para 35.

interpretative methods recognized by domestic law",[64] the ECJ has instructed national courts to employ certain *specific interpretative techniques* in order to arrive at an EU law consistent result. As Martin Brenncke puts it, the ECJ has developed certain "European methodological rules" of interpretation.[65] In *Pfeiffer*, for example, the ECJ instructed the national court *"*to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive*"*.[66] In *Björnakulla,*[67] the referring Swedish court had indicated to the ECJ that the wording of the Swedish law on trade marks was not clear, but that the Swedish preparatory works suggested an interpretation which could be contrary to the Trade Mark Directive. Against that backdrop, the ECJ held that the obligation to interpret national law, as far as possible, in light of directives, "applies notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule."[68] In addition to these general interpretative guidelines to national courts, the ECJ does from time to time take the national court by the hand, and guide it very specifically as to how national law *could be* interpreted. A recent illustrative example is the *Klausner Holz* case, in which the ECJ strongly hinted at how the Landgericht Münster could interpret the notion of *res judicata* in light of paragraph 322(1) of the German code of civil procedure in order to arrive at an EU law consistent result.[69] However, also in *Klausner Holz*, the ECJ was careful to stress that it was up to the national court to examine whether such a result was possible under national law.

This latter group of cases is particularly illustrative of the thin line on which the ECJ balances when it puts flesh on the bone of the duty of EU law consistent interpretation: on the one hand, EU law demands from national courts that they use their domestic legal techniques "as far as possible" to arrive at EU consistent results, and from this starting point the ECJ may give specific interpretative instructions to the national courts. On the other hand, the duty of consistent interpretation applies by definition to interpretations and applications of national law. Article 4(3) TEU therefore never requires

64. Case C-235/03, *QDQ Media* v. *Alejandro Omedas Lecha*, paras. 14–15; C-268/06, *Impact* v. *Minister for Agriculture and Food and Others*, EU:C:2008:223, paras. 102–103.

65. Brenncke, "Hybrid methodology for the EU principle of consistent interpretation", (2017) *Statute Law Rev*, hmw048.

66. Joined Cases C-397-403/01, *Bernhard Pfeiffer and others* v. *Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584, para 115.

67. Case C-371/02, *Björnekulla Fruktindustrier AB* v. *Procordia Food AB*, EU:C:2004:275. See Klamert, "Judicial implementation of directives and anticipatory indirect effect: Connecting the dots", 46 CML Rev. (2006), 1251–1275, at 1259.

68. Case C-371/02, *Björnakulla*, para 13.

69. Case C-505/14, *Klausner Holz Niedersachsen GmbH* v. *Land Nordrhein-Westfalen*, EU:C:2015:742, paras. 36–37.

national courts to stretch their own legal methodology so far that the result becomes *contra legem*. With this balance, the ECJ aims to ensure that national courts give EU law maximum effectiveness and uniform application while respecting the general principles of law, in particular legal certainty and legitimate expectations.[70] However, the limits of the duty of consistent interpretation are not only about balancing fundamental principles common to the EU legal system and the Member States' legal systems (the principle of loyal cooperation, on the one hand, and the principles of legal certainty and legitimate expectations etc. on the other hand). These limits also ensure the division of competences between the EU and the Member States and the institutional balances within the EU (in particular by respecting Art. 288 TFEU, which entails that directives cannot be invoked directly *vis-à-vis* individuals, and which therefore requires that the duty of consistent interpretation does not circumvent Art. 288).[71]

In this light, three observations should be made about Advocate General Bot's Opinion and the ECJ's ruling on this point. *First*, on the tone and style: Advocate General Bot's Opinion is a detailed – and, arguably, from the perspective of a national supreme court slightly patronizing – exposition of why he is not convinced at all about the SCDK's conclusion that it would be *contra legem* to interpret national law consistently with EU law. In the view of the Advocate General, a national court is only "confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive", and the SCDK was "very clearly not in that sort of situation".[72] Even assuming the Advocate General was correct that the SCDK had done too little to interpret national law in conformity with EU law, taking over its job and correcting its interpretation of national law is, in our view, contrary to both the cooperative spirit of Article 267 TFEU and the balances on which the duty of consistent interpretation are founded. In addition, it is plainly counterproductive if one wants to avoid escalating a conflict.

70. The ECJ also allows other limits on the consistent interpretation obligation. This includes, notably, the principle of non-retroactivity of penal liability, see Case C-168/95, *Arcaro,* EU:C:1996:363, para 42, and the case law cited therein. The principle of legality was the focus of another topical example of judicial "dialogue" unfolding between the ECJ and Italian Constitutional Court in the *Taricco* saga, see C-105/14, *Taricco and others,* EU:C:2015:555 (*Taricco I*), and after the Italian court's new preliminary reference in Case C-42/17, *M.A.S. and M.B* (*Taricco II*), EU:C:2017:936. In the latter case, the ECJ accepted the invitation of the Italian Constitutional Court to nuance the ruling in *Taricco I*.

71. There is abundant literature on the purpose, nature and scope of the duty of consistent interpretation. See e.g. Craig, "The legal effect of directives: Policy, rules and exceptions", 34 EL Rev. (2009), 349–377; Prechal, *Directives in EC Law*, 2nd ed. (OUP, 2005), pp. 180–215

72. A.G. Opinion in Case C-441/14, *Ajos*, para 68.

The ECJ, rightly, did not endorse the Advocate General's strict definition of *contra legem* or follow his attempt to take over the job of the SCDK. Nevertheless, and this brings us to our *second* observation, also the ECJ challenged the assumption of the SCDK. The ECJ instructed the SCDK to reconsider its own well-established case law in order to seek an interpretation consistent with EU law. To justify this requirement, the ECJ referred ("to that effect") to the *Centrosteel*[73] case. However, *Centrosteel* does not directly support such detailed instructions to national courts about the legal value of their own past case law.[74] Therefore, the *Ajos* case is a new important step in the line of cases mentioned above in which the ECJ gradually builds a common "European interpretative methodology". In our view, though the ECJ should generally be careful not to intrude on the Member State courts' interpretative techniques, this particular instruction seems fully justified: as both the Advocate General and the ECJ convincingly explain, the duty of consistent interpretation necessarily requires national courts to reconsider their own established case law, since otherwise that duty could be greatly reduced in practice. Such a conclusion also seems to follow naturally from the long-held obligation to interpret national provisions consistently with EU legislation – also when the latter is adopted after the former. Such an obligation seems to logically assume that national courts and authorities should generally keep up with new legal developments in the EU, including new case law, and attempt to adapt their practices to them, regardless of the fact that different national legal systems accord different value to judicial precedents. Under Danish law, nothing prevents national courts from reconsidering their own past decisions in light of new legal developments, and the SCDK has done so itself on previous occasions.

On the other hand, *third*, the Advocate General's definition of *contra legem* (cited above) appears too restrictive and difficult to reconcile with previous case law in which the ECJ has always stressed (as the Advocate General also did) that the limits of the duty of consistent interpretation are set by national legal methodology. In many legal systems, the *contra legem* limit probably depends on other sources than the very wording of a written national provision. In Danish law, for example, where preparatory works are generally accorded great weight, it may in some cases be possible to arrive at an EU law consistent interpretation even if the wording of the national provision conflicts with this result, and it may, conversely, be unavoidable to establish a

73. Case C-456/98, *Centrosteel,* para 17.

74. Ibid.; the ECJ merely noted that the national court appeared to have already changed its interpretation. A.G. Jacobs, on the other hand, in his Opinion in *Centrosteel,* EU:C:2000:137, para 36, seems to take the view that the Corte Suprema di Cassazione was obliged to change the line of its case law following a judgment from the ECJ, which made its previous interpretations of Italian law contrary to EU law.

contra legem situation even if the wording of the provision may be open. Possibly, the Advocate General's definition of *contra legem* is a reaction to his suspicions that the SCDK in the *Ajos* case did not take its duty of consistent interpretation seriously.[75]

The Advocate General's and the ECJ's detailed instructions to the SCDK about how to interpret Danish law – possibly based on a misunderstanding because the preliminary reference was too short on this point – may have been perceived in Denmark as though Luxembourg was not taking the basic question in the reference seriously. Nevertheless, the SCDK in *Ajos* accepted the ECJ's (but not the Advocate General's) instructions on how to interpret national law in conformity with EU law. But even applying these standards, the SCDK maintained that it would be *contra legem* to interpret Danish law in a way that gave Mr Rasmussen a right to severance allowance. It is of course possible to question whether the SCDK in a true spirit of loyal cooperation really did interpret paragraph 2a(3) in light of EU law "as far as possible".[76]

8. Balancing general principles of EU law, uniform application and the temporal effect of ECJ judgments

With the second question to the ECJ, the SCDK proposed to the ECJ to refine its much criticized *Mangold* case law, and allow national courts to balance the general principle of EU law prohibiting discrimination on grounds of age against the principles of legal certainty and legitimate expectations.

No Danish court has ever before referred a preliminary question to the ECJ in which it has invited the ECJ to reconsider its previous case law *and* to develop a brand new doctrine whereby conflicting general principles of EU law can be balanced by national courts. It is also well known that the ECJ's *Mangold* jurisprudence is one of the most criticized lines of case law in the Court's recent history.[77] Several advocates general, as the SCDK noted, have

75. Note also that the SCDK did not agree with the A.G. on this point. The SCDK concluded that "the applicable [Danish] law is clear" ("*klar retstilstand*"), and therefore there was a *contra legem* situation.

76. The SCDK does not mention Case C-371/02, *Björnekulla,* in which the ECJ dealt with the value of national preparatory works for the purpose of EU consistent interpretation. Moreover, the SCDK does not mention Joined Cases C-397-403/01, *Pfeiffer* where the ECJ in para 112 has said that the national court when reading national legislation must "presume" that the national legislature "had the intention of fulfilling entirely the obligations arising from the directive concerned".

77. See e.g. Mazák and Moser, "Adjudication by reference to general principles of EU law: A second look at the *Mangold* case law", in Adams, de Waele, Meeusen and Straetmans (Eds.), *Judging Europe's Judges: Legitimacy of the Case Law of the European Court of Justice: The legitimacy of the case law of the European Court of Justice* (Hart, 2013), pp. 61–86; Spaventa,

invited the Court to reconsider or refine *Mangold*.[78] Most of the criticism of the *Mangold* judgment concerns whether the ECJ in this area acts outside its mandate as a court of law and intrudes on the legislature, and whether the ECJ properly respects the principles of legal certainty and legitimate expectations. In this light, from the perspective of the SCDK, one could perhaps have expected the Grand Chamber and its Advocate General to read carefully the SCDK's question and to engage seriously with the SCDK's proposal. From the perspective of the ECJ, however, the second question in the preliminary reference, and the reasoning that justified it, including the blunt insistence that there was a *contra legem* situation, could be perceived as a provocation rather than an honest attempt to compromise: in one reading, the second question asked by the SCDK simply requested the ECJ to reconsider and abandon *Mangold*. Such a proposal was certainly not new to the ECJ, and the ECJ may have considered the SCDK's question slightly out of time and place. That issue had now been fiercely debated for ten years by national courts, EU law scholars and advocates general. When *Ajos* arrived in September 2014, the ECJ had already had plenty of opportunities to reconsider *Mangold*, but consistently refused to do so. Moreover, even the German Constitutional Court had by now hesitantly accepted the ECJ's *Mangold* and *Kücükdeveci* rulings.[79] In addition, the ECJ had to some extent already been sensitive to the criticism of *Mangold* and in a number of subsequent cases it had been careful not to expand the *Mangold* reasoning into other areas of Union law.[80] So, why

op. cit. *supra* note 14; Editorial Comment, "Horizontal direct effect: A law of diminishing coherence", 43 CML Rev. (2006), 1–8. See, on the other hand, Lenaerts and Gutiérrez-Fons, "The role of general principles of EU law", in Arnull et al., op. cit. *supra* note 13, pp. 179–197; and Dougan, op. cit. *supra* note 13.

78. E.g. Opinion of A.G. Mazák in Case C-411/05, *Félix Palacios de la Villa* v. *Cortefiel Servicios SA*, EU:C:2007:106; Opinion of A.G. Kokott in Case C-321/05, *Hans Markus Kofoed* v. *Skatteministeriet*, EU:C:2007:86; Opinion of A.G. Colomer in Joined Cases C-55-56/07, *Michaeler and Others* v. *Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen*, EU:C:2008:42; and Opinion of A.G. Trstenjak in Case C-282/10, *Dominguez*.

79. See BverfG's judgment of 6 July 2010, 2 BvR 2661/06, (*Honeywell*). The judgment is available in English: <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html>, (last visited 27 July 2017). The BverfG has challenged the ECJ in other famous cases. However, also here the BverfG has, in the end, accepted the interpretations of the ECJ. In the *Gauweiler* case, for example, the BverfG – hesitantly – accepted the ECJ's ruling in Case C-62/14, *Peter Gauweiler and Others* v. *Deutscher Bundestag,* EU:C:2015:400; see BVerfG, Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13, DE:BVerfG:2016:rs20160621.2bvr272813. See on this case e.g. essays in the Special Issue, "The *OMT* decision of the German Federal Constitutional Court", 15 GLJ (2014).

80. See e.g. Pech, "Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*", 49 CML Rev. (2012), 1841–1880; Lazzerini, "(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS*", 51 CML Rev. (2014), 907–933.

now? Moreover, the second question referred proposed a compromise solution, which would allow national courts to balance general EU law principles and arrive at different results in specific cases. From the perspective of the SCDK, this was probably an attempt to allow the ECJ to preserve its *Mangold* case law, but mitigate its damaging effects in Danish law – thus a face-saving device for both parties.[81] And yet, from the perspective of the ECJ, the proposal may have appeared so unrealistic that it was almost insulting, so fundamentally at odds with basic EU law structures that it was self-evident it would not be feasible. After all, none of the many critics of *Mangold* has, to our knowledge, proposed to delegate such a balancing exercise to national courts.

Possibly for these reasons, the reply of the ECJ is regrettably brief and uncompromising, merely repeating EU law orthodoxy. The ECJ simply recalled that according to well-established case law, if the SCDK were to conclude that there was a *contra legem* situation, the SCDK was obliged to disapply the conflicting national provision – also in a dispute between individuals. That was the ECJ's short reply to the long invitation to revisit the *Mangold* case law.[82] As regards the SCDK's proposal to allow national courts to balance the unwritten and horizontally directly applicable general principle of EU law against the principle of legitimate expectations, the ECJ again flatly refused: "a national court cannot rely on [the principle 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 grounds of age".[83] The basic explanation is contained in one short paragraph: "the application of the principle of the protection of legitimate expectations as contemplated by the referring court would, in practice, have the effect of limiting the temporal effects of the Court's interpretation because, as a result of that application, such an interpretation would not be applicable in the main proceedings."[84] There is no further discussion with the SCDK and no further engagement with the SCDK's concerns about legal certainty and legitimate expectations.

81. The SCDK had also suggested that the doctrine on State liability for breaches of EU law could be applied, possibly hinting that the ECJ could mitigate the damaging effects on Mr Rasmussen's right not to be discriminated by adopting stricter conditions for liability for the Danish State.

82. Some might also find ECJ's short answer a missed opportunity to explain and clarify what *Mangold* actually lays down, including whether it establishes "true" direct horizontal effect or not. However, given the SCDK's lack of focus on that finer nuance of the *Mangold* case law, it was not imperative for the ECJ to clarify that point of law; see section 3 *supra* at note 15.

83. Case 441/14, *Ajos,* para 38.

84. Ibid., para 39. The ECJ's para 39 is not really a justification for its conclusion, but a mere statement of the ECJ position: Ajos A/S' legitimate expectations cannot deprive Mr Rasmussen of his legitimate rights to be able to invoke a directly applicable EU law right.

Probably, from the ECJ's perspective, the decentralized balancing exercise proposed by the SCDK was so at odds with the basic requirements of a uniform and effective application of EU law that it merited only a brief and concise rejection. Regardless of whether one likes the interpretations of the ECJ, it would simply not be a solution to allow every national court to assess, each on their own, whether compliance would be contrary to legal certainty and legitimate expectations, depending on the state of national law. Given that the ECJ was not willing to overturn its *Mangold* case law, the ECJ's short reason for rejecting the SCDK's proposal is, in our view, convincing.

According to well-established case law (*Defrenne* and *Barber*, which the ECJ mentions), if an otherwise confirmatory judgment from the ECJ exceptionally takes the Member States and their citizens, acting in good faith, by surprise, and if there are serious difficulties complying with the judgment, the ECJ can limit its temporal effects.[85] However, the ECJ has on several occasions been uncompromising in its insistence that it is only itself – and not national courts – who can limit the temporal effects of EU law, including of its own judgments. Most recently, in *Gutiérrez Naranjo and Others,*[86] the ECJ even instructed a lower Spanish court to disregard a decision from the Spanish Supreme Court according to which a declaration that certain consumer clauses were a nullity should have limited temporal effects in Spanish law. This decision from the Spanish Supreme Court, in reality, limited the temporal effects of a provision in the Unfair Consumers Directive. According to the ECJ, "it is for the Court alone, in the light of the fundamental requirement of a general and uniform application of EU law, to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of [an EU law] rule".[87] Moreover, according to the Court, limiting the temporal effects of an ECJ judgment is a one-time opportunity: "there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation which the Court gives of a provision of [EU] law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to [EU] law under that law,

85. See, generally, Lang, "Limitation of the temporal effects of judgments of the ECJ", 35 *Intertax* (2007), 230–245; Murauskas, "Temporal limitation by the Court of Justice of the EU: Dealing with the consequences", 6 EJLS (2013), 78–95.

86. Joined Cases C-154, 307 & C-308/15, *Francisco Gutiérrez Naranjo and Others,* EU:C:2016:980.

87. Ibid., para 66.

fulfilling, at the same time, the requirements arising from the principle of legal certainty".[88]

Had the ECJ accepted the SCDK's suggestion in the second preliminary question, it would have endangered EU-wide legal certainty. The SCDK's proposal would turn this whole body of ECJ case law on its head and thus undermine the binding effects of the ECJ's rulings and the uniform application of directly applicable EU law. Did the SCDK really believe that the status of national law (the law on salaried employees), as interpreted by national courts, should determine whether and from when primary Union law should be given direct effect, and that the ECJ would allow national courts themselves to determine this in specific cases? According to which criteria would this balancing take place? Regardless of whether the national legislature and the national courts had acted in good faith? How could the two individuals in the *Ajos* case be more certain about their legal position in a situation where two legal systems provide for opposite results, and where a national court should then decide which one to give precedence after a balancing exercise? From the perspective of EU law, the SCDK's proposal would remove – rather than improve – legal certainty and the legitimate expectations of those Union citizens who attempted to enforce their directly applicable EU law rights. In reality, the ECJ said, what the SCDK asked was for a mandate to plainly disregard *Ingeniørforeningen i Danmark, on behalf of Ole Andersen* in disputes between private parties in Denmark *until* the Danish legislature decided to bring Danish law in compliance with EU law.[89] In order to do so, the ECJ would have to deviate from all the basic features of the case law-created conditions for limiting the temporal effects of ECJ judgments (good faith, serious consequences, "one single opportunity"). However, from the perspective of the ECJ, just as the interpretation and application of national law under the duty of consistent interpretation is and should be the reserve of the SCDK, as we saw above in section 7, the interpretation, including the determination of the effects, of directly applicable Union law should be the reserve of the ECJ.

There is another interesting, rather hidden point here. The Advocate General and the ECJ hinted that the SCDK could have made an ordinary request to the ECJ to limit the temporal effects of the ECJ's *Ajos* judgment. Perhaps it was too late to make this request in relation to the interpretation of the Directive given in the *Ole Andersen* judgment. However, the *Ole Andersen*

88. C-292/04, *Wienand Meilicke and Others* v. *Finanzamt Bonn-Innenstadt*, EU:C:2007:132, para 36 (a quote also used by A.G. Bot in his Opinion in Case C-441/14, *Ajos*, at para 80).

89. The law on salaried employees was, as mentioned in section 2 *supra*, amended in Feb. 2015 to comply with Case C-499/08, *Ingeniørforeningen i Danmark*.

case did not concern the interpretation of the general principle prohibiting discrimination on grounds of age, and it did not concern a horizontal relationship as in *Ajos*. Thus, a new request to limit the temporal effects of the ECJ's *Ajos* judgment could have been submitted. Such requests have been made successfully before, and the ECJ has in the past been willing to decide to limit the temporal effects of its rulings when it makes novel interpretations of Treaty provisions, which could give rise to uncertainty in relations between private parties.[90] Was that perhaps, in the eyes of the ECJ, a missed opportunity for a compromise solution in the case?

However, as the case was presented to the ECJ, the SCDK in reality left the ECJ with an either/or question: *either* the ECJ could overturn the *Mangold acquis* completely and roll back its existing case law on the horizontal direct effect of general principles of EU law, *or* it could confirm its case law and, as a necessary consequence, demand that all national courts, also the SCDK, comply with it and set aside conflicting national legislation. The middle-ground proposed by the SCDK was not feasible, and the middle-ground available under Union law (limiting the temporal effects) was not brought into play by either the SCDK, the parties or the Danish Government. And as the ECJ was not willing – had not been willing despite repeated invitations in the last ten years – to reconsider *Mangold*, it had to reject the compromise solution proposed by the SCDK.

9. The protection of legal certainty and legitimate expectations: Different perspectives on shared legal concepts

It has been argued that the ECJ with its *Ajos* judgment "did not accord the same weight to the principle of legal certainty ('retssikkerhedsprincippet') … as it had done in other judgments".[91]

In our view, as should be clear from the above, it would be more accurate and fair to say that the ECJ and the SCDK share a fundamental concern for legal certainty and legitimate expectations, but that they have different perspectives and starting points when it comes to how legal certainty and legitimate expectations should be preserved and protected: the ECJ begins in the Union legal order and considers the national legal orders as important components and supplements to this order. The Union courts' abundant case law on the protection of legal certainty and legitimate expectations generally tends to accord much higher weight to legitimate expectations created by the

90. See C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, EU:C:1995:463, paras. 139–146.

91. Kristiansen, UfR 2016 B.301, op. cit. *supra* note 3, at 308.

Union institutions (notably by the Commission or the ECJ itself).[92] Expectations of private undertakings (such as Ajos A/S) that they can violate Union law *solely* because their own national institutions allow them to do so are much less likely to be considered legitimate and worthy of protection *in EU law*. By contrast, national legal orders and national courts tend to protect legitimate expectations created by all public authorities, regardless of whether they are international, national or even local. This difference makes good sense, because Member States do not always have the same objective interest in fully complying with Union law in specific situations. Thus, it was not very surprising that the ECJ in its *Ajos* judgment did not accord the same weight to the SCDK's (national) notion of the principle of legal certainty and protection of legitimate expectations as it did to its own (EU-wide) notion of the same principle. The ECJ's *Ajos* judgment begins with the importance of a uniform and effective application of EU law. Its reference to the conditions for limiting the temporal effects of its judgments should also be seen as an expression of its concerns for Union-wide legal certainty about which system of rules is applicable. From the ECJ's perspective, this entails that "a national court cannot rely on that principle [of 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 grounds of age".[93]

In our view, one may disagree with the entire outcome in *Ajos*, but it is difficult to criticize the ECJ for developing its own methodology and approach to legal certainty and legitimate expectations based on its task to uphold the rule of law in the EU. It is, on the other hand, disappointing that the ECJ did not elaborate on precisely these differences, and in that way engage with the strong concerns about whether the *Mangold* case law complies with EU law's own standards of legal certainty. After all, as Advocate General Trestenjak explained in her Opinion in *Dominguez*, Union law, like national law, requires that rules which impose obligations on individuals are sufficiently clear and precise, and the ECJ has still not properly addressed this criticism.

Overall, given that the ECJ was unwilling to overrule its *Mangold* judgment, all the main elements in the ECJ's judgment are fully understandable and defensible (constructive interpretation, direct applicability, temporal effects). But the ECJ's reasoning is regrettably short and cold, questioning the premise of the SCDK (on *contra legem*) and the value of the SCDK's well-established case law, then reminding the SCDK of the ECJ's own established and apparently flawless and unquestionable case

92. Cf. for a general discussion on the notion of legitimate expectations in State aid cases, Giraud, "A study of the notion of legitimate expectations in State aid recovery proceedings: 'Abandon all hope, ye who enter here'?", 45 CML Rev, (2008), 1399–1431.

93. Case C-441/14, *Ajos*, para 38.

law (on direct applicability of general principles), dismissing in effectively one sentence the SCDK's attempt to compromise (the referred question 2), and completely discarding, almost disregarding, the SCDK's concerns for legal certainty. Most regrettable is probably that the ECJ did not take this opportunity to engage with the massive criticism of the *Mangold acquis*, including – a very crucial question for the SCDK – explaining in more detail its proper legal foundations in Union law. In this respect, it should be recalled that the ECJ has in many other judgments been willing to engage with and discuss, sometimes at great length, the various positions and concerns of Member States, EU institutions and national courts.[94]

10. Scope and reasoning of the SCDK's Ajos judgment

Regardless of how justifiable one might believe the ECJ's pokerfaced *Ajos* judgment is, it failed the most crucial test: its reasoning did not convince the SCDK. The ECJ's outright rejection of the second question asked by the SCDK triggered the SCDK to declare, in return, that the horizontal direct application of general principles of EU law – with no specific legal basis in the EU Treaties or based solely on Article 6(3) TEU and/or provisions in the Charter of Fundamental Rights – cannot be enforced by Danish courts.[95] Whether this conclusion was inevitable under Danish law or partly stimulated by the ECJ's uncompromising reply in *Ajos* is a moot question. However that may be, the SCDK's judgment came out as equally forceful and uncompromising. The reasoning of the majority in the SCDK judgment does not give Union law and the ECJ the benefit of the doubt. It contains virtually no expression of *Völkerrechtsfreundlichkeit*.

10.1. *How much EU law cannot be applied directly by Danish courts?*

The SCDK, for the reasons explained above, decided to disregard the ECJ's *Ajos* judgment.[96]

94. See e.g. Case C-415/93, *Bosman*; and C-127/98, *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform,* EU:C:2008:449 and C-42/17, *Taricco II*.

95. Obviously, if lower Danish courts disagree, they can ask the ECJ whether they should comply with this SCDK judgment. Following the Joined Cases C-154, 307 & 308/15, *Naranjo,* the ECJ would most likely order the lower court to disregard the SCDK's judgment. That, however, is unlikely to happen, and in any event not a desirable way to improve the relationship.

96. It is settled case law that a judgment in which the ECJ gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings, see Case C-52/76, *Benedetti* v. *Munari,* EU:C:1977:16, para 26, Case C-446/98, *Fazenda Pública,* EU:C:2000:691, para 49, and Case C-62/14, *Gauweiler,* para 16.

The SCDK's *Ajos* judgment entails that part of the EU legal order cannot be given full effect in Denmark. General principles of EU law developed by the ECJ with no specific legal basis in the EU Treaties or based solely on Article 6(3) TEU *and* all provisions in the Charter of Fundamental Rights of the EU are *not* directly applicable in Denmark in disputes between private individuals.

So far, the practical consequences of this state of affairs are very limited: first, to be clear, the SCDK does not question that EU secondary legislation (regulations and decisions) can have horizontal direct effect. Moreover, the SCDK generally accepts that Treaty provisions can have horizontal direct effect. Thus, for example, Articles 45,[97] 101,[98] 157[99] TFEU continue to be directly applicable also in horizontal disputes. Danish courts would therefore continue to set aside Danish legislation if it conflicts with these Treaty provisions (also when their scope is uncertain, as was found in *Barber* and *Bosman* where the ECJ therefore limited the temporal effects of its judgments). Also general principles and doctrines in EU law, which have been developed by the ECJ on the basis of Article 4(3) TEU for example, such as the principles of equivalence and effectiveness, continue to be applicable in horizontal disputes. To give an example, the obligation on Member States to ensure that national courts have the competence to adopt interim measures in cases involving a possible breach of EU law is a general principle of EU law, which can produce rights and obligations in horizontal disputes.[100] However, since this is based on Article 4(3) TEU – and not Article 6(3) TEU – it is capable of horizontal direct application.[101]

Moreover, general principles, such as the prohibition against discrimination on grounds of sex, which are both codified in the Charter *and* have an additional legal basis elsewhere in the TFEU (e.g. in Art. 157 TFEU), could have horizontal direct application in Denmark, at least as long as the ECJ continues to acknowledge that these principles are not solely based on Article 6(3) TEU and/or Charter provisions.

On the other hand, those general principles of EU law, which – according to the ECJ's case law – do not have any (other) legal basis in the Treaty (than Art. 6(3) TEU) and Charter provisions are excluded from horizontal direct application in Denmark. So far, this seems to be the case only for the principle

97. See e.g. Case C-415/93, *Bosman,* para 87; and Case C-281/98, *Roman Angonese* v. *Cassa di Risparmio di Bolzano SpA,* EU:C:2000:296, paras. 34–36.

98. Case C-282/95 P, *Guérin Automobiles* v. *Commission,* EU:C:1997:159, para 39.

99. Case 43/75, *Defrenne,* paras. 39–40.

100. Introduced in Case C-213/89, *The Queen* v. *Secretary of State for Transport, ex parte* (*Factortame*), EU:C:1990:257.

101. This particular principle has been found also to have an (unwritten!) legal basis in Danish civil procedural law, cf. the SCDK judgment of 24 Aug. 1994 in Case 86/1994, *Gyproc*, reported in UfR 1994.823. H

prohibiting discrimination on grounds of age. However, the ECJ has hinted that Charter provisions could, in principle, apply directly in horizontal disputes if they are justiciable for that purpose.[102] In addition to the principle prohibiting discrimination on grounds of age, some of the other prohibitions against discrimination in Article 21 and other Charter provisions (e.g. Art. 31(2)) could eventually be found to have horizontal direct application in the future, but would thus not be applied fully in Denmark.[103]

10.2. *The SCDK's reasoning*

In our view, from a legal-technical point of view, the SCDK's reasoning is legally justified. However, it only makes sense from the perspective of Danish law and only after a detailed study of the wording and structure of the Danish Accession Act and its preparatory works.

For a wider European audience, the following six points on the SCDK's reasoning deserve particular mention.

First, the SCDK was surely right that the Danish Government had not envisaged in the Accession Act concerning the Lisbon Treaty that the Charter provisions could have horizontal direct application. Moreover, it is also correct that the legislature did not expressly confirm the *Mangold* case in connection with this accession – or accept the possibility of direct horizontal applicability of general EU law principles with no explicit Treaty basis in previous accession acts. Therefore, though other conclusions were possible,[104] it makes legal sense to conclude that, when interpreted in light of its preparatory works, the Accession Act does not envisage such EU law obligations in Denmark.

In the part of the SCDK's reasoning where the Accession Act is interpreted, EU lawyers might think that the SCDK's majority should also have interpreted the Accession Act as far as possible in light of Union law, and taken into account the whole Danish legal system.[105] In our view, this part of

102. See Case C-176/12, *Association de médiation sociale* v. *Union locale des syndicats CGT and Others,* EU:C:2014:2, paras. 45–47.

103. In his Opinion in Case C-214/16, *C. King,* paras. 51–58 (EU:C:2017:439), A.G. Tanchev considered whether Art. 31(2) of the Charter (the right to paid annual leave) has horizontal application, but concluded that it was unnecessary to decide on this point since the national legislation could be interpreted consistently with Union law (Directive 2003/88). In its judgement in the case, EU:C:2017:914, the ECJ did not consider the point of horizontal application of Art. 31(2) of the Charter. See, generally, Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing, 2016); Leczykiewicz, "Horizontal application of the Charter of Fundamental Rights", 38 ELR (2013), 479–497.

104. See e.g. Spiermann, op. cit. *supra* note 3.

105. Joined Cases C-397-403/01, *Pfeiffer,* para 118.

the SCDK's reasoning is not surprising.[106] Presumably, the SCDK (both the majority and the dissenting judge) assumed that the Danish Accession Act itself could not be subject to the duty of EU law consistent interpretation, considering that it is that Act which brings into effect the EU law duty of consistent interpretation in Denmark.[107]

Nonetheless, the SCDK's majority chose a relatively restrictive and dogmatic reading of the Accession Act, emphasizing in particular one answer given by the Minister for Foreign Affairs in the context of the accession to the Lisbon Treaty. The dissenting judge shows that another reading of the Accession Act (more forthcoming towards the EU legal order) was possible and could have produced a different result.

Second, the SCDK's reasoning and conclusion sends a clear general message to the ECJ (and to the Danish legislature). First, the SCDK shows that it does not reason like the ECJ when it comes to general principles, which do not have a specific legal basis in the EU Treaties.[108] As a Danish court with majoritarian instincts,[109] the SCDK meticulously examines the Danish legislature's words and will. The overall reasoning, and in particular the final statement that the SCDK would exceed its judicial powers if it enforced the ECJ's *Ajos* judgment, are remarkable in this respect. They suggest that the Danish legal system is basically sceptical, may even be disobedient, to the ECJ's judicial authority when ECJ rulings do not have a specific legal basis in the EU Treaties. The assumption or "burden of proof" is turned on its

106. It is perhaps more surprising that the SCDK's reading of the Accession Act does not mention "the principle of presumption" of conformity with Denmark's international obligations. In Denmark, as in many other domestic legal orders, there is a general presumption ("formodningsregel") that the Danish legislature intends to cooperate and comply with Denmark's international obligations. See e.g. report by the Danish Ministry of Justice on the incorporation of international law in respect of human rights, Betænkning om inkorporering mv. inden for menneskeretsområdet, 1526/2014, p. 5, available (in Danish) at: <justits ministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Betaenkning_1546.pdf.>, (last visited 27 July 2017).

107. See, for a different view, Nielsen and Tvarnøe, 2017, op. cit *supra* note 3, at 228.

108. This is in stark contrast to e.g. the German Constitutional Court, which has developed elaborate categories of reviews of the constitutionality of EU law (fundamental rights review, *ultra vires* review, constitutional identity review, and national identity review). See *supra* note 79, and Anagnostaras, "*Solange III*? Fundamental rights protection under national identity review", 42 EL Rev. (2017), 234.

109. See Rytter and Wind, "In need of juristocracy?: The silence of Denmark in the development of European legal norms", 9 I-CON (2011), 407–504. The majoritarian instinct is present in the words of the former SCDK president Børge Dahl as cited *infra* note 125: "The Danish [legal culture] is rooted in democracy and it is important that international developments do not become so dynamic and creative that it is impossible to catch up at a national level."

head for such ECJ rulings: the SCDK will not enforce them in Denmark, *unless* the Danish legislature in the future *explicitly* tells Danish courts to do so.

Third, one may wonder whether the SCDK's distinction between incorporated and non-incorporated general principles of EU law and its general requirement that there should be a specific legal basis in the EU Treaties for horizontal direct application of EU law obligations may exacerbate rather than reduce legal uncertainty for individuals in Denmark. From now on, it is not always easy to determine whether a new EU law obligation with horizontal direct application can be applied in Denmark. This appears to depend, primarily, on the ECJ's ability to identify a convincing legal basis in the Treaties for such an obligation.

Fourth, the SCDK's judgment should not be considered a new Danish opt-out of the EU legal order.[110] Opt-outs are agreed between the founding fathers in connection with treaty-making – not decided on unilaterally by Member States in their national accession acts. In this context, it is important to note that the SCDK does not question that Denmark has fully accepted its obligations under EU law, and it has not formally questioned the ECJ's authority from the perspective of EU law itself. Lenaerts and Gutiérrez-Fons – replying to the criticism of *Mangold* – have argued that "these objections [to Mangold] seem to overlook that general principles enjoy a 'constitutional status'. In light of the hierarchy of norms, this means that whether a general principle produces horizontal direct effect is a determination that takes place at the level of 'primary law'."[111] Arguably, the SCDK does not object to this, nor does it question that the ECJ has the competence to rule on such EU "constitutional" issues. Instead, the SCDK makes compliance with the *Mangold* case law a domestic issue. As the Accession Act now stands, *Danish law* demands from the ECJ that it finds a (specific) legal basis in the EU Treaties when it rules that general principles of EU law can have direct horizontal applicability.

Fifth, it is noteworthy that even if the ECJ had accepted the compromise proposal from the SCDK in the referred question 2, the SCDK might not have been able to use that solution, since the Accession Act prevents it from doing so. This suggests that, probably, the SCDK had not – at the time of the referral to the ECJ – fully considered its options after receiving the reply from the ECJ, and that the SCDK was therefore willing to listen carefully to the ECJ's explanations and solutions. At least in hindsight, it may be considered regrettable that the SCDK did not make the consequences clear to the ECJ in its preliminary reference. As is clear from our analysis in section 8 above, it

110. See, on the other hand, Kristiansen, UfR 2017 B.75, op. cit. *supra* note 3, at 83.
111. Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 77, p. 190.

was not surprising that the ECJ simply confirmed its past case law, and it was not surprising that the ECJ rejected the compromise solution. Under similar circumstances, other national (supreme or constitutional) courts have attempted to explain their domestic restraints to the ECJ.[112] It would arguably have been useful for the ECJ – and for the Commission and the Danish Government – if the SCDK had made its analysis of the Danish Accession Act available to them before its final judgment.[113] This might, for example, have given the ECJ an opportunity to ask the SCDK for clarification of whether question 2 was, in effect, a request to limit the temporal effects of its *Ajos* judgment.

Sixth, and in an evolutionary perspective, the SCDK's *Ajos* judgment should not be read in isolation. It is part of a broader picture in Danish law. True, since Denmark's accession to the EU, the SCDK has generally implemented the ECJ's judgments fully – also after the *Ajos* judgment. A recent example is the *Skjold* case,[114] in which the SCDK held that a late implementation of the ECJ's judgment in *Pereda*[115] led to liability for breach of EU law. However, at a more general and theoretical level, the SCDK has over the last 20 years shown signs of a greater willingness to engage with the more fundamental question about the limits of implementation and application of EU law in Denmark.

Thus, in the *Maastricht* case, the SCDK for the first time acknowledged that a group of ordinary citizens had legal standing to challenge the constitutionality of Denmark's accession to the Maastricht Treaty. Prior to that, it had been widely believed that Danish civil procedure did not allow for *locus standi* on such matters of a general nature. The SCDK changed its doctrine of judicial review on that occasion. Eventually, in 1998, the SCDK delivered its *Maastricht* judgment.[116] A key question in the case concerned whether the sovereignty transferred from Danish authorities to EU institutions was sufficiently demarcated as prescribed by Section 20 in the Constitution, which only allows for sovereignty to be transferred "to a certain specified

112. Notably, the German Federal Constitutional Court. See, e.g. the court's judgment in the *OMT* case, *supra* note 79.

113. Recall, *Ajos* concerned a dispute between two private parties, a case in which no government institution was involved. Thus, the SCDK's detailed analysis of the preparatory works of the Danish Accession Act, the whole legislative history of Denmark's relationship with the EU since 1973, was examined without input from the Danish Government.

114. Judgment of the SCDK of 19 Jan. 2017 in Case 42/2016, reported in UfR 2017.1243 H.

115. Case C-277/08, *Francisco Vicente Pereda* v. *Madrid Movilidad SA*., EU:C:2009:542.

116. Decision of the SCDK of 12 Aug. 1996 in Case 272/1994, reported in UfR 1996.1300 H. See also judgment of the SCDK of 6 April 1998 in Case 361/1997, reported in UfR 1998.800 H.

extent".[117] The SCDK was open towards the Union, and ruled that "The fields of responsibility may be described in broad categories, and there is no requirement for the extent of the delegation of sovereignty to be stated so precisely that there is no room left for discretion or interpretation. The powers delegated may be indicated by means of reference to a Treaty."[118]

In 2013, the SCDK delivered its next landmark ruling on the constitutionality of the Danish accession to the Lisbon Treaty.[119] The case concerned whether the ratification and implementation involved a transfer of sovereignty within the meaning of Section 20 of the constitution. In the *Lisbon* judgment, the SCDK accepted the constitutionality of Denmark's accession to the Lisbon Treaty. In that context it stated that: "… Danish courts must [only] rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act. Similarly, this applies with regard to Community law rules and legal principles which are based on the practice of the EC Court of Justice."[120]

Generally, the SCDK in these judgments undertook to review the constitutionality of EU law in Denmark – and thus expanded its intensity of review. This could be seen as an increasing concern about the expanding EU legal order.[121] However, as is clear from the quotation above, in these cases the SCDK developed a margin of appreciation ("extraordinary situation"; "required certainty"), which has been seen as giving ECJ interpretations on the scope of EU competences and EU law obligations the benefit of the doubt. Unless it was manifestly trespassing its boundaries, the SCDK would accept the ECJ's evolving and dynamic case law. It was this margin of appreciation, which the dissenting Judge Scharling emphasized.[122] However, the majority in *Ajos* did not mention any such margin in its review of whether EU law was incorporated fully in Denmark.

117. Our translation.

118. Our translation.

119. SCDK judgment of 20 Feb. 2013 in Case 199/2012, reported in UfR 2013.1451 H. See Palmer Olsen "The SCDK's decision on the constitutionality of Denmark's ratification of the Lisbon Treaty" 50 CML Rev. (2013), 1489–1504.

120. Our translation.

121. Madsen et al. argue (op. cit. *supra* note 3, at 147–148), that the SCDK developed a stricter (less EU-open) standard of review in the *Lisbon* ruling as compared to the *Maastricht* ruling, and that the *Ajos* judgment was the SCDK's next step in a tendency towards a less conciliatory approach to EU.

122. Interestingly, there were no dissenting opinions in either the *Maastrict* ruling or the *Lisbon* ruling; this might suggest that *Ajos* was a "harder" case.

There have also in recent years been other indications that the clash that came with *Ajos* was not purely a theoretical possibility. Notably, several former Supreme Court presidents have been critical of the ECJ and sceptical, in particular, on the incorporation of the Charter into the EU legal order.[123] As former President Dahl expressed in a *Festschrift* for a colleague at the bench:[124]

> "Each Member State's legal order has its own answer to the right balance between law and politics. The Danish is rooted in democracy and it is important that international developments do not become so dynamic and creative that it is impossible to catch up at a national level. Given the circumstances in Denmark and the other Nordic countries, we should be confident to have our own approach to the questions raised by internationalization. Nordic legal pragmatism is a common value that is worth safeguarding, and we should not just give way for others."[125]

From the other side, not surprisingly, also the ECJ judges take pride in upholding their legal order and, like the SCDK, very rarely admit to making mistakes. In President Lenaerts' words, "as a constitutional umpire, the ECJ takes its role seriously, that is, it is seeking to strike the balance imposed by the rule of law among the different interests at stake in a multi-layered system of governance".[126]

11. How can the lacunae created by the SCDK be remedied?

EU law offers, in principle, several remedies to fully enforce EU law and thus repair the gap created by the SCDK. Obviously, the Commission could bring

123. See Melchior, "Hvem bestemmer: Folketinget eller domstolene?", U.2011B.43; Melchior, "EU's charter om grundlæggende rettigheder – en ændret magtfordeling?", in Krunke et al (Eds.), *Festskrift til Henning Koch: Rettens magt – Magtens ret* (DJØF, 2014), pp. 289–300. See also criticism by Dahl, "Hvad skal vi med Højesteret" in Dahl, Jensen and Mørup (Eds.), *Festskrift til Jens Peter Christensen* (DJØF, 2016), pp. 619–634.

124. Dahl, ibid., p. 634. See also Madsen et al., op. cit. *supra* note 3, at 149, who, referring, *inter alia*, to Dahl's critical stance to the ECJ, argue that the *Ajos* case can be seen as a product of growing irritation in Denmark with "international courts over their perceived micromanagement" and their expansive tendencies which "essentially collide with Danish legal culture and its focus on textual interpretation". For a similar view, see Sadl and Mair, op. cit. *supra* note 3, at 360–362.

125. Our translation from Danish.

126. Lenaerts, "The Court's outer and inner selves: Exploring the external and internal legitimacy of the European Court of Justice", in Adams et al., op. cit. *supra* note 77, pp. 13–60, at p. 17. See Weiler's criticism of Lenaerts defence of the ECJ, "Epilogue: Judging the judges – Apology and critique", in Adams et al., ibid., pp. 235–253, especially at p. 238, where Weiler contends that "[t]o read Lenaerts, the Court is, well, perfect".

infringement proceedings against Denmark as the law stands presently. Moreover, lower national courts could in principle request preliminary rulings from the ECJ about whether they should comply with the SCDK judgment.[127] However, such routes are probably not fruitful ways to remedy the gap that is now created.

How could Denmark itself bridge the gap in order to ensure that EU law is given full effect on Danish territory? And will Denmark do so following the *Ajos* judgment?

Clearly, the SCDK judgment does not create a constitution-level conflict between the EU legal order and the Danish legal order. The "shortcomings" of Denmark's implementation of EU law can be remedied by amending the Accession Act.

The reasoning of the majority of the SCDK does not explicitly clarify *whether* the Accession Act does not confer the competences to the Union institutions (i.e. the ECJ) to develop unwritten general principles without a clear, specific legal basis in the Treaty, and with direct horizontal applicability in Denmark (Section 2 of the Act), or *whether* the Accession Act simply does not provide for the entry into force and direct applicability of such unwritten general principles (Section 3 of the Act). In other words, it is not completely clear from the majority's reasoning whether the gap is due to a "competence deficiency" or a "transposition deficiency". This question is important for the Danish constitutional procedure to be used to repair the shortcoming. If the *lacuna* is a "competence deficiency", it can only be remedied by conferring the "missing" competences on the EU (the ECJ) in accordance with the procedure in Section 20(2) of the Danish Constitution.[128] That procedure requires either a 5/6 majority in Parliament, or – if such qualified majority is not obtained – approval in a referendum. If, on the other hand, the *lacuna* is simply due to an incomplete implementation of those EU law obligations which are based on Article 6(3) TEU and/or the Charter, no new transfer of competences to the ECJ is needed. The deficiency can be remedied by an amendment to the Accession Act following the ordinary legislative procedure, which requires only a simple majority in Parliament. In our view, the latter interpretation is correct, and thus Danish law could be repaired by a simple

127. There is of course also the possibility for individuals to bring damage actions against the Danish State. As a matter of fact, the estate of Karsten Eigil Rasmussen has brought damage actions against the Danish State for its failure to correctly implement Directive 2000/78's prohibition of discrimination on grounds of age. The case is currently pending in Eastern High Court of Denmark. Possibly, individuals could also bring "*Köbler*" damage action against the Danish State in respect of the Supreme Court's explicit refusal to implement an ECJ ruling.

128. An English translation of the provision is cited *supra* note 50. On this provision, see e.g. Danielsen, "Denmark – One of many national constraints on European integration: Section 20 of the Danish constitution", 16 EPL (2010), 181–192.

amendment to Section 3 (or 4) of the Accession Act in order to remedy the "transposition deficiency".[129]

Regardless of which interpretation is correct, the SCDK's judgment passed the crucial question – should unwritten general principles of EU law and Charter provisions have direct horizontal application in Denmark? – to the Danish Government and Parliament. It is now up to them to decide whether and, if so, how Denmark should fully implement its EU law obligations. In today's political environment, this is certainly not an easy political balancing exercise. So far, there has been no communication from the Danish Government about whether it intends to take action following the *Ajos* judgment. It would not be surprising if the Government considers the practical consequences of the judgment to be so small and the political implications of confronting it so large, that it is better to be pragmatic and assume, at least for now, that *Ajos* will not *de facto* affect the application of EU law in Denmark.

12. Concluding remarks

As we have shown above, both the judgments in *Ajos* – of the ECJ and the SCDK – are legally sound and understandable. The ECJ's Grand Chamber judgment in *Ajos* is not particularly remarkable; it is in line with EU law orthodoxy and only adds a further perfectly understandable component to the duty of EU law consistent interpretation (i.e. that national courts should also work to change well-established interpretations in their case law in order to attain consistency). The SCDK's judgment, by contrast, is a landmark decision. Not because of it practical implications, which are probably very limited, but because of its approach to defining the boundaries of Danish law's acceptance of the ECJ's judgments. In its judgment, the SCDK does not directly discredit the ECJ's development of general EU law principles with direct horizontal application, or claim a lack of respect of the rule of law (though that is clearly the undercurrent of the SCDK's preliminary reference and the judgment when read together).[130] Instead, it insists that before Danish courts can impose such EU law obligations directly on private parties, they have to verify that the publicly elected Danish legislature really meant to implement such international obligations in the Danish legal order. As it is, according to the majority but contrary to the minority's view, the legal sources

129. However, this intricate point of Danish constitutional law will not be elaborated further in this article.

130. And the SCDK makes sure that one reads them together by, rather unusually, quoting at length its preliminary reference in the final judgment.

on Denmark's accession to the EU suggest that the legislature did not have such an intention.

In our view, the result of *Ajos* – a newly found conflict between EU law and Danish law and the demands for corrections – should not be exaggerated. Trying to bridge the gap once and for all by amending the Danish Accession Act (or the EU Treaties) does not seem feasible in the foreseeable future. Arguably, the best way forward now is for the EU institutions and the Danish State organs to "mind the gap" and do their best not to create similar situations in the future. Thus, we return to the importance of constructive and respectful judicial dialogue. Tensions between different legal cultures regularly occur within the many levels of legislative, administrative and judicial authorities in the EU. Such tensions can lead to fruitful cross-fertilization of legal orders – as the evolution of general principles in EU law has shown on many occasions. But they can also lead to less fruitful deadlocks. The preliminary reference procedure is a key instrument for solving tensions and avoiding deadlocks when legal orders interact. In *Ajos*, that procedure was used in a way that gradually built up tensions and ended in a clear clash. Going through the main steps in the *Ajos* dialogue, both courts could be blamed for failing to communicate in that spirit of good faith, which is the foundation of the preliminary reference procedure. Hopefully, in future *Ajos*-like exchanges between the ECJ and the SCDK, both sides will take more care to explain themselves and to recognize the other.