General principles of EU law fulfil a triple function. 1 Firstly, they enable the European Court of Justice to fill normative gaps left either by the authors of the Treaties or by the EU legislature. The “gap-filling” function of general principles thus ensures the autonomy and coherence of the EU legal system. Secondly, general principles serve as an aid to interpretation, since both EU law and national law falling within the scope of EU law must be interpreted in light of the general principles. Finally, they may be relied upon as grounds for judicial review. EU legislation in breach of a general principle is to be held void and national law falling within the scope of EU law that contravenes a general principle must be set aside. 2

In addition, general principles also play an important role in the vertical and horizontal allocation of powers. Vertically, the application of general principles may displace long-standing legal traditions at odds with the constitutional foundations of the Union. Even in areas where the Union does not enjoy legislative competence as such, the joint application of the substantive law of the Union and of general principles may force the national legislature to accommodate its policy choices to EU law. Stated differently, where a national measure falls within the scope of EU law, general principles may “circumscribe” (or “frame”) the powers retained by the Member States. 3 Horizontally, as a source of “primary law”, general principles may limit the discretion enjoyed by the EU legislature. When giving expression to a general principle, the EU

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2. These last two functions are grounded in the constitutional status of general principles in the hierarchy of norms. See Case C-101/08, Audiolux, judgment of 15 Oct. 2009, nyr, para 63, and Case C-174/08, NCC Construction Danmark, judgment of 29 Oct. 2009, nyr, para 42.

legislature must respect the essential content of that general principle. Otherwise, the resulting legislation could be declared void. Thus, the application of general principles may result in setting aside the choices favoured by the legislature at either national or supranational level. Does this mean that general principles run the risk of operating as an unstoppable centripetal force at the service of an activist judiciary? While general principles, in particular fundamental rights, may arguably be seen as a “federalizing device” detrimental to national sovereignty, the purpose of the present contribution is to show that general principles do not only have a “top-down” dimension. Indeed, national constitutions and national constitutional courts play an important role in the formation and development of general principles, giving rise to a “bottom-up” effect. Hence, the true function of general principles must be assessed in the light of a “mutual cross-fertilization” which creates a continuous flux of ideas and exchange of opinion between the ECJ and its national counterparts. This gives rise to a “common constitutional space” defined by a dynamic dialogue.4 In addition, recent developments in the case law of the ECJ show that the application of general principles is consistent with the principle of separation of powers. It will thus be argued that the ECJ does not rely on general principles in order to replace legislative choices by its own preferences. Stated simply, by looking at the function of general principles, we attempt to determine how general principles affect the vertical and horizontal allocation of powers. This is the running theme of this contribution, which unfolds as follows.

Section 1 is devoted to exploring the “gap-filling” function of general principles. In this section, we seek to identify the substantive and adjudicatory foundations that enable the ECJ to engage in such “gap-filling” without encroaching upon the competence of the EU legislature. Vertically, it will be argued that the “gap-filling” function of general principles does not have a “top down” dimension, but it is rooted in a commonality of values shared by both the Union and its Member States. In Section 2 we examine whether general principles may generate autonomous rights which must be protected beyond what is required by consistent interpretation. The purpose of this section is not, however, to provide a definitive answer to that question. Instead, we attempt to show that this question is closely related to the debate on the horizontal direct effect of directives (or the lack thereof). Next, this section examines the arguments put forward by several advocates general who oppose the horizontal direct effect of general principles on the grounds that such effect would have adverse repercussions for the powers retained by the Member States as well as for the prerogatives of the EU legislature. Section 3 explores

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how general principles operate as a ground for judicial review. Drawing on the distinction between rules and principles in constitutional adjudication, this section looks at how the ECJ has balanced different values. This question goes to the very heart of constitutional justice, given that the solution adopted by the ECJ will have repercussions for both the vertical and horizontal allocation of powers. Most importantly, the answer to this question defines the role that the judiciary must play and lays the foundation for respect for the rule of law in the EU legal order. It is argued here that the ECJ can avoid the classic dilemma of "judging whether a particular line is longer than a particular rock is heavy". Instead, by making use of appropriate balancing criteria the ECJ is able to weigh competing interests against each other in a coherent, rational, and dynamic fashion. Section 4 looks at the common constitutional space created by the application of general principles. It argues that, with regard to the establishment and development of general principles, national constitutional traditions have made and will continue to make an important contribution. Finally, a brief conclusion supports the contention that, when applying general principles of EU law, the ECJ strives to preserve the constitutional allocation of powers sought by the authors of the Treaties.

1. The “gap-filling” function

“As a traité cadre, the [TFEU] provides no more than a framework”. Its provisions are broadly drafted, vesting the ECJ with wide powers to develop a “common law” that prevents constitutional or legislative gaps from impeding the achievement of Union objectives. General principles are without doubt the most salient example of this “federal common law”. Gap-filling involves addressing legal problems overlooked by the authors of the Treaties or by the Union legislature. By solving these problems, gap-filling may also entail that, in areas of shared competence, national legislative choices are pre-empted. In light of the vertical and horizontal repercussions for the allocation of powers resulting from gap-filling, it is important to identify the source of constitutional authority which enables the ECJ to engage in such “judicial lawmaking”. Additionally, by locating this constitutional authority, one may draw some conclusions as to how the ECJ must perform its judicial lawmaking powers when establishing general principles. The power for the

6. Tridimas, op. cit. supra note 1, p. 18.
ECJ to engage in gap-filling is both substantive and adjudicatory. The former power stems from “the system of the Treaty” and from specific Treaty provisions. The latter is primarily based on the preliminary reference procedure laid down in Article 267 TFEU.8

Ever since the landmark decision in Van Gend & Loos,9 the ECJ has consistently held that the Union is a distinct and autonomous legal order. Yet autonomy could hardly be attained in a legal system that is not self-sufficient and coherent. For the Union legal order to find its own independent space between national and international law, the fragmentation resulting from constitutional and legislative gaps could not be allowed to persist. Although inspired by the constitutional traditions of the Member States or by international treaties, solutions intended to fill gaps must come from within the Union legal order itself.10 The very raison d’être of Union law calls upon the ECJ to assume its responsibilities for “finding” the law (“Rechtsfindung”) by fashioning general principles of EU law. Gap-filling grounded in the “system of the Treaty” aims to create norms that are intrinsically linked to the nature, objectives and functioning of the Union. This power is thus confined to formulating “grounding” principles, such as the principles of primacy, direct effect and State liability in damages for conduct that infringes EU law.

The authority to create judge-made principles also derives from certain specific Treaty provisions. First and foremost, Article 19 TEU states that Union Courts “shall ensure that in the interpretation and application of the Treaties the law is observed”. However, as Koopmans notes,11 the original version of the EEC Treaty told “us nothing about its substantive principles”. It thus provided little guidance as to the content of the “law” to be observed.12 Nonetheless, in the aftermath of World War II, legitimacy could not be based upon a formalistic conception of the rule of law. In order to reassure the Member States, the Community legal order had to embrace a particular public morality reflecting the basic values of European liberal democracies. With a view to accomplishing this mission, the ECJ had to engage in creating new principles that would contribute to completing the legal order established by the Treaty, while aligning the new legal order of the Community, and later the Union, with the basic constitutional tenets common to its Member States. The incorporation of fundamental rights as general principles of EU law clearly illustrates this

8. Ibid., 13.
12. Tridimas, op. cit. supra note 1, p. 20.
Nevertheless, because of the significant discrepancies among the different Member States as to how the rule of law should be defined, an automatic transfer of concepts and principles from the national to the supranational context was not possible. This circumstance did not however preclude national constitutional traditions from serving as guidelines for the ECJ. Hence, Article 19 TEU encapsulates a version of the rule of law that is adapted to a supranational context, but which is also designed to be recognized and accepted by the national legal orders within the EU.

Apart from Article 19 TEU, two additional Treaty provisions explicitly support the establishment of judge-made rules in EU law. Article 6(3) TEU mandates the Union to respect “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union’s law”. This Treaty provision, which largely reproduces ex Article 6(2) TEU, is no less than an explicit endorsement by the authors of the Maastricht Treaty of the case law of the ECJ in the field of fundamental rights protection. Likewise, by stating that the principle of non-contractual liability of the Union is to be developed “in accordance with the general principles common to the laws of the Member States”, Article 340 TFEU clearly indicates that the authors of the Treaties foresaw judge-made law as an instrument for filling lacunae in the legal order of the EU.

Moreover, just as happens with Article 19 TEU, it should be noted that neither Article 6(3) TEU nor Article 340 TFEU can be interpreted without looking at the laws and case law of the Member States. Those Treaty provisions impose on the ECJ an express obligation to examine, and to draw on, the various approaches adopted at national level.

In this regard, there is a strong correlation between the degree of convergence existing among the different national legal systems and the deference shown to national law by the ECJ. The more convergence there is among the legal orders of the Member States, the more the ECJ will tend to follow in their footsteps. Where convergence is not total but a particular approach is

13. Case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125. See Tridimas, “Primacy, fundamental rights and the search for legitimacy”, in Maduro and Azoulai (Eds.), The Past and Future of EU Law (Hart Publishing, 2010), p. 98 (opining that “[r]ecognition of fundamental rights as binding norms of Community law was the main instrument for the legitimization of the EC legal order, the acceptance of supremacy and the embracement of the preliminary procedure by national courts”).
15. Ibid., 886. See also Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] ECR 1651.
common to a large majority of national legal systems, then the ECJ will normally follow that approach, adapting and developing it to fit within the EU context. A good example is provided by the ECJ’s case law on the general principle of State liability in damages.\[16\] Although the introduction of that judge-made principle was justified on the ground that it “is inherent in the system of the EC Treaty”,\[17\] it has subsequently been refined and developed on the basis of comparative law methodology. Thus, in *Brasserie du Pêcheur and Factortame*, drawing on the comparative law analysis carried out by Advocate General Tesauro in his Opinion, the ECJ ruled that liability for loss or damage caused by a Member State could not be made conditional upon a finding of fault or negligence.\[18\] As for the obligations imposed on the injured party, relying again on the Opinion of Advocate General Tesauro, the ECJ found that there was a duty to mitigate loss incumbent on the party claiming damages which was “common to the legal systems of the Member States”.\[19\] Likewise, in *Köbler*, the ECJ drew on the rules applicable in national legal systems in order to dismiss the arguments based on the principle of *res judicata* and the principle of the independence of the judiciary, which were put forward by a number of Member States opposed to State liability for the conduct of national courts. Referring to the Opinion of Advocate General Léger, the ECJ held that those arguments were indeed invoked by national legal systems to justify the imposition of limits on State liability for such conduct, but not in such a way as to create an insurmountable obstacle to such liability in all circumstances. On the contrary, the ECJ observed that, in spite of divergences on the content and scope of the principle of State liability for acts of the judiciary, there was a common trend at national level in favour of recognizing that individuals could claim compensation for damages caused by national courts.\[20\]

By contrast, where there are important divergences among national legal systems, the ECJ will be careful before adopting an “EU” solution. The ruling of the ECJ in *Grant* illustrates this point.\[21\] In this case, the ECJ was asked whether ex Article 141 EC (now 157 TFEU) precluded an employer from refusing to award a travel concession to the same-sex partner of an employee in a stable relationship. The ECJ took a close look at the solutions provided for by national legislatures, observing that Member States had taken quite

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19. Ibid., para 85.
different stands. Some of them had given same-sex registered partnerships the same status as marriages. Most of them treated these unions like stable heterosexual relationships outside marriage only with respect to a limited number of rights. Finally, only a few recognized no rights for same-sex partners. In light of these divergences, the ECJ ruled that “in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.”

For EU law to develop in this field, legislative action was said to be needed. However, the existence of divergences among national legal systems may not automatically rule out the incorporation, into the EU legal order, of a legal principle which is recognized in only a minority of Member States. As is explained below, since the ECJ follows an evaluative approach in the discovery of general principles, incorporation may take place where “such a legal principle is of particular significance [for the project of European integration], or where it constitutes a growing trend”.

Judicial lawmaking may take place within the framework of any of the Treaty provisions conferring jurisdiction on the EU Courts. In particular, the preliminary reference procedure has provided the ECJ with opportunities for developing general principles. It is, thus, not surprising that through this procedure most general principles have been incorporated into Union law. The success of this procedure may be explained by the fact that situations that were explored in the abstract by the authors of the Treaties or the Union legislature may prove incomplete when solving concrete cases.

As a result, the gap-filling function of general principles, which is grounded in the Treaties themselves, ensures the coherence of the EU legal order without encroaching upon the choices made by the authors of the Treaties or by the

22. Ibid., para 35.
24. See Section 4.
EU legislature. It follows that such gap-filling function is consistent with the principle of separation of powers. Vertically, when engaging in gap-filling, the ECJ endeavours to find a compromise guaranteeing that the project of European integration is not put at risk, whilst making sure that its decisions are sufficiently close to the practice and values of national courts to enjoy recognition and credibility in the Member States. In deploying a comparative law analysis, the ECJ will seek the solution that does not risk encountering incomprehension or resistance in some Member States.27

2. Aid to interpretation and beyond?

As mentioned in the introduction, this section aims, in a first stage, to determine whether general principles may go beyond the bounds of consistent interpretation so as to produce horizontal direct effect. It then proceeds to discuss whether such effect would be compatible with the constitutional allocation of powers sought by the authors of the Treaties.

2.1. General principles of EU law and consistent interpretation

National courts have a duty to interpret both EU law itself and national law falling within the scope of application of EU law in accordance with general principles of EU law. Since general principles stand at the pinnacle of the hierarchy of norms established by EU law alongside the Treaties themselves, an interpretation that is consistent with a general principle is always preferred to one that would negate or contradict the general principle.28

The ruling of the ECJ in Sturgeon illustrates this point.29 In that case, the ECJ was asked whether Regulation No. 261/200430 confers a right to compensation upon airline passengers in the event of delay. The wording of Regulation No. 261/2004 does not expressly create a right to compensation for those passengers whose flight is delayed, as opposed to passengers whose flight is cancelled, on whom such a right is explicitly conferred. Can this legislative silence be read as denying compensation to this category of passengers? The ECJ replied in the negative. The ECJ began by observing that, in light of its objectives, Regulation No. 261/2004 does not exclude awarding compensation

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27. Lenaerts, op. cit. supra note 14, 906.
28. Lasok and Millett, Judicial Control in the EU (Richmond, 2004), pp. 399–400.
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to passengers whose flight is merely delayed. Nor does Regulation No. 261/2004 rule out the possibility that, for the purposes of recognition of the right to compensation, both categories of passengers can be treated alike.\textsuperscript{31} Next, the ECJ noted that, in accordance with a general principle of interpretation, “a \{Union\} act must be interpreted in such a way as not to affect its validity”.\textsuperscript{32} This means that a Union act must be interpreted in compliance with superior rules of EU law, including the principle of equal treatment. Hence, where passengers whose flight is cancelled and passengers whose flight is delayed are in a comparable situation, Regulation No. 261/2004 must be interpreted in such a way as to treat both categories of passengers equally. To this effect, the ECJ noted that both categories of passengers suffer similar damage, consisting in a loss of time. In particular, the situation of passengers whose flight is delayed is comparable to that of passengers who are informed upon arrival at the airport that their flight is cancelled and subsequently re-routed in accordance with Article 5 of Regulation No. 261/2004. Since Article 5(1)(c)(iii) of Regulation No. 261/2004 only provides for a right to compensation where the cancellation of a flight and its subsequent re-routing entail a loss of time equal to or in excess of three hours, the same should apply in the event of delay.\textsuperscript{33} Therefore, the ECJ ruled that in order for Regulation No. 261/2004 to comply with the principle of equal treatment, it had to be interpreted so as to grant a right to compensation to passengers whose flight is delayed and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.\textsuperscript{34} Finally, the ECJ recalled that air carriers are not obliged to pay compensation where they manage to prove that cancellations and delays are caused by extraordinary circumstances.\textsuperscript{35}

\textsuperscript{31. Sturgeon, cited supra note 29, para 46.}
\textsuperscript{32. Ibid., para 47.}
\textsuperscript{33. Ibid., para 57.}
\textsuperscript{34. The approach followed by A.G. Sharpston is somewhat different. She concurred with the ECJ in acknowledging that if compensation to passengers whose flight is delayed were excluded, then it would be impossible to reconcile Regulation No. 261/2004 with the principle of equal treatment. Yet, in contrast to the ECJ, the A.G. did not provide a particular time-limit after which passengers whose flight is delayed enjoy a right to compensation. In her view, “the actual selection of a magic figure is a legislative prerogative”. See Opinion of A.G. Sharpston in Sturgeon, op. cit. supra note 29, delivered on 2 July 2009, nyr, paras. 93–94. However, the ECJ deployed another argument in order to counter this “separation of powers” objection. It invoked Recital 15 in the preamble of Regulation No. 261/2004, whereby “the legislature … linked the notion of ‘long delay’ to the right to compensation”. Thus, the ECJ did not encroach upon the prerogatives of the EU legislature but simply limited itself to clarifying a legislative choice already contained in Regulation No. 261/2004, namely the distinction between “delay” (inferior to three hours) and “long delay” (equal to or in excess of three hours). Whilst the latter gives rise to compensation, the former does not. See Sturgeon, cited supra note 29, para 62.
\textsuperscript{35. Sturgeon, cited supra note 29, para 67 (extraordinary circumstances are defined as those which “are beyond the air carrier’s actual control”).}
As Tridimas has pointed out, parallels can be drawn between the duty to interpret Union acts in conformity with general principles of EU law and that of consistent interpretation of national law with directives. First, in both cases, the vertical allocation of powers between the Member States and the EU cannot be altered. For the duty of consistent interpretation of national law with directives, this means that, without prejudice to the *Inter-Environnement Wallonie/Adeneler* exception, a national court is not bound by this duty with an anticipatory effect, that is, before the period for transposition of the relevant directive has expired. Similarly, general principles cannot be relied upon as an aid to interpretation outside their scope of application. For instance, if an activity lacks an economic nature, it will not fall within the scope of the Treaty provisions on free movement. Accordingly, national courts cannot be asked to interpret national legislation affecting such an activity in light of a general principle of EU law. The same is true of purely internal situations which are governed exclusively by national law. Second, in both cases, the national courts may not infringe the competences of the national legislature. Put simply, a contra legem interpretation must be ruled out. Yet, this limitation does not prevent national courts from using alternative interpretative tools found within national procedural rules, in order to align national law with EU law. Finally, a consistent interpretation of national law with directives or general principles may not aggravate the criminal liability of private parties in the absence of an implementing law explicitly providing for such liability. Since in these cases the principle of legality must be complied with, any creative methods of reading the law are strictly forbidden.

2.2. May general principles of EU law produce horizontal direct effect?

Apart from these parallels, the question remains whether a general principle of EU law can operate beyond the bounds of consistent interpretation, so that it may produce direct effect. It is settled case law that a general principle may be “invoked vertically against the State”.45 By contrast, it is less clear whether a general principle may be directly relied upon by private parties in civil proceedings. In other words, may a general principle by itself give rise to horizontal direct effect?46 The qualification “by itself” is intended to refer to the absence of any supporting Treaty or legislative provision which is itself directly effective,47 but it does not imply an alteration to the scope of application of general principles as such. One should recall that the scope of application of general principles covers three different situations: (a) when Member States implement EU legislation48 (“the agency situation”),49 (b) when the ECJ examines the validity of national measures derogating from EU requirements50 (“the derogation situation”) or (c) where some specific substantive EU rule is applicable to the situation in question51 (“measures falling within the scope of EU law”). It is thus assumed here that the conflict between a general principle of EU law and national law takes place in an “agency situation”, or in a “derogation situation”, or falls “within the scope of EU law”. The solution of that conflict will determine inter alia whether a general principle enshrined in an

46. Whilst it is true that in Case C-2/92, Bostock, [1994] ECR I-955 and Case C-60/92, Otto, [1993] ECR I-5683, the ECJ denied the application of a general principle in a private dispute, these two judgments do not rule out the possibility that general principles may ever produce horizontal direct effect. In Bostock, the fact that the applicant sought to apply a general principle retroactively in order to modify a lease contract was decisive. In Otto, the very raison d’être of the principle invoked was confined to a public law context. See Tridimas, op. cit. supra note 1, pp. 47–59.
47. For instance, if a directive implements Art. 157 TFEU and a national legislature fails to implement such a directive, then an employee having received unequal pay because of his or her gender may rely on Art. 157 TFEU against his or her employer without the need to bring in the general principle of non-discrimination on grounds of sex.
51. This would be the case e.g. where there are potential impediments to interstate trade (Case C-71/02, Karner, [2004] ECR I-3025); or where Member States act as trustees of the EU in an area of exclusive EU competences (Joined Cases C-286/94, C-340 & 401/95 and C-47/96, Molenheide and Others, [1997] ECR I-7281); or where penalties are adopted by the national legislature with a view to securing compliance with EU law, but the latter does not expressly require so (Case 77/81, Zuckerfabrik Franken, [1982] ECR 681). See Opinion of A.G. Sharpston in Bartsch, op. cit. supra note 45, para 69. See also Tridimas, op. cit. supra note 1, pp. 39–42; Prechal, “Competence creep and general principles of law”; 3 Rev. Eur. Adm. L. (2010), 8.
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It is difficult to address this issue without first revisiting the debate on the horizontal direct effect of directives. Functionally speaking, if general principles are allowed to produce effects that directives enshrining these principles are precluded from having, it looks like the same outcome is being reached by different means. For the losing party in a civil dispute, it seems indeed of little importance whether the national provision on which he or she relies is set aside by reference to a directive or to the general principle enshrined within it. Moreover, in accordance with the hierarchy of norms, both general principles and directives prevail over national law.

Commentators have categorized two opposite ways of addressing this issue, namely – borrowing the terms used by Dougan – either by embracing a “primacy model” or by advocating a “trigger model”.

On the one hand, the “primacy model” argues that the principle of primacy must be divorced from the principle of direct effect when purging the EU legal order of conflicting national provisions, i.e. where EU law is used to set aside the application of national law (“exclusionary effect”). The principle of direct effect would then only be relevant for the enforcement of new rights bestowed upon or obligations imposed on private parties, i.e. where EU law substitutes or supplements national law (“substitutionary effect”). In contrast to setting aside provisions of national law conflicting with a directive, a substitution effect entails actively imposing a particular burden on an identifiable debtor for the benefit of an identifiable creditor that would otherwise not exist.

In this latter case, a directive may not be relied upon against a private party in unimplemented or wrongly-implemented directive can be relied upon in civil disputes after the directive’s period for transposition has expired.


55. See e.g. Case C-91/92, Faccini Dori, [1994] ECR I-3325, para 5 (there, the non-implemented directive granted consumers a right of cancellation for a period of at least seven days in relation to contracts negotiated away from business premises. Hence, Ms. Faccini Dori did not seek to set aside Italian law, but to enforce new rights that Community law granted her).

civil proceedings. Instead, national courts should have recourse to the duty of consistent interpretation and to the principle of State liability if consistent interpretation proves impossible. In essence, this model is founded on viewing the Union and national systems as a unitary legal order.57

However, the application of the “primacy model” to directives has not been immune from criticism. Critics of the “primacy model” raise five main objections. Firstly, in practice, the distinction between “exclusionary” and “substitutionary” effects is sometimes difficult, if not impossible, to make.58 It is also formalistic and depends on the way the parties themselves (or the national court in the context of a preliminary reference) frame the dispute. Secondly, this model assumes that all Member States have accepted the supremacy of EU law unconditionally, when reality shows that residual friction remains between EU secondary legislation and national constitutions.59 Thirdly, this model would be difficult to reconcile with the rationale behind the Francovich right to damages and the duty of consistent interpretation.60 Fourthly, this approach passes on the economic cost of a Member State’s failure to comply with a directive to the party relying on provisions of national law whose application is set aside by virtue of the principle of primacy. Last but not least, the above model is difficult to reconcile with one specific general principle, that of legal certainty.61

Under this model, general principles of EU law should produce horizontal direct effect. If a dispute between private parties falls within the scope of EU law, a private party will be able to rely on a general principle to set aside the effects of conflicting national measures. Indeed, given that the principle of primacy applies to all norms of EU law with binding effects, there is no reason why general principles – which have the status of primary law – should be left out.62 For the purposes of this model, it is irrelevant whether national law is set aside by reference to a directive or to the general principle contained therein. Yet, Pfeiffer confirmed that directives do not entail horizontal direct effect. Even so, direct reliance on general principles of EU law as given expression

57. Dougan, op. cit. supra note 52, 943; Lenaerts and Corthaut, op. cit. supra note 53, 289.
58. Dougan, op. cit. supra note 52, 937–940. See also Dashwood, op. cit. supra note 52, 103 (qualifying this distinction as a “false dichotomy”, given that at the end of the day, the dispute would still be resolved “on the basis of a rule different from that prescribed by the national legislature”).
60. Ibid., 943–947.
in a directive still seems to be possible under the “primacy model”; at least, that is what Mangold and Kücükdeveci suggest.

It must be stressed, however, that the horizontal application of general principles can operate only when it is uncontested that the conflicting national law falls within the scope of EU law. Otherwise, the boundaries of the EU legal order would be continually extended to the detriment of national sovereignty. For example, a general principle may be relied upon to set aside a national law which falls within the scope of application of a directive whose period for transposition has already expired. Conversely, if a national law has no link whatsoever with EU law, it falls outside the scope of the Treaty and no general principle of EU law will be applicable.

This is how the ECJ distinguished the facts in Bartsch from those in Mangold. In the latter case, the ECJ was asked whether German employment law that allowed successive fixed-term contracts for workers older than 52 years without requiring any justification was contrary to Directive 2000/78. In the event that this was so, the national court also asked about the legal consequences of such a finding for the contractual relationship between the employee and the employer, both being private parties. The ECJ stated that the objective pursued by the German legislation in question was legitimate, in so far as it promoted employment for older workers. However, it failed to meet the proportionality test, since it took into account neither the personal situation of employees before they were 52 years old nor the structure of the labour market.

At this juncture, the ECJ observed that at the time of the facts, the period for the transposition of Directive 2000/78 had not expired. Therefore, Directive 2000/78 could neither be invoked, nor bring in the application of a general principle of EU law. However, since the contested German legislation in fact implemented Directive 1999/70 whose period for transposition had long expired, “[t]here was, therefore, a Community law framework of relevant rules … to which the general principle of equal treatment (including equal treatment irrespective of age) could be applied”.

By contrast, in Bartsch, the ECJ found no link with EU law. In that case, the period for the transposition of Directive 2000/78 had not expired at the relevant time. But in contrast to Mangold, the conflicting national provisions

64. Case C-555/07, Kücükdeveci, judgment of 19 Jan. 2010, nyr.
66. See supra note 23.
70. See Opinion of A.G. Sharpston in Bartsch, op. cit. supra 45, para 70.
an occupational pension scheme which excluded a widow(er) from being entitled to a survivor’s pension where her (or his) deceased husband (or wife) was a private-sector employee 15 years older than her (or him) – did not implement Community legislation. Nor was there any substantive rule of EU law applicable to the situation. Accordingly, the ECJ held that the general principle of EU law forbidding unequal treatment on grounds of age could not be relied upon by the applicant.71

Logically, the next question then became whether the ECJ would have reached a different outcome in Bartsch, had the facts taken place after the expiry of the period for transposition of Directive 2000/78.72 This is precisely the issue that the ECJ had to address in Kücükdeveci.73 There, the national court asked whether Paragraph 622 of the German Civil Code (BGB), which provides for the periods of notice on dismissal which employers are required to observe to be increased incrementally with the length of service, but which disregards periods of the employee’s employment before the age of 25, is compatible with EU law, notably Directive 2000/78 or the general principle of non-discrimination on grounds of age. If so, the national court also enquired whether this general principle may be applied to set aside Paragraph 622 BGB in a private dispute. The ECJ began by noting that, in contrast to Bartsch, the alleged discriminatory conduct took place after the period for transposition of Directive 2000/78 had expired. It also observed that Paragraph 622 BGB fell within the scope of application of that Directive given that the notice period is a condition of dismissal as provided for by Article 3(1)(c) of Directive 2000/78. This meant that, since the contested legislation fell within the scope of application of that Directive, the latter had “the effect of bringing within the scope of European Union law [Paragraph 622 BGB]”.74 Next, the ECJ found that, in accordance with Paragraph 622 BGB, employees who entered into an employment contract before the age of 25 benefited from a shorter period of notice than those who started working at a later age. Accordingly, the former category of employees was treated less favourably than the latter category just because of their age.75 The ECJ ruled that such a difference in treatment could not be justified as the contested provision failed to comply with the principle of proportionality.

71. But see Prechal, op. cit. supra note 51, 10.
72. See Dashwood, op. cit. supra note 52, 108 (If so, he submits that “Mangold would be seen to have blown a very large hole in what remains of the no horizontal direct effect rule for directives”).
73. Kücükdeveci, cited supra note 64.
74. Ibid., para 25.
75. Ibid., para 31.
On the other hand, the “trigger model” reads the principle of primacy as being limited in scope by the principle of direct effect. Only insofar as an EU norm is directly effective may conflicting national law be set aside. On this reading, the EU and national legal orders are not a single entity; rather, they operate in two different, albeit closely connected spheres. For the former to penetrate the latter, a link must be established. The principle of direct effect supplies that link. Under this model, the transfer of legislative competence to the EU does not imply the existence of adjudicatory jurisdiction for the national courts, unless such transfer “triggers” the principle of direct effect. The “trigger model” thus draws a distinction between legislative competence and judicial power. Since directives lack horizontal direct effect, national courts have no adjudicatory jurisdiction to rely on their provisions in order to set aside national law defining the legal position of a private party. Instead, national courts must have recourse to the default mechanisms of consistent interpretation and the principle of State liability.

This model is not free from shortcomings either. It is argued that in the case of the enforcement of directives the “trigger model” gives rise to disparities between direct and indirect judicial review. Direct judicial review takes place where the object of proceedings – brought against public authorities – is to set aside a national legislative or administrative act conflicting with a directive. By contrast, indirect judicial review occurs where the incompatibility of a national legislative or administrative act with a directive arises as a preliminary issue in a dispute between private parties. In the case of direct judicial review of a national legislative or administrative act, in order for EU law to produce exclusionary effects it is only necessary to assess the degree of discretion left by the directive to national authorities. Conversely, indirect judicial review of such an act in light of an unimplemented or wrongly-implemented directive is barred. It follows that whether a directive produces exclusionary effects will depend on the procedural avenues left to applicants by national law. If direct judicial review is possible, then a conflicting national rule may be set aside. If not, then such a rule will have to remain in force as the national courts have no power, under EU law, to disapply it.

As to general principles of EU law, the “trigger model” does not preclude investing them with horizontal direct effect. However, such effect would, on that view, allow a party to circumvent directives’ inherent lack of horizontal

76. Dougan, op. cit. supra note 52, 934.
77. Ibid., 942.
79. See e.g. Case C-201/02, Wells, [2004] ECR I-723.
80. See Lenaerts and Corthaut, op. cit. supra note 53, 300.
81. See Opinion of A.G. Sharpston in Bartsch, op. cit. supra note 45, para 83.
direct effect. This would undermine the consistency of the trigger model, since, in respect of directives, it would break the required linkage between the national and EU legal orders.

2.2.2. The third way
Given the strengths and weaknesses of both models, it has been said that the ECJ hesitates to opt unequivocally and definitively for one model or the other. For Dashwood, “Marshall (No.1) really was a crossroads” where the ECJ could have taken a final decision, opting for one of the two models. Instead, the ECJ adopted a more balanced approach, “which is hard to justify in an intellectually coherent way”. Indeed, some commentators argue that the reasoning of the ECJ in some cases is easier to reconcile with the “primacy model” than with the “trigger model”, and sometimes vice versa.

However, according to Ross, far from being a sign of inconsistency, this reluctance to make a final choice actually reveals a more pragmatic and flexible alternative, according to which there is a “preference for mutual spheres of accommodation” that avoids sophistic conceptual disputes. In this respect, Ross advocates “an exercise of judicial balancing that must maximize [the principle of] effectiveness … but within the limits represented by legal certainty, non-retroactivity, non-criminalization” understood as general principles of EU law. He reads Pfeiffer in this light, arguing that the ECJ did not side with the “primacy model”, but it nonetheless gave a broader reading to the principle of consistent interpretation by inviting national courts to look at national procedural rules capable of producing exclusionary effects.

2.3. General principles of EU law, horizontal direct effect and the constitutional allocation of powers

Several objections can be raised against the horizontal application of general principles of EU law that do not apply to the horizontal direct effect of directives. For instance, Advocate General Ruiz-Jarabo Colomer, whose second
Opinion in *Pfeiffer* favoured the horizontal direct effect of directives with a view to excluding conflicting national rules.\(^{90}\) Subsequently argued in *Michaeler* that the horizontal application of general principles of EU law would “convert … typical [Union] acts into merely decorative rules which may be easily replaced by the general principles”.\(^{91}\) Likewise, Advocate General Kokott, whose reasoning in *Berlusconi*\(^{92}\) fits well with the “primacy model”, opined in *Kofoed* that parties should not be able to rely on a general principle of EU law where the latter is given specific effect and expressed in a concrete manner in a directive. Since the content of general principles is “much less clear and precise”, the Advocate General considered that, for situations falling within the scope of a directive, “[t]here would [otherwise] be a danger … that the harmonization objective of [the] Directive … would be undermined and the legal certainty … which it seeks to achieve would be jeopardized”.\(^{93}\)

In the context of Directive 2000/78, Advocate General Mazák in *Palacios de la Villa* observed that if general principles of EU law could be invoked independently of Union implementing legislation, not only would legal certainty be threatened – an obligation not laid down in national law being imposed on certain subjects of the law – but the vertical and horizontal allocation of powers laid down in Article 19 TFEU would also be disturbed.\(^{94}\) The vertical allocation of powers would be threatened because the unanimity procedure laid down in that provision protects the competences of the Member States. The horizontal allocation of powers would suffer because the application of general principles of EU law between private parties runs the risk of rendering meaningless the choice of the Council to enact Union legislation lacking horizontal direct effect.\(^{95}\)

In *Küçükdeveci*, Advocate General Bot argued that the horizontal application of the general principle of non-discrimination on grounds of age did not encroach upon the powers of the EU legislature. He posited that the normative


\(^{92}\) Opinion of A.G. Kokott in *Berlusconi*, op. cit. supra note 44.


\(^{95}\) Ibid., para 138 (Art. 19 TFEU states that the Council “may take appropriate action to combat discrimination”. It follows that it is for the Council to decide whether such action requires the adoption of a regulation or a directive). The same argument was deployed by the ECJ to reject the horizontal direct effect of directives in *Faccini Dori*, cited supra note 55. There it held that “[t]he effect of extending that case law to the sphere of relations between individuals would be to recognize a power in the [Union] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations”. Ibid., para 24.
Powers and general principles

yardstick for evaluating whether national law complies with EU law remains the relevant directive and not the general principle enshrined therein. It is only at a later stage that the general principle might become relevant, that is, when assessing the implications that flow from the fact that a national provision is in breach of the directive. In examining whether a national provision is discriminatory, the ECJ will confine itself to interpreting Directive 2000/78. In particular, it will take due account of the limitations or derogations to the principle of equal treatment introduced by the EU legislature. Thus, the Advocate General suggests that this two-step analysis does not impinge upon the prerogatives of the EU legislature. Prechal seems to agree with Advocate General Bot. She states that a directive implementing a general principle should facilitate, rather than limit, “the application and implementation of the general principle” contained therein. Accordingly, as a sanction imposed on the infringing Member State, national provisions conflicting with the directive should be set aside. However, in order not to upset the vertical and horizontal allocation of powers provided for by the Treaty, she argues that not only should the general principle be “operational” – i.e. contain judicially manageable standards –, but the ECJ should also follow “very closely the letter of the Directive, … remain[ing] nearly entirely within the scope of what the legislature provided for”. This is precisely what the ECJ did in Mangold and Kücükdeveci. First, the principle of equality is “often as such operational”. Second, the ECJ remained close to the terms of the Directive.

In addition, the objections mentioned in the previous paragraphs seem to overlook that general principles of EU law enjoy a “constitutional status”. In light of the hierarchy of norms, this means that whether a general principle produces horizontal direct effect is a “[question] of [primary-law] interpretation which fall[s] within the jurisdiction of the [ECJ]”. Such a question does not fall within the powers of the Union legislature, nor of the Member States. It would take a Treaty amendment for the political process to interfere with it. Defrenne and Angonese illustrate this point. In the former case, the ECJ ruled that the general principle of equal pay for equal work – grounded in ex Article 119 EEC (now 157 TFEU) – may produce horizontal direct effect. After looking at the aim, the nature and the place of the principle of equal pay for

96. Opinion of A.G. Bot in Kücükdèveci, op. cit. supra note 64, para 34.
97. Prechal, op. cit. supra note 51, 18–19.
98. Ibid.
99. Ibid.
100. Ibid.
equal work in the scheme of the Treaty, the ECJ held that this principle is “mandatory in nature” and accordingly, applies to public authorities and private individuals alike.\textsuperscript{104} By contrast, not only was Directive 75/117,\textsuperscript{105} which sought to improve the legal protection of workers suffering from unequal pay caused by sex discrimination, irrelevant to determine whether the principle of equal pay for equal work could produce horizontal direct effect, but the ECJ actually pointed out that in no way could Directive 75/117 reduce the effectiveness and the temporal scope of that principle.\textsuperscript{106}

Likewise, in Angonese the ECJ observed that Regulation No. 1612/68\textsuperscript{107} which implemented the principle of free movement of workers as laid down in ex Article 39 EC (now 45 TFEU) was not applicable to a competition for a post organized by a private bank. This circumstance, however, did not prevent the principle of free movement of workers – a specific application of the general principle of non-discrimination on grounds of nationality – from producing horizontal direct effect. The ECJ reasoned that its findings in Defrenne could, \textit{a fortiori}, apply to the free movement of workers, since both principles are “mandatory in nature” and seek to combat discrimination, albeit based on different grounds, on the labour market.\textsuperscript{108} In the field of social law, could Defrenne support the horizontal application of other “constitutional categories” of the principle of non-discrimination which are “mandatory in nature” but are not laid down in a Treaty provision? In this regard, one could argue that in order to preserve the vertical and horizontal allocation of powers, only those general principles of EU law which are enshrined in a Treaty provision may produce horizontal direct effect. Stated differently, in the absence of a Treaty provision, Defrenne may not be relied upon. Yet, this argument does not seem convincing. A close reading of Defrenne reveals that the wording of ex Article 119 EEC did not play a major role in the rationale of the ECJ.\textsuperscript{109} Indeed, the ECJ did not focus on whether this Treaty provision was sufficiently precise to produce direct effect, preferring, instead, to “identify and isolate” the general principle of equal pay for equal work.\textsuperscript{110} Most importantly, Defrenne shows

\begin{itemize}
\item \textsuperscript{104} Defrenne, cited supra note 102, para 39. A legal principle is “mandatory in nature” (in French, “caractère impératif”) when it is not subject to private autonomy.
\item \textsuperscript{105} O.J. 1975, L 45/19.
\item \textsuperscript{106} Defrenne, cited supra note 102, para 60. See also Case 96/80, Jenkins, [1981] ECR 911, para 22 (holding that Directive 75/117 could not alter the content or scope of that general principle); Case C-17/05, Cadman, [2006] ECR I-9583, para 29.
\item \textsuperscript{107} O.J. 1968, Spec. Ed. Sérès I-475.
\item \textsuperscript{108} Angonese, cited supra note 103, paras. 34–35.
\item \textsuperscript{109} E.g., the ECJ observed that, while ex Art. 119 EEC was formally addressed to the Member States, this circumstance did not exclude “rights from being conferred on individuals” who seek to enforce the duties laid down therein. Ibid., para 31.
\item \textsuperscript{110} Craig and De Búrca, \textit{EU Law: text, cases and materials,} 4th ed. (OUP, 2007), pp. 276–277.
\end{itemize}
that in deciding the horizontal application of the principle of equal pay for equal work, the ECJ was respectful of the prerogatives of the Union legislature and of the Member States. To this effect, the ECJ drew a distinction between situations where a “purely legal analysis” sufficed to detect the presence of sex discrimination, and complex situations where such a presence could not be ascertained unless legislative measures were adopted.\footnote{Defrenne, cited supra note 102, paras. 19–22. See also Audiolux and NCC Construction Danmark, cited supra note 2, (discussed below) in which the ECJ drew the same distinction.} While in relation to the former type of situations, the ECJ is in a position to hold that the general principle of equal pay for equal work produces horizontal direct effect, in the latter type of situations the ECJ is not. Therefore, insofar as this distinction is complied with, the vertical and horizontal allocation of powers is not disturbed by the horizontal application of a general principle. This is so regardless of whether the general principle is grounded in a Treaty provision.

It is in this sense that the ECJ confirmed in \textit{Kücükdeveci} that the general principle of non-discrimination on grounds of age, now enshrined in Article 21 of the Charter, is to be applied horizontally in an employment relationship covered by Directive 2000/78.\footnote{Kücükdeveci, cited supra note 64, paras. 50–55.}

As a result, the fact that a general principle of EU law may produce effects that go beyond what is required by consistent interpretation does not necessarily mean that the constitutional allocation of powers sought by the authors of the Treaties is adversely affected. Insofar as the normative yardstick for evaluating whether national law complies with EU law remains the relevant directive and not the general principle contained therein, the powers of the EU legislature are safeguarded. In addition, since general principles of EU law enjoy a “constitutional status”, the principle of the hierarchy of norms mandates national courts to interpret both EU law itself and national law falling within the scope of application of EU law in accordance with general principles of EU law. In the same way, by virtue of the same principle, whether a general principle produces horizontal direct effect is a “[question] of [primary-law] interpretation which fall[s] within the jurisdiction of the [ECJ]”,\footnote{Brasserie du Pêcheur and Factortame, cited supra note 18, para 25.} i.e. outside the political process at either the national or EU level.

\section*{3. Grounds for review}

General principles of EU law may be further relied upon in order to review the legality of secondary EU law and the compatibility of national law falling
within the scope of EU law with that law. For EU measures, this flows from
Article 263 TFEU, which states that an action for annulment can be brought
on grounds of “infringement of this Treaty or of any rule of law relating to its
application”. For national measures, the latter part of this quotation is missing
in Articles 258 to 260 TFEU. It follows that in this connection general prin-
ciples of EU law are not grounds for review. Yet, general principles of EU law
are relevant because the ECJ must ensure that in the interpretation and appli-
cation of the Treaties the law is observed, so that in the substantive scope of
application of EU law, national measures are to conform to the general prin-
ciples of that law.

A legal principle and a legal rule operate differently as grounds for review.
The application of the latter is straightforward, since rules apply in an “all-or-
nothing” fashion. The inquiry is limited to determining whether or not the
rule in question applies to the factual case at hand. If so, then the rule itself
indicates the solution. In the same way, any conflict between rules may be
solved by the maxims “lex superior derogat legi inferiori”, “lex posterior
derogat legi anteriore” and “lex specialis derogat legi generali”. By contrast,
the consequences of applying a legal principle to a factual scenario are not as
easy to foresee. All relevant factors must be taken into consideration in the
application of a legal principle. Unlike rules, principles are norms whose impli-
cations remain undetermined until they are applied to a concrete factual sce-
nario. Given that no principle encapsulating an individual right or the general
interest is absolute, the courts must engage in balancing to evaluate whether
a legal norm is consistent with a general principle. In case of a conflict
between two principles, one of which is embodied in or justifies a norm adopted
by the legislature while the other points to the invalidity of such a norm, a
balancing exercise is necessary to allow for consideration of the conflicting
principles at issue. As opposed to the syllogistic reasoning followed when
applying rules, “balancing requires the explicit articulation and comparison of
rights or structural provisions, modes of infringement, and government
interests”.

114. Art. 19(1) TEU.
115. See Joined Cases C-60 & 61/84, Cinéthique v. Fédération Nationale des Cinémas
Français, [1985] ECR 2605, para 25; Case C-12/86, Demirel v. Stadt Schwaebisch Gnud,
117. For a classic study on balancing in the context of constitutional rights, see generally,
Alexy, A Theory of Constitutional Rights (OUP, 2002). See also Harbo, “The function of the
proportionality principle in EU law”, 16 ELJ (2010), 166.
118. Against a relative interpretation of individual rights, see Habermas, Between Facts and
60–61.
Furthermore, the distinction between principles and rules also reveals a different conception of the judicial function and, in turn, a different understanding of the rule of law.\textsuperscript{120} While rules tend to limit the margin of appraisal of judicial decision-makers more than principles, the over-inclusiveness or under-inclusiveness of rules may lead to a result contrary to substantive justice. But rules reinforce predictability and hence legal certainty more than principles do. Some authors therefore posit that rules restrain judges from intruding into the realm of politics. Thus, if one understands the proper role of the judiciary in democratic societies as being limited to acting as a mouthpiece for the law, then rules contribute to confining judges to this role more effectively than principles do.\textsuperscript{121}

While principles may leave more scope for judicial participation in law-making, they also require greater judicial accountability. The application of principles forces judges to state sufficient reasons for the outcome reached; they must clearly indicate the different steps in their analysis.\textsuperscript{122} Therefore, the use of principles does not prevent judges from taking decisions with a clear political impact, but it should prevent judges from becoming politicized. In contrast to the confrontation between competing special interests inherent in the political process, the judicial application of principles requires a dialogic, reconciliatory and contextual reasoning, which restricts the adoption of decisions on the basis of personal policy choices.\textsuperscript{123} It follows that endorsing rules to the detriment of principles results in “the rule of law [being understood] as a law of rules”.\textsuperscript{124} Conversely, if principles are relied upon when reviewing legislation, then the rule of law is read as a law of principles.

In the EU, it is rather the latter of these two lines of reasoning that has been followed. This is not surprising given that it corresponds to the way in which constitutional justice has predominantly been understood in Europe (and elsewhere) ever since human rights were placed at the centre of national legal orders.\textsuperscript{125} To this effect, it has even been suggested that, as “a master technique

\textsuperscript{120} Ibd., 62–69.
\textsuperscript{121} See e.g. Scalia, “The rule of law as a law of rules”, 56 Univ. Chicago. L. Rev. (1989), 1179–1180.
\textsuperscript{122} Von Bogdandy, “Founding principles of EU law: A theoretical and doctrinal sketch”, 16 ELJ (2010), 103 (holding that “a judicial decision which employs the balancing of principles is more intelligible for most citizens than a ‘legal-technical’ reasoning phrased in hermetic language which obscures the valuations of the court. To devise legal controversies as conflicts of principles allows for a politicization which should be welcomed in light of the principle of democracy, since it promotes the public discourse on judicial decisions”).
\textsuperscript{123} Sullivan, op. cit. supra note 119, 67–69.
\textsuperscript{124} Scalia, op. cit. supra note 121, 1179–1180.
of judicial governance”, “balancing is the most important institutional innovation in the history of European legal integration”. 126

Balancing is, however, not free from criticism. Detractors have advanced a well-known critique127 according to which balancing involves “the assumption of a common metric in the weighing process”, but it tells nothing about “how various interests are to be weighted”. 128 For example, how is the ECJ supposed to strike the right balance between market integration and environmental protection, or between social and economic objectives? The critics posit that unless these opposite interests are translated into a common standard, they cannot be measured against each other. Moreover, if a common standard or metric is ever found, then “the problem that gave rise to the need for a balancing method dissolves”. 129 Bengoetxea, MacCormick, and Moral Soriano provide a good reply to this critique. 130 From the assumption that two values are incommensurable (e.g. the environment and internal market integration), it does not follow that a conflict between them cannot be solved rationally. The authors argue that balancing should not refer to a pre-established and universal metric system. Instead, value pluralism131 and the importance of the particularity of the situation should guide the ECJ when balancing competing interests. Yet, since the balancing that these authors propose is contextual, it runs the risk of being perceived as an arbitrary practice, undermining the coherence of the legal system. Bengoetxea, MacCormick, and Moral Soriano counter this objection by stating that, instead of laying down the criteria which provide a definitive means for resolving all conflicts between competing principles, the ECJ should establish the different steps in its legal reasoning necessary to reach an outcome. 132 This step-by-step balancing framework would enhance the

126. Ibid., 141.
128. Ibid., 471.
129. Ibid., 472.
130. Bengoetxea, MacCormick, and Moral Soriano, “Integration and integrity in the legal reasoning of the European Court of Justice”, in De Búrca and Weiler (Eds.), The European Court of Justice (OUP, 2001), p. 44.
131. Ibid., p. 64 (value pluralism implies that “principles cannot be reduced to a single value or coherent set of values, nor should conflicts between reasons be interpreted as an imperfection, but rather as the normal state of human beings”).
132. Ibid., 65. Von Bogdandy, op. cit. supra note 122, 101 (opining that “[t]he solution to a conflict of principles cannot be determined either scientifically or legally, it can only be structured”). Likewise, Harbo, op. cit. supra note 117, 182 (who argues that “[t]he reason why courts establish principles of law in general and the proportionality principle in particular is … to assure some kind of legitimacy for its decisions. [To this effect,] the binding of the court’s reasoning to some (more or less) explicitly stated procedures must be perceived as imperative in order to secure legitimacy for the court’s decision in a liberal rights-based constitutional regime”).
coherence of the legal system, by reconciling its conflicting principles and by establishing links with legal, moral and political theories. For example, where free movement and environmental protection point to different outcomes, they consider that the ECJ applies three balancing criteria. First, the “rule of reason” enables the ECJ to identify mandatory requirements. Secondly, the principle of proportionality defines the level of intrusion into free movement that can be tolerated in order for a Member State to promote environmental protection. Finally, the ECJ examines whether the conflict involved an unequal treatment between domestic and intracommunity trade, and if so whether it can be justified. Still according to these authors, at all three stages, the ECJ must construct its analysis by choosing among different legal, moral, or political theories in support of its decision. A theory that would contribute to the coherence of the legal system is provided by Poiares Maduro, who invites the ECJ to look not only at “the telos of the [Union] rules to be interpreted”, but also at “the telos of the legal context in which those rules exist”. Hence, by having recourse to balancing criteria enriched by different, albeit converging, legal, moral, or political theories, the ECJ ensures a case-by-case, flexible construction of the EU legal order based on the rule of law, expressed inter alia in the various general principles of EU law.

4. Expression of a common constitutional space

The interaction between general principles of EU law and national law is to be seen as a continuing two-way process. As Koopmans puts it, general principles “are, in a certain sense, commuters” who travel back and forth from the national legal systems to the EU. To preserve this two-way process when discovering and developing general principles of EU law, it is vital that the ECJ follows a methodology that satisfies the expectations of national courts. Otherwise, the latter may perceive such principles as illegitimate judicial lawmaking and decide to stop engaging with the ECJ.

133. See Tridimas, op. cit. supra note 1, pp.193–194 (arguing that, when reviewing national measures, the principle of proportionality operates as “an instrument of market integration”).
134. Bengoetxea, MacCormick, and Moral Soriano, op. cit. supra note 130, 74. It is worth noting that the principle of proportionality and non-discrimination act here in complementary fashion, in so far as the latter is subsumed in the former.
135. Ibid., 79.
4.1. The establishment of general principles of EU law

4.1.1. The evaluative approach and the Charter
In discovering general principles, it is well established that the ECJ does not seek to identify the lowest common denominator from national constitutional traditions. Instead, the ECJ follows “an evaluative approach”, according to which it incorporates the solution provided for by the national legal systems that fits better or is in line with the objectives and structure of the Treaty. 139 Herdegen opines that the ECJ must be cautious when having recourse to this evaluative approach “that harbours the potential for excessive judicial activism”. 140 He echoes the criticisms of Advocate General Mazák in Palacios de la Villa 141 regarding the methodology employed by the ECJ in Mangold when establishing the general principle of non-discrimination on grounds of age. Herdegen and Advocate General Mazák posit that neither national constitutional traditions, nor international law provide an adequate source of inspiration for the ECJ’s position. Only two national constitutions recognize the principle at issue, 142 whilst the various international instruments to which the Member States are signatories refer to the principle of equality in general, but remain silent on the principle of non-discrimination on the specific grounds of age. 143 Additionally, Herdegen and Advocate General Geelhoed criticize the ECJ for deducing the principle of non-discrimination on grounds of age from the principle of equality. 144 Recalling Grant, 145 they argue that it falls to the EU legislature and, where appropriate, to the national legislature, to identify the criterion on which differentiation between individual situations cannot legitimately be based. Herdegen goes even further suggesting that, since the ECJ encroached upon the competences reserved to the Member States, German courts should read the ruling in Mangold as ultra vires 146 (German courts would thus refer this question to the German Constitutional Court 147 which would

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142. Only the Portuguese and Finnish constitutions recognize this principle.
146. Herdegen, op. cit. supra note 140, 348.
147. In its decision on the Treaty of Lisbon of 30 June 2009, the German Constitutional Court claimed jurisdiction to decide whether EU law is ultra vires or whether it runs counter to
then decide, in light of its *Maastricht* decision, whether *Mangold* should be declared inapplicable in Germany).148

These objections apparently overlook the internal source of inspiration supporting the findings of the ECJ in *Mangold*, namely the Charter of Fundamental Rights of the European Union150 (the Charter). Article 21(1) of the Charter states indeed that “any discrimination based on … age … shall be prohibited”. If *Mangold* had been delivered after *Parliament v. Council*,151 perhaps the ECJ would have made an express reference to this instrument.152 In the latter case, the ECJ held for the first time that, while the Charter is not legally binding, it may operate as a source of inspiration for the establishment of general principles.153 Since then, the ECJ has continued this trend, often citing Articles of the Charter as a source of inspiration for general principles of EU law.154 This is a positive development. Not only is the aim of the Charter to reaffirm the European *acquis* regarding fundamental rights,155 but the Charter also embodies contemporary European values and is designed to meet the challenges of social and technological change.156 In fact, since 1 December 2009, when the Treaty of Lisbon entered into force, the Charter stands on an equal footing with the TEU and the TFEU. Accordingly, the Charter provides a sound legal basis


148. See German Constitutional Court, BVerfGE 89, 155. For the English version, see CMLR [1994] 57 et seq.

149. But see German Constitutional Court, decision of 6 July 2010 in *Honeywell*, BVerfG, Constitutional Complaint, 2 BvR 2661/06. Here, the German Constitutional Court was called upon to determine whether, by holding that the general principle of non-discrimination on grounds of age may produce horizontal direct effect, the ruling of the ECJ in *Mangold* was *ultra vires*. The German Constitutional Court replied in the negative. It reasoned that, since *Mangold* involved a policy field in which the Union enjoys legislative competence by virtue of Art. 19 TFEU (ex 13 EC), the horizontal application of the general principle of non-discrimination on grounds of age as given expression in Directive 2000/78 was a question for the ECJ alone to address. This means that the German Constitutional Court will only undertake an *ultra vires* review where it considers that the ECJ has interpreted an EU norm in such a way that it entails the conferral of a new legislative competence to the Union. See annotation by Payandeh, 48 CML Rev. (forthcoming)

150. See supra note 23.


152. Herdegen, op. cit. supra note 140, 351 (holding that the change in the ECJ’s attitude towards the Charter was, in part, triggered by the severe criticism against *Mangold*).


156. Tridimas, op. cit. supra note 1, p. 358.
for the establishment of general principles of EU law. By rendering rights visible and by merging and systematizing in a single document the sources of inspiration scattered in various national and international legal instruments, the Charter brings clarity for both citizens and national courts as to how fundamental rights are protected at the EU level. Express reliance on the Charter as a ground for establishing a general principle of EU law cannot awaken national sensitivities. On the contrary, since the Charter is the result of a pan-European consensus, drawing on its Articles for inspiration is a sign of judicial deference to the political process. The Charter thus provides an adequate basis to cope with the objections raised by Advocate General Mazák and Herdegen.

Furthermore, since from now on the Charter is primary EU law, it fulfils a triple function. First, just as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the “discovery” of general principles of EU law.

However, from the fact that the Charter is now legally binding it does not follow that the EU has become a “human rights organization” or that the ECJ has become “a second ECHR”. To this effect, the second paragraph of Article 6(1) TEU stresses that “[t]he provisions of the Charter shall not extend

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158. In its fifth para, the Preamble of the Charter states: “This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights.”

159. But see Herdegen, op. cit. supra note 140, 352 (opining that “it remains to be seen whether the reference to the Charter … ensures methodological added value with respect to the scope of fundamental rights and the justification of interference by EU legislation or Member States’ action”).

160. After the entry into force of the Treaty of Lisbon, see Case C-403/09 PPU, Detiček, judgment of 23 Dec. 2009, nyr, para 58 (where the Charter was relied upon as an aid to interpretation of Regulation Brussels II bis, O.J. 2003, L 338/1). See also Kičičkdevčević, cited supra note 64, para 22.

161. Tridimas, op. cit. supra note 1, p. 613.
in any way the competences of the Union as defined in the Treaties”. A similar statement is also reproduced in Article 51(2) of the Charter. It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. To this effect, Article 51(1) of the Charter states that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. While in relation to the EU institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article limits the application of the Charter to the Member States “when they are implementing Union law”. But what does “implementing Union law” mean? Unfortunately, the explanations relating to the Charter are not conclusive in this respect. It is thus for the ECJ to define the exact meaning of this provision of the Charter. Until then, it is worth noting that academic opinion is divided concerning the possible ways of interpreting the terms “implementing Union law”.

On the one hand, following a literal interpretation, it may be argued that the Charter only applies to the Member States where the latter act as agents of the Union ("the agency situation"). For example, this would be the case for national measures which implement a directive. In accordance with this approach, the scope of application of the Charter would be narrower than that of general principles of EU law. Indeed, one should recall that, in addition to “agency situations”, general principles of EU law may also be invoked when examining the validity of national measures derogating from EU requirements or where some specific substantive EU rule is applicable to the situation in question.

This narrow reading of the terms “when [the Member States] are implementing Union law” finds support in the drafting process of the Charter, which "illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy".

162. Art. 51(2) of the Charter reads as follows: “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.
164. Tridimas, op. cit. supra note 1, p. 363 (opining that the Praesidium commentary on Art. 51 of the Charter gave rise to confusion as it “sidelin[ed] the difference between national action for the implementation of [Union] law and national action falling within the scope of [Union] law”). See also Eeckhout, op. cit. supra note 157, 977; Prechal, op. cit. supra note 51, 20.
165. See supra note 48 et seq. and accompanying text.
Likewise, the Convention on the Future of Europe also favoured limiting the scope of application of the Charter, so as to minimize national resistance to the Charter’s legally binding status as provided for by the Treaty establishing a Constitution for Europe.\textsuperscript{167} Put simply, both the Convention in charge of drafting the Charter and the Convention on the Future of Europe sought to ensure the Member States that the Charter would not upset the vertical allocation of powers.

In light of that objective, it may legitimately be asked whether the Charter serves to reduce the range of situations in which the EU legal order protects fundamental rights. Alternatively, does this merely imply that the judicial protection of fundamental rights in the EU legal order will be subject to a dual regime, according to which the Charter would apply to the Member States when acting as agents of the Union, while general principles of EU law could still be invoked in “derogation situations” and in relation to “measures falling within the scope of EU law”? For Lord Goldsmith, where Member States do not act as agents of the Union, “the protection of fundamental rights for the citizen will be the existing structure of national law and constitutions and important international obligations like the [ECHR]”.\textsuperscript{168} In his view, the Charter has to be read as an instrument which limits the powers of the EU, as opposed to “an exercise in extending [its] competences”.\textsuperscript{169} Likewise, former Advocate General Jacobs – writing extrajudicially – argued that in situations other than the “agency situation”, a Member State’s compliance with fundamental rights should not be subject to judicial review of the ECJ.\textsuperscript{170} He posited that “[o]nce it has been established that a restriction is justified from the perspective of [EU] law, the restriction might still be caught as infringing fundamental rights. But that would be a matter for national law, or possibly the European Convention on Human Rights, not for [EU] law”.\textsuperscript{171} The former Advocate General referred to Familiapress\textsuperscript{172} to illustrate this point. In that case, the ECJ was asked to determine whether Austrian legislation prohibiting the sale of periodicals containing prize competitions complied with Article 34 TFEU (ex 28 EC). Austria alleged that its legislation was justified on the ground of preserving press diversity, an important aspect of the freedom of expression. According to the former Advocate General, the ECJ should have limited itself

\textsuperscript{167} Knook, “The Court, the Charter, and the vertical division of powers in the European Union”, 42 CML Rev. (2005), 373.
\textsuperscript{169} Ibid, 1206.
\textsuperscript{171} Ibid, 336.
\textsuperscript{172} Case C-368/95, Familiapress, [1997] ECR I-3689.
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to examining whether the Austrian legislation at issue complied with the public policy derogations contained in the Treaty. If so, then that national measure should have been upheld as a matter of EU law. The question whether such a measure complied with the freedom of press was a separate issue, and was not for EU law to decide. However, Eeckhout argues that the problem with that view is that it would allow “the relevant Treaty provisions [to] be interpreted in a way which tolerates the violation of fundamental rights”.173 In addition, he rightly notes that the notion of “public policy” is difficult to apprehend without considering fundamental rights. By way of example he observes that, had the ECJ decided in Grogan174 that the freedom to provide services was applicable to the Irish ban on the distribution of specific information about clinics in another Member State where abortions were performed, it would have been very difficult for the ECJ to decide whether such a measure complied with EU law without considering Ireland’s argument based on the right to life.175 Most importantly, in the “derogation situations”, determining whether a Member State complies with fundamental rights vests the rulings of the ECJ with legitimacy. It reassures national courts, in particular the constitutional courts, that the Union embraces the values and principles in which national constitutions are grounded. As Tridimas says, the protection of fundamental rights guarantees “ideological continuity” between the two levels of governance.176 Accordingly, in order to demonstrate that the Union takes fundamental rights seriously, “they should be all-pervasive in EU law”.177 Even if Article 51(1) of the Charter were subject to a strict interpretation, the scope of application of general principles of EU law should not be adversely affected. General principles would take over where the scope of application of the Charter ends.178 However, Dougan believes that such a dual regime would not be without

173. Eeckhout, op. cit. supra note 157, 977.
175. Eeckhout, op. cit. supra note 157, 978.
176. Tridimas, op. cit. supra note 1, 302.
177. Eeckhout, op. cit. supra note 157, 977.
178. E.g., regardless of whether Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom is a real “opt-out” or a clarification of the existing case law, one could argue that general principles of EU law will still apply to these Member States. See Baquero Cruz, “What’s left of the Charter? Reflections on law and political mythology”, 15 MJ (2008), 72 (opining that “[u]sing general principles, the [ECJ] can diminish or even neutralize the negative effects of the Protocol”); Dougan, “The Treaty of Lisbon 2007: Winning minds, not hearts”, 45 CML Rev. (2008), 668–667 (while acknowledging the option of general principles, the author prefers to interpret the Protocol restrictively). For a critical overview of Protocol (No 30), see generally Barnard, “The ‘opt-out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of rhetoric over reality?”, in Griller and Ziller (Eds.), The Treaty of Lisbon: EU Constitutionalism without a Constitutional Treaty? (Springer, 2008), pp. 257, 264.
difficulties, as it “might prove burdensome”. He notes that, while the fundamental rights protected may be the same, a dual regime could give rise to arbitrary divergences as to the actual quality and potency of those rights.

On the other hand, in order to overcome the difficulties inherent in this discussion, it is being argued that the terms “implementing Union law” must be read in accordance with the case law of the ECJ in the field of fundamental rights protection. Put simply, “implementing Union law” should be interpreted as “acting within the framework of Union law”. This would mean that the scope of application of the Charter and that of general principles of EU law overlap. Thus, the Charter would not alter the scope of application of fundamental rights protection under EU law, respecting the constitutional allocation of powers sought by the authors of the Treaties. Does this mean, as Weiler considers, that a catalogue of fundamental rights has little added value? In our view, the answer to this question should be in the negative. Since the material scope of the Charter is broader than that of general principles, the Charter may contribute significantly to the “discovery” of general principles.

4.1.2. General principles of EU law and constitutionally prohibited forms of discrimination

Two recent decisions of the ECJ demonstrate that recognizing the principle of equality as a general principle of EU law does not allow the ECJ to interfere with the prerogatives of the EU legislature. In *Audiolux*, the ECJ was asked whether there was a principle of equal treatment of minority shareholders. This principle would seek to protect minority shareholders by obliging the dominant shareholder when exercising the control of or acquiring the company, to offer to buy their shares under the same conditions as those agreed when the acquisition or takeover of the company took place. The ECJ began by denying that the alleged principle of equal treatment of minority shareholders could be found in secondary legislation. Next, it examined whether such a principle could be inferred from the general principle of equality. The ECJ replied in the negative. It held that not only would such a principle require weighing the

180. Ibid.
181. Eeckhout, op. cit. supra note 157, 993.
184. *Audiolux*, cited supra note 2. See also case note by Bengoetxea, 47 CML Rev, 1173–1186.
185. Ibid., para 32.
186. Ibid., para 52. (Reaching the same conclusion, A.G. Trstenjak also examined Treaty provisions and international law. See Opinion of A.G. Trstenjak in *Audiolux*, op. cit. supra note 2, paras. 75–80).
interests of the dominant shareholder against those of minority shareholders, but it would also necessitate an evaluation of the legal consequences for corporate takeovers. Likewise, in light of the principle of legal certainty, this principle would require a precise expression, ensuring that interested parties were able to act in complete awareness of their obligations and rights. In any event, even assuming that minority shareholders deserve special protection, the general principle of equality does not provide the right avenue for guaranteeing this protection. The ECJ also observed that, while the general principle of equality has a constitutional status, the alleged principle of equal treatment of minority shareholders would require such a degree of specificity that its formulation inevitably involves legislative choices. Therefore, the ECJ concluded that the alleged principle of equal treatment of minority shareholders could not be recognized as a general principle of EU law.

In NCC Construction Danmark, the ECJ again stressed that, in the absence of legislative choices, the application of the general principle of equality is confined to constitutional questions. The facts of the case may be summarized as follows. Under Danish law, a construction business had to pay VAT on supplies relating to construction effected on its own account (self-supply), whereas the subsequent sale of buildings thus constructed was an exempt transaction. This meant that, in accordance with Article 17 of the Sixth VAT Directive, if a construction business paid VAT for goods and services used for both the construction of a building and the subsequent sale of that real estate, then it could only deduct the VAT charged on those goods and services in relation to its taxable activities. The applicant, a construction company, argued that the Sixth VAT Directive had not been properly transposed into Danish law. It contended, among other grounds, that the right to a deduction of VAT had been infringed by Denmark, since the authorities of that Member State had legislated in a way that subjected the applicant to less advantageous treatment (partial deduction) than that to which building businesses were entitled under the Sixth VAT Directive (full deduction). The ECJ began by observing that the right to deduction is a fundamental principle underlying the common EU system of VAT. Indeed, it is the embodiment of the general principle of equality within that common system. Next, basing its approach on Audiolux, the ECJ ruled that, in contrast to the general principle of equality which has a constitutional status, the right to deduction is grounded in secondary EU law.
Danish legislature had exercised its legislative discretion in compliance with the Sixth VAT Directive, Denmark was entitled to impose a limitation on the right to deduction for goods and services used for both exempt and taxable activities. Moreover, the ECJ pointed out that the general principle of equality read in the context of the common VAT system only required Denmark to treat comparable economic operators alike.\(^{194}\) This was indeed the case, since the first sale of a building affected by both construction businesses and property developers was exempted from VAT.\(^{195}\) As a result, the ECJ ruled that Danish law was compatible with the right to deduction.

It follows from *Audiolux* and *NCC Construction Danmark* that it falls to the Union legislature (or, where appropriate, to the national legislature) to identify the criteria on which differentiation between individual cases cannot legitimately be based. Yet, as *Mangold* demonstrates, the general principle of equality may be relied upon without further legislative intervention in relation to constitutionally prohibited forms of discrimination (e.g. discrimination on grounds of nationality, sex, age). The distinction between constitutionally prohibited forms of discrimination and other sets of circumstances calling for legislative intervention is a positive development. It shows that, beyond constitutionally prohibited forms of discrimination, the general principle of equality cannot be relied upon to replace legislative choices. Otherwise, the ECJ would risk being dragged into policy-making based on its own conception of redistributive justice.\(^{196}\) However, this does not mean that the general principle of equality is confined to protecting constitutional situations. As *NCC Construction Danmark* shows, it only means that, when legislative discretion is involved, that principle intervenes at a later stage: as an *ex post* review of the internal consistency of the choices made by the legislature.

4.2. *The development of general principles of EU law*

With respect to the development of general principles of EU law, should the ECJ adopt a strictly uniformizing and hence hierarchical approach, or else should it recognize that general principles leave some room for constitutional values that differ from one Member State to another (“value diversity”)?

The latter option fits well with the notion of “constitutional pluralism”, a legal theory that seeks to provide a non-hierarchical explanation of the interaction between EU and national law.\(^{197}\) For general principles, a moderate
discourse on “constitutional pluralism” would posit that beyond a core nucleus of shared values where the ECJ must ensure uniformity, the *ius commune europaeum* resulting from the application of general principles cannot disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. In this view, the ECJ cannot rely on general principles of EU law, particularly fundamental rights, as an unstoppable centripetal force that would ensure uniformity while destroying constitutional diversity.

When touching upon sensitive areas of national constitutional law which lie outside a core nucleus of shared values, respect for constitutional pluralism implies that the ECJ should exercise a degree of judicial deference. The decision of the ECJ in *Omega* illustrates this approach. There, the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that it infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in ex Article 49 EC (now 56 TFEU). Thus, the ECJ was called upon to strike a balance between ex Article 49 EC and human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective – the protection of human dignity –, the ECJ ruled that, for the purposes of applying the principle of proportionality, “[i]t is not indispensable … for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”. Put simply, the fact that a Member State other than Germany has chosen a system of protection of human dignity less restrictive of the freedom to provide services did not render the German measure contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the German Constitution and did not go beyond what was necessary to that effect, the ECJ considered that it was a justified restriction. Thus, *Omega* demonstrates that the ECJ did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany which was more protective of free movement. Instead, it endorsed a model based on

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hand, a total absence of hierarchy would lead to the fragmentation of a system based on multi-level governance. For an account on the different views of constitutional pluralism, see Avelj and Komárek (Eds.), “Four visions of constitutional pluralism”, 21 *EUI Law Working Papers* (2008), available at: <cadmus.eui.eu/dspace/handle/1814/9372>.

199. Ibid., 17.
201. Ibid., para 37.
“value diversity”, where national constitutional traditions are not in competition with the economic objectives of the Union, but form an integral part of it.\textsuperscript{202}

A moderate discourse on constitutional pluralism introduces a welcome element of balance into the development of general principles of EU law. However, the ECJ must still guarantee a core nucleus of shared values vital to the integrity of the EU legal order. In relation to those values, the ECJ has no choice but to follow a hierarchical approach. The question that then arises is how to define the outer limits of this nucleus. In this regard, Weiler argues that “the [Union] should not impose its own standard on the Member State measure but allow a wide margin of appreciation, insisting only that the Member State does not violate the basic core encapsulated in the ECHR”.\textsuperscript{203} Thus, by having recourse to a margin of appreciation, not only would the ECJ mediate between the “European commonality” and “national particularism”, but it would also reinforce its commitment to subsidiarity.\textsuperscript{204}

However, the application of a margin of appreciation is a complex task, given that its operation depends, to a large extent, on the right whose exercise is being restricted, the factual context and the legitimate aims pursued by the restrictive measure.\textsuperscript{205} This complexity is highlighted by contrasting \textit{Omega} with \textit{Viking}\textsuperscript{206} and \textit{Laval}.\textsuperscript{207} In the former case, the ECJ held that the contested national measure fell within the margin of appreciation and thus was submitted to a soft proportionality test. By contrast, in \textit{Viking} and \textit{Laval}, even though the ECJ recognized for the first time the right to take collective action “as a fundamental right which forms an integral part of the general principles of [EU] law”,\textsuperscript{208} it submitted collective action restricting the Treaty provision on free

\begin{itemize}
\item \textsuperscript{202} Tridimas, op. cit. \textit{supra} note 1, p. 341.
\item \textsuperscript{203} Weiler, “ Fundamental rights and fundamental boundaries”, in Weiler, \textit{The Constitution of Europe “Do the new clothes have an emperor” and other essays on European integration} (CUP, 1999), 126. See e.g. Joined Cases C-465/00, C-138 & 139/01, \textit{Österreichischer Rundfunk and Others}, [2003] ECR I-4989; Case C-101/01, \textit{Lindqvist}, [2003] ECR I-12971. Alternatively, one could also argue that national courts, in particular national constitutional courts, must have an important role in drawing the contours of this core nucleus. The latter’s hierarchical character would not prevent an ongoing constitutional dialogue between the ECJ and its national counterparts. See Cartabia, op. cit. \textit{supra} note 198, 23–27. Hence, the ECHR would only comprise a part, albeit an essential one, of such nucleus.
\item \textsuperscript{204} Sweeney, “A ‘margin of appreciation’ in the internal market: Lessons from the European Court of Human Rights”, 34 LIEI (2007), 27.
\item \textsuperscript{205} Ibid., 45.
\item \textsuperscript{206} Case C-438/05, \textit{ITF and FSU v. Viking Line ABP and OÜ Viking Line Eest}, [2007] ECR I-10779.
\item \textsuperscript{207} Case C-341/05, \textit{Laval un Partneri Ltd v. Svenska Byggnadsarbeteareförbundet}, [2007] ECR I-11767.
\item \textsuperscript{208} Ibid., paras. 90–91. \textit{Viking}, cited \textit{supra} note 206, paras. 43–44 (quoting the Charter as a source of inspiration).
\end{itemize}
movement of persons to stricter scrutiny.\(^{209}\) Does this mean that it is impossible for the ECJ to adopt a margin of appreciation approach without giving rise to inconsistencies? A close reading of \textit{Viking} and \textit{Laval} may provide a negative reply.

In \textit{Laval}, Directive 96/71 (the Posted Workers Directive)\(^{210}\) was decisive in determining the area of discretion enjoyed by the Member States. This Directive provides a list of mandatory rules of minimum protection in relation to the terms and conditions of employment of posted workers which the host Member State may impose on the posting undertaking.\(^{211}\) Since the trade unions in \textit{Laval} sought to force the posting undertaking to sign a collective agreement containing obligations not specifically referred to in the Directive, their action was a disproportionate obstacle to the freedom to provide services.\(^{212}\) Furthermore, the Directive also lays down the regulatory means by which the host Member State can establish the list of mandatory rules for minimum protection, namely, by law, administrative provisions, or universally applicable collective agreements or arbitration awards. Neither Swedish legislation nor administrative regulations provided for a minimum wage. Nor was any collective agreement or arbitral award recognized as universally applicable. Therefore, the ECJ considered that, even though guaranteeing payment of a minimum wage to posted workers was an overriding reason of public interest, collective action forcing the posting undertaking to enter into negotiations on pay without any legal frame of reference would render it impossible or excessively difficult for that undertaking to identify its legal obligations regarding minimum pay.\(^{213}\) As

\(^{209}\) It is worth noting that one of the main criticisms of these judgments lies in that the ECJ applied the fundamental freedoms to trade unions, despite the fact that trade unions, unlike public authorities, do not represent the general interest but that of their members. In addition, it is also argued that, unlike non-governmental regulatory bodies to which the fundamental freedoms apply (Case 36/74, \textit{Walrave and Koch}, [1974] ECR 1405; Case C-415/93, \textit{Bosman}, [1995] ECR I-4921), trade unions do not enjoy exclusive control to regulate an area of the economy. See e.g. Davies, “One step forward, two steps back? The \textit{Viking} and \textit{Laval} cases in the ECJ”, \textit{37 Industrial Law Journal} (2008), 126, 136–137. However, as Dashwood points out, where a Member State delegates the regulation of employment relations to both sides of the industry, “recourse to collective action by trade unions form[s] an integral part of the process of regulating the provision of services in that [Member State]”. Insofar as trade unions enjoy legal autonomy which allows them “to regulate working conditions in a Member State by way of collective agreements, underpinned by the threat or use of collective action”, he posits that their ability to hinder free movement is analogous to that of non-governmental regulatory bodies. See Dashwood, “\textit{Viking} and \textit{Laval}: Issues of horizontal direct effect”, 10 CYELS (2007–2008), 525, 535 and 539. See also Opinion of A.G. Mengozzi in \textit{Laval}, op. cit. supra note 207, para 160.

\(^{210}\) O.J. 1997, L 18/1.

\(^{211}\) \textit{Laval}, cited supra note 207, para 80. Besides, Sweden had not made use of Art. 3(10) which could grant further rights to posted workers. See para 84.

\(^{212}\) Ibid., para 108.

\(^{213}\) Ibid., para 110.
a result, in *Laval*, the normative framework adopted by the EU legislature conditioned the way in which the ECJ applied the principle of proportionality.

Moreover, in contrast to the contested measure in *Omega*, the collective action taken in *Viking* and *Laval* involved measures which potentially cloaked protectionist, albeit socially legitimate, claims. In *Omega*, activities involving “playing at killing” were banned because they were incompatible with a basic value of the German constitution. Despite the effect on trade, the German authorities’ attitude had nothing to do with the fact that the equipment was imported from the UK.214 Hence, there was no intent to insulate the local market from external competition in *Omega*. Conversely, in *Viking* and *Laval*, trade unions sought protectionist measures by struggling to keep jobs at home.215 While it is in principle legitimate for trade unions to seek to protect workers from social dumping, it is equally true that trade unions are not entitled to shield local labour markets from competition coming from Member States with low average wages. For this reason, the ECJ may have felt that granting a margin of appreciation to trade unions in such a broad way, as if they were Member State authorities, was inappropriate.216 Otherwise, the ECJ might have tilted the balance in favour of a “social Europe” that arguably excludes a large part of its new citizens.217 Trade unions could easily engage in social protectionism, leading to retaliatory measures and eventually to the fragmentation of social groups across Europe.218 In this regard, had the Scandinavian trade


215. *Viking*, cited supra note 206, para 15 (“In press statements FSU justified its position by the need to protect Finnish jobs”).

216. For an alternative explanation, see Azoulai, “The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization”, 45 CML Rev. (2008), 1350–1353 (arguing that the ECJ “refuses to consider the system of social relations as a ‘constitutional order’ enjoying the capacity of self-determination” and consequently, trade unions do not enjoy a broad margin of discretion. The State remains the only reference to balance social and economic objectives in light of national constitutional traditions. In his view, this is a paradox, given that the ECJ applied ex Art. 49 EC to trade unions, while denying them a role in determining the public social order. To this effect, see *Laval*, cited supra note 207, para 84, where the ECJ held that trade unions may not put forward grounds of public policy to argue that collective action complies with EU law).


218. Whilst it is true that in *Viking*, the ITF engaged its members in a coordinated and internationally agreed action to counter the problems associated with the flag of convenience and social dumping, the transnational character of such an action does not rule out that it might give rise to social protectionism. In this regard, A.G. Poiares Maduro correctly observed that “[a] policy of coordinated collective action could easily be abused in a discriminatory manner if it operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions”. In his view, a compulsory coordinated industrial action would
unions in *Laval* and *Viking* reacted to cheaper labour coming from the Baltic States with a transnational mindset, perhaps seeking to raise standards throughout the EU rather than seeking to exclude workers from other Member States, the ECJ might have been more sympathetic to their claims.\(^{219}\) For example, fears of social protectionism might have been alleviated had the Scandinavian trade unions joined forces with their Baltic counterparts to provide a “European solution” to intra-Union relocation or to the remuneration of posted workers.\(^{220}\)

It follows from these cases that the ECJ leaves to the Member States a margin of appreciation when defining the social objectives to be protected as well as when setting out the means to attain them, provided that no fundamental EU value, such as the prohibition of protectionism, is at stake.

### 5. Conclusion

The constitutional function of general principles of EU law has been, and still is, to put the flesh of common European values on the bones of “the basic constitutional charter, the Treaties”,\(^{221}\) while, at the same time, not upsetting the vertical and horizontal allocation of powers sought by the authors of the Treaties.

Horizontally, this means that, though the ECJ must make sure that the EU legislature complies with general principles which are primary law, it must not encroach upon the prerogatives of the EU legislature by replacing legislative choices with its own preferences. Stated differently, the application of general principles must abide by two structural principles, namely the principle of separation of powers and that of the hierarchy of norms. It follows that, when having recourse to general principles, the ECJ must distinguish between matters pertaining to the province of constitutional law and those which are subject to legislative discretion. A close look at recent cases, such as *Audiolux* and *Küçükdeveci*, reveals that the ECJ strives to draw such distinction. In *Audiolux*, the ECJ held that the principle of equality only applies to constitutionally prohibited forms of discrimination (such as discrimination on grounds of

enhance the bargaining powers of some trade unions to the detriment of others, fragmenting the labour market and hindering free movement. It is indeed worth recalling that a trade union – member of the ITF – which fails to comply with an ITF circular exposes itself to sanctions and even to the loss of membership. See Opinion of A.G. Poiares Maduro in *Viking*, op. cit. supra note 206, paras. 7 and 71.

\(^{219}\) Barnard, “*Viking and Laval: An introduction*”, 10 CYELS (2007–2008), 492 (opining that “[i]nstead of lamenting their loss of autonomy, trade unions need to examine the judgments in these cases to see how they can use [Union] concepts to their own ends”).


nationality, sex or age), but not to situations of such degree of specificity that their formulation inevitably involves legislative choices. Likewise, in *Küçükdeveci*, the ECJ applied the principle of non-discrimination on grounds of age as “given expression in Directive 2000/78” in order to test the compatibility of a national measure with EU law. In so doing, it appears that, insofar as secondary legislation codifying a general principle is not in breach of the latter but respects its essential content, the ECJ will be deferential to solutions put forward by the political branches of the Union. However, once it is determined that a national measure infringes secondary legislation embedding a general principle, the consequences that flow from such determination do not pertain to the powers of the EU legislature. Given that general principles enjoy a “constitutional status”, whether a general principle produces horizontal direct effect is a “[question] of [‘primary-law’] interpretation which fall[s] within the jurisdiction of the [ECJ]”.222

Vertically, the ECJ must be respectful of the constitutional traditions of the Member States, but not to the extent of giving up the basic constitutional tenets of the Union. This is what appears to transpire by contrasting the outcome of *Omega* with that of *Viking* and *Laval*. Beyond the bounds of a core nucleus of key shared values vital to the Union’s integrity, however, the ECJ should have recourse to a “margin of appreciation” analysis which would strike the right balance between “European commonality” and “national particularism”. Thus, the national identities are preserved as the Union continues to be based upon a model of “value diversity”.

Finally, it is uncontested that, whilst general principles of EU law contribute to rendering the EU legal order self-sufficient, autonomous and coherent, they cannot operate as an excuse for a “competence creep” via judicial activism. Yet, in order for general principles to carry out their constitutional task properly the role of the EU judiciary cannot simply be that supported by Montesquieu, according to which judges are limited to acting as a mouthpiece for the law. The application of general principles entails a more proactive type of adjudication whereby courts are often called upon to address politically charged questions left unsolved by the political process. This does not imply, however, that the EU judiciary is engaging in judicial activism. The rational structure under which general principles operate forces judges to state, in a transparent and clear fashion, the reasons underpinning the solution they support. In other words, the argumentative discourse that takes place when applying general principles confines judges to the realm of judicial deliberations.

In addition, one must not confuse “competence creep” with the pervasive nature of the “constitutional law” of the EU, in particular that of general

principles. On the one hand, if general principles were to be applied to situations falling outside their scope of application, one could correctly argue that the ECJ contributes to the “competence creep”. Nevertheless, Bartsch makes clear that the ECJ does not intend to do that. Quite the contrary, the ECJ has stressed that general principles will not apply in the absence of a substantive link with EU law. On the other hand, once a situation falls within the scope of application of general principles, the imposition of limits upon the powers retained by the Member States is an inevitable consequence of the principle of primacy. However, from the fact that general principles circumscribe the powers retained by the Member States it does not follow that national choices are ignored. By imposing such limits, general principles seek to create a “common constitutional space” where EU and national law engage in a dynamic dialogue which gives rise to a mutual influence between the two levels of governance. Hence, as instruments of constitutional dialogue, general principles facilitate the constant renewal of the EU legal order, epitomizing the “EU’s living constitution”.

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