



## “CLASH OF TITANS”. GENERAL PRINCIPLES OF EU LAW: BALANCING AND HORIZONTAL DIRECT EFFECT<sup>¶</sup>

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ABSTRACT: More than 10 years after the first ruling on the horizontal effect of the principle of non-discrimination on grounds of age, in the *Dansk Industri* case (Court of Justice, judgment of 19 April 2016, *Dansk Industri (DI), Acting on Behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, case C-441/14 [GC]) the CJEU reiterates *Mangold* and *Kücükdeveci*. It has by now proclaimed a new form of horizontality, deriving from the combined application of two different sources of law, i.e. the directive and the general principle. According to the Court, neither the general principle of legal certainty, nor that of legitimate expectations, which can be jeopardised by the horizontal effect of non-discrimination on grounds of age, question the necessity to ensure its effectiveness. Protecting non-discrimination on grounds of age justifies not only a broader application of that principle, but also its hierarchical priority over other general principles of EU law. However, insofar as general principles equally protect other fundamental rights, some questions arise: can the judicial activism of the CJEU equally improve effectiveness and uniformity in the protection of fundamental rights within the EU? Or, as *Dansk Industri* suggests, does the former goal (i.e. effectiveness) necessarily affect the latter?

KEYWORDS: Directive 2000/78 – CJEU – general principle of non-discrimination on grounds of age – principles of legal certainty and legitimate expectations – balancing – direct effect.

### I. THE BACKGROUND OF THE *DANSK INDUSTRI* CASE

Concerning the *Dansk Industri* case<sup>1</sup>, Mr. Rasmussen had been working for Ajos A/S, a company incorporated under Danish law, from the 1<sup>st</sup> June 1984 to the end of June

<sup>¶</sup> Notwithstanding the common ideas shared by the Authors, paras. I, III (second preliminary question) and IV.2 have been written by Elena Gualco, and paras. II, III (first preliminary question) and IV.1 by Luísa Lourenço.

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<sup>1</sup> Court of Justice, judgment of 19 April 2016, case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC].

2009, when he was dismissed. According to the Danish law on salaried employees, Mr. Rasmussen was in principle entitled to a severance allowance to be calculated on the number of years he had been continuously employed in the same undertaking. Since Mr. Rasmussen had been employed by Ajos for more than 18 years, para. 2, lett. a), no. 1, of the abovementioned law imposed on his employer the obligation to pay a severance allowance whose amount should correspond to a three months' salary.

Nevertheless, Ajos refused to pay such a sum arguing that, as long as Mr. Rasmussen was entitled to old-age pension from the employer and he subscribed that pension scheme before reaching 50 years of age, his situation fell within the scope of para. 2, lett. a), no. 3, of the law on salaried employees, which, under those circumstances, excluded the payment of the severance allowance. In this regard, consistent national case-law specified that the entitlement to the severance allowance was barred notwithstanding the employee's decision to remain on the employment market, instead of retiring.

Faced with Ajos' refusal to pay the severance allowance, the trade union Dansk Formands Forenin, acting on Mr. Rasmussen's behalf, sued Ajos in March 2012, claiming the payment of the severance allowance due. Relying on a previous judgment of the CJEU, in the case *Ingeniørforeningen i Danmark*,<sup>2</sup> it argued that para. 2, lett. a), no. 3, of the law on salaried employees violated the Directive 2000/78,<sup>3</sup> and that the national interpretation of that provision was inconsistent with the general principle prohibiting discrimination on grounds of age.

The Danish Maritime and Commercial Court accommodated the claim, enhancing the connection between Mr. Rasmussen's case and the *Ingeniørforeningen*, and specifying that the CJEU has already declared that the national provision at stake was contrary to EU law.

Ajos, however, appealed that decision before the Danish Supreme Court, noticing that the CJEU's judgment in *Ingeniørforeningen i Danmark* could not be followed by the national case law without leading to an interpretation *contra legem* of a national provision, i.e. para. 2, lett. a), no. 3, of the law on salaried employees. The company also objected that accommodating such an interpretation of both the Directive 2000/78 and the general principle of non discrimination on grounds of age would jeopardise the principles of legal certainty and the protection of legitimate expectations.

Against that backdrop, the Supreme Court first stressed that *Ingeniørforeningen i Danmark* differed from the present case insofar as the former was a vertical dispute, whereas the latter was a horizontal one.<sup>4</sup> Recalling that any horizontal direct effect of Directives shall be excluded, the Supreme Court considered therefore essential to clari-

<sup>2</sup> Court of Justice, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark* [GC].

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>4</sup> *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC], cit., para. 15.

fy several issues concerning the extent to which an unwritten principle of EU law, such as non-discrimination on grounds of age, can have horizontal effect.

Specifically, the Supreme Court submitted two preliminary questions<sup>5</sup> to the CJEU in order to:

a) assess whether compliance with a general principle of EU law can prevent a private party from relying on a provision of national law and the consistent interpretation of that national law given by national jurisdictional authorities;

b) understand, on the one hand, whether the general principle of non-discrimination on grounds of age can be weighed against the principle of legal certainty and its corollary, the principle of the protection of legitimate expectations, whose respect could be jeopardised by the horizontal application of the principle of non-discrimination on grounds of age; on the other hand, whether the duty of a Member State to compensate for the harm suffered by private persons as a result of its incorrect transposition of a Directive<sup>6</sup> can impact on the admissibility of such a balancing exercise.

In other words, the second preliminary question aimed to ascertain the possibility of (and the conditions for) declaring the prevalence of the principles of legal certainty and legitimate expectations over the principle of non-discrimination on grounds of age.

## II. THE OPINION OF ADVOCATE GENERAL BOT

The Advocate General<sup>7</sup> started by analysing the case with reference to *Ingeniørforeningen*, as invoked by the referring court. The national judges, indeed, had held that the situation at stake in the present case was different, since the employment situation was not a vertical relationship (that is, governed by public law), but rather between a private employer and an employee. It thus questioned whether the fact that para. 2, lett. a), no. 3, of the law in question could not apply in the first type of situations would equally preclude its application in this type of *horizontal* ones. The Advocate General replied that the said article, as interpreted by the national courts, was definitely incompatible with Directive 2000/78, independently of the type of employment relationship. Restricting the interpretation given by the Court of Justice in *Ingeniørforeningen i Danmark* to relationships governed by public law would tantamount to restricting the scope of the judgment. He furthered that the reasons for the incompatibility “hold true regardless of the nature of the legal relationship at issue”.<sup>8</sup>

<sup>5</sup> *Ivi.*, para. 20.

<sup>6</sup> Court of Justice, judgment of 19 November 1991, joined cases C-6/90 and C-9/90, *A. Francovich and D. Bonifaci and others v. Italian Republic*, para. 33.

<sup>7</sup> Opinion of AG Bot delivered on 25 November 2015, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, cit.

<sup>8</sup> Opinion of AG Bot, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, cit., paras 34-35.

The Advocate General then turned to the duty of consistent interpretation. In fact, as the referring court had argued, faced with the lack of horizontal direct effect of the Directive, it should turn to the interpretation of the law in a manner consistent with the latter. However, the same court had also argued that such interpretation was not possible: admitting it, in the case at issue, would result in a *contra legem* reading of the law, which is one of the limits to consistent interpretation. In this respect, the Advocate General reminds that “directives are not entirely devoid of any effect in the context of disputes between individuals. The obligation upon national courts to interpret national law in conformity with the content and objectives of directives means that directives may have an indirect effect in such disputes”.<sup>9</sup>

Furthermore, according to the Advocate General, the duty of consistent interpretation is not restricted just to rules of national law, but equally includes national case law. As such, there is no need to recur to the general principle of non-discrimination on grounds of age, which would enable “the court to resolve disputes between individuals by neutralising the application of the domestic law inconsistent with EU law”;<sup>10</sup> rather, the Advocate General states, it seems to stem from the order for reference that the only impediment to a consistent interpretation in the present case is existing national case law, which conflicts therewith.

After analysing the arguments of the parties and the references to *Ingeniørforeningen i Danmark*, the Advocate General indeed proceeded to affirm that it does not follow from the latter ruling “that the every wording of article 2a(3) of the Law on salaried employees is inconsistent with directive 2000/78”.<sup>11</sup> He hence suggested that “the implementation by the national court of an interpretation in conformity with EU law would merely require it [the national court] to change its case-law”, which does not amount to as big an obstacle as “the existence of a provision of national law whose very wording is irreconcilable with a rule of EU law”.<sup>12</sup> The Advocate General hence concluded that the “existence of national case-law which is inconsistent with directive 2000/78 presents no obstacle to the national court’s fulfilment of its obligation to interpret national law in conformity with EU law”. This, according to him, is equally in line with the principles of legal certainty and of protection of legitimate expectations.<sup>13</sup>

### III. THE JUDGMENT OF THE COURT OF JUSTICE

The first question focused essentially on the application of the general principle of non-discrimination on grounds of age to the situation at issue. The Court starts by remind-

<sup>9</sup> *Ivi.*, para. 41.

<sup>10</sup> *Ivi.*, para. 47.

<sup>11</sup> *Ivi.*, para. 64.

<sup>12</sup> *Ivi.*, paras 70 and 72.

<sup>13</sup> *Ivi.*, para. 83.

ing that the source of such principle is not to be found in the Directive 2000/78, but rather in international instruments and in the national constitutional traditions common to the Member States. As such, since this instrument of secondary law merely "gives concrete expression to that principle in relation to employment and occupation, the scope of protection conferred by the directive does not go beyond that afforded" by the general principle. However, the Court adds, the principle will only apply to the situation at issue if this situation falls "within the scope of the prohibition of discrimination laid down by Directive 2000/78".<sup>14</sup>

Then, referring to the ruling in *Ingeniørforeningen i Danmark*, it recalls that para. 2, lett. a), no. 3, of the national law under analysis was held to fall under the provision laid down in Art. 3, para. 1, lett. c), of Directive 2000/78; the same legislation being at issue in the present case, it thus falls within the scope of EU law and equally under the scope of the general principle of non-discrimination on grounds of age.<sup>15</sup> As a result, and as held in *Ingeniørforeningen i Danmark*, if the provisions of the Directive 2000/78 preclude national legislation such as the one at issue in the present case, also the "fundamental principle of equal treatment", of which the general principle of non-discrimination on grounds of age is but a specific expression, demands that these norms should be prohibited.

Once clarified the first preliminary question, the CJEU focuses on the analysis of the second preliminary ruling dealing with the alleged possibility to balance the horizontal application of the general principle of non-discrimination on grounds of age with two other general principles of EU law: the principles of legal certainty and of protection of legitimate expectations.<sup>16</sup>

The Court's reasoning can be divided into two parts. The CJEU firstly analyses the duty of consistent interpretation, stressing that any national jurisdiction has the obligation to interpret its national law consistently with EU law: notwithstanding the fact that Directives are neither directly applicable to individuals, nor directly binding on them, any national court must take all the appropriate measures to ensure the fulfilment of the "result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU".<sup>17</sup> The Court recalls that the duty of consistent interpretation finds a limit in the general principles of EU law, and that, anyway, it cannot lead to an interpretation *contra legem* of the national provision. Nevertheless, the doctrine of consistent interpretation imposes the obligation to amend even an established case law, in so far as it produces a result contrary to the purpose sought by the Directive.<sup>18</sup>

<sup>14</sup> *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC], cit., paras 23-24.

<sup>15</sup> *Ivi.*, para. 25.

<sup>16</sup> *Ivi.*, para. 28 *et seq.*

<sup>17</sup> *Ivi.*, para. 31.

<sup>18</sup> *Ivi.*, paras 32-33.

Entering the second part of its reasoning, the Court then observes that, in those cases where the attempt to interpret the national law consistently with EU law is unsuccessful, the general principle of non-discrimination on grounds of age, and the obligation to give full effectiveness to the jurisdictional protection foreseen by EU law,<sup>19</sup> impose on the national court the burden to disapply any provision of national legislation contrary to that principle. According to the Court's ruling, neither the principle of legal certainty nor that of protection of legitimate expectations affect that obligation of national courts. Specifically, weighing the horizontal effect of non-discrimination on grounds of age with the two abovementioned principles would have the effect of limiting the temporal effects of the Court's interpretation,<sup>20</sup> and of denying the "individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation".<sup>21</sup> Furthermore, the possibility for the employee to claim compensation based on the infringement of EU law by a Member State does not modify the obligation pending on the national court.<sup>22</sup> Therefore, the Court finally states that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required to disapply any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age.

#### IV. LEGAL ANALYSIS

##### IV.1. HORIZONTAL DIRECT EFFECT OF GENERAL PRINCIPLES: HERE WE GO AGAIN?

With regard to the Court's answer to the first question of the national court, essentially two comments need to be made.

The development of general principles of EU law in combination with secondary law instruments in the rulings of the Court has always been a thorny legal issue, and this case is not an exception. Indeed, when in para. 23, the Court states that the scope of the protection afforded by the Directive 2000/78 does not go beyond the one afforded by the general principle, it correctly states that the scope of the Directive 2000/78 is narrower than that of the general principle, since it is confined to the area of employment and occupation. It then proceeds to state that the situation at issue must fall within the scope of prohibition laid down by Directive 2000/78 – which seems to be the case, since the same provisions were in analysis in *Ingeniørforeningen i Danmark*. However, it should be reminded that we are here in a clear horizontal situation: the fact that something is within the scope of the general principle does not mean that it is within the

<sup>19</sup> *Ivi.*, para. 35.

<sup>20</sup> *Ivi.*, para. 39.

<sup>21</sup> *Ivi.*, para. 41.

<sup>22</sup> *Ivi.*, para. 42.

scope of the Directive – at least, not within the *ratione personae* scope of application of the instrument.

Moreover, we see here again a situation where it is the general principle of non-discrimination on grounds of age, as a general principle of EU law and a specific expression of the principle of equal treatment, which is applied between the two private parties; notwithstanding, the Directive 2000/78 provisions are essential to frame the situation, and, ultimately, are the law which is applied to assess the situation (even if such is possible only due to the reference to primary law). As such, even though the principle has horizontal direct effect, the relevant, written law which will be applied are the provisions of the Directive 2000/78.<sup>23</sup> This is a clear case of a combination of sources so as to achieve an effect which none of them, independently, would arguably have.

On another note, it seems clear that the Court has definitely established and confirmed its *Mangold*<sup>24</sup> and *Kücükdeveci*<sup>25</sup> case law. Indeed, as in these cases, the fact that there is no public entity involved does not seem to have a deterring effect for the application of the directive. Many will argue this is a clear attribution of horizontal effect to Directives; however, this seems to happen specifically with Directive 2000/78 and the principle of equal treatment in its different manifestations: it is thus in the niche of employment relationships that this type of reasoning from the Court of Justice still strives.

It has been argued that the objective of the anti-discrimination Directives is, in reality, to establish *access justice*, that is, to create equal conditions of access to the market, but within the market rationale and not as a fundamental rights' value *per se*, or a result of social justice.<sup>26</sup> While it is true that the foundations of the Communities and, after, the Union, are based on a conception of the individuals as economic factors, exercising their freedoms in a common internal market, it seems that the development of the case law has pointed equally at a shift in this conception towards the understanding

<sup>23</sup> The horizontal direct effect of general principles of EU law protecting fundamental rights seems to stem from their status as primary law, as guaranteed by Art. 6, para. 3, TEU, and has been widely accepted as a fact by academics. See E. MUIR, *Of Ages in – and Edges of – EU Law*, in *Common Market Law Review*, 2011, p. 39 *et seq.*, at pp. 57-59; see also E. SPAVENTA, *The Horizontal Application of Fundamental Rights as General Principles of Union Law*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (eds), *A Constitutional Order of States? Essays in Honour of Alan Dashwood*, Oxford: Hart Publishing, 2011, p. 199 *et seq.*, at pp. 208-209: "general principles [...] are applicable whenever the situation falls within the scope of Union law, regardless of whether the trigger is the Treaty or a directive, and regardless of whether the litigation is vertical or horizontal"; and M. SAFJAN, P. MIKLASZEWICZ, *Horizontal Effect of the General Principles of EU law in the Sphere of Private Law*, in *European Review of Private Law*, 2010, p. 475 *et seq.*

<sup>24</sup> Court of Justice, judgment of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm* [GC].

<sup>25</sup> Court of Justice, judgment of 19 January 2010, case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC].

<sup>26</sup> H.W. MICKLITZ, *Social Justice and Access Justice in Private Law*, in *EUI Working Paper LAW*, January 2011.

of individuals also, and primarily, as EU citizens.<sup>27</sup> In fact, as the *Zambrano* case shows, it is the “genuine enjoyment of the substance of the rights” the value to be safeguarded, sometimes independently from cross-border elements.<sup>28</sup>

#### IV.2. THE CLASH BETWEEN GENERAL PRINCIPLES OF EU LAW: ONE WINNING OR ALL LOSING?

As already mentioned, this case can be considered an update of the previous *Mangold* and *Kücükdeveci* decisions. However, as for the second preliminary question, the present decision raises a number of issues that *Mangold* and *Kücükdeveci* had only implicitly entailed.

Although the CJEU’s jurisdiction prevents it from solving the national dispute, the meaning – and the impact – of this case law can be appreciated only if the object of the Court’s ruling is correctly understood. As recalled by AG Bot,<sup>29</sup> in *Ingeniørforeningen i Danmark* the Court specified that the violation of the equal treatment principle flowed from the interpretation that the national provision – para. 2, lett. a), no. 3, of the law on salaried employees – had received by the national courts. As a consequence, such interpretation was held to be inconsistent with EU law. In the present case it seems that, again, the controversial aspect of national law was not para. 2, lett. a), no. 3, in itself, but rather its application by the national courts: the Court, in fact, stresses the necessity of changing any established case law based on interpretation of national law inconsistent with EU law by recalling its precedent *Centrosteeel*.<sup>30</sup> That being the case, one may argue that the Danish law was not *per se* contrary to the general principle, and that, therefore, perhaps the doctrine of consistent interpretation still had room to operate in the pending case.<sup>31</sup>

Anyway, the most controversial aspect of the *Dansk Industri* decision concerns the possibility to weigh the horizontal application of a general principle with two other fundamental principles of EU law: legal certainty and legitimate expectations.

Taking the view of the CJEU, one may argue that this decision enhances the importance of the principle of non-discrimination, confirming once and for all, that, at this

<sup>27</sup> See A. WIESBROCK, *Legal Migration to the European Union*, Leiden: Martinus Nijhoff Publishers, 2010, at p. 174: “the conclusion can be drawn that Directives 2000/43/EC and 2000/78/EC as opposed to most previous EC anti-discrimination law are not primarily economically motivated but have their main underlying objective a concern for human rights. For this reason the Directives constitute a significant step towards the development of an autonomous principle of equal treatment in the Community legal order”.

<sup>28</sup> Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi* [GC].

<sup>29</sup> Opinion of AG Bot, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, cit., para. 65.

<sup>30</sup> Court of Justice, judgment of 13 July 2000, case C-456/98, *Centrosteeel Srl v. Adipol GmbH*.

<sup>31</sup> Opinion of AG Bot, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, cit., para. 64.

point, the *Mangold* approach is by now consolidated. Affirming that the respect of equality should be ensured in any dispute, even in the horizontal ones, is a way to stress the importance of this principle and, above all, to fulfil its effectiveness. As already suggested within the academic debate,<sup>32</sup> in future the Court may discover that further discriminatory grounds are covered by an horizontal general principle of non-discrimination;<sup>33</sup> or, even, that other general principles of EU law are suitable to be enforced in horizontal disputes.

However, it is questionable whether the aim pursued by recognising direct horizontal effect to a general principle, while valuable, is nonetheless worth the criticisms that such horizontality *de facto* entails. Notwithstanding the easiness of the Court in affirming that neither the principle of legal certainty, nor that of legitimate expectations are affected by the horizontal application of the principle of non-discrimination on grounds of age, it seems that the reality is quite the opposite, as both principles are interfered with such horizontality.

With regard to the principle of legal certainty, as long as general principles are unwritten rules, their application largely depends on the attitudes of the judiciary: in spite of the effort of the CJEU in ensuring the uniform protection of fundamental rights, it is quite evident that, especially when a fundamental right is a general principle of law, its enforcement could vary according from one court to the other. Therefore, if the horizontal application of a general principle broadens the protection of a fundamental right, it also increases the possibility of diverging case law. Even though the “uniformity goal” is inevitably challenged anytime the horizontality is at stake, a methodology shall be found in order to prevent fundamental rights’ horizontal effect from becoming an actu-

<sup>32</sup> T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds), *General Principles of EU Law and European Private Law*, The Netherlands: Kluwer Law International, 2013, p. 213 *et seq.*

<sup>33</sup> The Court has already found out that the principles of non-discrimination on grounds of nationality and sex have horizontal effect, insofar as their horizontality is triggered by a directly applicable Treaty provision: see, respectively, Court of Justice, judgment of 12 December 1974, case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, and judgment of 8 April 1976, case 43/75, *G. Defrenne v. Société anonyme belge de navigation aérienne Sabena*. With regard to the possibility of linking the horizontality of a general principle to a directive, see Court of Justice, judgment of 10 May 2011, case C-147/08, *J. Römer v. Freie und Hansestadt Hamburg* [GC], where the Court implicitly qualified the principle of non-discrimination on grounds of sexual orientation as a general principle of EU law. However, in that judgment – as already stated in a previous case focusing on age discrimination (Court of Justice, judgment of 23 September 2008, case C-427/06, *B. Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [GC]) – the Court stressed that the application of a general principle of EU law, and therefore its horizontal effect, depend on the possibility to bring the situation in the main proceedings within the scope of European Union law. Considering that the period for transposing the Directive 2000/78 was still pending, the Court finally clarified that the situation at stake fell outside the temporal scope of application of the directive and, as a consequence, that the principle prohibiting discrimination based on sexual orientation was not yet enforceable.

al threat to the substantive and effective protection of fundamental rights. As a matter of fact, the self-restraint of the CJEU in developing some guideline leading national jurisdictions when they deal with horizontality, gives the latter an absolute discretion in assessing the extent and the impact of the horizontal effect of non-discrimination on grounds of age. Furthermore, considering that the national courts' attitude in applying EU law and in following the CJEU case law varies significantly among Member States, it seems that the *Dansk Industri* case has at least one side effect. Ensuring a *tout-court* horizontality to a general principle of EU law means allowing the arbitrary application of such provision by national judges and, from the individuals' perspective, taking the risk of encroaching the legal certainty principle they rely on.

With regard to the principle of legitimate expectations, it seems that the effective improvement of the protection against age discrimination may be questioned from another point of view. As the *Dansk Industri* case clearly shows, the main result of the horizontality of non-discrimination on grounds of age is to impose on an individual, usually the employer, the burden to comply with an unwritten provision of EU law, even in those circumstances where neither the national law, nor the national case law, have fulfilled that duty. In that circumstance, however, the individuals' obligation to overrule the wording of a written provision (inconsistent with a general principle) does frustrate their legitimate expectations as regards the validity, and then applicability, of that provision.<sup>34</sup>

Finally, if balancing general principles<sup>35</sup> shall not be considered an adequate solution, because it will end up in jeopardising the uniform protection of fundamental rights, the prevalence of the principle of non-discrimination on grounds of age over other general principles cannot be regarded as a good option either, since it does affect the protection of someone else's fundamental rights.

Two last observations have to be made in this regard. Firstly, it seems that the method of balancing fundamental rights, being based on proportionality, is the preferable option, as it results in the exercise of one or more of such fundamental rights being only reduced rather than totally precluded. Secondly, while the balance between fundamental rights encompasses the idea that general principles of EU law have all the same value and strength, the idea that one general principle is to take precedence over another raises the question – that have already been tackled in doctrinal writings – on the existence of a hierarchy among general principles of EU law.<sup>36</sup>

<sup>34</sup> E. SPAVENTA, *The Horizontal Application of Fundamental Rights as General Principles of Union Law*, cit., p. 199 *et seq.*

<sup>35</sup> As long as both legal certainty and legitimate interests have been qualified as general principles of EU law. See F. FONTANELLI, *General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci*, in *European Public Law*, 2011, p. 225 *et seq.*

<sup>36</sup> J. ZILLER, *Hierarchy of Norms, Hierarchy of Sources and General Principles in European Union Law*, in U. BECKER, A. HATJE, M. POTACS, N. WUNDERLICH (hrsg), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag*, Baden-Baden: Nomos, 2014, p. 334 *et seq.*