



# “CLASH OF TITANS 2.0”. FROM CONFLICTING EU GENERAL PRINCIPLES TO CONFLICTING JURISDICTIONAL AUTHORITIES: THE COURT OF JUSTICE AND THE DANISH SUPREME COURT IN THE *DANSK INDUSTRI* CASE

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**ABSTRACT:** The present *Insight* focuses on the reception by the Danish Supreme Court (judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.*) of the Court of Justice decision in the *Dansk Industri* case (judgment of 19 April 2016, case C-441/14 [GC]). Instead of disapplying a national provision which was found by the Court of Justice to be inconsistent with the general principle of non-discrimination of grounds of age, the Danish Supreme Court stresses that the Law of Accession of the Kingdom of Denmark to the European Union does not cover general principles of EU law and the national provision cannot be disapplied. The selective approach of the Danish Supreme Court raises a number of concerns which this *Insight* highlights: first, a clear misunderstanding regarding the functioning of general principles of EU law; second, a violation of the duty of sincere cooperation and the relate doctrine of supremacy of EU law; third, an arguable assessment of the effects of the Charter of Fundamental Rights.

**KEYWORDS:** general principles – Charter of Fundamental Rights of the European Union – supremacy of EU law – sincere cooperation – non-discrimination on grounds of age.

## I. INTRODUCTION

When the ‘first chapter’ of the *Dansk Industri* ‘saga’ was released, Dr. Lourenço and I commented the decision of the Court of Justice arguing that that judgment led to a ‘clash of titans’.<sup>1</sup> The choice to refer to general principles of EU law – precisely the general prin-

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<sup>1</sup> E. GUALCO, L. LOURENÇO, “Clash of Titans”. *General Principles of EU Law: Balancing and Horizontal Direct Effect*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 643 *et seq.*

ciple of non-discrimination on grounds of age and the general principle of legitimate expectations and legal certainty – as ‘titans’ was grounded on the idea that general principles have a constitutional role and structural function within the architecture of the EU.

Moving from this remark, the importance of the *Dansk Industri* case was to be found in the twofold clarification that: first, general principles, or at least some general principles, cannot be weighed-up; second, if the general principle of non-discrimination on grounds of age is at stake, it must prevail over other conflicting general principles.

Although the Court of Justice judgment in the *Dansk Industri* case could be criticised under a number of points of view,<sup>2</sup> the reception of that judgement by the Danish Supreme Court seems even more problematic.<sup>3</sup>

## II. THE DANISH SUPREME COURT’S REASONING

Before entering the core of its decision the Danish Supreme Court tackles two main issues: first, the Danish Supreme Court acknowledges the outcome of the Court of Justice judgment in the *Dansk Industri* case. Second, the Danish Court highlights that the same piece of national legislation which was at stake in the *Dansk Industri* case – i.e. para. 2a, no. 3, of the Law on salaried employees – had already been challenged within a previous dispute.<sup>4</sup> Since in that case it was held that the national provision could not be interpreted in compliance with EU law and specifically with directive 2000/78,<sup>5</sup> within the *Dansk Industri* decision too, the doctrine of the consistent interpretation could not operate.<sup>6</sup>

As regard to the possibility to rely on the direct effect of EU law, however, the *Ingeniørforeningen i Danmark v. Region Syddanmark* case and the *Dansk Industri* dispute should be distinguished insofar as the former was a vertical dispute, while the latter is a horizontal one. Against this backdrop, the Danish Supreme Court opens its legal reasoning acknowledging that directives cannot be enforced within horizontal disputes. Therefore, directive 2000/78 could not be relied upon in the dispute at stake.<sup>7</sup>

<sup>2</sup> *Ibid.*, p. 650 *et seq.*

<sup>3</sup> Danish Supreme Court, judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.* An informal English translation of the case can be found in [www.supremecourt.dk](http://www.supremecourt.dk).

<sup>4</sup> Court of Justice, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark*.

<sup>5</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>6</sup> The relationship between consistent interpretation and direct effect is tackled by G. BETLEM, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, in *Oxford Journal of Legal Studies*, 2002, p. 397 *et seq.*; M. DOUGAN, *When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy*, in *Common Market Law Review*, 2007, p. 931 *et seq.* At this regard see also Court of Justice, judgment of 16 September 2010, case C-149/10, *Zoi Chatzi v. Ypourgos Oikonomikori*; Opinion of AG Darmon delivered on 14 November 1989, case 177/88, *Dekker*, para. 15.

<sup>7</sup> Danish Supreme Court, *DI acting for Ajos A/S v. The estate left by A.*, cit., p. 41 *et seq.*

Moving from this observation, the Supreme Court focuses on the possibility to recognize the horizontal effect of the general principle of non-discrimination on grounds of age and on the question whether its direct effect can be balanced with the principles of legal certainty and legitimate expectations.

According to the Danish Supreme Court, the answer to the abovementioned questions is that the general principle of non-discrimination on grounds of age could not be applied in the dispute because general principles of EU are not covered by the Danish law concerning Denmark's membership of the European Union. Therefore, the national provision, which was found to be against EU law, could not be set aside.

Such a conclusion is supported by the following arguments. First, the Court recalls that "the question whether a rule of EU law can be given direct effect in Danish law [...] turn first and foremost on the Law of accession by which Denmark acceded to the European Union".<sup>8</sup> In other words, the Danish Supreme Court argues that the direct effect of the EU shall be assessed by the Supreme Court itself, relying on the Danish Law on accession. Moving from this premise, the Danish Supreme Court observes that the source of the general principles of EU law cannot be found in the Treaties: hence, general principles are not directly applicable in Denmark. Not even Art. 6 TEU, which expressly foresees that fundamental rights are protected by the EU as they are *inter alia* general principles of EU law, can change such a conclusion.<sup>9</sup>

Furthermore, although the Charter of Fundamental Rights of the European Union makes express reference to the principle of non-discrimination on grounds of age, such a legal provision is not enforceable in the horizontal disputes. Hence, being the *Dansk Industri* case a dispute between individuals, the Charter could not lead to the non-application of the national provision inconsistent with a provision of the Charter itself.

Against this backdrop, the Danish Supreme Court finally states that it "would be acting outside the scope of its powers as a judicial authority if it were to disapply the [national] provision in this situation".<sup>10</sup>

### III. THE 'SELECTIVE' SUPREMACY OF EU LAW ACCORDING TO THE DANISH SUPREME COURT: IS IT TIME TO REAFFIRM *COSTA V. ENEL*?

As already underlined, the Danish Supreme Court justifies its conclusions on the assumption that, insofar as the general principle on non-discrimination on grounds of age is not foreseen by any directly applicable Treaty provision, the Law of Accession does not allow the general principle to take precedence over a national provision.

The abovementioned statement raises several issues. First of all, the Danish Supreme Court seems to have misinterpreted the functioning of general principles of EU

<sup>8</sup> *Ibid.*, p. 45.

<sup>9</sup> *Ibid.*, p. 46.

<sup>10</sup> *Ibid.*, p. 48.

law. Secondly, the judgment seems not to take into account the doctrine of primacy of EU law and its consequences.

As to the first aspect, both the Court of Justice and the academia have specified that general principles – as a source of EU law – draw inspiration not only from international treaties, such as the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>11</sup> but also from the inner structure of the European Union.

Against this backdrop, the general principles of EU law should be intended as a source of law which has not been created by the Court of Justice but that the Court has ‘merely’ recognized.<sup>12</sup> Furthermore, general principles of EU law enjoy the status of primary law as long as they represent the unwritten bill of rights of the European Union.<sup>13</sup>

These observations lead to two consequences. First, any act adopted by the EU institutions, being subject to judicial review, must comply with general principles,<sup>14</sup> since it falls under the Court’s jurisdiction according to Art. 19 TEU. Second, general principles of EU law bind all Member States when they are acting within the scope of application the Treaties.<sup>15</sup>

<sup>11</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.

<sup>12</sup> See Court of Justice, judgment of 12 November 1969, C-29/69, *Stauder*, p. 419 *et seq.* The importance of respecting fundamental rights has been gradually improved by the Court of Justice by *i*) affirming that the constitutional traditions common to the Member States are a source of inspiration for the protection of fundamental rights as general principles of EU law (Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*); *ii*) stating that “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law” (Court of Justice, judgment of 14 May 1974, case 4/73, *Nold*); *iii*) electing the European Convention on Human Rights as a preferred standard to assess the respect of fundamental rights within the European Union (Court of Justice, judgment of 28 October 1975, case 36/75, *Rutili*, and judgment of 13 December 1979, case 44/79, *Hauer*).

<sup>13</sup> R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2012, p. 409 *et seq.*, spec. p. 411.

<sup>14</sup> T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 50 *et seq.*

<sup>15</sup> EDITORIAL COMMENTS, *The scope of application of the general principles of Union Law: An ever expanding Union?*, in *Common Market Law Review*, 2010, p. 1589 *et seq.*; T. PAPADOPOULOS, *Criticising the horizontal direct effect of the EU general principle of equality*, in *European Human Rights Law Review*, 2011, p. 437 *et seq.*; F. FONTANELLI, *General Principles of EU Law and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci*, in *European Public Law*, 2011, p. 225 *et seq.* See also Opinion of AG Geelhoed, delivered on 16 March 2006, case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*; Opinion of AG Mazak, delivered on 15 February 2007, case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*; Opinion of AG Ruiz-Jarabo Colomer, delivered on 24 January 2008, joined cases C-55 and 56/07, *Michaeler and o.*; Opinion of AG Kokott, delivered on 8 May 2008, case C-73/07, *Tietosuojavalvutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*.

Transposing this latter statement to the general principle of non-discrimination on grounds of age, several EU written sources testify that its protection falls under the field of application of EU law.

A first legal argument which demonstrates the applicability of general principles to the dispute can rely on directive 2000/78 and Art. 19 TFEU. Although the scope of application of general principles could be broader than that of the directive, the two legal instruments can overlap: according to the case law of the Court of Justice,<sup>16</sup> this is the case of non-discrimination on grounds of age which has been specified in directive 2000/78.

Specifically, it seems that the fact that the directive could not be relied upon in that particular dispute because of its horizontality, did not prevent the dispute from falling under the scope of application of directive 2000/78. Such a statement stresses that the lack of direct effect of a EU provision in a given dispute does not interfere with the capacity of the rule to assess the applicability of EU law towards that dispute. A confirmation at this regard can be easily found in the *Dansk Industri* case itself, where both the Court of Justice and the Danish Supreme Court observed that the dispute at stake was a replica of a previous case, *Ingeniørforeningen i Danmark*, which was held to fall under the field of application of EU law.

As a second remark, the express reference to fundamental rights as general principles of EU law in Art. 6 TEU testifies that Member States are bound by general principles anytime EU law is at stake. Insofar as the Treaties of Maastricht and Lisbon have been listed in the Law of Accession and no formal exception has been made for Art. 6 TEU, it cannot be argued that general principles are not covered by the Law of Accession.

It seems therefore that the general principle of non-discrimination on grounds of age is indeed covered by the Law of Accession of the Kingdom of Denmark to the EU: *via* directive 2000/78 and Art. 19 TFEU, as well as *via* Art. 6 TEU.

Insofar as these written sources have been listed by the Kingdom of Denmark in the Law of Accession, they trigger the obligation of the Denmark authorities to ensure the protection of the general principle of non-discrimination on grounds of age.

The Danish Supreme Court's choice not to disapply the national provision inconsistent with a general principle of EU law cannot be supported under a second point of view.

The Danish Supreme Court's argument appears to be disrespectful of the doctrine established by the Court of Justice in its decision *Costa v. ENEL*.<sup>17</sup> According to the well-grounded principle of law that the Court of Justice has firstly conceived in the *Costa v. ENEL* case, the duty of cooperation between Member States and the European Union implies that "the law stemming from the Treaty [...] could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community

<sup>16</sup> Court of Justice, judgment of 19 January 2010, C-555/07, *Seda Küçükdeveci*.

<sup>17</sup> Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

itself being called into question". In other words, when the Member States decided to join the EU they accepted to devolve part of their sovereign power to the European Union. This means that, within the field of application of EU law, Member States are bound by the EU legal provisions and shall ensure their primacy over the national rules.

Insofar as it has been clarified that general principles cover all situations falling under the field of application of EU law, their applicability and enforcement have to be ensured by disapplying any inconsistent national provision. To this respect, the 'selective approach' supported by the Danish Supreme Court represents a clear attempt not to comply with the duty of sincere cooperation and the obligation to accommodate the supremacy of EU law.

#### IV. THE HORIZONTALITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

A second misleading aspect of the Danish judgment is related to the effect of the Charter. The facts of the dispute took place before the Charter of Fundamental Rights was formally given the status of primary legislation, therefore the Charter could neither be applied, nor be enforced within that dispute. Nevertheless, the Supreme Court's approach to the Charter raises some concerns too.

Within the final part of its judgment, the Danish Supreme Court held that, according to the Law of Accession, the direct applicability and the horizontal effect of the Charter of Fundamental Rights should be excluded.<sup>18</sup>

At this latter regard, notwithstanding the pending need for an intervention of the Court of Justice clarifying once and for all whether the Charter is entitled to have horizontal effect,<sup>19</sup> it is undeniable that the answer to such an issue cannot be given by a national authority. Otherwise, the Court of Justice prerogative of being the sole institution entitled

<sup>18</sup> Danish Supreme Court, *DI acting for Ajos A/S v. The estate left by A.*, cit., p. 48.

<sup>19</sup> The debate around the horizontality of the Charter has been fostered by some Advocates General (e.g. Opinion of AG Trstenjak, delivered on 8 September 2011, case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*) as well as within the academia (*ex multis*, see S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen: Europa Law Publishing, 2016; E. FRANTZIOU, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 2015, p. 657 *et seq.*; S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart Publishing, 2014). So far, the Court of Justice seems to hesitate in recognising the Charter's articles the value they deserve despite the observation that the Charter of Fundamental rights should be considered as the 'bill of rights' of the EU (see R. BIFULCO, M. CARTABIA, A. CELOTTO, *L'Europa dei Diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna: Il Mulino, 2001; K. LENAERTS, E. DE SMIJTER, *A "Bill of Rights" for the European Union*, in *Common Market Law Review*, 2001, p. 273 *et seq.*). Not only the potential horizontality of the Charter has not been fully clarified (see Court of Justice, judgement of 15 January 2014, case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*), but also the vague distinction between 'rights' and 'principles', laid down in Art. 52 of the Charter, has not been properly investigated (Court of Justice, judgment of 24 January 2012, C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*).

to provide the right interpretation of the Treaties and EU legislation<sup>20</sup> would be irretrievably jeopardised and, once again, its case-law would be completely twisted.

## V. CONCLUSION

In other contexts the Danish judgement has been described as an attempt of the Supreme Court either to set a dialogue with the Court of Justice or to openly disobey the Court of Justice's rulings.<sup>21</sup> Following the observations carried out in the present *Insight*, however, it seems that the solution to that *dilemma* leads necessarily to the second scenario.

As a matter of fact, despite the formal statement about the necessity to take into account the decision of the Court of Justice in the *Dansk Industri* case, the section of the judgment related to the Court's reasoning and decision is openly against several obligations foreseen within EU law. Namely, the duty stemming from Art. 4, para. 3, TEU to accommodate the supremacy of EU law, by setting aside national legal provisions whose application would otherwise conflict with a EU rule; and the obligation to respect the sole authority of the Court of Justice in interpreting EU legal provisions.

Against this background it seems therefore that the judgement of the Supreme Court has triggered a new 'clash of titans', where the expression does not refer to a conflict between general principles anymore, but to a contest between supreme jurisdictional authorities. Disregarding what will happen after this judgment in terms of jurisdictional actions, this recent decision highlights the need for the Court of Justice to clarify, once and for all, the role and the functioning of general principles within the constitutional edifice of the EU.

<sup>20</sup> Art. 19 TEU.

<sup>21</sup> S. KLINGE, *Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle*, in *EU Law Analysis*, 13 December 2016, eulawanalysis.blogspot.co.uk.

