ARTICLES

THE DANISH *AJOS* CASE: THE MISSING CASE FROM *MAASTRICHT* AND *LISBON*

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ABSTRACT: In the Danish *Ajos* case the Danish Supreme Court rejected to follow the guidance from the Court of Justice. This *Article* will provide an analysis of the case and reflect on the implications on the European integration and the ongoing dialogue between the European Courts. We will also provide a background and an introduction to the Danish Constitutional Reservations to Union law and the scope and development of the case law regarding the accessions to the European Union treaties. It is considered; whether the *Ajos* case was the "missing case" from the *Lisbon* judgment. Furthermore, the case will be analysed from a comparative legal perspective relating it to developments seen by other constitutional courts, for instance the Italian *Taricco II* case and the German *Honeywell* case both of which can be interpreted as more open toward Union law and European integration.

KEYWORDS: application of Art. 21 of the Charter of Fundamental Rights of the European Union – horizontal relationships – judicial dialogue – constitutional reservations to Union law – comparative legal analysis – political implications.

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I. Introduction and structure

The *Ajos* judgment from the Court of Justice dealt with the scope of Directive 2000/78/EC,[1] the EU Employment Directive, and the general EU-law principle of non-discrimination on grounds of age, adding another case to the Court of Justice's *Mangold* and *Kücükdeveci* line of jurisprudence.[2] The importance of the case from a national political and European integrational perspective cannot be understated. *Ajos* is not only relevant as interpretation of Danish law but as a case reflecting the difficulties in the ongoing dialogue between the CJEU and the national courts.

The questions in the preliminary reference made by the Danish Supreme Court (DSC) to the Court of Justice regarded the requirement for national courts to suspend national law and set aside statutory law that breaches the EU law principle of age discrimination and have major effect on the relationship between national and EU law. The concern from the DSC was that by setting aside national law the court would violate the principle of legal certainty for private individuals.

The main proceedings began in the Danish Maritime and Commercial High Court that specialises in labour law cases.[3] The High Court took a labour law approach using the principle of equal treatment from Union law and consistent interpretation of the national law, and ruled in favour of the employee stating that the employer had to pay severance allowance. The High Court referenced both to the *Mangold* and *Kücükdeveci* case law, in addition to *Ole Andersen*, a Danish preliminary reference, where the Court of Justice found that the Directive precluded the same national rules as were disputed in *Ajos*, only in a vertical relationship, in a case against the Member State.[4]

Ajos appealed the case to the DSC, which decided to make a preliminary reference to the Court of Justice even though none of the parties to the case had asked for it.[5] Thereby, *Ajos* was turned into a matter of public interest touching upon elements of legal certainty, foreseeability and the dialogue between the CJEU and the national constitutional courts.

This *Article* is structured as follows. First, a brief account of *Ajos* is provided. This is followed secondly by interpreting the judgment in light of the DSC's case law before the *Ajos* judgment in regard to the accession to the EU and EU integration along with the national political response to *Ajos*.

[1] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[2] Court of Justice: judgment of 19 April 2016, case C-441/14, *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen* [GC]; judgment of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm* [GC]; judgment of 19 January 2010, case C-555/07, *Seda Küküdeveci v. Swedex GmbH & Co.* [GC].

[3] See Danish Maritime and Commercial High Court, judgment no. F-0019-12.

[4] Court of Justice, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark (on behalf of Ole Andersen) v. Region Syddanmark* [GC].

[5] Danish Supreme Court, order of 22 September 2014, case 15/2014.

Finally, *Ajos* is placed in a comparative context, drawing primarily upon recent case law from the Italian courts in the *Taricco II* case handed down on 5 December 2017. This case has many similarities to *Ajos*, but the Court of Justice here chose another path in the dialogue with national constitutional courts.

II. Brief account on *Ajos*

II.1. The reference to the Court of Justice

The DSC referred two questions to the Court of Justice in *Ajos*. The first related to the compliance of the national rules implementing the Directive and the application of the principle of non-discrimination on grounds of age. The second question referred to the balancing of principles. The DSC wanted clarification on whether it was possible to weigh the principle of equal treatment (and the issue of its direct effect) against the principle of legal certainty, and to conclude on that basis that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age – and thereby not set aside the national legislation.

The framing of the question posed by the DSC can be interpreted as being somewhat rhetorical given it wanted to solve the case with reference to Union law and relieve the employer, in accordance with national law, of its obligation to pay the severance allowance. The Court of Justice openly rejected the solution offered by the DSC in its judgment, and refused to let the national courts balance the principles against each other, and instead the Court gave clear guidance on how the DSC was to settle the case. The Court of Justice left the DSC with two options. Firstly, to apply national law in a manner consistent with the Directive, or secondly, to disapply any provision of national law contrary to Union law.

The DSC had also put forward an option that the employee could claim damages from the Member State in order to mitigate a result that the employee would not get the severance payment that he was entitled to under EU law. The solution was rejected with no further argumentation by the Court of Justice along with the question about the balancing of the conflicting principles regarding legal certainty.

The Court of Justice firmly stated that "[n]either the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation".[6]

[6] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 43.

II.2. The reasoning of the Supreme Court

Upon the Court of Justice's judgment going back to the national court, the reasoning by the DSC was divided in two parts in its final judgment.[7] The first part of the reasoning related to the question on if it was possible to interpret national law in conformity with the Directive. The second part was whether the EU principle of prohibiting discrimination on the grounds of age, an unwritten principle, could take precedence over national law.

The DSC held that the legal position under Danish law was clear, and that it would not be possible to arrive at an interpretation of national law that was consistent with the Directive as interpreted in *Ole Andersen* using the methods of interpretation recognised under Danish law. The DSC in its judgment explained in detail the position under Danish law that it was clear and not only relying on established case law and the interpretation of national law made by the DSC itself. This was a focal point in the answers provided in the preliminary reference from the Court of Justice, in which the Court stated that "[...] the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law".[8]

The disputed national position was that an employee was not entitled to a severance allowance when, at the time of severance, the employee was entitled to an old-age pension from an employer, irrespective of whether an employee opted to avail himself of the entitlement to a pension. The DSC stressed that the position had been reaffirmed over the years since the Parliament introduced the rule in 1971, and had kept the same wording of the provision in the later amendment in 1996. Consequently, it was not only established case law, but also the will of the Parliament that had decided on the national position on severance payment.

Another argument was put forward by the employee regarding the Act Prohibiting Discrimination on the Labour Market, the implementation of the Employment Directive's rules on discrimination on grounds of age, in the 2004-Act.[9] The argument was, that this Act was to take precedence over the older Act on Salaried Employees due to the principles of "*lex posterior* and *lex specialis*".[10]

The DSC rejected that argumentation and found that it was assumed in the preparatory works (*travaux préparatoires*) that the Directive's rules did not result in the need for amendments to para. 2a of the Act on Salaried Employees.[11] Consequently, the DSC found that the Act could not take precedence over the more senior Act on Salaried Em-

[7] Danish Supreme Court, judgment of 6 December 2016, case 15/2014.

[8] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 33.

[9] Danish Act no. 1417 of 22 December 2004 implementing Employment Directive's rules on discrimination.

[10] See Danish Supreme Court, judgment of 11 August 2015, no. 104/2014, *Skibby Supermarked*, concerning a handicapped persons' access to employment.

[11] See *travaux préparatoires* in the Parliament's Gazette 2004-05, collection 1, Annex A, L 92, p. 2701.

ployees, and therefore the DSC concluded that it could not follow the guidance from CJEU by using the methods of interpretation recognised under national law.

The DSC found that it would be "*contra legem*" to interpret para. 2a, sub-para. 3, of the Act on Salaried Employees in conformity with the Directive since the national legal position was clear. In this first part of the reasoning, the DSC acted unanimously.

In the second part of the judgment's reasoning, the majority of eight out of the nine judges concluded that the DSC could not set aside national law. Thus, the DSC found that the Danish Accession Act (DAA) did not confer sovereignty to the extent required for the unwritten EU principle prohibiting discrimination on the grounds of age to take precedence over national law. The DSC made a distinction between the role of the Court of Justice as interpreter of Union law following an Art. 267 TFEU preliminary reference, and the role of national courts to interpret whether Union law can be given direct effect in national law, relying on the DAA by which Denmark acceded to the European Union. Consequently, the DSC stated that it is for the Court of Justice to rule on whether Union law has direct effect, and takes precedence over a conflicting national provision, including in disputes between individuals, but the effect of this decision is for the national courts to decide. The DSC found: "[t]he question whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union".[12]

The reasoning focuses on the lack of legal basis in the DAA, which sets the limits of the conferred sovereignty to the Union, in line with Art. 20 of the Danish Constitution and Art. 5 TEU. The DSC then went on to perform an in-depth analysis of the *travaux préparatoires* of the DAA, and the subsequent amendments to the DAA.[13] Accordingly, the DSC found that principles developed, and established on the basis of Art. 6, para. 3, TEU have not been made directly applicable in Denmark.

After analysing the *Mangold* and *Kücükdeveci* case law, the DSC found that the situation like *Ajos*, in which a principle at treaty level under Union law is to have direct effect could thereby create obligations. Thus, the question was whether this was allowed to take precedence over conflicting national law in a dispute between individuals, without the principle having any basis in a specific treaty provision. The DSC said this was not foreseen in the DAA, and consequently the principle was not applicable in Denmark.

Reflecting further on the temporary issue and the fact that *Mangold* was handed down in 2005, the DSC also noted that *Mangold* was not mentioned in the preparatory works during the latest amendment of the DAA following the Treaty of Lisbon, and, therefore, the case could not alter the interpretation on the DAA. Furthermore, the DSC

[12] Danish Supreme Court, judgment no. 15/2014, cit., p. 45.

[13] An in-depth analysis of the accession act was made by P. LACHMANN, *Grundlovens § 20 og traktater, der ændrer EU's institutioner*, in *Juristen*, 2012, p. 259 before the Lisbon case about the Amendments to the Accession Act was decided.

stated that the CJEU in *Mangold* did not balance legal certainty and the protection of legitimate expectations against the prohibition of discrimination on grounds of age, which might have changed the outcome.

Lastly, the DSC recalled that, the facts of the case, the dismissal of the employee, took place before the Treaty of Lisbon entered into force on 1st December 2009. Consequently, the DSC stressed that the application of any Charter of Fundamental Rights of the European Union (Charter) provision was not legally binding, thereby disregarding the argument that the employee could rely on the Charter provisions. The Charter was mentioned *en passant* in the preliminary ruling from the Court of Justice: "[the principle of equal treatment], now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law".[14]

The DSC noted that the provisions in the Charter could not be invoked in horizontal relationships. This can be marked as *obiter dictum* regarding future cases were the dismissal of an employee had taken place after the Treaty of Lisbon had entered into force.[15]

After concluding that the DAA did not provide a legal basis in a horizontal relationship to give precedence to an unwritten Union law principle, the DSC added that: "[t]he Supreme Court would be acting outside the scope of its powers as a judicial authority if it were to disapply the provision in this situation",[16] thus finding that the national court could not disapply para. 2a, sub-para. 3 of the Act on Salaried Employees as then in force, *Ajos* could thus rely on the national provision. The scope of the DSC's powers will be returned to later.

Finally, the dissenting judge voted to follow the directions by the Court of Justice, who found that Union law should take precedence over national law, and that following the argumentation in the Danish *Maastricht*[17] and *Lisbon* judgments, there was no conflict with the DAA.[18]

III. *Ajos* in light of DSC's practise about accession to EU

In order to understand the *Ajos* judgment and its scope, we turn to DSC practice before *Ajos*. The DSC is traditionally reluctant and shows restraint in relation to the political institutions. For instance, only in one judgment has the Supreme Court found a piece of legislation unconstitutional.[19]

[14] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 22.

[15] See also J. Kristiansen, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – Om Højesterets dom i Ajos-sagen*, in *Ugeskrift for Retsvæsen*, 2017, pp. 81-82, and F. Fröhlich, *Retssammenlignende perspektiver på Højesterets kompetencekontrol i Ajossagen*, in Ugeskrift for Retsvæsen, 2017.

[16] Danish Supreme Court, judgment no. 15/2014, cit., p. 48.

[17] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

[18] Danish Supreme Court, judgment of 11 January 2011, no. 366/2009.

[19] Danish Supreme Court, judgment of 19 February 1999, no. 295/1998.

This restraint has also applied to the area of EU integration. This is clear in two important Supreme Court judgments in the field of EU integration: the *Maastricht* judgment and the *Lisbon* judgment. Both judgments concerned constitutional review of legislation with regard to the Danish accession to respectively the Maastricht Treaty and the Lisbon Treaty. In both judgments the Supreme Court found that the Constitution had not been violated. However, the question is whether a shift of thought is on its way. In order to answer this the Supreme Court's approach beginning with the *Maastricht* judgment, over the *Lisbon* judgment to the recent *Ajos* judgment, will be analysed.

The hypothesis is that during this period from 1998 to 2016 we see a move towards a more active Supreme Court stepping increasingly into a role as protector of the Constitution, general legal principles and the people.

First, we will provide some background on the Danish context regarding constitutional review. Second, we will test the hypothesis by analysing the relationship between the DSC and the Danish legislator in the light of the three most important judgments on Denmark's participation in EU cooperation:

– The *Maastricht* judgment;
– The *Lisbon* judgment;
– The *Ajos* judgment.

Third, we will discuss the possible reasons for and the scope of this development.

III.1. Background on the Danish constitutional context as regards review of constitutionality of legislation

A key to understand the *Maastricht*, *Lisbon* and *Ajos* judgments is the prevailing interpretation of the separation of powers between the legislative and judicial authorities in the Danish constitutional setting. The constitutional tradition is to have a strong Parliament and restraint courts. Denmark has no constitutional court. However, the ordinary courts can carry out a constitutional review even though such a competence is not directly mentioned in the Constitution. Danish courts will only set aside legislation if it clearly violates the Constitution. The courts do not carry out abstract reviews. This means that that a plaintiff must have a specific legal interest to bring a case before the courts. This tradition of cautious courts and a strong Parliament can also be found in some of the other Nordic countries, but the other Nordic countries amend their constitutions more frequently which leaves a little less room for constitutional interpretation than in Denmark.[20]

Another important observation is that the Danish Constitution has only been revised four times. The last substantial revision was in 1953, and some provisions still have the same wording as the Constitution of 1849. The Constitution is very difficult to amend and it requires both an election and a referendum in which a majority of the

[20] See H. Krunke, *The Danish Lisbon Judgment: Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013*, in *European Constitutional Law Review*, 2014, p. 545 *et seq*.

persons taking part in the voting, and at least 40 per cent of the electorate, have voted in favour of the amendments. Since the Constitution must function in a modern constitutional context the interpretation of the Constitution is important. By focusing on *not* making "political" decisions or interfering in the legislative process, the courts in practise leave much room for the political institutions Parliament and the Government. This relationship between the legislature and the courts is directly reflected in several paragraphs in the *Maastricht* and *Lisbon* judgments.

III.2. Analysis of case law: *Maastricht* judgment, *Lisbon* judgment and *Ajos* judgment

With the *Maastricht* judgment the Supreme Court widened the scope of ordinary citizens' access to court in cases in which they have no specific legal interest. The Supreme Court defined the following criteria for legal standing in such cases:[21]

– Involvement of a transfer of legislative powers in a number of general and important public policy areas;

– An impact on ordinary people's lives and thus on the Danish population in general.

This was a very dynamic development at the time. Following Denmark's accession to the EC in 1972 citizens had previously wanted to bring a case on the constitutionality of Denmark's accession to European Community Treaties to the courts.[22] However, the courts had found that since they had no specific legal interest in the case the Court could not treat the substance of the case.[23]

Moving on to the substance of the case, the Supreme Court stated that transfer of powers under Art. 20 must not mean that Denmark is no longer an independent state.[24] The Court concluded that this constitutional precondition had not been breached by the Maastricht Treaty. However, it did not define what is meant by an "independent state". The Court stated that the limits to transfers under Art. 20 must primarily rely on considerations of a political character.

The plaintiffs had also argued that so much sovereignty had been ceded, that the constitutional precondition for a democratic form of government had been nullified. According to the Supreme Court any transfer of legislative powers implies a certain encroachment on the Danish democratic form of government, but that was taken into consideration when Art. 20 was designed.

The Court further stated that "it is for the Danish Parliament to decide whether the Government's participation in the European cooperation should be conditional on more democratic control".

[21] Danish Supreme Court, judgment of 12 August 1996, no. 272/1994.
[22] Danish Supreme Court, judgment of 28 June 1973, no. 321/1972.
[23] *Ibid.*
[24] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

These statements of the Supreme Court are in line with the traditional role of the political actors in interpreting the Danish Constitution, in a constitutional setting in which the courts only declare legislation unconstitutional if it manifestly violates the Constitution. This form of separation of powers is based on the idea that the legislature is legitimised by popular elections, whereas the courts in Denmark have no such democratic legitimacy.

The *Lisbon* judgment from 2013 is innovative to the extent that, while the Court upheld the traditional relationship between the legislature and the courts, it also emphasised that the political actors' comprehensive powers go hand in hand with responsibility.[25]

In relation to the indirect transfer of powers, the Court said that the Danish authorities must ensure that there is no creeping transference of powers and ensure that the constitutional assumption that the approval of the Lisbon Treaty did not require an Art. 20 procedure is respected.

The Supreme Court also emphasised that the Court of Justice may not expand the powers of the EU by means of its interpretations:

> "The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the s. [Art.] 20 procedure, and the Danish authorities are obliged to ensure that this is observed".[26]

In other words, the political actors are bound by the constitutional preconditions for the assessment and must act as a watchdog.[27]

If they do not adequately fulfil this role, the Supreme Court can review the constitutionality of (secondary) EU law in specific cases.

Furthermore, the Supreme Court referred to its jurisdiction to carry out judicial reviews "if an Act or a judicial decision that has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act".

The same will apply if EU acts are adopted or if the CJEU delivers judgments based on such applications of the Treaties by reference to the Charter.

Finally, we reach the *Ajos* judgment from December 2016.[28] This judgment is very interesting because the Supreme Court chose not to follow a preliminary ruling from the CJEU. The reason for this is the following:

[25] Danish Supreme Court, judgment of 20 February 2013, no. 199/2012.

[26] Danish Supreme Court, judgment no. 199/2012, cit.

[27] As regards Art. 352 TFEU and Art. 6, para. 1, TEU, both in the *Maastricht* judgment and in the *Lisbon* judgment the Supreme Court emphasised that the Government must prevent decisions that would lead to further surrender of sovereignty.

– it is not possible within the DAA to give precedent to the unwritten EU principle on age discrimination;

– the Supreme Court would be acting outside the limits of its powers as a judicial authority if it was to disapply the national provision in this situation.

One dissenting judge refers to the argumentation laid out in the *Maastricht* judgment and the *Lisbon* judgment and reaches the conclusion that there is no conflict with the directive and that Union law should take precedence over national law:[29]

> "By judgment of 6 April 1998 (UfR 1998.800) on the Maastricht Treaty and by judgment of 20 February 2013 (UfR 2013.1451) on the Lisbon Treaty, the Supreme Court ruled on those two treaties in relation to inter alia Paragraph 20 of the Constitution on delegations of sovereignty by statute and within specified limits. In that connection it is assumed inter alia that it is not in itself incompatible with the specificity requirement in Paragraph 20 of the Constitution or contrary to the premises forming the basis of the Law on accession that the EU Court of Justice, in interpreting the Treaty, also attaches weight to interpretative factors other than a provision's wording, such as the Treaty's purpose. The same holds true for the EU Court of Justice's law-making activity.
> The following was stated on the EU Court of Justice's jurisdiction in the judgment on the Maastricht Treaty under point 9.6 (as reiterate in the judgment on the Lisbon Treaty) and point 9.7:
> '9.6. The appellants have submitted that the EC Court of Justice's jurisdiction under the Treaty, read in the light of the principle of primacy of Community law, means that Danish courts are prevented from enforcing the limits on the delegation of sovereignty that has taken place through the Law on accession and that this must be taken into consideration in the determination of whether the specificity requirement in Paragraph 20(1) of the Constitution has been observed.
> By the Law on accession, it is recognised that jurisdiction to rule on the lawfulness and validity of an EC legal act lies with the EC Court of Justice. This means that Danish courts cannot hold an EC legal act to be inapplicable in Denmark without the question of its compatibility with the Treaty having been the subject of a ruling by the EC Court of Justice, and that Danish courts can generally assume that decisions by the EC Court of Justice on that point come within the scope of the delegated sovereignty. The Supreme Court finds, however, that it follows from the specificity requirement in Paragraph 20(1) of the Constitution, together with Danish courts' jurisdiction to rule on the statute's constitutionality, that the courts cannot be stripped of their jurisdiction to rule on the question whether an EC legal act goes beyond the limits of the sovereignty delegated through the Law on accession. Therefore, should *the extraordinary situation* arise in which it can be held, with the requisite certainty, that an EC legal act upheld by the EC Court of Justice is based on an application of the Treaty that falls outside the scope of the delegation of sovereignty effected by the Law on accession, Danish courts must hold that EC legal act

[28] Danish Supreme Court, judgment of 6 December 2016, no. 15/2014.
[29] Dissenting opinion in Danish Supreme Court, judgment no. 15/2014, cit.

> to be inapplicable in. The same holds true in respect of EC legal rules and legal principles, which are based on the EC Court of Justice's case-law [emphasis added by authors].
> 9.7. In the light of the foregoing, the Supreme Court finds that neither the additional powers conferred on the Council under Article 235 of the EC Treaty nor the EC Court of Justice's law-making activity can be held to be incompatible with the specificity requirement in Paragraph 20(1) of the Constitution'.
> The EU Court of Justice's law-making activities within the framework of the Treaty and its interpretative style were known when Denmark became a member of the EC on 1 January 1973. These hallmarks of the EC Court's activities were part of the debate before the decision (and referendum) on Denmark's accession to the EC. Thus attention in the debate focused inter alia on the Court's development of the principle of primacy of Community law over national law: see inter alia judgment in Case 6/64, Costa v ENEL, ECLI:EU:C:1964:66. When the Court developed and established that principle, the primacy of Community law was not referred to in the Treaty.
> The Court has also, in the time leading up to the most recent amendments to the Law on accession, further developed that style of interpretation, holding, for example, that treaty provisions as well can have direct effect on individuals by imposing duties on them: see judgment of 8 April 1976, 43/75, Defrenne, ECLI:EU:C:1976:56, in which the Court held that Article 119 [of the EEC Treaty] as then in force imposed a duty on Member States to implement and uphold the principle of equal pay for equal work for men and women.
> In the light of the foregoing, I find that there is not such an *extraordinary situation* that it can be held with the requisite certainty that the application of a general principle of EU law prohibiting discrimination on grounds of age in the employment sphere falls outside the jurisdiction conferred on the EU Court of Justice by the Law on accession [emphasis by authors].
> I accordingly find that the Law on accession confers the requisite basis for disapplying Paragraph 2a(3) of the Law on salaried employees in the case, and that Danish courts will not thereby be acting outside the limits of their jurisdiction".

Returning, to the majority ruling in the *Ajos* judgment, on the one hand, the majority's second argument signals the Court's respect of the political institutions and that the Court sees its own role as more passive.

Furthermore, we know from the Danish government's intervention in the preliminary case, that the Danish government requested that the CJEU provided the Supreme Court with the possibility not to give direct effect to the unwritten EU principle of age discrimination in respect of the principle of rule of law and the principle of legal certainty.[30] This way, the outcome of the case, which the Supreme Court reached, was in compliance with the Danish government's perception of the case even though the arguments might differ slightly from each other. Also, this way one might say that the judgment shows respect of the political institutions.

[30] Ministry of Foreign Affairs of Denmark written submission of 19 December 2014 to the Court of Justice, para. 51. Translation by the authors.

On the other hand, at the same time we see a much more active and self-confident Supreme Court than we normally see with the courage to set aside a preliminary ruling. A Supreme Court which sets limits for EU integration and stands up for the Constitution, the Act of Accession and general legal principles (though it does not directly refer to rule of law and legal certainty). The Court actively steps into the role as protector of the Constitution, general legal principles and the Danish people.[31] This way the Supreme Court gains a new identity. It is no longer the passive Court, which – in contradiction to for instance the German Constitutional Court – sets no or very few limits for how far EU integration can go without interfering with the Danish Constitution and the Act of Accession. The Court sends a signal to the political institutions that they will actively have to amend the Act on Accession to the EU – they cannot passively let EU integration go further, than what was allowed through the Act on Accession to the EU.

This seems to lead to a slight paradox since we on the one hand see a Court which through the content of its judgment shows respect of the traditional relationship between the courts and the legislator in the Danish separation of powers but on the other hand seems inspired by other more dynamic and active European Courts to stand up for the Constitution, legal principles and the people. The judgment seems to provide the Supreme Court with new legitimacy at the national level.

In other words, formally the Court respects the political institutions but at the same time it in reality becomes a much more important player in EU integration with the *Ajos* judgment sending a signal of its powers to the Danish politicians as well as the EU institutions including the Court of Justice.

The remarks made by the dissenting judge are quite interesting. They reflect that according to her, the Supreme Court does not follow the line laid out by itself in its former practise when it decides not to follow the preliminary ruling by the Court of Justice in the *Ajos* judgment. If we follow this line of thought, *Ajos* constitutes a break with existing practise, and thereby (maybe) violating the same principle of legal certainty that it initially was set out to protect.

It is however also possible to point out a link between the *Lisbon* judgment and the *Ajos* judgment by focusing on the statements by the Supreme Court in the *Lisbon* judgment on the limits of European integration and the warning to the Danish politicians as watchdogs and to the Court of Justice in relation to dynamic interpretations. One might say that *Ajos* is a "follow-up" on these statements (the missing case in the *Lisbon* judgement with adequate standing).

In conclusion, it seems that the Supreme Court has gone from being a quite passive Court to 1) broaden the access to court in the *Maastricht* case, to 2) warn the national

[31] See H. Krunke, *Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy and Human Rights*, in M. Scheinin, H. Krunke, M. Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham: Edward Elgar Publishing, 2016, p. 71 *et seq*.

political institutions and the Court of Justice of their responsibilities and of the constitutional limits of EU integration in the Lisbon case and finally to 3) become an empowered Court which has drawn a clear line in the sand as regards the limits of EU integration in the *Ajos* case. While, the Supreme Courts first broadened the access to court in cases on the constitutionality of EU treaties in the 1990's, this way indirectly strengthening court control with EU integration, the Court has in 2016 with the *Ajos* case set substantial limits for EU integration.

III.3. Possible reasons for and scope of the development

In order to understand the judgment it is useful to look at the Danish legal tradition as regards legal sources, legal reasoning in judgments and the content of the Constitution. It is probably no coincidence that it is an unwritten EU Constitutional principle, which has triggered the Supreme Court not to follow a preliminary ruling. The Danish Constitution does not directly set out general legal principles and values. While, some legal principles are regarded as legal sources primarily in private law, legal principles are not commonly used directly as legal sources. As regards constitutional principles, they are few and normally seen as some broader considerations behind the written constitutional text, which are reflected in the written text. The courts are not active in defining new constitutional principles. Written law interpreted in light of its *travaux préparatoire* ranks very high in the Danish legal system. Further, as mentioned earlier Danish courts are normally quite reluctant and do not apply a dynamic style of interpretation. Therefore, the idea that an unwritten constitutional principle created by the Court of Justice should set aside written legislation is in itself unusual for Danish judges. Furthermore, the *Ajos* case concerned a horizontal relationship since the case concerned two private parties. Third, the application of the preliminary ruling would violate legal certainty for the private parties. This way, the dynamic interpretation style by the Court of Justice in combination with its view on unwritten legal principles as a legal source, which can have constitutional status, is not in harmony with the legal tradition in Denmark.

In the Court of Justice proceedings in *Ajos*, the Danish Government submitted their observations as an intervener before the hearing. On the issue of balancing the principles, the Government made a reference to Art. 4, para. 2, TEU and national constitutional identity. Furthermore, as we shall return to, other national Supreme Courts/Constitutional Courts have referred to national constitutional identity in cases on the relationship between EU law and national law, including in cases concerning direct horizontal effect.

This way, the Danish government has found national constitutional identity relevant to the *Ajos case* and other national European Courts have found national constitutional identity relevant in similar cases. Nevertheless, the DSC did not refer to national constitutional identity in its judgment. It seems that the Court could have included constitutional identity with a reference to Art. 4, para. 2, TEU in the case already in the prelimi-

nary reference. The argument would then be that the principle of legal certainty (and/or rule of law) are part of the Danish national constitutional identity. Several possible reasons for why the Supreme Court did not refer to national constitutional identity can be provided: 1) uncertainty as to whether legal certainty can be defined as a constitutional principle, 2) the Supreme Court is reluctant as regards defining Danish constitutional identity because of the Danish model of separation of powers with strong legislators and restraint courts, and 3) uncertainty as to whether Art. 4, para. 2, TEU can be applied with sufficient certainty in a situation regarding direct effect in the relationship between two private parties, leading to the Supreme Court not having to apply the Directive in *Ajos.*[32] In the following, we will mainly focus on reason 1) and 2).

Does legal certainty constitute a constitutional principle? The principle of legal certainty is not directly mentioned in the Constitution. Nevertheless, such a principle probably does exist since a number of judgments point in that direction, and since it is an underlying value in many constitutional provisions.[33] In many cases, the High Court or the DSC has accepted legal arguments that refer to legal certainty considerations, with legal certainty often being integrated in the interpretation of legislation in a specific field. The interesting aspect is that legal certainty is sometimes referred to as a general consideration or principle, and not just through a reference to the preparatory works, which play an important role in interpretation in the Danish legal system.[34] Even more insightful are the judgments which not only indicate that a principle of legal certainty exist, but also that it might have constitutional rank. In the *Tvind* case,[35] the DSC stated that legal certainty is a core value behind the separation of powers in Art. 3 of the Constitution.[36] This judgment is the only judgment in which the DSC has ruled legislation

[32] Besides the mentioned substantial reasons a possible procedural reason could be mentioned namely that since the argument was not brought up by the parties in the case, the Supreme Court did not discuss constitutional identity.

[33] See Constitutional provisions such as Arts 3, 22, 43, 62-65, 71 and 77-79, H. KRUNKE, T. BAUMBACH, *The Role of the Danish Constitution in European and Transnational Governance*, in A. ALBI, S. BARDUTZKY (eds), *The Role and Future of National Constitutions in European and Global Governance*, The Hague: Asser Press, 2018 (forthcoming).

[34] See for instance Danish Western High Court, judgment of 26 January 2015, no. S-2482-14; Danish Supreme Court, judgment of 13 March 2014, no. 74/2013; Danish Supreme Court, judgment of 18 December 2013, no. 205/2012; Danish Eastern High Court, judgment of 25 April 2012, no. S-250-12.

[35] Danish Supreme Court, judgment of 19 February 1999, no. 295/1998.

[36] See also the following case law. In Danish Supreme Court, decision of 17 May 2000, case no. 74/2000, Art. 877, para. 3 in the Administration of Justice Act was set aside based on legal certainty considerations. In Danish Supreme Court, judgment of 2 July 2008, no. 157/2008, considerations of legal certainty trumped Art. 37 of the Danish Aliens Act. Furthermore, in Danish Supreme Court, judgment of 18 December 2013, no. 205/2012, the DSC stated that it would be a violation of legal certainty and predictability if the Danish Holidays Act was interpreted in compliance with Directive 2003/88. In Danish Special Court of Final Appeal, judgment of 2 July 2015, no. K-156-14, the dissenting judge wanted to set aside Art. 987, para. 1, of the Administration of Justice Act because of legal certainty considerations.

unconstitutional. Even though it is often not entirely clear in case law when legal certainty is applied as a source of interpretation, (maybe building on the preparatory works) and when it is applied as an independent source of law, case law leaves the impression that it is possible to argue not only for the existence of such a legal principle, but also for its constitutional rank.

In the *Ajos* case, the private employer (Ajos) had argued that it would be a violation of Art. 3 of the Danish Constitution on separation of powers and a principle of legal certainty at constitutional rank to interpret Danish legislation according to the *Mangold* principle, or not apply Danish legislation. As stated earlier, the Supreme Court in its judgment stated that if it were to set aside national law, it would be acting outside the limits of its competences as judicial power. Two observations can be made at this juncture. Firstly, the DSC does not mention legal certainty, and secondly, it does not make a direct reference to Art. 3 of the Danish Constitution. Hence, the Supreme Court does not (directly) refer to an unwritten constitutional principle of legal certainty.

However, as mentioned, in *Tvind*, the Supreme Court referred to legal certainty as an underlying value, which Art. 3 of the Constitution should be interpreted in the light of.[37] This way it could be put forward that by referring to the limits of judicial competence, the Court indirectly included the principle of legal certainty in its ruling. This argument might even be said to be strengthened by the fact that the DSC did not specifically refer to Art. 3, but to the competence of the court which is not only described in Art. 3, but also appears in other constitutional provisions. This way it underlines the general character of legal certainty as an underlying principle of the Constitution. Yet, the latter cannot be concluded for certain.

Notwithstanding this, if *Ajos* is viewed in the light of *Tvind*, legal certainty is present in the *Ajos* judgment though not directly referred to.

Whereas the DSC abstained from drawing on constitutional identity as an argument in the case, the Italian Constitutional Court refers several times to constitutional identity and Art. 4, para. 2, in *Taricco*, which is examined below. However, it has been emphasised in legal literature that the Italian court actually ends up down-playing the constitutional identity argument by underlining the importance of the constitutional traditions at both the national and European level.[38] Nonetheless, the new preliminary references made to the CJEU, re-referrals, include an argument, which could be interpreted as constitutional identity,[39] though that precise term is not used and there is no reference to Art. 4, para. 2, TEU "[...] even when setting aside such legislation would contrast with the

[37] See footnote 36.

[38] F. Fabbrini, O. Pollicino, *Constitutional Identity in Italy: European Integration as the Fulfilment of the Constitution*, in *EUI LAW Working Papers*, forthcoming, p. 14.

[39] Italian Constitutional Court, order of 23 November 2016, no. 24.

supreme principles of the constitutional order of the Member State or with inalienable human rights recognized under the Constitution of the Member State".[40]

Interestingly, as mentioned earlier in the Court of Justice proceedings in *Ajos*, the Danish Government submitted their observations as an intervener before the hearing, and on the issue of balancing the principles, the Government stated that,

> "[i]n this specific balancing [of rights] the government attach significant weight to the fact that basic conditions for the existence of a state based on the 'rule of law' and a legal system is; the principle of legal certainty, the principle of protection of legitimate expectations, as well as the possibility for citizens to know their obligations and could be adapted accordingly. This must be regarded as the very foundation of a state that bases its legal system on the principle of 'rule of law'. These principles must therefore weigh heavily and heavier than a principle which constitutes a concrete application of the principle of equality as a fundamental right based on the common constitutional traditions".[41]

Especially, if the quotation is combined with paras 56-57 in the written submission from the Danish Government, where a direct reference is made to Art. 4, para. 2, TEU, stating that the rule of law, including separation of powers, form the very core of the concept.[42]

> "56. It follows from Article 4(2) TEU, the Union respects the national identity of the Member States, as expressed in their fundamental political and constitutional structures.
> 57. Article 4(2) TEU, by its very nature, does not change the principle of primacy of EU law, but the purpose of the provision seems relevant to include in a case that affects the core of the Member States' understanding of the rule of law, including the division of responsibilities between the legislative and judicial power. The Mangold judgment's, EU: C: 2005:709, reception in the Member States, in legal theory and in the Court's own Advocates General, confirms, in the Government's view, that there is reason to compromise. In any event, the view is in support of leaving the final, concrete balance to the national court, taking into account all the elements of the case, including the foregoing considerations".

This way, whereas the DSC does not refer to constitutional identity in its judgment, the Danish government does so, this way defining part of Danish constitutional identity – something the DSC has never done. It seems to go well hand in hand with the Danish separation of powers, that whereas for instance the German Constitutional Court has been active in defining German constitutional identity, in the Danish context the political institutions play this role whereas the courts are silent on this topic (at least for the

[40] Italian Constitutional Court, order no. 24/2017, cit., p. 10 *et seq.*

[41] Ministry of Foreign Affairs of Denmark written submission of 19 December 2014 to the Court of Justice, para. 51. Translation by the authors.

[42] See also J. KRISTIANSEN, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret*, cit., p. 84.

time being).[43] In other words, if the DSC had defined Danish constitutional identity in its judgment it would have shown a much more activist approach than it does in its *Ajos* judgment stepping in the footsteps of other more activist and dynamic courts.

Furthermore, it is interesting to look at the context in which the *Ajos* judgment came out. Several European Constitutional Courts/Supreme Courts were in a critical dialogue with the Court of Justice.[44] The DSC hosted a conference on "Public trust in Courts" in the spring of 2016. The former president of the Supreme Court, Børge Dahl, had at several occasions including the FIDE congress in 2014, stated concern regarding the principles of rule of law and legal certainty in relation to interpretations by the Court of Justice.[45] Politically, the *Ajos* judgment came out in a Brexit-era with growing populism in many Member States. Finally, Denmark was to take over chairmanship for the Council of Europe the following year and high on the political agenda was an on-going reform of the European of Human Rights in light of the principle of subsidiarity including the scope of the dynamic interpretation of the European of Human Rights and understanding of special national circumstances. These aims are expressed in the programme for Denmark's chairmanship:[46]

> "A strengthened dialogue between the member States, national courts and the European Court of Human Rights on the interpretation of the Convention, including the use of the principle of subsidiarity and the margin of appreciation, will make the Court stronger in the longer term. A key objective for the Danish chairmanship is to find new ways to jointly ensure such a strengthened dialogue on developments in the Court's jurisprudence; a dialogue in which civil society should also play a key role. Our goal is a system that has both the necessary impact and understanding of local needs and conditions.
> [...]
> It will be a priority for the Danish chairmanship to shed light on how we handle the challenge resulting from the fact that the European Court of Human Rights, through its judgments, increasingly has influence on policy areas of critical importance to member States and their populations. It must be ensured that there is a sufficient ongoing dialogue, including at policy level, on the development of human rights. This includes inter alia questions such as the scope of the dynamic interpretation of the Convention and the need to take into account the principle of subsidiarity and its functional tool, the margin of appreciation".

[43] On the relationship between constitutional identity and separation of powers, see H. KRUNKE, *The Danish Lisbon Judgment*, cit., pp. 545-570, and H. KRUNKE, *Constitutional Identity – Seen through a Danish Lens*, in *Retfaerd*, 2014, p. 24 *et seq*.

[44] See for instance from Germany: German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13, paras 1-220 (OMT) and Italy: Italian Constitutional Court, order 24/2017, cit.

[45] See B. DAHL, *Keynote Address*, in U. NEERGAARD, C. JACQUESON (eds), *Proceedings: Speeches from the XXVI FIDE Congress*, Copenhagen: DJØF Publishing, 2014, p. 26 *et seq*.

[46] See Priorities of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, 15 November 2017-18 May 2018.

Finally, we shall reflect on the scope of the judgment. The judgment raises several questions as regards its scope and future impact both in Danish law and in EU law keeping in mind that the parliament has amended the disputed national legislation to secure compliance with EU law, and no indications of an infringement procedure from the Commission has been seen.

The dissenting judge in the *Ajos* judgment found that if the *Maastricht* criteria was applied in the *Ajos* case there was no conflict between the Directive and Danish legislation and Union law should take precedence over national law. However, the majority of judges were under the impression that there was no legal basis in the Act of Accession to the EU to let an unwritten EU principle take precedence of national legislation in the relationship between two private parties. Does this mean that the *Maastricht* criteria is no longer in place? And that we have a new more narrow criteria? Interestingly, based on the *Maastricht* criteria the Supreme Court found both in the *Maastricht* judgment and in the *Lisbon* judgment that unwritten EU constitutional principles defined by the Court of Justice such as the principles of supremacy and direct effect did not fall outside the competence transferred to the EU and that the competence of the Court of Justice had a dynamic character. Therefore, one might wonder whether the DSC has changed its approach and left the *Maastricht* criteria. Another interpretation of the judgment could be that the *Maastricht* criteria is still in place as a starting point but what made the *Ajos* case special in the eyes of the Supreme Court was the fact, that it was a horizontal relationship between two private parties. The fact that the case concerned direct effect in relation to two private parties is emphasized by the Supreme Court throughout its judgment, which could support the latter interpretation.

Another interesting aspect regarding the scope of the judgment is that the Supreme Court discusses direct effect in relation to the Charter. This is a question, which has been discussed in a number of recent judgment at other Supreme Courts/Constitutional Courts.[47] The DSC underlines that the Charter including Art. 21 does not have direct effect in Denmark (through the Danish Act on Accession to the EU). The same applies to principles which are based on Art. 6, para. 3, TEU. This way, the Supreme Court seems to have expressed how it will treat future cases involving the Charter.

Finally, we might reflect over the impact of the judgment in relation to national Supreme Courts' and Constitutional Courts' respect of EU law and the impact of EU law in the national legal systems. Throughout this *Article*, we have presupposed that the Supreme Court did not follow the preliminary ruling. This could potentially influence other national courts not to follow preliminary rulings. However, one might ask whether the Supreme Court's judgment actually falls within the scope of the preliminary ruling from the Court of Justice? According to EU law, the age discrimination principle is a constitu-

[47] See for instance Italian Constitutional Court, order no. 24/2017, cit. and UK Supreme Court, judgment of 16 October 2013, no. UKSC 2012/0151, and judgment of 16 October 2013, no. UKSC 2012/0160.

tional principle with direct effect but EU law cannot be applied in a *contra legem* situation. Seen through this lens the DSC has followed EU law and the preliminary ruling in the sense that it has not applied EU law in a case in which it would have been *contra legem*. In favour of such an interpretation could be mentioned the fact that the EU has not initiated actions against Denmark regarding a violation of the treaties. Against such an interpretation could be mentioned, that the DSC in its judgment does not accept that the EU constitutional principle on age discrimination – or any other principles based on Art. 6, para. 3, and the Charter – have direct effect in the Danish legal system. Furthermore, it has been put forward in parts of legal literature that it was actually possible for the Supreme Court to interpret Danish legislation in accordance with EU law without the appearance of a *contra legem* situation.[48]

This way, though no definite answers can be given yet in relation to the scope of the *Ajos* judgment, as shown the *Ajos* judgment has the potential to impact the future relationship between EU law and Danish law (in a new direction) and it provides an important contribution to the European case law on the relationship between EU law and national law. The latter naturally leads us to a brief comparative visit to a few other Constitutional Court/Supreme Court cases, which are comparable to the Danish *Ajos* case.

IV. Comparative analysis of the *Ajos* case

As already touched upon above the *Ajos* case fits into a comparative European context, and hence into the judicial dialogue between national courts and the CJEU. Focus in this section will be on two comparative perspectives. First, it is considered whether other European Courts have been concerned with upholding legal certainty in relation conflict between national legal order and EU law. It is seen that by combining the jurisdiction of the national courts and the separation of powers the constitutional principles is used to potentially limit the direct effect of Union law. Second, it is considered whether other national European Courts are invoking constitutional reservations in combination with the principle of loyal cooperation and using a more EU-open dialogue compared to *Ajos*.

IV.1. Upholding legal certainty at a national level

In *Ajos* the DSC chose to highlight the discussion carried out by the AGs of the Court about the doctrinal basis of horizontal application of general EU principles in the reference to the Court of Justice.

[48] See R. Nielsen, C.D. Tvarnø, *Danish Supreme Court Infringes the EU Treaties by Its Ruling in the Ajos case*, in *Europaraettslig Tidskrift*, 2017, p. 303 *et seq*. and R. Nielsen, C.D. Tvarnø, *Ajos-sagens betydning for rækkevidden af EU-konform fortolkning i forhold til det almindelige EU-retlige princip om forbud mod aldersdiskrimination*, in *Danish National Gazette*, Section B, 2016, p. 269.

The DSC revisited the *Ole Andersen* case when considering whether the same approach could be applied in a horizontal EU law relationship between two private individuals – or if it would be a breach of legal certainty. In the said judgment AG Kokott had in her opinion questioned that the Court of Justice had relied directly on the general legal principle of the prohibition of age discrimination, stating that it was for the national court to set aside any provision of national law, which may conflict with that prohibition.[49] The AG found in para. 22 that it appeared "to be a makeshift arrangement for the purposes of resolving issues of discrimination in legal relationships between individuals, in which Directive 2000/78 is not as such directly applicable and cannot therefore replace national civil or employment law".

The AG also emphasized that the idea of an in-depth reappraisal and examination of the doctrinal basis of the controversial horizontal direct effect of general legal principles or fundamental rights between individuals were certainly appealing, but not necessary to resolve the case at hand since the main proceeding related to a vertical legal relationship. In another case, the *Dominguez* case, also AG Trstenjak had made reservations regarding legal certainty for private individuals and the risk of mixing sources of law as regard to directives as secondary law and general principles as primary EU law.[50] In regard to absence of legal certainty for private individuals she emphasized in para. 164, that:

> "[…] the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. However, as it will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law there would, from his point of view, be uncertainty as to the application of national law similar to that experienced where a directive is directly applied in a relationship between private individuals".

The DSC raised the same concerns and by referring the *Ajos case* to the Court of Justice they aimed to find a solution by balancing the conflicting principles. By rejecting the solution by the DSC the Court of Justice offered no easy way out for the national court, but to turn on a plate and apply EU law as told by the Court of Justice. The DSC did not act as expected; instead, the Danish judges found their own way of solving the problem and thereby securing legal certainty under Danish law as mentioned above.

In the *Taricco II* case[51] the Italian Constitutional Court made a preliminary reference to the CJEU about the extent to which the national courts are required to fulfil the obli-

[49] Opinion of AG Kokott delivered on 6 May 2010, case C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark*.

[50] 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*.

[51] Court of Justice, judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B.* [GC].

gation, identified by the Court in the judgment of 8 September 2015, *Taricco et al.* to disapply, in pending criminal proceedings, the rules in the last sub-para. of Art. 160 and the second sub-para. of Art. 161 of the *Codice penale* (the Penal Code).[52]

The *Taricco II* case concerned whether Art. 325 TFEU had primacy over national provisions in the Penal Code on a narrow limitation period for prosecuting tax offences, as the Court of Justice had suggested in the *Taricco et al.* case.[53] According to the Italian Constitutional Court, this would violate the constitutional principle of legality, which has special weight in the field of criminal law. The first preliminary reference was discussed by the Italian Constitutional Court, order no. 24, which ended up sending another preliminary reference to the Court of Justice. In the reference, the Italian Constitutional Court on a number of occasions, referred to foreseeability and level of certainty for individuals. The Italian Constitutional Court also refers to the limits set for the power of the courts in the Italian system of separation of powers.[54] The Italian Constitutional Court emphasised that it is not empowered to make choices based on discretionary assessments of criminal policy and regarding the constitutional systems of the Member States of civil law tradition. Accordingly, it said: "[...] [t]hese do not grant the courts the power to create new criminal law in place of that established by legislation approved by Parliament, and in any case reject the notion that the criminal courts may be charged with fulfilling a purpose, albeit defined by law, if the law does not specify in what manner and within what limits this may occur".

This paragraph in the decision was followed by the consideration, that "[the] conclusion would exceed the limits applicable of the exercise of judicial powers within a state governed by the rule of law, at least within the continental tradition and does not appear to comply with the principle of legality laid down by Article 49 of the Nice Charter".

As of 18 July 2017 the AG in *Taricco II* Bot delivered his opinion in the case and found that the Court of Justice should answer the questions referred for a preliminary ruling by the Italian Constitutional Court by re-stating the argumentation from the *Taricco I* case. He also found that none of the arguments put forward by the Italian Constitutional Court could alter that result. Bot suggested that Art. 325 TFEU had to be interpreted as requiring the national court to disapply the absolute limitation period in the national legal order. Thereby the facts of the case has many similarities to the *Ajos* case (but also differences being about criminal proceedings and not civil labour law).

The argumentation that had been put forward by the Italian Constitutional Court that Art. 49 of the Charter could preclude the Italian courts from disapplying national rules was disregarded by the AG. Also the suggestion that Art. 53 of the Charter could allow the courts to refuse to fulfil the obligation identified in the *Taricco I* case on the

[52] Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco et al.* [GC].
[53] Italian Constitutional Court, order no. 24/2017, cit.
[54] Italian Constitutional Court, order no. 24/2017, cit., pp. 5, 9 and 11.

ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the Constitution of that State was rejected.

Finally, AG Bot rejected the argument that Art. 4, para. 2, TEU could be used as a leverage in allowing the courts to refuse to fulfil the obligation identified by the Court of Justice in *Taricco I* on the ground that the instant application would affect the national identity of Italy. The argument was, that national identity would be affected, if the courts had to use a longer limitation period than that provided for by the law in force at the time when the offence was committed.[55]

The AG held that the protection of a fundamental right must not be confused with an attack on the national identity or, more specifically, the constitutional identity of a Member State. Finding that even though The *Taricco I* case concerned a fundamental right protected by the Italian Constitution, that did not mean that the application of Art. 4, para. 2, TEU could be envisaged.

It could be argued that, if a similar argument had been put forward in *Ajos* by the DSC (as the national government did) AG Bot would have dismissed it on the same grounds. In the judgment in the *Taricco II* case the Court of Justice followed the AG in regard to Art. 325 TFEU, and found that it had to be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, even though they formed part of national substantive law. However, contrary to the AG the Court of Justice found that the obligation to protect the financial interests of the EU was not absolute.

The Court of Justice found the rules had to be disapplyed: "[…] unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed".[56]

The Court of Justice did not answer the third question from the Italian Constitutional Court about the constitutional identity, since the conclusion of the first and second question gave the referring court enough leeway to balance the principles of legal certainty in the Italian Constitution against the effectiveness of EU law. This was the same task that the DSC was unsuccessfully trying to solve under EU law in *Ajos*, instead the DSC had to combine the jurisdiction of the national courts and the separation of powers in the Constitution to limit the direct effect of Union law under Danish law.

[55] See *supra*, section III.3.
[56] *M.A.S. and M.B.*, cit., para. 62.

IV.2. Different approaches to the ongoing dialogue between national courts and the Court of Justice

When deciding to make a preliminary reference, and by choosing to revisit the discussion carried out by some of the AGs of the Court of Justice the DSC chose a path that could be interpreted as disobedient or at least sceptic towards the existing case law from the Court of Justice regarding the principle of non-discrimination on grounds of age. The critique from the AGs of the Court of Justice continues also after the *Ajos* case. And even some encouragement to *Ajos* might be found. AG Bobek held in his opinion in *Abercrombie & Fitch* that it is a "sensible practice of a number of legal systems that see the role of fundamental rights in private law relationships primarily as an interpretative one".[57]

This comparative outlook will focus on other European constitutional courts' approaches in the dialogue between the courts. When comparing the *Ajos* case with the predecessor in the *Mangold* case and the German Federal Constitutional Court's/Bundesverfassungsgericht (BVerfG) decision some major differences can be pointed out. In the *Honeywell* case the BVerfG had to decide if the *Mangold*-case from the CJEU was constitutional or not and if the Court of Justice had overstepped its competence in regard to the principle of non-discrimination on grounds of age. The Court performed a so-called *ultra vires* review.

Honeywell has already been thoroughly examined and analysed before.[58] However, in regard to the comparison with *Ajos* the case relates to the same problem: the review of if the Court of Justice is overstepping its competence in regard to the doctrinal basis of the principle and the relationship to the German Constitution. The outcome and the result of the case was very much different from *Ajos*. The BVerfG found that in regard to the interpretation it had to be remembered that the *ultra vires* review by the court could only be considered if a breach of competences was *sufficiently qualified*. The same doctrine or threshold was previously used in the Danish *Maastricht* and *Lisbon* cases:

> "Therefore, should the extraordinary situation arise in which it can be held, with the requisite certainty, that an EC legal act upheld by the EC Court of Justice is based on an application of the Treaty that falls outside the scope of the delegation of sovereignty effected by the Law on accession, Danish courts must hold that EC legal act to be inapplicable in Denmark".[59]

[57] Court of Justice, judgment of 19 July 2017, case C-143/16, *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro*.

[58] M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9 *et seq*. and Editorial Comment, *Ultra Vires. Has the Bundesverassungsgericht Shown his Teeth?*, in *Common Market Law Review*, 2013, p. 925 *et seq*.

[59] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

In *Ajos* on the other hand, the DSC judges, did not set a lower bar of "sufficient qualification" of the breach of competence as explained above. It would have been if the dissenting judge of the DSC had had her will. The explanations on the different outcome of the cases can of course be related to the differences in the German Constitution *vis-à-vis* the Danish. In order to understand the different approaches a very significant feature of interpretation can be underlined in the BVerfG's argumentation on the *ultra vires* review: "Die Ultra-vires-Kontrolle darf nur europarechtsfreundlich ausgeübt warden".[60]

Or as the English translation says the "[u]ltra vires review may only be exercised in a manner which is open towards European law". A similar principle of interpretation with the emphasis on the EU integration is not fully recognised under Danish law. The German position reflects in some ways the EU law principle of loyal cooperation, which implies mutual respect and assistance between the national and EU level.

Going back to the Italian re-referral in the *Taricco II* case and investigating it from the same perspective a similar positive approach in relation to EU law can be identified. Several places in the decision, such as in para. 8 on the reflection on the identity-clause: "This Court would like to stress that, [...], it does not however compromise the requirements of uniform application of EU law and is thus a solution that complies with the principle of loyal cooperation and proportionality". [61]

The tone and the language in the Italian Constitutional Court decision is somewhat respectful in regard to the Court of Justice and simply points at some difficulties for the national constitutional court to obey and comply with EU law. This style of dialogue could be interpreted as in contrast to the DSC in *Ajos*, which leads us to the next section.

After the outlook on the two different approaches from the Italian Constitutional Court and the BVerfG we look into the argumentation and the use of language in the Danish decision to refer *Ajos* to the Court of Justice. In light of the approach of its Italian and German colleagues, it may seem a bit harsh and extremely candid when the DSC suggests that the Court of Justice is not consistent in its own case law.[62]

The DSC pointed that out by referring on the one hand to the *A.M.S.* case, para. 36, in which the CJEU stressed that according to settled case law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.[63] On the other hand the DSC argued that this would be the case if the line of argumentation in *Kücükdeveci* was applied.

Many other explanations (than legal) can be found as to why the DSC argued as it did, such as the cultural differences in the way Danish lawyers (including judges) write

[60] German Federal Constitutional Court, judgment of 6 July 2010, 2 BvR 2661/06, para. 58.

[61] Italian Constitutional Court, order no. 24/2017, cit., para. 8.

[62] Danish Supreme Court, no. 15/2014, cit.

[63] Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de médiation sociale v. Union locale des syndicats* [GC].

and argue without too many detours and straight to the point, but it can also be interpreted as being confronting towards the Court of Justice. Many former DSC judges have after they resigned from the bench in the DSC expressed the view that the interpretations made by the European Courts (including the CJEU) puts the concepts of separation of powers and legal certainty on a slippery slope.[64]

Despite the general argument put forward that the DSC is reluctant towards making preliminary references to the Court of Justice the Court did so in *Ajos* despite the fact that neither of the parties had requested it. A critique could be made of the way the DSC did it by making the argument that the Court of Justice should "think again" in order to make its own case law consistent.[65] Instead, inspiration from the Italian Constitutional Court could be drawn and a lesson learnt for the DSC could be that in future referrals to the Court of Justice it must be even more thorough when drafting and explaining the difficulties posed by obeying and complying with EU law. Such an approach might prove more successful when engaging in the ongoing dialogue between the European Courts.

V. Concluding remarks

In the *Article*, we give a brief account of *Ajos* and draw a line from *Maastricht* via *Lisbon* to *Ajos* by reflecting on the development of the case law of the DSC. Here the strong emphasis that the Danish Courts puts on the parliamentary prepatory works (*travaux préparatoires*) and the will of the legislator also in regard to EU law is highlighted.

Ajos has been given many interpretations already.[66] It has been viewed as a battle between monism against dualism, as a clash between different legal cultures or as competing institutions on a national and international level. We have analysed the case

[64] See B. Dahl, *Keynote Address*, cit., pp. 26-36 and T. Melchior, *Er grundloven ændret?*, in *Festskrift til Jens Peter Christensen*, 2016, p. 239.

[65] M. Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, pp. 1039-1063 contrary to M. Broberg, N. Fenger, H. Hansen, *Den strukturelle faktors betydning for nationale domstoles præjudicielle forelæggelser for EU-Domstolen: En statistisk analyse*, in *Juristen*, 2017, pp. 182-195, who have based their analysis on statistics and suggested other explanations (when taking population, economic wealth, length of membership and other factors into account).

[66] O. Spiermann, *En højesteretsdom om EU-tiltrædelsesloven*, in *Danish National Gazette*, Section B, 2017, p. 297; J. Kristiansen, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret*, cit.; R. Nielsen, C.D. Tvarnø, *Danish Supreme Court Infringes the EU Treaties by its Ruling in the Ajos Case*, cit., pp. 303-326, and M. Rask Madsen, H. Palmer Olsen, U. Sadl, *Competing Supremacies and Clashing Institutional Rationalities*, in *iCourts Working Paper Series*, no. 85, 2017 p. 17; R. Holdgaard, D. Elkan, G. Krohn Schaldemose, *From Cooperation To Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal To Comply*, in *Common Market Law Review*, 2018, p. 17 *et seq.*; U. Neergaard, K. Engsig Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case*, in *Yearbook of European Law*, 2017, p. 1 *et seq*.

from a primarily constitutional perspective with emphasis on separation of powers and the temporary context in which the case was decided in.

As regards the scope of the judgment we have discussed different perspectives namely whether the judgment can be interpreted as 1) a break with the "Maastricht criteria", 2) primarily based on the fact that it was a horizontal relationship between two private parties or 3) as being in accordance with EU law and the preliminary ruling. The most clear implication of *Ajos* is that the DSC sets out a restrictive line for future cases which involve the Charter and principles developed or established on the basis of Art. 6, para. 3. Especially in relation to the prohibition of discrimination on grounds of age in Art. 21, it will be interesting to see how the DSC will respond to cases about prohibition of discrimination on other grounds than age in horizontal relationships based, for instance, on a disability (obesity)[67] or religion following the forthcoming judgement in *Cresco.*[68]

Seen through a comparative lens we have analysed *Ajos* and compared it with the latest *Taricco II* case and found that the strong focus on upholding legal certainty at a national level is a tendency that can be seen also in other Constitutional courts, but to some extent can be framed differently. Further, we concluded that the German *Honeywell* case and the Italian *Taricco* re-referral can be interpreted as more open toward Union law compared with *Ajos.*

[67] Court of Justice, judgment of 18 December 2014, case C-354/13, *Kaltoft v. Municipality of Billund*.

[68] Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 13 April 2017, case C-193/17, *Cresco Investigation GmbH v. Markus Achatzi*.