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How to cite this publication

Please cite the final published version:

Neergaard, U., & Sørensen, K. E. (2017). Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case. *Yearbook of European Law*, 36(1), 275-313. DOI: 10.1093/yel/yex008

Publication metadata

Title:	Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case
Author(s):	Neergaard, U., & Sørensen, K. E.
Journal:	<i>Yearbook of European Law</i> , 36(1), 275-313
DOI/Link:	https://doi.org/10.1093/yel/yex008
Document version:	Accepted manuscript (post-print)

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Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU and the *Ajos* Case

*Ulla Neergaard and Karsten Engsig Sørensen**

Abstract: In its combative *Ajos* judgement recently rendered by the Danish Supreme Court, the court openly and controversially challenged the authority of the CJEU. By the same token, in the preliminary ruling by the CJEU preceding it, the CJEU had continued to develop the controversial general principle prohibiting age discrimination. This issue lay at the heart of the dispute and it seems very likely that the Danish Supreme Court felt that the CJEU had been too activist when it originally ‘launched’ this general principle. Indeed, the reasoning of the Danish Supreme Court gives the impression that the CJEU had itself created it out of nowhere. In turn this appeared to be an implicit reference to the widely criticised interpretative approach of the CJEU, resulting in a far-reaching willingness to espouse judicial activism. But in acting as it did, it seems ironic that the Danish Supreme Court itself showed that it too had an activist streak. Thus, both Courts were quite imaginative in trying to mould the central issues as falling within their exclusive jurisdiction. As a consequence of the judgments, parts of EU law are not, it appears, fully part of Danish law, but unfortunately the full implications and therefore the remedy are far from certain. While both judgments appear to reflect a lack of mutual trust between the two courts, they also expose a range of highly significant issues of wide importance. To understand both what went wrong in the judicial dialogue and the wider issues at stake, in this article the judgments are analysed in depth and placed into their wider context. Among other matters, we have considered how the courts should strike the sensitive balance, which has to exist in the relationship between the national courts and the CJEU, requiring mutual trust or, at the least, judicial comity in accordance with the hierarchy of norms established by virtue of EU law. Also, we discuss how - if that degree of cooperation were to break down, as has happened in *Ajos* as a result of the Supreme Court’s failure to follow the preliminary ruling of the CJEU - uniformity of application of EU law could be jeopardized.

I. Introduction – A combative judgment

In its seminal Opinion 2/2013 regarding the draft international agreement by which the EU was to accede to the European Convention on Human Rights, the Court of Justice of the European Union (hereinafter referred to as the ‘CJEU’) put huge emphasis on the constitutional principle of mutual trust, which it understood as follows:

That principle requires... each of [the Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law.¹

Obviously, mutual trust also constitutes a founding principle in the relationship between the EU institutions, including the CJEU, and the Member States including its courts. About the latter relationship the present President of the CJEU, Lenaerts, recently has stated the following: ‘Thus, just as national courts trust the ECJ to say what the law of the EU is, the ECJ trusts national supreme and constitutional courts to monitor the correct application of that law.’² Even though the origin and thus legal basis of such a principle of mutual trust are

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¹ Opinion 2/13, EU:C:2014:2454, para. 191.

² Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’, (2017) *CMLRev*, 805-840, at 839. Also see Mayoral, ‘In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe’, (2017) *JCMS*,

not completely clear, we assert in this article that it is of utmost importance in the relationship between the CJEU and the national courts to ensure the efficient functioning of the entire system.³ Against that background, after more than 40 years of Danish membership of the EU, it seems rather surprising that, at least at first glance, an expression of lack of mutual trust between the two courts has manifested itself, namely in the judgment recently rendered by the Danish Supreme Court ('Højesteret' in Danish and hereinafter referred to as the 'SCDK') in the so-called *Ajos* Case,⁴ and in the preliminary ruling rendered by the CJEU.⁵ which preceded it. In this decision, which has huge historic potential, the SCDK in the shape of eight out of nine participating judges openly - and controversially - challenged the authority of the CJEU as it disregarded the guidelines, which the latter had set out.⁶

The judgment immediately caused some drama in the media, and several articles in legal journals were quickly to follow. Among legal scholars, as well as others, the judgment was heavily debated, and disagreement as to whether the SCDK was right or wrong became a major talking point. For instance, Professors Nielsen and Tvarnø stated: '... the Supreme Court in its judgment in the *Ajos* case has violated EU law. Measured by ... EU law requirements, it has committed serious errors. It has failed to fulfil its duty to interpret Danish law in conformity with EU law....' ⁷ The Professors Madsen, Olsen and Sadl claimed that: '...if the basic legal logic of the decision were to apply systematically across Europe, it would fragment the concept of the EU legal order. That would be legally problematic in terms of legal certainty and coherence, and most likely undermine the broader project of European integration through law.' ⁸ Finally, it is worth mentioning that in the highly regarded *Verfassungsblog*, the following was stated: 'The authority of the European Court of Justice has been challenged and contested in unprecedented ways in recent weeks... [T]he Danish Supreme Court is defying the court with a boldness that would even make the Second Senate

551-568; and 'Impact through Trust: The CJEU as a Trust-Enhancing Institution Book: International Courts and Domestic Politics', in Wind and Follesdal (eds): 'International Courts and Domestic Politics' (Oxford: OUP, forthcoming).

³ Most likely the principle is supported by the principles of loyalty and cooperation. As to the principle of loyalty, see in particular Klamert, 'The Principle of Loyalty in EU Law' (Oxford: OUP, 2014).

⁴ See for the Danish SCDK judgment UfR 2017.824H (Case no. 15/2014, *DI, acting on behalf of Ajos A/S v Estate of A*). A translation from Danish into English is available here:

<www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Pages/TherelationshipbetweenEUlawandDanishlawinacaseconcerningasalariedemployee.aspx>. All references to the *Ajos* judgment of the SCDK will be to the English translation and generally then referred to as the SCDK judgment. The judgment was rendered on 6 December 2016.

⁵ See Case C-441/14, *Ajos*, C:2016:278. The judgment was rendered on 19 April 2016.

⁶ The only dissenting judge, Justice Jytte Scharling, followed, by contrast with the majority, a pathway that sought to reconcile the differing views. In parenthesis, it is interesting to note that there were only two female judges among the nine judges rendering the judgement. On 10 January 2017, according to the webpage of the SCDK, only 6 out of 19 judges were women <www.supremecourt.dk/about/staff/Pages/default.aspx>. There is some evidence that attitudes towards the EU might vary in accordance with a given person's sex; for example, in the 'Brexit' referendum, there was a majority of females (and a minority of males) who were in favour of a 'remain' vote. The problem of the uneven distribution of males and females has been acknowledged by the present SCDK President, Thomas Rørdam, in an interview which took place on exactly the day when the *Ajos* judgment was rendered, and thus nearly two months before he took up the office on 1 February 2017; see Juul, 'Følelser er ok i Højesteret', (2017) *djøfbladet*, 35-38.

⁷ Nielsen and Tvarnø, 'Danish Supreme Court infringes the EU Treaties by its ruling in the *Ajos* case', (2017) *Europarättsligt Tidsskrift*, 303-326, at 326.

⁸ Madsen and others, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation', (2017) *iCourts Working Paper Series*, Copenhagen, No. 85, 1-15, at 15, <www.icourts.dk/paper/Competing-Supremacies-and-Clashing-Institutional-Rationalities-Danish-Supreme-Courts-Decision>.

of the German Federal Constitutional Court writhe with unease.’⁹ Significantly, all this took place in relation to a judgement rendered in a country where there is absolutely no tradition for criticising the SCDK, albeit in most instances rightly so (although not necessarily legally and politically healthy).

Denmark does not have a constitutional court equivalent to what may be seen in certain other countries. Rather, the SCDK, which had already been established back in 1661, and is the court having the ultimate national word concerning the interpretation of the Danish Constitution (i.e. ‘Grundloven’ in Danish), prides itself for judicial self-restraint and is accordingly known for adopting a conservative, literal approach to the words of the law. This leaves very little room for the exercise of judicial discretion, combined with a tendency reluctantly to ensure effective protection for individual rights.¹⁰ Put another way, judge-made law is regarded as less acceptable than a more strict approach to interpretation. The tradition of the SCDK also implies that it is reluctant to set aside legislation as in conflict with the Constitution (and after *Ajos* the same approach might continue to be applied in relation to EU law notwithstanding the longstanding principle of its primacy).¹¹ Even though a degree of influence stemming from international courts is discernible, these factors all imply that the Danish constitutional tradition is quite different from that of most other jurisdictions. Therefore, in Denmark, the protection of the individual’s fundamental rights mainly derives

⁹ Steinbeis, ‘Editorial’, *Verfassungsblog*, 4 February 2017, <<http://verfassungsblog.de/trump-taricco-turks-and-tusk/>>. Other works regarding the judgment to be mentioned are: Amblagh, ‘The Anatomy of Constitutional Pluralism in the European Union’ (2017) *Edinburgh School of Law Research Paper Series*, University of Edinburgh, No 2017/13; Garner, ‘The Borders of European Integration on Trial in the Member States: *Dansk Industri*, *Miller*, and *Taricco*’, (2017) *EJLS*, 1-12; Haket, ‘The Danish Supreme Court’s *Ajos* judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order’, (2017) *Review of European Administrative Law*, 135-151; Holdgaard and others, ‘Højesteret har sagt fra over for EU-Domstolen (2017) *Advokaten*, 32-37; Jacqueson, ‘Danemark. Le clash: La Cour suprême du Danemark défait la CJEU dans l’affaire *Ajos*’, (forthcoming) *Revue européenne de droit comparé du travail et de la sécurité sociale*; Kristiansen, ‘Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – om Højesterets dom i *Ajos*-sagen’, (2017) *Ugeskrift for Retsvæsen*, U.2017B.75-84; Nielsen and Tvarnø, ‘Domscommentar. Præjudikat eller ikke præjudikat. Chartrets retsvirkning i dansk ret efter EU-domstolens og Højesterets afgørelser i *Ajos*-sagen’, (2017) *Tidsskrift for Rettsvitenskap*, 218-246; Sadl and Mair, ‘Mutual Disempowerment: Case C-441/14 *Dansk Industri (DI) acting for Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*’, (2017) *European Constitutional Law Review*, 347-368; and Sørensen, ‘Aktivistiske domstole – et blik Europa og Danmark’ (2017) *Juristen*, 73-80.

¹⁰ Rytter, ‘Individets grundlæggende rettigheder’, (Copenhagen: Karnov Group, 2013) 33. Also see Christoffersen, ‘Den grundlovgivende dommer, in Krunke and others (eds), ‘Rettens magt - Rettens ret. Festskrift til Henning Koch’, (Copenhagen: Jurist- og Økonomforbundets Forlag, 2014) 69-80. That the SCDK is seen as not having a tradition for being very ‘activist’ is, however, not without exceptions. For instance its interpretation of the disputed Paragraph 2(a)3 at issue in *Ajos* was – perhaps rather ironically – originally not based on the written law as such (see inter alia p. 43 of the SCDK judgment), but rather on its own case law. If so, it could thus be asserted that the SCDK in the case was defending a self-created, case law based rule against what it sees as the CJEU’s activism, and that too could be regarded as being activist. Also, some would view the SCDK as a state-supportive institution, which seeks to protect the status quo. Thus, for example, the argument put forward by the SCDK in its formulation of the second of the preliminary questions regarding damages may support that point of view. It is also an institution, in common with the lower courts, which to some degree is reluctant in giving full effect to international obligations, and where it has in literature been claimed, that there is a reluctance to refer cases to the CJEU. See in that regard in particular Wind, ‘Who Is Afraid of European Constitutionalism? The Nordic Distress with Judicial Review and Constitutional Democracy’, (2014) *iCourts Working paper*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2539045>.

¹¹ Rytter: ‘Individets grundlæggende rettigheder’, (Copenhagen: Karnov Group, 2013) 33. Also see Christensen: ‘Højesteret i dagens samfund’, in ‘Højesteret’, (Copenhagen: Jurist- og Økonomforbundets Forlag, 2015) 11-53, at 11 and 29-34, where it is explained that this control does not directly have its legal basis in the Constitution, but follows from a constitutional tradition (i.e. ‘sædvane’ in Danish).

from international sources of law, given effect by virtue of Danish implementing legislation. Yet even in these cases, the Danish courts are nevertheless still perceived as being reluctant to give effect to such rights.¹²

Undoubtedly, the *Ajos* judgment appears as almost the culmination of an implied development - and at times expressly articulated restiveness - among constitutional and supreme courts across Europe challenging the authority of the CJEU.¹³ In fact, this is a trend which increasingly appears among politicians and citizens of the Member States; a criticism that, for instance, may have led the UK Government in its negotiating aims to openly refuse to accept CJEU jurisdiction in a post-Brexit world. In Denmark, however, the SCDK had until 6 December 2016 followed a pragmatic and careful approach towards the CJEU and EU law. This has now changed dramatically, as it has now surprisingly chosen to disobey the CJEU, thus undermining a cornerstone of the EU *acquis* by failing to apply the principle of supremacy of EU law. As a matter of the SCDK's honouring the principle of judicial comity alone, let alone failing to act consistently with the principle of mutual trust, this was a startling outcome.

Such a choice by the SCDK calls for an in-depth analysis of the case with the purpose of understanding what we see as an example of an imperfect judicial dialogue between the CJEU and the SCDK, which in our opinion should be founded on effective and loyal cooperation as well as on mutual trust. It may be argued that the SCDK virtually set a trap for the CJEU when it phrased its preliminary questions. In turn, the CJEU became ensnared, and the result seems to have been that the two courts failed to find a compromise when the opportunity arose. Thus, in their attempts, so it seems, to win the upper hand, they each tried to define the relevant issues as a matter for their exclusive jurisdiction, so that in the end it seemed to become a question which legal system should enjoy the right of primacy at the expense of the other. In other words, the cases address the question of supremacy of EU law over national law. In the end the SCDK did not accept that part of EU law had supremacy over Danish law, even though the CJEU in its judgment had asserted the supremacy of EU law. At first sight, insistence on protecting the principle of supremacy of EU law is nothing new. The position of the CJEU is well-known and is the price for ensuring the uniform application of EU law across the Member States; by the same token, the SCDK had already expressed its reservations about the supremacy of EU law in earlier judgements. However on closer examination the decision in *Ajos* may also have some important, additional implications of wider significance, based on the constitutional traditions of each Member State. A possible reason for the lack of trust on the Danish side could be their perception that the progressive and perhaps even activist judicial behaviour of the CJEU is very different

¹² Rytter: 'Individets grundlæggende rettigheder', (Copenhagen: Karnov Group, 2013) 33. Also see more generally Christoffersen and Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights', (2011) *Nordic Journal of International Law*, 257-277.

¹³ However, as a matter of comity, most national constitutional and supreme courts, even including the significant ones in the UK and Germany, have managed to find a way to avoid a clash. See for an overview of the interrelationship generally Tridimas, 'The ECJ and the National Courts. Dialogue, Cooperation and Instability' in Arnulf and Chalmers (eds), 'The Oxford Handbook of European Union Law' (Oxford: OUP, 2015) 403-430, who concludes at 430 that: 'There appears to be growing disagreement between the ECJ and some national courts about what and how much can be done on the basis of the Treaties'.

from the way that Danish courts, and in particular the SCDK, see themselves.¹⁴ To illustrate this, reference may be made to the former President of the SCDK, Dahl, who has put it in the following way: ‘One issue concerns the democratic legitimacy of the EU: An issue which has been a recurring theme in the ongoing debate about the EU since the very beginning of the Community. A dynamic, creative method of interpretation should not be taken so far as to endanger the democratic legitimacy of the Union.’¹⁵ After having pointed out the problems involved in activist judicial behaviour, he continued by identifying the risk that the CJEU might be moving down that road by observing: ‘The European Court of Justice is of paramount importance in ensuring a European Union based on the rule of law. A dynamic and creative interpretation at international courts is, however, a challenge for all national courts. International developments through court practice should not be so dynamic that the national level cannot see the rule of law, including the principle of foreseeability reflected in what is happening. It is crucial that the population has confidence in the courts as the guardians of the rule of law as fortunately is still the case in Denmark.’ In *Ajos* itself, the self-perception of the SCDK as a non-activist court was obvious when it stated in the case that it would be acting outside the scope of its powers as a judicial authority if it were to disapply the disputed Danish provision as suggested by the CJEU.¹⁶

Since the controversial *Mangold* was at the centre of the dispute in *Ajos*, it seemed very likely that the SCDK felt that the CJEU had been too activist, when it deemed the general principle prohibiting age discrimination to be part of EU law.¹⁷ In fact, the reasoning of the SCDK appears to insinuate that the CJEU had more or less created this general principle out of nowhere; a criticism in respect of which it does not stand alone.¹⁸

¹⁴ Thus it is not too surprising that one of the first academic criticisms of the activist approach of the CJEU was formulated by the Danish professor Rasmussen in his doctoral thesis ‘On law and policy in the European Court of Justice: a comparative study in judicial policymaking’, (Dordrecht: Martinus Nijhoff, 1986).

¹⁵ Dahl, ‘Keynote Address’ in Neergaard and Jacqueson (eds), ‘Proceedings: Speeches from the XXVI FIDE Congress. The XXVI FIDE Congress in Copenhagen 2014. Congress Publications Vol. 4’ (Copenhagen: Website publication in cooperation with DJØF Publishing, 2014) 26-30, at 29-30 <fide2014.eu/pdf/Volume4_Speeches_from_the_XXVI_FIDE_Congress.pdf>. Also, see the following publications by either former or present SCDK judges/presidents: Dahl, ‘Hvad skal vi med Højesteret’, in Dahl and others (eds), ‘Festskrift til Jens Peter Christensen’, (Copenhagen: Jurist- og Økonomforlagets Forlag, 2016) 619-634, at 634; Dahl and Christensen, ‘Danmarks Højesteret siden 1814 – Kontinuitet og forandring’, in Schei and Øie (eds), ‘Lov, sannhet, rett. Norges Høyesterett 200 år’, (Oslo: Universitetsforlaget, 2015) 43-57, at 57 <file:///C:/Users/mlg293/AppData/Local/Microsoft/Windows/INetCache/IE/09447HL4/Danmarks%20Højesteret%20siden%201814%20-%20Kontinuitet%20og%20forandring.pdf>; Hjortnæs, ‘Om Højesterets rolle – grænsen mellem politik og jura’, in Dahl and others (eds), ‘Festskrift til Jens Peter Christensen’, (Copenhagen: Jurist- og Økonomforlagets Forlag, 2016) 635-644, at 637 and 644; Melchior, ‘En ændret magtfordeling’, in Ersbøll (ed), ‘EU’s Charter i et menneskeretligt krydsfelt’, (Copenhagen: Jurist- og Økonomforbundets Forlag, 2016) 245-257, at 257; and Thomas Rørdam, in an interview by Geist, *Information*, 1 February 2017. In addition, see Christoffersen, ‘Den grundlovgivende dommer’, in Krunke and others (eds), ‘Retten til magt – Magtens ret. Festskrift til Henning Koch’, (Copenhagen: Jurist- og Økonomforlagets Forlag, 2014) 69-80; and Toftegaard Nielsen, ‘Den tredje statsmagt?’ in Dahl and others (eds), ‘Festskrift til Jens Peter Christensen’, (Copenhagen: Jurist- og Økonomforlagets Forlag, 2016) 645-667, at 667.

¹⁶ P. 48 of the SCDK judgment.

¹⁷ Case C-144/04, *Mangold*, EU:C:2005:709. On the claimed activism of the CJEU, see e.g. Neergaard, ‘Europe and the Welfare State – Friends, Foes, or...?’, *YEL*, (2016), 1-41, at 11 et seq; and Neergaard and Nielsen, ‘Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the European Court of Justice’, in Neergaard and others (eds), ‘European Legal Method—Paradoxes and Revitalisation’, (Copenhagen: DJØF Publishing, 2011) 95-184.

¹⁸ See e.g. Mazák and Moser, ‘Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law’, in Adams and others (eds), ‘Judging Europe’s Judges. The Legitimacy of the European Court of

Given that the judgment of the SCDK may be viewed as a criticism of the CJEU (as in its eyes being far too activist), it seems rather ironic that the SCDK itself showed in the *Ajos* case that it too had an activist streak.

To fully understand what went wrong in the judicial dialogue, it is necessary to analyse the judgment in depth and to place it into its wider context. Thus, our intention is to address the following issues of pivotal interest: the background of the case and outline of the course that it ran (Section II); application of the duty of consistent interpretation (Section III); modification of the general principle prohibiting age discrimination by other principles (Section IV); the importance paid to the Danish Constitution and *Law on accession* (Section V); consequences of the judgment (Section VI); and conclusions (Section VII). In other words, Section II serves the aim of briefly introducing the case, whereas Sections III-V focus on a thorough analysis of what to us appear as the three core clusters of identifiable legal issues throughout the proceedings. Finally, our intention in Section VI is to analyse the possible legal consequences of it. The approach taken is mainly legal in its character. But we have also tried to focus on the nuances in the legal arguments underpinning the reasoning of each of the courts. Also, we have inevitably injected a more contextual flavour in the analysis.

II. The background to the case and outline of its course

On the surface, the case appears rather banal as it simply concerns Danish labour law regulation regarding severance allowances. In fact, it could be viewed as having started out in earlier proceedings (delivered by the ‘Sø- og Handelsretten’, i.e. in English the Maritime and Commercial Court, on 14 January 2014) as a pure labour law case. However, it changed character when it reached the SCDK, as, at that stage, the issues had become redefined to reflect questions of constitutional and EU law.

The factual background to the case comprised events, which had taken place back in June 2009. A had been dismissed from the private company *Ajos A/S*, where he had been continuously employed since 1 June 1984.¹⁹ A was therefore, in principle, entitled to a severance allowance corresponding to three months’ salary under Paragraph 2a(1) of the *Law on salaried employees* (i.e. ‘Funktionærloven’ in Danish).²⁰ However, because he had reached the age of 60, and thus was entitled to an old-age pension from his employer under a scheme he had joined before reaching the age of 50, he was after all not entitled to the allowance in question.²¹ In accordance with a consistent line of case law, the provision was interpreted in such a way that the right to severance allowance was forfeited when there was an entitlement to a pension, irrespective of whether the employee opted to avail himself of that pension or the employee decided to continue working.²² Even though A continued working and thus did not avail himself of his pension he was not granted any severance allowance. In 2010 a

Justice’, (Oxford: Hart, 2013) 61-86, at 62: ‘Admittedly, the case law of *Mangold*... attracted criticism from more than just the usual “Eurosceptic” suspects in the media, academia or political domain. The critical reactions were, in fact, strikingly broad-based, and included, to mention but one, the unusually harsh comment published by the former German President and former President of the Federal Constitutional Court of Germany, Roman Herzog, and others, under the title “Stop the European Court of Justice”’.

¹⁹ P. 2 of the SCDK judgment.

²⁰ P. 2 of the SCDK judgment.

²¹ P. 2 of the SCDK judgment.

²² P. 2 of the SCDK judgment.

judgment from the CJEU made it clear that not granting severance allowance to a person that continues working was age discrimination in violation of the Employment Directive.²³ After this A decided to challenge the decision not to grant him severance allowance. The parties in the case ended up being the industrial organisation, DI (Danish Industry), which acted on behalf of the company Ajos A/S, against the Estate of A, as A meanwhile had passed away. Essentially, the core of the subject matter seen from the narrower perspective of the parties – and simply put – was that if Danish domestic law applied as enacted, it meant that the Estate of A was not entitled to a severance allowance. By contrast, if EU law and the prohibition against discrimination on grounds of age were given priority, the Estate was entitled to the allowance. However, at the level of overarching legal principle, bigger issues were at stake, which as already indicated above, will be expanded upon in the present article.

At first instance in the proceedings, the Maritime and Commercial Court upheld the claim brought on behalf of A (as represented by his legal heirs, but hereinafter ‘A’) for payment of the severance allowance in question. That court decided that the contested Paragraph 2a(3) was contrary to Directive 2000/78²⁴ (hereinafter “the Employment Directive”) and found that the previous national interpretation of Paragraph 2a was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.²⁵

This judgment was subsequently appealed by DI to the SCDK, which by order of 22 September 2014, referred two questions to the CJEU. In the first question, the SCDK sought guidance as to whether the general EU law principle prohibiting discrimination on grounds of age precludes legislation such as the Danish legislation at issue.²⁶ In the second question, the SCDK asked whether it is consistent with EU law to weigh the general EU principle prohibiting discrimination on grounds of age and the issue of its direct effect against the principle of legal certainty and the related principle of the protection of legitimate expectations. In that regard, it was also asked whether it - in order to decide whether such a balancing exercise may be carried out – is necessary to take into consideration the fact that the employee may, in appropriate cases, claim compensation from the Danish State if it were held that Danish law was incompatible with EU law.

The SCDK explained in its preliminary reference that it saw the main issue in the case to be whether an EU law principle prohibiting discrimination on grounds of age can be used as a basis for requiring the private-sector employer, Ajos A/S, to pay a severance allowance, even though it is not obliged to do so under Paragraph 2a(3) of the *Law on salaried employees*. Thus, in its opinion, the case raised issues of whether an unwritten EU law principle could preclude an individual or private-sector business from relying on a national legislative provision. It also asked, among other matters, whether - what it saw as – an unwritten EU law principle prohibiting discrimination on grounds of age had the same content and scope on this point as in the Employment Directive, or whether the Employment

²³ See Case C-499/08, *Andersen*, EU:C:2010:600.

²⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²⁵ Judgment of the Maritime and Commercial Court of 14 January 2014, *Boet efter A mod DI smf Ajos A/S*, 12-13.

²⁶ Judgement of the SCDK of 22 September 2014, *DI som mandatar for Ajos A/S mod Boet efter A.*, U.2014.3667H.

Directive on this point contained protection against age discrimination, which was broader than that which follows from the EU law principle.²⁷

The Grand Chamber of the CJEU delivered its judgment on 19 April 2016. Generally, it did not have much sympathy for the considerations behind the referred questions and rejected Ajos' and the Danish Government's arguments. More particularly, with regard to the first question it firmly ruled that the general principle prohibiting discrimination on grounds of age must be interpreted as precluding, including in disputes between private persons, national legislation such as that at issue in the proceedings before the referring court.²⁸ With regard to the second question, the CJEU first concluded that '...EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age.'²⁹ In addition, it stressed that: 'Neither 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.'³⁰

Subsequently, in spite of the ruling of the CJEU, the SCDK chose its own peculiar route in terms of its supporting reasoning and conclusions. As the details of the arguments of the SCDK will be referred to and discussed in the remaining parts of the article, it suffices here to record that the majority of the bench concluded that the Danish '... Law on accession did not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as that provision was contrary to the prohibition.'³¹ In considering the arguments along the way to its ultimate destination, the SCDK emphasised *inter alia* that it was faced with a *contra legem* situation and that it was therefore not possible to interpret the contested Paragraph 2a(3) in accordance with the Directive.³² As a result, it held that Danish courts could not disapply the contested Paragraph 2a(3) as then in force, and Ajos could thus rely on the provision.³³

III. First core cluster of issues: Application of the duty of consistent interpretation

The first of the three core clusters of relevant legal issues throughout the proceedings concerned the duty of consistent interpretation. In fact, the most subtle way of handling potential conflicts between EU law and national law is for the national courts to use the duty

²⁷ P. 5 of the SCDK judgment.

²⁸ Case C-441/14, *Ajos*, EU:C:2015:776, para. 27.

²⁹ Case C-441/14, *Ajos*, EU:C:2015:776, para. 43.

³⁰ Case C-441/14, *Ajos*, EU:C:2015:776, para. 43.

³¹ P. 48 of the SCDK judgment.

³² P. 44 of the SCDK judgment.

³³ P. 48 of the SCDK judgment.

to interpret national law consistently with EU law.³⁴ In *Ajos*, the SCDK had already considered this solution before it chose to refer preliminary questions to the CJEU, and had concluded that it would not be possible to interpret Paragraph 2a(3) of the *Law on salaried employees* in a way which was consistent with the directive. In a number of previous judgments, the SCDK had ruled that the Danish provision should be interpreted as meaning that an employee is not entitled to a severance allowance where, at the time of severance, the employee was entitled to an old-age pension from his or her employer and irrespective of whether the employee opted to avail himself or herself of this pension.³⁵ Against this backdrop, an EU-consistent interpretation of Danish law would be *contra legem*.³⁶ In what follows, we will carefully analyse first the argumentation of the Advocate General and the CJEU (Sub-Section A), which is then followed up by an analysis of the argumentation of the SCDK (Sub-Section B). At the end of the section, certain interim conclusions are put forward (Sub-Section C).

A. The reasoning of the Advocate General and the CJEU

Even though the SCDK had dismissed the possibility of an EU-consistent interpretation, the issue was nevertheless addressed in the preliminary ruling. Advocate General Bot had noted that the wording of Paragraph 2a(3) of the Danish act did not in fact prevent an interpretation under which there would still be an entitlement to severance allowance if the employee had chosen not to avail himself or herself of a pension that he or she was entitled to.³⁷ Looking at the wording of the Danish provision there is no doubt that this is true. Based on this, the Advocate General recommended that the SCDK should be invited to solve the issue at hand by interpreting national law in conformity with the directive, as this was ‘the most appropriate means of resolving the conflict’.³⁸ Advocate General Bot did not consider that there existed a *contra legem* situation, since that expression to his mind had to be understood as being an interpretation that contradicted the very wording of the national provision.³⁹

The CJEU confirmed the duty to interpret national law in conformity with EU law, and further emphasised that the fact that this duty was limited by general principles of law and could not serve as the basis for interpreting national law *contra legem*.⁴⁰ Then the CJEU stated that the duty of consistent interpretation might oblige national courts to change their established case law. Therefore, the SCDK could not refuse to apply a consistent interpretation merely because the national courts had consistently interpreted national law in a manner incompatible with EU law.⁴¹

³⁴ The duty to interpret national law consistently with EU law is sometimes called ‘indirect effect’ as it, just as happens in the case of direct effect, may be invoked by individuals and companies to secure rights provided by EU law. But where direct effect has as a consequence that the rights are granted by EU law, indirect effect has the consequence that the rights are granted by national law after it has been interpreted in a consistent way.

³⁵ The SCDK lists a number of these cases, see p. 43 of the SCDK judgment.

³⁶ See para. 14 of C-441/14, *Ajos*, EU:C:2015:776; and para. 6.5 of the reference to the CJEU, UfR 2014.3667H.

³⁷ It seems that the Danish Government had confirmed that the wording allowed such an interpretation during the proceedings of Case C-499/08, *Andersen*, EU:C:2010:600, see para. 63 of the Opinion of AG Bot in C-441/14, *Ajos*, EU:C:2015:776.

³⁸ See para. 66 of the Opinion.

³⁹ See para. 68 of the Opinion.

⁴⁰ Para. 32 of the judgment.

⁴¹ See paras 33-34 of the judgment.

Before looking at how the SCDK responded to this, it is worth contemplating the implication of the CJEU's interpretation of the duty of consistent interpretation. There has been some debate about what the duty implies, and especially how much can be decided by the CJEU and how much is left to the national courts. Most agree that the duty implies that national courts should interpret national law consistently with EU law to the extent possible under national law. There are several judgments where the CJEU has confirmed that the duty of consistent interpretation should be undertaken according to the principles of interpretation applied by the national court and to the extent possible under national law.⁴² The duty implies that if several interpretations are possible, preference should be given to the interpretation consistent with EU law, as the national courts should achieve an EU-consistent result 'as far as possible'.⁴³ But there is no requirement that national courts should apply methods of interpretation that they would not normally use.⁴⁴ In line with this, it should be left to national law to determine whether it is impossible to comply with the duty because fulfilment of the duty of consistent interpretation would be *contra legem*.⁴⁵ This approach to the duty of consistent interpretation also fits the operation of the preliminary ruling system. Thus, the point of departure is that Article 267 TFEU allows the CJEU to interpret EU law, not national law.⁴⁶

However, from time to time there have been indications, which might be interpreted to mean that the national judges may not be free in their choice of method of interpretation. In particular, the judgment in Case C-106/89, *Marleasing*, caused much debate about how much discretion national judges have when they interpret national law, and whether they are free to apply the methods of interpretation which they usually apply.⁴⁷ Even though the judgment seemed to indicate that the national courts should do whatever it takes to achieve an interpretation consistent with EU law, later cases used moderated wording, which indicated that *Marleasing* might have been misread, partly due to errors in translation into some languages.⁴⁸ Equally there were a few subsequent cases which seemed to indicate that the CJEU might interfere in the methods of interpretation of national law.⁴⁹ One of them was Case C-371/02, *Björnekulla*, where Swedish law implementing a directive included a commentary accompanying the legislation. The commentary inserted by the Swedish legislator had suggested a specific interpretation of the directive. The CJEU, however, pointed

⁴² See for instance Joint Cases C-397-403/01, *Pfeiffer*, EU:C:2004:584, para. 116, C-212/04, *Adeneler*, EU:C:2006:443, paras 110-111, C-282/10, *Dominguez*, EU:C:2012:33, para. 27 ('applying the interpretative methods recognised by domestic law') and C-187/15, *Pöpperl*, EU:C:2016:550, para. 43.

⁴³ See Case C-91/92, *Dori*, EU:C:1994:292, para. 26, and Case C-334/92, *Miret*, EU:C:1993:945, para. 20.

⁴⁴ Similarly, Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: connecting the Dots', (2006) *CMLRev*, 1251-1275 at 1259, Riesenhuber, 'Richtlinienkonforme Rechtsfindung und nationale Methodenlehre', (2005) *Recht der Internationalen Wirtschaft*, 47-54 at 51, and Roth and Jopen in Riesenhuber (eds): 'Europäische Methodenlehre', (Berlin: De Gruyter, 2015) 277-278.

⁴⁵ Similarly, Martin Brenneke, 'A Hybrid Methodology for the EU Principle of Consistent Interpretation', p. 19 (available on ssrn.com) and Roth and Jopen in Riesenhuber (eds): 'Europäische Methodenlehre', (Berlin: De Gruyter, 2015) 281.

⁴⁶ Thus C-177/94, *Perfili*, EU:C:1996:24, para. 9, and Case C-115/08, *CEZ as*, EU:C:2009:660, para. 57.

⁴⁷ See for instance Prechal: 'Directives in EC Law', (Oxford: OUP, 2005) 197-199; Nielsen, 'EF-rettens kilder i de nationale retssystemer', (1992) *Juristen*, 253-265; and Campbell, 'National legislation and EC Directives: judicial co-operation and national autonomy', (1992) *Northern Ireland Legal Quarterly*, 330-356 at 346-352.

⁴⁸ See Case C-91/92, *Dori*, EU:C:1994:292, para. 26; and Case C-334/92, *Miret*, EU:C:1993:945, para. 20, in both of which the CJEU used the phrase 'as far as possible'.

⁴⁹ See also Case C-282/10, *Dominguez*, EU:C:2012:33.

out that the correct interpretation of the directive pointed to a different solution. The Court confirmed the duty to interpret national law consistent with EU law and added: ‘That applies notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule.’⁵⁰ This seemed to imply that the CJEU required the national court to ignore the *travaux préparatoires* despite the fact that in Swedish law – and Danish law as we will see later – it is quite common to interpret national law in the light of *travaux préparatoires*.

However, these cases are hardly proof that the CJEU has interfered in the methods of interpretation used by national courts. Thus, *Marleasing* may be explained by a less than happy translation. By the same token, *Björnakulla* may be read, not as a general rejection of reliance on the national *travaux préparatoires*, but just as an indication that it would be less appropriate in the case under consideration. The case did concern a law implementing a directive. In this situation, overreliance on the conclusions of the Swedish legislators on how the *directive* should be interpreted, might have been unwise since there was no way that they would know what the correct interpretation would be as long as the CJEU had not ruled on this. Moreover, the Swedish legislators clearly wanted to comply with the directive – given that they were trying to implement the directive – and therefore it might have been less appropriate to rely on the legislators’ conclusions which, in the event, have proven not to be consistent with EU law.⁵¹

The question is whether the preliminary ruling in *Ajos* indicates a shift in approach as a consequence of which the CJEU may consider it necessary to address the choice of methods of interpretation used by national courts, in situations where they inexorably lead to a result that is contrary to EU law. Reading the Opinion of Advocate General Bot it seems that he comes very close to stating that the concept of *contra legem* is defined by EU law. He takes the view that the reservation for *contra legem* cases only applies to situations where the wording of the national provision prohibits the EU-consistent interpretation. He seems to interpret the ultimate barrier of *contra legem* narrowly.⁵²

The CJEU does not seem to go quite as far as Advocate General Bot suggested. First, the CJEU does not attempt to interpret the meaning of *contra legem*, thus leaving it fairly open whether factors other than the wording of national law might prevent a consistent interpretation. Furthermore, even though the CJEU in paragraph 33 states that the requirement to interpret national law in conformity with EU law ‘...entails the obligation for national courts to change its established case-law...’, it nevertheless points out in paragraph 37 that, if the SCDK considered it impossible to interpret Danish law consistently with EU law, the SCDK should solve the problem by giving the general principle prohibiting age discrimination preference over Danish law. The fact that the CJEU acknowledges the possibility that it may be impossible to interpret in a manner that is consistent with EU law shows that the CJEU leaves the final decision on how to interpret Danish law to the SCDK.

⁵⁰ Para. 13 of the judgment.

⁵¹ The case may be seen as imposing an obligation on the national courts to presume that the state had the intention to comply with EU law according to Case C-334/92, *Miret*, EU:C:1993:945, para. 21. See also Brenneke, ‘A Hybrid Methodology for the EU Principle of Consistent Interpretation’, 16 (available on ssrn.com) and Klamert, ‘Judicial Implementation of Directives and Anticipatory Indirect Effect: connecting the Dots’, (2006) *CMLRev*, 1251-1275 at 1259.

⁵² A similar narrow interpretation of *contra legem* is suggested by Schütze: ‘European Union Law’, (Cambridge: CUP, 2015) 400.

However, it is also clear that the CJEU in the case at hand did not feel comfortable (or trustful enough) to leave it entirely to the SCDK to interpret national law. The reason why the CJEU felt the need to make such a clear suggestion about ignoring established case law is quite easy to guess. Thus, if established case law might be enough to prevent an EU-consistent interpretation, there would be a risk that, if the courts in a Member State had interpreted EU law wrongly in a sufficient number of cases, it would be impossible to change that interpretation without an intervention by the legislators. Therefore, national courts should be ready to change or develop their case law if the CJEU articulates new considerations in respect of interpretation of EU law for the national court to address when interpreting national law consistently with EU law. If this was not the case, it would ‘greatly diminish the potential of the technique of consistent interpretation in resolving conflicts between EU law and national law’ as pointed out by Advocate General Bot in his Opinion.⁵³

Normally it is open to national courts to change an existing precedent when a higher court decides on a new interpretation of the law. This is also the case in Denmark, where the lower courts will often have to change an approach based on past precedent based on a judgment given by the courts of appeal or the SCDK. However, national supreme courts like the SCDK may not be used to having their judgments overruled. Therefore, the statement by the CJEU that the SCDK should allow its previous case law to be set aside if the duty of consistent interpretation so requires may be seen as a clear signal that, when it comes to EU law, the interpretation of the CJEU takes precedence over that of the SCDK.

Even though it is possible to guess the reason why the CJEU did feel compelled to make its statement about ignoring established national case law, this statement nevertheless indicates that the CJEU might no longer be prepared to leave it to the national courts to decide, which methods of interpretation they should use, when a breach of EU law would otherwise inevitably be involved. If this is the case, the obvious conclusion is that the CJEU was trying to make an issue that used to be a matter for the national courts into an issue of EU law and thus gain jurisdiction to rule on the issue. As some might have anticipated, the SCDK was not satisfied with this attempt to usurp its jurisdiction.

B. The reasoning of the SCDK

Turning now to the response from the SCDK, it initially recognised that there was a duty to interpret national law in conformity with EU law, but nevertheless upheld its view that it was not possible to interpret Danish law consistently with the directive in this case.

First, the SCDK pointed to the fact that there were several judgments in which it had interpreted national law in a different way. The SCDK then added new information and reasoning, relating to the fact that the Danish legislation had been changed in 1996 in response to this case law. In hindsight, it would have been better for the judicial dialogue if this information had been revealed to the CJEU in the first place in the order referring the two questions to it.

The importance of the 1996 change to the relevant Danish legislation was the following: As will be recalled, the consequences of the case law were that if an employee over 60 was entitled to a pension, the right to a severance allowance was lost. Given that an

⁵³ Para. 73.

employee, when dismissed, might only have been entitled to a very modest pension, the law was changed in 1996 to prevent the employee from losing the right to severance allowance in such situations. Technically, this was done by requiring that the employee should have joined the pension scheme before the employee turned fifty and therefore would have been accruing entitlements for at least ten years before the time at which the entitlement to severance allowance could be forfeited. By making this change, the legislator implicitly acknowledged that the basic principle established by case law was defensible. If that was not the case, the legislator would have made more substantial changes in the regulation, notwithstanding the interpretation by the SCDK. Therefore the SCDK took the view that ‘...the state of law is clear and that it is not possible, in applying the rules of interpretation recognised under Danish law, to arrive at an interpretation of... that is consistent with the Employment Directive...’.⁵⁴

By pointing out that the case law had been implicitly confirmed by the Danish legislator, the SCDK sought to buttress its case law by praying in aid this extra authority which might to some degree explain why, case law could no longer simply be changed by interpretative method.⁵⁵ Therefore, the SCDK’s ruling can in this regard hardly be seen as a completely unprincipled refusal to follow the ruling of the CJEU. In fact, it is possible to read the ruling as an acceptance by the SCDK that normally its case law could in principle be adjusted, when interpreting national provisions consistently with EU law, but not in a situation where case law had been confirmed by the legislators. Furthermore, the SCDK argued that the concept of *contra legem* was not limited to the situation where the wording of the national provision prevented an interpretation consistent with EU law, but included other situations where the law was clear and therefore could not be changed by interpretation.⁵⁶ Thus, according to the SCDK, the term *contra legem* meant ‘against the law’ and not necessarily against the wording of the law.⁵⁷ This broader interpretation of the concept of *contra legem* conflicted with the interpretation of Advocate General Bot, but since the CJEU did not endorse this interpretation, the SCDK was not ruling in a manner incompatible with the judgment of the CJEU.⁵⁸

The duty to interpret national law consistently with EU law requires that the national court should use national law in its entirety to attain that aim. Therefore next, the SCDK also considered whether Paragraph 2a(3) of the *Law on salaried employees* could be interpreted consistently with EU law by taking into account Paragraph 1 of the Danish *Law*

⁵⁴ See p. 43 of the SCDK judgment. This part of the decision was unanimously agreed.

⁵⁵ In comparison, the Danish Maritime and Commercial Court in its decision in *Ajos* as court of first instance did not think that Paragraph 2a(3) of the *Law on salaried employees* could be interpreted consistently with EU law, but instead resolved the case by applying and giving supremacy to the general principle prohibiting age discrimination.

⁵⁶ It should be mentioned that the SCDK has often used the duty to interpret national law consistently with EU law to give effect to EU law. However, there is one other case from 2014 (UfR 2014.914H) where the SCDK also held that a consistent interpretation was impossible because Danish law was clear and thus it was *contra legem*.

⁵⁷ The reservation that the national court should not interpret national law *contra legem* has been repeated in many cases, but the CJEU has not explained what is meant by this. There are several judgments confirming that the CJEU does not favour an interpretation of EU law that conflicts with the wording of EU law, see Case C-220/03, *ECB*, EU:C:2005:748, para. 31, Case C-263/06, *Carboni*, EU:C:2008:128, para. 48, and C-582/08, *Commission v UK*, EU:C:2010:429, para. 33. But these judgments can hardly be used as an indication of how *contra legem* should be interpreted in the context of the duty to interpret national law consistently with EU law.

⁵⁸ Differently Nielsen and Tvarnø, ‘Danish Supreme Court infringes the EU Treaties by its ruling in the *Ajos* case’, (2017) *Europarättslig Tidskrift*, 303-326, at 319, who suggest that the CJEU confirmed the interpretation of AG Bot that *contra legem* means against the wording of national law.

prohibiting discrimination on the labour market. That provision prohibited *inter alia* age discrimination, and had been adopted in 2004, when implementing the Employment Directive. However, the SCDK found that Paragraph 1 of the *Law prohibiting discrimination on the labour market* did not affect the interpretation of Paragraph 2a(3) of the *Law on salaried employees*. When the new Paragraph 1 of the *Law prohibiting discrimination on the labour market* was adopted, Danish legislators themselves considered whether it would be necessary to change Paragraph 2a(3) of the *Law on salaried employees* to comply with the principle prohibiting age discrimination. They concluded that this was not necessary. Consequently, the Danish legislators, in the view of the SCDK, had evidently decided that the new provision had not had any implications for Paragraph 2a(3). Therefore, the SCDK did not see that it could, by interpretative method, infer any such implications either. This degree of deference to the views of the legislators is common in rulings of the Danish courts since it is an integral part of national interpretative method.

The rejection of the possibility of using the duty to interpret national law consistently with EU law looks objectionable. The SCDK relied on the *travaux préparatoires* of the act implementing the Employment Directive, and this did not sit well with the CJEU judgement in *Björnakulla*. After all, the Danish legislators had been wrong when they assumed that Paragraph 2a(3) did not infringe the principle prohibiting age discrimination, and the SCDK could have ignored this mistake given that the Danish legislators had clearly intended to give full effect to the directive. Therefore, the refusal to give the *Law prohibiting age discrimination* precedence, based on a comment from the Danish legislators when implementing the Employment Directive, was not in compliance with the duty to interpret the whole body of national law so as to ensure an interpretation consistent with EU law.⁵⁹

C. Interim conclusions

By way of interim conclusion, there was evidence that there existed a lack of trust between the two courts. The CJEU chose to address the issue of interpretation of Danish law despite the fact that the SCDK had said that a consistent interpretation was not possible. It was not the first time that the CJEU had chosen to address issues not raised in the preliminary questions posed by the referring court,⁶⁰ but in this case it may have been seen by the SCDK as lack of trust. Although the intention of the CJEU might have been to make constructive to the SCDK on how it should approach Danish interpretative method, the CJEU ruling might equally be read as an attempt to shift jurisdiction from national law into EU law so that the CJEU could itself determine what constituted *contra legem*. In this light, the ruling of the SCDK might be read as an attempt to reaffirm national jurisdiction over the issue. The SCDK, however, was careful not to phrase its judgment on this issue as a direct rejection of the suggestion by the CJEU to the national court that it should disregard existing case law, but on the other hand, the Danish court insisted on its own view that case law could constitute *contra legem* (and in this case would do so). Finally, it seems that the refusal to interpret Paragraph

⁵⁹ Even if the SCDK had not relied on the *travaux préparatoires* – and thus not infringed *Björnakulla* – it is debatable whether it could have overruled a clear provision such as the one in Paragraph 2a(3).

⁶⁰ Also in Case C-282/10, *Dominguez*, EU:C:2012:33, the CJEU commented on the possibility of interpreting French law consistently with EU law even though the referring court had stated that such an interpretation was not possible.

1 of the *Law prohibiting discrimination on the labour market* as requiring a change to paragraph 2a(3) did not comply with how the duty of consistent interpretation was understood by the CJEU.

IV. Second core cluster of issues: Modification of the general principle prohibiting age discrimination by other principles

The second of the three core clusters of relevant legal issues throughout the proceedings concerned the issue of whether it was possible to balance the principle prohibiting age discrimination against other principles. Specifically, in its second question, the SCDK asked whether the application of the principle prohibiting age discrimination could be weighed against the principle of legal certainty and the related principle of the protection of legitimate expectations with the consequences that the latter principles might be given precedence. The SCDK also asked whether in weighing these principles it was relevant to take into consideration the possible entitlement of the employee to claim compensation from the Danish State on the hypothesis that Danish law was incompatible with EU law.

It is evident from the Danish reference that the idea that the general principle prohibiting age discrimination could be qualified by the principle of legal certainty was thought to have found support in the Opinion given by Advocate General Trstenjak in Case C-282/10, *Dominguez*.⁶¹ Here, she had suggested that in some cases it might infringe the rights of private individuals if general principles that were neither clear, precise nor predictable were applied against them. The SCDK clearly felt that applying the general principle of age discrimination against Ajos A/S over a rule in Danish law, which, in its opinion, was clear, would conflict with the principle of legal certainty. Moreover, the SCDK argued that, if A was awarded compensation from the Danish State, it should be possible to use the principle of legal certainty to rule in favour of Ajos A/S. Given that there is no clear hierarchy as between general principles at Treaty level, the idea that they should be balanced might seem inviting. But the idea is novel and thus it might be seen as an ‘encouragement’ by the SCDK for the CJEU to modify its ruling in *Mangold* and subsequent cases.

However, the CJEU dismissed the idea completely. It stated that, if it allowed the principle of protection of legitimate expectations to curb the application of the general principle prohibiting age discrimination, it would limit the temporal effect of the CJEU’s interpretation. According to settled case law, the interpretation given by the CJEU in a preliminary ruling should also be applied to legal relationships that arose before the CJEU ruling, ‘...unless there are truly exceptional circumstances.’⁶² Furthermore, the fact that an employee may be able to claim compensation from a Member State cannot affect the obligation of the national court to apply the general principle prohibiting age discrimination.⁶³

This outright dismissal of the arguments did not allow the SCDK any scope to rely on the suggested balancing of principles. There is little doubt that, if the CJEU had allowed such a balancing exercise, the SCDK would not have needed to consider whether the general principle prohibiting age discrimination had been given direct effect in Denmark (see

⁶¹ The SCDK cites large parts of the Opinion in the references, but the most important parts are found in para. 164-167.

⁶² See para. 40 of the judgment.

⁶³ See para. 42 of the judgment.

below). Consequently, a conflict between Danish law and EU law would not be likely to have arisen. In this light, the CJEU missed an opportunity to find common ground between the two courts and settle the case without the conflict that resulted. It must be admitted, however, that this would have required the CJEU to take an important step away from *Mangold* because it would have allowed the national courts to impose limitation on the full impact of the general principle prohibiting age discrimination.

Here again, it is possible to see indications that there was a lack of trust between the two courts. The fact that the SCDK suggested to the CJEU that it was possible to qualify the general principle prohibiting age discrimination might have been seen as a criticism of the CJEU for having fashioned the principle as part of EU law. But the fact that the CJEU rejected the solution proposed by the SCDK might also reflect a lack of trust. One wonders whether the primary reason why the CJEU did not want to allow the SCDK to have the opportunity to qualify the principle expressed in the former's case law, was because it did not trust the SCDK and other national courts to modify the application of the general principle prohibiting age discrimination and that modifications or qualifications could result in considerable damage to the uniform application of the principle that it was asserting. Instead the CJEU preferred to assert an unconditional principle prohibiting age discrimination that the SCDK was bound to apply in preference to Danish law. Thus, under EU law the SCDK was left no scope other than to apply the general principle prohibiting age discrimination to make the private employer pay the severance payment. However, the SCDK decided to avoid this conclusion by shifting jurisdiction once again to Danish law.

V. Third core cluster of issues: The importance attributed to the Danish Constitution and *Law on accession*

The third of the three core clusters of identifiable legal issues throughout the proceedings concerns the question whether the general principle prohibiting discrimination is part of Danish law according to the Danish Constitution and the *Law on accession*. The purpose in what follows is carefully to analyse the argumentation of the SCDK in relation to these sources of law (Sub-Section B). But first, aspects of the Danish constitutional system will be presented to the reader to provide the necessary context (Sub-Section A). The section is finalised by a few interim conclusions (Sub-Section C).

A. The Danish constitutional system

The Danish constitutional system is mainly based on the Danish Constitution, which has its origin all the way back to 5 June 1849, when it was adopted.⁶⁴ It had its ideological background in the abolition of absolute monarchy and the introduction of a parliamentary political system.⁶⁵ It was most recently amended in 1953 (and before that, only a few times).⁶⁶

⁶⁴ It applies to all three members of the realm, i.e. Denmark, the Faroe Islands and Greenland, cf. Paragraph 1. However only Denmark is a member of the EU.

⁶⁵ Rehof: 'The Danes, Their Constitution and the International Community', in Dahl and others: 'Danish Law in a European Perspective', (Copenhagen: Thomson, 2002) 65.

⁶⁶ Christensen and others: 'Grundloven', (Copenhagen: Jurist- og Økonomforbundets Forlag, 2015) 34.

It now consists of 89 provisions.⁶⁷ The majority of these provisions still subsist and are largely identical with how they were formulated in 1849. Because the drafting of the original provisions is largely unchanged and because they reflect extremely old-fashioned formulations, the Danish Constitution is nowadays viewed by many as quite out-dated and insufficient for the needs of a modern society. One further reason behind the current climate of criticism is that it does not contain a comprehensive catalogue of all those fundamental rights, which are now commonly included in more modern constitutions. It is mainly limited to civil and political rights, and thus it does not truly reflect rights such as social rights, for example, to the extent that such rights may be found in the Charter of Fundamental Rights of the European Union (hereinafter referred to as 'CFREU'). Unsurprisingly, it does not contain a prohibition against age discrimination or anything like it.

The main reason that the Danish Constitution has not matured as constitutions in comparative countries have done is that it is quite difficult to amend it.⁶⁸ In brief, according to Paragraph 88 it requires '... adoption in Parliament... of the amendments in question, the calling of a general election, re-adoption of the same proposal in the newly elected Parliament, and confirmation by referendum with a majority of at least 40 per cent of all possible voters.'⁶⁹

The Danish Constitution does not contain any provisions referring explicitly to the EU. However, two provisions are nevertheless of importance, namely Paragraphs 19 and 20. The former concerns treaty-making powers and is of a rather complex nature.⁷⁰ For the purposes of this article, it suffices to say that the provision is often regarded as implying that a dualist system is in principle in force in Denmark.

Paragraph 20, which is of at least an equal degree of complexity, concerns the delegation of powers to international organisations. Its precise text (in translation) is:

- (1) Powers vested in the authorities of the Realm under this Constitutional Act may, by statute to a certain specified extent, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.
- (2) For the enactment of a Bill dealing with the above, a majority of five sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary

⁶⁷ Hvidt, 'Grundlovens baggrund og historie, in Zahle (ed): 'Danmarks Riges Grundlov med kommentarer', (Copenhagen: Jurist- og Økonomforbundets Forlag, 1999) 1.

⁶⁸ See e.g. Christensen: '§ 88', in Zahle (ed): 'Danmarks Riges Grundlov med kommentarer', (Copenhagen: Jurist- og Økonomforbundets Forlag, 1999) 509.

⁶⁹ Rehof: 'The Danes, Their Constitution and the International Community', in Dahl and others (eds): 'Danish Law in a European Perspective', (Copenhagen: Thomson, 2002) 61-97, at 65.

⁷⁰ Paragraph 19 of the Constitution provides (in translation): '(1) The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing, the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation the fulfilment of which requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, denounce any international treaty entered into with the consent of the Folketing. (2) Except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall forthwith be submitted to the Folketing. If the Folketing is not in session it shall be convened immediately. (3) The Folketing shall appoint from among its Members a Foreign Policy Committee, which the Government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Policy Committee shall be laid down by statute.'

Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in Section 42.⁷¹

The provision was inserted in the Constitution in 1953 to prepare for future international arrangements. Accordingly, it constituted the legal basis for the Danish membership of the European Communities from 1 January 1973. It implies that powers vested in the Danish authorities under the Constitution may ‘to a certain specified extent’ be delegated to international authorities set up by mutual agreement for the promotion of international rules of law and cooperation.⁷² It was thus stipulated in the language of dualism often prevailing in those times, and which is one of the factors which today has complicated the Danish state’s membership of the EU, as such generally does not fit too well with traditional dualism.⁷³

The SCDK has rendered two judgments of importance to the understanding of how Paragraph 20 of the Constitution should be interpreted in relation to EU membership. The first concerns the Maastricht Treaty and the other the Lisbon Treaty.⁷⁴ In both instances, the SCDK ruled that the Danish courts cannot be deprived of their right to adjudicate questions as to whether EU law instruments overstep the boundaries for the transfer of sovereignty that has been ceded by the Kingdom of Denmark.⁷⁵ If the boundaries are overstepped, the consequence could be inapplicability of EU law.⁷⁶ Furthermore, the SCDK established that, even when EU adopts rules according to the competences delegated, the Danish Constitution ranks above EU law.⁷⁷

The Danish *Law on accession*, which addresses the accession to the European Community in 1973 and the accession to subsequent EU treaties resulting in changes to EU law, should in particular be understood in light of the aforementioned Paragraph 20 of the Constitution.⁷⁸ The Law thus provides in Paragraph 2 that the powers conferred on the

⁷¹ Taken from the translation into English of the SCDK’s *Lisbon Case* (UfR 2013.1451H). See further below about that case. For a translation of the entire Constitution, see: <http://legislationline.org/documents/section/constitutions>.

⁷² Due, ‘Danish Law in a European Context’, in Dahl and others (eds): ‘Danish Law in a European Perspective’, (Copenhagen: Thomson, 2002) 13-14. For an account of the provision, see Danielsen: ‘Delegation of Sovereignty – Article 20 of the Danish Constitution: The story of a successful operation but a dead patient?’, in Koch and others (eds): ‘Europe. The New Legal Realism’, (Copenhagen: DJØF Publishing, 2010) 135-152.

⁷³ Zahle, ‘EU og den danske grundlov’, (Copenhagen: Ejlers’ Forlag, 1998) 105.

⁷⁴ See UfR 1998.800H and UfR 2013.1451H respectively. For recent commentaries, see e.g. Biering and Lehrer: ‘To Hold a Referendum or Not?’, (2015) *European Public Law*, 169-191; Danielsen: ‘One of Many National Constraints on European Integration: section 20 of the Danish Constitution’, (2010) *European Public Law*, 181-192; Krunke: ‘The Danish Lisbon Judgment – Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013’, (2014) *European Constitutional Law Review*, 542-570; Lachmann: ‘Grundlovens § 20 og traktater, der ændrer EU’s institutioner’, (2012) *Juristen*, 259-273; and Olsen: ‘The Danish Supreme Court’s decision on the constitutionality of Denmark’s ratification of the Lisbon Treaty’, (2013) *CMLRev*, 1489–1504.

⁷⁵ Christensen: ‘The Supreme Court in Today’s Society’, in ‘The Supreme Court of Denmark’, (Copenhagen: DJØF Publishing, 2015) 11-53, at 51. More precisely, in both judgments, the SCDK could be said to have prepared for the line taken in its *Ajos* judgment. This may be understood from the following statement in the *Lisbon* judgement at p. 15 of the English translation: ‘If an act or a judicial decision which 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, as amended, this may be made subject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on such application of the Treaties with reference to the Charter of Fundamental Rights.’

⁷⁶ Ibid.

⁷⁷ Ibid. 52.

⁷⁸ See further about the *Law on accession*, Danielsen, ‘Suverænitetssafgivelse’, (Copenhagen: Jurist- og Økonomforbundets Forlag, 1999) in particular 124 and the following.

authorities of the Kingdom by the Constitution may, within the limits specified in the treaties, etc., referred to in Paragraph 4 of that Act, be exercised by the EU's institutions.⁷⁹ In Paragraph 3, it is stipulated that:

- (1) Those provisions referred to in Paragraph 4 are put into force in Denmark in so far as they are directly applicable in Denmark under EU law.
- (2) The same applies in respect of those legal instruments which are adopted by the European [Union's] institutions before Denmark's accession to the European [Union] and published in the *Official Journal of the European [Union]*.⁸⁰

Paragraph 4 of the Law then contains a long list of those treaties, etc., to which the provisions of Paragraph 2 and Paragraph 3 apply.⁸¹ As the interpretative method of Danish courts may include emphasis on *travaux préparatoires*, the SCDK not too surprisingly in its presentation of the law so far as relevant to the case – under the overall heading ‘Legal basis, etc.’ – in *Ajos* refers to and quotes various materials related to the adoption and amendment of the *Law on accession*. This collection of texts mainly consists of materials in which the meaning of Paragraph 20 of the Constitution, of horizontal direct applicability and of fundamental rights are considered. Thus, it may be assumed that the SCDK considers this material as being of some relevance, not least because it returns to parts of it in the part of the judgment dealing with its reasoning.⁸²

B. The argumentation in *Ajos* with regard to the Danish Constitution and the *Law on accession*

As mentioned above, the third crucial and also decisive part of the legal issues in *Ajos* concerns the SCDK's examination of whether there was authority under Danish law to apply the principle prohibiting discrimination on grounds of age with direct effect in a dispute between individuals in such a way that *Ajos* could not rely on Paragraph 2a(3) of the *Law on salaried employees* as then in force. In that regard, the main point of the SCDK was that it interpreted the *Law on accession* as not providing the legal basis to allow for what it found to be a completely unwritten principle, namely the one at stake prohibiting discrimination on grounds of age, which could not take precedence over Paragraph 2a(3) of the *Law on salaried employees*. Therefore, it found that it would be acting outside the scope of its powers as a judicial authority if it were to disapply the relevant provision. At the practical level, this meant that *Ajos* could thus rely on the provision, thereby becoming the ‘winner’ in the proceedings.

The route which the reasoning followed in getting to that conclusion has a rather complicated character, somehow dressed in a coating of obscure clarity. Thus, although the SCDK accepts that the CJEU has jurisdiction to rule on questions concerning the interpretation of EU law, it nevertheless finds that the question whether a rule of EU law can be given direct effect in Danish law, if required under EU law, turns first and foremost on the

⁷⁹ I.e. Law No 447 of 11 October 1972, as amended, *Law on Denmark's accession to the European Union*.

⁸⁰ P. 19 of the SCDK judgment. Also see Danielsen, ‘Suverænitetssafgivelse’, (Copenhagen: Jurist- og Økonomforbundets Forlag, 1999) 323 and the following.

⁸¹ For the list, see pp. 22-23 the SCDK judgment. As a consequence the Law on accession is changed every time the Treaties are changed to update the list in Paragraph 4.

⁸² However, for the present purpose it would be too far-reaching to explain about the content of all this material.

precise scope of the *Law on accession* under which Denmark acceded to the European Union. Thereby, the SCDK seems to believe that Danish accession to the EU is not all encompassing in areas of EU competence and subject to CJEU jurisdiction. Importantly, the SCDK's view is that, in the light of paragraph 20 of the Constitution, read with paragraph 2 of the Law of Accession (the provision delegating sovereignty), powers may be exercised by the EU institutions if, and only if, they are specified in treaties identified in paragraph 4 of the *Law on accession*. In turn, under Paragraph 3 (see above), those provisions referred to in Paragraph 4 are given effect in Denmark in so far as they are directly applicable (e.g. have direct effect) under EU law. It is a key point in the SCDK's reasoning that the CJEU does not refer to provisions in the specified treaties as a basis for the principle prohibiting age discrimination, but only to unspecified 'various international instruments and in the constitutional traditions common to the Member States', and that it should thus be seen as an unwritten principle, which applies at Treaty level. This leads the SCDK to state that a situation in which a principle at Treaty level under EU law is to have direct effect and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific Treaty provision, is not foreseen in the *Law on accession*. All in all, the view of the SCDK is that only EU law which can be considered as part of the 'accession package', as amended by the national legislator from time to time, is to be viewed as directly applicable in Denmark and then only on the condition that it is directly applicable pursuant to EU law.

As part of its reasoning, the SCDK turns its attention to Article 6(3) TEU as well as to the CFREU. The reason for doing so seems to have been that the SCDK wished to decide whether the general principle prohibiting age discrimination through these two sources of law might nevertheless be considered to be part of Danish law. Article 6(3) TEU states, as it may be recalled, that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. The SCDK decided that, under the *Law on accession*, neither principles developed or established on the basis of Article 6(3) TEU nor provisions of the CFREU, including Article 21 thereof on non-discrimination, have been given direct effect in Denmark. It finds support for this point of view in various *travaux préparatoires*. In addition, the SCDK stresses that its conclusion is not changed by the fact that the judgment in *Mangold*, in which the CJEU established the principle against age discrimination for the first time, was delivered in 2005 and thus existed when the *Law on accession* was amended in 2008.⁸³

The only dissenting judge, Justice Jytte Scharling, reached the opposite result to the majority as she finds 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. Among other reasons, she finds that the CJEU's law-making activities within the framework of the Treaty and its interpretative approach were known when Denmark became a member of the EC on 1 January 1973. Furthermore, since the judgment in *Mangold* was delivered in 2005, before the latest amendment to the *Law on accession* in connection with Denmark's ratification of the Lisbon Treaty was adopted, she takes the view that it was known at the time of that amendment that

⁸³ See on this issue further below in Section VI.

the principle prohibiting discrimination on grounds of age under EU law had direct effect. Also, she stresses that no reservation was made in connection with the adoption of the amending legislation to the effect that that principle should not have direct effect in Denmark. This all means at the practical level that she takes the view that Ajos was obliged to pay the disputed severance allowance.

The main possible flaw in the reasoning of the SCDK is the way it reads Paragraph 3(1) of the *Law on accession*. In fact, a straightforward reading of this provision is that it stipulates that those provisions referred to in Paragraph 4 are put into force ‘in so far as they are directly applicable in Denmark under EU law’ and, if so, surely the reference to ‘under EU law’ implies that this matter is not for the SCDK to decide upon, but rather for the CJEU, as it is the latter which has the final say as to what is directly applicable under EU law.⁸⁴ This argument is not undermined by the ‘defence’ of the SCDK that the disputed principle does not have a basis in a specific Treaty provision, as, according to EU law, the interpretation of that which is directly applicable is up to the CJEU – as is confirmed by the wording of Paragraph 3(1). However, as indicated above, the SCDK has chosen instead to give overriding weight to a completely different aspect of the *Law on accession*, thereby putting its main emphasis on Paragraph 4.

Another possible flaw to point out relates to the fact that the SCDK to a large degree supports its surprising reasoning on the strength of the aforementioned *travaux préparatoires*. It may thus have created a difficult dilemma for itself to face in the future. The reason is that it superficially supports the Danish legislator’s intention, by virtue of a *Law on accession*, to give its citizens, the fellow Member States and the EU the impression that it has created fully dedicated EU membership. However, in actual fact, the inference to be drawn is that Denmark has provided for reservations from the EU acquis, based on giving precedence (in some cases at least) to the *travaux préparatoires*. A natural understanding of accession to an international or EU Treaty is that it is in principle the ‘full package’, to which a given state accedes, unless explicitly stated otherwise in accordance with the *Vienna Convention on the Law of Treaties* and under EU law. In this regard, certain commentators have claimed, that the SCDK, as a result of *Ajos*, invented a fifth ‘opt-out’ besides the formally adopted four.⁸⁵ This may at present be limited to the enforceability of fundamental rights (see below), but in *Ajos* the SCDK pointed to a rabbit which could almost magically be pulled out of a hat in future, as yet unknown, scenarios. Interestingly other commentators have pointed out that the *Law on accession* should have been interpreted by the SCDK in line with the EU principle of consistent interpretation and, if it had been, the Court could easily have reached the opposite result.⁸⁶

⁸⁴ In the same direction, also see Danielsen, ‘Suverænitetssafgivelse’, (Copenhagen: DJØF Publishing, 1999) 324, and his references to relevant *travaux préparatoires*.

⁸⁵ See e.g. Kaae, ‘Danmark har fire forbehold i EU. Nu har Højesteret opfundet et femte’, *Jyllandsposten*, 12 February 2017. As a consequence of the initial so-called Danish ‘No’ in 1992 to the Maastricht Treaty, Denmark’s situation in this regard became one of the more peculiar ones. According to the Edinburgh Agreement of 1992, the purpose of which was to assist in approval in a second referendum, four exemptions/derogations/reservations were allowed for. Accordingly, in a new referendum, which took place in 1993, the Danes finally accepted the Maastricht Treaty. The four opt-outs, which are still in force even today, concern Union Citizenship, EMU, Defence Policy, and Justice and Home Affairs. See in particular Protocol No 22 of the Treaties.

⁸⁶ Nielsen and Tvarnø, ‘Danish Supreme Court infringes the EU Treaties by its ruling in the Ajos case’, (2017) *Europarättsligt Tidsskrift*, 303-326, at 320.

A further possible flaw lies in the rationale, on which the SCDK implicitly seems to have built its reasoning, namely that the Danish legislator assumed that EU law had forever been frozen. However, everything points in the opposite direction, namely that the legislator had been fully aware of the dynamism of the system, as well as the different style of interpretation exercised by the CJEU. Indeed, the SCDK itself had in the aforementioned *Maastricht* Case – and which it itself repeated in the *Lisbon* Case – stated the following:

The fact that the EC Court of Justice in its interpretation of the Treaty also attaches importance to factors of interpretation other than the wording of the provisions, including the objectives of the Treaty, is not in violation of the assumptions on which the Accession Act was based, nor is it in itself incompatible with the demand for specification in s. 20(1) of the Constitution. The same applies to the law-making activities of the EC Court Justice within the scope of the Treaty.⁸⁷

Thus, the SCDK seems impliedly to have signaled acceptance of the CJEU's alleged more textually free style of interpretation, on the basis of which *Mangold* is said to have derived, and which the SCDK has now criticized in *Ajos*.

A final possible flaw to point out relates to that part of the reasoning in the judgment regarding the CFREU. The SCDK concludes in that regard that those fundamental rights that are now in the CFREU, including Article 21 on non-discrimination, do not have direct effect (possibly meaning only horizontal direct effect). The consequences of such a sweeping statement could be rather dramatic. Since it was in fact not even necessary for the SCDK to address these issues, it therefore seems rather surprising that it did so – not least in the way it did it.⁸⁸

C. Interim conclusions

We have referred above to the deferential constitutional tradition in Denmark including the general self-perception of the SCDK as well as its past judgments (especially the one concerned with the Maastricht Treaty in which the SCDK could be said to have paved the way for the kind of reasoning adopted here). That tradition was well reflected in *Ajos*, not least in the Court's reasoning regarding the *Law on accession*. That reasoning appeared to be very rigid, but could to a large degree be understood in light of different styles of interpretation between the two courts, where the SCDK seems to have had very little tolerance of the more activist approach of the CJEU.⁸⁹ However, as already stated nearly twenty years ago by the prominent Danish law professor, Zahle, who had also at a certain point been a judge at the SCDK: the one who transfers competence, throws its powers into a new room with its own forces and laws, and that these may differ from the national ones should be no surprise or viewed as a sufficient basis for legal criticism.⁹⁰ Finally, we referred above to the trap in which, on one view, the SCDK set for the CJEU. It was almost symptomatic of the approach of the SCDK that, in its order of 22 September 2014 in which it referred the two questions to the CJEU, it did not even prepare the CJEU for the possibility that the *Law on*

⁸⁷ Taken from the translation into English of the SCDK's *Lisbon* Case (UfR 2013.1451H) 14.

⁸⁸ See p. 47 of the SCDK judgment. See further Section VI below.

⁸⁹ See further Section VI below on the various other implications of *Ajos*.

⁹⁰ Zahle, 'EU og den danske grundlov', (Copenhagen: Ejlers' Forlag, 1998) 30, but also see e.g. 25-27.

accession could become a pivotal issue. In fact, when considering the SCDK's views in that regard, it could with some justification be claimed that the preliminary questions were almost superfluous. For a judicial dialogue ideally based on comity or even mutual trust, that would be rather unusual and striking. In the alternative, the arguments of the dissenting judge, offered a much more modern, convincing and tolerant road to principled judicial compromise.

VI. Consequences of the judgment

It follows from *Ajos* that there are now parts of EU law that currently cannot be viewed as implemented in Danish law. To fully understand the impact of the judgment, it is necessary to analyse what parts of EU law, according to the SCDK, have not been implemented in Denmark (Sub-Section A) and furthermore contemplate what the consequences are (Sub-Section B).

A. EU law in need of implementation

It is clear from the judgment that the general principle prohibiting age discrimination is not part of Danish law. This does not necessarily imply that the principle is not part of the EU law, which Denmark has ratified, but it indicates that the overarching principle prohibiting age discrimination does not have direct effect in Denmark, and thus it cannot be invoked as part of Danish law.⁹¹ This is the result of the dualist approach, which is taken to be the guiding principle in respect of implementation of public international law in Denmark.⁹² Accordingly, for international law to have effect in Denmark's domestic law, it should not only be adopted by the Danish government, but should also be implemented in Danish law. However, from an EU law point of view, the fact that parts of EU law – which, in accordance with EU law, should have direct effect – do not have direct effect in Denmark, is obviously rather problematic. Whether this is due to a failure to have ratified an EU Treaty properly, or due to a lack of an effective implementation regime is not important from an EU law point of view. In either situation, EU law is not given such domestic effect as it should have in line with EU law.

The reason why the SCDK did not accept that the general principle prohibiting age discrimination was part of Danish law was that the principle was not based on any specific Treaty provision.⁹³ The SCDK accepted that Treaty provisions, which have been interpreted by the CJEU to have direct effect also have that effect in Danish law in accordance with Paragraph 3 of the Danish *Law on accession*. However, as pointed out above the rationale of the SCDK was that since the general principle prohibiting age discrimination was based on 'various international instruments and in the constitutional traditions common to the Member States', this principle was not based on the Treaties (as specified in paragraph 4 of the Act on accession) and thus not covered by the mentioned Paragraph 3 of that Act.

⁹¹ The translation of the SCDK's judgment uses the term 'directly applicable'. Since this term in a EU law context is normally used to describe the effect of regulations, the term 'direct effect' is used here.

⁹² It is normally assumed that Danish law, as a main rule, apply a dualist approach, see Terkelsen, 'Folkeret og dansk ret', (Copenhagen: Karnov Group, 2017) 41; Peter Germer: *Indledning til folkeretten*, (Copenhagen: DJØF Publishing, 2010) 94; and Espersen and others 'Folkeret', (Copenhagen: Ejlers' Forlag, 2003) 100.

⁹³ See sixth paragraph on p. 45 of the SCDK judgment.

This raises the question whether there are other general principles of EU law that may not have the necessary basis in the Treaties to be covered by Paragraph 3, read with paragraph 4. When looking for such principles, we should not only look for principles that intended to have horizontal effect (e.g. impose obligations on private individuals), but also principles intended to have vertical effect. The dualist approach in Denmark means that if an international commitment has not been implemented, it cannot be given effect in Danish law, neither in vertical nor in horizontal relationships.⁹⁴ This does not mean that it is without relevance whether or not a principle is intended to have horizontal effect, as it is assumed that implementation of international commitments that impose obligations on private individuals require a firmer basis in Danish law than does the implementation of other international commitments.⁹⁵ However, even international commitments that are intended to have vertical effect need implementation to have direct effect in Danish law. Even though it would be tempting to limit the implication of the judgment to general principles having horizontal effect, there is no firm ground for doing so.⁹⁶

Potentially, there seem to be several principles in EU law that are intended to have direct effect but are not based on a specific Treaty provision. They include the principle of direct effect, the principle of consistent interpretation, the principle of state liability for breach of EU law, the principle of supremacy of EU law,⁹⁷ the right to recover taxes levied in breach of EU law that must be repaid, the principle of abuse of law,⁹⁸ etc.⁹⁹ Additionally, there are several fundamental rights, many which are now codified in the CFREU.¹⁰⁰

Even though these general principles are not found in any specific provisions in the Treaties, they are nonetheless derived from them. Many of them are based on the duty of

⁹⁴ Thus, there is nothing in the history of Paragraph 3 of the *Law on accession* that indicates that it differentiates between horizontal and vertical effect. In the account prepared by the Ministry of Justice before the Danish Accession to the EEC in 1972 the Ministry points out that the Treaty contains provisions with horizontal effect and provisions with vertical effect, and it is foreseen that both of them need to be given direct effect in Denmark through legislation, see 'Justitsministeriets redegørelse af juli 1972 for visse statsretlige spørgsmål i forbindelse med en dansk tiltrædelse til De Europæiske Fællesskaber', published (1971) in *Nordisk Tidsskrift International Ret*, 65-130 at 107.

⁹⁵ See Terkelsen, 'Folkeret og dansk ret', (Copenhagen: Karnov Group, 2017) 100 with further references.

⁹⁶ Differently, Holdgaard and others, 'Højesteret har sagt fra over for EU-Domstolen', (2017) *Advokaten*, 32-37, who assume that the *Ajos* judgment only affects general principles with horizontal effect. The same point – with reservations – is made by Kristiansen, 'Grænser for EU-retten's umiddelbare anvendelighed i dansk ret – om Højesterets dom i *Ajos*-sagen', (2017) *Ugeskrift for Retsvæsen* 75-84 (at 82).

⁹⁷ This principle would have been codified if the proposal for a constitution had been adopted. Instead, the principle was mentioned in Declaration 14 to the Lisbon Treaty.

⁹⁸ It is still disputed whether there is a principle that EU law cannot be abused, or whether it is only a rule of interpretation, see the discussion in de la Feria and Vogenauer (eds), 'Prohibition of Abuse of Law. A New General Principle of EU Law?', (Cambridge: Hart Publishing, 2011).

⁹⁹ On the other hand, the principle of proportionality and several aspects of the principle of equality is now codified in the Treaties.

¹⁰⁰ It is also relevant to consider whether there may be general principles developed not at Treaty level but applying to areas where the EU has adopted secondary legislation, see Basedow, 'General Principles of European Private Law and Interest Analysis', (available at SSRN.COM). Even though the CJEU did not accept such principles in Case C-101/08, *Audiolux*, EU:C:2009:626, there may already be examples of such principles being developed and later codified in secondary legislation. See for instance the transparency principle in procurement law introduced by the CJEU in Case C-275/98, *Unitron*, EU:C:1999:567, para. 31, now codified in directive 2014/24, Article 18. See also the neutrality principle introduced in VAT law in 89/81, *Hong Kong*, para. 6, and now codified several places in the VAT directives. For such principles Danish courts would not look for Paragraph 3 in the *Law on accession*, but instead Paragraph 2. Even though Denmark has accepted that the EU may act in these areas the SCDK may not think that this authority may not allow the CJEU to adopt general principles that are not based on the secondary legislation.

loyalty according to Article 4(3) TEU and Article 288 TFEU. Often, however, the link to the Treaty provisions is not that clear, but instead it is supported by the ‘spirit of the Treaty’¹⁰¹ or is ‘inherent in the system of the Treaty’.¹⁰² Others, like the principle prohibiting age discrimination, are not based on the Treaty at all, but on other international sources and common traditions of the Member States.

To evaluate which principles are part of Danish law it is necessary to assess how much specific basis in the Treaties the SCDK will require for Paragraph 3 of the *Law of accession* to confer direct effect. This question is not easy to answer based on the *Ajos* judgment. On the one hand, the SCDK observes that there is no specific provision in the Treaties, which addresses age discrimination, which may indicate that the Court believes that one specific Treaty provision should be available as its source. On the other hand, the SCDK does note that all the sources of the principles are outside the Treaties, and therefore in this case there is no Treaty basis at all. There is a long range of possibilities between these two extremes (specific provision and no basis at all), and the SCDK does not indicate to what extent Paragraph 3 will include those principles found in this in-between range of possibilities.

There are, however, several arguments favouring the view that a general principle, even without being based on a specific Treaty provision, may have direct effect in Danish law as long as it has some basis in the Treaties. Here we will limit ourselves to four arguments:

First, Paragraph 3 of the *Law of accession* was included because, even before the Danish accession in the early 1970s the (now) CJEU had started conferring direct effect on some Treaty provisions.¹⁰³ At that stage, the CJEU had also developed general principles such as the principle of supremacy of EU law, which had some basis in the Treaty, but was by no means based on a specific Treaty provision.¹⁰⁴ When joining the EEC, the Danish legislators knew that there existed principles of direct applicability, which were based more loosely on the Treaty.¹⁰⁵ Thus, Paragraph 3 might be read as an acceptance that further principles might develop in this way in the future.¹⁰⁶

Secondly, since the *Law on accession* has been amended several times since then,¹⁰⁷ it might be argued that principles, which the CJEU has developed at different times have been subsequently encompassed as within the ambit of Paragraph 3 when the *Law on accession* has been updated to include new Treaties. In *Ajos*, the SCDK did accept that principles could be included within the scope of Paragraph 3 as a by-product of accession to new Treaties. It noted that *Mangold* had been decided in 2005, and thus several years before the *Law on accession* had been changed due to accession to the Lisbon Treaty in 2009. Yet,

¹⁰¹ See Case 6/64, *Costa v ENEL*, EU:C:1964:66.

¹⁰² See Joint Cases C-6 & 9/90, *Francovich*, EU:C:1991:428, para. 35.

¹⁰³ Starting with Case 26/62, *Van Gend en Loos*, EU:C:1963:1.

¹⁰⁴ See Case 6/64, *Costa v ENEL*, EU:C:1964:66.

¹⁰⁵ This was also concluded by the Danish Ministry of Justice in an account from 2007 entitled ‘Redegørelse for visse forfatningsretlige spørgsmål i forbindelse med Danmarks ratifikation af Lissabon-traktaten’, para. 4.4.2.c.

¹⁰⁶ The dissenting judge in the SCDK judgment was also making this point. According to her, the ‘EU Court of Justice’s law-making activities within the framework of the Treaty and its interpretative style were well known when Denmark became a member of the EC’. She found that it had been accepted that the reference in Paragraph 3 to the Treaties could also constitute a general principle developed by the CJEU, even the general principle prohibiting age discrimination, see p. 50 of the SCDK judgment.

¹⁰⁷ As mentioned in Section V.B the *Law on accession* is changed every time the EU Treaties are changed to update the list in Paragraph 4.

the SCDK did not consider that the change in 2009 meant that *Mangold* had been given direct effect in Danish law. In the SCDK's view, the change to the *Law on accession* had been only a consequence of accession to the Lisbon Treaty, and there had been no explicit reference to *Mangold* in the *travaux préparatoires*.¹⁰⁸ This indicates that a change in the *Law on accession* would only encompass general principles as within the scope of Paragraph 3 if there had been an explicit reference to these principles.¹⁰⁹

Thirdly, in an earlier judgment by the SCDK concerning the accession to the Maastricht Treaty there had been an indication that the SCDK accepted that the CJEU might develop principles that were not based on specific provisions in the Treaty. The plaintiffs in this case argued that Paragraph 20 of the Danish Constitution had not been observed when Denmark joined the EU (the then EEC) since the delegation of sovereignty to the EEC/EU had been more far-reaching than provided for by that provision. As mentioned above, the provision requires that the delegated sovereignty must be 'within specific limits'. The plaintiff argued that this specificity requirement had not been complied with due to *inter alia* the activism of the CJEU, which had taken EU law beyond the competences that had been originally delegated by virtue of the Danish Constitution and the Act on accession. As an example, the plaintiff pointed to the fact that the CJEU had created the principle of consistent interpretation and the principle of state liability for breach of EU law.¹¹⁰ The SCDK decided that Paragraph 20 of the Constitution had not been infringed. Without addressing the specific principles mentioned, it held that the 'EC Court of Justice's law-making activities can [not] be held to be incompatible with the specificity requirement of Paragraph 20(1) of the Constitution.'¹¹¹ This may be read as an acceptance that the CJEU activism under consideration in that case was operating within the framework of the Treaties and therefore within the bounds of the sovereignty that had been delegated to the EU.¹¹² The case did not, however, address the same issue as that in the *Ajos* judgment, since it dealt with the specificity requirement of Paragraph 20 of the Constitution and not the extent to which Paragraph 3 gave direct effect to EU law. But it seems that the SCDK accepted that some principles developed by the CJEU had been within the parameters of the Treaties and thus the power delegated to the EU. If so, from there the leap to the conclusion that those principles are among those given direct effect does not seem far.¹¹³

Fourthly, many EU principles have previously been applied by Danish courts, including the SCDK. This is the case with, for instance, the principle of state liability, recovery of taxes levied in breach of EU law, direct effect, supremacy of EU law, and

¹⁰⁸ P. 47 of the SCDK judgement.

¹⁰⁹ Interestingly, there is a reference to the fundamental rights established by the CJEU in Case C-260/89, *ERT*, EU:C:1991:254, in the 2007 report prepared by the Ministry of Justice prior to the accession to the Lisbon Treaty ('Redegørelse for visse forfatningsretlige spørgsmål i forbindelse med Danmarks ratifikation af Lissabon-traktaten'), see para. 4.4.3.a. Whether this is enough to 'incorporate' these into Paragraph 3 we do not know.

¹¹⁰ See p. 862 of the judgment in UfR 1998.800H.

¹¹¹ See para. 9.7 of the judgment UfR 1998.800H. The English translation is taken from the English version of the SCDK judgment, p. 50.

¹¹² See also Danielsen, 'Suverænitetssafgivelse', (Copenhagen: DJØF Publishing, 1999) p. 342 and 348.

¹¹³ In para. 9.5 the SCDK explains that the fact that the CJEU interprets the Treaties by relying on factors other than their wording, including the purpose, does not mean that the accession to EU law is contrary to Paragraph 20 of the Constitution. It added, '[t]he same is true for the law-making activities of the CJEU within the framework of the Treaty' [authors' translation]. The last addition indicates that law-making activities may be deemed to fall outside the Treaty, and this was exactly what the SCDK found to be the case in *Ajos*.

consistent interpretation.¹¹⁴ It must be assumed that the SCDK would not have applied a general principle if it felt that it was not covered by Paragraph 3 of the *Law on accession*. This must be the case even though the problem of direct effect under Paragraph 3 was not in dispute in any of the previous cases, because the SCDK would have had a duty only to apply rules that were part of Danish law and in any event would *ex officio* have had to take up the issues of its own volition if there had been a problem with giving general principles of EU law direct effect. Of course, the SCDK may have changed its mind, but there must be an assumption against that being the case since the Court in *Ajos* might (if that had been its view) have been expected to say so, given the far reaching implications of such a course on the rights (past and existing) of Denmark's citizens.

Thus, there are several arguments in favour of the view that *Ajos* does not mean that Paragraph 3 had not given direct effect to the general principles that have some basis in the Treaties, albeit not in the form of a specific provision. This limits the problem to those general principles that have *no or very little* basis in the Treaties. They include the fundamental rights that, like the principle prohibiting age discrimination, are deduced from other sources. In such cases, it is clear that the SCDK is likely to find that they are not part of Danish law. Even though one may argue that these provisions have a basis in the Treaty in what is now Article 6(3) TEU, the SCDK rejected this view in *Ajos*. Based on the *travaux préparatoires* to the law that ensured the Danish accession to the Maastricht Treaty, the SCDK concluded that inclusion of the current Article 6(3) TEU had not been intended to give these general principles direct effect in national law. It only ensured that these general principles could be used for setting aside secondary EU law, not national implementing legislation, as invalid.¹¹⁵ Thus, the SCDK concluded that Article 6(3) TEU did not transfer any new sovereignty to the EU under the Danish Constitution. Therefore, in this case the SCDK seems to have found firm ground for not including fundamental rights among those parts of EU law that are granted direct effect in accordance with Paragraph 3.¹¹⁶ Apart from the general principle prohibiting age discrimination this includes the principle of equality, the principle of legal certainty, the right to property, the freedom of expression and many others.¹¹⁷

The SCDK went a step further, in what appears as an *obiter dictum*, as it concluded that those fundamental rights that are now in the CFREU, including Article 21 on

¹¹⁴ See the following judgments respectively: UfR 2007.3124H, UfR 2004.2308H, UfR 2011.539H, UfR 2011.2646H and UfR 1990.72H. Looking at the lower Danish courts there is also an example where the principle prohibiting age discrimination has been applied, see UfR 2012.2247Ø. However, the lower courts clearly could not know that this principle was not part of Danish law before the SCDK decided so in *Ajos*.

¹¹⁵ It seems that the SCDK did not think that invoking a general principle to challenge the validity of secondary legislation in a case before the Danish courts required the general principle to have direct effect. As the consequences of invoking the general principle in this case only affect EU law, it may be argued that this is different from cases where a general principle is invoked to affect Danish law.

¹¹⁶ Even though the SCDK interpreted Article 6(3) TEU in a way that implied that the general principle covered by this provision did not have direct effect in Denmark, it cannot be concluded that the impact of the *Ajos* case is limited to the general principles covered by Article 6(3). The Court's reasoning in respect of this provision only serves to signal that general principles without any basis in the Treaties do not have direct effect in Denmark. See for a contrary view Holdgaard and others, 'Højesteret har sagt fra over for EU-Domstolen', (2017) *Advokaten*, 32-37, who assume that the SCDK judgment only affects general principles developed according to Article 6(3) TEU and the CFREU.

¹¹⁷ See the overview in Tridimas, 'The General Principles of EU Law', (Oxford: OUP, 2006) 307-311.

non-discrimination, did not have direct effect.¹¹⁸ At first sight, this seems surprising since the CFREU provision has a basis in the Treaties, and therefore could be among those given direct effect in accordance with the aforementioned Paragraph 3. But again, the SCDK relies on the *travaux préparatoires* to the *Law on accession*, this time those leading to accession to the Lisbon Treaty. The SCDK noted that it had been assumed that the inclusion of the CFREU had not created any new competences or alter any existing competences, and consequently the CFREU should be assumed not to have had direct effect. We have asked ourselves whether the SCDK actually meant horizontal effect when it referred to ‘direct effect’. Thus, it might have been asserting that the CFREU had been addressed to the Union and the Member States in accordance with Article 51 of the CFREU. It could thus be argued that horizontal effect was excluded by Article 51, but not necessarily vertical effect.¹¹⁹ Such an interpretation would not obviously follow from the references that the SCDK made to the *travaux préparatoires* since those arguments were not focusing on horizontal effect. However, the SCDK also mentioned that, according to the answer the Foreign Minister gave to the Danish Parliament, the CFREU did not intend to impose obligations on individuals.¹²⁰ This might indicate that the SCDK, despite the rejection of direct effect, might have intended to focus on horizontal effect.¹²¹ In conclusion, it is not clear whether the SCDK rejected that the principle of direct effect under the CFREU in both vertical and horizontal relationships, or alternatively only rejected horizontal effect. According to the SCDK, these principles might be invoked to set aside EU law but not Danish law, even when Danish law is being used to implement EU law.

In conclusion, it seems that the *Ajos* case has undermined not only the general principle prohibiting age discrimination, but also has the potential to undermine reliance on other general principles which have no explicit basis in the EU Treaties. It seems that the general principles were denied both horizontal and vertical direct effect in Danish law, but it is possible that the Court intended to rule that CFREU provisions should only be denied horizontal effect. Since we do not know the SCDK’s view about how much specificity any general principles must have under the Treaties to enable them to be considered to have direct effect in accordance with Paragraph 3 of the *Law on accession*, it is not possible to state exactly which principles may be held to lack direct effect. But it seems likely that fundamental rights and CFREU provisions would be affected by this approach. Also, somehow ironically, the principle of legal certainty and the principle of legitimate expectations, although themselves key concepts available in Danish case law, and to which the SCDK pays so much regard, are not as such based on specific provisions in the Treaties either and might thus not have direct effect in Denmark.

B. Remedying *Ajos*

¹¹⁸ P. 47 of the SCDK judgment.

¹¹⁹ The implication of Article 51 of the CFREU is far from clear; also see e.g. Müller-Graff, ‘Die horizontale Directwirkung der Grundfreiheiten’ (2014) *Europarecht*, 3-29; Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’, (2013) *European Law Review*, 479-497; and Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’, (2015) *European Law Journal*, 657-679.

¹²⁰ P. 47 of the SCDK judgment.

¹²¹ Cf. Kristiansen, ‘Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – om Højesterets dom i *Ajos*-sagen’, (2017) *Ugeskrift for Retsvæsen* B. 75, 81-82.

Because it is not entirely clear which general principles are affected by *Ajos* and to what extent, it is not easy to point out how the case should be remedied.

It was clear that the wording of Paragraph 2a(3) of the *Law on salaried employees* had to be amended to remove the discriminatory element. This change took effect as from 1 February 2015.

It is also clear from *Ajos* that the principle prohibiting age discrimination does not have direct effect in Denmark. This is partially cured by incorporating the general principle prohibiting age discrimination in Paragraph 1 of *Law prohibiting discrimination on the labour market*. Not only does it prohibit age discrimination but also other kinds of discrimination based on race, religion, sexual orientation, language, handicap, nationality, etc. To a large extent, this provision covers the same type of discrimination as prohibited in Article 21 of the CFREU. But the scope differs since the Danish law only covers discrimination on the labour market, whereas Article 21 has a broader reach.¹²² Thus, it cannot be argued that the principle prohibiting age discrimination has been fully implemented in Danish law.

Furthermore, the *Ajos* judgment may have the consequence that other general principles and in particular relevant CFREU provisions do not have (horizontal?) direct effect in Denmark. Since we do not fully know which principles lack direct effect based on the SCDK's specificity test, it is more difficult to solve this problem. It seems, however, that different options are available to the Danish government.

First, this could be done by adopting legislation to implement relevant principles, as it becomes apparent that they do not have direct effect in Danish law to the extent that they should have had. If the legislator makes sure that the principles are incorporated with retroactive effect, this may ensure that the general principles are given direct effect in Danish law to the same extent as the CJEU has given direct effect to the general principles and/or CFREU provisions. But of course, an extension of rights which confer horizontal applicability with retroactive effect might result in a policy headache and there would be winners and losers, not least given the costs of meeting retrospective claims.

Secondly, since the CFREU is likely to lack enforceability in Danish national law, the *Law on accession* could be amended to make it clear that Paragraph 3 allows the CFREU to have direct effect if the CJEU were to interpret it in such a manner.

Thirdly, Denmark could delegate authority to the CJEU to develop general principles. This would have to be given effect in line with Paragraph 20 of the Constitution, and would most likely require a referendum. Based on previous experiences with referenda on complicated EU issues, the Danish Government would most likely try to avoid this.

So far, the Danish Government has to our knowledge done nothing. Given that the SCDK did not apply EU law in its *Ajos* judgment, and given that there is an obvious problem with the implementation of the general principle prohibiting age discrimination in Denmark, the Commission may have grounds for starting infringement procedures against Denmark. However, the Commission has to our knowledge not initiated such a procedure so far.

So what are the potential implications? A and other dismissed employees who were denied severance allowance in the period until the new Danish provision took effect on 1 February 2015 might sue for damages for not being paid any severance allowance. Since

¹²² Peers and others, 'The EU Charter of Fundamental Rights', (Oxford: Hart, 2014) 589-593.

the Danish Government failed to implement the Directive properly, there might be a serious breach of EU law that would result in an award of damages. At the very least the Danish government would be responsible for losses occurring after the CJEU in 2010 made it clear that Danish law did not comply with the directive.¹²³ Even if it were accepted that Member States had a reasonable time to comply with a judgment from the CJEU, it would hardly be possible to justify a period of four years, as has happened in this case. Alternatively, A and others with pending cases might argue that the SCDK was in serious breach of EU law when it decided that it could not interpret Danish law consistently.¹²⁴

Another likely outcome is that other general principles of EU law may be challenged for not having been accorded direct effect in Denmark. Given that the SCDK judgment did not spell out how much specificity a general principle should have in the Treaties in order to be available in Danish law, it is likely that these issues will have to be litigated in future cases.

VII. Conclusions

In what has been said above, we hope to have provided a careful analysis of *Ajos*. At a more specific level, we have found that the SCDK, in particular, has been judicially combative and has thus exposed itself to criticism. The analysis also implies that both courts have failed to hold a collegiate judicial dialogue as befits the highest courts of the EU and a Member State. This is because, *inter alia*, they have made the issue into a jurisdictional dispute. Furthermore, the behaviour of both courts may be explained as grounded in a lack of mutual trust or at least in failing to demonstrate a reasonable degree of willingness to handle the situation on the basis of an appropriate level of judicial comity. Indeed, these troubled waters could have been avoided, had the argumentation of the minority vote at the SCDK been followed by a majority, as a feasible, principled and convincing way out of what has instead become a judicial standoff.

As a result of *Ajos*, the SCDK – traditionally perceived as a court in which in most cases the Danish population has a high degree of trust – has challenged the authority of the CJEU and, one may argue, the primacy of EU law.¹²⁵ The SCDK had, as indicated above, already stated in the *Maastricht* judgment that it could not accept unconditional supremacy of EU law over Danish law. But the *Ajos* cases show that this reservation may be more far-reaching than previously assumed. In the *Maastricht* case the SCDK had made two reservations. First, EU law could not take precedence over the Danish Constitution and therefore EU law had to respect the limitation implied in Paragraph 20 of the Constitution. But since the SCDK has interpreted Article 20 quite liberally and since the EU Charter has a broader range of fundamental rights than found in the Danish Constitution, the SCDK seems

¹²³ See Case C-499/08, *Andersen*, EU:C:2010:600.

¹²⁴ This solution is suggested by Nielsen and Tvarnø, ‘Danish Supreme Court infringes the EU Treaties by its ruling in the *Ajos* case’, (2017) *Europarättlig Tidskrift*, 303-326, at 325. As argued above in Section III the SCDK is likely to have made a mistake when it decided that Paragraph 1 of the Danish *Law prohibiting discrimination on the labour market* could not be interpreted to ensure that A received severance allowance. Whether this mistake constitutes a serious breach of EU law is debatable, and it is by no means obvious that there is liability due to a mistake of this nature.

¹²⁵ Denmark is the country in Europe, where the population has the highest degree of trust in its courts, see <www.domstol.dk/om/Nyheder/Pressemeddelelser/Pages/Tilliditopforsyvendegang.aspx>.

already to have accepted that there might be circumstances in which EU law cannot be interpreted in conformity with the letter of the Danish Constitution. The second reservation was that the application of EU law in Denmark was predicated on the principle that it must be within the powers delegated under Paragraph 20 of the Constitution. This is the reservation applied in the *Ajos* case, and what is new is that the SCDK, when interpreting the *Accession Act*, relied heavily on the *travaux préparatoires* of the Danish legislators, not only the most recent texts but also older preparatory work. It is quite normal for the Danish courts (as courts in other States do) to use such preparatory work when interpreting Danish law. But here it meant that the opinion of ministries and legislators going back several decades impacted on how the SCDK perceived the power of the EU today. By relying so heavily on what had been assumed at the time of accession and on later amendments of the act, the SCDK did not allow for the dynamic way that EU law tends to develop (and is accepted as developing). If the SCDK continues to insist on using the preparatory work in this way, it may be that the future will show that there are other areas where EU law had developed beyond what historically had been anticipated by the Danish legislators, with the result that EU law does not necessarily have supremacy over Danish law. This could be avoided if the SCDK relied less heavily on such preparatory work in future cases. Given that the Accession Act deals with the Danish participation in an international union in which uniformity of interpretation of common rules is the cornerstone of the rule of law, it may be argued that the interpretation of the act should also take into consideration how the other participants, including the EU institutions, interpret the powers delegated to the EU.

Yet, at a time where Europe is seen to be encountering challenges on many other levels, not least due to nationalist winds blowing so strongly, criticism from a highly trusted national court, is not what the CJEU and the EU project (and in turn at the end of the day the Member States themselves) as a whole need the most, unless of course such criticism is absolutely justified.¹²⁶ Perhaps, surprisingly and simultaneously, confidence in the SCDK itself has now been lowered, at least in the eyes of certain Danish legal scholars and practitioners, since it has been subject to severe criticism. The SCDK is sceptical of the activist approach of the CJEU, but, by showing its own activist streak in handing down *Ajos*, it has exposed itself to criticism.¹²⁷

It appears particularly surprising that this development has taken place in Denmark considering that other constitutional and supreme courts from much larger and more influential countries have managed to come up with a more balanced reaction to the claimed activism of the CJEU.¹²⁸ Even if the CJEU now should decide to moderate its *Mangold* case law, it would only be a temporary solution to a concrete challenge, as undoubtedly other crises of a similar character are likely eventually to pop up over time.

If the mutual trust between the two courts is in decline, the consequences are manifold. The former President of the SCDK, Børge Dahl, indicated one consequence, when

¹²⁶ Yet, as it has been stressed by Lenaerts, however in a different legal context, ‘blind trust’ is of course never to be strived for, see Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’, (2017) *CMLRev*, 805-840.

¹²⁷ Thereby, the SCDK could be seen as having done what was warned against by Zahle, ‘EU og den danske grundlov’, (Copenhagen: Ejlers’ Forlag, 1998) 106-7.

¹²⁸ See in that regard the overview in Craig and de Búrca, ‘EU Law. Text, Cases and Materials’ (Oxford: OUP, 2015) 278-309.

he stated the following: ‘If the interpretation of the European Court of Justice is taking national courts by surprise, one may fear a growing unwillingness of national courts and parties to a legal conflict to present matters before the Court of Justice. Their willingness to do so is crucial for the harmonious interpretation of EU law and thereby for the cohesion and effectiveness of EU law. But their willingness also very much depends on the transparency and foreseeability of the legal procedures in Luxembourg...’¹²⁹ Thus, national courts may be more reluctant to make preliminary references to the CJEU, and instead decide issues relating to EU law on their own. The consequence of this will most likely be a more decentralised and divergent application of EU law throughout the Union.

Another consequence may be that the courts will be reluctant to give up jurisdiction on various issues. In *Ajos*, there are several examples of both the SCDK and the CJEU trying to define the problem at hand as an issue within their exclusive jurisdiction. Thus, the SCDK has raised the constitutional issue, while the CJEU may be attempting to make the *contra legem* issue a question falling within the scope of EU law instead of accepting that it is pre-eminently a matter for national law.

But how can this lack of trust be overcome? It is plainly important that the courts should temper their language in their judicial dialogue, that they should accept that they have jurisdiction over different issues and that there is a need to cooperate for the law to work. The former President of the SCDK, Børge Dahl, has also pointed out that more dialogue may be needed to ensure that trust can be enhanced: ‘Dialogue on these fundamental issues is needed on the road ahead’. Others have suggested the same remedy.¹³⁰ But of course, dialogue can never be sufficient, if there is no trust or will to truly cooperate.

It is self-evidently impossible to know, whether *Ajos* is to be considered as just a lonely swallow never again to be repeated by the SCDK,¹³¹ or whether in reality it signals a new self-confidence on the part of the SCDK with greater implications for the application of EU law in Denmark, and thus potentially leading to more activist infighting between the two courts. If the latter should be the case – and the example perhaps were even to be followed by other national constitutional and supreme courts to a larger extent than seen so far – undoubtedly the situation could no longer be ignored by especially the Commission of the European Union and in the case of Denmark, the Danish legislator. The reasons are – despite the advantages of a system of checks and balances within a judicial system – that, in the long run, the rule of law, which inevitably involves a sensitive partnership between the courts of the EU and which is necessary for the uniform application of EU Law as a cornerstone of the European project, would otherwise be endangered.

In *Julius Caesar*, Shakespeare highlights how Brutus struggled with his conscience – whether to accept that ultimate authority belonged to an individual ruler (Caesar) or to the State. Brutus – as guardian of republican values had seen Caesar as too personally

¹²⁹ Dahl, ‘Keynote Address’ in Neergaard and Jacquesen (eds), *Proceedings: Speeches from the XXVI FIDE Congress. The XXVI FIDE Congress in Copenhagen 2014. Congress Publications Vol. 4* (Copenhagen: Website publication in cooperation with DJØF Publishing, 2014) < <http://fide2014.eu/post-congress-materials/>>, 26-30, at 30.

¹³⁰ Lady Justice Arden, ‘Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe’, 2010, *YEL*, 3-20.

¹³¹ If that is the case, the intention of the SCDK could then among others be to warn the CJEU against what the SCDK is likely to view as intolerable judicial activist interpretations and that here in the context of a subject matter not as far-reaching as for instance the Maastricht and Lisbon Treaty Cases (UfR 1998.800H and UfR 2013.1451H respectively) would have been, had a similar signal been wanted chosen to have been sent out in that connection.

ambitious and thus had participated in his assassination - came up with the following explanation:

If, then, that friend [of Caesar's] demand why Brutus rose against Caesar, this is my answer. Not that I loved Caesar less, but that I loved Rome more... As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honour him: but as he was ambitious, I slew him.¹³²

Similarly, one might ask whether it was justifiable for the SCDK to honour the Danish Constitution more than to follow, as it perceived, an activist CJEU, and thereby leaving behind, among others, the protection of European citizens' EU rights.

¹³² Shakespeare, 'The Tragedy of Julius Caesar', in Bate and Rasmussen (eds): *The RSC Shakespeare. William Shakespeare. Complete Works*, (New York: The Modern Library, 2007) 1805-1858, at 1835. The authors gratefully owe the discovery of this quotation to Christopher Muttukumaru.