Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of 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*

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Introduction

The judgment of the Court of Justice in *Dansk Industri*[1] revisits a classic *problématique* of EU law: Must the national court apply a general principle of EU law in a dispute between private parties and 'set aside' a conflicting national legislative provision? And must the national court give effect to an unwritten general principle of EU law, which prohibits age discrimination, even if this requires reversing its long-standing interpretive position and case law? The Court of Justice first decided that general principles of EU law could require that national courts set aside conflicting national provisions in disputes between private parties in the *Mangold*[2] and *Kücükdeveci*[3] cases. These judgments drew considerable criticism both within and from outside the Court, accusing it of, amongst other things, judicial activism, adjudicating ultra vires and, not in the least, of imprecise and poor reasoning.[4] The scope of the horizontal effect of the principle remained

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[1] ECJ 19 April 2016, ECLI:EU:C:2016:278, *Dansk Industri, acting on behalf of Ajos A/S* v *Estate of Karsten Eigil Rasmussen*.

[2] ECJ 22 November 2005, ECLI:EU:C:2005:709, *Mangold* v *Helm*.

[3] ECJ 19 January 2010, ECLI:EU:C:2010:21, *Kücükdeveci*.

[4] *See*, for instance, W. Herzog, 'Stoppt Den Europäischen Gerichtshof!' [*Stop the European Court of Justice!*], *Frankfurter Allgemeine Zeitung*, 8 September 2008; A. Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?', 9 *Cambridge Yearbook of European Legal Studies* (2006) p. 81; 'Editorical Comments: The Court of Justice in the Limelight – Again', 45 *Common Market Law Review* (2008) p. 1571; M. Herdegen, 'General Principles of EU Law – The

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unclear, however, and instead of clarifying its position in subsequent cases as it had in *Dominguez*, the Court remained silent.[5] The *Dansk Industri* case presented yet another challenge in this respect. The concrete issue at hand was whether general principles of legal certainty and the legitimate expectations of private employers could offset the application of the general principle of non-discrimination on grounds of age, which protects the rights of older employees.

The Court of Justice dealt with these questions in a preliminary reference procedure initiated by the Danish Supreme Court. It answered the question as to whether the principle of non-discrimination on grounds of age could apply in private disputes in the affirmative. It held that the principle precluded the application of national legislation that stipulated that only employees who had not yet reached a pensionable age at the time of dismissal were entitled to a special severance allowance. National legislation, which treated employees differently based on their age, was disproportionate and constituted unjustified discrimination. The Court answered the second question – whether legal certainty and legitimate expectations could offset the application of the principle of non-discrimination – in the negative. It held that national courts needed to reverse their own case law and, if necessary, to give the general principle effect so as to protect the rights of individuals.

The Supreme Court of Denmark, in its follow-up ruling, decided not to apply the unwritten principle of EU law to the case at hand, and did not follow the interpretation of the Court of Justice.

This (re)action of the national Supreme Court is disheartening for those who study the theory and practice of EU law and integration. It defies a *belief* (in the sense of faith) widely held by European scholars in the preliminary reference mechanism as a workable form of judicial cooperation.[6] It furthermore questions the assumed *actual willingness* of national courts to act as European courts and to give EU law practical effect.[7] Finally, in the context of increased political scrutiny

Methodological Challenge', in U. Bernitz et al. (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008); D. Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', 35 *Industrial Law Journal* (2006) p. 329; M. De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?', 18 *Maastricht Journal of European and Comparative Law* (2011) p. 109.

[5] *See* M. de Mol, 'Dominguez: A Deafening Silence Court of Justice of the European Union (Grand Chamber). Judgment of 24 January 2012, Case C-282/1, Maribel Dominguez v Centre Informatique Du Centre Ouest Atlantique and Préfet de La Région Centre', 8 *European Constitutional Law Review* (2012) p. 280.

[6] For a sobering account of judicial dialogue *see* H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment, and Good Faith* (Cambridge University Press 2005).

[7] Most recently, on 26 January 2017, the Italian Constitutional Court referred a preliminary question to Luxembourg challenging the Court's decision in ECJ 8 September 2015, ECLI:EU:C:2015:555, *Taricco and Others*) because it struggled with its implementation in practice.

of judicial action and mounting pressure on the Court to leave important decisions on matters of social justice, economy and migration to the political branch, the conflict between judicial counterparts, even the more reluctant ones,[8] erodes trust in the judiciary as a rights-upholding branch on both the national and European levels. It disempowers both courts.[9]

This commentary analyses the judgment of the Court of Justice and the corresponding judgment of the Danish Supreme Court through the interaction of two layers of law: the surface layer (the 'law as it stands') and a deeper layer (the layer of legal culture and principles of law that underlie the surface layer).[10] It reflects upon fundamental questions of EU law pertaining to the horizontal effect of directives, general principles of EU law, and consistent interpretation or conform interpretation (from French *interprétation conforme*) as embedded in the deeper layer of legal culture and, in particular, the judicial method. The latter is an intrinsic part of judicial self-perception; it is how courts conceptualise their role in democratic societies.[11]

We claim that the preliminary reference made by the national Supreme Court to the Court of Justice was an invitation to reconsider questions of law *and* judicial power. More precisely: the preliminary reference sought clarification on points of law on the surface level. Those points of law are, however, inseparable from the law's deeper layer: the commensurability of the European judicial method with the Danish judicial method, and the value autonomy of a nation state to draw lines, in this case, between old and young, work and retirement, workers and employers, and individual and collective interests in the labour market. We argue that the Court of Justice, by addressing only the surface level and separating it from the deeper level of legal culture, provoked an unnecessarily harsh and exaggerated national response.

This commentary is structured as follows: The first section presents the facts of the case, the national legal framework and the questions posed in the preliminary reference. It summarises the arguments of the Advocate General, the Court of Justice, and the Danish Supreme Court. The second section is a reflection on the

[8] For the characterisation of the Danish Supreme Court as a rather reluctant participant in judicial dialogue *see* J. Elo Rytter and M. Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', 9 *International Journal of Constitutional Law* (2011) p. 470.

[9] Karen Alter argued that the willingness of national courts to cooperate with the Court of Justice was based on the empowerment thesis: the national courts gained ground in their national legal systems; in exchange, they empowered the Court of Justice: K.J. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009).

[10] K. Tuori, *Critical Legal Positivism* (Ashgate 2002).

[11] N. MacCormick and R.S. Summers, *Interpreting Statutes: A Comparative Study* (Dartmouth 1991) p. 463.

legal issues pertaining to the case as well as on the deeper aspects of legal culture that underlie those issues. It is divided into three parts. The first contains general observations on problematic aspects of the Opinion and the judgment of the Court of Justice. The second analyses the national judicial method and judicial self-understanding in order to comprehend the rejection of the interpretative solution offered by the Court of Justice to the Danish Supreme Court. The third delves deeper into the substance of the case – matters of national value autonomy and national sensitivity with regard to age discrimination in particular. The commentary ends with a brief conclusion.

The *Dansk Industri* case

The facts, the legal background, and the preliminary reference

The *Dansk Industri* case concerns the preliminary reference made by the Danish Supreme Court to the Court of Justice in a dispute between Mr Rasmussen and his employer, Ajos, a private company.

Mr Rasmussen was dismissed at the age of 60 but soon accepted another offer of employment and therefore remained in the labour force. Mr Rasmussen was in this case technically entitled to a severance allowance equal to three months' salary under paragraph 2a(1) of the Salaried Employees Law. However, because he had already reached pensionable age his situation fell under Paragraph 2a(3) of the same act, which provided an exception to the general principle. According to Danish law, employers were not obliged to pay the allowance in cases where the dismissed employee had joined a pension scheme before the age of 50, allowing them, at the time of the dismissal, to retire and receive a sizeable pension from the employer.

In March 2012, the trade union brought an action against Ajos on Mr Rasmussen's behalf before the Danish Maritime and Commercial Court, demanding payment of the severance allowance. Mr Rasmussen, however, passed away during the proceedings at the national level, which were subsequently resumed by his legal heirs.

On 14 January 2014, the Danish Maritime and Commercial Court upheld the claim, following the judgments of the Court of Justice in *Andersen*,[12] which declared that paragraph 2a(3) of the Danish Salaried Employees Law ran contrary to Directive 2000/78 (the Employment Directive). The Maritime and Commercial Court ruled that paragraph 2a(3) of the Salaried Employees Law ran contrary to a general principle of European law that prohibited age discrimination.

[12] ECJ 12 October 2010, ECLI:EU:C:2010:600, *Ingeniørforeningen i Danmark*.

Ajos appealed the judgment before the Danish Supreme Court. The latter stayed the proceedings and referred two questions to the Court of Justice for preliminary reference under Article 267 TFEU.

With its first question, the Danish Supreme Court sought to establish whether the principle of non-discrimination on grounds of age precluded the application of Danish legislation that denied an older employee the severance allowance.

Second, could a Danish court weigh the principle of non-discrimination on grounds of age against the principles of legal certainty and the protection of legitimate expectations in such situations, and conclude that the latter took precedence? In determining whether a balancing exercise could be carried out, would it be necessary to consider the possibility that the employee could claim compensation from the Danish State on account of the incompatibility of the Danish law with European law?

These questions arose within a distinctly national legal context. The key national provision in dispute was Article 2a of the Salaried Employees Law, stemming from 1971, which ran contrary to the Employment Directive, prohibiting discrimination on grounds of age. The Employment Directive was implemented in Denmark in 2004 through its transposition into Danish law as the Anti-Discrimination Law. However, the Anti-Discrimination Law did not amend the Salaried Employees Law. The Danish Supreme Court thus continued to apply its existing interpretation of Article 2a(3) of the Salaried Employees Law. This position was challenged six years later (in 2010) in *Andersen*. After *Andersen,* it became clear that the Danish Supreme Court's interpretation of Article 2a(3) ran contrary to the Employment Directive. However, *Andersen* concerned public sector employees, who could rely directly on the Employment Directive.[13] With regard to private sector employees, who could not invoke the Employment Directive because of the no-horizontal effect rule, the Danish Supreme Court reaffirmed its position that Article 2a(3) still applied. That situation resulted in a considerable amount of case law. The Danish legislator subsequently amended the Salaried Employees Law, bringing it in line with EU law. The amendment entered into force and application as of 1 February 2015.

The facts of *Dansk Industri* played out during the interim between *Andersen* and the amendment of the Salaried Employees Law. Accordingly, when Mr Rasmussen brought his case in 2012, the Danish Supreme Court held that

[13] The Employment Directive was implemented by the Danish Parliament in 2004. The legislator considered that the Employment Directive did not affect the severance allowance rules of the Law on Salaried Employees (Art. 2a), that is, the national provision in dispute in the *Ajos* case. The Act of Parliament no. 1417 of December 22, 2004 is available at <www.retsinformation.dk/Forms/R0710.aspx?id=30191>, visited 25 March 2017. The Law on Salaried Employees has since been amended several times, including the contested provision, which was amended in 2015 and now applies to all employees irrespective of age.

interpretation of Article 2a(3) in conformity with the Employment Directive and *Andersen* would be *contra legem*. The Employment Directive could not apply directly, and the Salaried Employees Law could not be interpreted in accordance with the Directive. By contrast, the general principle of non-discrimination on grounds of age could have direct effect and apply between private parties (horizontally), as the Court infamously decided in *Mangold* and *Kücükdeveci* (the *Mangold* principle). Hence, the question arose as to whether the disputed national provision also ran contrary to the general principle of EU law prohibiting age discrimination – to which the Directive gave a specific expression – and if it could apply in horizontal situations. The underlying question was whether the *Mangold* principle could effectively be limited by the principle of legal certainty.

The Opinion of the Advocate General

Advocate General Bot delivered his opinion in November 2015.[14] His main argument was that the Danish court could interpret the Danish law in conformity with the Employment Directive and thereby give it indirect effect. The matter was, arguably, a simple question of judicial 'technique.'[15]

The Advocate General came to this conclusion by first revisiting *Andersen* as the existing precedent. According to the Advocate General, the interpretation of the Court of Justice in that case was clear: the Danish provision as interpreted by the Danish courts was incompatible with Articles 2 and 6(1) of the Employment Equality Directive. Thus, the provision of Danish law in question 'quite simply'[16] also could not apply in relationships between employees and employers, whether they were governed by public or private law. The contrary view would result in restricting the scope of the Court's judgment to a single category of legal relationships, namely those governed by public law.

While the Advocate General acknowledged that the referring court's problem had to do with the limits of consistent interpretation and that court's conviction that interpretation of the national law in conformity with the Directive would be *contra legem*, he nonetheless advised the Court to examine the *validity* of the premise.[17] The Advocate General expressed doubts as to whether the Danish Supreme Court had sent the preliminary reference for the 'right' reasons, a rather unusual move: there was a problem of interpretation, however, it was not the problem identified by the Danish Supreme Court.

The Advocate General then refocused his analysis on a conceptual question: what is consistent interpretation? *In abstracto*, the Advocate General reasoned that

[14] Opinion of Advocate General Bot in *Dansk Industri, supra* n. 1.
[15] Ibid., point 64.
[16] Ibid., points 34 and 35.
[17] Ibid., point 57.

contra legem interpretation was an interpretation that contradicted the very wording of the national provision at issue: a national court would be confronted with the unpleasant prospect of *contra legem* interpretation if the clear, unequivocal wording of a provision of national law was irreconcilable with the wording of a directive – something that the Court of Justice acknowledges, yet does not, and cannot, require from national courts.[18] The Advocate General submitted, however, that the referring court was very clearly not in such a situation: 'Indeed, were it to interpret Article 2a(3) of the Law on salaried employees in conformity with Directive 2000/78, that would in no way compel it to rewrite that provision of national law. The national court would not, therefore, be making any incursion into the sphere of competence of the national legislature.'[19] Moreover, '[t]he implementation by the national court of an interpretation in conformity with EU law would merely require it to change its case-law so that the interpretation which the Court gave of Directive 2000/78 in its judgment in *Andersen* […] [was] given full effect in the national legal system […].'[20]

In concreto, the Advocate General suggested that the Danish Supreme Court had incorrectly assumed that it needed to adopt a *contra legem* interpretation in order to comply with EU law. In fact, consistent interpretation would not be *contra legem* since the actual wording of the Danish legislation was ambiguous.[21] The premise of the national court was thus mistaken. In support of this, the Advocate General referred to the Opinion of Advocate General Kokott in the *Andersen* case, which argued for consistent interpretation on the grounds that the Danish law was not clear.[22] Advocate General Kokott supported her conclusion by citing positions taken by the Commission and the Danish government. The Commission observed that the Danish Court's case law did not necessarily reflect the wording of Article 2a(3) of the Danish law on salaried employees. The Danish government, according to Advocate General Kokott, did not seem to believe it would be impossible to interpret the Danish law in conformity with the Directive.[23]

After concluding that the practice of the Danish Supreme Court was not necessarily compelled by the Danish statute, and that consistent interpretation was possible, Advocate General Bot considered whether the Danish Supreme Court would need to override the national legislature. According to the Advocate

[18] Ibid., point 68.
[19] Ibid., point 69.
[20] Ibid., point 70.
[21] Ibid., point 59.
[22] Ibid., point 61, AG Bot, referring to the Opinion of AG Kokott in *Ingeniørforeningen i Danmark, supra* n. 12, point 84.
[23] Opinion of AG Kokott in *Ingeniørforeningen i Danmark, supra* n. 12, point 63.

General this would not be the case as, by reversing previous national case law to give the Directive full effect, the Supreme Court in no way overstepped its judicial powers.[24] The Court of Justice, by insisting that the Danish Supreme Court depart from its case law, would in fact 'merely' be reminding the latter of the essential role it plays in 'providing the legal protection, which individuals derive from the rules of EU law, and (ensuring) that those rules are fully effective,' thus referring to *Kücükdeveci*, paragraph 47.[25]

The Advocate General reasoned that the national court would not be imposing new duties on the employer as a matter of EU law, but rather as a matter of national law interpreted in accordance with EU law. In conclusion, the Advocate General added that it was up to the Court of Justice to decide on the temporal limits of its judgments in accordance with the principle of legitimate expectations. There was thus no question as to whether the principle of non-discrimination on the basis of age could override the principles of legal certainty and legitimate expectations.

The judgment of the Grand Chamber

The Court, sitting in the Grand Chamber, did not follow the Advocate General's suggestion that it examine the validity of the premise that national law could not bear consistent interpretation. It opted to let the national court decide the matter instead. It did not question the assumptions made by the Danish Court but rather concentrated on the question of whether the principle of non-discrimination on grounds of age precluded the application of the Danish legislation. It also addressed the subject of the horizontal effect of unwritten principles, which the Advocate General had avoided entirely in his opinion. In summary, the Court of Justice outlined two alternatives for the Danish Supreme Court: The national Court could give indirect effect to the Employment Directive if it thought that the national law could bear consistent interpretation, or it could choose to dis-apply the Danish provision as being in conflict with the principle prohibiting age discrimination.

The Court developed its reasoning by laying out – step by step, pedagogically and authoritatively – the fundamentals of EU law beginning with the importance of national courts cooperating to ensure, first, the protection of individual rights derived from EU law and second, the full effect(iveness) of those provisions.[26]

On the one hand, the Court recognised that the doctrine of not granting horizontal effect to directives limited any efforts made by the national courts to

[24] Opinion of AG Bot in *Dansk Industri, supra* n. 1, point 71.

[25] *Kücükdeveci*, *supra* n. 3.

[26] *Dansk Industri*, *supra* n. 1, para. 29, citing ECJ 5 October 2004, ECLI:EU:C:2004:584, *Pfeiffer*, para. 111, and *Kücükdeveci*, *supra* n. 3, para. 45.

achieve those goals.[27] On the other, the *von Colson* principle obliged national courts to, first, consider *the whole body of rules of law*; second, to apply *methods of interpretation* recognised by those rules in order to interpret national law,[28] as far as possible, in the light of the wording and the purpose of the directive concerned;[29] and finally, to achieve the result sought by the directive and comply with the third paragraph of Article 288 TFEU.[30] The Court reminded the national court that consistent interpretation furthermore entailed

> the obligation for national courts to change its established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgment in *Centrosteel*, C-456/98, EU:C:2000:402, paragraph 17).[31]

The national court could thus not validly claim that consistent interpretation was impossible because it had always interpreted that provision in a manner that was not compatible with EU law.[32] If, however, the national court concluded that interpretation in line with the directive would be *contra legem* in a concrete case then, according to the Court of Justice, the general principle prohibiting age discrimination would require it to set aside national provisions that did not comply with that principle.[33]

The Court then turned to the second question: whether a national court could balance the principle of non-discrimination on grounds of age against the principles of legal certainty and the protection of legitimate expectations, and whether it could conclude that the principle of legal certainty took precedence. The Court did not discuss the principles of legal certainty and legitimate expectations at any great length. According to the Court, the national court was obliged, on the basis of settled case law, to apply correct (sic!) interpretation to situations established even before the Court had established its correct interpretation.[34] A further argument was that protection of legitimate expectations

[27] *Dansk Industri*, *supra* n. 1, para. 30 ff, with references to ECJ 26 February 1986, ECLI:EU:C:1986:84, *Marshall*, para. 48; ECJ 14 July 1994, ECLI:EU:C:1994:292, *Faccini Dori*, para. 20; and *Pfeiffer*, *supra* n. 26, para. 108.

[28] *Pfeiffer*, *supra* n. 26, paras. 113 and 114, and *Kücükdeveci*, *supra* n. 3, para. 48.

[29] National courts are never required to adopt *contra legem* interpretation, which the Court also stressed.

[30] ECJ 10 April 1984, ECLI:EU:C:1984:153, *von Colson and Kamann*, para. 26, and *Kücükdeveci*, *supra* n. 3, para. 47.

[31] *Dansk Industri*, *supra* n. 1, para. 33.

[32] Ibid., para. 34.

[33] Ibid., para. 37.

[34] Ibid., para. 40, with reference to ECJ 29 September 2015, ECLI:EU:C:2015:635, *Gmina Wrocław*, paras. 44 and 45 and the case law cited.

could not be invoked to deny the plaintiff protections that had been accorded by means of correct interpretation.[35] Thus, the national court could not invoke legal certainty and legitimate expectations in order to continue to apply a rule of national law that ran contrary to EU law. The Court of Justice did not consider the question of state liability.

At this point, it is appropriate to include a description of the Danish Supreme Court decision.

The judgment of the Danish Supreme Court

In its follow-up judgment, the Danish Supreme Court found that harmonious interpretation was not possible using the methods of interpretation recognised by Danish law.[36] Additionally, it considered that the principle of non-discrimination on grounds of age – which had no clear legal basis in the Treaty and was not covered by the Accession Act – could not override national law. We shall elaborate on these points in turn.

With regard to the first point, the Danish Supreme Court engaged in a detailed analysis of legal sources, confirming its position that consistent interpretation would be *contra legem*: the Danish law was clear. Article 2a was introduced in 1971 and Parliament left the wording of the provision unchanged in all later amendments. The Danish Supreme Court held that it could not deviate from such a clear provision using the methods of interpretation recognised under Danish law. All nine justices of the Danish Supreme Court agreed on this point.

The reasoning with regard to the second point was less straightforward, and controversial from an EU legal perspective: the Danish Supreme Court found that the principle of non-discrimination on grounds of age could not take precedence over conflicting Danish national law because there was no legal basis for such an effect. The unwritten general principle of non-discrimination on grounds of age was not a recognised source of Danish law. To arrive at this conclusion, the Danish Supreme Court reconstructed the meaning of the Danish Accession Act by analysing the accession process starting with the preparatory works leading to its initial adoption in 1972 and continuing on through its subsequent amendments. The Supreme Court's reasoning focused on the lack of legal basis in the Accession Act which, in the Court's estimation, placed limits on the applicability and effect of EU law within the Danish legal system. This meant that the Danish

[35] Ibid., para. 41, with reference to ECJ 8 April 1976, ECLI:EU:C:1976:56, *Defrenne*, para. 75, and ECJ 17 May 1990, ECLI:EU:C:1990:209, *Barber*, paras. 44 and 45.

[36] Case No. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A*, available at <www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf>, visited 25 March 2017.

Supreme Court considered the applicability of EU law in the Danish legal system to be a matter governed by the Accession Act rather than a matter of EU law (primacy).

As neither the Danish Accession Act as amended post-Lisbon nor the Danish Parliament's preparatory works preceding it referred to the case law of the Court of Justice establishing the general principle of non-discrimination on grounds of age (notably *Mangold* and *Kücükdeveci*), the Danish Supreme Court concluded that the Court of Justice did not have the jurisdiction to give it precedence over a conflicting national statute:

> 'The EU Court of Justice has jurisdiction to rule on questions concerning the interpretation of EU law: see Article 267 TFEU. It is therefore for the EU Court of Justice to rule on whether a rule of EU law has direct effect and takes precedence over a conflicting national provision, including in disputes between individuals.
>
> The question whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union.'[37]

Additionally, the Danish Supreme Court held that *Mangold* did not address the balance between the prohibition of age discrimination, and the principles of legal certainty and protection of legitimate expectations.

The Danish Supreme Court then summarised its position, and concluded that by giving effect to EU law it would overstep its judicial mandate:

> 'In summary, we accordingly find that the Law on Accession does 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 the provision is contrary to the prohibition.
>
> The Supreme Court would be acting outside the scope of its judicial powers if it were to dis-apply the provision in this situation.
>
> Consequently, the Danish courts cannot dis-apply paragraph 2a(3) of the Law on salaried employees as it stood and Ajos can rely on the provision.'[38]

The final position of the Danish Supreme Court was thus that, by setting aside national law, it would be acting beyond the limits of its own competence as a judicial body, thereby violating its mandate under the Danish constitution, notably section 3a on the separation of powers. The Danish Supreme Court ruled by a majority of eight, with one justice dissenting.

[37] Ibid. Unofficial translation.
[38] Ibid. Unofficial translation.

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Reflection

General observations

The *Dansk Industri* case highlights the discrepancy between the 'a-contextual' written word of European law and its application in a national context. Moreover, it brings to the fore the question of the doctrinal sustainability of the Court's own legal solutions and techniques to compensate for the lack of horizontal effect accorded to directives, in particular the limits of consistent interpretation.

From the European perspective, the referring court should have followed the 'sacred text':[39] a set of well-established precedents. National courts should apply general principles of European law in horizontal situations,[40] including the principle of non-discrimination on grounds of age.[41] The latter is a *general* principle of European law, stemming from international treaties and the constitutional traditions common to the Member States, to which the Employment Equality Directive merely gives 'specific expression'.[42] The content of the general principle is 'thus' no broader than the content of Articles 2 and 6 of the Employment Directive. Furthermore, according to settled case law, a national court hearing a dispute must protect rights that individuals derive from European law by ensuring their full effectiveness.[43] If necessary, the national court must dis-apply any provision of national legislation that runs contrary to this principle,[44] even if this requires the reversal of long-standing practice (case law).[45] There is, fundamentally, no doubt that the principles of legal certainty and legitimate expectation must yield to this obligation, and that they cannot stand in the way of individual rights and their effective enforcement.[46] That said, these principles are part of the *acquis* on the obligation of consistent interpretation: they impose limits on national courts, in particular on the no *contra legem* rule.[47]

However, this is usually easier said than done. The application of the above-mentioned *acquis* in the national context has been shown to pose problems.

[39] The term coined in M. Shapiro, 'Comparative Law and Comparative Politics', 53 *Southern California Law Review* (1979) p. 537.

[40] *Defrenne*, *supra* n. 35.

[41] *Mangold* v *Helm*, *supra* n. 2; *Kücükdeveci*, *supra* n. 3.

[42] *Kücükdeveci*, *supra* n. 3, para. 21.

[43] ECJ 9 March 1978, ECLI:EU:C:1978:49, *Amministrazione delle Finanze dello Stato* v *Simmenthal* and ECJ 19 June 1990, ECLI:EU:C:1990:257, *Factortame*.

[44] *Kücükdeveci*, *supra* n. 3, paras. 51 and 53.

[45] ECJ 13 July 2000, ECLI:EU:C:2000:402, *Centrosteel,* para. 17.

[46] *Defrenne*, *supra* n. 35, para. 75, and *Barber*, *supra* n. 35, paras. 44 and 45.

[47] ECJ 4 July 2006, ECLI:EU:C:2006:443, *Adeneler*, para. 110. For a general discussion *see* P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions, 34(3) *European Law Review* (2009) p. 349.

The Danish court was forced into an unenviable situation: to give effect to EU law it would have to abandon its own case law – which it had obviously previously deemed to be correct – because that precedent interpreted both EU law and national law incorrectly. For the highest court and the highest interpretive authority, this reversal would have been awkward if not humiliating. If it stuck to its case law and interpretive position it would violate EU law, potentially leaving itself open to liability. The Danish Supreme Court instead opted for open confrontation with the Court of Justice.

From the European perspective, an established set of legal principles (primacy, consistent interpretation, non-discrimination on grounds of age, the duty of national courts to protect the rights individuals derive from EU law) may, in theory, have formed a coherent whole and secured a proverbial 'seamless web of judicial protection' for individual rights. On the 'ground', however, the same principles may well have been triggering the fragmentation of the national legal system, discrimination between the treatment of public versus private employment relationships and older versus younger workers, and increased financial burdens on private employers – effects not remedied by national legislation.

The solution proposed by the Advocate General diverged greatly from the concerns of the referring court.[48] The suggestion that the Danish Supreme Court apply consistent interpretation completely dodged the *Mangold* problématique and the ever-awkward horizontal effect of unwritten general principles of European law, which were both at the core of the preliminary reference. The Opinion was constructed upon the established and fundamental *judge-made doctrines* of European law. Paradoxically, it could be argued that the reliance on fundamental doctrines did not enable the Advocate General to solve, but rather to avoid the fundamental and unsolved *problems and questions*. In other words, the Opinion failed to engage with precisely those issues the Danish Supreme Court considered legally unconvincing and that prompted it to make a reference in the first place, while ignoring the above-mentioned predicament the Danish Supreme Court found itself in. At first glance, the Opinion proposes the least invasive and least confrontational technique for ensuring the conformity of national law with EU law, namely, consistent interpretation. Upon further inspection, the authoritative language and the logic of primacy in the Opinion seem, by contrast, to demand just the opposite: a complete make-over of national law by the Danish Supreme Court. Even more controversially, the Opinion demanded the adoption of judicial methodology and a judicial role foreign to the Danish Supreme Court.

The judgment of the Court did not avoid addressing the problems inherent in using the horizontal application of general principles to make up for the lack of

[48] Interestingly, the judgment of the Danish Supreme Court disregards the Opinion of AG Bot in this case, while referring to the same Advocate General in the discussion of *Kücükdeveci*.

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horizontal effect accorded to Directives, or for reluctance to make use of *contra legem* interpretation. Nonetheless, the Court did not reconsider a single one of its existing legal arguments. It did not acknowledge that the principle of non-discrimination on grounds of age was a contestable and contested issue, perhaps hoping that the Danish Supreme Court would follow the example of the German courts.[49]

These general observations converge at two main points, which we address in more detail below. First, the Opinion and the Judgment are unreflective and categorical. Both fail to engage with disturbing aspects the Court's previous case law and methods of interpretation as seen through the eyes of the referring court, thereby disregarding the deeper layers of national judicial specificity and legal culture. Second, *Dansk Industri* is also based on a problematical precedent, *Andersen*, in which the Court touches on sensitive issues of Member State autonomy.

Intrusive methods of interpretation

The *Dansk Industri* case brought together two seemingly irreconcilable judicial methods and institutional self-images: an 'activist' Court of Justice, often crossing the boundary of legal application with its purposive method of interpretation, and a 'self-restrained' Danish Supreme Court, respectful of the limits of judicial power in a democratic system.[50] In this section we shall develop this argument further.

Even if the Danish Supreme Court believed that consistent interpretation was, generally, an acceptable method of giving effect to EU law in the court systems of Member States that recognised such methods of interpretation, the idea of putting it into practice in the Danish legal system sat uncomfortably with its self-image as an essentially law-applying institution. Such institutions, it is safe to say, do not reverse their case law easily; this conflicts with their conception of legal certainty. And, they do not gladly reverse it on the order of a Court whose methods they distrust and disagree with; this conflicts with their idea of democracy.

The judgment passed down by the Court of Justice shows little patience for the self-constraint of the Danish Supreme Court, and ignorance of its interpretive traditions. The Court reaffirms its case law without casting doubt or trying to elaborate on its scope, content, or context. This is nothing new,[51] but one could

[49] *Mangold* provoked a fierce reaction of the legal community (and the general public) but eventually the German Constitutional Court complied with the guidelines.

[50] The Danish Supreme Court makes several references to the law-making activity of the Court of Justice, which adopts decisively different methods of interpretation, in particular the objective-teleological method, and its past law-making activity. It demonstrates this contrasting approach with multiple references to legislative text and legislative intent.

[51] For criticism, *see* M. de S. O. L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2009).

imagine that, in the present case, it aggravated Danish disagreement with the legal questions, the intrusive proportionality test as a balancing exercise with an uncertain outcome, and the unwelcome judicial meddling with the legislative process through the interpretive technique of consistent interpretation. The concerns of the Danish Supreme Court were not illusory, as we demonstrate in more detail below.

The Danish Constitution of 1849 did not codify judicial review of legislative acts. The Danish Supreme Court first asserted this power in 1921, however only in cases where 'the act's incompatibility with the *text* of the Constitution [was] certain and manifest.'[52] This statement is characteristic of the Danish approach to legal interpretation, which is textual and subjective-teleological.[53] It is set in a legal culture that considers judicial self-restraint a virtue, and a majority in Parliament the ideal type of government. In this setting, an unelected supranational judicial body with the ability to set aside national laws will be perceived as a highly disturbing – and even illegitimate – element in the European political process. This sentiment is held not only by many national judges but is equally present among politicians, national legal experts, and the general public.[54]

The judgment of the Danish Supreme Court reflects these concepts. It lists all relevant sources of Danish law – at great length and in inelegant and painstaking detail – taking up 20 (of in total 70) single-spaced A4 pages. The Court revisits Danish legislation, European legislation and the 1972 Act of Accession as well as its amendments post-Lisbon. Throughout the text, the Danish Supreme Court, without exception, interprets legal sources literally and looks for legislative intent, often quoting entire passages from preparatory works, parliamentary debates, and commentaries to the draft legislation, notices or explanations from the Ministry of Foreign Affairs, and Reports from the Ministry of Justice on the correct application and interpretation of Danish statutes, and even the recommendations of various legislative committees.

As an illustration, when discussing the sources of law that justified the transfer of sovereign power from the Danish state to the EU in the Law of Accession, the Danish court invokes parts of the report of 11 May 2009 on the relationship between the EC Court of Justice's jurisdiction and the Constitution, drafted by the Ministry of Justice and Ministry of Foreign affairs, in cooperation with the Office of the Prime Minister. In that report, the discussion also revolved around the 'Court of Justice's law-making activity' and 'style of interpretation,' which

[52] B. Christensen, *Rettens forhold til regeringen efter 1849* [*The Court's relationship with the Government after 1849*], in HØJESTERET 1661–1961 [THE SUPREME COURT 1661–1961] p. 407, 408.

[53] Rytter and Wind, *supra* n. 8.

[54] Ibid., p. 475.

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could raise 'constitutional issues.' The law-making activity and style of interpretation are defined as methods by which the 'Court of Justice, in its interpretations, also attaches importance to interpretative factors other than the wording of the relevant provisions, including the aim of the treaty or legal act.' The tone of the report is tolerant of both, stressing however their 'foreignness' to the Danish legal system.

The Danish Supreme Court concludes that the principle of non-discrimination on grounds of age, with its origins in various international instruments and in the constitutional traditions of the Member States – but not in the text of the Treaty, the Accession Act or its post Lisbon amendments – is not directly applicable in Denmark.

Intrusive tests and national sensitivity

The decision of the Court of Justice in *Dansk Industri* is about *how,* and not *why*, the Danish Court should bring Danish law into conformity with the Directive. *How* the Danish Court should do so, as outlined above, is either by consistent interpretation or by the disapplication of the national law. *Why* the Danish law constituted a violation of the Employment Directive was not explained, as the Court of Justice had already decided the question in the earlier *Andersen* case. We believe that the inimical reaction of the Danish Court can only be fully understood in light of *Andersen*, where the Court of Justice decided that the Danish law ran contrary to the Employment Directive. We will argue that the Court in *Andersen* opted for an audacious interpretation of the Employment Directive, thereby touching upon the value autonomy of Member States.

Generally speaking, there are two reasons that can serve to clarify why the interpretation of the Employment Directive by the Court elicited such controversy. First, according to the general commentary attached to the Danish Anti-Discrimination Law implementing the Employment Directive, the Danish legislator saw the Salaried Employees Law, which was at stake in both *Dansk Industri* and *Andersen*, as falling under the derogations specified in the Employment Directive. Therefore, it did not need to be amended and therefore remained independent from the Danish Anti-Discrimination Law.[55] The Danish Supreme Court later referred to this commentary of the Danish legislator so as to make clear that there was no basis for arguing that the Danish Anti-Discrimination Law took precedence over the Salaried Employees Law. Because it was arguably impossible to interpret the latter law in conformity with the Employment Directive, the Danish Supreme Court concluded that there was a *contra legem* situation.

[55] Ibid., fn. 32.

Second, and independent of the views held by the Danish legislator and the Danish Supreme Court, interpretation of the Employment Directive by the Court of Justice would still have been ambiguous, since the interpretation of individual rights is never value neutral.[56] The right to equality is an imprecise concept:[57] 'an empty vessel with no substantive moral content of its own.'[58] The formula employed in discrimination matters is that like cases should be treated alike, and unlike cases in an unlike manner. Yet, the law does not determine the *tertium comparationis* that underlies a clear value judgement.[59] The interpretation of the individual right to equal treatment on grounds of age – as found in the Employment Directive – is thus never neutral, and therefore might come into conflict with dominant values present in the cultures of the various Member States.

The fundamental rights jurisprudence of the Court of Justice has received increasing criticism alleging disrespect towards Member States' concerns and values. The Court is said to focus mainly on individual rights and entitlements, thereby disregarding the (public) interests of the Member States.[60] The danger is that such bias arguably encourages cultural homogenisation and centralisation, and endangers the pluralistic nature of the European constitutional architecture.[61] Underlying these concepts of private and public autonomy is the ultimate question of how best to achieve individual freedom and autonomy. Whereas advocates of private autonomy believe that the full realisation of individual freedom requires the strengthening of individual rights, public autonomy advocates argue that individual freedom also requires a strengthening of

[56] This underlies a specific conception of rights, according to which rights are never neutral and always underlies a specific collective good or general interest. *See* for instance Raz, *infra* n. 62; J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press 1999) p. 102-128. For a critique of such conception of rights, *see* for instance J. Waldron, 'Rights as Trumps', in J. Waldron (ed.), *Theories of Rights* (Oxford University Press 1984).

[57] It was the ideal of Enlightenment philosophers like Locke and Rousseau, and provided the basis for the French Declaration of the Rights of Man and the US Constitution. As Schaar writes, '[e]quality is a protean word. It is one of those political symbols […] into which men have poured the deep urgings of their hearts': J. Schaar, 'Equality of Opportunity, and Beyond', in J. Roland Pennock and J.W. Chapman (eds.), *Equality* (Aldine Transaction 2007).

[58] P. Westen, 'The Empty Idea of Equality', 95 *Harvard Law Review* (1982) p. 537 at p. 547.

[59] This *tertium comparationis* upon which a decision of likeness is made is the gateway to understanding the value base upon which a non-discrimination case decision is taken. *See* S. Baer, 'Equality: The Jurisprudence of the German Constitutional Court', 5 *Columbia Journal of European Law* (1999) p. 249; Westen, *supra* n. 58, p. 537.

[60] For an intriguing argument along these lines, *see* for instance J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy', 12 *International Journal of Constitutional Law* (2014) p. 525.

[61] *See* M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5(1) *EuConst* (2009) p. 5.

the cultural and social context that the individual inhabits.[62] Hence, the views of those who criticise the individual autonomy bias of the Court of Justice and are fearful of the cultural homogenisation of Europe are grounded in a belief that the freedom and autonomy of European citizens not only requires a strengthening of individual rights, but also respecting the values and cultures of Member States.

To be clear, the idea that a transnational court like the Court of Justice is the final arbiter of fundamental rights has great merit, since it is able to pass judgment on individual rights independent of traditional and cultural constraints in a national context. Yet, while disentanglement from the national context can be liberating for the individual, it also runs the risk of disregarding and overruling certain values specific to the national context, and which are equally important for individual autonomy and freedom. So how can a court like the Court of Justice adjudicate such competing claims? How can it be the ultimate guardian of the individual autonomy and freedom of European citizens while respecting public autonomy, meaning the diverse cultures, traditions, and values predominant in the various European Member States?[63] This question can be addressed only after one understands which value considerations a fundamental rights question touches upon.[64] The value considerations at issue in the *Andersen* case will be addressed in more detail below.

The facts of the case are nearly identical to the facts of *Dansk Industri*, with one difference: Mr Andersen was dismissed by his public-sector employer. When the Region Syddanmark dismissed him after 27 years of employment, he was 63 years old, meaning that he had reached the minimum age (60, in his case) for receiving an old-age pension. However, as Mr Andersen did not wish to stop working, he registered as a job-seeker and requested a severance allowance from his former

[62] This interpretation of private and public autonomy underlies a perfectionist understanding of individual freedom and autonomy, *see* J. Raz, *The Morality of Freedom* (Oxford University Press 1988).

[63] Many terms have been used to describe the interest of a collective (as opposed to the interest of the individual), such as public autonomy, collective good, general interest etc.

[64] J. Komárek suggests that national courts are generally better equipped to decide on fundamental rights matters due to their tendency to take issues of public autonomy seriously into account. We believe that the answer is not so straightforward, and that it depends on the value judgement underlying the respective right. Neither is it convincing to argue that a national court is generally better equipped to decide on fundamental rights issues, as J. Komárek claims, nor can we claim that the Court of Justice is generally the best forum for adjudicating fundamental rights. AG Kokott's Opinion in *Andersen* seems to be grounded in the latter approach, as she compares matters of non-discrimination on grounds of age with those of pregnancy and gender, a comparison that is mind-boggling (Recital 38, CJEU), as the nature of the right of non-discrimination on grounds of age and gender could not be more disparate. Unfortunately, the case-note is too short to explain this argument in greater detail.

employer on the basis of the Danish Salaried Employees Law, the same law at stake in *Dansk Industri*.[65] As Mr Andersen had already reached pensionable age, his employer refused to pay a severance allowance, a decision he challenged in court. The Court of Justice had to decide whether the Danish law was discriminatory on grounds of age.

The Court held that the Danish law, which deprived certain workers of their right to a severance allowance for the sole reason that they were entitled to an old-age pension, constituted discriminatory treatment on grounds of age, as prohibited by Directive 2000/78.[66] The Court followed its usual three-stage analysis. After deciding that the situation fell within the scope of EU law and that the national provision was discriminatory, the Court dedicated the bulk of its judgment to addressing the question of whether such discriminatory treatment could be justified on the basis of Article 6(1) of the Directive. Whereas the legitimate aims the Danish government invoked to justify the measure could be considered 'objective and reasonable' in the terminology of Article 6(1) of the Employment Directive,[67] the Court did not consider the measure to be necessary.

The Court has so far developed two types of proportionality test on the basis of Article 6(1) of the Directive, one loose and one strict.[68] The use of these differing levels of scrutiny becomes especially clear at the last stage of the proportionality test, where different levels of scrutiny concerning the *appropriateness* and the *necessity* of the legitimate aims are pursued.[69] The Court mainly uses the loose test in cases regarding retirement age, thereby giving broad discretion to the public autonomy interests of the Member States. In the *Palacios* case, for instance, the Court did not seem to find anything inappropriate about choosing an arbitrary age for mandatory retirement.[70] Furthermore, in retirement age cases, the Court often uses what

[65] On this basis, employers, in the event of the dismissal of an employee who has been employed for 12, 15, and 18 years, have to pay the employee a severance allowance corresponding respectively to one, two, or three months' salary. Several exceptions to this rule exist, such as that the employer does not have to pay the severance allowance if the employee has reached pensionable age. As one derogation to this rule, the employer is freed of this obligation if the employee, on termination of the employment relationship, is entitled to an old-age pension (Art. 2a(2)) and/or receives an old age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 (Art. 2a(3)).

[66] *Ingeniørforeningen i Danmark, supra* n. 12, paras. 23-24.

[67] For a discussion of what 'objective and reasonable' means, *see* the Opinion of AG Kokott in *Ingeniørforeningen i Danmark, supra* n. 12, paras. 41-45.

[68] *See* C. Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture', 40 *Industrial Law Journal* (2011) p. 280 at p. 291-295; E. Dewhurst, 'The Development of EU Case-Law on Age Discrimination in Employment: "Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four"', 19 *European Law Journal* (2013) p. 517 at p. 526.

[69] *See* Dewhurst, *supra* n. 68, p. 535.

[70] The Court decided that it was up to the national court to balance the legitimate aims of the Member State with suitable measures 'on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a

Kilpatrick has termed 'add-ons' to back up the proportionality of the legitimate aim claim made by the Member States by, for instance, taking into account such matters as the legitimate interests of the individual concerned or the fact that the disputed law was collectively bargained.[71] By contrast, in cases like in *Mangold*, which did not concern retirement age but where the age threshold was also arbitrarily determined, the Court adopted a strict proportionality test and eventually decided the case in favour of individual autonomy above the public interests of the Member State.[72]

The Court's decision in *Andersen* stands out in this respect, as it used the proportionality test 'add-on' it had previously used in *Palacios* in order to screen the legitimate aim of the applicant in greater detail. However, it did not use the extra tool to back up the proportionality of the Member State's public autonomy claim as it had in *Palacios*, but rather to declare the Danish measure disproportionate. More concretely, the Court argued that the Danish measure unduly prejudiced Mr Andersen's right to work. Although he was of pensionable age, he wished to continue pursuing his career and therefore needed the allowance. Although *Andersen* involves the sensitive matter of retirement age, it was decided in favour of the individual and not in favour of the Member State's public autonomy.

The value judgment underlying the Court's case law – which we discern in the 'add-on' to the proportionality test – allows us to identify criteria by which we can more satisfyingly address the question of whether *Andersen* should have been decided in favour of the individual, or rather in favour of public autonomy. In this 'add-on', the Court of Justice specified that the situation of the applicant and that of a younger employer with the same length of service was alike in that they both enjoyed a right to work.[73] It is this reference to the right to work which touches upon the fundamental question of what makes the life of a person who has reached pensionable age worthy and valuable.

In a culture dominated by 'Youthism', 'old age is typically depicted as a time of decrepitude and social marginality'.[74] Often, laws touching on matters of

particular Member State, to prolong people's working life or, conversely to provide for early retirement': ECJ 16 October 2007, ECLI:EU:C:2007:604, *Felix Palacios de la Villa* v *Cortefiel Servicios SA*, para. 69.

[71] Kilpatrick, *supra* n. 53, p. 293.

[72] In *Mangold*, the Court argued that the German measure, which had an age threshold of 52, would not benefit the legitimate aim of integrating older workers into the workforce as they could be offered an indefinite number of fixed-term contracts until retirement.

[73] In some cases, the choice of comparator is very obvious, such as in *Roca Álvarez* where it was obvious that the situation of, respectively, men and women was being compared. In age discrimination cases, the choice is more difficult, as many different age categories can serve as comparator. The comparator chosen by the Court in *Andersen* only becomes apparent with the add-on to the proportionality test in Recital 44.

[74] J. Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge University Press 2006) p. 11.

retirement age therefore conjure up negative images and stereotypes, such as that the average worker's health, cognitive ability, and working capacity decrease upon reaching pensionable age. In short: the pensionable worker is unproductive and redundant.[75] However, the attribution of a level of productivity to older workers is not without danger, as advocates of retirement age legislation have repeatedly pointed out. According to them, the idea so commonly held in modern societies – that successful aging means being and remaining active, productive and healthy until an advanced age – is contestable and offers little more than a prescription for a type of authoritarian 'lifestyle fascism.' They argue that older workers should be protected from having to fulfil the same societal expectations as younger people – such as being productive, active, and flexible – and that a life of quietude and relaxation in old age is equally valuable. The decision of the Court in *Andersen* has to be understood against a backdrop of varying conceptions of what a good life in old age entails. It is a decision grounded in the conviction that being productive, healthy, and active in old age is something to be valued and worshipped.[76]

Clearly, *Andersen* was not about the state forcing older workers to stop by means of a compulsory retirement age, as in *Palacios*. Nevertheless, the Danish law in *Andersen* can clearly be interpreted as the Danish state dis-incentivising older workers eligible for pension from looking for new employment, just as it constrained Mr Andersen's desire to continue working. The law is therefore at the foundation of a different value judgment determining what successful aging means than the value judgment made by the Court of Justice. While there are good arguments for both approaches, this case note does not pretend to choose one side or the other. Rather, the question here is whether it would have not been more appropriate for the Court to give discretion to Denmark, since the underlying considerations touched upon issues of profound national sensitivity. In her Opinion in *Andersen*, Advocate General Kokott suggested that a feasible balancing act between individual and public autonomy issues in that the Danish legislature 'could have made payment of the severance allowance subject to the condition that the worker concerned must actually register as a job seeker for a certain minimum period of time and refrain from claiming payment of his old-age pension until that period has expired.'[77] Against this background, the Court of Justice could have confined itself to indicating how the balance between private and public autonomy in the necessity component of the proportionality test could be struck, and deferred to the national court by allowing it to rule on it.

When it comes to age-discrimination cases, it is important to acknowledge that there is no such thing as age neutrality, and that rulings on age-discrimination

[75] Ibid., p. 10-11.
[76] *Ingeniørforeningen i Danmark, supra* n. 12, para 44.
[77] Opinion of AG Kokott in *Ingeniørforeningen i Danmark, supra* n. 55, para. 65.

always touch upon sensitive national values. Against this background, the Danish Court decision can also be read as a clear signal to the Court of Justice that certain fundamental rights decisions require the Court of Justice to allow Member States 'a margin of discretion', thereby avoiding cultural homogenisation and centralisation that could endanger the pluralistic nature of the European constitutional architecture.

Conclusion

In summary, this analysis focuses on two problems inherent to the *Dansk Industri* judgment: the upholding of European dogmas while showing no sensitivity to national judicial specificity and to the national legal culture; and the problems posed by allowing precedent to encroach upon a Member State's value autonomy. The Danish Supreme Court questioned certain fundamental European law doctrines, and urged the Court of Justice to re-evaluate some of their most problematical aspects. The inflexibility of the Court of Justice in this respect was met with a seemingly equal measure of obstinacy from the Danish Supreme Court. The most distressing result is not, as would initially appear, the rebellion of a national high court against a supranational court, but rather the mutual disempowerment of European courts as rights-upholding institutions at a time when the judicial protection of individual rights, public trust in the judiciary to perform this task, and cultivation of an unwavering faith in the European project, are more important than ever before.

No court feels at ease when it is confronted with an explicit jurisprudential reversal. The Danish Supreme Court made an attempt when it sent a preliminary reference to Luxembourg. The rest is history.

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