JUDGMENT OF THE SUPREME COURT
Delivered Thursday 6 December 2016

Case 15/2014
(First Chamber)

DI, acting on behalf of Ajos A/S
(advokat Thomas Nielsen)
v
Estate of A
(represented by advokat Arvid Andersen)

Judgment in earlier proceedings delivered by the Sø- og Handelsretten (Maritime and Commercial Court) on 14 January 2014.

The bench consisted of nine judges: Poul Søgaard, Jytte Scharling, Thomas Rørdam, Jon Stokholm, Poul Dahl Jensen, Jens Peter Christensen, Hanne Schmidt, Lars Hjortnæs and Kurt Rasmussen.

Claims

The parties have reiterated their claims.

Reference for a preliminary ruling

By order of 22 September 2014 (UfR 2014.3667), the Højesteret (Supreme Court) requested the EU Court of Justice to answer the following questions:

'Question 1
Does the general EU law principle prohibiting discrimination on grounds of age preclude legislation, such as the Danish legislation at issue, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement?

Question 2
Is it consistent with EU law for a Danish court hearing an action in which an employee seeks from a private-sector employer payment of a severance allowance which, under the Danish law described in question 1, the employer is not bound to pay, even though that is contrary to the general EU principle prohibiting discrimination on grounds of age, to weigh that principle and the issue of its direct effect against the principle of legal certainty and the related principle of the protection of legitimate expectations and to conclude on that basis that the principle of legal

certainty must take precedence over the principle prohibiting discrimination on grounds of age, such that the employer is, in accordance with national law, relieved of its obligation to pay the severance allowance and, in order to determine whether such a balancing exercise may be carried out, is it necessary to take into consideration the fact that the employee may, in appropriate cases, claim compensation from the Danish State on account of the incompatibility of Danish law with EU law?'

The Supreme Court stated inter alia the following by way of background for the questions referred:

6. *Background for the questions*

6.1. When A was dismissed and left his post with Ajos A/S at the end of June 2009, he had been continuously employed with the company since 1 June 1984 and therefore was, in principle, entitled to a severance allowance corresponding to three months' salary under Paragraph 2a(1) of the Law on the relationship between employers and salaried employees (Funktionærloven) ('the Law on salaried employees'). However, as he had reached the age of 60 and was entitled to an old-age pension from his employer under a scheme he had joined before reaching the age of 50, under Paragraph 2a(3), as consistently interpreted in the case-law, he was not entitled to that severance allowance, even though he continued in employment following his dismissal: see below under point 6.5.

6.2. By judgment delivered on 12 October 2010, *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600 (often referred to as 'the *Ole Andersen* case'), the EU Court of Justice held that, by not permitting payment of the severance allowance to workers who are eligible for an old-age pension from their employer, Paragraph 2a(3) of the Law on salaried employees is contrary to the Employment Directive [Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation] and the prohibition contained therein prohibiting discrimination on grounds of age where the dismissed workers intend to continue with their career.

6.3. In cases where the employer is a public authority, as was the situation in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, the conflict between the national provision in Paragraph 2a(3) of the Law on salaried employees and the Employment Directive can be resolved by allowing the employee to invoke and rely on the very provisions of the directive – provided that they are unconditional and sufficiently precise – so that Paragraph 2a(3), in that specific application of that law, is overridden in so far as that provision is contrary to the directive.

6.4. In situations involving individuals it is not possible to attach direct effect to directive provisions: see, for example, paragraph 42 in the EU Court of Justice's judgment in *Dominguez*, C-282/10, EU:C:2012:33. In cases between individuals a possible conflict between a national provision and a directive can be resolved by interpreting the national provision as much as possible in keeping with the directive, so that the apparent conflict is removed. This obligation to interpret in conformity with the directive is subject to certain limitations and there is no obligation to interpret national law *contra legem*: see paragraph 25 of that judgment.

6.5. In Danish case-law Paragraph 2a(3) of the Law on salaried employees has been consistently interpreted – see, most recently, the Supreme Court's judgment in UfR 2014.1119 – as meaning that an employee is not entitled to a severance allowance if the employee is entitled to an old-age pension financed by his or her employer under a scheme which the employee in question joined before attaining the age of 50, irrespective of whether the employee opts temporarily not to receive a pension in order to pursue a professional career. Against that background it would be *contra legem* to interpret Paragraph 2a(3) in such a manner as to bring the provision into line with the Employment Directive as interpreted by the EU Court of Justice in its judgment *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

6.6. The main issue in this case then becomes 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. The case thus raises issues of whether an unwritten EU law principle can preclude an individual or private-sector business from relying on a national legislative provision.

6.7. In *Kücükdeveci*, C-555/07, EU:C:2010:21, the EU Court of Justice held — by way of extension of its judgment in *Mangold*, C-144/04, EU:C:2005:709 — that there is a principle prohibiting discrimination on grounds of age which must be regarded as a general principle of EU law, and that the Employment Directive gives specific expression to that principle (paragraph 21). In *Kücükdeveci*, C-555/07, EU:C:2010:21, the EU Court of Justice further held that it is for the national court, which must rule on a dispute involving that principle, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (paragraphs 51 and 53).

6.8. Following the judgment in *Kücükdeveci*, C-555/07, EU:C:2010:21, one of the EU Court of Justice's Advocates General has highlighted a number of issues of principle and called for the EU Court of Justice's approach in that judgment to the issue of direct application of general legal principles in relation to individuals to be the subject of a more in-depth examination in terms of legal theory: see Advocate General Trstenjak's Opinion in *Dominguez*, C-282/10, EU:C:2011:559. In that connection the Advocate General has inter alia queried the significance of the principle of legal certainty and the impact of the EU Court of Justice's approach in leaving the question of the true scope of the protection of the general legal principle fully open without stating whether the directive possibly contains broader provisions which fall outside the principle's protection.

6.9. In particular in terms of the principle of legal certainty Advocate General Trstenjak, in her Opinion in *Dominguez*, C-282/10, EU:C:2011:559 (point 164) asserted that the EU Court of Justice has stated on numerous occasions that the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. The Advocate General went on to state that, since following the EU Court of Justice's approach in *Kücükdeveci*, C-555/07, EU:C:2010:21, it will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law there would, from his point of view, be uncertainty as to the application of national law similar to that experienced where a directive is directly applied in a relationship between private individuals, which the EU Court of Justice, as so often affirmed in its case-law, has been at particular pains to avoid. The EU Court of Justice has also held in its most recent case-law that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between individuals: see *Association de médiation sociale* v *Union locale des syndicats CGT and Others*, C-176/12, EU:C:2014:2, paragraph 36.

6.10. As stated earlier, the present case involves a situation where a private-sector employer has dismissed an employee in circumstances where under the national legal rules (Paragraph 2a(3) of the Law on salaried employees) the employer cannot be ordered to pay a severance allowance, but where this is contrary to the Employment Directive as interpreted by the EU Court of Justice in its judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

6.11. With the first question guidance is sought as to whether the unwritten EU law principle prohibiting discrimination on grounds of age has the same content and scope on this point as in the Employment Directive, or whether the Employment Directive on this point contains protection against age discrimination which is broader than what follows from the EU law principle.

6.12. If the answer to the first question means that the scheme under Paragraph 2a(3) of the Law on salaried employees is not only (partly) contrary to the Employment Directive as held by the EU Court of Justice in its judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, but is also contrary to the principle prohibiting discrimination on grounds of age, the question then arises as to the direct application of the principle in relations between individuals (so-called horizontal direct effect). Following the EU Court's judgment in *Mangold*, C‑144/04, EU:C:2005:709 (particularly paragraphs 77 and 78) and *Kücükdeveci*, C‑555/07, EU:C:2010:21 (particularly paragraphs 51 and 53) it must be assumed that EU law requires that the prohibition of discrimination on grounds of age covered by that principle is to be applied directly by the national courts in cases between individuals as well.

This raises questions as to how such a direct application in relation to an individual is to be balanced with the principle of legal certainty and the related principle of the protection of legitimate expectations.

By question 2 guidance is sought as to whether it is compatible with EU law for a Danish court, in a case between an employee and a private employer concerning payment of a severance allowance which the employer under national law as described in question 1 is exempt from having to pay but where that result is not compatible with the general EU law principle prohibiting discrimination on grounds of age, to undertake a weighing-up of that principle and its direct effect with the principle of legal certainty and the related principle of the protection of legitimate expectations and, following that weighing-up, reaches the conclusion that the principle of legal certainty must prevail over the principle prohibiting discrimination on grounds of age, with the result that under national law the employer is exempt from having to pay the severance allowance.

Guidance is also sought as to whether the fact that the employee, depending on the circumstances, may claim compensation from the State as a result of the Danish legislation's incompatibility with EU law has an impact on the issue of whether such a weighing-up may be considered: see in that connection the case-law following from the judgment of 19 November 1991 in *Francovich and Others*, C-6/90 and C-9/90), ECLI:EU:C:1995:372, whereby both the

principle prohibiting discrimination on grounds of age and the principle of legal certainty can be accommodated.'

The Court of Justice of the European Union (Grand Chamber) delivered judgment on 19 April 2016, *Dansk Industri*, C-441/14, ECLI:EU:C:2016:278, stating inter alia :

'*Question 1*

21 By its first question, the referring court, which is adjudicating in a dispute between private [individuals], seeks to ascertain, in essence, whether the general principle prohibiting discrimination on grounds of age is to be interpreted as precluding national legislation, such as that at issue in the proceedings before it, which deprives an employee of the right to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.

22 In order to answer that question, it is appropriate first of all to note that the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in *Mangold*, C-144/04, EU:C:2005:709, paragraph 74, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraphs 20 and 21). It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union ['the Charter'], must be regarded as a general principle of EU law (see judgments in *Mangold*, C-144/04, EU:C:2005:709, paragraph 75, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 21).

23 It should then be noted that, as Directive 2000/78 does not itself lay down the general principle prohibiting discrimination on grounds of age but simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle. The EU legislature intended by the adoption of the directive to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment and, in particular, to specify various possible exceptions to that principle, circumscribing those exceptions by the use of a clearer definition of their scope.

24 Lastly, it should be added that, in order for it to be possible for the general principle prohibiting discrimination on grounds of age to be applicable to a situation such as that before the referring court, that situation must also fall

within the scope of the prohibition of discrimination laid down by Directive 2000/78.

25 It is sufficient to observe in that regard that, as the Court has previously held, by generally excluding a whole category of workers from entitlement to the severance allowance, Paragraph 2a(3) of the Law on salaried employees affects the conditions regarding the dismissal of those workers for the purposes of Article 3(1)(c) of Directive 2000/78 (judgment in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 21). It follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age.

26 In those circumstances and in the light of the fact that the Court has previously held that Articles 2 and 6(1) of Directive 2000/78 are to be interpreted as precluding national legislation, such as the legislation that is the subject of the present request for a preliminary ruling, pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they joined before attaining the age of 50 cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment (judgment in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 49), the same applies with regard to the fundamental principle of equal treatment, the general principle prohibiting discrimination on grounds of age being merely a specific expression of that principle.

27 In the light of the foregoing considerations, the answer to the first question is that the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as precluding, including in disputes between private [individuals], national legislation, such as that at issue in the proceedings before the referring court, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.

Question 2

28 By its second question, the referring court seeks to ascertain, in essence, whether EU law is to be interpreted as permitting a national court seised of a dispute between private [individuals], where it is established that the relevant national legislation is at odds with the general principle prohibiting discrimination on grounds of age, to balance that principle against the principles of legal certainty and the protection of legitimate expectations and

to conclude that the latter principle should take precedence over the former. In that context, the referring court is also uncertain whether, in carrying out that balancing exercise, it may or must take account of the fact that the Member States are under a duty to compensate for the harm suffered by [individuals] as a result of the incorrect transposition of a directive, such as Directive 2000/78.

29 In the first place, it should be noted in that regard that, according to settled case-law, where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective (see, to that effect, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 111, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 45).

30 While it is true that, in relation to disputes between individuals, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, judgments in *Marshall*, 152/84, EU:C:1986:84, paragraph 48; *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 20; and *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108), the fact nonetheless remains that the Court has also consistently held that the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, to that effect, inter alia, judgments in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 47).

31 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (see, inter alia, judgments in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114, *and Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 48).

32 It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (see judgments

in *Impact*, C-268/06, EU:C:2008:223, paragraph 100; *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25; and *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 39).

33 It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails 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).

34 Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.

35 That point having been made clear, it should be added that even if a national court seised of a dispute that calls into question the general principle prohibiting discrimination on grounds of age, as given concrete expression in Directive 2000/78, does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (judgment in *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 51).

36 Moreover, it is apparent from paragraph 47 of the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2) that the principle prohibiting discrimination on grounds of age confers on [individuals] a [subjective] right which they may invoke as such and which, even in disputes between private [individuals], requires the national courts to disapply national provisions that do not comply with that principle.

37 Accordingly, in the present case, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the national court must disapply that provision.

38 In the second place, with regard to identifying the obligations deriving from the principle of the protection of legitimate expectations for a national court adjudicating in a dispute between private [individuals], it should be noted that a national court cannot rely on that principle in order to continue to apply a rule of national law that is at odds with the general principle prohibiting discrimination on grounds of age, as laid down by Directive 2000/78.

39 Indeed, the application of the principle of the protection of legitimate expectations as contemplated by the referring court would, in practice, have the effect of limiting the temporal effects of the Court's interpretation because, as a result of that application, such an interpretation would not be applicable in the main proceedings.

40 According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and, where necessary, defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that, unless there are truly exceptional circumstances, which is not claimed to be the case here, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied (see, inter alia, judgment in *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraphs 44 and 45 and the case-law cited).

41 Moreover, the protection of legitimate expectations cannot, in any event, be relied on for the purpose of denying an individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation (see, to that effect, judgments in *Defrenne*, 43/75, EU:C:1976:56, paragraph 75, and *Barber*, C-262/88, EU:C:1990:209, paragraphs 44 and 45).

42 With regard to the referring court's question mentioned in paragraph 19 above, it should be noted that the fact that it is possible for [individuals] with a [subjective] right deriving from EU law, such as, in the present case, employees, to claim compensation where their rights are infringed by a breach of EU law attributable to a Member State (see, to that effect, judgments in *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 33, and *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 20) cannot alter the obligation the national court is under to uphold the interpretation of national law that is consistent with Directive 2000/78 or, if such an interpretation is not possible, to disapply the national provision that is at odds with the general principle prohibiting discrimination on ground of age, as given concrete expression by that directive, or justify that court giving precedence, in the dispute before it, to the protection of the legitimate expectations of a private [individual], namely in this case the employer, who has complied with national law.

43 In the light of all the foregoing, the answer to the second question is that EU law is to be interpreted as meaning that a national court adjudicating in a

dispute between private [individuals] 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. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the [individual] 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.'

Arguments

DI, acting on behalf of Ajos A/S, has argued that, at the time of his dismissal, A did not meet the conditions for payment of a severance allowance under Paragraph 2a of the Law on salaried employees, as he was eligible under a private, employer-funded pension scheme and was therefore covered by Paragraph 2a(3) as then in force.

The fact that the EU Court of Justice, in its judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, held that Paragraph 2a(3) is incompatible with the Employment Directive, cannot lead to another outcome. In order for obligations under EU law to have binding effect for individuals in Denmark, it must either be possible to interpret Paragraph 2a(3) in accordance with EU law or it must be possible to apply the EU rule directly in Denmark. Neither of those possibilities is available here.

An EU Directive cannot by itself create obligations for individuals. The EU Court of Justice made precisely this point most recently in paragraph 30 of its judgment of 19 April 2016 in the present case. That judgment further states that, in so far as possible, inconsistencies between national law and the Employment Directive are to be resolved by interpreting national law in conformity with EU law (paragraph 31). This presupposes, however, that there is a reasonable interpretative margin. The national court's duty to 'bend' national law to comply with a directive can only be 'stretched' as far as national interpretative tradition allows. The outer limit of the obligation to interpret in conformity is interpretation *contra legem* (paragraph 32), that is to say, an interpretation 'contrary to prevailing law'. In the order for reference of 22 September 2014, the Supreme Court presumes that it would be *contra legem* to apply an interpretation of Paragraph 2a(3) of the Law on salaried employees to bring it in line with the Employment Directive as interpreted by the EU Court of Justice in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600. The EU Court of Justice presumes in paragraphs 33 and 34 that the Supreme Court should be able simply to change its case-law. This should not lead to the Supreme Court's changing its assessment that an interpretation consistent with the directive would be *contra legem*. The Supreme Court is the authoritative

interpreter of Danish law, and its case-law on Paragraph 2a(3) is firmly founded in the legislature's statements about the provision.

There is no basis for Paragraph 2a(3) of the Law on salaried employees to have to yield to the prohibition of discrimination on grounds of age set out in the Danish Law prohibiting discrimination on the labour market (Forskelsbehandlingsloven) based on the principle of *lex posterior*. On the contrary, Paragraph 2a(3) is *lex specialis* in relation to the general prohibition of discrimination on grounds of age set out in the Danish Law prohibiting discrimination on the labour market, as that provision specifically governs the legal position for severance allowance in the event of dismissal of older workers. The legislature specifically adopted a position on Paragraph 2a of the Law on salaried employees, including Paragraph 2a(3), in connection with the implementation of the Employment Directive in 2004. In this respect the present situation can be distinguished from the situation on which the Supreme Court adjudicated in its judgment reported in UfR 2015.3827, in which the relevant ministry did not comply with Paragraph 5(2) of the Law on salaried employees (120-day rule), in the discussion of proposed amendments to the Law prohibiting discrimination on the labour market.

Nor is it possible, in Danish law, to apply directly 'the general EU law principle prohibiting discrimination on grounds of age' contrary to the clear state of the law as set out in Paragraph 2a(3) of the Law on salaried employees, to the detriment of Ajos. The origins of the principle are nebulous. Moreover, several of the EU Court of Justice's Advocates General have expressed reservations about the scope of the principle. In paragraph 35 the EU Court of Justice states that a national court has a duty to ensure the full effectiveness of that principle 'within the limits of its jurisdiction'. It is not within the Danish courts' jurisdiction to apply the principle prohibiting discrimination on grounds of age by disapplying a clear state of the law in Denmark between two individuals, on two principal grounds.

Firstly, there is no basis for doing so in the Danish Law on accession to the EU (Loven om Danmarks tiltrædelse of Den Europæiske Union) ('the Law on accession'). There is thus no basis for the proposition that Denmark has transferred to the EU Court of Justice, with direct effect for individuals on the basis of unwritten legal principles, the power to order Danish courts to disapply clear Danish legislation.

Secondly, it would be contrary to Paragraph 3 of the Danish Constitution (Grundloven) and the principle of legal certainty on a constitutional level if the Supreme Court, as a result of the application of the principle prohibiting discrimination on grounds of age, were to change the clear state of the law as set out in Paragraph 2a(3) of the Law on salaried employees, including by disapplying the provision to the detriment of Ajos which, as a private-sector business, has made its arrangements in reliance on a clear state of the law.

The argument that the allowance is not payable as a result of the dismissal agreement reached by A and his union with the company has been withdrawn in the case before the Supreme Court. The arguments to the effect that there has been laches, that interest is charged on a claim for a severance allowance only from the time the proceedings are instituted and that there is no basis for ordering a private-sector employer to pay an allowance under the Law prohibiting discrimination on the labour market are maintained.

A's estate has argued that, at the time of his dismissal in May 2009, A met the requirements for being paid a severance allowance under Paragraph 2a of the Law on salaried employees, since he remained on the employment market. Paragraph 2a(3) of the Law on salaried employees as then in force and the relevant case-law were contrary to EU law. The EU Court of Justice's so held in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600 in October 2010. It is not decisive in that connection that Ajos is a private-sector employer.

It is thus possible, by making an interpretation in a manner consistent with EU law, to achieve harmony between Paragraph 2a(3) of the Law on salaried employees and the prohibition of discrimination on grounds of age. This holds true irrespective of whether the interpretation is done on the basis of the Employment Directive or the primary law principle prohibiting discrimination on grounds of age. Neither the wording of Paragraph 2a(3) of the Law on salaried employees nor the *travaux préparatoires* and aim preclude such an interpretation in a manner consistent with EU law. The discrimination angle has not been dealt with in the case-law thus far on Paragraph 2a(3) of the Law on salaried employees, and there is no *contra legem* situation. On the basis of the wording of Paragraph 2a(3), it is possible for the Supreme Court to interpret the provision in accordance with EU law. Moreover, in paragraphs 33 and 34 of its judgment, the EU Court of Justice explicitly held that the specific exception in the form of the prohibition of a *contra legem* interpretation is to be restricted to covering only the direct wording and nothing else, including previous national case-law on the interpretation of Paragraph 2a(3).

In paragraph 31 of its judgment, the EU Court of Justice stated that the Supreme Court is under a duty to take account as much as possible of all aspects of national law. The prohibition of discrimination on grounds of age in Paragraph 1 of the Law prohibiting discrimination on the labour market must therefore take precedence over Paragraph 2a(3) of the Law on salaried employees: reference is made to the principles on *lex specialis* and *lex posterior*. The Supreme Court has previously applied such a model in dealing with a conflict between the Law on salaried employees and the prohibition of discrimination on grounds of handicap, in that the Supreme Court, referring to Paragraph 2a of the Law prohibiting discrimination on the labour market, found that the 120-day rule in Paragraph 5(2) of the Law on salaried employees could not be applied: see the judgment reported in UfR 2015.3827. It is not true that Paragraph 2a(3) of the Law on salaried employees was part of the legislature's discussion in dealing with the amendment proposal for the Law prohibiting

discrimination on the labour market. The only issue was whether entitlement to a severance allowance could give rise to discrimination against younger salaried employees.

Even if the Supreme Court were to conclude that an interpretation of Paragraph 2a(3) in a manner consistent with the Directive is not possible, it follows from the EU Court of Justice's case-law, including paragraph 37 in the present case, that the Supreme Court is to disapply the provision. The direct effect of the principle means that the prohibition of discrimination on grounds of age takes precedence over Paragraph 2a(3) of the Law on salaried employees.

The Government and the Folketinget (Danish Parliament) have, since the enactment of the Danish Law on accession in 1972, been aware of the EU Court of Justice's style of interpretation and application of the law in the form of references to the constitutional traditions common to the Member States and have always recognised and accepted the EU Court of Justice's law-making case-law. In a number of cases prior to *Mangold*, C-144/04, EU:C:2005:709, the Court has emphasised that the EU's institutions and the Member States, in applying EU law, are to uphold the so-called fundamental rights in exercising their powers. Furthermore, by the Amsterdam Treaty, on which a referendum was held in 1998, a specific legal provision was inserted in Article 6a, under which rules can be adopted inter alia to combat discrimination on grounds of age. It can therefore be assumed that in the field of employment both legislative and judicial powers have been transferred to the EU. In addition, through the Lisbon Treaty and the Charter, Denmark has accepted – both retrospectively and prospectively – the full legal effect of the general EU law prohibition of discrimination on grounds of age, as that principle was first enshrined in *Mangold*, C-144/04, EU:C:2005:709. The statement in the Charter to the effect that its provisions do not extend the Union's powers as defined by the Treaties has its origin in the fact that those powers were already transferred to the EU's institutions, including the EU Court of Justice. Against that background, the EU Court of Justice has, through the law-making activity made available to it and as evidenced in *Mangold*, C-144/04, EU:C:2005:709, acted within its Treaty-conferred powers. Accordingly, there is no extraordinary situation, and it cannot be held with the requisite certainty that the EU Court of Justice's case-law is based on an application of the Treaty that lies outside the delegation of sovereignty effected by the Danish Law on accession: see point 9.6 in the Supreme Court's judgment on the Maastricht Treaty (UfR 1998.800). Thus, in holding that the prohibition of discrimination on grounds of age is a fundamental right at Treaty level, the EU Court of Justice has acted within the limits of the transfer of powers as referred to in Paragraph 20 of the Constitution.

Lastly, it is argued that the Supreme Court must not refuse to follow the EU Court of Justice's decisions on the ground that they are supposedly contrary to Paragraph 3of the Constitution and the principle of legal certainty on a constitutional level.

The claim has not lapsed through inaction and interest is to be paid on the severance allowance from the time of dismissal on 30 June 2009. Compensation must also be paid for violation of the Law prohibiting discrimination on the labour market.

Legal basis, etc.

I. Danish law

A. The Law on salaried employees

Paragraph 2a of the Law on salaried employees was inserted into the law by Law No 224 of 19 May 1971 and read as follows:

'1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.

2. The provisions of subparagraph (1) shall not apply if the employee will receive a State retirement pension or employer pension on termination of the employment relationship.

3. The provisions of subparagraph (1) shall apply *mutatis mutandis* in the case of unfair dismissal.'

The commentary on the draft legislation (*Folketingstidende* [Danish Hansard] 1970-71, Annex A, L 53, column 1334) states inter alia the following:

'In order to soften the transition to other employment for older salaried employees who are dismissed after having been employed for many years with the same undertaking, it is proposed to introduce a provision to the effect that the employer, at the time of the employee's termination, is to pay a sum to the employee corresponding to one, two or three months' salary, depending on whether the person concerned has been employed in the undertaking for 12, 15 or 18 years. It is a given that, in addition to the aforementioned benefit, the salaried employee is to receive his or her usual salary during the dismissal period.
In subparagraph (2) it is proposed that the provision not apply if the employee will receive a State retirement pension or employer pension on termination of the employment relationship, that is to say, in situations which usually mean that the person concerned retires from the labour market.'

By Law No 287 of 24 April 1996, Paragraph 2a(2) of the Law on salaried employees was repealed and replaced by the following:

‘2. The provisions of subparagraph (1) shall not apply if the employee will receive a State retirement pension on termination of the employment relationship.

3. No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50.

4. The provisions of subparagraph (3) shall not apply if, as at 1 July 1996, the question of the reduction or withdrawal of the severance allowance on account of the employer’s payment of an old-age pension is governed by a collective agreement.’

Paragraph 2a(3) was also in force when A was dismissed in May 2009. The commentary on the draft legislation, which led to Law No 287 of 24 April 1996, states inter alia the following (*Folketingstidende* 1995-96, Annex A, L 180, p. 3537):

‘The severance allowance was introduced in Paragraph 2a of the Law on salaried employees by Law No 224 of 19 May 1971 (*Folketingstidende* column 916, 1299, 6433 and 6526, Annex A, column 1331, Annex B, column 1817 and Annex C, column 903). The original aim of the provision was to soften the transition to other employment for salaried employees who were dismissed after having been employed for many years with the same undertaking. Thus, salaried employees retiring from the labour market, that is to say, dismissed with a pension from the employer or a State retirement pension, are not entitled to the allowance.
The new labour market pension schemes, which to a large extent have been implemented in recent years, mean that in the coming years many very modest pension amounts will be paid out. When the provision was enacted in 1971, such small pension amounts were largely unknown.
The current formulation of Paragraph 2a(2) of the Law on salaried employees has been interpreted by the courts as meaning that even relatively modest pension benefits paid by the employer lead to loss of entitlement to the severance allowance under Paragraph 2a(1). Thus, in the Supreme Court’s judgment of 14 February 1991, reported in UfR 1991.317, the Court held that a lump sum pension payment of roughly DKK 9000 and a yearly payment of DKK 8 led to loss of the severance allowance.
Under the proposal, salaried employees with these very modest pension benefits will not lose their severance allowance, which can consist of to up to three months’ salary.
…
Commentary on the individual provisions of the draft legislation
Paragraph 1
Under the proposed Paragraph 2a(2), the severance allowance will still not by payable if, at the time of termination, the salaried employee will receive a State retirement pension.

Severance allowances are generally not payable where there is an old-age pension from the employer, but where the salaried employee joined the pension scheme after reaching the age of 50, the severance allowance will be payable. The proposed provision in Paragraph 2a(3) is inserted because salaried employees who joined in later years will have a very brief savings period and thus a low pension amount.
…'

Paragraph 2a of the Law on salaried employees read as follows following Law No 52 of 27 January 2015:

'1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12 or 17 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one or three months' salary.
2. The provisions of subparagraph (1) shall apply *mutatis mutandis* in the case of unfair dismissal.'

The new Paragraph 2a is applicable to dismissals taking place following the entry into force of the law on 1 February 2015. The commentary on the draft legislation states inter alia (*Folketingstidende* 2014-15, collection 1, Annex A, legislative proposal No L 84):

'1. Introduction and background
…
With the proposed simplification of the provision, clarification is given on the legal uncertainty caused by the EU Court of Justice's judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600 in relation to salaried employees who, at the time of termination, had the opportunity to begin receiving an old-age pension from their employer: see Paragraph 2a(3) as currently in force; if a salaried employee fulfils the proposed provision's requirement for years of employment and is dismissed by his or her employer or unfairly dismissed, the salaried employee will be entitled to receive a severance allowance corresponding to one or three months' salary. Thus, with the proposed Paragraph 2a, it will not be necessary to ascertain whether the salaried employee is continuing in paid employment, which was among the points on which the Supreme Court had to rule in its judgment of 17 January 2014 on the interpretation of Paragraph 2a as then in force in the light of the EU Court of Justice's judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.
…
2. Current law
…
As stated above, until the judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, Danish courts had interpreted Paragraph 2a(3) as meaning that a severance allowance was not payable if, at the time of termination, the dismissed salaried employee had the opportunity to receive an old-

age pension from his or her employer, irrespective of whether or not the dismissed salaried employee availed himself or herself of that opportunity.

3. The draft legislation
With the draft legislation it is proposed to amend Paragraph 2a of the Law on salaried employees. The provision will still deal with entitlement to a severance allowance for salaried employees who are dismissed or unfairly dismissed by their employer and who, at the time of termination, have been employed with the same undertaking for 12 years or more. The provision is significantly simplified, however, in that the pension-related exceptions contained in the Paragraph 2a(2) to (4) as currently in force are not included in the proposed Paragraph 2a. With the enactment of the proposed Paragraph 2a, it will be irrelevant for the purposes of the severance allowance whether the salaried employee concerned retires to receive a pension, has the opportunity to retire and receive a pension or wishes to continue in paid employment after termination. There will be an unconditional, exception-free right to a severance allowance for salaried employees who fulfil the basic requirements laid down in the provision.
…
It is proposed that the amendment to Paragraph 2a enter into force on 1 February 2015. It is the years of employment at the time of termination that are decisive for whether a severance allowance is payable, but it is the dismissal or unfair dismissal by the employer that triggers entitlement to a severance allowance. Entry into force on 1 February 2015 therefore means that the question of severance allowance for a salaried employee who is dismissed before 1 February 2015 is determined under Paragraph 2a as currently in force, irrespective of whether the termination takes place after 1 February 2015, while a dismissal by an employer after 1 February 2015 may trigger entitlement to a severance allowance under the proposed Paragraph 2a.
…

9. Relationship to EU law
The draft legislation is a follow-up to the EU Court of Justice's judgment of 12 October 2010, *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.
…
Commentary on the draft legislation's individual provisions
Paragraph 1 (Paragraph 2a of the Law on salaried employees)
…
Under the proposed Paragraph 2a, the severance allowance will still be able to be used in accordance with the aim of the current Paragraph 2a – to soften the transition to other employment for salaried employees who are dismissed after having been employed for many years with the same undertaking – although with the repeal of the pension-related exceptions the severance allowance gains a broader scope under the proposed Paragraph 2a. The allowance may also be viewed as a financial 'helping hand' in return for long and faithful service or as a form of individual 'plaster on the wound' for a salaried employee who is dismissed after having worked for many years

for the same employer. Thus the considerations that originally formed the basis for the current Paragraph 2a no longer pertain, but with the proposed provision Paragraph 2a of the Law on salaried employees takes on a different hue.
…
Paragraph 2 (transitional provision)
It is proposed that the amendment to Paragraph 2a enter into force on 1 February 2015. As it is the dismissal of the employee that triggers entitlement to a severance allowance, it will be the time of dismissal that is decisive for what is applicable for the purposes of the severance allowance, which is apparent from the proposed Paragraph 2a(2). Thus, a salaried employee who is dismissed before 1 February 2015 will be entitled to a severance allowance under Paragraph 2a as currently in force, even though the termination of the salaried employee may take place only after 1 February 2015.
…'

B. The Law prohibiting discrimination on the labour market

Consolidated Law No 1349 of 16 December 2008 prohibiting discrimination on the labour market, etc. (Forskelsbehandlingsloven) contains inter alia the following provisions:

> '1. For the purpose of this Act, discrimination shall mean any direct or indirect discrimination on the grounds of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.
>
> …
>
> 2. An employer may not discriminate against employees or applicants for vacancies in connection with recruitment, dismissal, transfer, promotion or with regard to pay and working conditions.
>
> …
>
> 7. Any person whose rights have been violated by non-compliance with sections 2-4 may be awarded compensation.'

…

The Employment Directive is implemented in Danish law by Law No 253 of 7 April 2004 amending the of the Law prohibiting discrimination on the labour market, etc. and by Law No 1417 of 22 December 2004 amending the Law prohibiting discrimination on the labour market, etc.

In the draft legislation that forms the basis for Law No 1417 of 22 December 2004, in which the discrimination criteria handicap and age were inserted into the Law

prohibiting discrimination on the labour market, the general commentary states inter alia (*Folketingstidende* 2004-05, collection 1, Annex A, L 92, pp. 2698 and 2701):

'2.1.2 The Directive's specific provisions on age
As regards age, the starting premise in the Directive is that discrimination on grounds of age is forbidden. Thus the Directive protects both old and young people against discrimination. At the same time the Directive recognises that there may be situations in which it will be lawful to attribute significance to an employee's age. The Directive therefore contains a specific provision in Article 6(1), under which Member States may provide that differences of treatment on grounds of age are not to constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. In other words, the absolute starting point in the Directive, under which direct discrimination is unlawful and cannot be legitimised, may be departed from as regards direct discrimination on grounds of age, in so far as the Member States so determine, and in so far as that departure is otherwise reasonably and proportionally justified by a legitimate aim within the context of national law.
…

5.2 Age limits in the Law on salaried employees

Paragraph 2a the Law on salaried employees concerning entitlement to a severance allowance.

Under Paragraph 2a of the Law on salaried employees, a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, will be entitled to a severance allowance corresponding to, respectively, one, two or three months' salary if the salaried employee is dismissed by the employer. The overall aim of the provision is to ensure that an allowance is paid to salaried employees after a lengthy period of employment 'in order to soften the transition to other employment for older salaried employees' (see *Folketingstidende* 70/71, Annex A, column 1334). The provision applies only when the salaried employee is dismissed by the employer. It also applies in the event of unfair dismissal: Paragraph 2a(4). The provision thus fulfils a protective aim in relation to older persons' prospects for new employment in the form of salary over an extended period. The provision is an example of indirect discrimination towards younger salaried employees and should therefore be assessed in the light of Article 2(2)(b) of the Directive. Under that provision, indirect discrimination is permissible if the provision in question (here entitlement to a severance allowance contingent on years of employment) is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. As the aim of Paragraph 2a of the Law on salaried employees is to protect older salaried employees and ease their transition over to other employment, the provision will be capable of being upheld as justified indirect discrimination: see requirements

in Article 2(2)(b) of the Directive. Therefore, no amendments to Paragraph 2a of the Law on salaried employees are proposed.
…"
In a consultation submission of 12 October 2004 from the Ledernes Hovedorganisation (Danish Federation of Managers and Executives) inter alia the following is stated:

'1. Amendment of Law prohibiting discrimination on the labour market

A. The Danish Federation of Managers and Executives has taken part in the discussion of the prohibition of discrimination on grounds of age or handicap in the Implementeringsudvalget (Implementation Committee). The Danish Federation of Managers and Executives finds that the proposal submitted is in keeping with the discussions that have taken place within the committee.

However, the Danish Federation of Managers and Executives in the Implementation Committee (Implementeringsudvalget) has, in vain, requested an analysis of the Directive in relation to Paragraph 2a(2) and (3) of the Law on salaried employees.

The immediate conclusion of the Danish Federation of Managers and Executives is thus that those provisions give expression to a form of discrimination on grounds of age that cannot be upheld by reference to Article 2 or Article 6.

The Danish Federation of Managers and Executives will therefore again request that the Ministry of Employment describe the relationship to Paragraph 2a(2) and (3) of the Law on salaried employees, including the question whether both or only one of the provisions should be amended.
…'

In a consultation document from the Ministry of Employment, which was sent to the Folketingets Arbejdsmarkedsudvalg (Parliamentary committee on the labour market) on 8 November 2004, inter alia the following is stated:

'The Danish Federation of Managers and Executives requests an analysis of the relationship to Paragraph 2a(2) and (3) of the Law on salaried employees concerning entitlement to a severance allowance, viewed in relation to Articles 2 and 6 of the Directive.

The overall aim of Paragraph 2a(1) is to ensure that an allowance is paid to salaried employees after a lengthy period of employment "in order to soften the transition to other employment for older salaried employees" (see Folketingstidende 70/71, Annex A, column 1334). There is, however, no entitlement to a severance allowance if, at the time of termination, salaried employees will receive a State retirement pension: see Paragraph 2a(2). On this point the Law on salaried employees is in harmony with the provisions of the draft legislation on statutory termination.

…'

C. The Law on accession, etc.

Paragraphs 2 to 4 of the Danish Law on accession (Law No 447 of 11 October 1972, as amended, Law on Denmark's accession to the European Union) (tiltrædelsesloven) provide:

> '2. The powers conferred on the authorities of the Kingdom by the Constitution may, within the limits specified in the treaties, etc., referred to in Paragraph 4, be exercised by the European Union's institutions.
>
> 3. (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]*.
>
> 4. The provisions of Paragraph 2 and Paragraph 3 concern the following treaties, etc.:
>
> 1. Treaty of 25 March 1957 establishing the European Economic Community;
> 2. Treaty of 25 March 1957 Establishing the European Atomic Energy Community;
> 3. Convention of 25 March 1957 on certain institutions common to the European Communities;
> 4. Convention of 13 November 1962 amending the Treaty establishing the European Economic Community, with a view to making applicable to the Netherlands Antilles the special regime of association defined in part IV of the said Treaty
> 5. Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities;
> 6. Treaty of 22 April 1970 amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities;
> 7. Treaty of 22 January 1972 concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community;
> 8. Treaty of 13 March 1984 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities;

9. Single European Act of 17 and 28 February 1986, with the exception of Titles I and III thereof;

10. Treaty of 7 February 1992 on European Union, including the protocols and declarations, with the exception of:

(a) Part Three of Title II, Article 104c(9) and 11 of Chapter 1, Articles 105(1), (2), (3) and (5), Article 105a, 108a, 109 […] of Chapter 2 of [and Article 109a(2)(b) of Chapter 3 of] Title VI of that Treaty, and Articles 3, 6, 9.2, 12.1, 14.3, 16, 18, 19, 20, 22, 23, 26.2, 27, 30, 31, 32, 33, 34, 50 and 52 of the Protocol on the statute of the European system of Central Banks and of the European Central Bank in so far as those provisions concern participation in the third stage of Economic and Monetary Union, and

(b) Article K.9 of Title VI of the Treaty;

11. Decision of 12 December 1992 concerning certain problems raised by Denmark on the Treaty on European Union, with accompanying protocols;

12. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, with accompanying protocols and declarations, with the exception of:

(a) Article K.14 of the Treaty on European Union, as amended by Article 1(11) of the Treaty of Amsterdam, and

(b) the provisions in Title IIIa, apart from Article 73j(2)(b)(i) and (iii) of the Treaty establishing the European Community, as amended by Article 2(15) of the Treaty of Amsterdam;

13. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, with accompanying protocols and declarations with the exception of:

(a) Article 2(4) of that Treaty, amending Article 67 of the Treaty establishing the European Community,

(b) Article 2(33) of that Treaty, inserting a new Article 229a of the Treaty establishing the European Community, and

(c) Protocol on Article 67 of the Treaty establishing the European Community;

14. The Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community and certain related acts, with accompanying protocols and declarations, with the exception of:

a. (legal reservation) Article 2(63) to (68) of that Treaty amending the provisions in Title IV of Part Three of the Treaty on the Functioning of the European Union on an area of freedom, security and justice, in so far as those provisions do not apply to measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas, and the Treaty's Article 2(29), which inserts a new Article 16b in the Treaty on the Functioning of the

European Union, in so far as that provision concerns the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title [V] of Part Three of that Treaty, and

b. (Euro reservation) those provisions set out in Article 116a(2) of the Treaty on the Functioning of the European Union, and in Article 42(1) of the Protocol on the statute of the European system of Central Banks and of the European Central Bank.

…'

In connection with the discussion of the draft legislation on Denmark's accession to the EC, the Minister for Foreign Affairs answered a number of questions. The answer to question 31 contained inter alia (*Folketingstidende* 1971-72, Annex B, column 3018 et seq.):

> 'The requirements laid down in Paragraph 20 of the Constitution, to the effect that powers can be transferred only by statute and within specified limits, means that generally there can be no transfer of, for example, all legislative power or all executive power. The statute enacted will, either directly or through reference to the text of the Treaty, specify the extent to which the transfer takes place. That specification may consist in a statement of the matters or topics over which the common bodies can exercise powers, and a statement of the content of those powers, for example, whether they consist in laying down general rules, taking specific decisions of an administrative nature or rule on legal disputes. The requirement that the specification must be stated in the statute rules out the possibility of the international bodies in question themselves deciding on the extent of their powers.
> …'

In the report of the Ministry of Justice of July 1972 on certain State law-related questions in connection with a Danish accession to the European Communities inter alia the following is stated (p. 107 et seq.):

> 'There are also certain *provisions in the Treaties themselves* that are directly applicable. First and foremost these are provisions regulating the mutual relationship between individual undertakings (particularly the prohibition of anti-competitive agreements and abuse of a dominant position), although provisions imposing obligations on the Member States can also give rise to rights for individuals, but only if the provision, by its nature, is intended to create legal effects between the Member States and individuals. This is the case where the provision contains a clear and unconditional obligation for the Member State which, in terms of the provision's implementation or its effects, does not require any intervention by the Community institutions and leaves the Member State no discretion as to its implementation.

> Lastly, the Court has in a number of decisions held that, in certain cases, *provisions* can be directly applicable. In those judgments, the Court seems to apply the same guidelines as in its rulings on whether treaty provisions imposing obligations on the Member States are directly applicable. Directives and decisions addressed to the Member States will therefore, at most, confer direct rights on individuals. They can never entail direct obligations for individuals.
> …'

In connection with the Maastricht Treaty the Law on accession was amended by Law No 281 of 28 April 1993. In the commentary on the draft legislation inter alia the following is stated (*Folketingstidende* 1992-93, Annex A, L 176, column 6697 et seq. read together with column 6467):

> 'As highlighted in the commentary on the concurrently herewith tabled legislative proposal for Denmark's accession to the Edinburgh Decision and the Maastricht Treaty, accession to the Maastricht Treaty entails that certain powers conferred on Danish authorities will be transferred to the EC's institutions.
> …
>
> Paragraph 2 of the Law on accession of 1972 provides that powers are transferred to the institutions of the European Communities in so far as laid down in the treaties, etc., referred to in Paragraph 4, whilst under Paragraph 3(1), those provisions referred to in Paragraph 4 are put into force in Denmark in so far as they are directly applicable in Denmark. The first pillar of the Treaty (Article G) contains such provisions.
>
> According to the formulation of the provision, there are two areas in respect of which no powers are transferred pursuant to Paragraph 20 of the Constitution. First and foremost is the third stage of Economic and Monetary Union. Second are any transfers of areas of cooperation from the intergovernmental cooperation under the third pillar of the Maastricht Treaty (Art. K.9, read together with Art. K.1(1) to (6) to EC cooperation under the first pillar.
> …'

In Law No 355 of 9 June 1993 on Denmark's accession to the Edinburgh Decision and the Treaty of Maastricht, inter alia the following is stated in the commentary on the draft legislation (*Folketingstidende* 1992-93, Annex A, L 177, column 6718 et seq.):

> '*The principle of observance of fundamental rights*
> "Fundamental rights" is a common term for individuals' basic rights in Member States that are provided for in those States' constitutions, the

European Convention for the Protection of Human Rights and Fundamental Freedoms ['the European Convention on Human Rights'] and similar treaties.

In its case-law, the EC Court of Justice has held that fundamental rights are part of EC law. Therefore, when the EC Court of Justice is to determine whether a specific EC legislative act is contrary to EC law, it assesses whether the legislative act infringes rights laid down in instruments such as the European Convention on Human Rights or the constitutions of the Member States. If so, the Court disapplies the legislative act.

This judge-made principle is now part of the Maastricht Treaty, through the formulation that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

…'

Denmark has, pursuant to Paragraph 1 of Law No 321 of 30 April 2008 amending the Law on Denmark's accession to the European Communities and the European Union, acceded to the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community and certain related acts with accompanying protocols and declarations. In the relevant legislative proposal, the report of the Ministry of Foreign Affairs to the Parliament on the Lisbon Treaty was submitted as an annex. The report states inter alia the following (*Folketingstidende* 2007-08, collection 2, Annex A, L 53, p. 2177):

'*The Charter and the European Convention on Human Rights*

The EU's Charter of Fundamental Rights was adopted by the EU's institutions in 2000. The Charter has to date been political but not legally binding. The Lisbon Treaty does not include the Charter in its text, but makes it legally binding by inserting a treaty provision that refers to it. At the same time, it is emphasised in the Treaty that the Charter does not extend the EU's powers. The Charter is again proclaimed in an updated version in December 2007.
…'

During the discussion of the draft legislation in the Parliament's European Affairs Committee (Folketingets Europaudvalg), the Minister for Foreign Affairs replied to inter alia the following question from the committee:

'Question 290:
"Does the Charter of Fundamental Rights, ref. Article 6 TEU, also contain legal obligations for individuals?"

Answer:
"No. The Charter is addressed to addressed to the institutions and bodies of the EU and to the Member States when they are implementing EU law: see Article 51(1) of the Charter."'

In the Ministry of Justice's report of 4 December 2007 for certain constitutional law questions in connection with Denmark's ratification of the Lisbon Treaty inter alia the following is stated in Title 4.4.3 on the Union's accession to the European Convention on Human Rights (p. 97 et seq.):

> *'a) The current treaty basis*
>
> It follows from the EC Court of Justice's case-law that "fundamental rights" – including rights under the European Convention on Human Rights – are among the general legal principles observance of which is ensured by the EC Court of Justice. In its judgment of 18 June 1991, *Elliniki Radiophonia Tiléorassi*, C-260/89, ECLI:EU:C:1991:254, paragraph 41, the EC Court of Justice held inter alia:
>
> "… It follows that … the Community cannot accept measures which are incompatible with observance of the human rights … recognised and guaranteed [under the Convention]."
>
> With the Maastricht Treaty, an express provision was inserted in Article 6(2) of the Treaty on European Union concerning the Union's observance of fundamental rights. The provision reads as follows:
>
> "*Article 6*
>
> …
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."
>
> *b) The Lisbon Treaty*
>
> With the Lisbon Treaty, Article 6(3) of the Treaty on European Union provides that fundamental 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, are to constitute general principles of EU law. The provision matches the substance of the corresponding provision in Article 6(2), as the latter provision has been interpreted by the EC Court of Justice.

…’

The Lisbon Treaty entered into force on 1 December 2009, and the entry into force provision in Law No 321 of 30 April 2008 on Denmark’s ratification of the Lisbon Treaty that Paragraph 2, relating to the Law on accession, enters into force at the same time as the Lisbon Treaty.

Prompted by the EC Court of Justice’s judgment of 25 July 2008, *Metock and Others* v *Minister for Justice, Equality and Law* Reform, C-127/08, ECLI:EU:C:2008:449, the Government requested the Ministry of Justice to draw up a legal report describing the relationship between the EC Court of Justice’s jurisdiction and the Constitution. The Ministry of Justice drew up the report in cooperation with the Prime Minister’s Office and the Ministry of Foreign Affairs, and in the report of 11 May 2009 on the relationship between the EC Court of Justice’s jurisdiction and the Constitution inter alia the following is stated (p. 29 et seq.):

‘...

4.2.2 Is the EC Court of Justice’s law-making activity within the framework of the Treaty or does the Court’s style of interpretation give rise to constitutional issues?

The EC Court of Justice, as mentioned inter alia in point 4.2.1, has jurisdiction to rule on questions of uncertainty surrounding the scope of the EU’s competences, and the EC Court of Justice has, on that basis, delivered a series of judgments of considerable significance for the development of the law within the EU: see point 4.1.6.

That law-making activity within the framework of the Treaty must inter alia be viewed in the context of how the EC 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.

These hallmarks of the EC Court of Justice’s approach were already present when Denmark joined the EC on 1 January 1973, and were part of the debate before the decision (and referendum) on Denmark’s accession to the EC: see above under point 4.2.1. Thus attention in the debate focused inter alia on the Court’s development of the principle of primacy of Community law over national law: see inter alia judgment in Case 6/64, *Costa* v *ENEL*, ECLI:EU:C:1964:66, discussed above under point 4.1.6.

Reference is also made to the Supreme Court’s pronouncements on the EC Court of Justice’s law-making activity and style of interpretation in connection with the Maastricht case.

Thus, during the proceedings before the Supreme Court, the appellants argued inter alia that Paragraph 20 of the Constitution only confers authority to transfer sovereignty 'by statute and within specified limits' and that that condition, inter alia by reference to the EC Court of Justice's law-making activity, was not met. On behalf of the Government, the Government's Legal Advisor (Kammeradvokaten) disputed that the EC Court of Justice's style of interpretation should mean that the competences thus transferred were too vague to be transferred under Paragraph 20 of the Constitution.

The Supreme Court held that neither the EC Court of Justice's law-making activity within the framework of the Treaty nor the fact that the EC Court, in interpreting the EC Treaty, also attaches importance to interpretative factors other than the wording of the relevant provisions, including the aim of the treaty, is contrary to the presumptions that form the basis for the Law on accession or in itself incompatible with the specificity requirement in Paragraph 20 of the Constitution.

The Ministry of Justice takes the view that there is nothing – including judgments from the EC Court of Justice – subsequent to the judgment in the Maastricht case that would lead to a different assessment of the relationship to the Constitution than the one made by the Supreme Court.

Against that background, it is the Ministry of Justice's view that neither the EC Court of Justice's law-making activity within the framework of the Treaty or the Court's style of interpretation gives rise to constitutional issues.

It should nevertheless be mentioned inter alia that the fact that the EC Court of Justice's style of interpretation does not give rise to constitutional issues does not mean that the outcomes arrived at by the Court in specific cases may not from time to time provide an opportunity for debate. This occurred, for example, in relation to the judgment in *Metock and Others* v *Minister for Justice, Equality and Law Reform*, C-127/08, ECLI:EU:C:2008:449, In that connection the general observation is made that even if judgment is not given in favour of Denmark in a case before the EC Court of Justice concerning the scope of the EU's powers, that does not of course mean in itself that those powers that the EU's institutions might have after the judgment must be considered incompatible with the Law on accession or the Constitution.

The fact that cases may arise before the EC Court of Justice in which, for example, the Danish Government expresses a view that the Court does not endorse in its judgment is, moreover, in principle not different from cases before Danish courts in which, for example, a ministry is unsuccessful with its interpretation of the legislation relevant to the specific case.

…'

II. EU law

A. The Employment Directive

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Directive) was adopted on the basis of Article 13 of the Treaty establishing the European Community (EC Treaty), which read as follows:

'…
Article 13: Action to combat discrimination based on sex, racial or ethnic origin, religion, etc. (ex Article 6a)

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.'

The provision is now found as Article 10 and Article 19 of the Treaty on the Functioning of the European Union (TFEU).

The Employment Directive contains inter alia the following recitals:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental 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, as general principles of Community law.

…

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

…'

Articles 1, 2 and 6 of the Employment Directive provide inter alia:

'*Article 1*

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a … particular age … at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

…

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

…'

B. Article F of the Maastricht Treaty and Article 6 TEU

The Maastricht Treaty on European Union contains inter alia the following provisions:

'TITLE I

Common provisions

…

Article F

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

TITLE II

Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community

Article G

The Treaty establishing the European Economic Community shall be amended in accordance with the provisions of this Article, in order to establish a European Community.

…"

Article 6 of the Treaty on European Union (TEU) – as adopted in the Lisbon Treaty – reads as follows:

'*Article 6:*
Fundamental rights

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental 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.'
[emphasis added]

C. The Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (2010/C 83/02) which, by reference to Article 6(1) of the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community, is legally binding, contains inter alia the following provisions:

> *'Article 21*
>
> *Non-discrimination*
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. …
>
> *Article 51*
>
> *Field of application*
>
> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

D. The EU Court of Justice's case-law

In its judgment of 22 November 2005, *Mangold*, C‑144/04, EU:C:2005:709, the EU Court of Justice (Grand Chamber) held inter alia:

> '74 In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation", the source of the actual principle underlying the prohibition of those forms of discrimination being

found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. …

…

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law …

78. …

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

…'

In its judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, the EU Court of Justice (Grand Chamber), reiterated the point that the principle prohibiting discrimination on grounds of age is to be regarded as a general principle of EU law. Inter alia the following is stated in that judgment:

'The questions referred for a preliminary ruling

…

19 To answer that question, it must first be ascertained, as the referring court suggests, whether the question should be examined by reference to primary European Union law or to Directive 2000/78.

20 In the first place, that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that that directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional

traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age (see *Mangold*, C-144/04, EU:C:2005:709, paragraph 74).

21 In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, *Mangold*, C-144/04, EU:C:2005:709, paragraph 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, *Defrenne*, 43/75, EU:C:1976:56, paragraph 54).

22 It should also be noted that Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the Charter, "[a]ny discrimination based on … age … shall be prohibited".

23 For the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.

24 In contrast to the situation concerned in *Bartsch*, C-427/06, ECLI:EU:C:2008:517, the allegedly discriminatory conduct adopted in the present case on the basis of the national legislation at issue occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78, which, for the Federal Republic of Germany, ended on 2 December 2006.

25 On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.

…

49 According to the national court, however, because of its clarity and precision, the second sentence of Paragraph 622(2) of the BGB is not open to an interpretation in conformity with Directive 2000/78.

50 It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific

application of the general principle of equal treatment (see, to that effect, *Mangold*, C-144/04, EU:C:2005:709, paragraphs 74 to 76).

51 In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*, C-144/04, EU:C:2005:709, paragraph 77).

52 As regards, second, the obligation of the national court, hearing proceedings between individuals, to make a reference to the Court for a preliminary ruling on the interpretation of European Union law before it can disapply a national provision which it considers to be contrary to that law, it is apparent from the order for reference that this aspect of the question has been raised because, under national law, the referring court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the Bundesverfassungsgericht (Federal Constitutional Court).

53 The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.

…

56 In the light of the foregoing, the answer to Question 2 is that it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its [power], in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle.

…’

In Advocate General Bot's Opinion of 7 July 2009 in *Kücükdeveci*, C-555/07, EU:C:2010:21 inter alia the following is stated:

> '77 With regard, first, to the very existence of the prohibition of age discrimination as a general principle of Community law, I am inclined to consider that the fact that the Court has emphasised such a principle corresponds to the development of that right as it flows from the inclusion of age as a criterion of prohibited discrimination in Article 13(1) EC, on the one hand, and, on the other, the establishment of the prohibition of age discrimination as a fundamental right as a result of Article 21(1) of the Charter of Fundamental Rights of the European Union. The Court's reasoning would, of course, have been more convincing if it had been based on those factors, rather than merely on the international instruments and constitutional traditions common to the Member States, the majority of which do not recognise a specific principle prohibiting age discrimination. I think it is important, however, to emphasise that, by proclaiming that such a general principle of Community law exists, the Court is in accord with the wish expressed by the Member States and the Community institutions to counteract age discrimination effectively. From that point of view, it is not surprising that the prohibition of age discrimination, as a specific expression of the general principle of equal treatment and non-discrimination and as a fundamental right, should enjoy the eminent status of a general principle of Community law.
>
> …"

In its judgment of 12 October 2010 in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, the EU Court of Justice (Grand Chamber) stated inter alia:

> *'National law*
>
> 8 Paragraph 2a of the [Law on salaried employees] contains the following provisions on severance allowances:
>
> "1. In the event of dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.

2. The provision laid down in subparagraph (1) shall not apply if the employee is entitled to an old age pension on termination of the employment relationship.

3. No severance allowance shall be payable, if the employee will – on termination of the employment relationship – receive an old age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years.

…"

9 The national court notes that, according to settled national case-law, there is no entitlement to a severance allowance where a private pension scheme to which the employer has contributed allows payment of an old-age pension on termination of the employment relationship, even if the employee does not wish to exercise his right to retirement. This holds true even where the amount of the pension will be reduced as a result of the bringing forward of the retirement date.

…

The dispute in the main proceedings and the question referred for a preliminary ruling

…

17 … [T]he Vestre Landsret [Western Regional Court] decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

"Is the prohibition of direct or indirect discrimination on grounds of age contained in Articles 2 and 6 of … Directive 2000/78 … to be interpreted as precluding a Member State from maintaining a legal situation whereby an employer, upon dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, must, upon termination of the salaried employee's employment, pay an amount equivalent to one, two or three months' salary respectively, while this allowance is not to be paid where the salaried employee, upon termination of employment, is entitled to receive an old-age pension from a pension scheme to which the employer has contributed?"

Consideration of the question referred

…

47 Consequently, by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, none the less wish to waive their right to such a pension temporarily in order to continue with their career, Article 2a(3) of the Law on salaried employees unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued by that provision.

48 Therefore, the difference of treatment resulting from 2a(3) of the Law on salaried employees cannot be justified under Article 6(1) of Directive 2000/78.

49 Consequently, the answer to the question referred is that Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding national legislation pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment.

…'

In her Opinion of 6 May 2010 in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, Advocate General Kokott stated inter alia:

'22 On the basis of those considerations, the Court has, until today in two cases regarding references for preliminary rulings, relied directly on the general legal principle of the prohibition of age discrimination, stating that it is the responsibility of the national court to "set aside", where necessary, any provision of national law which may conflict with that prohibition. However, this appears to be a makeshift arrangement for the purposes of resolving issues of discrimination in legal relationships between individuals, in which Directive 2000/78 is not as such directly applicable and cannot therefore replace national civil or employment law.

23 The idea of an in-depth reappraisal and examination of the doctrinal basis of the controversial horizontal direct effect of general legal principles or fundamental rights between individuals is certainly appealing, but would be excessive here. In this case, the Court is faced with a vertical relationship in which Mr Andersen, as a worker, can unquestionably rely directly on the principle of equal treatment laid down in Directive 2000/78 as against his public employer. It is

> therefore quite sufficient to answer the question referred by the Vestre Landsret by reference only to that directive, which gives specific expression to the general legal principle of non-discrimination on grounds of age. Indeed, this is the approach which the Court has adopted in judgments in other recent cases relating to age discrimination which also involved vertical legal relationships.'

The Supreme Court's reasoning and decision

Background to the case and questions

On 25 May 2009 A, then aged 60, was dismissed by Ajos A/S after some 25 years of employment as an employee in the same private-sector undertaking. Before turning 50 years of age, he had joined a pension scheme that entitled him to receive an old-age pension from his employer. On 16 June 2009 he took up a new post with another undertaking, to which he transferred his old-age pension entitlement without activating it.

Ajos did not pay the severance allowance, as Paragraph 2a(3) of the Law on salaried employees as then in force contained a provision providing that no severance allowance would be payable 'if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50'.

By judgment delivered on 12 October 2010, *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, the EU Court of Justice held that 'by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, none the less wish to waive their right to such a pension temporarily in order to continue with their career, Article 2a(3) of the [Law on salaried employees] unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued by that provision' (paragraph 47). Against that background the Court held that Paragraph 2a(3) of the Law on salaried employees as then in force was, within the limits specified, contrary to the Employment Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

In March 2012 the trade union Dansk Formands Forening brought an action on A's behalf against Ajos, claiming payment of a severance allowance. Ajos refused the requested payment.

By judgment of 17 January 2014 (UfR 2014.1119) the Supreme Court, in a case involving public-sector employers, held that, in consequence of the EU Court of Justice's judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, Paragraph 2a(3) of the Law on salaried employees

cannot be applied in cases where the employee opts to waive his right to such a pension temporarily in order to continue with his career.

The present case concerns the question whether Ajos, under Paragraph 2a(3) of the Law on salaried employees as then in force does not have to pay the severance allowance to which A, now A's estate, would generally be entitled under Paragraph 2a(1) of that law. The decision on that point turns primarily on whether it is possible to interpret the provisions of the Law on salaried employees as then in force in a manner consistent with the Employment Directive as interpreted by the EU Court of Justice in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600, potentially by applying the rules laid down in the Law prohibiting discrimination on the labour market, enacted to implement the Employment Directive. If that is not possible, a ruling must be made on whether a principle of EU law prohibiting discrimination on grounds of age means that Ajos cannot rely on Paragraph 2a(3) of the Law on salaried employees as then in force.

Interpretation in a manner consistent with the Directive

A's estate has submitted that the estate is entitled to an allowance under Paragraph 2a(1) of the Law on salaried employees and under the Law prohibiting discrimination on the labour market, because the exception laid down in Paragraph 2a(3) of the Law on salaried employees as then in force is to be construed in accordance with the EU Court of Justice's interpretation of the Employment Directive in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

It is apparent from the EU Court of Justice's judgment of 19 April 2016 in *Dansk Industri*, C-441/14, ECLI:EU:C:2016:278, that the EU Court of Justice has consistently held that, in relation to disputes between individuals, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual but that the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (paragraph 30). Furthermore, it follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (paragraph 31). Moreover, the obligation to interpret national law in conformity with EU law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (paragraph 32).

Following the introduction of Paragraph 2a of the Law on salaried employees in 1971, the Supreme Court has ruled on a number of occasions on how Paragraph 2a(3), as then in force, was to be interpreted: see the Supreme Court's judgments of 4 October 1973 (UfR 1973.898), 7 December 1988 (UfR 1989.123 and UfR 1989.126), 14 February 1991 (UfR 1991.314/1, UfR 1991.314/2 and UfR 1991.317), 9 May 2008 (UfR 2008.1892) and 17 January 2014 (UfR 2014.1119). It was held in those judgments that an employee was not entitled to a severance allowance where – subject to the conditions laid down in the provision – at the time of severance the employee was entitled to an old-age pension from his or her employer, irrespective of whether the employee opted to avail himself or herself of the entitlement to a pension.

In the judgment reported in UfR 1991.317 the Supreme Court stated that that outcome followed from the provision's wording, read in conjunction with the relevant *travaux préparatoires*, even though that case involved a relatively modest pension amount.

Following that judgment, Paragraph 2a(3) was amended by Law No 287 of 24 April 1996, so that entitlement to the severance allowance was lost only if the employee joined the pension scheme in question before reaching the age of 50. According to the commentary on the draft legislation, the amendment came about as a result of the 1991 judgment and was aimed at preventing employees with very low pension benefits from losing their entitlement to a severance allowance (*Folketingstidende* 1995-96, Annex A, L 180, p. 3537). The law did not contain any other amendments material to the interpretation of the provision as established in the case-law.

In view of the foregoing, the Supreme Court takes the view that the state of the 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 Paragraph 2a(3) of the Law on salaried employees as then in force in a manner that is consistent with the Employment Directive as interpreted by the EU Court of Justice in its judgment in *Ingeniørforeningen i Danmark* v *Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

The Supreme Court observes in that connection that there is no basis for allowing Paragraph 1 of the Danish Law prohibiting discrimination on the labour market to take precedence over Paragraph 2a(3) of the Law on salaried employees so as to achieve an interpretation that is consistent with the Directive. The Supreme Court emphasises in that respect that the legislature, in the implementation of the Employment Directive's rules on discrimination on grounds of age through Law No 1417 of 22 December 2004, has assumed that the Directive's rules have not resulted in the need for amendments to Paragraph 2a of the Law on salaried employees: see point 5.2 of the commentary on the draft legislation (*Folketingstidende* 2004-05, collection 1, Annex A, L 92, p. 2701). In this respect the present situation can be distinguished from the situation on which the Supreme Court had to rule in its judgment of 11 August 2015 (UfR 2015.3827), concerning the relationship between the 120-day rule in Paragraph 5(2) of the Law on salaried employees and Paragraph 2

of the Law prohibiting discrimination on the labour market concerning handicapped persons' access to employment.

There is thus a *contra legem* situation, which means that it is not possible to interpret Paragraph 2a(3) of the Law on salaried employees as then in force in accordance with the Employment Directive.

The principle prohibiting discrimination on grounds of age

Eight judges – Poul Søgaard, Thomas Rørdam, Jon Stokholm, Poul Dahl Jensen, Jens Peter Christensen, Hanne Schmidt, Lars Hjortnæs and Kurt Rasmussen – state:

The EU Court of Justice's judgment of 19 April 2016 in the present case is to the effect that the principle prohibiting discrimination on grounds of age confers on individuals a subjective right which they may invoke as such and which, even in disputes between private individuals, requires the national courts to disapply national provisions that do not comply with that principle (paragraph 36). Accordingly, in the present case, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the national court must disapply that provision (paragraph 37). According to the EU Court of Justice, neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the individual 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 (paragraph 43).

In paragraph 22 of that judgment the following is stated with respect to the principle prohibiting discrimination on grounds of age:

'…[T]he source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in *Mangold*, C-144/04, [EU:C:2005:709,] paragraph 74, and *Kücükdeveci*, C-555/07, [EU:C:2010:21,] paragraphs 20 and 21). It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of [the Charter], must be regarded as a general principle of EU law (see judgments in *Mangold*, [C-144/04, EU:C:2005:709,] paragraph 75, and *Kücükdeveci*, [C-555/07, EU:C:2010:21,] paragraph 21).'

Following the reasoning in that judgment, it would be contrary to the principle prohibiting discrimination on grounds of age to apply Paragraph 2a(3) of the Law on salaried employees as then in force to the present case, in which A opted to continue in his career after he was dismissed by Ajos.

DI, acting on behalf of Ajos, has submitted that there is no authority under Danish law to apply that principle with direct effect in a dispute between individuals, so that Ajos may not rely on Paragraph 2a(3) of the Law on salaried employees as then in force.

We wish to state the following on the matter:

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.

Under Paragraph 2 of that law, powers which under the constitution are conferred on the authorities of the Kingdom are exercised by the European Union's institutions in so far as laid down in the treaties, etc., referred to in Paragraph 4. Under Paragraph 3, 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.

Following the EU Court of Justice's judgments in *Mangold*, C-144/04, EU:C:2005:709, *Kücükdeveci*, C-555/07, EU:C:2010:21, and the present case, we find that the principle prohibiting discrimination on grounds of age is a general principle of EU law which, according to the EU Court of Justice, is to be found in various international instruments and in the constitutional traditions common to the Member States. The EU Court of Justice does not refer to provisions in those treaties covered by the Law on accession as a basis for the principle.

Even though the principle is inferred from legal sources outside the EU Treaties, it is obvious that the three aforementioned judgments must be construed as involving an unwritten principle which applies at treaty level. There is nothing in those judgments, however, to indicate that there is a specific treaty provision providing the basis for the principle.

A situation such as this, in which a principle at treaty level under EU law is to have direct effect (thereby creating obligations) 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.

Already when the Law on accession came into being in 1972, the legislature was aware that provisions in the treaties themselves can be directly applicable: see the report of the Ministry of Justice of July 1972 for certain State law issues in

connection with Danish accession to the European Communities, page 107 et seq. These types of provisions became part of Danish law through Paragraph 3 of the Law on accession.

It is furthermore well known and also foreseen in the Law on accession that the EU Court of Justice can develop and establish general principles that are to be found in the European Convention on Human Rights and similar treaties and in the constitutional traditions common to the Member States. Such general principles are not, however, directly applicable in Denmark by virtue of the Law on accession, and thus cannot be relied on in disputes between individuals. Reference is made to the provision currently in force, Article 6(3) of the Treaty on European Union (TEU), under which fundamental rights, as guaranteed by the European Convention on Human Rights, and as they result from the constitutional traditions common to the Member States, are general principles of EU law. The provision was originally enacted in connection with the Maastricht Treaty (as Article F in Section I on common provisions in the Treaty on European Union), and with the amendment of the Law on accession the view was taken in that connection that the provision was not among the provisions covered by Paragraph 2 of the Law on accession on transfer of powers and Paragraph 3 on treaty provisions, etc., which are directly applicable in Denmark (*Folketingstidende* 1992-93, Annex A, column. 6698 read with column 6467).

It is apparent from the *travaux préparatoires* for the Law on Denmark's accession to the Edinburgh Decision and the Maastricht Treaty that the provision was a codification of the EU Court of Justice's case-law, according to which the court, in examining a specific EU act, ascertains whether the act infringes rights laid down in, for example, the European Convention on Human Rights or in the Member States' constitutions (*Folketingstidende* 1992-93, Annex A, column 6718 et seq.).

Subsequent amendments to the Law on accession have brought no change in the situation that Article 6(3) is not among the provisions covered by Paragraph 2 and Paragraph 3 of the Law on accession. Thus, in the Ministry of Justice's report of 4 December 2007 for certain constitutional law questions in connection with Denmark's ratification of the Lisbon Treaty, it is merely stated that 'the provision corresponds substantively to the applicable provision in Article 6(2) of the EU Treaty, as the latter has been interpreted by the EC Court of Justice': see page 98 of the report.

In *Kücükdeveci* the EU Court of Justice stated (paragraph 22) that Article 6(1) of the Treaty on European Union (TEU) provides that the Charter is to have the same legal value as the Treaties, and that under Article 21(1) of the Charter, any discrimination based on age is to be prohibited. In the same vein, in the present case the EU Court of Justice has stated that the general principle prohibiting discrimination on grounds of age is now enshrined in Article 21 of the Charter.

Article 6(1) TEU refers to the Charter and states that the provisions of the Charter are not to extend in any way the competences of the Union as defined in the Treaties. The Charter entered into force on 1 December 2009 and in Article 21 lays down a prohibition of discrimination inter alia on grounds of age. Article 51 of the Charter states that the Charter is addressed to the institutions, bodies, offices and agencies of the Union and to the Member States, although only when they are implementing Union law. The Charter does not create any new competences or tasks for the Community and the Union and does not alter any competences or tasks provided for in the Treaties.

In line with the foregoing, the report submitted by the Ministry of Foreign Affairs to the Danish Parliament in connection with the proposal for amending the Law on accession as a result of the Lisbon Treaty (*Folketingstidende* 2007-08, collection 2, Annex A, L 53, p. 2177) is to the effect that the Charter does not expand the EU's powers, and the answer of the Minister for Foreign Affairs to question 290 from the Parliament's European Affairs Committee concerning the draft legislation is to the effect that the Charter does not entail legal obligations for individuals.

It follows from the foregoing that, under the Law on accession, principles developed or established on the basis of Article 6(3) TEU have not been made directly applicable in Denmark. The same holds true for the provisions of the Charter, including Article 21 thereof on non-discrimination which, under the Law on accession, has not been made directly applicable in Denmark.

Against that background, we find that there is no basis for holding that the EU law principle prohibiting discrimination on grounds of age which, according to the EU Court of Justice, is to be found in various international instruments and in the constitutional traditions common to the Member States – that is to say, legal sources corresponding to those referred to in Article 6(3) TEU – have been made directly applicable in Denmark by the Law on accession.

In our opinion, it does not change this conclusion that the judgment in *Mangold*, in which the EU Court of Justice established the principle for the first time, was delivered in 2005 and thus existed when the Law on accession was amended in 2008. The amendment of the Law on accession was solely a consequence of the Lisbon Treaty, and the judgment in *Mangold* is not referred to in the *travaux préparatoires* for the amending legislation. On that ground alone, the judgment cannot give rise to the Law on accession subsequently being interpreted differently than before the amendment. Moreover, in its judgment in *Mangold*, the EU Court of Justice had not ruled on whether the EU law principles of legal certainty and the protection of legitimate expectations could, depending on the circumstances, open up for allowing the principle prohibiting discrimination on grounds of age to take precedence over applicable national legislation in a dispute between individuals. Lastly, we note that the amendment of the Law on accession as a result of the Lisbon Treaty first entered into force at the same time as the Lisbon Treaty on 1 December 2009; for that reason

also, great significance cannot be attached to the amendment in the present case, in which the dismissal had taken place half a year previously.

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 powers as a judicial authority if it were to disapply the provision in this situation.

As a result of the foregoing, Danish courts cannot disapply Paragraph 2a(3) of the Law on salaried employees as then in force and Ajos can thus rely on the provision.

We accordingly vote to uphold the claim for dismissal of the case.

Judge Jytte Scharling states:

The question is whether the principle prohibiting discrimination on grounds of age, which under EU law has direct effect and is based on the EU Court of Justice's case-law, is based on an application of the Treaty coming within the scope of the transfer of powers to the European Union as effected by the Law on accession.

As stated by the majority of the members of this Court, the EU Court of Justice has jurisdiction to rule on questions of interpretation of EU law: see Article 267 TFEU, and 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.

In its judgment of 22 November 2005 in *Mangold*, C 144/04, EU:C:2005:709, the EU Court of Justice held that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the first and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States (paragraph 74). The EU Court of Justice further held that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law (paragraph 75). It follows from that judgment that the principle prohibiting discrimination has direct effect, including in a dispute between individuals.

By that judgment, the EU Court of Justice has thus, as part of its law-making activity, established that the general EU law principle prohibiting discrimination on grounds of age applies at Treaty level and is directly applicable.

By judgment of 6 April 1998 (UfR 1998.800) on the Maastricht Treaty and by judgment of 20 February 2013 (UfR 2013.1451) on the Lisbon Treaty, the Supreme Court ruled on those two treaties in relation to inter alia Paragraph 20 of the Constitution on delegations of sovereignty by statute and within specified limits [Translator's note: the Danish expression is 'i nærmere bestemt omfang', which appears in the English translation of Paragraph 20 of the Constitution as 'by statute and within specified limits'; referred to below as 'the specificity requirement']. In that connection it is assumed inter alia that it is not in itself incompatible with the specificity requirement in Paragraph 20 of the Constitution or contrary to the premises forming the basis of the Law on accession that the EU Court of Justice, in interpreting the Treaty, also attaches weight to interpretative factors other than a provision's wording, such as the Treaty's purpose. The same holds true for the EU Court of Justice's law-making activity.

The following was stated on the EU Court of Justice's jurisdiction in the judgment on the Maastricht Treaty under point *9.6* (as reiterate in the judgment on the Lisbon Treaty) and point *9.7*:

'*9.6.* The appellants have submitted that the EC Court of Justice's jurisdiction under the Treaty, read in the light of the principle of primacy of Community law, means that Danish courts are prevented from enforcing the limits on the delegation of sovereignty that has taken place through the Law on accession and that this must be taken into consideration in the determination of whether the specificity requirement in Paragraph 20(1) of the Constitution has been observed.

By the Law on accession, it is recognised that jurisdiction to rule on the lawfulness and validity of an EC legal act lies with the EC Court of Justice. This means that Danish courts cannot hold an EC legal act to be inapplicable in Denmark without the question of its compatibility with the Treaty having been the subject of a ruling by the EC Court of Justice, and that Danish courts can generally assume that decisions by the EC Court of Justice on that point come within the scope of the delegated sovereignty. The Supreme Court finds, however, that it follows from the specificity requirement in Paragraph 20(1) of the Constitution, together with Danish courts' jurisdiction to rule on the statute's constitutionality, that the courts cannot be stripped of their jurisdiction to rule on the question whether an EC legal act goes beyond the limits of the sovereignty delegated through the Law on accession. Therefore, should the extraordinary situation arise in which it can be held, with the requisite certainty, that an EC legal act upheld by the EC Court of Justice is based on an application of the Treaty that falls outside the scope of the delegation of sovereignty effected by the Law on accession, Danish courts must hold that EC legal act to be inapplicable in

Denmark. The same holds true in respect of EC legal rules and legal principles, which are based on the EC Court of Justice's case-law.

9.7. In the light of the foregoing, the Supreme Court finds that neither the additional powers conferred on the Council under Article 235 of the EC Treaty nor the EC Court of Justice's law-making activity can be held to be incompatible with the specificity requirement in Paragraph 20(1) of the Constitution.'

The EU Court of Justice's law-making activities within the framework of the Treaty and its interpretative style were known when Denmark became a member of the EC on 1 January 1973. These hallmarks of the EC Court's activities were part of the debate before the decision (and referendum) on Denmark's accession to the EC. Thus attention in the debate focused inter alia on the Court's development of the principle of primacy of Community law over national law: see inter alia judgment in Case 6/64, *Costa* v *ENEL*, ECLI:EU:C:1964:66. When the Court developed and established that principle, the primacy of Community law was not referred to in the Treaty.

The Court has also, in the time leading up to the most recent amendments to the Law on accession, further developed that style of interpretation, holding, for example, that treaty provisions as well can have direct effect on individuals by imposing duties on them: see judgment of 8 April 1976, 43/75, *Defrenne*, ECLI:EU:C:1976:56, in which the Court held that Article 119 [of the EEC Treaty] as then in force imposed a duty on Member States to implement and uphold the principle of equal pay for equal work for men and women.

In the light of the foregoing, I find that there is not such an extraordinary situation that it can be held with the requisite certainty that the application of a general principle of EU law prohibiting discrimination on grounds of age in the employment sphere falls outside the jurisdiction conferred on the EU Court of Justice by the Law on accession.

It follows from Paragraph 3 of the Law on accession that the provisions of the treaties referred to in Paragraph 4 are put into force in Denmark in so far as they are directly applicable in Denmark under EU law. In the light of the foregoing, I find that the principle prohibiting discrimination on grounds of age must be considered to follow from those treaties referred to in Paragraph 4 of the Law on accession, as those treaties have been interpreted by the EU Court of Justice.

The principle prohibiting discrimination on grounds of age was established in the *Mangold* judgment in 2005 and is not to be found in the Charter, which entered into force on 1 December 2009. Nor does the principle have any basis in a specific Treaty provision and was not known when the Law on accession was amended in connection with the Maastricht Treaty. In my view there is not the requisite certain basis for maintaining that what is stated in the *travaux préparatoires* for the amendments to the Law on accession in connection with the Maastricht Treaty on Article 6(3) of the

Treaty on European Union (TEU) also encompasses the subsequently-established principle prohibiting discrimination on grounds of age. I further note that 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 (Law No 321 of 30 April 2008) was adopted. It was thus known at the time of that amendment that the principle prohibiting discrimination on grounds of age under EU law was directly applicable, and 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.

I accordingly find that the Law on accession confers the requisite basis for disapplying Paragraph 2a(3) of the Law on salaried employees in the case, and that Danish courts will not thereby be acting outside the limits of their jurisdiction.

For those reasons, and since I can concur in the view that interest is charged on the claim for a severance allowance only from the time the proceedings are instituted and that there is no basis for ordering Ajos to pay an allowance under the Law prohibiting discrimination on the labour market, I vote to uphold the judgment of the (Maritime and Commercial Court).

Conclusion and costs

As the decision is taken by majority vote, the case against Ajos is dismissed.

In view of the nature and important implications of the case, the Supreme Court holds that none of the parties shall pay the costs of the proceedings before the Maritime and Commercial Court or the Supreme Court to the other party or to the Treasury.

On those grounds:

The case against Ajos A/S is dismissed.

None of the parties shall pay the costs of the proceedings before the Maritime and Commercial Court or the Supreme Court to the other party or to the Treasury.

Translator's note:

By way of further information, an unofficial translation of Paragraph 20(1) of the Danish Constitution (Grundloven) is given below:

Danish:

Paragraph 20
Stk. 1.
Beføjelser, som efter denne grundlov tilkommer rigets myndigheder, kan ved lov i nærmere bestemt omfang overlades til mellemfolkelige myndigheder, der er oprettet ved gensidig overenskomst med andre stater til fremme af mellemfolkelig retsorden og samarbejde.

English:

Paragraph 20

(1) The powers conferred on the authorities of the Kingdom by this Constitution may, by statute and within specified limits, be transferred to international authorities established by reciprocal agreements with other States to promote international cooperation and the international legal order.