The development of age and disability equality within the European Union: the Court of Justice and the (mis)implementation of EU general principles

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Abstract: Over the years, EU general principles have proven to be an essential source of protection of equality. The approach followed by the European Court of Justice has made general principles one of the most effective sources of law towards the goal of expanding the protection of equality and improving its enforcement. Against this backdrop, the article argues that some recent decisions in the fields of disability and age discrimination challenge the merits of such approach and eventually disclose its shortcomings. The ruling in *Kaltoft* shows at time a lack of consistency of the CJEU case-law and a far too discretional reasoning, while *Dansk Industri* and *Parris* demonstrate that the Court's arbitrary approach has the capacity to ultimately jeopardise the effective and fair enjoyment of equality as an individual right.

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1. Introduction

The enforcement of equality and the improvement of its protection has been an on-going process within the European Union (henceforth also 'EU') for many years now. Since the first leading case in this field,[1] the European Court of Justice has constantly stressed the need to ensure the respect of this principle within each and every EU policy and piece of legislation, as well as national activities pertinent to the EU.

Among the suitable tools for the achievement of the abovementioned goal, one in particular has proven its value: the general principles. The reliance on general principles of EU law has in fact been the key to both broadening the protection of equality and achieving its enforcement.[2]

Notwithstanding the contribution of general principles towards the enhancement of equality within the EU, the European Court of Justice has yet to adopt a uniform approach when dealing with general principles. The lack of any methodology by the Court of Justice has led to a lack of consistency within its case law: as the article will point out, some recent rulings in the field of age and disability discrimination not only highlight the unpredictability of the Court of Justice rulings but also how these rulings are misaligned towards the achievement of effective equality.

To prove this point, the paper will focus on some recent decisions of the Court of Justice concerning age and disability anti-discrimination law where the Court's choice either to rely on or to avoid EU general principles reveals a few shortcomings. The paper has then the

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[1] Judgment of the Court of 12 November 1969, 29/69, *Erich Stauder* v *City of Ulm – Sozialamt*, ECLI:EU:C:1969:57.

[2] See M. BELL, *The principle of equal treatment: widening and deepening*, in P. CRAIG, G. DE BURCA (eds.), *The evolution of EU law*, 2nd ed., Oxford, 2011, 611 ff.

ultimate aim of assessing – in the targeted fields of age and disability discrimination – the extent to which general principles should represent a preferred option for the enforcement of equality.

2. The establishment of equality through general principles

In order to properly investigate the role of general principles in the selected Court of Justice case law, a few preliminary observations are needed. Although the following observations apply to the general principle of equality as a whole, they will be further developed in this paper with sole regard to the chosen criteria of age and disability discrimination.

First, it has to be recalled that the development of the concept of equality in itself is closely linked to the creation and shaping of the EU general principles. As matter of fact it was indeed in an anti-discrimination case where the EU Court of Justice firstly employed the concept of EU general principles: if in *Stauder*[3] general principles firstly acted as judiciary-driven provisions, they have since then increased their constitutional role within the architecture of the European Union.[4]

At a time when the European Community did not have any competence in the field of human rights, the reliance on an unwritten source of law (i.e. general principles) was grounded on the pre-existence of general principles in the legal system leading the Court of Justice to (lawfully) acknowledge their existence rather than (unlawfully) create a new legal source.[5]

Over the years this unwritten source has been sided by several written sources. The EU provisions in the field of anti-discrimination law, however, have significant limitations which drastically reduce their capacity to provide an effective protection of equality.[6]

Among the EU primary provisions in the field of equality law, neither art. 19 TFEU, nor art. 21 of the EU Charter provide an effective protection of equality. On the one side, art. 19 TFEU foresees an exhaustive list of discriminatory grounds, it acts as a mere legal basis for the adoption of provisions combating discriminations and, as a result, it lacks direct effect.[7] On the other side, even though the Charter could tackle further discriminatory grounds than those expressly mentioned in art. 21, its application is subject to the unclear wording of its horizontal clauses, and the direct effect of the EU Charter is still debated.[8] Among the secondary provisions addressing equality – namely directive 2006/54,[9] directive 2000/43[10] and directive

[3] Case C-29/69, *Erich Stauder*, cit.; Case 11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114; Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Commission of the European Communities*, EU:C:1974:51; Case 36/75, *Roland Rutili* v *Ministre de l'intérieur*, EU:C:1975:137; Case 44/79, *Liselotte Hauer* v *Land Rheinland-Pfalz*, EU:C:1979:290.

[4] AG Trstenjak in Case C-282/10, *Maribel Dominguez* v *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559 para. 94, who refers to the definition given by V.M. SCHWEITZER, W. HUMMER, W. OBWEXER, *Europarecht. Das Recht Des Europäische Union*,Vienna, 2007, at 65.

[5] K. LENAERTS, J. GUTIÉRREZ-FONS, *The constitutional allocation of powers and general principles of EU law*, in *Common Market Law Review*, 2010, 1629 ff., who at p. 1633 recall that such power of the Court of Justice is grounded on the following EU provisions: art. 19 TEU, art. 6(3) TEU and art. 340 TFEU.

[6] See E. SPAVENTA, *Should we "harmonize" fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system*, in *Common Market Law Review*, 2018, 997 ff., at 1010.

[7] T. TRIDIMAS, *The general principles of EU law*, Oxford, 2006, at 64.

[8] On this topic, and specifically focusing on art. 21 EU Charter see A. WARD, *The impact of the EU Charter of Fundamental Rights on anti-discrimination law: more a whimper than a bang?*, *Cambridge Yearbook of European Legal Studies*, 2018, 32 – 60, at. 36.

[9] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, 23 – 36.

[10] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19.07.2000, 22 – 26.

2000/78[11] – only the latter directive tackles age and disability. Further to being only vertically and not horizontally enforceable, Directive 2000/78 merely applies in the field of employment and occupation, thus having only a limited impact in the establishment of equality.[12]
The role of general principles can therefore be appreciated against the scenario just outlined: acknowledging that none of the EU sources is *per se* suitable to effectively tackle discrimination (and thus establish equality), general principles represent measures of last-resort in all those situations where the protection granted by the EU written provisions is inadequate. With a view of equipping the EU normative framework with a flexible and yet binding source of law, general principles have been recognised three main functions.[13]
First, general principles have a gap-filling function. Thanks to their unwritten nature, general principles can easily fill the *lacunae*[14] that emerge when applying EU law or implementing EU law at national level.[15] Hence, general principles of EU law are judicially-driven norms,[16] spontaneously inferred by the Court from the array of primary and secondary provisions of EU law to complete the legal order established by the Treaties.[17]
Second, general principles of EU law are essential tools for the interpretation of both EU law and national law anytime the latter is falling within the scope of EU law. To promote the protection of equality within the EU, the European Court of Justice has widely referred to general principles following the dual trend of engaging the concept of consistent interpretation, and broadening the interpretation of existing EU primary and secondary law.[18]
Within a third function, general principles are instead contemplated as grounds for judicial review,[19] in four different scenarios. In addition to the case of EU legislation and Treaties' provisions, three other situations have been recognised as enabling the applicability of general principles of EU law: the 'agency situation', i.e. the situation where a member state is implementing an EU provision;[20] the 'derogation situation', occurring when member states adopt a measure derogating from an EU provision;[21] and the 'substantive EU law situation', covering those domestic measures which otherwise fall within the scope of application of EU law.[22]

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[11] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16 – 22.
[12] See L. WADDINGTON, M. BELL, *More equal than others: distinguishing European Union equality directives*, *Common Market Law Review*, 2001, 587 ff. See also S.M. CARBONE, *Discriminazioni sulla base dell'età tra principi generali UE e criteri applicativi*, *Studi sull'integrazione europea*, 2017, 23 ff..
[13] See K. LENAERTS, J. GUTIÉRREZ-FONS, *The constitutional allocation of powers*, cit., at 1629.
[14] T. TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, in *Cambridge Yearbook of European Legal Studies*, 2014, 361 ff., at 379.
[15] Joined Cases 201 and 202/85 *Marthe Klensch and o.* v *Secrétaire d'État à l'Agriculture et à la Viticulture* EU:C:1986:439.
[16] C. SEMMELMANN, *General principles in EU law between a compensatory role and an intrinsic value*, *European Law Journal*, 2013, 457 ff., at 461.
[17] K. LENAERTS, J. GUTIÉRREZ-FONS, *The constitutional allocation of powers*, cit., at 1632.
[18] *Ibidem*, at 1636.
[19] In both vertical and horizontal disputes. See T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU Law and European Private Law*, Kluwer Law International, 2013, 213 ff., at 215.
[20] Case 5/88, *Hubert Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321. See also T. TRIDIMAS, The g*eneral principles of EU law*, cit., at 36.
[21] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (*ERT*) EU:C:1991:254. An excellent investigation of the Court of Justice's scrutiny in assessing both the 'implementation' and the 'derogation' situations is provided by J. SNELL, *Fundamental Rights Review of National Measures: Nothing New under the Charter?*, in *European Public Law*, 2015, p. 285 ff., at 287.
[22] AG Sharpston in Case C-427/06 *Birgit Bartsch* v *Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* EU:C:2008:297, para. 69.

Notwithstanding the function they serve, general principles embody common values already shared within the common constitutional traditions of the member states[23] or implicitly accepted by member states when joining the EU.[24] Therefore they belong to EU primary law and they enjoy a constitutional status.[25]
There are two major implications connected to the status of general principles. First, any act adopted by the EU institutions, which is subject to judicial review, must comply with general principles,[26] since it falls under the Court's jurisdiction according to art. 19 TEU.[27] Such an obligation is now formalised with regard to those general principles protecting fundamental rights – such as equality – that have been included in the Charter.[28] Second, general principles of EU law bind all member states when they are acting within the scope of application of the Treaties.[29]
The scenario presented so far was meant highlight the rationale behind the recognition of general principles as a EU primary source of law, i.e. to give the EU a degree of flexibility within the promotion of the *ius commune europaeum*. The following section will move from this remark in order to investigate whether – within a few recent rulings in the field of age and disability discrimination – the added value of using general principles as the key towards the achievement of equality is jeopardised by the persistent lack of methodology shown by the Court of Justice when addressing them.[30]

3. The convoluted approach of the Court of Justice towards the concept of 'interpretation': *Kaltoft*

The current CJEU approach towards the use of general principles raises a few concerns regarding the distinction between 'interpretation' and 'law-making'. According to the Court of Justice itself, the second function carried out by general principles is that of guiding the interpretation of EU written provisions. In other words, every EU provision shall be interpreted in compliance with EU general principles, i.e. in the way which best accommodates the value(s) protected by the general principle.
As a consequence, the Court of Justice discretion when interpreting EU law might vary depending on the room for interpretation that the written provision itself allows. This, however, should never result into a normative activity exercised by the Court of Justice, given that the Court of Justice, as the EU jurisdictional body, is prevented from creating new legal provisions.
Notwithstanding the alleged clarity of the divide between interpretation and law-making, the recent *Kaltoft* ruling shows how such distinction can in fact be blurring. The dispute that triggered the preliminary reference procedure involved Mr Kaltoft, a Danish child-minder, and the Municipality of Billund, a Danish public administrative authority. Mr Kaltoft was hired by the Municipality of Billund to work as child-minder by taking care of children at his home. At

[23] S. ROBIN-OLIVIER, *Le principe d'égalité en droit communautaire. Etude à partir des libertés économiques*, P.U.A.M., 1999, at 329 ; C. SEMMELMANN, *General principles in EU law between a compensatory role and an intrinsic value*, cit., at 462.
[24] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos* v *Netherlands Inland Revenue Administration* EU:C:1963:1.
[25] K. LENAERTS, J. GUTIÉRREZ-FONS, *The constitutional allocation of powers and general principles of EU law*, cit., at 1647. T. TRIDIMAS, *The general principles of EU law*, cit., at 51.
[26] T. TRIDIMAS, *The general principles of EU law*, cit., at 50.
[27] Cases 46/93 and 48/93, 5 March 1996, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others., ECLI:EU:C:1996:79, para. 27.
[28] T. TRIDIMAS, *The general principles of EU law*, cit., at 11 – 12.
[29] Editorial Comments, *The scope of application of the general principles of Union Law: An ever expanding Union?*, in *Common Market Law Review*, 2010, at 1589.
[30] See M. ROSS, *Effectiveness in the European Legal order(s): Beyond supremacy to constitutional proportionality?*, in *European Law Review*, 2006, 476 ff.

the time when Mr Kaltoft was employed, he suffered from severe obesity and was subsequently provided by the employer with financial assistance with the aim of letting him attend physical and fitness sessions in order to lose weight. Despite Mr Kaltoft's attempts, his loss of weight was systematically regained. Hence, when in late 2010 the decline in child numbers forced the Municipality of Billund to nominate a child-minder for dismissal, it was decided that Mr Kaltoft would be the addressee of such action.

Given the vagueness of the reasons for his dismissal, and acknowledging that he was the only child-minder to have been dismissed, Mr Kaltoft expressed the view that such decision had been taken because of his obesity. He therefore referred to the Fag og Arbejde (FOA), the Danish union of public employees, in order to bring a claim alleging that he was a victim of discrimination on grounds of obesity and sought compensation.

In the main proceedings, the Danish court found that a clarification regarding EU law was essential in order to solve the dispute. In particular, the Danish court referred to the Court of Justice to ascertain whether EU equality law prohibits discrimination on grounds of obesity and, if this was not the case, whether obesity could be considered a form of disability and therefore fall under the EU rules covering non-discrimination on grounds of disability.

After highlighting that non-discrimination is a general principle of EU law which is 'binding on Member States where the national situation at issue in the main proceedings falls within the scope of EU law',[31] the Court of Justice recalled that neither EU primary legislation, nor the EU secondary provisions mention obesity as a discriminatory ground. Stating the impossibility of expanding the scope of application of the existing legal provisions, the Court thus answered the first question declaring that non-discrimination on grounds of obesity cannot be considered a general principle of EU law.

The solution offered by the Court of Justice seemed to be the only possible under EU law: considering the principle of conferred competence, and stressing that general principles of law shall apply within the field of application of EU law, there seems to be no room for a general principle of non-discrimination on grounds of obesity.

However, such reasonable 'self-restraint' of the Court has been immediately overridden as soon as the second preliminary ruling has been examined: the Court in fact clarified that, although being subject to specific conditions, obesity can amount to a disability within the meaning of Directive 2000/78[32] and therefore benefit from the protection foreseen by the directive itself.

After recalling that the EU has ratified the UN Convention on the Rights of Persons with Disabilities,[33] the Court stressed how the notion of disability must be intended as either impossibility or hindrance upon the ability to exercise a professional activity. Although obesity itself cannot be considered a disability, under some circumstances obesity can indeed represent a long-term limitation that 'may hinder the full and effective participation of that person in professional life on an equal basis with other workers'.[34] This being the case, obesity would then fall under the concept of disability foreseen by Directive 2000/78, so that any disparate treatment grounded on such a factor – unless justified under the directive itself – would amount to discrimination on grounds of disability.

[31] Case C-354/13 *Fag og Arbejde (FOA) acting on behalf of Karsten Kaltoft*, *cit.*, para. 32.

[32] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 02 December 2000, 16.

[33] The UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, A/RES/61/106, was adopted on 13 December 2006 and was opened for signature on 30 March 2007. It entered into force on 3 May 2008.

[34] Case C-354/13 *Fag og Arbejde (FOA) acting on behalf of Karsten Kaltoft*, *cit.*, para. 59.

As a result of this recent decision, the principle of non-discrimination on grounds of disability – which also applies to individuals primarily responsible for the care of disabled people[35] – has been *de facto* entitled to cover obesity.
Although, on the bright side, the Court was aiming to provide an enhanced interpretation of the notion of disability in order to protect Mr. Kaltoft's rights, the judgment triggers a few criticisms from the perspective of EU anti-discrimination law.
First and foremost, *Kaltoft* seems to be an example of the enlargement of the EU field of application through general principles. Directive 2000/78 now has the potential to cover obesity discrimination too, although the enlargement of the field of application of such a directive does not seem to fall under the concept of interpretation but rather under the concept of law-making. If this is the case, the criticisms that were raised in the aftermath of *Mangold*[36] have been proven to be valid: notwithstanding the Court's statements, unwritten general principles have indeed the power to alter the conditions for the application of the EU written provisions.[37]
This concern is worsen by the observation that the same substantive result, i.e. protecting individuals against obesity discrimination, could have been achieved without bending Directive 2000/78 to an unnatural function. This conundrum could have been solved by looking at the non-exhaustive list of discriminatory grounds foreseen in the EU Charter of Fundamental Rights and by following the *ratio decidendi* of the *Åkerberg Fransson* case as a guideline.[38] On the one side, the Charter does allow the enlargement of the discriminatory grounds expressly foreseen in its art. 21. On the other side, the relevant national provisions affecting Mr Kaltoft's situation did amount to national provisions falling under the scope of application of EU law. Therefore, instead of relying *tout court* on directive 2000/78, the Court could have once and for all accommodated the legal value of the Charter by acknowledging its enforceability within the situation at stake.
Under a different, and yet similar point of view, *Kaltoft* decision also exacerbates the scenario belonging to EU anti-discrimination law. Disregarding the need for clarification that has been stressed by several fronts, the Court of Justice's current approach makes it almost impossible to predict whether a given situation will fall under the field of EU discrimination law.[39]

4. The neurotic approach towards direct effect: *Dansk Industri* and *Parris*

The analysis of two recent decisions on the principle of non-discrimination on grounds of age entangles further observations concerning the lack of methodology governing the use of EU general principles as grounds for judicial review.

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[35] Case C-303/06, *S. Coleman* v *Attridge Law and Steve Law*, EU:C:2008:415.
[36] Judgment of the Court of 22 November 2005, case C-144/04, *Werner Mangold* v *Rüdiger Helm*, ECLI:EU:C:2005:709. See M. ROSS, *Effectiveness in the European Legal order(s): Beyond supremacy to constitutional proportionality?*, cit., at 494.
[37] The core of the debate being whether EU directives were had been given horizontal direct effect. In the sense of recognising such an effect, AG Ruiz-Jarabo Colomer in his Opinion of 27 April 2004, *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01)* v *Deutsches Rotes Kreuz, Kreisverband Waldshut and V*, Joined cases C-397/01 to C-403/01, in *Reports*, 2004, I-8835; and, again, of 24 April 2008, *Othmar Michaeler (C-55/07 and C-56/07), Subito GmbH (C-55/07 and C-56/07) and Ruth Volgger (C-56/07)* v *Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen*, Joined cases C-55/07 and C-56/07, in *Reports*, 2008, I-3135. On the contrary, in the sense of excluding any direct effect of directives and, moreover, of relaying the applicability of general principles to the limits and conditions of the directives, see the Opinion of AG Mazak of 16 October 2007, *Félix Palacios de la Villa v Cortefiel Servicios SA*, Case C-411/05, in *Reports*, 2007, I-8531. For a comment on this subject, see K. LENAERTS, *The Principle of Equal Treatment and the European Court of Justice*, in *Il Diritto dell'Unione europea*, 2013, 461 ff.
[38] Judgment of the Court 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
[39] See para 164 in A.G. Trstenjak's Opinion in Case C-282/10, *Dominguez*, cit.

After the controversial judgments in *Mangold* and *Kücükdeveci*,[40] the Court of Justice has recently dealt with the direct effect of the general principle of non-discrimination on grounds of age in two further decisions: *Dansk Industri*[41] and *Parris*.[42] Both judgments raise a few criticisms related to the consistency (and the fairness) of EU equality law: they in fact sharpen the complexity of understanding whether a given situation will receive an actual protection by EU law or if it will simply be dismissed by referring to either States' sovereignty and discretion or to the justification test under the EU equality directive.

The *Dansk Industri* case originated from Mr Rasmussen's attempt to get a severance allowance in addition to his pension, once he had been dismissed from the Danish company, Ajos A/S, where he had been working for more than twenty years. Disregarding his potential entitlement to receive such allowance, its effective enjoyment was precluded under a provision of Danish law that excluded the payment of the severance allowance for those dismissed employees that were at the time entitled to an old-age pension and that joined the pension scheme before turning 50 years old. Against this backdrop, Mr Rasmussen felt he had been discriminated against on grounds of age also because the same provision of the law on salaried employees had already been found to be inconsistent with EU law within a previous judgment of the European Court of Justice.[43]

Within the abovementioned scenario, and after acknowledging the horizontality of the dispute, the Danish Supreme Court raised two different questions: first, whether the concerned national provision should be considered to be in violation of the EU general principle of non-discrimination on grounds of age; and second, whether the potential contrariety to the EU general principle should be somehow weighted against two other general principles of EU law, particularly the principle of legitimate expectation and the principle of legal certainty.

The Court's approach to both preliminary questions looks bold: as a first point of clarification, the Court recalled *Mangold* and *Kücükdeveci* judgments to highlight that the combination of the general principle of non-discrimination on grounds of age with Directive 2000/78 would require the non-application of a conflicting national provision. Given that any consistent interpretation had already been excluded in the *Ingeniørforeningen i Danmark* case, only the disapplication of such a provision could successfully ensure the genuine enjoyment of equality on grounds of age. When turning to the second preliminary question, however, the reasoning of the Court does not seem to have a clear focus about the consequences that the ruling would have triggered. When asked about the possibility of balancing general principles to prevent a general principle, such as non-discrimination on grounds of age, from jeopardising the respect and the enjoyment of other general principles, the Court quite abruptly clarified that no such issue would happen and that, in any case, the direct effect of the general principle of non-discrimination on grounds age should not be limited on that basis.[44]

The reasoning above has the merit of proving the importance of age equality. Yet, it seems that, once again, the Court of Justice has failed to anticipate the ultimate outcome of its strong stance. The side effects of the *Dansk Industry* decision have in fact emerged as soon as the Danish Supreme Court acknowledged the outcome of the preliminary ruling and accommodated it into the dispute at the main proceeding.[45] Instead of recognising Mr. Rasmussen's entitlement not

[40] Judgment of the Court of 19 January 2010, case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21.

[41] Case C-441/14 *Dansk Industri (DI)*, *cit*.

[42] Case C-443/15 *David L. Parris* v *Trinity College Dublin and Others* EU:C:2016:897.

[43] Case C-499/08 *Ingeniørforeningen i Danmark* v *Region Syddanmark* EU:C:2010:600.

[44] S.M. CARBONE, *Discriminazioni sulla base dell'età tra principi generali UE e criteri applicativi*, cit., at 26.

[45] See R. HOLDGAARD, D. ELKAN, G. K. SCHALDEMOSE, *From cooperation to collision: The ECJ's Ajos ruling and the Danish Supreme Court's refusal to comply*, 2018, in *Common Market Law Review*, 17 ff.; E. SPAVENTA, *Should we "harmonize" fundamental rights in the EU?*, cit., at 1002; E. GUALCO, *La Cour de justice retourne sur*

to be discriminated against because of his age, the Danish Supreme Court rather preferred to state that general principles of EU law are not covered by the Danish law of accession to the EU and therefore are not binding within the Danish legal system unless a specific amendment to such law is made.

Although such a reaction cannot be justified, it can be quite easily explained: under the member states' point of view, the outcome of the preliminary ruling in *Dansk Industri* could be and was perceived as a threat to states' sovereignty powers and prerogatives.[46] The unwritten form of general principles and the fact that they are quite arbitrarily 'discovered' by the European Court of Justice prevents member states from exercising any *ex ante* check on this source of law. If general principles were written legislation, member states would have an indirect control over them via the EU institutions, but because no legislative process is involved when general principles are at stake, the only kind of supervision left to member states is an *ex post* check to assess the compliance of general principles with the national constitutional foundations. The Danish Supreme Court has clearly implemented this latter form of control by indirectly assessing that the effects of general principles into the national legal system have gone too far.[47]

In the aftermath of the Danish Court's decision several questions have arisen. A first – and theoretical – issue focuses on the need to clarify whether a better investigation by the Court of Justice could have potentially prevented such a strong reaction of the Danish Court. A second, and much more important question, deals with the resulting uncertainty regarding the status of general principles in the national legal systems and the impact of this ruling on the relationship between Denmark and the European Union.

In this regard, one may easily argue that the Danish Supreme Court's reasoning can be dismissed as inconsistent under EU law by simply recalling the nature and the functioning of EU general principles: as unwritten provisions which are not created, but purely discovered by the Court of Justice, these principles permeate the EU legal system as a whole, therefore being implicitly acknowledged as soon as a State joins the EU. In other words, Member States' commitment to be bound by general principles seems to be embedded in their national legal provisions allowing the accession to the EU.

The abovementioned observation, however, does not change the fact that the Danish Supreme Court ruling openly challenges the EU general principles and their suitability as a source for protecting equality. Given the need to ensure that EU law is uniformly and consistently observed across the member states, the importance of that reasoning should not be disregarded but it should lead the Court of Justice to question (if not rethink) its overreliance on general principles. As stressed throughout this paper, although being a valuable source of protection of equality, the unwritten form of general principles on the one side, and the huge discretion that the Court of Justice exercises when applying general principles, on the other side, has the potential to undermine the effective and fair enjoyment of equality.

This last observation has been recently confirmed in *Parris*. The decision in this case originated from a dispute between Dr Parris, a former lecturer having both Irish and British nationality, and his employer, Trinity College Dublin. Within the pension scheme provided by this institution, a survivor's pension would have been payable to the spouse or, since 1 January

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l'effet direct du principe de non-discrimination en raison de l'âge: (encore) beaucoup de bruit pour rien?, in *federalismi.it*, 2017, 1 ff., at 13.

[46] See K. LENAERTS, J. GUTIERREZ-FONS, *The Role of general principles of EU law*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA, *A constitutional order of States? Essays in EU law in honour of Alan Dashwood*, Oxford, 2011, at 181, who already pointed out that national courts 'may perceive general principles as illegitimate judicial law making and deciding to stop engaging with the ECJ'.

[47] G. ZACCARONI, *Is the horizontal application of general principles ultra vires? Dialogue and conflict between supreme European courts in* Dansk Industri, in *federalismi.it*, 2018, at 1.

2011, to the civil partner of the University's employees. This rule applied only to members who were married or entered into civil partnerships before turning 60 years old. Following his appointment in 1972, Dr Parris joined the university pension scheme. Nevertheless, as Dr Parris was homosexual, he could neither get married nor enter into a civil partnership until 2005, when same-sex partnerships became legal in the UK according to the Civil Partnership Act. On that basis, Dr Parris registered a civil partnership with his partner on 21 April 2009: at that time he was aged 63.

Furthermore, as soon as the Civil Partnership Act was enacted in Ireland, Dr Parris approached Trinity College Dublin and requested to join the survivor's pension scheme offered by the University. The above-mentioned Act entered into force on 1 January 2011 and shortly after, Dr Parris – who retired at the end of 2010 – received notification that his civil partnership had been recognised in the UK.

Despite this formal recognition, the Irish Higher Education Academy rejected Dr Parris' request to access the survivor's pension scheme on the grounds, first, that the recognition of the partnership was granted after his retirement; and second, that – since Dr Parris entered into a civil partnership after reaching the age of 60 years old – the age requirement foreseen by the University policy was not met.

Faced with obvious disappointment, Dr Parris brought a claim before the Irish Labour Court arguing that he was a victim of discrimination by reason of his age and sexual orientation.

Against this backdrop, the Irish Court sought clarification from the European Court of Justice in order to assess whether the domestic provision at stake led to discrimination on grounds of sexual orientation; discrimination on grounds of age; discrimination on those grounds combined.

Following a relatively simplistic reasoning, the Court of Justice denied that any of the above discrimination would trigger a violation of equality. As regard to the first preliminary question, after excluding any form of direct discrimination, the Court of Justice denied the existence of indirect discrimination as well. Despite the possibility of affecting homosexual employees more severely than heterosexual employees, the 60-year age limit was found to be legitimate not because of the justification test provided within Directive 2000/78,[48] but because the directive shall apply 'without prejudice to national laws on marital status and the benefits depended thereon'.[49] Hence, because Dr Parris turned 60 before homosexual partnerships were even introduced in Ireland, the preliminary requirement for indirect discrimination to operate was missing.

Shifting to the second preliminary question, the Court clarified that the rule at stake could not constitute discrimination on grounds of age given that it merely laid down an age limit for the entitlement to receive a survivor's benefit, which therefore fell under the exception of art. 6(2) directive 2000/78. As a logical conclusion to the observations made above, the Court then stated that – given the absence of both discrimination on grounds of sexual orientation and discrimination on grounds of age – no multiple or intersectional discrimination could arise.

As this short overview indirectly highlights, the role and function of general principles is not even mentioned in the decision above. Such self-restraint appears to be surprising and disappointing at time: surprising because *Parris* has been delivered after quite a (if not too) bold ruling, i.e. *Dansk Industri*; and disappointing for several reasons that will now be presented.

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[48] Under art. 6 Directive 2000/78, *supra* n. 66, a national measure has to pursue a legitimate aim and be proportionate towards that goal in order to be legitimate according to EU anti-discrimination law. In this regard, the Irish provision clearly intended to discourage marriages of convenience, whereas the rule was aimed at excluding the potential abuse of the pension benefits.

[49] Case C-443/15 *David L. Parris*, *supra* n. 75, para. 57; Recital 22, Directive 2000/78, *supra* n. 66.

First, the *Parris* case represented an excellent opportunity for the Court to clarify the effect of general principles according to EU law, particularly explaining if and to what extent a hierarchy among general principles exists.
Secondly, *Parris* raises a concern related to another kind of hierarchy: the one among discriminatory grounds. As known, when the *Mangold* judgment was delivered only a few member states already foresaw age as a ground of discrimination, whereas the majority of the member states still lacked any provision covering age equality. Yet, this issue has not prevented the Court of Justice from acknowledging that age equality still represented a value commonly shared by all member states, which therefore deserved to be qualified as a general principle of EU law. On a different note, the Charter has made fundamental rights more understandable by listing, among other, the grounds that member states and by consequence the European Union qualify as discriminatory. This means that, since the creation of the EU Charter of Fundamental Rights in 2000, non-discrimination on grounds of sexual orientation has certainly been recognised as a common value across the member states.[50] Consequently, despite member states' autonomy to regulate marital status, as soon as same-sex partnerships (and then marriages) were introduced in Ireland, Dr Parris had indeed become entitled not to be discriminated against because of his sexual orientation.[51] As also stressed by the Advocate General,[52] the fact that Dr Parris joined a pension scheme before having the legal opportunity to register his civil partnership does not alter such a conclusion. In the light of these observations, why is non-discrimination on grounds of sexual orientation still prevented from being a EU general principle?[53]
Further to the remark above, the Court's decision has omitted an accurate analysis of the existence of discrimination on grounds of age. As a matter of fact, Ireland's alleged goal to prevent marriages of convenience occurring merely for pension and other benefits does not seem to justify the unfair treatment demonstrated within the dispute at the main proceeding. If under the perspective of age equality, the 60 years old limit could potentially avoid heterosexual marriages of convenience, when homosexual couples are at stake, such a limit leads to obvious discrimination. Given that homosexual partners were prevented from entering into any legal partnership until 2010, the survivor's pension scheme would automatically be precluded for all employees that were already 60 years old at that time. Hence, this category of individuals – like Dr Parris – would clearly be victims of an intersectional discrimination grounded on both sexual orientation and age.
Against this backdrop, one further criticism of the *Parris* decision rests on the last of a series of missed occasions for the Court to finally accommodate the existence of intersectional discrimination.[54] Despite the lack of an express provision on this, the acknowledgment of intersectional discrimination seems perfectly compatible with the idea that all discriminatory grounds belong to a common general principle of equality. In addition to that, and under a more operational point of view, it should be pointed out that if discrimination based on one ground

[50] Despite the accomplishment achieved when art 13 EC was created, the insertion of a right to non-discrimination on grounds of sexual orientation within the Charter was still needed in order to finally trigger the doctrine of direct effect, feature that has been so far excluded with regard to art. 13 EC (now art 19 TFEU).
[51] M. MÖSCHEL, *If and when age and sexual orientation discrimination intersect: Parris*, *Common Market Law Review*, 2017, 1835 ff., at 1842.
[52] AG Kokott in Case C-443/15 *David L. Parris*, *cit.*, paras. 100 – 110.
[53] Furthermore, it is worth to point out that sexual orientation tends to be unreasonably disregarded also when the application of art. 21 EU Charter is at stake. At this regard, see A. WARD, *The impact of the EU Charter of Fundamental Rights on anti-discrimination law: more a whimper than a bang?*, cit., at 42.
[54] M. MÖSCHEL, *If and when age and sexual orientation discrimination intersect:* Parris, cit., at 1845. See also R. NIELSEN, *Is European Union equality law capable of addressing multiple and intersectional discrimination yet? Precautions against neglecting intersectional cases*, in D. SCHIEK, V. CHEGE, *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, Routledge, 2009, at 31.

jeopardises equality, then a disparate treatment focusing on multiple or on a combination of grounds[55] even more so breaches equality.[56] As an ultimate observation, it could be stressed that for once the reliance on an unwritten provision such as the general principle of equality would be not only suitable but highly desirable. Insofar as EU written norms prohibit discrimination on several grounds, it is only logical to affirm that whenever a single provision can infringe two or more manifestations of equality at a time, such a provision should be labelled as discriminatory. In the absence of any express statement on that issue, the gap-filling function of general principles could easily and smoothly fill this blank.
A last issue stemming from *Dansk Industri* and *Parris* judgments is connected to the principle of equality as a whole: the lack of any methodology in the Court's case law and the huge discretion that the Court deploys in the field of equality ultimately undermines the respect and enjoyment of equality within the European Union. On the one hand, individuals are given the opportunity to receive actual protection under EU equality law thanks to the direct effect of general principles; on the other hand, however, they cannot rely on clear guidance to understand when they can successfully trigger direct effect and when, on the contrary, the benefits of such a doctrine are precluded.

5. Conclusions

This paper has acknowledged that general principles of EU law are not only a valuable source of protection of equality on grounds of age and disability, but also a *passe-partout* key enabling the EU legal order the degree of flexibility to cope with the challenges an increasingly integrated Union entails. General principles of EU law are in fact an almost unlimited source of protection of equality as far as – thanks to their inner flexibility – their content and their effects can be easily adapted to any situation where the respect of equality is questioned.
Against the backdrop above, the paper has however stressed the possible risks that the other inner aspect of general principles,[57] i.e. their vagueness, involves in terms of uniformity and legal certainty within the protection of such equality. The paper has highlighted that three main shortcomings are still seeking an accommodation by the European Court of Justice.
A first criticism focuses on the necessity of balancing the enhancement of general principles as a tool for protecting equality with the respect of other fundamental principles of EU law, such as the fundamental rights of the counterparty within a horizontal dispute. In this regard, the Court of Justice in the *Dansk Industri* case[58] demonstrated that the main effect of the so-called *Mangold* approach is to impose on private parties the obligation to respect fundamental rights that the State was in the first place unable to ensure, and, as a consequence, to transfer the related liability from States onto individuals.[59] Despites the Court's insistence that the horizontal direct effect of a general principle of EU law – like that of non-discrimination on grounds of age – shall prevail over the principles of legal certainty and the protection of legitimate expectations,[60] this approach does not seem to maximise the protection of a fundamental right, but rather to jeopardise it.

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[55] With regard to Dr Parris also defined as a 'compounded type of discrimination [...] situated at the crossroads of age and sexual orientation discrimination' (M. MÖSCHEL, *If and when age and sexual orientation discrimination intersect:* Parris, *cit.*, at 1848).
[56] AG Kokott in Case C-443/15 *David L. Parris*, *supra* n. 52, paras. 147 – 159.
[57] See L.S. ROSSI, *How fundamental are fundamental principles? Primacy and fundamental rights after Lisbon*, in *Yearbook of European Law*, 2008, p. 65 ff., at 87, who argues that 'fundamental principles remain a sort of grey area, where vagueness and flexibility are two sides of the same coin'.
[58] Case C-441/14 *Dansk Industri (DI)*, *supra* n. 26, para. 28.
[59] E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA, *A constitutional order of States? Essays in EU law in honour of Alan Dashwood*, cit., at 217.
[60] Case C-441-14 *Dansk Industri (DI)*, *supra* n. 26, paras. 38 – 43.

Considering that the principles of legal certainty and the protection of legitimate expectations have been recognised as general principles of the EU in themselves,[61] the Court should, at least, elaborate a methodology for the horizontal application of general principles of EU law.[62] Otherwise, notwithstanding the efforts to increase the protection of fundamental rights, such as the principle of non-discrimination on grounds of age – by foreseeing different but connected paths, the risk is to see the constitutional edifice of the European Union imploding.[63]

A second concern deals with the possibility of extending the recognition of horizontal direct effect to further general principles[64] than the one (non-discrimination on grounds of age) that has already received such assessment by the Court of Justice. In this regard, if the idea of extending this characteristic to all fundamental rights protected by the European Union would be tempting, its concrete application would probably bring both the EU and the national jurisdictional systems to collapse.[65] When it comes to equality, however, it seems that extending the horizontal effect of equality to further grounds than those already covered[66] should be not only logical, but also fair. Moving from the remark that all grounds of discrimination represent an expression of the broader and supreme principle of equality, no distinction should be made in regard to their enforcement and effect. If the Court has recently followed this latter approach with regard to the interpretation of discrimination on grounds of religion,[67] the above-mentioned risk has instead materialised in the *Parris* decision, when the Court of justice deliberately neglected to recognise the equal value of all discriminatory grounds protected at EU level, by not accommodating the direct effect of non-discrimination on grounds of sexual orientation. Such a neurotic case-law – that tends to create a hierarchy among discriminatory grounds – is much likely to ultimately frustrate the effective protection of equality in the EU.[68]

Lastly, the commitment towards mainstream equality has to be recalled: art. 10 TFEU implies that the European Union has embedded the respect of equal treatment in each and every activity carried out at supranational level. This translates into an obligation to ensure the effective enjoyment of equality, which goes beyond the mere enunciation of the right to equal treatment and actually entails the institutions' duty to accommodate equality in all situations, i.e. to read the EU policies and actions through the lens of equality. Being one of the EU institutions, the European Court of Justice has to comply with the obligation above. The criticisms outlined in the present paper, however, describe quite a different scenario: given the tailored approach towards general principles currently followed by the Court of Justice, the Court seems more oriented towards ensuring individual justice rather than implementing an equal and coherent enjoyment of equality.

The resulting paradox of such an approach, however, is that the inner significance of equality itself risks being ultimately frustrated. As the paper has pointed out, the lack of methodology

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[61] F. FONTANELLI, *General Principles of EU Law and a Glimpse of Solidarity in the Aftermath of Mangold and Kücükdeveci, in European Public Law,* 2011, 225, at 234.

[62] K. LENAERTS, J. GUTIERREZ-FONS, *The Role of general principles of EU law*, *cit.*, at 181.

[63] E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, cit., at 218, expresses her concern by affirming that 'the Court risks transforming the constitutional 'order' of states in a constitutional chaos'.

[64] T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, cit., at 213.

[65] This scenario seems to be portrayed also by E. SPAVENTA, *Should we "harmonize" fundamental rights in the EU?*, cit. at 1022.

[66] Namely sex, nationality and age.

[67] Judgment of the Court of 17 April 2018, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257. See L. LOURENÇO, *Religion, discrimination and the EU general principles' gospel:* Egenberger, in *Common Market Law Review*, 2019, 193 ff.; R. MCCREA, *Salvation outside the church? The ECJ rules on religious discrimination in employment*, 2018, in *EU Law Analysis*, available at http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html.

[68] See E. SPAVENTA, *Should we "harmonize" fundamental rights in the EU?*, cit., at 1022.

together with the clear fragmentation and unpredictability of the Court's decisions triggers the idea that instead of being a universal and constitutional value, equality – as a general principle of EU law – has sadly become a *passe-partout* key capable of opening the Pandora's box of the Court's discretion.

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