Rapports

The *Ajos* Case and the Danish Approach to International Law

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1 INTRODUCTION

In December 2016, the Danish Supreme Court rendered a judgment on the relationship between Danish law and EU law, which has attracted much attention. The Supreme Court ruled that it was not possible to allow the general principle of EU law prohibiting discrimination on grounds of age to take precedence over national law as required in a ruling by the Court of Justice of the European Union (CJEU).

The case – commonly referred to as the *Ajos* case – is one of the few examples of an evident clash between Danish national law and EU law. However, the *Ajos* case did not come as a complete surprise. In recent years, the Danish Supreme Court has delivered a number of judgments clarifying the status of international law and EU law in Denmark. The aim of this report is to outline the Danish Supreme Court's approach to international law and EU law and the underlying constitutional considerations.

2 THE STATUS OF INTERNATIONAL LAW IN DENMARK

2.1 A DUALIST APPROACH

Denmark belongs to the dualist states. Danish law and international law have traditionally been perceived as two distinct legal spheres, and the Danish Constitution contains no provision incorporating treaties or customary international law into Danish law. The dualist view on the relationship between Danish law and international law goes back to the second half of the nineteenth century, with similar thoughts evolving in the other Scandinavian states. German legal theory was the primary source of inspiration.

The early dualist scholars accepted that international law did not necessarily have to be formally transformed into domestic law to have an impact on the

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domestic level. It was assumed that national courts, when interpreting national law, would try to avoid a conflict with international law.[1] In Denmark, the influential Alf Ross in 1942 formulated two rules. The 'rule of interpretation' stated that Danish law should be interpreted in accordance with Denmark's international obligations. The other rule, which he named the 'rule of presumption', was an attempt to introduce an old common law doctrine in Denmark, namely, that international law is held to be part of the law of the land.[2]

Neither of the rules suggested by Alf Ross were based on Danish case law. For several years no Supreme Court decisions expressly touched upon the relationship between Danish law and international law. This only changed as late as the 1980s, when the European Convention on Human Rights was increasingly invoked before Danish courts. Danish legislation was interpreted in conformity with the Convention, but it remained uncertain as to how far Danish courts would go to avoid violations of international law. In a judgment from 1986, the Supreme Court upheld the traditional dualist approach by declaring that Article 11 of the Convention 'cannot be applied directly' contrary to a Danish statute, but a few years later, in 1990, the Supreme Court with reference to Article 6 of the Convention applied a national statute in such a way, that – in the opinion of many scholars – it's clear wording seemed to be set aside.[3]

The European Convention on Human Rights was incorporated into Danish law in 1992. When incorporating the Convention it was stressed that the existing balance of power between the Danish legislature and the courts should be maintained.[4] It is still today a much debated question among legal scholars to what extent courts and administrative authorities can disapply Danish law in the case of a possible conflict with the European Convention on Human Rights. There is little case law on the matter.

When considering the general relationship between Danish law and international law the 'rule of interpretation' and 'rule of presumption' are still commonly used terms in Danish legal theory, but they are not always applied in their original sense. The difference between the rules has become blurred, and the terminology has been subject to criticism.[5]

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1 E.g. H. Triepel, *Völkerrecht und Landesrecht* 154, 398–400 (Leipzig: Verlag von C.L. Hirschfeld 1899).

2 A. Ross, *Lærebog i Folkeret* 82, 77–79 (1st ed., Copenhagen: Ejnar Munksgaard 1942). He was deeply influenced by G. A. Walz, *Völkerrecht und Staatliches Recht* (Stuttgart: W. Kohlhammer 1933), published ten years earlier.

3 The judgments are published in Danish Weekly Law Reports (UfR), UfR 1986, 898 and UfR 1990, 13.

4 *See* e.g. betænkning no. 1220 (Copenhagen: 1991) on the incorporation of the European Convention on Human Rights in Danish law with an English summary, 203–215 (at 205–208).

5 For a more detailed examination of Danish legal theory and its origin, *see* O. Terkelsen, *Folkeret og dansk ret* Ch. 2 (Copenhagen: Karnov 2017).

2.2 International law and constitutional interpretation

The present Danish Constitution was adopted in 1953, but in many respects, the rules originates in the first Constitution from 1849. It is cumbersome to amend the Constitution, as amendments have to be approved by a referendum, and a majority in favour of the amendment consisting of at least 40% of all entitled Danish voters is required. Before 1953, the Danish Constitution was amended only in 1866, 1915 and 1920 – aside from some amendments in the years following the adoption of the Constitution.

Denmark has no constitutional court, as the Supreme Court is the highest judicial authority. It is generally accepted that the Supreme Court can test the constitutionality of legislation, but the Supreme Court uses this power very cautiously. In 1999 the Supreme Court used this power for the first and only time to formally set aside a statutory provision for being in violation of the Constitution.[6]

The interpretation of the Constitution has virtually been unaffected by international law.[7] The Danish Supreme Court does not use, for example, international human rights law in interpreting the Constitution. By contrast, the German Federal Constitutional Court refers to the European Convention on Human Rights and the case law of the European Court of Human Rights as interpretation aids to determine the contents and scope of fundamental rights and of rule of law principles of the German Basic Law.[8]

The Danish Supreme Court handed down a significant ruling on the role of international law in constitutional interpretation in 2010.[9] The case centred upon the question of whether citizens had sufficient legal standing to bring proceedings against the government, challenging the legality of its engagement in the 2003 Iraq War. The Supreme Court ruled that the applicants had no standing, but nevertheless considered whether the decision to engage in the war was in violation of section 19(2) of the Constitution.

Section 19(2) states: 'Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing [the Danish Parliament].' In the *travaux préparatoires* it was assumed that the State would only resort to force in accordance with international law. The applicants claimed that the parliament could therefore only consent to the use of force in the case of a UN Security

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6 UfR 1999, 841.

7 J. P. Christensen, J. Albæk Jensen & M. Hansen Jensen, *Dansk Statsret* 346, 41–43 (2d ed., Copenhagen: Jurist- og Økonomforbundet 2016).

8 E.g. BVerfGE 74, 358 and BVerfGE 128, 326.

9 UfR 2010, 1547.

Council mandate, or otherwise, in accordance with international law. This interpretation was rejected by the Supreme Court. It did not use international law in interpreting the provision.

The Supreme Court stated that, according to the wording, section 19(2) is a procedural rule regulating the relationship between the national government and the national parliament. The interpretation suggested by the applicants would imply that Denmark had to a large extent entrusted the UN Security Council, including the permanent members holding veto powers, to decide whether Denmark could use force. The Supreme Court added that such an interpretation would also be contrary to the Danish approach to international law, according to which international law does not have the same legal value as the Constitution.

2.3 International law and statutes

Section 19(1) of the Danish Constitution implies that treaties cannot supersede or replace statutory law. The government must obtain the consent of the parliament before entering into any international obligations the fulfilment of which 'requires the concurrence of the Folketing'. This refers to obligations the fulfilment of which requires changes to existing legislation or new legislation or involves expenditures.

As outlined above, it has been subject to some uncertainty how far Danish courts and other public authorities would go to avoid violations of international law by way of interpretation of domestic law. In a significant ruling from 2005 the Supreme Court clearly stated that it is not willing to disapply a statutory provision.[10]

The case concerned a beneficiary of social security who brought proceedings against a Danish municipality for stopping his social security payments. The applicant had failed to participate in obligatory job-activation measures prescribed by the national legislation on social security. He claimed that the legislation was violating two International Labour Organization (ILO) conventions. The Supreme Court stated that no violation of the two ILO conventions had occurred, and added that the ILO conventions could not lead to the national statutory provisions relating to activation measures being set aside.

The case law concerning the status of customary international law in Denmark is sparse. The 2010 judgment regarding the Iraq War seems to uphold a dualist approach as regards international law in general.

The foregoing addresses the rare situations of a norm conflict. It should be added that courts and administrative authorities, normally, to the extent possible,

[10] UfR 2006, 770.

interpret national law in such a way that a violation of the State's international obligations is avoided.

3 RECENT SUPREME COURT DECISIONS ON THE IMPACT OF EU LAW

3.1 The principle of consistent interpretation

The principle of consistent interpretation was established by the CJEU in the *von Colson and Kamann* case.[11] As a result, Member States are obliged, so far as possible, to interpret national law in conformity with EU law. The CJEU has, however, underlined that the principle of consistent interpretation cannot serve as basis of an interpretation that is *contra legem*. It is the task of national courts to interpret national law in accordance with the ordinary interpretive methods recognized by national law.

The obligation to interpret national law in conformity with EU law has, until recently, not been subject of much debate in Denmark. As mentioned, national courts, normally, to the extent possible, interpret national law in such a way that a violation of Denmark's international obligations – including obligations arising from EU law – is avoided. Denmark is not alone in this regard, as it is the same situation in most other Member States.

The CJEU in *Björnekulla* stated that a Member State is required, so far as possible, to interpret national law in conformity with an EU directive 'notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule'.[12] The *travaux préparatoires* are, normally, taken into account when interpreting Danish legislation.

In a judgment from 2013 the Danish Supreme Court considered whether an employee working for a private employer, who fell ill during holiday leave, was entitled to a replacement holiday.[13] The wording of the Holiday Act did not explicitly preclude such an interpretation, but according to, inter alia, the *travaux préparatoires*, the risk of illness during holiday passed from the employer to the employee at the beginning of the period of holiday. This was not in accordance with the Working Time Directive as interpreted by the CJEU. *Björnekulla* was invoked by the employee, and the High Court interpreted the Holiday Act in conformity with the directive. However, the Supreme Court noted that the obligation of consistent interpretation cannot serve as basis for an interpretation

[11] Case 14/83, *von Colson and Kamann*, paras 26, 28. For more recent case law, *see* e.g. Case 282/10, *Dominguez*, paras 24, 25, 27, and Case 441/14, *DI* (Ajos), paras 30–34 (also discussed below).
[12] Case 371/02, *Björnekulla*, para. 13.
[13] UfR 2014, 914.

that is *contra legem*. The Supreme Court held that the law pursuant to the Holiday Act was clear. It was not possible to conclude that the Holiday Act passed the risk of illness arisen during holiday to the employer.

Questions about the appropriate methods of interpreting national law arose again in the *Ajos* case. The case concerned whether a private sector employee, after being dismissed, was entitled to a severance allowance under the Salaried Employees Act. According to the Act, an employee was not entitled to severance allowance, if, on the termination of the employment relationship, the employee would receive an old-age pension from the employer. In the case law of the Supreme Court, this exemption had been consistently interpreted as meaning that an employee was not entitled to a severance allowance, irrespective of whether the employee had opted temporarily not to receive the pension in order to pursue a professional career.

The CJEU held that the Salaried Employees Act, as interpreted by the Supreme Court, was not consistent with the Employment Directive and the prohibition contained therein prohibiting discrimination on grounds of age.[14] In a request for a preliminary ruling the Supreme Court noted that it would be *contra legem* to interpret the Salaried Employees Act in such a manner as to bring the provision into line with the Employment Directive as interpreted by the CJEU.[15] The Supreme Court thereby pointed to its own consistent interpretation of the Salaried Employees Act, but this understanding of *contra legem* was rejected by the CJEU, which held 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'.[16]

In the Supreme Court judgment following the return of the preliminary ruling from the CJEU, the Supreme Court still reached the conclusion that the law was clear.[17] It was not possible, 'in applying the interpretive methods recognized by Danish law', to arrive at an interpretation in a manner that was consistent with the Employment Directive as interpreted by the CJEU. The Supreme Court now also included references to the *travaux préparatoires* of the Salaried Employees Act indicating that the legislator had confirmed the interpretation established in the Supreme Court's case law, but it remains questionable whether an interpretation of

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[14] This was already stated by the CJEU in Case 499/08, *Ingeniørforeningen i Danmark*, regarding a dispute between an employee and a *public* employer. In this context the Working Time Directive could have direct effect.

[15] UfR 2014, 3667.

[16] Case 441/14, *DI* (Ajos), para. 33. Interestingly, the CJEU did not follow the approach of its Advocate General who – in line with the Björnekulla judgment – more generally stated that a '*contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue', Case 441/14, *DI* (Ajos), Opinion of AG Bot, para. 68.

[17] UfR 2017, 824.

a statute, which is firmly settled by the Supreme Court, can just be changed to the disadvantage of an individual as required by the CJEU in the *Ajos* case.[18]

3.2 Direct effect and supremacy of EU law

3.2[a] *The Legal Basis of EU Law in Denmark*

Danish membership of the EU in 1973 was enabled by section 20 of the Constitution.[19] The provision provides that the power to exercise, inter alia, legislative, executive and judicial authority with direct effect in Denmark may, by statute 'to a more specified extent', be transferred to international authorities established by mutual agreement with other states for the promotion of international rules of law and cooperation. A majority of five-sixths of the members of the parliament is required to pass such a statute. If such a majority is not obtained, the statute may be submitted to the electorate for approval or rejection.

The Accession Act was adopted in 1972 in accordance with section 20 of the Constitution.[20] Section 2 of the Accession Act is delegating sovereignty to the EU. Section 3 is implementing provisions of the founding treaties, etc., having direct effect under EU law. Sections 2 and 3 are linked with section 4, which lists the founding treaties, etc., of the EU and its predecessors. The list starts with the 1957 EEC Treaty and ends with the Treaty of Lisbon and is considered to satisfy the requirement that sovereignty can only be delegated 'to a more specified extent'. The Supreme Court, in its Maastricht judgment from 1998, held that the powers delegated may be indicated by means of reference to a treaty.[21]

The Accession Act implies that EU law is part of national law, and may be invoked before national courts and other authorities. The Act also provides a legal basis for recognizing the primacy of EU law. EU law cannot, from a Danish perspective, derogate from the Constitution, due to such powers not being able to be transferred to the EU without a constitutional amendment. In principle, a statute might also prevail over EU law if this is intended by the legislator. There is, however, a strong presumption against a statute being intended to violate EU law.[22]

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[18] Cf. Terkelsen, *supra* n. 5, at 138, 97–98. The CJEU has reiterated its ruling in e.g. Case 554/14, *Ognyanov*, paras 67–70.

[19] For a more detailed discussion on s. 20, *see* e.g. J. Hartig Danielsen, *One of Many National Constraints on European Integration: Section 20 of the Danish Constitution*, 16(2) Eur. Pub. L. 181–192 (2010).

[20] Act no. 447 of 11 Oct. 1972, with subsequent amendments.

[21] UfR 1998, 800.

[22] Cf. *Justitsministeriets Redegørelse af Juli 1972 for vise Statsretlige Spørgsmål i Forbindelse med en Dansk Tiltrædelse af De Europæiske Fællesskaber*, 41 Nordisk Tidsskrift for International Ret 113, 65–130 (1971).

The Supreme Court in the Maastricht judgment stressed that national courts cannot be deprived of their right to test whether EU law exceeds the limits for the transferal of competence determined by the Accession Act. According to the Supreme Court, legal acts adopted by the EU institutions as well as rules and legal principles which are based on the practice of the CJEU are inapplicable in Denmark if the 'extraordinary situation' should arise that with 'the required certainty' it can be established that they constitute a transgression of the sovereignty assigned to the EU by the Accession Act. The Maastricht judgment was reiterated by the Supreme Court in its Lisbon judgment delivered in 2013.[23]

3.2[b] *The Horizontal Direct Effect of General Principles*

Throughout the years, the CJEU has development a number of general principles of EU law, e.g. principles of equality, proportionality and the protection of legitimate expectations.[24] In the beginning, the purpose of the general principles of EU law was to impose limitations upon the power of the EU institutions. An act adopted by the institutions violating general principles of EU law could be challenged and annulled by the CJEU. During the 1980s and 1990s the CJEU extended the scope of the general principles. Thus, Member States are obliged to observe the general principles when implementing EU law. Furthermore, Member States are bound by general principles when adopting national measures under an express derogation provided for in the treaties or adopting measures falling within the scope of EU law.

Fundamental rights form part of the general principles of the Union's law. This is expressly recognized in Article 6(3) of the Treaty on the European Union, which was inserted by the Maastricht Treaty. Fundamental rights were further codified and developed by the EU Charter of Fundamental Rights, which became legally binding by the Treaty of Lisbon. Article 6(1) of the Treaty on the European Union states that the rights, freedoms and principles set out in the Charter shall have the same legal value as the Treaties of the EU, but the Charter shall not extend in any way the competences of the Union. According to Article 51(1) of the Charter, the provisions of the Charter are 'addressed to the institutions and bodies of the Union' and 'to the Member States only when they are implementing Union law'.

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[23] UfR 2013, 1451.

[24] T. Tridimas, *The General Principles of EU Law* Ch. 1 (2d ed., Oxford: Oxford University Press 2006), provides an outline of the development of the general principles.

In *Mangold* the CJEU established the EU law principle prohibiting discrimination on grounds of age and held that the principle has horizontal direct effect.[25] The principle 'confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle', the CJEU explained in its subsequent case law.[26] According to the CJEU the source of the general principle prohibiting discrimination on grounds of age is to be found 'in various international instruments and in the constitutional traditions common to the Member States'.[27] The principle is codified in Article 21(1) of the Charter which prohibits various types of discrimination. In *Association de médiation sociale* the CJEU held that Article 21(1) has horizontal direct effect.[28]

The decision of the CJEU to confer horizontal direct effect on general principles of EU law was controversial and has been questioned by, inter alia, a number of Advocate Generals.[29] In the *Ajos* case the Danish Supreme Court asked the CJEU whether principles of legal certainty and protection of legitimate expectations could alter the obligation to disapply a provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. This was, however, rejected by the CJEU.[30] Instead, the CJEU in its preliminary ruling reiterated that national courts are required to recognize the supremacy of the general principle prohibiting discrimination on grounds of age.

3.2[c] *The Supreme Court Judgment in the* Ajos *Case*

Following the preliminary ruling of the CJEU, the Danish Supreme Court in December 2016 gave judgment in the *Ajos* case. The Supreme Court ruled that it was not possible to disapply a provision of the Danish Salaried Employees Act that was violating the general principle prohibiting discrimination on grounds of age.[31]

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[25] Case 144/04, *Mangold*, paras 74–77. It has not without good reason been said that the *directive* giving expression to the general principle of EU law was given horizontal direct effect by the CJEU, *see* e.g. T. C. Hartley, *The Foundations of European Union Law* 240, 229–231 (8th ed., Oxford: Oxford University Press 2014). *See* below the formulations used by the CJEU in recent case law.

[26] Case 441/14, *DI* (Ajos), para. 36, and Case 176/12, *Association de médiation sociale*, para. 47.

[27] Case 441/14, *DI* (Ajos), para. 22, Case 555/07, *Kücükdeveci,* paras 20-21, and Case 144/04, *Mangold*, paras 74-75.

[28] Case 176/12, *Association de médiation sociale*, paras 41, 47; cf. also Case 555/07, *Kücükdeveci,* para. 22.

[29] Case 411/05, *Palacios de la Villa*, Opinion of AG Mazák, paras 132–138, Case 427/06, *Bartsch*, Opinion of AG Sharpston, paras 87–93, Case 499/08, *Ingeniørforeningen i Danmark*, Opinion of AG Kokott, paras 22–23, Case 282/10, *Dominguez*, Opinion of AG Trstenjak, paras 69–169 (especially paras 164–167).

[30] Case 441/14, *DI* (Ajos), paras 38–43.

[31] UfR 2017, 824. The judgment has been discussed intensively among Danish legal scholars, *see* e.g. U. Neergaard & K. E. Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish*

The *Ajos* case, which is briefly outlined in section 3.1, concerned a dispute between an employee and a private employer, i.e. the horizontal direct effect of the general principle.

In principle, the Supreme Court did not contest the ruling of the CJEU, as the Court stressed that it is for the CJEU 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 Supreme Court based its judgment on Danish constitutional law. 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 Accession Act' by which Denmark acceded to the EU, the Court stated from the outset.

The Supreme Court noted that, according to the CJEU, the source of the EU law principle prohibiting discrimination on grounds of age was international instruments and constitutional traditions common to the Member States. The CJEU had not referred to provisions in the treaties listed in the Danish Accession Act as a basis for the principle, see section 3.2[a] regarding the scope of the Act. The Supreme Court held that a situation such as this, in which a general principle is to have direct effect and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific treaty provision, was 'not foreseen' in the Accession Act.

The Supreme Court also held that the provisions of the EU Charter of Fundamental Rights, including Article 21(1) on non-discrimination, did not have horizontal direct effect in Denmark under the Accession Act.

In supporting its conclusion, the Supreme Court referred extensively to the *travaux préparatoires* of the Accession Act. For example, when the Lisbon Treaty was implemented by an amendment of the Accession Act, the government in a reply to a question from a committee of the Danish Parliament explicitly stated that the EU Charter of Fundamental Rights did not entail legal obligations for individuals.

From a constitutional perspective the reasoning of the Supreme Court in the *Ajos* case is straightforward. The Accession Act did not provide a legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over the Salaried Employees Act in a dispute between individuals. In the words of the Supreme Court it 'would be acting outside the scope of its powers as judicial authority' if it were to disapply the provision in this situation. The judgment of the Supreme Court was delivered by a majority consisting of eights judges. A single dissenting judge held that the Accession Act did confer the requisite legal basis for disapplying the Salaried Employees Act.

Supreme Court, the CJEU, and the Ajos *Case*, 36(1) Y.B. Eur. L. 275-313 (2017), with further references.

4 CONCLUSIONS

International law and EU law play an increasingly important role in Denmark, including in the case law of Danish courts. The aim of this report has been to outline the Danish Supreme Court's approach to international law and EU law. Traditionally, Denmark has been considered as a dualist state, and the Supreme Court has upheld the dualist approach. In recent case law the Court has, inter alia, clarified that it will not use international law in interpreting the Danish Constitution and that international law is not capable of superseding Danish statutes.

Danish courts and administrative authorities, normally, to the extent possible interpret Danish legislation in such a way, that a violation of Denmark's international obligations is avoided. However, international obligations, including obligations arising out of EU law, cannot lead to an interpretation *contra legem*. The Supreme Court has, inter alia, made clear that according to the generally accepted interpretation methods of Danish law the *travaux préparatoires* of a statute must be taken into account when considering whether an interpretation in conformity with EU law is possible. There might be a disagreement between the Supreme Court and the CJEU as to what constitutes an interpretation *contra legem*.

In the *Ajos* case a clash between the Supreme Court and the CJEU occurred regarding the effect of general principles of EU law in Denmark. The Supreme Court ruled that the Danish Accession Act did not provide a legal basis to allow the general principle prohibiting discrimination on grounds of age to take precedence over conflicting Danish law in a dispute between individuals as required by the CJEU. The same applies to the EU Charter of Fundamental Rights. The ruling of the Supreme Court gives food for thought about the relationship between Member State's courts and the CJEU.[32] That having been said, one must be careful not to exaggerate the consequences of the ruling. It is based on considerations of Danish constitutional law and concerns the particular question of the direct effect and supremacy of general principles of EU law and the EU Charter of Fundamental Rights in Denmark.

[32] Interestingly, in 2010, the German Federal Constitutional Court ruled that the judgment in the *Mangold* case did not constitute a transgression of the competence assigned to the EU by Germany, *see* BVerfGE 126, 286.