



## ‘A Matter of Principle’

The Interaction of General Principles of EU law  
with other legal sources in the case-law of the CJEU

Luísa Lourenço

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

Florence, 17 December 2015



European University Institute  
**Department of Law**

This thesis has been submitted to language correction.

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## SUMMARY

General principles of EU law have been used by the Court of Justice of the European Union since its inception. They have been attributed several functions, and their application reaches across all fields of EU law. Much has been written about individual principles, but the analysis of their application in combination with other legal sources has been neglected.

This thesis aims at presenting a framework to study the relationships of different norms in the EU, having general principles as a reference norm. It is an enquiry on how certain general principles are applied in combination with provisions in Treaties, regulations and directives. The Court has, in great part, been responsible for the construction of these interactions; and the modes of operation used show another facet of a peculiar legal system. Many times studied from the perspective of a rigid hierarchical legal system, EU law is indeed much more complex, with its different sources assuming different possible combinations, which lead to different results.

By deconstructing the existing pre-conceptions with regard to the categories and functions attributed to general principles of EU law, this thesis aims at showing that a broader theory relating to the interaction of these and other legal sources, and the impact and effects achieved therewith, is missing. As such, a new taxonomy, based on the modes of operation deployed in the use of these tools, is here proposed, in an attempt to bring clarity to the principle-based reasoning of the CJEU.



'An army of principles will penetrate where an army of soldiers cannot'

Thomas Paine, *Agrarian Justice*, 1797





*maxima perfectio suae imperfectionis cognitio*

(inscription on the wall of Convento di San Miniato, Tuscany)



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*'It was the best of times, it was the worst of times,  
it was the age of wisdom, it was the age of foolishness'*

Charles Dickens, Tale of Two Cities, Book I

Now that my time in Florence has come to an end, it is also time for some checks and balances. The beginning of an academic career and the doubts about present and future made of the staring at a blank screen an exasperating and exhilarating task – and somehow these two were never in perfect equilibrium. Florence became a home. Friends became family. Life became tangled in work, and work in life, in a total of four fantastic years. During this time I have met many people, and to all of them I owe a thank you, for they have influenced my life, in one way or the other. However, some names must be named – although many will certainly be forgotten.

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# INTRODUCTION

## A. Overview of the Topic

General principles of European Union law have been eulogized and demonized in equal proportion due to their polemic use in the jurisprudence of the Court of Justice of the European Union (hereafter ‘CJEU’ or ‘the Court’). The European adjudicatory system presents, much like every other aspect in EU law, the peculiarities of a wholly new legal system, when compared to both the international and national planes. This new legal order, created by the union of countries with different legal traditions, required a strong interpreter, a discoverer, to build upon the wills manifested upon the creation of new rules. Such is the Court. Established in 1952, the ‘guardian of the Treaties’ seats in Luxembourg, and is composed of the Court of Justice, the General Court and the Civil Service Tribunal. As the main judicial body of the European Union, it is responsible for ensuring the uniformity in the interpretation and application of EU law throughout the Union. With that aim, it ‘reviews the legality of the acts of the institutions of the European Union, ensures that the Member States comply with obligations under the Treaties, and interprets European Union law at the request of the national courts and tribunals.’<sup>1</sup> It thus assumes an extremely important role in the construction, maintenance and development of the legal system. However, with great power comes great responsibility<sup>2</sup> - as well as, necessarily, heavy criticism.

On the balancing of freedom and constraints on its adjudicatory role, general principles have many times tipped the scale of the Court towards what was labelled as unbridled expansionist aims<sup>3</sup>. Over the years, the Court pronounced estranged and greatly debated

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<sup>1</sup> As stated in the Curia website: [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/)

<sup>2</sup> To cite Voltaire's commandement: 'un grand pouvoir impose une lourde responsabilité'.

<sup>3</sup> See amongst others, Keeleng, D., ‘In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?’, in *Scritti in Onore di G.F.Mancini* (Curti Gialdino ed., Milano 1998); Mancini, G. F., ‘Attivismo e Autocontrollo nella Giurisprudenza della Corte di Giustizia’, RDE 229 (1990); Cappelletti, M., ‘Is the European Court of Justice Running Wild?’, 12 *EUR.L.REV.* 3 (1987); Editorial Comments, ‘The Court of Justice in the limelight - again’, *CMLRev* 45, 2008, 1571-1579; Editorial Comments ‘The scope of application of the general principles of Union law: an ever expanding Union?’, *CMLRev* 47, 2010, 1589-1596; De Mol, M., ‘The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?’, *MJ* 1-2 (2011), p.109-135.

rulings, decisions which shaped the Union to its current state. In some of those rulings, it resorted to general principles. Borrowed from international instruments, national legal constitutions and traditions, or extracted from Treaty aims and objectives, they appear as an unavoidable feature of the development of European Union law, their use dating back to the very foundations of the latter.

What can explain the Court's proclivity to use them? It should be noted that, from the outset, the Court was called upon to define the boundaries of the European Communities. The system was undeniably born with economic aims: the creation of an internal market, where the fundamental freedoms protected the individual as a factor of production and whose objective was close economic cooperation. The Court itself was designed to be the keeper of this order, not as a constitutional or supreme court of any kind. It was the system created by the Council of Europe the one designed to guarantee further protection, in the human rights field<sup>4</sup>. The development of the Communities and the movement of people, however, soon brought about further concerns, and the reaffirmation of the system implied the recognition of founding bases: primacy of EC law over Member States' law, and direct effect of the former, in certain situations, on the latter's sphere. The strength of these claims necessarily implied that the system should give answers which extended to problems in areas other than the strictly economic, so as to avoid undermining by part of national laws and judiciary. Accepting the contrary would result in a complete failure of the system.

The lack of protection of fundamental rights of the individual, that same individual who is exercising the economic freedoms and consolidating the internal market, soon became, however, a pressing matter, triggered especially by the intervention of the German and Italian Constitutional Courts<sup>5</sup>. While it is perhaps excessive to recall all the

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<sup>4</sup> With the creation of the European Court of Human Rights, in 1959, as rightful guardian of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)

<sup>5</sup> See the decision of the Bundesverfassungsgericht of the 18.10.1967, and the *Frontini* sentence from the Italian Constitutional Court, 27.12.1973. These were followed, respectively, by *Solange* (1974) and *Granital* (1984). On the matter, see De Witte, B., 'Community law and national constitutional values', in *Legal Issues of European integration*, 1, 1991, p.10/11: 'fundamental rights have been the primary focus of the 'rebellion' of the German and Italian constitutional courts against the Court of Justice in the 1970's. They were not prepared to accept the absolute supremacy of community law, as required by the Court of Justice, if that implied the sacrifice of fundamental rights' guarantees provided by their national constitution. (...) the Court of Justice has decided to fill the gap in legal protection (...) by deciding that

facts, the idea is that it seems clear that the only possible response on the Court's part would have to be the one given: the EC system would necessarily encompass the protection of fundamental rights. General principles were, undoubtedly, the available legal sources to fill in this 'gap'. As such, since they form 'an integral part of the general principles of law, the observance of which it ensures'<sup>6</sup>, fundamental rights were protected. The rulings enacted in the line of *Nold*, *Stauder*, *Internationale Handelsgesellschaft* and *Hauer* are the precursors of this technique, the reliance on general principles of law, which would end up being perfected by the Court, and expanded to other areas<sup>7</sup>.

It is easy to understand why the Court would have to state a fundamental rights vocation for EU law. Without it, it would never be capable to enforce the primacy it had pronounced as one of the main features of the system, or it would run the risk of countervailing. The choice of general principles as the tools to undergo this 'expansion' comes across as a product of the background in which it was set. Indeed, albeit the Court was a totally new institution, the judges composing it had deeply enshrined educational roots in the national legal systems they derived from. The continental civil law tradition was hence present, based on the premise that the system is to be regarded as complete, and that gaps are to be filled within the system, since the role of the judge is not to create law, but to interpret it<sup>8</sup>. The judges of the Court had to 'find' the general principles inherent to the system so as to complete it. This arguably happened by recourse to the values fostered and protected as general principles in the national constitutional laws and traditions of the Member States, together with inspiration taken from international instruments, such as the European Convention on Human Rights<sup>9</sup>.

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fundamental rights are part of the unwritten general principles of law which the Community institutions have to respect in their activities'.

<sup>6</sup> Judgment in *Nold v High Authority*, 18/57, EU:C:1959:6

<sup>7</sup> *Ibid.*, and cases *Stauder*, 29/69, EU:C:1969:57, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114 and *Hauer*, 44/79, EU:C:1979:290.

<sup>8</sup> Article 5 of the *Code Napoléon* states: 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.'

<sup>9</sup> This process of integration has frequently been equated with a constitutionalisation of the European Union legal order. See Andriantsimbazovina, J., 'Unité ou dualité du système de protection des droits fondamentaux de l'Union européenne depuis du Traité de Lisbonne?', in *Mélanges en l'honneur du Professeur Joël Molinier, Liber Amicorum*, LGDJ Lextenso Éditions, 2012, Paris, 15 ff, at p.20: 'cette

Nonetheless, the intricate patchwork of rules created needed connecting factors and the surpassing of difficulties and gaps. As such, beyond the acknowledgement of fundamental rights as general principles, other areas are equally important, with highlight to the area of administrative law. The Court has, in fact, expressly recognized a certain number of general principles of EU law: Rideau refers to the examples of good faith<sup>10</sup>, observance of the rights of defense<sup>11</sup> and legal certainty<sup>12, 13</sup>; Tridimas individualizes further the principles of proportionality<sup>14</sup>, protection of legitimate expectations<sup>15</sup> and effectiveness<sup>16, 17</sup>. There are equally references to acquired rights<sup>18</sup>, state of necessity<sup>19</sup>, legitimate self-protection<sup>20</sup>, *force majeure*<sup>21</sup>, prohibition of unjust enrichment<sup>22</sup> and, arguably, the precautionary principle<sup>23</sup>, *ne bis in idem*<sup>24</sup> and interdiction of retroactive application of criminal sanctions<sup>25 26</sup>.

Their use in the area of fundamental rights, however, due to its visibility (and the initial reluctance of the Court to tackle them) was particularly criticized, with blooming accusations of judicial activism, 'competence-creep' and attribution of horizontal direct

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constitutionalisation [de l'Union européenne] se traduit notamment par l'intégration progressive dans l'UE des valeurs véhiculées par la protection des droits de l'homme'.

<sup>10</sup> See, namely, judgment in *SNUPAT v High Authority*, 32/58 and 33/58, EU:C:1959:18

<sup>11</sup> See, namely, judgment in *Compagnie belge d'assurances générales sur la vie and contre les accidents*, 27/69, EU:C:1969:56

<sup>12</sup> See, namely, judgment in *Neumann*, 17/67, EU:C:1967:56

<sup>13</sup> Rideau, J., *Droit Institutionnel de l'Union européenne*, 6<sup>ème</sup> ed., LGDJ Eds., 2010, at p.248

<sup>14</sup> See judgment in *Vodafone and Others*, C-58/08, EU:C:2010:321, and *Fédesa and Others*, C-331/88, EU:C:1990:391

<sup>15</sup> See, amongst others, judgment in *Sofrimport v Commission*, C-152/88, EU:C:1990:259, and judgment in *Mavridis v Parliament*, 289/81, EU:C:1983:142

<sup>16</sup> See, amongst others, judgment in *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79 and, more recently, judgment in *Köbler*, C-224/01, EU:C:2003:513

<sup>17</sup> Tridimas, T., *The General principles of EU law*, 2nd edition, Oxford University Press, 2006

<sup>18</sup> Judgment in *Abad-Villanueva and Others v Commission*, F-23/06, EU:F:2011:149

<sup>19</sup> Judgment in *Klöckner-Werke AG v Commission*, C-303/81, EU:C:1983:129

<sup>20</sup> Judgment in *Ferriera Valsabbia and Others v Commission*, 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79, EU:C:1980:81

<sup>21</sup> Judgment in *IFG v Commission*, 68/77, EU:C:1978:23

<sup>22</sup> Judgment in *Maxwell v Commission*, F-55/09, EU:F:2010:44

<sup>23</sup> Judgment in *Alpharma v Council*, T-70/99, EU:T:2002:210, and judgment in *Agrarproduktion Staebelow*, C-504/04, EU:C:2006:30

<sup>24</sup> Judgment in *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582

<sup>25</sup> Judgment in *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270; judgment in *Jager*, C-420/06, EU:C:2008:152 (especially at paragraphs 59 and 60)

<sup>26</sup> As provided under the title 'Principes Généraux du droit' in the Digest of the CJEU's jurisprudence, available at [http://curia.europa.eu/common/recdoc/repertoire\\_jurisp/bull\\_ordrejur/tab\\_index\\_A-01\\_02.htm](http://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_ordrejur/tab_index_A-01_02.htm)

effect to directives, amongst others: the CJEU would be running wild<sup>27</sup>. Nowadays, there is arguably little space for such intervention. The system has become more mature and comprehensive, and European legislation has evolved to exhaustive levels, with regulatory instruments being enacted in almost all areas subject to the application of EU law. Nonetheless, general principles are still being used by the Court – and perhaps in a more creative way. It is precisely perhaps the increase in the number of legislative instruments, with detailed frameworks, the one dictating that the use of general principles has been unfolded in several different modes of operation. The ‘creative’ activity of the Court has guaranteed that general principles have still, notwithstanding the existence of other instruments, a role to play in the consolidation of the EU legal system.

Without any doubt, they are established and recognized as sources of European Union law. ‘Discovered’ by the Court, derived from the ‘national constitutional laws and traditions’, as well as international instruments, general principles of EU law are yet to reunite a real consensus as regards their true universal character and the way they are extracted from these sources. Albeit it seems clear that the Court should not have to

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<sup>27</sup> See Conway, G., *The limits of legal reasoning and the European Court of Justice*, Cambridge/New York, Cambridge University Press (2012), at p.4: ‘The ECJ is widely noted for the creative nature of its teleological interpretation, and although the Court has often been strongly defended in the literature, its central role in developing the norms of EU law in a way that goes beyond just applying existing norms is hard to deny’; Herdegen, M., ‘General Principles of EU Law – the Methodological Challenge’, in Bernitz, U., Nergelius, J. And Cardner, C. (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, Great Britain 2008, at p.344: ‘While hence being an indispensable instrument for establishing and maintaining the rule of law within the European Union (...) general principles of law may inadvertently turn the ‘rule of law’ into a ‘rule of judges’, a *gouvernement des juges*’; Rasmussen, H., ‘Between Self Restraint and activism: a judicial policy for the European Court’, *ELRev*, vol.13(1), 1988, 28-38, at p. 77: ‘the European Court went too far, too often. In defiance of much European tradition, the European court engaged in a teleological, pro-community crusade, the banner of which featured a deep involvement which led it to give primacy to pro-integrationist public policies over competing ones that were often (...) considered as meriting some protection’. On the ‘defending’ side, see Tridimas, T., ‘The European Court of Justice and Judicial Activism’, 21 *EUR.L.REV.* 199 (1996), at p. 209/210: ‘The founding Treaties are moulded by teleology and the idea of incremental integration is expressly provided for in the EC Treaty. (...) The language of the Treaty is often unhelpful; teleological interpretation is particularly suited to the interpretation of the Treaties; and the Court exercises the functions of a constitutional court.’ (...) One may venture to suggest that, in some cases, the reasoning of the Court is less than compelling. (...) But it is not correct to say that, by having regard to the objectives of the Treaty which seeks to further integration, the Court oversteps its power as a judicial body.’; and Arnull, A., ‘Judicial Activism And The Court Of Justice: How Should Academics Respond?’, *Maastricht Working Papers - Faculty of Law* 2012-3, at p.25: ‘Many of the decisions often criticised as activist were not reached *contra legem*, that is to say, by disregarding the express terms of the Treaties. What the Court usually did was to answer questions on which the Treaties were silent or ambiguous in a particular way’.

resort to a ‘lowest common denominator’ technique, the fact is that the origin and legitimacy of certain proclaimed principles is questioned still<sup>28</sup>.

At this point, it should come as no surprise that the topic of general principles of EU law has been academically dissected. These sources have been analyzed in relation to their nature and origin, their functions and categories, their importance in the fundamental rights field, their intrusive capacity as tools for judicial activism, amongst others. In the latest years, in view of the growing body of written rules, the literature has been particularly fierce in criticizing the ‘principle-based’ or ‘principled’ reasoning of the Court, questioning the legitimacy of a gap-filling which seems to go beyond the arguably existent lacunae<sup>29</sup>. Bearing this in mind, it is hard to see how any analysis could present novelties in the field.

Even so, this work proposes a look at the thematic of general principles from perhaps a slightly different point of view, where a different taxonomy comes into play. Indeed, the chosen approach departs from the usual pre-conceptions used in the treatment of general principles; however, rather than focusing on particular general principles, it shifts the spotlight to the *modus operandi*, that is, when and where general principles are used in the reasoning of the Court, combined with other norms, and which are the effects achieved therewith. This thesis thus aims at creating a framework to study the interaction of legal instruments and the dynamics created therein, in view of providing a different look into the theory of legal sources of the EU. The norms of reference to assess the relationships between them are hence here general principles of EU law, and the interactions analyzed encompass those with Treaty provisions, as well as secondary EU law and national laws.

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<sup>28</sup> Reuter points, making reference to the *Algera* case (judgment in *Algera and Others v Assemblée commune*, 7/56 and 3/57 to 7/57, EU:C:1957:7), that the Court reads such principles by analyzing rather ‘l'esprit des droits nationaux, leur orientation et leur évolution’. Reuter, P., ‘Le Recours de la Cour de Justice des Communautés européennes à des principes généraux’, in *Mélanges offerts à Henri Rolin*, Éditions A. Pedone, Paris, 1964, p.262-283, at p.273.

<sup>29</sup> Amongst others, see Herzog, R. and Gerken, L., ‘Stop the European Court of Justice’, published on September 10, 2008 at 10:07 CET and available at <http://euobserver.com/?aid=26714>; Pollicino, O., ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint’, *German Law Journal*, Vol. 5, n°3 (2004), 284-317



## B. Project Relevance and Focus of the Research

This thesis is not about general principles 'in general'. It is about the combination of these and other legal sources, in an attempt to expound an EU theory of legal sources. It started as a deep interest in the effect of general principles of EU law as created, or discovered, by the Court of Justice of the European Union in the area of fundamental rights protection and enhancement of European Union citizenship. It drifted into administrative law and employment law issues, having finally settled for a focal lens over certain phenomena related to the use of such tools in combination with other sources of EU law.

Most of other works focusing on general principles of EU law have opted by presenting them using a different approach. Seminal books, such as the ones by Tridimas<sup>30</sup> and Groussot<sup>31</sup>, start by presenting opening chapters on the origins, functions and categories of general principles, to then turn to more specific analysis of particular general principles of EU law, tracing the way their development took place in the case-law of the ECJ. The focal point of these analyses is on particular general principles of EU law, deemed especially important due to their expression in the case law of the Court and/or effects. By presenting the different cases and the way such principles have been shaped throughout the time, and in response to different situations, both authors have contributed for a thorough overview of the position general principles of EU law have occupied in the evolution of the legal system.

While accepting the extreme importance of such approach and the deep contribution it has brought to the understanding of general principles as legal sources and crucial tools for the development of EU law, it is perhaps, at this point, worth adopting a slightly different perspective, in order to amplify the understanding of certain phenomena in EU law. My work hence tries to shift the focus of the analyses: rather than trying to isolate each general principle and the way it was developed, it deals with the different ways in which the Court has deployed general principles, with which objective it has done so,

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<sup>30</sup> Tridimas, T., *The General principles of EU law*, cit. supra.

<sup>31</sup> Groussot, X., *General Principles of Community Law*, Groningen : Europa Law Publishing, 2006

and which are the effects achieved as a result. In view of the difficulties stemming from the terminology chosen by both the Court and the legislature, my aim was to find other ways to perceive these legal sources. This analysis brings dynamic elements of source combination, showing the proclivity general principles have to be used not only in a static top-down relationship, but in different combinations. Hence, the division I will use throughout this thesis takes into account the modes of operation adopted by the Court in the use of general principles. By taking each source on their own, I explore the complex combinations made thereof, reversing the traditional hierarchy considerations and exploring the complexity of the norms which lend themselves to an entwined application.

Nevertheless, this does not mean that no part will be devoted to the basic concepts essential to understanding the matter. On the contrary, I believe it is essential to address the functions usually attributed to general principles, in order to contrast and align them with the modes of operation which will be presented. It will equally look at the categories in which traditionally general principles of EU law are divided. With regard to the latter, a caveat exists: this work does not adhere to any of the presented categories, nor does it purport to present a new, all encompassing, categorization. This can be explained by different reasons. In the first place, I believe that all the categories presented fail to consider certain aspects, which, as will be explored further, results in one principle belonging to more than one category at the same time. Secondly, I firmly believe that it is impossible to encompass general principles of EU law in closed categories, without considering the inter-changeability of roles, the evolution achieved through the case-law and the malleability these tools present as legal sources. These and other arguments will be explored in detail in Chapter I.

What is the added value of this approach? This thesis is about the combination of legal sources in European Union law, with general principles serving as an epicentre for the analysis. As such, the focus lies on the different methods the Court uses in deploying general principles, or, if we prefer to call it so, the different ways general principles of EU law operate, instead of in particular general principles and their expression in the case-law. By exploring the interactions construed by the Court, I tried to depart from the typical hierarchical approach to the structure of EU law.

Indeed, the EU legal system is composed of a myriad of sources, whose study has neglected to take into account much more than hierarchical relationships. The norms are presented in a rigid hierarchical set; the focus is on the application of EU law in a top-down movement, even though the concept of hierarchy is blatantly omitted in the Treaties<sup>32</sup>. It is undeniable that hierarchy represents an extremely important feature in the system of the EU polity: EU law is generally seen as a hierarchical structure, albeit a *sui generis* one. With the basic premises for its operation being primacy and direct effect, EU law is read from the perspective of a structured polity, walking towards the creation of a federal system.

Having been qualified as primary law<sup>33</sup>, general principles of European Union law have the capacity to trump inferior norms. This facet has been extensively analyzed in the doctrine, usually, and understandably, from the point of view of their primary law rank. Qualified as 'constitutional' principles<sup>34</sup>, they fulfilled a function inherent to the establishment of a hierarchy of norms in EU law. This hierarchical view reflects the traditional approach: general principles are seen as legal sources in their own right, as primary law. Albeit hierarchical relations can explain the affirmation of the system as a whole, it should be noted that the novelties brought about by the case-law have been, many times, connected to a different application of legal sources, whose combination results in different effects, effects which would not be achieved had each sort been applied individually.

What this analysis strives to add to the theory of EU legal sources is thus something slightly different. While accepting the traditional approach, I believe that it is important to look at these legal sources (and others, surely) beyond their application in isolation. My suggestion is to take a different perspective which focuses on the combination of legal sources, rather than on each source by itself. To be more precise: general principles have been used in multiple ways, trumping secondary law, and imposing a primary law value interpretation. They have been used as seminal tools for judicial

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<sup>32</sup> Even if the creation of EU law's primacy over national laws leaves per se little leeway for questioning the application of EU law in the legal systems of the Member States.

<sup>33</sup> See, amongst other, Lenaerts, K. and Gutiérrez-Fons, J., 'The Constitutional Allocation of Powers and General Principles of EU Law', *CMLRev* 47 (2010), 1629-1669, at p.1641

<sup>34</sup> *Ibid.*, at p.1647.

review of national legislation, arguably their first and foremost primary function, and as hermeneutical tools to fill the 'gaps' of a system whose birth departed from both national and international law canons<sup>35</sup>. The theory of legal sources in EU law I purport to present goes beyond this: it looks at the functions that general principles perform, not only in their hierarchical prevalence, as primary law, but especially focusing on which other results can stem from their combination with written sources, and how this impacts on the development of EU law. As such, the aim is not to give an exhaustive account of all the possible general principles used in the reasoning of the Court, but merely on specific ways in some general principles operate in interaction with legal sources of different kinds, that is, how their individual application to a case is in fact different, and leads to different results, depending on which other element or norm they are connected to. The goal is to understand the combinations, and how the Court refers to certain principles to achieve a result that neither the principle nor the instrument at stake could achieve on their own.

This choice was made, as mentioned, due to the difficulties lying on the definition of what can be considered or not to be a general principle, especially in light of the unwritten/written character of such legal sources, and the confusing terminology stemming from case-law and primary and secondary sources. On the other hand, in face of the impossibility of making one particular general principle correspond to a specific mode of operation, since, depending on the situation, underlying considerations and other legal sources at stake, the types of interaction vary greatly, this work does not achieve a mathematical formula which is all encompassing and will always point to the right result.

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<sup>35</sup> See Grimm, D., *The Democratic Costs of Constitutionalisation: The European Case*, *ELJ*, 2015, at p.7: 'In its view, European law was neither a part of international law nor dependent on a national order to apply it, but was an autonomous legal order that had emancipated itself from the national sources. This meant that it was not necessary to interpret European law in the cautious manner of international law, emphasizing the will of the contracting parties and limiting the adverse impacts on national sovereignty. Instead, the ECJ began to interpret the European treaties in a constitutional mode, namely as more or less detached from the Member States' will and oriented instead by an objectivised purpose.'

## C. Analysis

This analysis entails a brief look at the nature, terminology and functions of general principles of EU law, as developed both by the Court and academic scholarship. The following chapters will nonetheless follow a line of argument which is based on a methodological or operative aspect rather than an ontological one. Indeed, much has been said about the nature and sources of general principles, and their qualification is still heavily debated nowadays; nonetheless, it seems that what has been lacking in the approach taken in these analyses is a closer look at the mechanisms used by the Court so as to make general principles applicable, instead of the general principle *per se*.

With this frame of reference, it will be shown that the traditional definition, categories and functions usually attributed to general principles of EU law are less than elucidating. The same goes for the terminology used, blurred in the case-law, legislative instruments and Charter of Fundamental Rights. Depending on the policy area concerned and the written instrument that supports its application, the same principle will be seen to achieve different results, and perform different operations. Particularly important is the recognition of fundamental rights as general principles, as stated by Art. 6.3 TEU. The Charter, furthering the terminology difficulties in light of the codification of 'rights' and 'principles' will also be analyzed. It will moreover be defended that a special niche for the development of different modes of operation of general principles as fundamental rights seems to be that of employment and labour law; the reasons for this will be discussed further.

The combination of legal sources assumes a peculiar role in the structure of EU law, especially as designed by the case law of the Court. Indeed, whilst hierarchy is an important factor in the establishment and development of EU law, other forms of combination of written and unwritten norms have equally allowed for a deepening of the EU legal system as a whole. The part played by general principles in these dynamics has a particular importance, since the modes of operation in which the Court has deployed them, in interaction with written provisions, have deeply fostered EU's integration, in light of a *telos* the Court itself has 'discovered' for EU law. In fact, as will be seen, principles and objectives and values of EU law are, many times,

interchangeable, with one becoming the other, and vice-versa, depending on the situation. The first have provided the latter with an 'operative' facet, allowing the pursuit of the aims of the Union.

At this point, one should perhaps recall what this work is not about. This research is not about finding distributive justice, nor does it provide a normative approach to the Court's case law, aiming at proposing any type of solutions. It is not about fundamental rights, or European citizenship. It is especially not about judicial activism of the European Court of Justice. Having said so, this thesis might, and will certainly, touch upon some or all of those, since it endeavours at delivering a comprehensive approach to certain phenomena present in the rulings of the Court. In as much the ultimate aim of this thesis is to present a study of the ways in which general principles are used as tools by the ECJ, when combined with other (written) sources, and to propose a new taxonomy for such analysis.

As regards the principles studied here, some caveats are in order. In the first place, albeit starting with the concept of the general principle and its categories and functions in EU law, as is explained throughout, focus is rather pointed at specific modes of operation. This means that this work does not follow a structure developed around particular principles - and that indeed there will be no extensive treatment of certain very important general principles of EU law, such as proportionality, subsidiarity, rights of defense, State liability, etc. Moreover, areas identified as core areas for the development of general principles, such as the common agricultural policy and competition law, are not extensively studied as such<sup>36</sup>. The lack of individualization of general principles will, however, be replaced by an individualization of the specific types of interaction found to exist between general principles and written legal sources.

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<sup>36</sup> For a more structured approach around individualized principles, see Tridimas, T., *The General Principles of EU Law* (cit. supra), who develops the study according to specific principles/policy areas.

## D. The Contribution of General Principles to the Development of EU law

The role of the Court of Justice is a factor which necessarily has to be considered in this work, as it has been a crucial actor in the integration of the European Union and its conception as a fully-fledged new legal system. Its legitimacy in this development, and the singular characteristics of its judicial adjudication, which are displayed namely in the use of general principles, prompts an inquiry to the very origins of the institution, so as to understand the way its own authority was established, and how it has changed and been consolidated in the more recent years.

Indeed, when the Court was created in the cradle of the European Communities, the inspiration for the interpretation of the new emerging legal system was necessarily a product of the national formation of judges'. There was a need to build a certain body of legal tradition, which was necessarily inspired by the available national legal contexts. Moreover, it should be noted that, at the inception, the common law system was absent as a direct inspiration source, with influences being in particular provided for by the French and German legal systems<sup>37</sup>. This context explains equally the recourse to general principles as tools for legal reasoning. General principles were envisaged within the national legal systems as a way to guarantee that judicial adjudication was sufficiently grounded in the existing rules<sup>38</sup>. Indeed, the references found in the *Code Napoléon* show a clear intention of keeping general principles as mere gap-fillers, being that the gaps encountered in the provisions would have to be filled with recourse to the rules existing in the system and not 'invented' by the judges<sup>39</sup>.

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<sup>37</sup> Wiesbrock, A., 'Legal Migration to the European Union', (2010) *Koninklijke Brill NV*, pp.163–252, at p.189: 'Initially, the Court relied heavily on principles derived from the legal systems of the original six Member States, in particular France and Germany. However, over the time, the Court developed its own body of precedent, relying less on national law'.

<sup>38</sup> Voigt, C., 'The Role of General Principles in International Law and their Relationship to Treaty Law', *Retfærd Årgang* 31 2008 NR2/121, at p.10: '[general principles] give significant discretion to judges and law makers. (...) General principles are a source of arguments for judges in situations where other sources fail. (...) At the same time, general principles also constrain judges in that they prevent them from relying too much on their own subjective opinion.'

<sup>39</sup> See, on the French system, Komarek, J., 'Judicial Lawmaking and Precedent in Supreme Courts', *LSE Law, Society and Economy Working Papers 4/2011*, London School of Economics and Political Science

The characteristics of the Communities, however, soon prompted the need for a deeper teleological approach to interpretation of the (then incipient) body of rules<sup>40</sup>. The Court has recurred to the objectives established by the founding Treaties so as to create a fully-fledged legal system, to which the Member States transferred part of their sovereignty<sup>41</sup>. In the attempt to concretize the new system as a complete one, the Court imbued it with constitutional character and established its own authority as the supreme court of the Union<sup>42</sup>. The evolution of the system shows deference on the part of the

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Law Department, at <http://ssrn.com/abstract=1793219>, last accessed 28/11/2014, at p.19: 'At the same time, judicial creativity is presented as circumscribed by the Code or, more precisely, its spirit. Judges cannot 'rebel' against the Code and become completely free. The force with which the (spirit of the) Code constrains judges is relative. This is more so once general principles of law are accepted, since these principles enable judicial creativity to 'acquire' a very particular autonomy'. The Cour de Cassation does not pretend to ground the general principles in a specific provision of the Code but relies on them as the sole basis for its decisions. However, the central idea remains: it is on the basis of the (spirit of the) Code that the judges formulate the principles.' See, moreover, Ordóñez-Solis, D., 'European Judges In A Global Society: Power, Language And Argumentation', *EJLS*, Autumn/Winter 2007 - Volume 1 - Issue 2, at p.4: 'what characterises European judges is their role as constitutional judges applying the Constitution, judges applying the European Convention on Human Rights and judges bound by European law'.

<sup>40</sup> See Pescatore, P., 'Les objectifs de la Communauté comme des principes d'interprétation', in *Miscellanea W. J. Ganshof Van Der Meersch, Studia Ab Disipulis Amicisque In Honorem Egregii Professoris Edita*, Bruylant 1972, at p.328: teleological interpretation is presented as 'une méthode particulièrement appropriée aux caractéristiques propres des traités instituant les communautés'. See further, at p. 362: 'l'application de ce critère téléologique a donné à la jurisprudence de la Cour un caractère évolutif très marqué que forme une admirable illustration d'une phrase du grand juriste allemand Rudolf von Ihering, disant que 'le but est le créateur du droit'. A l'aide de cette méthode, la Cour a pu donner une grande cohésion à son œuvre et apporter ainsi une contribution notable à l'évolution de droit communautaire'.

<sup>41</sup> See Lenaerts, K., and Gutiérrez-Fons, JA., 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *EUI Working Paper AEL 2013/9*, Academy of European Law Distinguished Lectures of the Academy, at p.24: 'unlike ordinary international treaties which aim to regulate the exchange of provisions, the adjustment of mutual interests, and the delimitation of zones of influence, the founding Treaties are entirely grounded in the idea that there are objectives of paramount constitutional importance that the EU must attain.' See also Pescatore, P., 'Les objectifs de la Communauté' (cit. supra), at p. 361: 'l'abandon de la souveraineté absolue par la subordination des Etats participants aux exigences de l'œuvre qu'ils ont entreprise en commun; la reconnaissance, en d'autres termes, d'une idée d'ordre placée au-dessus des états. (...)'; and Reuter, cit. supra, notes that this task was naturally facilitated by the amplitude of its competences, as defined by the Treaties (at p.270).

<sup>42</sup> The Treaties are indeed described as having 'constitutional overtones' (see Jacobs, F., and Karst, K., 'The Federal Legal Order: The USA and Europe Compared - a Juridical Perspective', in Cappelletti, M. et al. (eds.), *Integration Through Law, Europe and the American Federal Experience*, Vol. I Methods Tools, and Institutions, Book I: A political, legal and economic overview, 1986, Walter de Gruyter, p.169-244, namely at p.174). The system was developed by the interpretation of the Court, which established a clear hierarchical rapport, favouring the development of the polity. See Bieber, R., and Salomé, I., 'Hierarchy of Norms in European Law', in *CMLR* 33 (1996), 907-930, at p.909: 'Among the multitude of norms composing a complex legal order, hierarchy creates "structures", thus enhancing stability and predictability of the respective legal system'. For a deeper analysis on the role of the CJEU as a constitutional court, see Da Cruz Vilaça, J., 'Reflections on Judicial Review of the Constitutionality of EU Legislation', in Da Cruz Vilaça, J., *EU Law and Integration - Twenty Years of Judicial Application of EU law*, 2014, Hart Publishing, 44-54



European legislator, who integrated the changes sought by the jurisprudence in the new written rules, stemming from the Treaty revisions and new secondary legislation<sup>43</sup>.

The consolidation of the doctrines was in part successful due to the strong attitude of the Court regarding its own authority and powers. This authority was developed much in line with that of a supreme court, which necessarily begs the comparison between the jurisprudential doctrine in the EU in a parallel way to that of a federal system, namely that of the United States. In fact, many of the developments the Court imprinted in the process of maturing EU law to have been inspired by pre-existing doctrines, and those connected to the operation of a federal system<sup>44</sup>.

In the first place, the methods of interpretation employed ranged from literal to purposive interpretation, along with a clear integrative aim<sup>45</sup>. The expansive readings were often grounded on the need to guarantee the effectiveness and the unity of EU law<sup>46</sup>. On the other hand, in spite of not openly incorporating in its self-governing rules

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<sup>43</sup> On this aspect, Esteban, M.L., *Values and Principles, The rule of law in the European Constitution*, The Hague, Kluwer Law International, at p.43: 'the definition of new values and principles through the case law of the court has not only filled in the occasional gaps in the founding treaties, but has also anticipated the subsequent amendments to the treaties, determining their content.'

<sup>44</sup> Basedow, J., 'The Court of Justice and Private Law: vacillations, general principles and the architecture of the European judiciary', *European Review of Private Law*, 3-2010, at p.448: 'additional functions which the Court of Justice has acquired over time. Its role as an administrative tribunal and as an international court dealing with disputes between member states has remained unchanged. But the court has gained additional significance as a supreme tribunal safeguarding the uniform application of union law in all member states. Last, but not least, the court has turned into a constitutional tribunal.'

<sup>45</sup> See Lenaerts, K. and Gutiérrez-Fons, JA., 'To Say What the Law of the EU Is' (cit. supra), at p.27: 'a purely textualist approach does not suffice to interpret, in a complete and consistent fashion, the provisions of the Treaties which are open texture. Moreover, where various linguistic versions of a legislative act of the EU are inconsistent, the ECJ may not endorse a textualist approach without calling into question the principle according to which all 24 official languages of the EU stand on an equal footing'; and p.47/48: 'Since the legitimacy of the EU legal order was conditioned upon aligning the objectives pursued by the EU with the values in which national constitutions are grounded, the ECJ decided to engage in gap filling by having recourse to the constitutional traditions common to the Member States (...) since judges must state the reasons why a provision pursues one objective instead of another, teleological interpretation reinforces judicial accountability as it renders the ECJ's determinations subject to public scrutiny. In addition, teleological interpretation may be relied upon with a view to reducing the scope of application of an EU law provision which is 'over-inclusive', thereby preventing such provision from being applied in situations not foreseen by the EU legislator. (...)A combined application of the methods of interpretation applied by the ECJ shows that the philosophical foundations of EU law are not those of a hierarchical legal order where interpretation is the result of a 'top-down' and dogmatic approach.'

<sup>46</sup> Perju, V., 'Reason and Authority in the European Court of Justice', 49 *Va. J. Int'l L.* 2008-2009, 307, at p.369: 'Effectiveness has been used as a trump card in support of the Court's favored, generally expansive, teleological interpretation, and it has been frequently urged that any interpretation other than the Court's would endanger the effectiveness of a given provision.'

a principle of *stare decisis*, it is quite clear that the Court established its authority solidly, in a self-justificatory movement. The Court used its own jurisprudential developments as inspiration for the creation of what can be seen as a type of precedent in EU law<sup>47</sup>.

### A doctrine of precedent?

Some authors have interpreted this movement as the establishment of a precedent in the reasoning of the European Court of Justice. This is especially accurate if one is to understand precedent in a broad sense, namely as 'a prior judicial decision which has normative implications beyond the context of the particular case in which it was delivered', in the words of Komarék<sup>48</sup>. Jacob furthermore notes that this practice has been essential in shaping the EU's legal landscape; however, adding to the lack of consistency in the approach, the Court has never explained in detail how it makes use of this legal technique<sup>49</sup>.

What is apparent from the case-law is the Court's tendency to refer to its own rulings so as to solidify the proposed legal solutions, resting the legitimacy to tackle certain issues in the fact that they were previously addressed, even if in an incipient way, by previous rulings<sup>50</sup>. These broad references that the Court engages into have necessarily earned it fierce criticism, and necessarily brought accusations of judicial activism.

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<sup>47</sup> Arnall, A., 'Article 6, Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law', *Fordham International Law Journal*, Volume 31, Issue 5, 2007, at p.1177: 'The development of a body of precedent, treated as highly persuasive if not formally binding, took the sting out of some decisions of the Court by enabling it to present them as applications of established principles in new circumstances.'

<sup>48</sup> Komarek, J., 'Judicial Lawmaking' (cit. supra), at p.3

<sup>49</sup> Jacob, M., *Precedents and Case-based reasoning in the European Court of Justice – Unfinished Business*, Cambridge University Press, 2014, p.3

<sup>50</sup> *Ibid*, at p.7: 'the ECJ primarily uses precedents to bolster its legitimacy and acceptance and to fend off outside challenges. (...) the Court above all refers to past decisions to resolve cases, demonstrate the coherence of EU law and thus enhance its credibility vis-à-vis other actors in the European legal space, notably the member states (and in particular their courts) and other EU institutions.' and at p.81 'the ECJ does not limit its precedent use to the indispensable parts of a prior case in the sense of a strict *ratio decidendi* as in some formalistic common law theories. Instead, the Court is quite happy to implicitly or expressly invoke what would be considered obiter dicta according to such approaches. This is already borne out by its frequent phrase 'see to that effect', which signals a more generous link to an earlier case.' See also Beck, G., *The Legal Reasoning of the Court of Justice of the European Union*, Modern Studies in European Law, Hart Publishing, Oxford 2012, at p. 237: 'by the early to mid-60's the Court of Justice began to treat its previous cases as authoritative interpretations of the EC Treaty and other EC measures in areas where the Treaty could be said to have left a 'gap' in the EU legal system'. In page 239 the author gives a precise account of the annual number of references to previous cases as interpretive *topoi*, when compared with other references.

Notwithstanding, the Court has established its own role in consolidating the European legal order, along with strengthening its own position as interpreter, as provided for by the Treaty, a process which has been qualified as a 'self-sustaining' one<sup>51</sup>.

The need for this sort of approach in EU law can easily be justified by the fact that the system was formulated as an incomplete, evolving one, with the early Treaties establishing but the bases of a new, fast-growing polity<sup>52</sup>. These conjectures are relevant for the topic at hand due to the deep entrenchment of these realizations with the use of general principles of EU law. Indeed, the latter acted as aggregating tools for the system, creating a bridge with national laws and international instruments, contributing to the enactment and consolidation of the doctrines spelled out by the Court<sup>53</sup>.

On the other hand, the pluralism of values represented and the vague concepts these tools represent justify all the more the need for a type of precedent. The Court has long supported its use of general principles on the need to respect the rule of law; it is this same rule which requires consistent application of the decisions enacted by the judiciary to situations presenting unequivocal similarities<sup>54</sup>. General principles have played a

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<sup>51</sup> Jacob, M., *Precedents and Case-based reasoning* (cit. supra), at p.116: 'Consider *Küçükdeveci*. The case concerned employment discrimination on the grounds of age. In the space of only three short paragraphs, the Court made eleven references to precedents (...). This is a pristine example of bootstrapping by precedent - that is to say, establishing legal propositions self-referentially without the help of other legal sources. Many of the Court's most consecrated pronouncements are perpetuated through such a self-sustaining process, including direct effect and the primacy of eu law.' See also Beck, G., *The Legal Reasoning* (cit. supra), at p.239

<sup>52</sup> See Komarek, J., 'Judicial Lawmaking' (cit. supra), at p.29: 'First, unlike the US Constitution and the French Civil Code, the Treaties are an unfinished project (...). The uncertain nature of the European Union allows the Court to play the role of an institution responsible for giving the European project momentum, which is tacitly approved by the actors with decision-making power. The Court's pronouncements are sometimes even taken as conclusive evidence for the constitutional character of the Union; but it is a generally accepted narrative of European integration that it was the Court that 'constitutionalised' it.' See also Höreth, M., 'The European Court of Justice and the U. S. Supreme Court: Comparable Institutions?', in Gehler, M., Bischof, G., Kunhardt, L., Steininger, R. (eds), *Towards a European Constitution, A Historical and Political Comparison with the United States*, Bohlau Verlag, 2005, p.143-162, at p.144: 'The power of the European Court of Justice becomes visible in its ability to contribute to the political integration of the Community. (...) By defining the autonomy of the Community's legal order, this community, in many respects, developed from an ordinary, treaty-based, international organization to a federal state-like polity based on an European constitutional order'

<sup>53</sup> On the understanding of principles as judicial precedents themselves, see Semmelmann, C., 'Legal principles as an expression of a European legal culture between unity and diversity', in Helleringer, G., Purnhagen, K. and Beck, C.H. (eds.), *Towards A European Legal Culture*, Nomos, 303 ff, at p.316: 'legal principles are unwritten judicially driven norms that may simply be recognized as judicial precedents provided that one accepts that judicial precedents are sources of EU law, or rather sources in their own right'

<sup>54</sup> See Beck, G., *The Legal Reasoning* (cit. supra), at p.234

determinant role in this type of self-reference, guaranteeing the affirmation of the Court as the ultimate interpreter of European law, not only in what concerns the development of the legal system but also, and especially, in establishing this relationship vis-à-vis the national courts (ensuring the latter act equally as European courts)<sup>55</sup>.

While it is well known that the EU was not built envisaging a federal structure, the developments explored above are inevitably connected with the perception of the Court of Justice as the closest form to a supreme court in what comes to the Union's legal order<sup>56</sup>. This is not clear from the outset, with the Court being seen as a 'mix between an administrative Court focused on the control of the legality of the decisions and actions of the High Authority, and a classic international Court of Arbitration between the member states and the Community'<sup>57</sup>. However, soon these features gave place to the creation of a true supranational organ, aimed at developing the Treaties according to a true, common European law<sup>58</sup>. The Treaties provided the written constitution, completed by general principles which infuse it with meaning and fill in the lacunae which were not foreseen.

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<sup>55</sup> Beck points here at the necessity to guarantee that national courts feel compelled to apply directly EU law, or to refer a matter to the ECJ in case of compatibility doubts. One of the examples presented is case *Cilfit and Others*, 283/81, EU:C:1982:335. *Ibid.*, at p.238

<sup>56</sup> Höreth, M., 'The European Court of Justice and the U. S. Supreme Court' (cit. supra), at p.150 'As a policy maker, the Court federalized the Community, disregarding the explicit legal commands of the Treaty texts and, probably, disregarding the founders' intentions, who explicitly did not choose a federal order for the Community at the beginning'. See also Rosenfeld, M., 'Comparing constitutional review by the European Court Of Justice and the US Supreme Court', in Pernice, I., Kokott, J. and Saunders, C. (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006), p.33: 'Neither the European Court of Justice nor the United States Supreme Court is a constitutional court, yet they both engage in constitutional review. These two courts are similar in one key respect: they are both non-specialized courts of general jurisdiction.' and p. 36: 'Although the EU is not a federation like the United States or Germany, it does possess certain institutional features commonly found in federal systems. This is the case not only with respect to direct effect, but also with respect to EU regulations which operate within member-states much like US federal law does within the fifty US states, and EU directives which require member-states to undertake internal implementation or risk becoming liable to citizens for injuries caused by its failure to do so. Accordingly, like the USSCt and other courts that engage in constitutional review in federal states, the ECJ adjudicates issues pertaining to the vertical division of powers. (...) From a functional standpoint, however, the role of the ECJ in dealing with vertical division of powers issues is analogous to that of the USSCt.' Ordóñez-Solis also reads the institutional scheme of the EU as one of federal nature: 'if the relations between European community law and the laws of the member states are so similar to the ones peculiar to federal law, the judicial system of the European Union responds precisely to this same federal institutional scheme and counts on judges of the federation, of the European Union, the Community courts seated in Luxembourg and the national judges that also act as judges of the European Union.' (Ordóñez-Solis, D., 'European Judges In A Global Society' (cit. supra), at p.7)

<sup>57</sup> Rasmussen, M., 'The Origins of a Legal Revolution – The early History of the European Court of Justice', in *Journal of European Integration History*, 14, 77-98, at p.84.

<sup>58</sup> Boerger-De Smedt, A., 'La Cour de Justice dans les négociations du traité de Paris instituant la CECA', (2008) 14 *Journal of European Integration History* 7, p.7-33, especially at p.16 and 25.

A constitutional court can base its expansive intervention on the need to apply and interpret the written Constitution<sup>59</sup>. This is exactly the vest the ECJ seems to have taken as its own<sup>60</sup>. Moreover, it has equally been defended that the preliminary ruling procedure is but a 'procedural of federal collaboration between national judges and the Court of Justice'<sup>61</sup>.

It is, in this aspect, hard not to draw a parallel with what can be observed in the United States legal system. Albeit that we are addressing very different structures - the USA being marked by its stable character and the EU as a still evolving polity, and configuring a form of international organization, unlike the first, amongst many other differences<sup>62</sup> -, comparisons are inevitable, and the judiciary is not an exception. To take but two references, *Riggs v Palmer*, from the New York Court of Appeals, and *McCulloch v Maryland*, from the United States Supreme Court, provide examples which find very close expression in rulings of the European Court of Justice. This does not come as a surprise, since the founding fathers necessarily looked at the other side of the ocean for inspiration. In 1957, discussing this topic with Michel Gaudet, Swatland affirmed that the position of the Court had to be carefully considered, due to the absence of 'any established code or system of jurisprudence for its law'<sup>63</sup>; Gaudet replied that the 'various possible interpretations of the Treaty' would have to be guided by the spirit

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<sup>59</sup> Komarek, J., 'Judicial Lawmaking' (cit. supra), at p.7

<sup>60</sup> Höreth, M., 'The European Court of Justice and the U. S. Supreme Court' (cit. supra), at p.143 'The way in which the Court has carried out its functions and which methods for treaty interpretation it used indicate that the Court behaved like an ordinary constitutional court'. See also Vesterdorf, B., 'A Constitutional Court for the EU?', in Pernice, I. (et al.), *The Future of the European Judicial System* (cit. supra), p.85: 'the ECJ can be said to have wider duties than a specialised constitutional court; its role also consists in promoting the unity and the consistency of the law, whether constitutional or not, by advising national courts through preliminary references and by judging on appeal from the CFI. Accordingly, were we to place the ECJ within this classification, it would look more like a "supreme court" than like a "constitutional court", at least to the extent that a "constitutional court" is supposed to be strictly specialised in constitutional adjudication.' This constitutional role of the Court is very succinctly spelt by Tridimas: 'The fundamental role of the ECJ is to ensure that both EU institutions and Member States comply with their obligations arising from the Treaties. This role is par excellence a constitutional one. The ECJ carries out, in effect, review of constitutionality of EU and Member State action', in 'Constitutional Review of member state action: the virtues and vices of an incomplete jurisdiction', *I-CON* (2011) Vol 9 No.3-4, 737-756, at p.737

<sup>61</sup> Ordóñez-Solis, D., 'European Judges In A Global Society' (cit. supra), at p.7

<sup>62</sup> On this and other characteristics that are markedly different, see Jacobs, F., and Karst, K., *The Federal Legal Order* (cit. supra)

<sup>63</sup> Correspondence between Michel Gaudet and Donald Swatland, *CMLRev*, 50, 369-382, 2013, at p.369

and aims thereof, so that the decisions of the Court could 'make sense for the Community both in the present and in the long run'<sup>64</sup>.

The lawsuit in *Riggs v Palmer* concerned the attempt, by the daughters of Mr. F. Palmer, to invalidate his will. Leaving them small legacies, this document established that the majority of Mr. Palmer's estate was to be inherited by his grandson, Mr. E. Palmer. Knowing this fact, and afraid that Mr. F. Palmer could change the will, the said grandson had murdered him. As such, in spite of being subject to criminal punishment, Mr. E. Palmer was not, by law, prevented from claiming the estate. The plaintiffs argued that allowing for the will to be executed as prescribed would result in Mr. E. Palmer being able to profit from a crime he committed. The Court responded affirmatively to the claim, using the values underlying the legislation as a tool to extend its scope, in a move they qualified as 'rational interpretation'. Indeed, in the words of the Court, 'it is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation'<sup>65</sup>.

This is a typical form of teleological or purposive interpretation, if read in comparison with the ones undertaken by the European Court of Justice. However, the NY Court of Appeals did go further, referring to the 'general, fundamental maxims of common law'. This can easily be equated with many of the cases which will be analyzed throughout this work, where a general principle underlying written provisions provided for an extensive reading, so as to guarantee the conformity of the law with the spirit envisaged by the Treaty makers. The 'gap' is filled with reference to a principle, understood as a value or objective to be protected under the system.

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<sup>64</sup> *Ibid.*, at p.373.

<sup>65</sup> *Philo Riggs v Elmer E. Palmer et al.*, Court of Appeals of New York, October 8, 1889, 115 NY 506, accessible on [http://www.courts.state.ny.us/reporter/archives/riggs\\_palmer.htm](http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm)

*McCulloch v Maryland*, on the other hand, provides a parallel to the implied powers doctrine, as developed by the European Court of Justice. Indeed, in this case the US Supreme Court was faced with a debate on the existence of the power, for the US government, to create a national bank. The Supreme Court decided this case by establishing that certain powers existent in the Constitution should be accompanied by powers of execution, or else the fulfillment of the aims pursued would be hindered<sup>66</sup>. It is easy to see a resemblance in this approach with the one undertaken in the implied powers case law<sup>67</sup>. Furthermore, the words of chief justice Marshall are quite marking as regards the nature of the mission of the Supreme Court: 'we must never forget, that it is a constitution we are expounding'<sup>68</sup>; the same can definitely be said about the work of the Court of Justice and its approach to the interpretation of the Treaties. Indeed, the Court did qualify them as the 'constitutional charter' of the Communities<sup>69</sup>.

This type of expansive ruling, with a consolidating aim, is moreover visible in landmark decisions as *Les Verts* and *Chernobyl*, where the Court established core principles in what comes to institutional relations within the Union system<sup>70</sup>. As Komarék puts it, this type of interpretation is justified with the need to adapt the existing law so as to comply with the development of the society - this type of evolution hence seems to find

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<sup>66</sup> *McCulloch v Maryland* (American Historical Documents, 1000–1904. The Harvard Classics. 1909–14, Page 17 U. S. 407/408): 'Although, among the enumerated powers of Government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies (...) a Government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be intrusted with ample means for their execution.' and page 17 U.S. 421 'the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional'.

<sup>67</sup> A parallel can easily be drawn with the 'implied powers doctrine', as established by the ERTA case (judgment in *Commission v Council*, 22/70, EU:C:1971:32)

<sup>68</sup> Chief Justice Marshall, *McCulloch v Maryland* (American Historical Documents, 1000–1904. The Harvard Classics. 1909–14. Opinion of Chief Justice Marshall, in the Case of *McCulloch vs. the State of Maryland* (1819)).

<sup>69</sup> *Opinion 1/91*, EU:C:1991:490

<sup>70</sup> See judgment in *Les Verts v Parliament*, 190/84, EU:C:1988:94, and *Parliament v Council*, C-70/88, EU:C:1991:373 (*Chernobyl*).

a particularly fertile ground in the development of the Communities, and then Union, as a substantive body of law and as a self-standing polity<sup>71</sup>.

This is essentially proof that progressive changes undergone in the EC/EU are a natural evolution of a legal system. In fact, the reference cases presented from the United States are from the 19th century, which shows that the innovative aspects of the EC/EU are so due to its peculiar configuration, but that the decisions of the Court have been inspired in well-established polities. This points equally at the affirmation of the European Court of Justice as quasi federal constitutional court, whose jurisdiction impacts on areas such as division of competences, but equally on matters relating to private law affairs, as will be explored throughout this work<sup>72</sup>. This process of uniformisation of the interpretation of law, with inspiration being sought from different sources, has been essential for the unification and integration of the European legal order: 'like Augustine, the ECJ may rely upon consensus among the different versions to uncover outliers that probably have simply gotten the point wrong, or it may attempt to find various threads running through the different versions which, taken together, suggest an underlying purpose behind the legislation'<sup>73</sup>. This underlying purpose, which the open texture of general principles assists in developing, has thus provided the Court with the power to create, develop and consolidate the EU as a legal system.

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<sup>71</sup> See Komarek, J., 'Judicial lawmaking' (cit. supra), at p.18

<sup>72</sup> Jacobs, F., and Karst, K., 'The Federal Legal Order' (cit. supra), p.192: 'in some respects, it [the ECJ] serves as a federal court: for example, determining with final authority, for all courts of the Community, questions of law, including questions of private law. In other respects, it serves as a constitutional court: as it determines the compatibility with the Treaty of Community legislation, or when it adjudicates on the division of competences between the Community and Member States.' and, at p.204, the elaboration on the federal and constitutional roles of both Courts. See also Cuyvers, A., *The EU as a Confederal Union of Sovereign Member Peoples - Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, 2013, E.M. Meijers Instituut, at p.148/149: 'the judicial branch is clearly the branch where the EU has gone furthest in incorporating federate modifications. A development that has been vital for the nature and functioning of the EU, and forms one of its key innovations compared to the standard confederal model. (...) The ECJ might not be a Supreme Court in the strict sense. It has a very limited direct jurisdiction (...). At the same time, it is a very powerful central court, generally obeyed by national courts, controlling a body of law that, at least from its own perspective, trumps all national law.' Cuyvers defends the understanding of the EU as a 'modified confederal system', due to its lower level of governmental integration.

<sup>73</sup> Solan, L., 'Statutory Interpretation in the EU: The Augustinian Approach', *Brooklyn Law School Legal Studies Research Papers, Working Paper Series*, Research Paper No. 78 July 2007, at p.16.



Cuyvers has argued that indeed there seems to be an approximation of systems, one which would render the EU closer to the form of a 'modified confederacy'<sup>74</sup>. The use of general principles appears here as a relevant tool for the convergence of systems, since they endow the Court with the flexibility to address numerous issues with a constitutional framework. Indeed these tools foster the interaction of legal sources at the various levels of EU law, favouring the interpenetration of primary and secondary law, as well as inserting considerations deeply connected to the national legal systems of Member States, binding the system altogether. This thesis hence purports to provide an overview of the systemic way in which general principles of EU law operate.

## E. Approach and Methodology

With regard to the first, this analysis focuses on the case-law of the European Court of Justice, along with some cases of the General Court. It will essentially look at the mode of operation of general principles in rulings when combined with directives, regulations and, sometimes, with Treaty provisions. The aim is to keep the analysis grounded on a very analytical approach to the text used in the rulings, as well as the interpretation provided to the written instruments which come into play in combination with general principles.

In terms of methodological concerns, further explanation is due. As was said above, there are several issues concerning the use of general principles, what implies enormous difficulty in tackling them separately. Moreover, since the analysis is based on case-law, choices had to be made in relation to the sample cases - and choosing such a sample is made especially difficult due to the lack of coherent terminology in both written instruments and rulings of the Court. This dictated that the analysis could not be based on the choice of a particular general principle of EU law, nor in the use of certain words or expressions by the Court.

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<sup>74</sup> Cuyvers, A., *The EU as a Confederal Union* (cit. supra), at p.4 'the EU can be usefully understood as a modified confederal system. For the EU does combine several of the core characteristics of a confederation with some federate elements.'

The cases were rather chosen in function of the mode of operation in question: by isolating different combinations of general principles with written instruments and their effects, throughout different areas and situations under EU law. The results produced and the reasoning behind them are thus the focus; consequently, and although from the text it will result that there is a special emphasis on the general principle of equality and non-discrimination, due to the multitude of its particular expressions, several general principles will be analyzed, without a particular order of precedence that not that imposed by the interaction at stake.

The approach will focus with particular acuity on issues of terminology, logical sequences in reasoning and the connexion discovered, or created, between general principles and written legal sources. The delimitation of the concept of general principle and the consideration of the ways in which the Court has used such tools would not be complete without a legal theory approach. I will thus recur to the basic definitions of principle and rule, together with their scope of application, and question whether the presented traditional theories fit the peculiar way in which these concepts have been developed in EU law. Here, I must, however, introduce again a caveat: while I recognize the value of such theories and their necessity in conceptualizing the dynamics present in any legal system, I feel their applicability in a system such as the EU legal system can present limitations which would not arise if the context was that of a national legal system, or the traditional international relations plane. This is particularly blatant when one attempts to transpose the 'balancing' exercise inherent to the use of 'principles' or 'standards', as opposed to rules, to the reasoning of the Court of Justice. Indeed, mathematical forms seem to fall short of explaining the phenomena observed, especially when general principles are deployed. The complexity and primary law value of the latter, considered together with the specificities their application entails, dictates that the principled reasoning of the Court cannot entirely follow the traditional legal theory approach to this distinction.

Moreover, it should be noted that there will be principles, and case-law developments, which will stray also from the types of interaction individualized throughout this work. This is especially so due to the inconsistencies in the terminology used, along with the lack of coherence, as patent in the judgments of the Court of Justice. On the other hand,

the Court's rulings are a process in constant evolution, as is the integration of the European Union. That implies that this work cannot provide a final word on the topic, since new cases will surely be added to the presented modes of operation, or even demand the 'creation' of new ones.

## **F. Structure and Outline**

This thesis will be structured around six main chapters. The first one will look at the concept of general principle in EU law. With the topic of this thesis being developed around this concept, it seems necessary and essential to attempt a delimitation of what can be considered a true general principle of EU law. The definition will hence take into account the case-law and academic literature, equally presenting the categories in which such tools are usually compartmented, as well as the functions they are to perform in the EU adjudicatory system. These do not seem conclusive, however, which is the reason why chapter two will focus on issues of terminology. This, as will be seen, represents one of the major difficulties tied with this research, since very different tools have been labelled, in the rulings and in legislation, as general principles, whilst not all of them present the characteristics the very Court claims as essential. The second chapter will hence analyze different layers of general principles in EU law, considering whether they may correspond to distinct functions and hierarchical levels.

The differences found in this chapter will point at the impossibility to rely in either the categorizations proposed in the first chapter or the expressions used. As such, chapter three will be devoted to the pivotal role that general principles have had in the development and consolidation of the different dynamics at play in EU law, through the case-law of the Court of Justice. After having broken the concept of general principle of EU law into its possible meanings, the idea shaping this chapter is to deepen the understanding of the correlation of general principles and other essential features in the development of EU law. Legal theory concepts will be borrowed as a departing point in the case law analysis, so as to show that general principles of EU law seem to have a very specific configuration within the system, especially in the way they are deployed by the judiciary. This will lead to the consideration of the different ways in which

principles are used, and hence the analysis of the combination of norms patent in the interpretation of the legal system.

This chapter will thus serve as an opening for the subsequent ones, which will isolate, after the general considerations above, cases of specific application of general principles in interaction with other sources. The classification and separation proposed do not intend to put forward a closed system of sealed categories; rather contrarily, they purport to organize the taxonomy present in EU law at the moment, in order to surpass the difficulties brought about by terminological uncertainty. As a consequence, it should be stated from the outset that the intention of this work is not to fit all general principles of EU law in the three categories proposed: while it does make sense to analyze them with those categories as a departing point, there are principles whose use does not fit in. As such, the taxonomy presented should be considered flexible and open, admitting exceptions, as this work also tries to show from the outset. The typologies of interaction will hence be analyzed in the following three chapters of this thesis.

Chapter four will lay down the type of interaction which would fit more commonly with the so-called traditional view of general principles of EU law. It will explore general principles of EU law as tools for interpretation, exercising the functions both doctrine and jurisprudence have recognized them to be endowed with. The analysis therein enshrined focuses on how the interaction of general principles of EU law and written instruments operates in a way which affects the scope of application of EU law with regards to the area or subject matter covered.

Moving to the second mode of operation identified, chapter five will look at the same phenomenon, but with the impact being achieved on the relationships covered. This will represent the more controversial use and what many have labelled as the core, competence-creep, function of general principles in the case law of the Court of Justice. The matter raises, as a side issue, the possibility for horizontal direct effect of directives. As such, the Chapter shall start by giving a brief account of the possible effects of these instruments, so that their use in combination with general principles can be assessed.

Chapter six will focus on yet a different mode of operation. Here, the case law analyzed underlines the peculiar relationship achieved with national legislation, when general principles are applied in combination with EU secondary law, so as to structure the interaction with national rules/national authorities. This type of interaction will be analyzed mainly in two different areas. The first one will tackle the area of general principles of private law, with a particular focus on consumer protection and contracts. There is a special 'twist' in this area, since the reference to concepts extracted directly from national legal instruments imprints national law concepts more directly in the reasoning.

Other area of particular interest for this mode of operation, and this interaction between European Union law and national law via secondary legislation, is that of criminal law. The Treaty of Lisbon has considerably extended the competences of the EU in these matters; however, as will be shown, the Court's case-law already took into consideration basic principles of individual protection, using them to restrict the reading of instruments of secondary law. Also in this area, consideration will be given to the nature of the general principles in question, and in which instruments the Court has anchored their application.



## CHAPTER I: WHAT IS A GENERAL PRINCIPLE OF EU LAW?

### Foreword

The aim of this chapter is to explore the concept of general principle of European Union law as it has been understood and used in the EU, especially by the European Court of Justice. A very common expression in case-law and textbooks, there is, however, little consensus on the exact contours of this legal figure, whose relevance is undeniable in the construction of the EU legal system.

This chapter will start by looking into the definition of the general principle of EU law, its nature and features. Then, it will proceed to present the categories in which general principles of EU law are usually divided, by both the doctrine and judiciary, as encompassing the different types of elements to be considered within the format of these tools and, finally, the functions they serve and the rank they are attributed in the hierarchy of legal sources. It will then shift to a critical view of the existing problems through the structure outlined above. Indeed, before turning to issues related to the terminology used in case law, legislation and academic analyses, this work will consider whether the definitions provided indeed portray what general principles of EU law are. In addition, the categories in which these tools are usually divided will be challenged in light of their nature.

A look into the functions and rank of general principles will equally point at the necessity to analyze the subject in a different way. This chapter, together with chapter II, purports to present the traditional approach to general principles and, while acknowledging its strengths, they will show the shortcomings and criticisms that can be pointed out, which this work intends to overcome by shifting the angle of the analysis.

Notwithstanding this attempt, this analysis does not provide for exhaustive 'solutions' to the definition and categorization of general principles. It will rather aim at looking at the ways in which these tools are deployed, in an attempt to make sense of the results achieved by each mode of operation utilized by the Court in its principled reasoning. Even so, this work recognizes that certain principles identified by the Court as such do

not fall within the categories presented. This hypothesis will be analyzed further in chapter II.

## 1.1 The traditional definition of General Principles

To understand the role of principles as interpretative norms and their concrete mode of operation in the rulings of the CJEU, one is compelled to start from the very basics and ask a seemingly simple question: what is a general principle of law? Such a concept, with its varied categories, functions and volatile character, is in fact difficult to grasp in its full meaning.

In the Eur-Lex website, general principles are presented as part of the 'unwritten sources of European law having judicial origin', which are 'used by the Court of Justice as rules of law in cases where the primary and/or secondary legislation do not settle the issue'. It is furthermore noted that fundamental rights are recognized by the Court as general principles and 'are gradually becoming elements of primary legislation'<sup>75</sup>. The first elements of this definition are hence that these instruments are 'unwritten' and 'sources of EU law'; it then proceeds to explore the role principles play in the system. It is quite tempting (and it is often the approach followed<sup>76</sup>) to define general principles with reference to the functions they fulfill, equating their importance namely with that of their gap-filling aptitude. Nonetheless, I will try to separate both and highlight the characteristics of these norms and the categories in which they are divided, before entering the realm of their functions.

Basedow addresses general principles of EU law departing from their unwritten character, stating that they are 'rules' which are not contained either in the Treaty or

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<sup>75</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432543956886&uri=URISERV:114533>

<sup>76</sup> See Arnall, A., 'What Is A General Principle Of EU Law?', in De La Feria, R. and Vogenauer, S., *Prohibition of Abuse of Law – a New general principle of EU law?*, Studies of the Oxford Institute of European and Comparative Law, Oxford Centre for Business Taxation, Hart Publishing 2011. In the very beginning, when defining general principles of EU law, the author indicates that 'such principles are used mainly to fill gaps and resolve ambiguity in the written law, but they have a significance which is more far reaching. Their capacity to legitimise Union law and the scope for judicial activism inherent in identifying and defining them gives the term general principles of law in this technical sense a special resonance' ( at p.7). It is quite common in literature to encounter this mixed functions-definition approach to general principles.



secondary legislation of the EU<sup>77</sup>. De Witte equally qualifies them as 'unwritten' norms<sup>78</sup>. While accepting that the lack of positivization of general principles might have been a distinctive factor in the annals of EC law, the fact is that, nowadays, references in writing to these tools have been largely multiplied. In spite of the scarce Treaty references, stating that general principles are unwritten appears to be a legal fiction: most of them have been expressly referred to in the case-law of the Court, in addition to the several mentions contained in secondary legislation. This cannot, thus, be presented as a decisive characteristic for the definition of general principles of EU law.

Morvan defends that 'principles come from scattered texts or upper-values pre-existing in a positive law, of which they extract and write the reasoning, the *ratio legis*'<sup>79</sup>. In the international plane, general principles are expressly recognized as legal sources of law, according to article 38 of the Statute of the International Court of Justice<sup>80</sup>. This seems like a more feasible departure point for the analysis of general principles of EU law: their origin and status as legal source.

In the European context, they have served to transport the fundamental values of the legal systems adhering to the Union from the national level to this supranational, quasi-federalist, form of legal system. Usually conceived as general and vague propositions, they are imbued of the firmest beliefs underlying the legal systems, hence providing the (new) legal system formed with the Treaty of Rome with the legitimacy and acceptance it needed. Indeed, their roots being anchored in both the legal systems of the Member States, and widely recognized as international law tools, it is not surprising that also the European Court of Justice has adopted their use from the beginning. More surprising is perhaps the little mention these tools deserve in the Treaties. In fact, in spite of

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<sup>77</sup> Basedow, J., 'The Court of Justice and private Law' (cit. supra), at p.460: 'the Court has constantly held that Union law contains rules which are not laid down in the Treaty or in secondary Union legislation; these unwritten rules are the general principles of Union law'.

<sup>78</sup> De Witte, B., 'Institutional Principles: A Special Category of General Principles of EC Law', in Bernitz, U., Nergelius, J. (eds), *General Principles of European Community Law: Reports from a Conference in Malmö, 27-28 August 1999*, The Hague, Kluwer Law International, 2000, 25, 143-159, at p.143: 'unwritten principles, recognized by the European Court of Justice, that have the status of higher law by the fact that they may be invoked as a standard for the review of Community acts'.

<sup>79</sup> Morvan, P., 'What's a Principle?', in *European Review of Private Law*, 2-2012, 313-322, at p.318

<sup>80</sup> Article 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...) c. the general principles of law recognized by civilized nations'

recognizing the 'values' of EU law and objectives it purports to achieve<sup>81</sup>, the references to general principles as sources of law are scarce. Express references can be found only in article 6.3 TEU, on fundamental rights protected as general principles of EU law, and article 340 TFEU, on non-contractual liability of the EU. Both these provisions indicate an anchoring of these principles in the national constitutional laws and traditions of Member States, as well as international instruments to which the EU is part.

They are, however, 'exotic beings'<sup>82</sup> in EU law, assuming a particular configuration, intrinsically connected to the *sui generis* character of the legal order they intend to shape. In fact, they are both different from international law principles as they derive from national law principles. Here lies one of the many peculiarities of EC/EU law: general principles which, albeit inspired by other sources, became original to its configuration, due to the formulation used by the Court. They have contributed to the creation of a teleological basis for the legal system, one which, in light of the case-law, progressively became independent from the existing structures belonging to the Member States. General principles seem to have imbued the system with fundamental grounding 'pillars' which stemmed from other instruments and legal orders; however, these 'Trojan horses'<sup>83</sup> have served not only as a vehicle for other legal sources to make their way into the system, but also became an important legal source of their own, putting the emphasis on values other than those to be protected by the internal common market throughout the years.

In conclusion, general principles of EU law are sources of law specific to the Union/EC system, which, in written or unwritten form, have been, due to their fundamental value and proneness to create commonalities, a strong vehicle for European integration.

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<sup>81</sup> See articles 2 and 3 of the Treaty on the European Union (consolidated version)

<sup>82</sup> Semmelmann, C., 'Legal principles' (cit. supra), at p.316. She further notes that 'whenever there is no law that covers a given situation, the EU courts start looking into the national legal orders and ideally reveal what serves as their 'toolbox' and how they select the most suitable solution for the EU legal system. (...) different legal principles import different sorts of content into the EU legal system', at p. 320/321.

<sup>83</sup> Semmelmann, C., 'The Public-Private Divide In European Union Law', in Neergard, U., and Nielsen, R. (eds), *European Legal Method In A Multilevel EU Legal Order*, p.183, at p.219

## 1.2 Categories of General Principles of EU law: four, three, two...?

As was referred above, the two references of general principles in the Treaty are contained in article 6 TEU, with respect to fundamental rights protected as general principles of EU law; and in article 340 TFEU, with regard to general principles common to the laws of the Member States in the establishment of non-contractual liability of the Union. These two areas are not, however, the only sectors of EU law where the Court of Justice has developed its general principles doctrine<sup>84</sup>. Under its sovereign competence to ensure 'the law is observed', the Court has used these tools in several areas of EU law, affirming their primary law value in the rulings and hence legitimizing the development of EU law achieved with it<sup>85</sup>.

This wide-spread use justifies the many categorizations proposed by the doctrine. Simon divides general principles of EU law in four core categories: ontological (those constituting the nucleus of the *sui generis* EU legal system), axiological (underlying values of the Union), sectorial (circumscribed to certain areas of EU law) and instrumental (those guiding judicial reasoning)<sup>86</sup>. This classification appears to be too divisive, failing to grasp the flexibility inherent to general principles. Would using it mean that characterizing principles such as direct effect and primacy as 'ontological' would lead to excluding them as configuring 'axiological' and 'instrumental'? Such an

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<sup>84</sup> An interesting quote by Semmelmann: 'legal principles mushroom in all areas of European Union law', (in 'Legal Principles', cit. supra, at p.303).

<sup>85</sup> Lenaerts, A., 'The Role of the Principle *Fraus Omnia Corruptit* in the European Union: A Possible Evolution Towards a General Principle of Law?', *Yearbook of European Law*, Vol. 32, No. 1 (2013), pp. 460–498, at p. 462: 'Nonetheless, the ECJ has applied the concept of general principles outside these specific contexts. The Court established a large number of general principles of Union law on the basis of Article 220 EC (now replaced in substance by Article 19 TEU), according to which the Court must ensure that within the interpretation and application of the Treaties the law is observed. The ECJ has included 'general principles' within the term 'law'. Principles created on that basis form part of the legal order of the European Union. Hence, a breach of them constitutes an 'infringement of the Treaties or of any rule of law relating to their application', which is a ground for judicial review of the legality of acts under Article 263 TFEU.' See also Semmelmann, 'Legal Principles' (cit. supra), at p.314/315: 'the treaties neither refer to legal principles as a generic source of EU law nor does article 288 TFEU make mention to them (...) Moreover, the notion of principle is reflected in various drafts on the harmonisation of private law in the EU without, however, employing the term 'principle' in a consistent manner. At times, the respective principles are termed 'general principles' which appears to amount to a term of art appearing sporadically in the treaties and in the case law that lacks, however, an authoritative definition'

<sup>86</sup> Simon, D., 'Les Principes en Droit Communautaire', in *Les Principes en Droit – Collection d'Études Juridiques dirigée par Nicolas Molfessis, sous la Direction de Sylvie Caudal*, Economica, Paris, 2006, p.287-304, at p.295 ss. Also four are the categories individualized by Reuter: 'principes solennellement posés dans le texte des traités', 'principes qui peuvent être déduits des articles des traités', 'principes communs au droit des pays membres', 'principes du droit international public' (see Reuter, P., *Le Recours de la Cour de Justice* (cit. supra), at p.262)

assumption would deprive principles from their eclectic character. Logically, this same objection applies to other principles.

Another four-folded categorization is that proposed by Wiesbrock, who divides general principles into 'general principles of administrative and legislative legality', 'general principles based on the fundamental freedoms of the internal market', political rights of EU citizens and fundamental rights<sup>87</sup>. Albeit fairly different from the previous four categories presented, this too seems considerably divisive: although indeed general principles are often connected to fundamental freedoms, for instance, it is hard to see why the political rights of the European citizens would not be enshrined in the fundamental rights category. The first category, on the other hand, would fall flat from providing a comprehensive and encompassing approach to the general principles 'developed' by the Court.

Waelbroeck and Schermers, instead use three different categories which would embody all general principles. The first is of 'compelling' general principles, those stemming from natural law; the second, 'regulatory', those common to the laws of the Member States; finally, there would be 'indigenous' general principles, corresponding to the ones developed by Community law<sup>88</sup>. This categorization is very similar to the one proposed by Jean Boulouis<sup>89</sup>. Again, however, such classification seems to become too narrow to encompass the peculiarities of general principles. The 'regulatory' principles, for example, as developed by the jurisprudence of the Court, have the proclivity to become indigenous. Moreover, how can one define them as not compelling, as opposed to the first ones?

Flaesch-Mougin synthesizes the categories of general principles of EU law in a different way. She refers to 'founding' principles, which would contain the principles connected to the functioning of the institutions. On the other hand, there would be 'sectorial' principles, 'open' principles and principles emanating from Member States. She adds to

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<sup>87</sup> Wiesbrock, A., 'Legal Migration to the European Union' (cit. supra), at p.170

<sup>88</sup> Schermers, H., and Waelbroeck, D., *Judicial Protection in the European Communities*, Europa Instituut University of Leiden, Kluwer Law, Netherlands, 1992, at p.27/28

<sup>89</sup> Boulouis, J., *Droit Institutionnel de L'Union Européenne*, Domat Droit Public, Montchrestien, Paris, 1997, at p.237/238

these different strands those principles which stem from the Court's case-law<sup>90</sup>. It is nonetheless questionable that principles stemming from the Court's case-law cannot equally be sectorial, open... or even borrowed from Member States' laws and traditions, as the justification for general principles of EU law usually goes. Furthermore, take those principles which regulate the functioning of the institutions which are naturally sectorial, since they do not extend to the whole field of application of EU law. Their foundations, however, are many times rooted in the rulings of the Court, for which they would pertain to the last category as well.

Tridimas suggests that the proposed classifications 'raise more questions than they answer', their limited value being attached to the 'relative character' of general principles. He then proposes a dual categorization: 'principles which derive from the rule of law' and 'systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice'. Advocate General Trstenjak, on the other hand, claims 'a distinction can be drawn between general principles of Community law in the narrow sense, namely those which are developed exclusively from the spirit and system of the EC Treaty and relate to specific points of Community law, and those general principles which are common to the legal and constitutional orders of the Member States'<sup>91</sup>.

The latter two proposals are similar to those advanced by Pescatore, in the early 80's<sup>92</sup>; in a way, together with the unwritten or written character of such rules, this dual categorization allows for a clear line of analysis, while encapsulating the differences found between principles which are original to the 'new legal order' and those which are

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<sup>90</sup> Flaesch-Mougin, C., 'Typologie des principes de l'Union européenne', in *Le Droit de L'Union Européenne en Principes, Liber Amicorum en l'Honneur de Jean Raux*, Ed. Apogée, 2006, p.99/15, at p. 104/105

<sup>91</sup> See Tridimas, T., *The General Principles of EU law* (cit. supra), at p.4. Opinion of Advocate General Trstenjak in *Audiolux and Others*, C-101/08, EU:C:2009:410, at paragraph 69)

<sup>92</sup> Pescatore, P., 'Le Recours, dans la jurisprudence de la Cour de Justice des Communautés Européennes, à des normes déduites de la comparaison des droits des États membres', *Revue Internationale de Droit comparé*, 1980, vol 32.2, p.337-359, at p.351: 'comme en droit international, on peut discerner ici deux sortes de principes: d'une part, ceux qui sont propres au droit communautaire (par exemple, les principes de structure de la Communauté et quelques principes de droit matériel, comme ceux de libre circulation, libre établissement, de non-discrimination...); d'autre part, les principes dérivés de l'expérience juridique nationale, comme le principe de bonne foi (qui a trouvé une expression à l'article 5 du Traité CE), le principe de sécurité juridique, le principe de proportionnalité, la protection de la confiance légitime. En réalité, l'affirmation de chacun des principes mentionnés en dernier lieu est une application implicite, inconsciente peut-être, de la méthode comparative'.

adopted, and adapted, to fit it. However, it is clear from the list presented above that there is no real consensus on this matter. In my view, the division between principles native to EC/EU law and principles imported from Member States fails a priori. While the first are said to be fruit of its development and affirmation as an entity, it is undeniable that many of them are the result from adaptation of national legal principles to the specific characteristics of the EU legal system. Even today, the flux continues between the national concepts and European ones, with influences being noted both ways. These categories seem hence to be movable - which was especially visible in the primordial state of the European Communities, when the biggest source of inspiration to fill in lacunae were necessarily the legal systems of the Member States in face of the inexistent developed corpus of rules.

On the other hand, if one were to take the difference which so often seems fundamental between written and unwritten principles to make this division, the obstacles are the same. Naturally unwritten principles lend themselves more easily to the general principle configuration due to the vague contours and configuration, left almost exclusively for the Court to inflate. However, this appears to be a mere legal construction, when looked at through the lens of development of the EU legal system. Many of the unwritten principles have progressively become codified, first by being qualified as such in the rulings of the Court, and then making their way into the Treaties and secondary legislation, having been 'adopted' in that form by the European legislator. Trying to maintain the qualification as a general principle of EU law attached to the written or unwritten character of the principles seems thus too feeble as a criterion, in light of the present stage of evolution of EU law.

Whichever categories one decides to adopt, it remains indisputable that no such division can be deemed hermetic and all encompassing. This is one of the reasons this work does not profess to any of the suggested categorizations, supported by the belief that the characteristics that may define the inclusion of a general principle in one or the other are mutable, and hence not defining<sup>93</sup>. It is clear that the Court has developed principles as

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<sup>93</sup> Indeed, any attempt of containing the diversity of general principles and their characteristics in hermetic ranks would result in voiding them of the flexibility essential to the role they play in the structural dynamics of the EU legal system. In this sense, see Simon, D., 'Les Principes en droit

structural to the EU legal system, and, in conjunction with those which clearly stem from the Member States and are presented as such, such norms were progressively developed into the *acquis communautaire*, with the boundaries becoming blurred throughout the integration process.

It should be noted, furthermore, that this jurisprudential intervention, legitimized under article 19 TEU and its guarantee of the rule of law, does not seem to entail the derivation of a lowest common denominator amongst the national systems, but rather a harmonization process<sup>94</sup>. In fact, the general principles of EU law ‘discovered’ by the Court, derived from the ‘national constitutional laws and traditions’, as well as international instruments, are yet to reunite a real consensus as regards their true universal character and the way they are extracted from such laws and traditions<sup>95</sup>.

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Communautaire’, (cit.supra), at p.290: ‘si l’on veut cerner le sens et la portée des principes en droit communautaire et s’essayer à une reconstruction, il est impossible méthodologiquement de tenter de plaquer une homogénéité artificielle sur cette diversité essentielle. Tout essai de réduction à l’unité est voué à l’échec, à moins que l’on accepte de restreindre la portée des principes à une notion vaporeuse qui les viderait de toute signification opératoire.’

<sup>94</sup>Also in this sense, see Opinion of Advocate General Trstenjak in *Audiolux* (cit.) at paragraph 69: ‘Whereas the first category of general principles can be derived directly from primary Community law, the Court essentially uses a critical legal comparison in order to determine the second category, which does not, however, amount to using the lowest common denominator method. Nor is it regarded as necessary for the legal principles developed in this way in their specific expression at Community level always to be present at the same time in all the legal orders under comparison.’; see also Lenaerts and Gutiérrez-Fons, ‘The Role of General Principles of EU Law’, in Arnull, Barnard, Dougan, Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Oxford : Hart Publishing, 2011, p.179-198, at p.183: ‘in discovering general principles, it is well established that the ECJ does not seek to identify the lowest common denominator from national constitutional traditions. Instead, the ECJ follows ‘an evaluative approach’, according to which the Court incorporates the solution provided for by the national legal orders that fits better or is in line with the objectives and structure of the Treaty.’ Also, Solan, L., ‘Statutory Interpretation in the EU’ (cit. supra), at p. 16: ‘Like Augustine, the ECJ may rely upon consensus among the different versions to uncover outliers that probably have simply gotten the point wrong, or it may attempt to find various threads running through the different versions which, taken together, suggest an underlying purpose behind the legislation’.

<sup>95</sup>Hesselink is quite critical in this aspect. See Hesselink, M., ‘A Toolbox for European judges’, *Centre for the Study of European Contract Law Working Paper Series*, No. 2010/07, at p.12: ‘an interesting question is whether only the CJEU is allowed to formulate them. In *Mangold* and *Küçükdeveci*, the Court said it had acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a ‘general principle of EU law’. This expressions suggests that the principle already (may have) existed before it was acknowledged by the CJEU. If this is true, could national courts also acknowledge European principles, even before the CJEU has done so? As a matter of expediency that might be quote risky because later on it may turn out that such a new Union principle did not really exist. (...) The mere fact that before *Mangold* the Court had not yet acknowledged its existence [of the general principle of non-discrimination on grounds of age] does not exclude that this principle already existed before as a general principle of EU law and that therefore a national court should or could have disapplied a national provision contrary to that principle, an even without reference to the CJEU. And the same would apply to other principles of EU law that may be existing already today but that the Court has not yet had the opportunity to recognise. These are important questions concerning the nature of the principles of Union law and concerning the nature of European adjudication and the European legal

Albeit it seems clear that the Court should not have to resort to a ‘lowest common denominator’ technique, the fact is that the origin and legitimacy of certain proclaimed principles is questioned still. This can also explain that the inspiration may be derived from a mixture of concepts and values of different legal systems, which are then transformed into ‘*topoi* or interpretative criteria’, in a demonstration of a communitarian approach, which intends to be flexible and progressive<sup>96</sup>.

### 1.3 Functions and Rank of General Principles of EU law

General principles have been recognized in international law and throughout national legal systems as a generally accepted gap-filling tool. This is what could be called their ‘first’ function, their aptitude to serve as tools for a process of judicial review of conformity of national laws or secondary law with primary EU law.

Historically, it should be recalled that the use of general principles for this purpose meant that they were tools made available within the legal systems: inherent to the legal *acquis* and searching for system completing, they helped the judiciary look into solutions within the system. This was the aim they were endowed with in the early *Code Napoléon*<sup>97</sup>. It should, however, be noted that they were therein seen as a way to reinforce the all-encompassing character of the law and the impossibility, for judges, to go any further than the solutions proposed by the system itself. The filling of gaps was to be made in harmony with the system as a whole, not to go beyond it. This is the context to which the judges of the European Court of Justice belonged. General principles seem to serve as a tool for both consolidation and control, allowing the judiciary to integrate the legal system on the basis of the spirit of the system itself.

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method: do EU courts merely discover or ‘acknowledge’ principles that were so far unknown, or do they create new ones?.

<sup>96</sup> Beck, G., ‘The Legal Reasoning’ (cit. supra), at p.196. See also Mayer, F., ‘Constitutional comparativism in action. The example of general principles of EU law and how they are made—a German perspective’, *I•CON* 11 (2013), 1003–1020, at p.1006: The formula “draws inspiration” used by the Court—the wording of article 6 TEU does not include that part of the CJEU’s concept—indicates that the CJEU does not engage in any kind of mathematical-empirical task.’ and p.1008: ‘What also appears to be obvious is that the CJEU cannot simply engage in a copy–paste effort. Typically, the CJEU will not try to transplant the member states’ doctrinal concepts of a given fundamental right’.

<sup>97</sup> Article 5 of *Code Napoléon*, cit. supra.



Although their position in the hierarchy of sources of EU law is, in the view of some authors, still open to debate<sup>98</sup>, general principles of EU law are usually consensually attributed a tripartite set of functions<sup>99</sup>. Besides the already mentioned role as ground for judicial review, they are said to work as interpretation tools and as standards for EU/State liability<sup>100</sup>. This stems from the doctrinal analysis of the case-law of the Court and from the rulings themselves, along with the Opinions enacted by Advocates General. The recognition of their role in the review of validity of other measures and conformity of national legislation is, in fact, what could be labelled the 'historical' function of general principles or, if one prefers, the most recurrent 'mode of operation' in which these rules are triggered. Rideau states that principles form an integral part of the legality parameters to which the European Union judge refers in order to examine the legality of a secondary law act in annulment procedures, or the validity of acts in the preliminary reference procedure<sup>101</sup>.

The interpretative function of general principles has, on the other hand, developed in line with the progressive European integration. It grew to encompass what would not traditionally be labelled as a 'gap', extrapolating those which would be considered the typical fields of application of EU law. Gap-filling is used whenever courts struggle to surpass *lacunae* in written law<sup>102</sup>. In such a case, both national courts and the International Court of Justice recognize these mechanisms as a legitimate way to find solutions which are not directly and expressly written. The legal system in question is to

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<sup>98</sup> In my view, general principles of EU law clearly possess primary law value. However, this position is still disputed. For a brief overview, see Rideau, J., *Droit Institutionnel de l'Union européenne* (cit. supra), especially at 303: 'Selon des nombreuses analyses, les principes auraient une valeur inférieure au droit primaire. On est toutefois conduit à s'interroger sur la possibilité de soutenir ce point de vue de manière générale alors que les principes généraux sont parfois repris par un support textuel figurant dans les traités depuis l'origine ou introduit ultérieurement, notamment sous l'influence de la jurisprudence, et ont alors sans aucune doute valeur de droit primaire.'

<sup>99</sup> A fourth 'function' has also been pointed out: see Prechal, S., 'Competence Creep and General Principles of Law', *Review of European Administrative Law* 3, no. I (2010) Europa Law Publishing, 5-22, at p.5: 'it is by now a hardly disputed matter that general principles of EU law may serve as an aid to interpretation for other legal – EU or national – provisions, as a gap-filling mechanism or that they may operate as a standard of review for both EU and Member State action. Less explored is the very fact that general principles may also serve as a vehicle to competence creep'

<sup>100</sup> Tridimas, *The General Principles of EU Law* (cit. supra), pages 21 to 35

<sup>101</sup> Rideau, J., *Jurisclasseur, Fasc. 191: Ordre Juridique De L'union Européenne – Sources non écrites*, août 2014, p.57: 'forment une partie intégrante des paramètres de la légalité auxquels le juge de l'Union européenne se réfère pour examiner la légalité d'un acte de droit dérivé dans le contentieux de l'annulation, ou la validité d'un acte dans le cadre des renvois préjudiciels' (free translation).

<sup>102</sup> Tridimas, T., *The General Principles of EU law* (cit. supra), at p.19: 'Legislative provisions may be interpreted in the light of the underlying premises of the legal system in such a way as to leave gaps which then need to be filled by recourse to general principles.'

be taken as a whole and the ‘gap’ is filled by recurring to its underlying aims and objectives, preventing courts from *non liquet*.

Since European Union law is a product of a combination of Member States’ law and international law, it should come as no surprise that general principles appear equally as a source of international law. As academia notes, however, general principles do not materialize very often in the rulings of international courts, which seem to be reluctant to apply this source of law in detriment of the written rules<sup>103</sup>. It is hence argued that, whilst at international level general principles might have a more muted character and be applicable merely as a subsidiary source, that is not the case in what comes to European Union law.

At EU level, general principles have their primary law status stemming from the Treaty provisions, and the interpretation made by the Court of Justice of national constitutional laws and traditions, as well as international instruments of which the Union is part<sup>104</sup>. Tridimas notes that, ‘in Community law their function goes further. They are (...) an integral part of the judicial methodology.’<sup>105</sup> It should be noted that a strong hierarchical component is present at EU level. General principles of EU law are certainly to be recognized as superior to secondary law. Their relationship with other primary law, however, is rather difficult to define. Many have argued that general principles have, undoubtedly, primary law rank. Nonetheless, in certain instances it has been observed that, when interacting with primary law, their position is not as clear cut. My claim is that it is so due to a failure to look at these tools in a dynamic way, rather than in a rigid interplay. These tools lend themselves to several modes of operation.

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<sup>103</sup> Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 1994

<sup>104</sup> Although they are presented under the heading 'supplementary law' in the Eur-Lex website, referred supra.

<sup>105</sup> Tridimas, T., *The General principles of EU law* (cit. supra), at p 57: ‘it has been suggested that in terms of methodology, the mandate given to the International Court is similar to that of the Court of Justice. It requires a synthesis of principles found in domestic legal systems rather than the mechanical application of the statistically predominant rules. (...) There are, however, significant differences between the application of general principles by the International Court and by the European Court. Although general principles are referred to by individual judges, it is notable that so far no majority decision of the International Court has been based expressly upon a general principle of law.’

It has been argued that the need for gap-filling in the interpretation of the European legal system has progressively decreased from the moment of the foundation of the European Communities<sup>106</sup>. In their early birth, the Treaties were incipient and could not encompass the constant challenges created with the progressive opening of frontiers and movement of capital, services and people. The Court hence performed its integrator task and used general principles as interpretative tools in several fields<sup>107</sup>. It started by affirming the primacy and direct effect of EU law and went on to develop administrative law<sup>108</sup> and create a catalogue for fundamental rights' protection<sup>109</sup>, amongst others. This case-law illustrates precisely the claim that general principles were used, at least to some extent, to allow European law to be applied outside the fields of legislative competence<sup>110</sup>. On the other hand, some of the Court's decisions have equally influenced the subsequent Treaty revisions in a decisive way<sup>111</sup>. And it is precisely the profusion of legislative texts nowadays – from the Treaties to the Charter of Fundamental Rights, encompassing also regulations, directives and other instruments – which dictates that the role of general principles, as understood traditionally, would tend to be exhausted, or at least extremely reduced. The modern tendency to written formalization of rules would necessarily reflect a decrease in the importance of these instruments, were they a mere gap-filling tool, taken in its literal sense.

Nonetheless, the importance of general principles in the contemporary jurisprudence of the CJEU seems not to have been exhausted with the crystallization of rules. Indeed, general principles have often provided the anchor for the CJEU to base its rulings,

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<sup>106</sup> *Ibid.*, at p.18

<sup>107</sup> Beck, G., 'The Legal Reasoning' (cit. supra), at p.237: 'by the early to mid-1960's the Court of Justice began to treat its previous cases as authoritative interpretations of the EC Treaty and other EC measures in areas where the Treaty could be said to have left a 'gap' in the EU legal system.' and at p.241: 'gaps in the treaty-based EU legal system, it has been shown, mean that the ECJ has had to do more than interpret, refine and clarify EU treaty and legislative provisions.'

<sup>108</sup> To refer merely some: judgment in *Meroni v High Authority*, 10/56, EU:C:1958:8, *Rau Lebensmittelwerke and Others*, 133/85 to 136/85, EU:C:1987:244; *Macchiorlati Dalmas v High Authority*, 21/64, EU:C:1965:30

<sup>109</sup> Again, some examples: *Stauder, Internationale Handelsgesellschaft* and *Nold*, cited above, and judgment in *Schmidberger*, C-112/00, EU:C:2003:333 and *Omega*, C-36/02, EU:C:2004:614

<sup>110</sup> See, in this respect, Morvan, who argues that the use of principles sometimes even without a text has as main aim the 'goal of subjugating the rules to a new judiciary control'. He adds that 'the motive for resorting to a principle is not the necessity to fill real gaps. Though principles stand out of the scope of written law (...) they feed an already complete positive law at the cost of setting aside texts that are available but considered inadequate or inopportune.' (Morvan, 'What's a Principle?' (cit. supra), at p.319)

<sup>111</sup> Perju, V., 'Reason and Authority' (cit. supra), at p.330: 'when the Treaty was amended, the amendments often codified, more than modified, the Court's earlier interpretations'.

defying a literal wording of the Treaties: not as gap-filling instruments, but rather as an interpretative method used to go beyond the text in question. It is thus perhaps the amount of written instruments available nowadays which can explain the need to look at the way general principles operate in a different way, recognizing their role has shifted in accompanying the evolution of EU law.

This work aims precisely at making sense of the taxonomies presented, as well as providing some alternative views on the way general principles are deployed in the case-law of the Court. However, there are limitations. Indeed, there seem to be certain principles which, even if characterized as such, and so called, do not seem to follow any of the modes of operation individualized in this work. Whichever the categorization followed, there seem to exist general principles of EU law which will have a standing of their own, with their particular configuration being developed within certain areas, in order to respond to the challenges raised therein. This is the notably the case of the precautionary principle, which, although characterized, in certain occasions, as a general principle of EU law, seems to have a distinct configuration – and, equally, mode of operating.

#### 1.4 The precautionary principle

The precautionary principle has some particularities which give it an interesting position within the system. Effusively used by the Court in the areas of environmental law and healthcare, this principle seems to assume a different role from that of the principles analyzed in the section above. Nonetheless, it does not seem to qualify either as a general principle of EU law, albeit that has been the wording used by the General Court<sup>112</sup>. Looking at the case law might provide a better understanding of its characteristics and consequent rank<sup>113</sup>. The aim of this section is precisely to show that, even though the intention in this work is to be as inclusive as possible in the treatment

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<sup>112</sup> See judgment in *ATC and Others v Commission*, T-333/10, EU:T:2013:451, at paragraph 79. The Court of Justice has never explicitly upheld such a qualification in its rulings – what seems to configure again the permanent confusion in terminology, with different concepts being nested under the same wording and designation. See, however, Lenaerts, K., '«In the Union we trust»: trust enhancing principles of Community law', *CMLRev* 41, 2004, 317-343, at p.335, where the author defines the precautionary principle as a 'general principle of Community law'.

<sup>113</sup> For a more extensive account of the development of the precautionary principle, see Da Cruz Vilaça, J.L., 'The Precautionary Principle in EC Law', in *EU Law and Integration* (cit. supra), p.321-354

of general principles, there are certain figures which abide by different rules. The inclusion in this chapter was chosen precisely because the wording points at potentially the same instrument - but a look at the specificities in the case-law demonstrates we are in face of something else.

#### 1.4.1 The cases

The *Artegodan* case, on medicinal products for human use, provides a particularly enlightening succession of arguments which relate to the features and scope of this principle<sup>114</sup>. The General Court started by stating that such a principle is binding. It further noted that, despite the fact that its mention in the Treaty is connected to the environmental policy, the principle is much broader in scope, extending to ‘all the Community’s spheres of activity’<sup>115</sup>. This explains its extension to the field of human health. The precautionary principle is then boldly characterized as a general principle of Community law, to be ‘regarded as an autonomous principle stemming from the Treaty provisions’ and, as such, requiring the competent authorities to act accordingly<sup>116</sup>. This case was later appealed – but the CJEU did not pronounce itself on the qualification of the principle.

Merely by reading the above, the classification seems striking: it is qualified as ‘autonomous’ and as a general principle of EU (Community) law. However, the principle is expressly referred to in the Treaty (more precisely in article 191.2 TFEU): it ‘stems’ from the written primary norms, rather than behaving as a constitutional substratum; that is, this particular principle does not seem to be an underlying value, but to be more meshed with the Treaty provisions. This type of anchorage of the principle is visible in the *Waddenvereniging and Vogelsbeschermingvereniging* case<sup>117</sup>, where the Court states that the provision of secondary law ‘integrates’ the principle. The case concerned the assessment of the implications of mechanical cockle fishing in a

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<sup>114</sup> General Court judgment in *Artegodan v Commission*, T-74/00, EU:T:2002:283, at paragraphs 181 and ff, especially.

<sup>115</sup> *Ibid.*, at paragraph 183

<sup>116</sup> See Tridimas, T., *The General Principles of EU Law* (cit. supra), at p.9: ‘the Court of First Instance also applies the general principles of law within the limits of its jurisdiction. Far from being merely a fact finding tribunal, the CFI has made its own mark in the case law’

<sup>117</sup> Judgment in *Waddenvereniging and Vogelsbeschermingsvereniging*, C-127/02, EU:C:2004:482

protected site under the Habitats directive<sup>118</sup>. The analysis of ‘significant effects’ according to article 6.3 of the directive led the Court to raise the use of the precautionary principle, ‘one of the foundations of the high level of protection pursued by Community policy on the environment (...) and by reference to which the Habitats directive must be interpreted’<sup>119</sup>. In reading that provision, the Court acknowledged that ‘the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats directive integrates the precautionary principle’, further remarking that the latter needs to guide the decisions of the relevant authority, ‘in light of the site’s conservation objectives’<sup>120</sup>.

Such reading is the same articulated by Advocate General Sharpston in her Opinion in *Sweetman and Others*<sup>121</sup>. This case versed again on the interpretation of the expression ‘adverse effect on the integrity of the site’ in light of the Habitats directive, this time concerning a road scheme which would cross a specific protected habitat under Annex I to the said instrument, which would result in the permanent loss of a significant area thereof. The effects on the environment and the area of conservation of the consent for this project were raised, reaching the Court in a reference for preliminary ruling. The Advocate General started by referring to *Waddenvereniging and Vogelbeschermingsvereniging*, restating that the precautionary principle is integrated in the directive provision. Moreover, she notes, the ‘principle is relevant to establishing whether any competent authority can rule out any adverse effect on the integrity of a site’, but the article lacks any interpretational gap to be filled by application of the precautionary principle<sup>122</sup>.

As is apparent, in spite of being recognized as potentially applicable as a gap-filling tool, in line with the interpretive function recognized to all general principles of EU law, the precautionary principle is denied any independent role to play here. It appears as

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<sup>118</sup>Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

<sup>119</sup>*Waddenvereniging and Vogelsbeschermingvereniging*, at paragraph 44

<sup>120</sup>*Ibid.*, at paragraphs 58 and 59

<sup>121</sup> Opinion of Advocate General Sharpston in *Sweetman and Others*, C-258/11, EU:C:2012:743, at paragraph 77 and ff.

<sup>122</sup>*Ibid.*, at paragraph 79

‘integrated’ in the directive, as the Court itself restates in the ruling<sup>123</sup>, further indicating that it is to be applied as means of assessing whether the objectives pursued by the directive are being reached<sup>124</sup>. Rather than appearing as an underlying value of the legislation at stake, it rather seems to be an instrument for appraisal of the attainment of the envisaged objectives. It is relevant for the assessment of certain powers of the authorities applying the directives, but it is integrated in the instruments, having no use beyond the written text of the instrument where it is embedded.

Also in this field there are references to 'specific expressions' of the principle. Here, however, they are rooted in the precautionary principle itself. *Monsanto Agricoltura Italia*<sup>125</sup> concerned safety assessment of foods produced from genetically modified maize in light of the regulation concerning novel foods and novel food ingredients<sup>126</sup>. The validity of the measures at stake concerning the marketing of GMO's was contested by the Italian government under the safeguard clause, referring to the precautionary principle. The Court stated, in paragraph 110, that the safeguard clause present in the regulation ‘must be understood as giving specific expression to the precautionary principle’. The consequence of this is that ‘the conditions for application of that clause must be interpreted having due regard to this principle’<sup>127</sup>. Elaborating on this idea, the Court restates that indeed the clause in question works as a specific expression of the principle. This dictates that ‘the principle must therefore, where relevant, be an integral part of the decision-making process leading to the adoption of any measure for the protection of human health based on Articles 12 and 13 of that regulation’<sup>128</sup>. Furthermore, the ‘principle must also be taken into account where relevant under the normal procedure, *inter alia* for the purpose of deciding whether, in the light of the conclusions concerning the assessment of risk, placing on the market may be authorised without any danger for the consumer’<sup>129</sup>. These statements of the Court are, however,

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<sup>123</sup>*Ibid.*, at paragraph 41.

<sup>124</sup>*Ibid.*, at paragraph 48

<sup>125</sup> Judgment in *Monsanto Agricoltura Italia and Others*, C-236/01, EU:C:2003:431

<sup>126</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council concerning novel foods and novel food ingredients

<sup>127</sup>*Ibid.*, at paragraph 110, with reference to paragraph 44 in judgment in *Greenpeace France and Others*, C-6/99, EU:C:2000:148, where the Court decided that the ‘observance of the precautionary principle’ was reflected in an obligation laid down in article 11.6 of the Directive in question.

<sup>128</sup>*Ibid.*, at paragraph 133

<sup>129</sup>*Ibid.*

mitigated by the reference to ‘where relevant’. It seems apparent that, although the principle forms part of the system for the application of these instruments, it does not assume a preponderant role, nor is it used as a ground for validation of provisions.

The same is patent in *Commission v Netherlands*, with reference to the protection of human health as a primary objective of the environmental policy of the EU, under article 174 EC<sup>130</sup>. The precautionary principle is here balanced against potential restrictions to freedom of movement of goods, under articles 30 and 36 EC. The Court starts by ascertaining that environmental policy ‘is to be based inter alia on the precautionary principle’ and that the requirements of such policy ‘must be integrated into the definition and implementation of other Community policies’, including the protection of human health (which reinforces the conception of the precautionary principle as being applicable in more than one field of EU law)<sup>131</sup>. The Court then observes that a degree of uncertainty ‘is inseparable from the precautionary principle’, which frames Member States’ discretion, but cannot justify that risk assessment is to be based on ‘hypothetical considerations’<sup>132</sup>. The correct application of the principle ‘requires, in the first place, the identification of the potentially negative consequences for health of the proposed addition of nutrients, and, secondly, a comprehensive assessment of the risk for health based on the most reliable scientific data available and the most recent results of international research’<sup>133</sup>.

Notwithstanding its presentation as an ‘underlying value’, stemming from the first paragraphs, the use of the principle seems to be framed by extremely specific requirements. Indeed, its ‘correct’ application dictates two very detailed obligations in this case for the Member State – which somewhat resembles exactly the type of requirements the Court stated made a principle too specific to qualify as a general principle of EU law, in *Audiolux* and *NCC*, amongst others. This follows from other cases, such as *Briels*, again a ruling concerning the interpretation of the Habitats directive<sup>134</sup>. After restating that the instrument in question ‘integrates’ the precautionary

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<sup>130</sup> Judgment in *Commission v Netherlands*, C-41/02, EU:C:2004:762

<sup>131</sup> *Ibid.*, at paragraph 45

<sup>132</sup> *Ibid.*, at paragraphs 51 and 52

<sup>133</sup> *Ibid.*, at paragraph 53

<sup>134</sup> Judgment in *Briels and Others*, C-521/12, EU:C:2014:330



principle, in paragraph 28, the Court affirms that ‘the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site’s conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.’ These obligations are specifically tailored in the directive’s provision – seemingly, the principle is absolutely absorbed by the written secondary law.

#### 1.4.2 A governance principle?

Overall, it is apparent that the characteristics of the precautionary principle leave it in an indeterminate area, with some features pointing at a constitutional character, while others render it much more dependent on written law<sup>135</sup>. This ambivalence is moreover patent in the fact that the precautionary principle, unlike other unwritten 'general principles', finds expression in the Treaty. Article 191.2 of the Treaty on the Functioning of the European Union establishes that 'Union policy on the environment shall (...) be based on the precautionary principle'. The first inevitable comment is that, as was shown in the cases above, the principle has extrapolated the environmental law field, showing a degree of generalization which is common to general principles of EU law, potentiating a far reaching horizontal application throughout different policy areas<sup>136</sup>. However, it also seems that the level of entrenchment that this principle finds in written

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<sup>135</sup> In fact, the precautionary principle is used to test the legality of measures, even if such measures do not relate to the scope of implementation of the secondary legislation in question, much in line with the cases of combination which will be analyzed in chapters III and IV. See Craig, P., *EU Administrative Law*, OUP, 2012, at p.471: 'the precautionary principle was used to contest the legality of, for example, a Community act withdrawing the authorization of a particular product [*Artogodan*], to challenge the legality of the regime for genetically modified foods [*Monsanto Agricultura*], and to assess the legality of Member State action concerning market requirements for vitamins [*Greenham/Abel*]. The challenged acts in these cases were not designed directly to implement the relevant principle, but it was nonetheless used to test the legality of the measure'. See also Heyvaert, V., 'Facing the Consequences of the Precautionary Principle in Community Law', *ELRev* 2006: the author speaks of a 'dual characterisation' of the principle, 'as a central plank of Community policy and a General principle of Community law' (p.189).

<sup>136</sup> See Scott, J. and Vos, E., 'The ambivalence of the precautionary principle', in Joerges, C., and Dehousse, R., *Good Governance in Europe's integrated market*, OUP 2002, 252 ff, at p. 256: 'the precautionary principle is one of the core principles of community environmental policy, as established by article 174 EC'. The authors further note that article 95.3 TEC (now article 114 TFEU) justifies its expansive reach and the inclusion of other policy areas in the scope of application of the precautionary principle.

sources, and the fact it is seemingly mimicked with the provisions of secondary law where it is expressed, opposes to its qualification as an independent, self-standing principle.

The precautionary principle seems to be inherent to the systems it is designed to guide, relying on the provisions of secondary law to lay down the specific requirements in policy fields. This dependence is furthermore proved by the fact that some instruments contain a working definition of the principle, laying down the exact steps its application should follow<sup>137</sup>. It has been defended that its main function in the case-law of the Court 'has been one of justification, attempted classification and moderation of a long standing tradition of judicial deference towards Community decision making operating in a context of scientific uncertainty'<sup>138</sup>.

Arguably, it can hence be considered a directing principle - which does not fall into any of the categories proposed above, or rather might fall in both<sup>139</sup>. Indeed, addressed to both EU legislator and Member States<sup>140</sup>, the precautionary principle clearly does not function as a mere interpretative principle, rather prompting action and regulating the decision making stances. As Szajkowska notes, its expressions vary depending on the field of law concerned, since it may be 'expressed in different ways at different levels'. She furthermore states that, 'being a directing principle for public authorities, at the same time, however, it is concrete enough'<sup>141</sup>. It thus seems that this principle should rather be qualified as a type of *governance principle*. This naturally adds another classification to the already confusing existing ones. However, it seems that this particular principle, and maybe others, can be seen as a more technical type, oriented towards the action itself.

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<sup>137</sup> See, for example, article 7 of Regulation (EC) No 178/2002 (28 January 2002), laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

<sup>138</sup> Heyvaert, V., 'Facing the Consequences' (cit. supra), at p.206

<sup>139</sup> See Szajkowska, A., 'The impact of the definition of the Precautionary Principle in EU Food law', *CMLRev* 2010, 47, p.173/196.

<sup>140</sup> See judgment in *Fornasar and Others*, C-318/98, EU:C:2000:337, at p.37: 'It must first of all be observed that Article 4 of Directive 75/442 (...)is intended to implement the precautionary principle (...).By virtue of those principles, it is for the Community and the Member States to prevent, reduce, and, in so far as is possible, eliminate from the outset, the sources of pollution or nuisance by adopting measures of a nature such as to eliminate recognised risks'

<sup>141</sup> Szajkowska, A., 'The impact' (cit. supra), at p.191/196

## Conclusion

The attempt to define a general principle of EU law has proved to be a difficult task; however, this tool has been essential for the development of the EU as a polity, and its integration as an ever more complete system. The different classifications presented purported to provide a broad understanding of the concept which lays at the centre of this thesis, along with its essential features. The categories presented, however, still fall short of explaining the concept in its entirety: by reading the case-law of the Court, it becomes apparent that there will be entwined elements, along with principles which seem to fail to adhere to certain characteristics.

Nonetheless, the functions to which general principles of EU law are usually attached will further serve as a departing point to the analysis of their mode of operation, and effects produced in the legal system. But first, a word on the terminology used to address these tools.



## CHAPTER II: 'GENERAL', 'FUNDAMENTAL' OR 'PARTICULARLY IMPORTANT' PRINCIPLE?

### Foreword

The previous chapter has presented the 'basics' in what comes to the definition, categories, functions and rank of general principles of EU law. However, before entering the analysis of the impact of the use of general principles as legal sources on the development of the EU, one must consider difficulties which stem from one essential factor: wording.

Indeed, it seems that the terminology patent in the Treaties, the case-law of the Court and even the Charter is less than explicit, to the point of creating a degree of confusion which hinders the coherence of the system. The translations into different linguistic versions prove to equally contribute to this state of affairs. The wording thus falls short of making sense of the judicial constructions envisaged and achieved by the use of general principles, which calls for a new and deeper analysis of the phenomenon at stake<sup>142</sup>.

Bearing moreover in mind the important role played by the Charter of Fundamental Rights, which recently configures equally primary EU law, attention will be given to the division between rights and principles in this instrument, and how this has been reflected in the case-law. The matter of the co-existence of general principles under article 6.3 TEU and the Charter has not quite yet been 'solved', be it by doctrine or jurisprudential intervention, deepening the existing confusion. Indeed this latter topic relates only to fundamental rights protected as general principles, leaving other general principles of EU law aside. It must be recalled, however, that fundamental rights

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<sup>142</sup> On the diversity of formulations, see Simon, D., *Les principes en droit communautaire* (cit. supra), at p.290: 'les recherches d'occurrences (...) conduisent à repérer, parfois à propos du même principe, des désignations telles que 'principe général de droit' (...) sans que ce foisonnement sémantique n'ait de véritable signification juridique'.

represent a big part of the general principles doctrine, and thus their treatment in the case-law is intrinsically connected to the definition of such tools<sup>143</sup>.

## 2.1 Terminology in the Case-Law

The rulings of the Court which recur to general principles of EU law are tamed by a deep lack of consistency in the chosen wording. This problem, as will be showed further, is equally patent in written instruments which make reference to such tools. There seems to be no coherent stand in what comes to the qualification of certain standards or rules as general principles, which fosters misunderstandings and renders the task of predicting their application all the more difficult. Indeed, whereas in some cases the Court states clearly that a certain principle qualifies as a general principle of EU law, in many others its reasoning is confusing and other expressions are chosen, which dictates generalized perplexity. This is particularly so in cases relating to fundamental rights' protection.

The 'complete' expression, 'general principle of European Union law', has been used many times. In the beginning, with rulings such as *Internationale Handelsgesellschaft*, *Stauder*, *Nold*, and others, the Court seemed to be filling in the gaps left by the incipient regulation provided for the existing EU legislation in many areas, especially securing the need to respect fundamental rights. It proclaimed principles which stemmed, in its words, from the national constitutional laws and traditions of the Member States, as general principles of EU law, underlying the European polity. Recently, rulings such as *Mangold*, *Küçükdeveci* and *Chatzi*<sup>144</sup> recur equally to this wording.

Queries arise, however, on whether the Court refers to the same type of primary norms when using expressions that seem similarly significant. In fact, there have been

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<sup>143</sup> There are even those who consider that the constitutional value given to general principles of EU law is restricted to those which protect fundamental rights, something which is made more visible by the Charter. See Andriantsimbazovina, J., 'Unité ou dualité du système de protection' (cit. supra), at p.18/19: 'sous réserve de la reconnaissance de la valeur juridique de la Charte par les droits fondamentaux de l'Union européenne, l'interprétation de celle-ci et la découverte des principes généraux du droit ont des points communs et des interactions fortes'; 'ces droits fondamentaux protégés comme principes généraux s'imposent à l'ensemble des normes de droit dérivé, y compris les règlements et les directives (...) ont un rang égal à ceux des traités.'

<sup>144</sup> Judgments in *Mangold*, C - 144/04, EU:C:2005:709, *Küçükdeveci*, C - 555/07, EU:C:2010:21 and *Chatzi*, C149/10, EU:C:2010:534

registered references to ‘fundamental principle of Community law’ (*Johnston*<sup>145</sup>), ‘general principles of Community law’ (*Hoechst*<sup>146</sup>) and even to a ‘particularly important principle of European Union social law’ (*Dominguez*<sup>147</sup>). In *Nierodzik*<sup>148</sup>, when referring to the dispositions of the Framework Agreement establishing the principle of non-discrimination in relation to the distinction between fixed term workers and permanent ones, the Court stated, in paragraph 24, that such an agreement ‘expresses a *principle of European social law* which cannot be interpreted restrictively’ (emphasis added).

Advocate-General Trstenjak expressed the opinion that these discrepancies represent solely a use of different wording, with no impact being caused in the value attributed to the principle<sup>149</sup>. Rather, it would represent a way for the Court to retain its flexibility in the utilisation of these interpretation tools, so as to ‘be able to decide on substantive matters which arise regardless of terminological discrepancies’<sup>150</sup>. However, and in spite of claiming to do it, the Court has failed to demonstrate how exactly it finds the legal basis of general principles of EU law in national constitutions and traditions and international instruments<sup>151</sup>. The approach is definitely not one of the search for a common denominator; rather, the Court seems to establish what it considers to be fair,

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<sup>145</sup> Judgment in *Johnston*, 222/84, EU:C:1986:206, at 1674

<sup>146</sup> Judgment in *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337, at paragraph 12

<sup>147</sup> See judgment in *Dominguez*, C-282/10, EU:C:2012:33, at paragraph 16

<sup>148</sup> Judgment in *Nierodzik*, C-38/13, EU:C:2014:152

<sup>149</sup> Opinion of Advocate General Trstenjak on *Audiolux* (cit.), at paragraph 67: ‘To some extent there are differences only in the choice of words, such as where the Court of Justice and the Advocates General refer to a generally-accepted rule of law [Case C-8/55, *Fédération Charbonnière de Belgique v High Authority* [1954-1956] ECR 245, at 299], a principle generally accepted [Case C-13/57, *Wirtschaftsvereinigung Eisen- und Stahlindustrie v High Authority* [1958] ECR 265, at 281], a basic principle of law [Joined Cases C-42 and 49/59, *SNUPAT v High Authority* [1961] ECR 53, at 84], a fundamental principle [Case C-85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 9], a principle [Joined Cases C-43/59, 45/59 and 48/59, *Lachmüller and Others v Commission* [1960] ECR 463, at 475], a rule [Case C-14/61, *Hoogovens v High Authority* [1962] ECR 253, at 272], or a general principle of equality which is one of the fundamental principles of Community law [Joined Cases C-117/76 and 16/77, *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7].’

<sup>150</sup> *Ibid.*, at paragraph 68

<sup>151</sup> See Lenaerts, K., and Gutiérrez-Fons, ‘To Say What the Law of the EU Is’ (cit. supra), at p.37: ‘when it comes to the discovery and development of general principles of EU law, the ECJ must take account of the legal systems of the Member States, notably their national constitutions’.

in an exercise of harmonisation of what it envisages to be the values to regard as common<sup>152</sup>.

The aforementioned differences, as well as the lack of clarity in the reasoning, create uncertainty as to the weight the Court effectively attributes to different formulations<sup>153</sup>. The use of the term ‘principle’ should, however, in itself, signal a higher rank, a ‘fundamental nature’: in the words of Simon, ‘the use in Community law of the term ‘principle’, which is ‘specifically used in order to indicate the fundamental nature of certain provisions’, could not in any way be interpreted as amounting to a ‘vague declaration’ deprived, *per ipsam*, of any normative, obligatory content. On the contrary, the use of the term ‘principle’ denotes the existence of a normative aspect destined to produce, as such, despite its generality, legal effects.’<sup>154</sup>

This seems to be confirmed by paragraph 28 of the ruling in *Defrenne II*, where the Court stated that ‘the word ‘principle’ is specifically used to indicate the fundamental nature of certain provisions’<sup>155</sup> – it did not use the expression ‘general principle of

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<sup>152</sup> *Ibid.*, at p.39: ‘Where convergence is not total but a particular approach is common to a large majority of national legal systems, then the ECJ will normally follow that approach, adapting and developing it to fit within the EU context’. It is interesting to compare, in this respect, the rulings in *Mangold* and *Dominguez*: whilst the principle proclaimed as general principle of EU law in the first case was recognized as a principle only in two Member States’ constitutions (Portugal and Finland), in the second ruling, despite the principle at stake was commonly recognized throughout the Member States, and laid down in the Charter of Fundamental Rights, the outcome was not the same. See contra Lenaerts, K. and Gutiérrez-Fons, JA., ‘The Role of General Principles of EU Law’ (cit. supra), at p.197, ‘while general principles may force the ECJ to sail alone in uncharted waters of constitutional law, national legal systems provide an indispensable compass’. See also, on the ‘evaluative approach’, Lenaerts, K. and Gutiérrez-Fons, JA., ‘To Say what the Law of the EU is’ (cit. supra), at p.40: ‘The way in which the evaluative approach operates may be illustrated by contrasting *Mangold* with *Akzo*. In the first case, the ECJ recognised, for the first time, that the principle of non-discrimination on grounds of age constitutes a general principle of EU law. That was so despite the fact that only two Member States had, when *Mangold* was delivered, conferred constitutional status on that principle. Conversely, in *Akzo*, by opting for the approach followed in the majority of Member States, the ECJ held that legal professional privilege could not cover exchanges within a company or group with in-house lawyers. The evaluative approach followed by the ECJ favours a dynamic interpretation of EU law. Where societal change brings about a high degree of convergence in the laws of the Member States, the evaluative approach enables the EU legal order to cope with those changes, thereby aligning the EU’s legal culture with those of its Member States.’

<sup>153</sup> The difference is even more flagrant in French: the Court uses as well the different formulation “*principe général DE droit communautaire*” and “*principe général DU droit communautaire*” – see Simon, D., *Les principes en droit communautaire* (cit. supra), at p.289

<sup>154</sup> Simon, D., ‘SABENA is dead, Gabrielle Defrenne's case is still alive: the old lady's testament’, in Maduro, M. and Azoulay, L. (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford (2010), at p.268

<sup>155</sup> Judgment in *Defrenne*, 43/75, EU:C:1976:56



EU/EC law'. Perhaps that can partially explain the existing differences, with the Court enhancing the fundamental nature of the principle when it needs to apply it directly so as to deliver concrete results. Even in cases where the reasoning circles around the general principle, the Court does not always maintain the complete expression throughout the full text. Some rulings can give us an idea of how the expressions vary even within the same reasoning.

In *Del Cerro Alonso*<sup>156</sup>, paragraph 27 of the reasoning refers to the principle of non-discrimination as a general principle, whilst, in paragraph 38 the same principle is qualified as a 'principle of Community social law' (a quite similar formulation to the one used in *Dominguez*<sup>157</sup>); in *DEB*<sup>158</sup>, the general principle of effective judicial protection (paragraph 29) receives the formulation of mere 'principle' (paragraph 33). The same is patent also in *Küçükdeveci* (when confronting paragraphs 21 and 27 with paragraph 23) and *Chatzi* (when confronting paragraph 63 with paragraphs 43 and 62)<sup>159</sup>.

It is far from clear whether these differences are relevant *per se*. The binding force attributed to the Charter of Fundamental Rights could be an explanation for this, since the latter instrument includes most of the general principles invoked by the Court in the area of fundamental rights. Although it is not meant to represent an extension of the powers enshrined in the Treaty, according to its horizontal clauses<sup>160</sup>, the Charter can

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<sup>156</sup> Judgment in *Del Cerro Alonso*, C-307/05, EU:C:2007:509

<sup>157</sup> See *Dominguez*, cit.

<sup>158</sup> Judgment in *DEB*, C-279/09, EU:C:2010:811

<sup>159</sup> See *Küçükdeveci* and *Chatzi*, cit. supra. These incongruences flow from many other cases. Some examples are the observance of the rights of the defence, qualified alternatively as a general principle (judgment in *Review Arango Jaramillo and Others v EIB*, C-334/12 RX-II, EU:C:2013:134 at paragraph 40 and *Sabou*, C-276/12, EU:C:2013:678, at paragraph 38) or a fundamental principle (judgment in *Kamino International Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, at paragraph 28); the same is observable for legal certainty, respectively being considered a general principle (judgment in *Association nationale d'assistance aux frontières pour les étrangers*, C-606/10, EU:C:2012:348, at paragraph 76) or a fundamental principle (judgment in *Grootes*, C-152/09, EU:C:2010:671, at paragraph 43). The terminology issues touch as well the source or anchorage of the general principle, with the Court using alternatively the expressions 'enshrined in' or 'given expression', which bear different meanings (see, respectively, judgment in *D. and A.*, C-175/11, EU:C:2013:45, at paragraph 80, and judgment in *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, at paragraph 36).

<sup>160</sup> The general provisions contained in Articles 51 to 54 of the Charter (see infra 2.2)

arguably render direct application of general principles easier<sup>161</sup>. However, and notwithstanding the fact that this instrument is to become the primary source of reference of the Court in the matter<sup>162</sup>, its application does not seem unproblematic. On the one hand, the main question is whether self-standing general principles of EU law can coexist with their equivalent in the Charter or if rather they should be preempted by the legislative instrument<sup>163</sup>. On the other hand, and despite the recent developments relating to the interpretation of the scope of application of the Charter<sup>164</sup>, some doubts remain due to the distinction of rights and principles patent in the Charter's provisions.

### 2.1.1 The Fundamental nature of General Principles of EU law

To understand the 'fundamental nature' attributed to general principles of EU law, their status and characteristics might provide a better starting point. It seems these features may be more important than the wording used by the Court. Indeed, the criticisms and confusion created amongst commentators are due not only to terminological aspects, but also to the lack of consistency in the use of principles as interpretative norms, with a bearing in the scope of application of the norms enshrining them. This is particularly flagrant when confronting some rulings: whilst having stated that general principles cannot have a degree of detail that requires legislation to be enacted at EU level, nor give rise to particular obligations, the Court has also applied general principles, through instruments of secondary EU law, to horizontal disputes<sup>165</sup>. It seems as such imperative

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<sup>161</sup> Especially if it is considered to present 'a source of authority for the discovery of general principles of EU law': Lenaerts, K., 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 2012, Volume 8, issue 3, p.375/403, at p.376. See also: Arnull, A., 'Article 6, Me and My Shadow' (cit. supra), at p.1193: The Union's Charter of Fundamental Rights led to both an attempt to fetter the Court's lawmaking and special arrangements for two Member States. [referring to Protocol 30 for UK and Poland].

<sup>162</sup> Wimmer, M., 'The Dinghy's Rudder: General principles of European Union Law through the lens of proportionality', *European Public Law*, 2014 Vol. 20(2), p.331-353, at p.340: 'the Court has in the last years been increasingly relying on Charter provisions, in some cases even without referring to the general principle. (...) In fact, the Charter has now become the reference text and the starting point for the CJEU's fundamental rights assessment.'

<sup>163</sup> Although, even after the full entry into force of the Charter and its primary law status, the Court has continued to refer firstly to certain general principles – see rulings in *Küçükdeveci* and *Chatzi*, cit. supra, amongst others. See Mayer, F., 'Constitutional comparativism in action' (cit. supra), at p.1007: 'The Charter does not replace the fundamental rights established by means of comparing the member states' constitutional orders. It complements them. This is suggested by the wording of article 6 TEU as amended by the Treaty of Lisbon.'

<sup>164</sup> See judgment in *Åkerberg Fransson*, C - 617/10, EU:C:2013:105 and in *Melloni*, C - 399/11, EU:C:2013:107

<sup>165</sup> See the rulings in *Audiolux* and *Küçükdeveci*, cit. supra

to understand which principles constitute ‘full-pedigree’<sup>166</sup> general principles of EU law. *Jippes* and *Audiolux*<sup>167</sup> can serve, for this purpose, as a departing point in understanding the criteria used by the CJEU<sup>168</sup>.

*Jippes*<sup>169</sup>, a case concerning cattle vaccination for control of the foot-and-mouth disease, provides some relevant insight on the reasoning the Court follows in order to determine what is to be considered, or not, a general principle of EU law. The questions raised related to the interpretation of directive 85/511 in light of the Convention for the Protection of Animals kept for Farming Purposes, to which the EU is bound. The parties sought guidance on the rules of compliance with respect for animal welfare, claiming the existence of a general principle of Community law which would guarantee animal welfare, protecting animals from undue pain and suffering.

The Court started by stating that animal welfare was not among the objectives of the Treaty<sup>170</sup>. It furthered this assertion very thoroughly, by referring to the Protocol, the Convention, the Treaty provisions and secondary legislation. As to the Protocol, it affirmed 'it is apparent from its very wording that it does not lay down any well-defined general principle of Community law which is binding on the Community institutions'. A similar conclusion resulted from reading the Convention, since no 'clear, precisely defined and unqualified obligation' is imposed by it; the same could be said of article 30 TEC. Finally, in spite of the existence of 'various provisions of secondary legislation referring to animal welfare', they contained 'no indication that the need to ensure animal welfare is to be regarded as a general principle of Community law'<sup>171</sup>. Tridimas has pointed out that this 'reactive' approach on the Court's part can be explained by the fact that no such principle existed in Community law or Member States law, at the time<sup>172</sup>.

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<sup>166</sup> Bengoetxea, J., ‘Case Note on Case C-101/08, *Audiolux SA...*’, *CMLRev* 47 (2010), 1173-1186, at p.1173

<sup>167</sup> Case C-101/08, *Audiolux*, cit. supra

<sup>168</sup> See, on this, Lenaerts and Fons, ‘The Role of General Principles of EU Law’ (cit. supra), at p.185/187

<sup>169</sup> Judgment in *Jippes and Others*, C-189/01, EU:C:2001:420

<sup>170</sup> *Ibid.*, paragraph 71: 'It should be borne in mind, at the outset, that ensuring the welfare of animals does not form part of the objectives of the Treaty, as defined in Article 2 EC, and that no such requirement is mentioned in Article 33 EC, which sets out the objectives of the common agricultural policy.' The connection between general principles and objectives of EU law will be further explored in Chapter II.

<sup>171</sup> *Ibid.*, at paragraphs 73 to 76

<sup>172</sup> See Tridimas, T., *The General principles of EU law* (cit. supra), at p.27

What seems to flow from this ruling is that the inexistence of an express reference, with the terminological correspondence, determines the inexistence of a general principle.

In *Audiolux*, some years later, the Court was questioned as to the existence and contours of a general principle of equality of minority shareholders, based on the preamble and articles of two directives (directive 77/91/EEC and directive 2004/25), as well as the European Code of Conduct, annexed to Recommendation 77/534. The Court of Justice started by promptly denying that the existence of such a principle could be inferred from the legislative references invoked<sup>173</sup>. Subsequently, it developed its reasoning in a way which allows us to extract some of the characteristics a principle should have so as to be considered as a ‘general principle of EU law’. In paragraph 34, the Court states that ‘the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain’, adding, on paragraph 35, that the scope of the invoked directives is limited to ‘well-defined situations’. *A contrario*, it seems to flow from these paragraphs that general principles of EU law ought to bear a degree of uncertainty and be ‘slightly’ undefined.

Moreover, the Court furthers in paragraph 42 that, being limited to very specific and well-defined situations, the provisions did not ‘possess the general, comprehensive character which is otherwise naturally inherent in general principles of law’ – this general character prevents them from applying merely to a circumscribed number of situations, for that would imply a limitation in scope. In addition, it seems that a true general principle of EU law, such as the principle of equal treatment (which nonetheless may have specific expressions, as the case law suggests), cannot give rise to particular obligations. Paragraph 57 states as follows: ‘it should be pointed out that the general principle of equal treatment cannot in itself either give rise to a particular obligation on the part of the dominant shareholder in favour of the other shareholders or determine the specific situation to which such an obligation relates’. It is furthermore added that the principle of equality can also not be so specific as to determine the choice between

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<sup>173</sup>*Audiolux*, cit. supra, at paragraph 34.

different means of protection<sup>174</sup>. The contrary would amount to assuming that the principle could presuppose certain legislative choices, which is not the case for general principles. Indeed, the Court advances, general principles do not require any legislative instrument of secondary law to be drafted or enacted to specify their details: their formulation cannot be so specific as to determine a legislative choice<sup>175</sup>. As such, the Court concludes by denying the status of general principle to that of protection of minority shareholders: it lacks, in light of the above, both the constitutional character inherent to general principles, as well as an independence which detaches their existence from written legislation<sup>176</sup>.

This reasoning was confirmed in the order in *Cosimo Damiano Vino*<sup>177</sup>, relating to the fixed term contracts. When asked about the implications of the principle of equal treatment and non-discrimination, the Court stated that

*‘un principe, tel que celui préconisé par la juridiction de renvoi, qui s’appliquerait aux différences de traitement entre les travailleurs à durée déterminée en ce qui concerne l’obligation d’indiquer les raisons objectives du recours à un premier ou unique contrat de travail à durée déterminée, présuppose des choix d’ordre législatif, reposant sur une pondération des intérêts en jeu et la fixation à l’avance de règles précises et détaillées, et ne saurait être déduit du principe général de non-discrimination. En effet, les principes généraux du droit de l’Union se situent au rang constitutionnel tandis que le principe préconisé par la juridiction de renvoi est caractérisé par un degré de détail nécessitant une élaboration législative qui se fait, au niveau de l’Union, par un acte de droit de l’Union dérivé’<sup>178</sup>*

It hence seems that the Court, although using legislative instruments to make the underlying principle operate, does not accept that principles are so specific as to require

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<sup>174</sup>*Ibid.*, at paragraph 61.

<sup>175</sup>*Ibid.*, at paragraph 63.

<sup>176</sup> Semmelmann characterizes this move of the Court as an unbound exercise of the adjudicatory powers by the Court. See Semmelmann, C., ‘Legal Principles’ (cit. supra), at p.303: ‘When a claim based on the alleged existence of a given legal principle appeared all too suspicious to the Court of Justice of the European Union, it took the liberty to reject the existence of a given (general) principle.’

<sup>177</sup> Order in *Vino*, C-161/11, EU:C:2011:420

<sup>178</sup> *Ibid.*, paragraph 39 (emphasis added).

their detailed tailoring by the legislator. In her opinion in *Audiolux*, Advocate General Trstenjak had noted that the fundamental importance of general principles is proved by the fact that they find ‘expression in primary law and in many rules of secondary Community law’<sup>179</sup>. This particular statement was fiercely criticized by Bengoetxea<sup>180</sup>, who claims that creating a test of importance based on the expression in positive law would amount to contradicting the widely proclaimed unwritten nature of general principles.

This reading of the Opinion segment seems to be reductive: effectively, ‘finding expression’ does not necessarily entail positivisation, especially not when it comes to the jurisprudence of the CJEU. However, and in spite of providing more detailed justification on the finding, or not, of a general principle, these rulings are not decisive for the understanding of the matter. The Court is known to use the European law, primary or secondary, as a ‘specific expression’ of the principles applied; the important question is hence which type of ‘triggers’ are found to make it operate principally through a certain legal instrument. Furthermore, in many cases, the secondary law instrument which provides the anchorage for the principle application will be the one dictating the regime applicable to the parties, albeit it is the general principle which, in theory at least, underlies the decision.

### 2.1.2 Beyond terminology – Lost in translation?

Beyond the inconsistencies pointed out above, another issue assumes special relevance and can have a deep influence in the whole treatment of general principles, namely in what comes to academic analysis. With the original working language of the Court being French, it may come as no surprise that the English translation (as used notably throughout this work) can sometimes lose a bit of accuracy in the process<sup>181</sup>.

A series of cases in the area of common agricultural policy and fisheries illustrate how small and apparently harmless changes in the expressions chosen to translate the

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<sup>179</sup> Opinion Advocate General Trstenjak in *Audiolux*, cit. supra, at paragraph 74

<sup>180</sup> Bengoetxea, J., Case Note on *Audiolux* (cit. supra), at p.1180

<sup>181</sup> On this, see Bengoetxea, J., ‘Multilingual and Multicultural Legal Reasoning: the European Court of Justice’, in Kjaer, A., Adamo, S., (eds), *Linguistic Diversity and European Democracy*, Adegate 2011, 97-122.

original version can have influence on the understanding of the tools at stake. The following are particularly relevant in what concerns the rank and basis, or origin, of the principle, as well as its connection to the written tool in question. The differences observed have natural reflection on case-law analyses, stirring the controversy.

The *Unitymark*<sup>182</sup> case is a good example. I shall here refer merely to the linguistic divergences, and as such will not go into depth of the legal analysis of the case, nor its facts. It suffices hence to refer to paragraph 53 of the ruling, where the Court states, in the original version, that 'le principe de non-discrimination ainsi que le principe de proportionnalité qui, en l'espèce, lui est étroitement lié font partie des principes généraux du droit communautaire et **trouvent leur expression** dans le domaine de l'agriculture, y compris la pêche, à l'article 34, paragraphe 2, deuxième alinéa, CE'. The same passage reads as follows in the English translation: 'the principle of non-discrimination and the principle of proportionality which, in this instance, is closely linked to it are general principles of Community law and, in the field of agriculture, including fisheries, **are embodied** in the second subparagraph of Article 34(2) EC' (emphasis added in both excerpts).

It can obviously be argued that this is a minimal difference, one which has no real impact, nor produces any type of 'damaging effects'. Indeed, it is minimal. However, it seems that it does produce some impact in what comes to the derivation of the principle, of its origin. The expression 'embodied' implies a deeper degree of entwinement, or *appartenance*, to, in this case, the Treaty provision. It might be argued that, per se, it does not make a difference, since it is primary law the one at stake in any case. Nonetheless, it should be recalled that general principles of EU law underlie even Treaty provisions, having the proclivity to alter the meaning, or read content, of certain articles.

To find a (written?) expression in a rule seems, on the contrary, to entail a more precise indication of contours. A 'good' translation can be found, for example, in *Franz*

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<sup>182</sup>Judgment in *Unitymark and North Sea Fishermen's Organisation*, C-535/03, EU:C:2006:193

*Egenberger*<sup>183</sup>: the original version states that 'l'article 34, paragraphe 2, deuxième alinéa, CE, qui énonce l'interdiction de discrimination dans le cadre de la politique agricole commune, n'est que **l'expression spécifique du principe général** d'égalité'. The translation of this paragraph is more authentic: 'according to settled case-law, the second subparagraph of Article 34(2) EC, which prohibits all discrimination in the context of the common agricultural policy, is merely a **specific expression of the general principle** of equal treatment'<sup>184</sup>. These incongruences necessarily contribute to the terminological amalgam.

### 2.1.3 Principles of Interpretation?

The underlined inconsistencies in terminology leave room for many doubts as to what is to be regarded as a general principle of EU law. It was argued above that, many times, the uses of, for example, the terms 'fundamental' or 'general' principle will be indiscriminate, and be used with the same meaning as regards the legal strength attributed to the principle in question. In this line, it was equally argued that stress should be rather put on the subsequent reasoning, on the use of the principle and its mode of operation, for these will be the ones defining the category at stake.

However, it seems that the Court and its Advocates General continue to struggle with this division. As was referred, in *Audiolux* the Court referred to the 'general, comprehensive character' of general principles of EU law, and in *Cosimo Damiano Vino* it proclaimed their constitutional character beyond doubt. Is there a 'lower' category of general principles of EU law<sup>185</sup>? Some latest cases in the taxation area seem to shed a bit of light on the matter.

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<sup>183</sup> Judgment in *Franz Egenberger*, C-313/04, EU:C:2006:454

<sup>184</sup> *Ibid*, at paragraph 33 (emphasis added). The same can be observed namely in *Agrana Zucker*, C-33/08, EU:C:2009:367, at paragraph 46

<sup>185</sup> See Basedow, J., 'The Court of Justice and private Law' (cit. supra), at p.461: 'it is difficult to maintain that all the general principles ascertained by the Court of Justice are of fundamental significance'.



*a) The principle of fiscal neutrality (as a specific expression of the principle of equal treatment and non-discrimination in the field of taxation)*

The approach taken by the Court in the *NCC* case was very similar to the ruling in *Audiolux*<sup>186</sup>. However, here it becomes rather clear that the Court envisages that some principles will be used as ‘general principles **of interpretation**’ – we are here referring to legal tools or techniques, rather than sources of EU law. *NCC* was a construction project and engineering company. It engaged equally in sale of real estate, an activity which it derives from its building works. The regulations on VAT in Denmark establish that the sale of buildings which have been constructed on the company’s own account is to be exempted from VAT. As such, *NCC* was obliged to establish a proportion of the amount in the respect of which it would be entitled to deduct VAT. In doing so, it excluded from the calculation the turnover from the sale of buildings constructed on its own account, alleging that such activity should be regarded as an ‘incidental real estate transaction’, covered by the exemption in the Sixth directive. The Danish authorities, however, subsequently changed their practice, establishing that only part of the VAT would be deductible for *NCC*.

*NCC* disputed this, considering full deduction was due. The case reached the Court in a reference for preliminary ruling, being that the national court asked, amongst other, whether such partial right to VAT deduction would be compatible with the principle of fiscal neutrality.

The Court started by saying that the principle of fiscal neutrality ‘as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation’.<sup>187</sup> It then added that it represents ‘a particular expression at the level of secondary Community law and in the specific area of taxation’ of the general principle of equal treatment. The latter is endowed, ‘like the other general principles of EU law’, with constitutional status. The same is not true as regards the principle of fiscal neutrality, for this principle ‘requires legislation to be drafted and enacted, which requires a measure of secondary Community law’<sup>188</sup>.The

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<sup>186</sup> Judgment in *NCC Construction Danmark*, C-174/08, EU:C:2009:669

<sup>187</sup> *NCC*, at paragraph 41.

<sup>188</sup> *Ibid.*, at paragraphs 42 and 44. Lenaerts and Fens use here the expression ‘grounded in secondary law’. They further note that the principle of equal treatment is applied as ‘an ex post review of the internal

reasoning is analogous to the one used in *Audiolux*, hinting at the fact that some principles cannot be considered as self-standing<sup>189</sup>: in this case, detailed legislative measures are required, for the principle of fiscal neutrality ‘cannot properly be relied upon to preclude the application of the provisions thus transposed’<sup>190</sup>

It is interesting that the Court characterizes the principle not only as a specific expression of the general principle of equal treatment ‘in the specific area of taxation’, but also ‘at the level’ of secondary law. This raises two important questions: on the one hand, can the specific expressions of general principles be perceivable as attached to specific areas? Can a sectorial application dictate the type of particular expressions retrieved from a general principle and the way they will operate?

On the other hand, when stating at the level of secondary law, the Court seems to point that this principle can be effectively defined as a type of unwritten secondary law, as such being deprived from a binding character, as opposed to general principles of constitutional status, which rank above in the hierarchy of legal sources and can be applied directly. Strikingly enough, however, there are cases where the principle of fiscal neutrality is used beyond this interpretative function and actually has an impact in the reading of a secondary legislation instrument, as will be shown below<sup>191</sup>.

The restrictive approach taken by the Court as to what should be qualified as a general principle of EU law is moreover patent in *Deutsche Bank*<sup>192</sup>, still with reference to the principle of fiscal neutrality. The dispute concerned VAT tax exemptions in the service of management of investment funds, to be assessed in the light of article 135.1 of directive 2006/112. Advocate General Sharpston pointed that this article indeed aimed at securing the principle of fiscal neutrality. She introduced, however, a caveat: in her view, the principle of fiscal neutrality in VAT may not extend the scope of express exemptions without clear wording pointing to that end. That is so because the principle

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consistency of the choices made by the legislator’ whenever legislative discretion is in question. See Lenaerts and Fons, ‘The Role of General Principles of EU Law’ (cit. supra), at p.186/187

<sup>189</sup> *NCC*, paragraphs 41/42

<sup>190</sup> *Ibid*, at paragraph 45

<sup>191</sup> Cf. Chapter III, namely case judgment in *Orfey Bulgaria*, C-549/11, EU:C:2012:832

<sup>192</sup> Judgment in *Deutsche Bank*, C-44/11, EU:C:2012:484

of fiscal neutrality in VAT, albeit providing for an expression of the principle of equal treatment, ‘is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with – and as a limitation on – the principle of strict interpretation of exemptions’<sup>193</sup>.

The Court followed the Opinion of the Advocate General closely. It started by acknowledging that exemptions under the said article are to be interpreted in a strict manner, since they constitute ‘exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person’<sup>194</sup>. As such, the service at stake could not be comprised therein. The Court then added that the principle of fiscal neutrality ‘cannot extend the scope of an exemption in the absence of clear wording to that effect’, since ‘that principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions’<sup>195</sup>.

Other VAT cases present the same approach. In *LVK*<sup>196</sup>, the Court reiterated that the principle of fiscal neutrality is a ‘reflection in matters relating to VAT’ of the general principle of equal treatment<sup>197</sup>. In the same line, in *Finanzamt Saarloouis v Malburg*<sup>198</sup>, the Court referred to the ‘common system of VAT’, where the principle of fiscal neutrality manifests itself through the envisaged deduction system. Furthermore, it reminds that such a principle ‘is not a rule of primary law but a principle of interpretation, to be applied concurrently with the principle on which it is a limitation’<sup>199</sup>. This formulation hints not only at the interpretive function of such kind of principles, but also at their secondary law rank, which can explain the need for concurrent application.

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<sup>193</sup> Paragraphs 58 to 60 of the Opinion of Advocate General Sharpston in *Deutsche Bank*, C-44/11, EU:C:2012:276

<sup>194</sup> *Deutsche Bank*, at paragraph 42.

<sup>195</sup> *Ibid.*, at paragraph 45

<sup>196</sup> Judgment in *LVK*, C-643/11, EU:C:2013:55

<sup>197</sup> *Ibid.*, at paragraph 55).

<sup>198</sup> Judgment in *Malburg*, C-204/13, EU:C:2014:147

<sup>199</sup> *Ibid.*, at paragraphs 41 and 43

The nature of the fiscal neutrality principle was again decanted by Advocate General Villalón in *Crédit Lyonnais*<sup>200</sup>. The Advocate General characterizes it as a ‘fundamental principle underlying the common system of VAT’, elucidating that it is ‘sometimes regarded as a general principle of European Union law underlying’ the said system. He reminds, however, that the Court stated that, ‘unlike other general principles of European union law, the principle of fiscal neutrality does not have constitutional status and requires legislation to be drafted and enacted, which requires a measure of secondary Community law. It is not therefore a rule of primary law, but rather a principle of interpretation’, which is to ‘guide’ member states as regards the transposition of the directive, amongst other. The Advocate General further refers at the common system of VAT as ‘established by the Sixth directive 77/388’<sup>201</sup>– so here the general principle underlies a common system created by an instrument of secondary law.

However, uncertainty remains, due to the effects sought in certain cases: there are situations in which the principle of fiscal neutrality is used, such as other general principles of EU law, as a way to extend the interpretation of a given article. In *Orfey Balgaria*, a case concerning building rights, the interpretation of article 65 of directive 2006/112, which establishes the conditions for VAT to be charged in the covered transactions, was raised<sup>202</sup>. The Court stated, in paragraph 32 of the ruling, that secondary law has to be aligned not only with the Treaty, but also with general principles of EU law<sup>203</sup>. And, it furthered, the principle of fiscal neutrality is but a ‘particular expression at the level of secondary law and in the specific area of taxation’ of the general principle of equal treatment<sup>204</sup>. As such, it decided, in paragraph 36, that article 65 of the directive was to be interpreted extensively in light of the underlying general principle<sup>205</sup>.

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<sup>200</sup> Judgment in *Le Crédit Lyonnais*, C-388/11, EU:C:2013:541

<sup>201</sup> *Ibid.*, at paragraph 53

<sup>202</sup> Case C-549/11, *Orfey Balgaria*, cit. supra

<sup>203</sup> *Ibid.*, at paragraph 32: ‘it is settled case law that a provision of secondary community law should as far as possible be given the interpretation which renders the provision consistent with the Treaty and the general principles of EU law’

<sup>204</sup> *Ibid.*, at paragraph 33

<sup>205</sup> *Ibid.*, at paragraph 36: ‘the principle of equal treatment would be disregarded if the application of article 65 of the VAT directive contributed to which form was taken by the consideration received by the

It seems, from the wording used by the Court and Advocates General, that there can be general principles of constitutional rank, and thus with primary law status, whilst others will rank lower, hence possessing a different binding force. The second of these two ranks places certain general principles at ‘the level of secondary law’. These principles are referred to as ‘principles of interpretation’ and seem to be, to a certain extent, mere ‘ordinary’ principles, that is, weaker than general principles<sup>206</sup>. Only those identified by the Court as having a ‘constitutional status’ can be labelled as general principles of EU law<sup>207</sup>.

A thorough analysis may show the parallel existence of principles pertaining to secondary law or of mere policy, as referred above. The ‘particularly important principle of European Social Law’ formulation in *Dominguez*, contrasting with the Opinion of the Advocate General (who indicated that the principle could easily be recognized as a general principle of EU law due to its expression in national constitutional laws and traditions of Member States<sup>208</sup>), might be an indicator that, as hinted in *Audiolux* and *NCC*, the distinction lays in the role played by the legislation: ‘general principles of Union law have a constitutional rank, as opposed to other types of principles falling outside the classification of general principles of EU law, since the former require detailed (policy-based) legislative fine-tuning’<sup>209</sup>. However, uncertainty remains, mostly due to the Court’s choice of wording, which hints at a deeper entwinement of sometimes indistinctively used tools.

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taxable person. Accordingly, that principle calls for an interpretation of article 65 to the effect that it applies also when the payment on account is made in kind, once the conditions referred to in paragraph 28 above are met.’

<sup>206</sup> On this particular matter, Hilson, C., ‘Rights and principles in EU law: a distinction without foundation?’, 15 *Maastricht J. Eur. & Comp. L.*, 2008, 193-215, especially at p.196, in what comes to, for instance, the principle of subsidiarity. When discussing the differences between rights and principles, the author refers to ‘general principles’ which are ‘binding on Member States when acting within the scope of Community law’ and ‘ordinary principles such as subsidiarity’.

<sup>207</sup> The confusion persists, however, also in the academia. The constitutional value of general principles of EU law is especially difficult. See namely Andriantsimbazovina, J., ‘Unité ou dualité du système de protection’ (cit. supra), at p.19: ‘les principes généraux appliqués aux droits fondamentaux ne sont pas des principes généraux comme les autres. Ce sont des principes de valeur constitutionnelle.’ It remains unclear what the ‘other’ general principles represent.

<sup>208</sup> Opinion of Advocate-General Trstenjak in case C-282/10, *Dominguez*, EU:C:2011:559, at paragraphs 99 to 114

<sup>209</sup> See Wimmer, M., ‘The Dinghy’s Rudder’ (cit. supra), at p.336

### *b) ...and a general principle of interpretation*

The terminological confusion is moreover patent in another judicial construction: the principle of consistent or uniform interpretation. Indeed, the Court has qualified, in several rulings, the said principle as a 'general principle of interpretation', referring to it so as to guarantee that any Union measure can be valid in light of higher, primary law<sup>210</sup>. In fact, it often recurs to citing a 'general principle of interpretation' so as to guarantee that any Union measure can be valid in light of higher, primary law<sup>211</sup>. Here again there seems to be a fault in wording, rather pointing at a legal technique which is a necessary consequence of the status of EU law.

Gordon and Moffatt summarize this doctrine of interpretation in a tripartite configuration of the principle; they identify a principle of uniform interpretation, a purposive principle and a derogation principle<sup>212</sup>. These three shape the approach of the Court, guaranteeing attention is being paid to any linguistic differences, that consistency with the whole of the system and its objectives is assured and, finally and respectively, that any derogations to EU law are to be interpreted narrowly. The authors furthermore note that 'reference to general principles of interpretation should not be confused with general principles of EU law which, as will be seen, themselves affect the general principles of interpretation in EU cases'<sup>213</sup>.

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<sup>210</sup> This is patent in the ruling in *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, with the Court declaring that 'according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity (...). Likewise, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness' (*Sturgeon*, paragraph 47). The same wording is used in other cases, such as *Chatzi* (cit. supra, at paragraph 43, adding ' and in conformity with primary law as a whole'), *McDonagh* (C-12/11, EU:C:2013:43, at paragraph 44) and *Strack* (C-579/12, EU:C:2013:570, at paragraph 40).

<sup>211</sup> *Strack*, cit. supra, at paragraph 40: 'it must also be borne in mind that, under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter'; *McDonagh*, cit. supra, at paragraph 44: 'Under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole'; *Chatzi*, cit. supra, at paragraph 43: 'In addition, under a general principle of interpretation, a Community measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole (...) including with the principle of equal treatment.'

<sup>212</sup> Gordon QC, R., and Moffatt, R., *EU Law in Judicial Review*, Oxford University Press, 2nd edition, 2014, at p.57

<sup>213</sup> *Ibid*, *ibid*, footnote 110.

This seems to indeed be the case. Again, the wording used by the Court is misleading: whilst using the expression 'general principle', the Court, in these cases, is addressing a peculiar legal technique, not the substantive value of legal sources. As such, rather than ranking this principle side by side with the general principles of EU law, which undoubtedly also have an impact in interpretation, it should be presented alongside other techniques of interpretation, as the *effet utile* doctrine, to give but an example. The latter have, contrary to general principles of EU law, no bearing of substantive significance. It is, in this case, a matter of wording, used to promote effectiveness of EU law.

In conclusion, general principles of EU law are, when applied, subject to the 'guidance' provided by this method. This being said, the two types of different concepts are not to be equated. One consists of a substantive norm, with constitutional value; the other, a mere interpretation rule<sup>214</sup>.

## 2.2 Rights and Principles in the Charter: yet another hurdle?

Enacted in 2000, in a pathway which resulted in the failure of the Constitutional Treaty, the Charter of Fundamental Rights of the EU gained added legal value with the entry into force of the Treaty of Lisbon. Although the Court of Justice and the General Court had already referred to its provisions as inspirations for case resolution<sup>215</sup>, it represented soft law until very recently. Now, having gained the same legal value as the Treaties, the Charter seems to be, however, still in need for normative filling. This is necessarily contained by the very clearly limiting so-called horizontal clauses, which state that the use of this instrument cannot result in an extension of the scope of EU law, in any case<sup>216</sup>.

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<sup>214</sup> The uniform interpretation across the legal order of the EU is thereby ensured. Dawson refers, in this case, to two levels in the reasoning with the principle of uniform interpretation: 'coherence among norms' and looking at the system as a whole, in that 'the interpretation of a norm ought to be consistent with the larger objectives and purpose of the Treaties.' See Dawson, M., 'New Governance and the Transformation of European Law - Coordinating EU Social Law and Policy', *Cambridge Studies in European Law and Policy*, December 2011, p.426.

<sup>215</sup> The first time the Court referred to the Charter was in case *Parliament v Council*, C-540/03, EU:C:2006:429

<sup>216</sup> The articles contained in Chapter VII, General Provisions: from article 51 to article 54 of the Charter. Especially relevant for the scope of this analysis are the following: art. 51/1: 1. The provisions of this

It is worth recalling the wording of article 6 TEU:

*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.*

(...)

*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.*

This article refers to both principles and general principles, emphasizing that fundamental rights necessarily integrate the latter category. In combination with the provision enshrined in article 52.5 of the Charter, which specifies the effect principles may or may not have, the terminology again seems to add to the confusion of concepts. In fact, if one is to assume, as it seems, that the Charter is composed of but fundamental

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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. (...) 2. 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.; 52 4. In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. On these limitations, see Martinico, G., 'What lies behind article 4(2) TEU?', in Saiz Arnaiz, A., and Alcobarro Ilivina, C. (eds.), *Natural constitutional identity and European integration*, 93 ff, at p.103 'these clauses represent just one of the strategies adopted to limit the efficacy of the Charter and avert the danger of a US-style 'incorporation' through the Bill of Rights.'



rights, such assertions could mean that all the rights in the Charter are to be protected as general principles of EU law<sup>217</sup>. The practice, however, has shown that the Court does not read it in this way.

### 2.2.1 Fundamental rights... but not general principles?

The formulation of article 52.4 EUCFR is very similar to the one historically used by the CJEU, in regards to the source and provenance: rights enshrined in the Charter are to be understood as stemming from the constitutional traditions of the Member States, and, as such, interpreted in conformity with such sources. Article 52.5 EUCFR, however, makes a clear distinction: the provisions of the Charter containing principles ‘may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’. It is apparent that principles in the Charter are not necessarily general principles; many of the rights enshrined therein are, however, protected as being general principles of EU law. In addition, there are general principles which are not enshrined in the Charter and nonetheless seem to possess the same primary law, constitutional value: a look at the area of public procurement, for example, will allow for that conclusion<sup>218</sup>.

The understanding of which regime is applicable to which titles of the Charter becomes hence especially difficult, with the Explanations of the Charter providing little

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<sup>217</sup> View expressed by Laurent Pech, at the Workshop ‘The Role of General Principles in the Contemporary Jurisprudence of the CJEU’, held on April 15<sup>th</sup>2013 at the European University Institute, Florence. See also Hilson, C., ‘Rights and principles in EU law’ (cit. supra), at p.196: ‘the Court declared that fundamental rights were part of the general principles of law. (...) in declaring that fundamental rights were part of them, the Court was at least effectively stating that rights were normatively equal to general principles’. Contra, see Rosas, A., and Armati, L., *EU constitutional law: an introduction*, Hart publishing, 2nd edition, 2012, at p.178: ‘There can be no doubt that at least some provisions of the Charter of Fundamental Rights are intended not only to be directly applicable but also to have direct effect. (...) the Charter, which sets out various rights, freedoms and principles, appears to make a distinction between rights (including freedoms) on the one hand and principles on the other, with the latter being significant for the Courts only when the acts implementing those principles are being interpreted. *A contrario*, the former category may be judicially cognisable in a broader range of situations, including when they are invoked directly by individuals.(...) the distinction, which seems to relate to the distinction sometimes made in legal theory between ‘rules’ and ‘principles’, may be difficult, if not impossible, to uphold, especially at an abstract level. In any event, the distinction does not correspond to the distinction between general principles of Union law and other norms of primary or secondary Union law.’

<sup>218</sup> See 4.1.2, *infra*.

clarification, and the CJEU is left with the challenging task of defining their status on a case by case basis<sup>219</sup>. The rulings in *Dominguez* and *Association de Médiation sociale* provide precisely the proof that, despite the fact that most general principles are now recognized in the Charter, not all the rights enshrined therein will represent general principles of EU law<sup>220</sup>. According to the Court, certain principles will require such a degree of specificity provided for by a certain legislative yardstick that they cannot rank as primary law principles, but rather as ‘principles of secondary law and mere policy principles’<sup>221</sup>. Could the use of the expression ‘particularly important principle of European social law’<sup>222</sup> hint at this?

In both cases, the Opinions of the Advocates General provide ample discussion of the status to be attributed to the invoked rights.

The reference in *Dominguez* related to the organization of working time. Ms. Dominguez had claimed, against her employer, entitlement to paid annual leave not taken in respect of a period when she was absent from work. The right to annual paid leave was raised with reference to article 31.2 of the Charter. Advocate General Trstenjak analyzed thoroughly the nature of the right enshrined in this provision. She noted, first and foremost, that it is to be recognized ‘as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the directive itself’<sup>223</sup>. As such, this right is consistently given

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<sup>219</sup> Lenaerts, K., ‘Exploring the Limits’ (cit. supra), at p.400: ‘the question is then under what circumstances a provision of the Charter contains a ‘principle’ instead of a ‘right’; ‘Given that the distinction between rights and principles remains unclear, it is for the ECJ to clarify it.’

<sup>220</sup> Wimmer notes that ‘even certain principles enshrined in the Charter of Fundamental Rights may fall outside the scope of the definition of general principles of EU law. (...) by declining to apply the right to paid annual leave in horizontal situations, the Court gave a hint that this principle does not rank as a general principle within the EU legal system, despite the fact that the right to paid annual leave is also provided for by article 31 of the Charter.’ Wimmer, ‘The Dinghy’s rudder’ (cit. supra), at p.336

<sup>221</sup> *Ibid*, p.335

<sup>222</sup> See paragraphs 43/44 of the ruling in *Dominguez*, cit. supra.

<sup>223</sup> Literal wording of paragraph 48 of judgment in *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177. See Paragraph 42 (and footnote 11) of Advocate General Trstenjak’s Opinion in *Dominguez*, cit. supra, with reference also to *BECTU*, C-173/99, EU:C:2001:356, paragraph 43, and *Merino Gómez*, C-342/01, EU:C:2004:160, paragraph 29. She further adds a reference to *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 22; *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 18; and *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 28, with regard to Directive 2003/88 EC.

expression by the provisions of an instrument of secondary legislation, the question hence being whether the incompatible national legislation can be set aside in light of it, either by direct application of the Charter article or using a principle-based approach of the *Küçükdeveci*-type.

According to the Advocate General, the right to annual paid leave seems to undoubtedly be a fundamental right, due to its inclusion in the Charter; however, she furthers, it is endowed with a higher intensity of protection than the other rights contained in the Solidarity chapter, for the latter rather requires ‘a guarantee of objective law in that the rights granted there are ‘recognised’ or ‘respected’ – and as such qualify as principles in the sense of article 51.1<sup>224</sup>. When looking at the possibility of creating some sort of horizontal direct effect, however, she notes that the binding force of this article lays rather in a ‘guarantee element’, which would translate in the adoption of safeguard rules by the Member States<sup>225</sup>.

She further states that it is ‘questionable’ whether such a right can have the force of a general principle of EU law<sup>226</sup>, recalling that the latter ought to be ‘substantively unconditional and sufficiently precise’. The first entails an unreserved and independent application of the principle, ‘without conditions attaching to it’, implying that it shall not be ‘subject to the taking of any other measure either by the institutions of the Member States or by the European Union’; the second rather requires the unequivocal creation of an obligation which is ‘legally perfect and can be applied by the courts as such’<sup>227</sup>.

This view is influenced by a restrictive reading of the addressees of the Charter, standing in stark contrast with the reading proposed later on by Advocate General Cruz Villalón, in *AMS*<sup>228</sup>.

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<sup>224</sup> Advocate General Trstenjak’s Opinion in *Dominguez*, paragraphs 75/76.

<sup>225</sup> *Ibid.*, at paragraph 81

<sup>226</sup> *Ibid.*, at paragraph 99

<sup>227</sup> *Ibid.*, at paragraph 135

<sup>228</sup> Advocate General Cruz Villalón suggested in his Opinion in *AMS* that the fact that individuals are not cited amongst the Charter’s addressees in no way means that they are not to be seen as such. See

The Court, on the other hand, seemed to have a different approach in mind. The first move made is an attempt to equate the right contained in article 31.2 either with articles 20 to 23 or to article 27. Then, it considered whether the right enshrined in article 31.2 is a right or a principle and whether it is sufficiently clear and precise to follow the regime attributed to the principle of equality and be invoked before a national court. It reached the conclusion that it was not.

In reference to this ruling, it has been claimed that, therefore, a general principle of EU law will be the result of a ‘legally perfect rule’<sup>229</sup>, applicable per se. This assessment does not seem convincing, since the general principles applied directly by the Court to certain situations were not legally perfect nor would lend themselves to isolated application. This matter will, however, be further discussed.

The reasoning in *Dominguez*, in what regards the characteristics of rights and (general) principles, was recently stirred by *Association de Médiation Sociale*, this time in relation to article 27 of the Charter. Association de Médiation Sociale (AMS) is a private association with no lucrative ends, whose main objective is to prevent delinquency in the area of Marseille, France. It employs young people through a system of ‘support employment contracts’, with view to their social and professional reinsertion (at the time of the proceedings, AMS had celebrated between 120 and 170 contracts of this kind). To undertake its activity, AMS has eight other workers, these with permanent contracts. Only the latter are taken into account in the calculation of its workforce, in accordance with article L. 1111-3 of the Code du travail, which has influence in the regime of representation of workers in the association (the minimum number of 50 workers is required for the application of the directive establishing a general framework for informing and consulting employees in the European Community (directive 2002/14) is hence not met). The local trade union (Union locale des syndicats CGT Quartiers Nord), in spite of the above, decided to create a division within AMS, nominating Mr. Laboubi, one of the eight permanent workers, as its representative.

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paragraph 28 of the Opinion of Advocate General Cruz Villalón in *Association de médiation sociale*, C-176/12, EU:C:2013:491

<sup>229</sup> See Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford EU Law Library, OUP, 2nd edition, 2012, with reference to paragraph 135 in *Dominguez*, at p.103: ‘therefore, in order to attain the status of a general principle of union law, a particular principle or rule must be common to the legal systems of the member states and be ‘legally perfect’ and capable of being applied by the courts as such.’

AMS opposed it, arguing that it was not obliged by law to have such representation; it further proceeded to suspend Mr. Laboubi's contract.

In light of proceedings brought before it, the Cour de cassation abstained from taking a decision, preferring to address a request for preliminary ruling to the CJEU. It asked, in essence, whether the fundamental right to information and consultation of workers, recognized by article 27 of the Charter and given expression by directive 2002/14, can be invoked in a dispute between private individuals in order to establish the conformity of a national transposing measure.

The approach suggested by Advocate General Cruz Villalón in his Opinion is a bold one. He began by stating that the matter at issue was essentially that of whether the Charter, when its content is given specific expression by a directive, may be relied upon in relations between individuals. To analyze the problem, he divided his Opinion in different sections. In his view, the fact that the wording of the Charter points to its application by Member States and EU institutions in nothing diminishes its aptitude to be applicable also between individuals; it would be an error to consider that the Charter somehow restricts 'the effectiveness of fundamental rights between individuals'<sup>230</sup>. He hence reaches the intermediate conclusion that article 27 of the Charter may be relied on in such disputes<sup>231</sup>; however, he adds, it is important to consider whether it is a right or rather a principle, and in the latter case thus narrowed by article 52.5.

In his view, the qualification as 'fundamental right' relates to the entire content of the Charter; he further adds that 'the fact that specific substantive content of the Charter is described as a 'right' elsewhere in the Charter does not in itself prevent it from potentially belonging to the category of 'principles' within the meaning of Article 52(5)'. Indeed, he concedes that social rights seem to be 'rights by virtue of their subject matter' but 'principles by virtue of their operation', criticizing the wording of the Charter in that it should have followed the expression used in article 51.1, 'to promote

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<sup>230</sup> Opinion of Advocate General Cruz Villalón in *AMS*, cit. supra, at paragraph 28

<sup>231</sup> *Ibid.*, at paragraph 41

the application of principles’, rather than attaching the verb ‘respect’ to rights and ‘observe’ to principles<sup>232</sup>.

He then goes on by looking at article 27, stating that it does not define any individual legal situations, hence requiring the public authorities to determine its objective content – as such, this article is a principle, in the sense of articles 51.1 and 52.5. Having said that, the Advocate General proceeds to analyze the regime applied to principles under the latter article: the need for implementing measures in order to promote such principles consists of, in his view, providing them with ‘sufficient substance’. He considers that ‘implementation’ has to mean a ‘specifically legislative implementation’<sup>233</sup>. Taking it a ‘step further’, as he himself acknowledges in the next paragraph, Advocate General Cruz Villalón states that ‘it is possible to identify, from among the legislative implementing acts referred to in the first sentence of Article 52(5) of the Charter, particular provisions which can be said to give specific substantive and direct expression to the content of the ‘principle’. That differentiation is essential, since, otherwise, in areas as extensive as social policy, the environment or consumer protection, the ‘implementation’ of a ‘principle’ would consist of nothing less than an entire branch of the legal system (...). That result would render nugatory and disruptive the function which the Charter confers on ‘principles’ as a criterion for interpreting and reviewing the validity of acts, since it would be impossible to carry out that function’. It is at this point that he makes a crucial statement relating to the way he understands the answer to the preliminary question put by the French court: in paragraph 66, he considers that ‘Article 3(1) of directive 2002/14 provides the content of the ‘principle’ with substantive and direct expression: the personal scope of the right to information and consultation.’ As such, ‘it may be referred to as an example of the substantive and direct expression of Article 27 of the Charter and, therefore, is capable of forming part of the content of Article 27 which may be relied on before the courts.’

The Court, however, did not follow the proposed solution. It pointed out, in paragraph 45, that, as stemming from its wording, article 27 lacks the conditions to full effectiveness, for ‘it must be given more specific expression in European Union or

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<sup>232</sup>*Ibid*, at paragraphs 44 and 45

<sup>233</sup>*Ibid*, at paragraphs 54 to 62

national law'. It then marks a stark contrast with the mode of operation of the principle of non-discrimination on grounds of age: the latter, enshrined in article 21.1, 'is sufficient in itself to confer on individuals an individual right which they may invoke as such', as proved by *Küçükdeveci*. The difference, the Court hints, lies in the nature of the right at stake: the analysis focused on whether the right, considered there clearly a general principle, needs a detailed instrument of secondary legislation to be put into practice. The directive applies the principle of equality to the field of employment law – arguably, it could have a simple provision stating its objective as such, and the right could be respected and applied directly.

The workers' right to information and consultation within the undertaking, as enshrined in article 27 EUCFR, is thus considered an incomplete right, which a worker cannot invoke per se. It stems from the ruling that further definition is needed as regards the conditions for such a right to be exercised in relation to the undertaking, some sort of governing whose objective is precisely to make the right enforceable. The existence of horizontal direct effect would, in light of this ruling, depend on the nature of the instrument vesting the right (in the case, as it was directive, it did not render the right applicable per se)<sup>234</sup>.

In *Dominguez*, in spite of finding that the hard core of the right in question seems to be self-sufficient, the Court decided it was not certain enough to be horizontally applicable. Again, this right was confirmed as a particularly important principle of European social law; however, and within the limits of the directive, Member States are found to be free to lay down conditions for its implementation<sup>235</sup>. The directive fulfils the purpose stated

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<sup>234</sup> In this light, it is useful to make reference to a footnote in Advocate General Trstenjak's Opinion in *Dominguez*, cit. supra, where she points that Bauer, J.-H./von Medem, A., in 'Küçükdeveci = Mangold hoch zwei? Europäische Grundrechte verdrängen deutsches Arbeitsrecht', *Zeitschrift für Wirtschaftsrecht*, Vol 11, 2010, p. 452, 'are against applying the approach in *Küçükdeveci* to the case of employees' fundamental rights under Article 27 et seq. of the Charter because of the **differences between these kinds of fundamental rights and prohibitions on discrimination**. They point out that in many of the material areas stated in Title IV of the Charter ('Solidarity') there are directives in existence which, on a traditional interpretation, are incapable of superseding national law to the contrary in disputes between private individuals. The authors also expressly refer here to the working time directive, which gives specific expression to the entitlement to paid annual leave under Article 31(2) of the Charter, for example.' (emphasis added)

<sup>235</sup> Paragraphs 16 and 18 of the ruling in *Dominguez*, cit. supra

in article 52.5 of the Charter, with the right in article 31.2 being ‘judicially cognisable only in the interpretation’ of the said instrument.<sup>236</sup>

Read in this light, perhaps one could better understand the criteria advanced by the Court in *Audiolux* and *NCC* constructions, where it stated that a true general principle of EU law cannot require the enactment of a detailed legislative framework for it to be made applicable. On the other hand, it is still not clear what the role of the legislative instrument is: the directive seems to provide a framework for the real application of the principle. Would it suffice for it to state, as referred, the application of such principle to relationships in a certain area so as to make a general principle applicable<sup>237</sup>? Arguably, the role of the instrument is to guide the application of the principle with certain purposes – as such, it will serve as an assessment basis for concrete situations. This seems to be suggested by the wording of the Court in *Test-Achats*, when stating that ‘the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question (...) that distinction is made by Article 5(2) of directive 2004/113’ (paragraph 29 of the ruling, referring to the application of the principle of equal treatment)<sup>238</sup>.

The recent ruling in *Glatzel* presents the first development of the *AMS* decision<sup>239</sup>. In this case, related to the rights of persons with disabilities as protected by article 26 of

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<sup>236</sup> See Peers, S., and Prechal, S., ‘Article 52 – Scope and Interpretation of Rights and Principles’, in Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds), *The Charter of Fundamental Rights – a Commentary*, Hart Publishing, Oxford, 2014, 1455 ff, at p.1507, ‘the very fact that the right to paid annual leave was in the past qualified as a principle of EU social law might be used as an argument in favour of limited justiciability. In the *Dominguez* case, the ECJ did not address this problem and only repeated that this entitlement has to be considered as a particularly important principle of EU social law. Yet, it cannot be excluded that by using the expression ‘particularly important principle of EU social law’, the Court merely wanted to refer to the fundamental rights character of the entitlement, in the sense of article 6.3 TFEU.’

<sup>237</sup> See contra Tridimas, T., *The General Principles of EU law* (cit. supra), at p.66: ‘whilst article 21 has in itself a normative substantive content, it is in fact much more limited in scope than the directives which have been adopted under article 13 which bind the Member States and apply also to relations between individuals. A further difference is that, whilst article 21 of the Charter contains an indicative list of prohibited grounds of discrimination, the list of grounds contained in article 13 is exhaustive and narrower’. In my view, this assertion does not seem accurate: on the one hand, this presupposes some sort of form of horizontal direct effect of directives and, on the other, it seems to me that it is not completely excluded that the Court reads article 19 in the light of the Charter, rather than restricting it.

<sup>238</sup> See also judgment in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100

<sup>239</sup> Judgment in *Glatzel*, C-356/12, EU:C:2014:350



the Charter, the Court further takes a stand, albeit implicitly, on the difference between rights and principles in light of the Charter.

The Court starts by acknowledging the principle of equal treatment as a general principle of EU law, of which the principle of non-discrimination, as enshrined in article 21.1 of the Charter, is a particular expression<sup>240</sup>. It then proceeds to consider article 26 in combination with article 52.5, stating that, as stems from the latter and the explanations to the Charter, reliance on the first ‘is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities’<sup>241</sup>. It is clear here already that this right, although representing one of the sub-divisions of the prohibition of discrimination, is not self-standing enough to represent a right on its own. The classification as principle is furthered in paragraph 78, with an assertion anchored on a reference to *AMS*: ‘although Article 26 of the Charter requires the European Union to respect and recognize the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such’.

It stems clearly from this paragraph that principles in the sense of the Charter do not require any sort of positive action by the Union, something which is aligned with the provision in article 19 TFEU. In order to endow it with effectiveness, article 26 needs to be given ‘more specific expression’ in European or national legislation, for which reason it fails to be invocable directly by individuals. Hence, it clearly represents a principle in light of the Charter.

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<sup>240</sup> *Ibid.*, at paragraph 43

<sup>241</sup> *Ibid.*, at paragraph 74

### 2.2.2 A general principle in light of the Charter?

The contrast of reasoning in these cases still fails to produce proof of the distinction between rights and principles and, moreover, of 'whether a provision is rights-conferring or not', an additional distinction to the already problematic one<sup>242</sup>. Arguing that rights, such as the right to annual paid leave, are not sufficiently precise due to the fact that they require legislative configuration would imply accepting the same reasoning for other rights qualified as general principles. Indeed, if the decisive factor is that the implementation depends on the existence of a legislative instrument or, in general, a written framework for the application of the principle, then some of the statements made by the Court in this area may appear bizarre<sup>243</sup>.

In cases such as *Mangold* and *Küçükdeveci*, where the Court found a general principle of EU law, the regime of the directive is the one framing the application of the said principle to the situation at stake. Can one argue that such a 'principle' in the sense of the Charter is that different from the general principle of non-discrimination on grounds of age? What does directive 2000/78 do that not represent a specific expression of the principle, exactly as the Court phrases it in *Glatzel*? It has been argued that the classification as 'principle' here is limited to the definition of the legal consequences of a norm. It seems bizarre that the same line of thought does not apply to the use of general principles as independent legal sources in the jurisprudence of the Court.<sup>244</sup>

That occurs similarly in other areas, where extensive interpretation of the instruments in question takes place: the fact that, eventually, the Court concedes on the application of a

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<sup>242</sup> Frantziou, E., 'Case Note: Case C-176/12, *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union', *EUConst* 10 (2014), p.332-348, at p.344.

<sup>243</sup> On the distinction to be made between the legislative framework and the Charter rights/ principles, see Lazzarini, N., '(Some of) The Fundamental rights granted by the Charter may be a source of obligations for private parties: AMS', Case-Law Note, Case C-176/12, *Association de Médiation Sociale*, *Common Market Law Review* (51) 2014, 907-934, at p.924: 'when the trigger for the application of the Charter is a Directive which gives effect to a fundamental right, one should take care not to 'mix' the trigger (which abstractly satisfies the requirements for direct effect) and the provision of the Charter (which by itself does not satisfy them).

<sup>244</sup> Contra, Peers, S. and Prechal, S., 'Article 52' (cit. supra), at p.1506: 'the fact that certain provisions or notions have been labelled in the past by the ECJ as principles of EU law is sometimes used as an argument to limit their justiciability (...). Such an approach ignores the distinction between general principles of law as sources of fundamental rights on the one hand and the use of the term principle for defining the legal consequences of the provision at issue, as envisaged by article 52.5, on the other.'

legislative piece's framework is an antithesis to the assertion that no legislative action is needed in those cases. This shall be further discussed below.

Peers and Prechal suggest that 'the wording, purpose and the nature of the provision at issue must be looked into', so as to define what constitutes a principle and a right under the Charter. However, they recognize that 'what in the Court's case law and, to an extent, also in the Charter, is called a principle, is not necessarily a principle for the purposes of article 52.5'<sup>245</sup>. Judge Safjan has defended that general principles of EU law and principles in the Charter are conflated, producing the same effects. His thesis is that if some principles from the Charter (or general principles, for that matter) become sufficiently determined by case-law, be it from the Court of Justice, the European Court of Human Rights or in the constitutional traditions of the Member States, they become equally sufficiently clear and transparent so as to be directly applied. This implies that such principles will hence become a direct basis for judicial protection<sup>246</sup>.

This latter view is, in my opinion, highly debatable. What seems clear is that, in drafting the Charter, Member States wanted to secure what is generally recognized as social principles, which depend from legislative intervention and are subject to more conditions for application than fundamental subjective rights. In a way, a type of programmatic rules, which would not be directly applicable to individuals, but entail rather some sort of positive action<sup>247</sup>. However, the wording chosen and the failure to make the distinction clear with regard to which specific provisions embody rights and which ones embody principles achieves merely more confusion, and opens leeway for the Court to deal with the issue on a case by case basis. This becomes furthermore problematic when the Court decides not to engage in the classification, as is patent in

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<sup>245</sup> *Ibid.*, at p.1507

<sup>246</sup> Views expressed at the lecture 'Some reflections about the methodology and dilemmas of constitutionalization in European private law - Lecture with Marek Safjan', European University Institute, Florence, May 26th, 2015.

<sup>247</sup> See, on this matter, Craig, P., *EU Administrative Law* (cit. supra), at p.469/470: 'It is tempting to think that there is an equation between rights and the civil and political Charter provisions, and principles and the social/economic provisions of the Charter. This would be mistaken. (...) It is equally tempting to think in terms of an equation between rights and prohibition, and principles and positive action. This too would be mistaken.' He further refers to the words of António Vitorino, who represented the president of the Commission in the Convention responsible for drafting the Charter: 'rights enforceable in courts and principles that could be relied on against official authorities' (at p.468)

the *YS* case<sup>248</sup>. Here, albeit recognizing that the right to good administration as enshrined in article 41 of the Charter 'reflects a general principle of EU law', the Court does not dwell in the interpretation of such principle, which seems to have a limited effect in what comes to individuals<sup>249</sup>.

Article 6 TEU itself poses a number of problems. In the first place, it is not clear whether it contains a hierarchy of sources: it has been argued that one could speak of a mere lexical hierarchy, with the sources being applied in a concurrent manner<sup>250</sup>. However, the Charter, despite representing the codification of the development of fundamental rights reached by case law<sup>251</sup>, does not exhaust the use of general principles and subsequent protection of fundamental rights under the latter epitome. It seems that fundamental rights can still be protected as general principles of EU law outside the scope of application of the Charter<sup>252</sup>. Moreover, this will imply acknowledging that, whilst the Charter does indeed have the value of primary law in an equal standing to the Treaties, general principles have been used before as a way to interpret and superimpose a result not expressly dictated by written primary law<sup>253</sup>, which might indicate that general principles of EU law will still prevail over the Charter<sup>254</sup>.

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<sup>248</sup> Judgment in *Y S and Minister voor Immigratie, Integratie en Asiel*, C-141/12 and C-372/12, EU:C:2014:2081

<sup>249</sup> *Ibid.*, at paragraph 67: 'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (...) Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application. 68 It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.'

<sup>250</sup> See Skouris, V., 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' (2006) 17 *European Business Law Review*, Issue 2, pp. 225–239

<sup>251</sup> Rosas, *EU Constitutional Law* (cit. supra), at p.57: 'the elevation of the Charter to Treaty level is the culmination of a process, dating back at least to the Treaty of Maastricht, of expressly confirming the existence of this or that general principle (often already identified by the Court as forming part of the EU legal order).'

<sup>252</sup> *Ibid.*, at p.56: 'fundamental rights as general principles of union law will thus continue to constitute a source of primary law alongside the Charter'

<sup>253</sup> See *Defrenne, Chernobyl, Les Verts*, cit. supra, amongst other.

<sup>254</sup> One might consider the contrary as well: see Ziller, J., 'La Constitutionnalisation de la Charte des Droits Fondamentaux et les traditions constitutionnelles communes aux États', in *Mélanges en l'honneur du Professeur Joël Molinier, Liber Amicorum*, LGDJ Lextenso Éditions, 2012, Paris, 665 ff, at p. 667:

## Conclusion

While it is undeniable that general principles play a determinant role in the development of the EU and its integration, the attempt to define a general principle of EU law on the basis of its characteristics, categories or functions has proven to be a difficult task, as was noted in the previous chapter. Also in when it comes to the terminology used in the case-law, legislative instruments and academia, consensus is far from being reached. There seem to be multiple possible expressions to underline the value of the instrument used; whether those differences are relevant per se to the qualification and nature of the principle, remains unclear. This is equally furthered by difficulties stemming from the use of different concepts in some of the case-law translations.

With primary law value having been attributed to the Charter of Fundamental Rights, the complexity of the topic deepened. In the first place, the Charter's division between rights and principles does not necessarily have any bearing in the understanding of general principles, which might, as has been seen, belong to both categories; secondly, albeit the Charter's horizontal provisions point at a distinction that would limit the application of the fundamental rights enshrined in the Charter, as well as delimitate the applicability of principles, it seems that they have equally allowed the Court to broaden their use. Finally, the fact that fundamental rights are still recognized as general principles of their own standing, which results from both the Treaty and the case-law, definitely broadens their potential scope of application.

Albeit it might seem that, in the latest cases related to the interpretation of Charter's contents and especially fundamental rights as general principles, the Court has strived to clarify its approach to the definition and effects of these instruments, there are still significant problems to be tackled. This becomes clear especially when contrasting two recent cases, *Felber* and *Schmitzer*<sup>255</sup>. In the *Felber* case the Court maintains the approach, anchoring the use of the general principle in the directive which endows it with a specific written expression; however, it abandons its classification as 'general principle' in 'directive 2000/78, which gives specific expression, in the domain of

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'utile de distinguer entre droits fondamentaux et autres droits. La question – sans réponse définitive – est de savoir s'il y a une hiérarchie des droits, avec une prévalence de ceux qui sont repris dans la Charte'

<sup>255</sup> Judgment in *Felber*, C-529/13, EU:C:2015:20, and in *Schmitzer*, C-530/13, EU:C:2014:2359

employment and occupation, to the **principle of non-discrimination on grounds of age**<sup>256</sup>. Schmitzer, on the other hand, points at a blatant lack of terminological, as well as methodological, consistency. In this case, also relating to the general principle of non-discrimination on grounds of age, the Court stated that 'the **right to equal treatment, which flows from the principle of non-discrimination on grounds of age** within the meaning of Article 2 of directive 2000/78, constitutes a right which is capable of being relied on by an individual against a public authority'<sup>257</sup>. Albeit in terms of content the formulation restates the praxis of the Court in the matter, the terminology, when used in this way, poses many problems per se.

In the first place, the positions are inverted when compared to former cases: non-discrimination on grounds of age is a specific ground for the general principle; it derives from equal treatment, and not the opposite. Furthermore, here, equal treatment is characterized as a 'right', whilst the non-discrimination on grounds of age is called a 'principle'. This deepens the already existing confusion. It hence remains unclear whether any conclusions can be derived from the wording chosen by the Court, since the case-law seems to remain tamed - also, but not only, in light of the new classifications brought in by the Charter of Fundamental Rights. Indeed, the dichotomy brought about by the coexistence of article 6.3TEU and the horizontal clauses of the Charter's seventh section seems to provide further leeway to the Court in what comes to establishing the scope of the fundamental rights and principles enshrined in the instrument. It does equally confer the Court the power to continue applying fundamental rights as general principles outside the contours laid down by the Charter.

In light of all the above, it becomes apparent that neither the definition, nor the categories or terminology are a good departing point for the analysis of general principles of EU law. To remain circumscribed by these factors would result in denying the dynamic role general principles have played, and continue to play, in the European integration. There is a larger phenomenon to be identified with regard to the function of general principles within the structure of EU law, other than the usually depicted hierarchical relationship. The impact produced on the structural dynamics of EU law is

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<sup>256</sup> *Felber*, paragraph 16 (emphasis added)

<sup>257</sup> *Schmitzer*, paragraph 48 (emphasis added)

especially visible when analyzing the modes of operation in which general principles are deployed by the Court, notably due to the interactions produced with other legal sources. If the role as grounds of judicial review is undeniable, the fact is that, when combined with other (written) legal sources, general principles have the proclivity to create results which would not be achieved by neither principle nor written rule in isolation.

Naturally, it may be questioned how the sample was reached, in light of the differences in wording. The aim of the present chapter was to highlight the feebleness of relying merely on the expressions used to address general principles; however, this will still serve as an indication to narrow the said sample cases. What seems to be essential is not to take the wording as an isolated element, that is, departing from the expression used by the Court, analysis rather the *modus operandi*, with the consequent assertion of whether the principle indeed can be considered a general principle of EU law, and the meaning of the application of that norm, whichever its value, in the situation at stake.

The aim of the next chapter is to explore the ways in which general principles have been developed within the particularities of the EU legal system, analyzing them for their dynamic quality serving the aims of the Treaties.





## CHAPTER III: GENERAL PRINCIPLES AND THE STRUCTURAL DYNAMICS OF EUROPEAN UNION LAW

### Foreword

The above chapters tried to provide an overview of what is understood as a general principle of EU law, the possible categories in which these principles can be divided and the functions they fulfill as legal sources of EU law. However, they also showed the difficulties inherent to the treatment of such an abstract concept. Beyond the usually accepted functions, the analysis highlighted that the categorization is varied, since the inception of EU law, and that none of the suggested categories seems to encompass completely the types of principles it purports to describe. On the other hand, the complexity of this issue is reflected in the differences presented by the terminology chosen by legislature, judiciary and academia alike, which, indistinct and confusing as it is, gets amplified by the different translations of passages which are used as determinant for the understanding of these concepts.

It is undeniable that, in spite of the challenges faced, terminology still plays an important role; however, it should not be the only factor to trigger the analysis of these legal sources. Indeed, if the wording chosen provides little help in the understanding of the functioning of these tools, the mode in which they will operate further throughout the reasoning is what enhances their peculiarities. One cannot obviously discard terminology, since the analysis will still look at cases where principles are isolated as such; however, the use of adjectives such as 'general', 'fundamental' and 'particularly important', or even no adjective whatsoever, might not be the decisive factor for the qualification. As such, this analysis is anchored in cases where the figure of a general principle operates as such, even if it is only called 'principle' instead of a 'general principle of EU law'. The case-law will clarify this.

The focus is thus turned from the substance of general principles of EU law to the way they are used, especially when combined with other legal sources. This assessment departs not from a focal point on a particular general principle as developed by the Court in substantive terms, but rather from the different possible interactions and the impact the use of these tools provokes on the shaping and application of EU law. The

aim of this chapter is to explore the way in which the structure of EU law, and its development and legal sources used therein, have been envisaged and established with the help of general principles.

### 3.1 The combination of legal sources in EU law

European Union law is filled with peculiarities. One of the aspects to be immediately underlined is the fact that it represents an atypical form of international law: 'the Union legal order is essentially based on international law principles', its nature not requiring any 'departure' from the said canons<sup>258</sup>. These peculiarities arise especially from the type of intervention taken up by its judicial organ, the Court of Justice, and general principles appear, in this context, as 'instruments of intrusion', due to their flexibility in the possibility to encompass different effects and applications. The development of secondary legislation, on the other hand, has created both a new role and new difficulties for general principles. Indeed, whilst the absence of legislation on certain matters opened more leeway for the Court to develop a principle-based reasoning, the existence of legislation creates the need for its own perfecting and gap-filling.

The understanding of the EU as a complex legal order implies the understanding of the underlying relationships present within the EU legal system. This is generally seen as a hierarchical structure, albeit a *sui generis* one: EU law is read from the perspective of a structured legal system, arguably walking towards the consecration of a federal system. Nonetheless, when writing about hierarchy of norms in EU law, one immediately encounters difficulties. Such a concept is not defined in the Treaties, even if the creation of EU law's primacy over national laws leaves little leeway for questioning the application of EU law in the legal systems of the Member States *per se*.

General principles of European Union law necessarily play a role in these considerations, since they have been qualified as primary law, which endows them with the capacity to trump inferior norms. This facet has been extensively analyzed in the doctrine. They have been explored from the point of view of their primary law rank, and

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<sup>258</sup> Moorhead, T., *The Legal Order of the European Union - The Institutional Role of the Court of Justice*, Routledge, at p.108

of the main function they have fulfilled in line with that conception, which is that of serving as a standard for judicial review of other norms. But while the establishment of a hierarchy was a precondition for the successful affirmation of the European Union's legal system (and the role of general principles as primary law has been undoubtedly quintessential in that process), an equally important factor has, however, been neglected: there are other types of combination of norms in which general principles play a very important role.

What is interesting, in this respect, is not the nature and structure of the principles *per se*, but rather the way they assume different functions and provoke different effects when combined with other sources. As suggested by Robin-Olivier, the effectiveness in the application of EU law seems to depend much more on the legal force of a certain combination of norms, rather than on the legal force of the said norms taken as isolated elements<sup>259</sup>.

Sankari notes equally that the special nature of the EU dictates the need for textual, contextual and teleological readings, as a combination of methods - which 'has become more nuanced as secondary legislation has developed'<sup>260</sup>. These nuances were also brought about by the use of general principles, which present one of the most interesting cases in what comes to the combination of norms in EU law, in this sense, with sometimes unexpected results stemming from their application. They are equally responsible for many of the breakthroughs in the advancement of the EU as a consolidated legal order, by means of the Court's intervention.

### 3.2 General Principles and Normative Hierarchy

The often used classification of EU law as a *sui generis* phenomenon is deeply connected to the need for a set of interpretive rules which allow for its reading in light

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<sup>259</sup> Robin-Olivier, S., 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections – Revisiting *Van Gend en Loos*', *Jean Monnet Working Paper* 07/14, suggests that effectiveness of EU law depends not on the legal force of the norms invoked, but rather on the relationship between the different norms (at p.5). See further, at p.6: 'references, taken separately, would be powerless' various types of combination 'differ according to the source of the norms combined (...), the relationship between these norms and also the different effects produced by their interaction'.

<sup>260</sup> Sankari, S., *European Court of Justice Legal Reasoning in Context*, Europa Law Publishing, 2013, at p.65 and ff

of other established legal orders, Member States' or the international legal order itself. The use of general principles for judicial adjudication has significantly contributed to this hierarchical reading. Their deployment as interpretative tools has been presented and analyzed within a sphere of primacy relations, with the complete superimposition of primary law being developed by the EU judiciary<sup>261</sup>. The affirmation of hierarchy has been essential for the conception of the EU legal system. The quasi-federalist approach has necessarily enhanced the strong top-down reading of the structure of the EU.

However, as Guastini notes, these hierarchical relationships are mainly a creation of the interpreter, who reads the bulk of available law in line with the objectives aimed at, so as to affirm the legal order<sup>262</sup>. The focus on the objectives and primacy of EU law has, however, resulted in a very restrictive overview of EU law, one which has been oblivious to the possibility of exploring other types of relationships in EU law. A substantial part and important feature of EU law has been forgotten: the interaction of such norms in combined application. Indeed, often general principles, primary law rules vividly proclaimed as such by the EU judiciary and harshly criticized by the Member States, operate in intrinsic connection with other legal sources, achieving different results from those which could be envisaged with the isolated application of one of them. A theory that truly explores the plurality of legal sources and the different possible combinations of norms, with the effects produced therewith, seems to be missing.

This work aims to present a certain number of those interactions and to analyze how general principles operate in such a combined form. The Court has indeed used general

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<sup>261</sup> As for other legal systems, the hierarchical structure appears as an essential feature for the affirmation of the EU: 'Among the multitude of norms composing a complex legal order, hierarchy creates "structures", thus enhancing stability and predictability of the respective legal system' (Bieber, R., and Salomé, I., 'Hierarchy of Norms' (cit. supra), at p.909

<sup>262</sup> 'Tout le monde semble croire que toute hiérarchie préexiste à l'interprétation, de telle façon que les interprètes ne peuvent que se borner à la reconnaître. En revanche, il est tout à fait évident que certaines relations hiérarchiques ne sont pas « trouvées »: elles sont créées par les interprètes. C'est le cas, par exemple, de la relation axiologique (de valeur) entre les principes fondamentaux ou généraux et les règles particulières d'une certaine matière. C'est également le cas de la relation entre principes constitutionnels établie par un tribunal constitutionnel afin de résoudre un conflit entre ces principes. C'est le cas, encore, de la relation entre la constitution et les principes supra-constitutionnels qui, d'après la jurisprudence de certains tribunaux constitutionnels, ne peuvent pas être modifiés ou bouleversés ni même au moyen d'une révision constitutionnelle.' Riccardo Guastini, 'Lex superior – Pour une théorie des hiérarchies normatives', *REVUS* (2013) 21, 47-55, at p.48

principles to develop the reasoning in the cases brought before it. The way in which they are used and the functions they fulfil is not so clear. It seems that different areas of law will require equally different configurations of those legal sources, dictated not only by the objectives sought by the Court in the specific area to tackle, but also by the other available sources with which principles will be called upon to interact. The typified functions and categories have been addressed; my aim is to look at particularities, specific cases where the interaction assumes peculiar shapes, producing different effects.

As legal sources, what is the position that general principles of EU law are to occupy in relation to other norms? This has a big impact in the definition of the outcome of such combinations. One should address here the points raised by Ziller in his article on the hierarchy of norms in EU law<sup>263</sup>. In fact, he makes, amongst other, three strong statements in relation to general principles. The first is that the formal position of general principles in this rank is the same as the case law of the Court (according to him, hence below primary law); secondly, he defends that general principles always rank higher than secondary law. Last, but not least, he states that general principles are binding in the same way primary law is, since they are used as means to interpret primary law<sup>264</sup>. He affirms, however, that 'there is little use in trying to establish a hierarchy between different general principles of EU law', since the only hierarchy present would be one of material sources. This would provoke no impact whatsoever on their formalistic position<sup>265</sup>.

I believe these statements are perhaps too bold and confusing, and cannot stand, at least not without further elaboration. The role that general principles play is varied and the different cases where principle based reasoning is used have their own nuanced

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<sup>263</sup> Ziller, J., 'Hierarchy of Norms: Hierarchy of Sources and General Principles In European Union Law', Becker, U., Hatje, A., Potacs, M., and Wunderlich, N. (eds.), *Verfassung und Verwaltung in Europa Festschrift für Jürgen Schwarze zum 70. Geburtstag*, Nomos Verlagsgesellschaft, Baden-Baden 2014, pp. 334-352.

<sup>264</sup> See, on this point, Tridimas, T., *The General Principles of EU Law* (cit. supra), at p.50/51: 'it is clear that those principles which are accorded constitutional status are superior to Community legislation since acts adopted by the institutions are subject to review on grounds of compatibility with them. (...) since their origins lie in the EC Treaty, they have equivalent status with the founding treaties [hence primary law value]. Their equal ranking derives from their character as constitutional principles emanating from the rule of law.'

<sup>265</sup> Ziller, J., 'Hierarchy of Norms' (cit. supra), at p.349 and ff.

conceptions. In the first place, and joining the first and third statements, it seems to stem quite clearly from the case law that the Court has always qualified the 'general principles of EU law' as primary law. In fact, the Court clearly qualifies general principles of EU law as constitutional in character. On the other hand, it seems highly unattainable to qualify general principles as ranking lower than primary law, but then defend that they have the same binding force, since they are used to interpret it. This problem arises otherwise due to the lack of consistent terminology and the use of the term 'principle' to address what should be labelled rather as guidelines or perhaps objectives. Such difficulties are heightened with the poorly drafted distinction brought about by the Charter between rights and principles, the latter not corresponding necessarily to general principles, as was seen above.

The statement regarding secondary law seems, in light of the above, more feasible. Nonetheless, once again, it is not necessarily what stems from the Court's case law, again due to the lack of coherence in the approach to all issues of general principles. It was referred above that certain principles, sometimes qualified by the Court as general principles, seem not to have the force of primary law, rather being applied concurrently with secondary legislation: the principle will serve as a tool to evaluate the balance to be struck and the meaning to be given to the written rules without, however, imposing a different reading or being used as ground for validity. Here the primary law status can definitely not stand. However, it is questionable whether these are indeed to be read as general principles of EU law at constitutional level, as envisaged by the Court.

They will, in fact, many times, rank as primary law, as the Court defines them; they will serve to shape the reading of other primary law sources, as is the case of some rulings where they were employed to shape Treaty provisions; they will serve to trump secondary law, imposing a reading which sometimes counters completely what is stated in its provisions; and, in other cases, they will rank as mere guiding tools.

### 3.3 A functionalist approach to the development of EU law

As stated above, a great part of the process of European integration has been sustained by the use of general principles. This is mostly so since the Court has supported its case law in a reasoning prone to defend the objectives envisaged by the creation of the Communities. Functionalism as a legal theory breeds on the relationships established between an organization and its Member States<sup>266</sup> – in the creation and development of the EC/EU, the underlying normative beliefs, the functions which the founding fathers had established as goals that the Communities were to fulfil, were the driving forces. They provided the normative underpinnings for the development of the legal system and its progressive inclusion of values other than those of the market. This integration was made in a self-referential way, that is, with a continuous interplay between national law and EU law. Semmelmann defends that 'the determination of objectives at an EU level as the basis for EU functionalism allows for a more deferential approach towards the particularities of national laws when EU norms are implemented at the national level, because it avoids imposing a methodology that is not shared by all Member States'<sup>267</sup>. The Court's role was crucial here, since the reasoning based on values and objectives to pursue led progressively to a combination between a functionalist approach, in relation to market integration, and the protection of individuals – and it was with the use of general principles of EU law that we have reached this *sui generis* form of functionalism in EU law today, where objectives are paralleled with rights' protection<sup>268</sup>.

This translated in a teleological approach to the texts and to the underlying values. This is why the next section will assess the importance, in the rulings of the Court, of figures other than general principles, but which are deeply entwined therewith - and which inflated the consolidation of the legal system.

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<sup>266</sup> See EJIL talks, Interview with Jan Klabbers, University of Helsinki, on *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations* (2014, vol. 25, no. 3), <http://ejil.org/live.php>

<sup>267</sup> Semmelmann, C., 'The Public-Private Divide In European Union Law – Or An Overkill Of Functionalism', *Maastricht European Private Law Institute Working Paper* No. 2012/12, at p.14.

<sup>268</sup> In this sense, Azoulai, L., 'La Fabrication de la Jurisprudence Communautaire', in Mbongo and Vauchez (eds), *Dans la fabrique du droit européen – Scènes, acteurs et publics de la Cour de Justice des Communautés européennes*, Bruylant, 2009, p.165 and ff, at p.168: 'l'orientation de la politique jurisprudentielle de la Cour a changé. L'objectif de construction du Marché commun s'est enrichi de nouveaux objectifs visant la garantie au bénéfice des citoyens européens (...). Il en résulte une extension considérable du champ d'application des règles communautaires'.

### 3.3.1 Values and Objectives of EU law

Values and objectives of EU law are equally important concepts in the development of the legal system. While the denomination used is different, and in some aspects these concepts appear to be distinct from general principles, there are many occasions where they have been used indistinctly, and where they seem to overlap with one another<sup>269</sup>. Indeed, it is widely recognized that the values of EU law, namely as protected by article 2 of the Treaty on the European Union, may serve as sources of EU law<sup>270</sup>. In the words of Bengoetxea, 'we can distinguish principles and values, but it seems difficult to define principles without a reference to the values they embody'<sup>271</sup>.

This is naturally reflected in the scope of competences and their exercise, as well as the legal reasoning of the Court. As Beck notes, 'reliance by the Court on the objectives of Union law is likely broadly to favour an expansive interpretation of the relevant legislation or Treaty provisions, and thus generally an integrationist outcome to the question at hand, simply because the objectives generally refer to the values, purposes and ends of Union competence and legislation'<sup>272</sup>. Indeed, the overlap between the different concepts serves a certain flexibility, which necessarily accompanies the evolution of the EC and then EU as a polity.

Albeit the founding Treaties might have had a markedly economic union tone, it was only a few years later that Pierre Pescatore pointed at the *finalité* of the Union as being something more vast<sup>273</sup>. The Court seems to have read it in the same way, as is patent namely from the first cases involving fundamental rights, where it acknowledged certain values other than the market ones were to be protected. General principles played a key role in this development, by endowing the Court with a degree of flexibility which allowed for a certain boundary stretching, and thus covering situations

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<sup>269</sup> Beck, G., *The Legal Reasoning* (cit. supra), at p.323: 'the objectives cannot be clearly distinguished from the values of the EU legal order, and they overlap with the general principles of EU law'

<sup>270</sup> Rosas notes that the respect for the rule of law implies that Member States are bound by article 2, adding that the structure and content of the Treaty naturally 'called for the determination of some general principles of Community law' in addition to the values therein enshrined (Rosas, A., and Armati, L., *EU Constitutional Law* (cit. supra), at pp.46/56)

<sup>271</sup> Bengoetxea, J., 'General principles navigating space and time', in Bernitz, U., Groussot, X., and Schulyok, F., *General Principles of EU law and European Private law*, Kluwer Law International 2013, 45-64, at p.45

<sup>272</sup> Beck, G., *The Legal Reasoning* (cit. supra), at p.323

<sup>273</sup> See Pescatore, 'Les objectifs de la Communauté' (cit. supra), at p.327



which would not be a priori envisaged as falling under EU's jurisdiction purview. This is moreover patent in the recent years, already outside the realm of fundamental freedoms and internal market consolidations, and in presence of more and more complete written legal instruments.

It is interesting to notice, however, that there seems to be an interpenetration of concepts, even when the Court used Treaty-based reasoning in fundamental freedoms cases. In fact, many times the justification is grounded on an underlying principle, often equated with values protected in EU law, or objectives it is to pursue. It is thus important to refer certain situations where the protection afforded depends on interchanging forms of general principles and values or objectives, or vice-versa. As Larik notes, 'objectives have always figured prominently in the primary law of the Union (...) while they were initially rather limited and focussed on specific areas, they have since expanded in the on-going course of deeper integration'<sup>274</sup>. This might be explained also in part by this interchanging role, with general principles making the objectives operative; qualifying them as such would also endow objectives with added legitimacy. Especially important is the primary law form and legal value they can provide, since values and objectives are not binding.

Two things need hence to be addressed: firstly, how the values and objectives may be 'aligned' with general principles; secondly, how they are used to legitimise the interpretation of secondary legislation in a very similar fashion to that involving principled reasoning. The interchangeable features of general principles and values and objectives of EU law is visible, namely, in *International Mail*<sup>275</sup>. This case concerned the liberalisation of postal services: International Mail provided 'outgoing cross-border postal services' for postcards sent from Spain, by setting specific letterboxes in the tourist locations. The labels purchased in such places would allow the customers to send postcards by using the service. This activity clashed with the existence of universal postal service provider in Spain. A preliminary reference was hence raised in relation to the reading of directive 97/67.

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<sup>274</sup> Larik, J., *Worldly ambitions: foreign policy objectives in European constitutional law*, European University Institute, 2013, at p.195

<sup>275</sup> Judgment in *International Mail Spain*, C-162/06, EU:C:2007:681

The Court started by pointing out that the directive makes explicit reference to the Treaty provisions. Then it proceeds to refer to the 'objective' of the directive's provisions, referring to article 86.2 of the Treaty as support for the interpretation: the gradual opening of the postal services sector to competition cannot upset the financial balance or provoke hindrance to the universality of this service<sup>276</sup>. As such, the discretion of the Member States is limited by the objectives pursued, the interests of the Community so being protected. This seems to be a classic case of reading of secondary law provisions as shaped by primary law.

As in a principle based reasoning, the instrument of secondary legislation is used as expression for the primary law provisions. Moreover, it is the underlying principle or objective which points to the resolution of the matter referred to the Court. The similarities are undeniable here, with primary law dictating what the result ought to be, even in presence of written legal instruments which sometimes seem to point at a different resolution for the dispute. Ultimately, of course, this represents the corollary of the duty of consistent interpretation, in accordance with primary law. It is not hard to see how this can be easier to accept, in terms of legitimacy, than when the same process is undergone with the anchoring being based on a general principle of EU law. Indeed, whilst the latter may present vagueness and lack legal certainty in the eyes of the Member States, Treaty provisions possess the added value of written certainty and result directly and expressly from their will.

This leads us back to the previous considerations: why this interchangeability of concepts, if not in binding legal value, at least as grounding bases? As Lenaerts and Van Nuffel note, recognition of 'the law' as a source for Union law legitimizes the Court of Justice to have recourse to general principles so as to interpret and apply European Union law<sup>277</sup>. Often, general principles do indeed seem to be extracted from, or assimilated to, the values and objectives of the Union<sup>278</sup>. On other occasions, general principles have lent themselves to be transformed into objectives, so as to allow for the

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<sup>276</sup> *Ibid.*, paragraphs 33/34

<sup>277</sup> Lenaerts, K., and Van Nuffel, P., *European Union Law*, Sweet and Maxwell, 2011, at section 22.016

<sup>278</sup> See Larik, J., *Wordly Ambitions* (cit. supra), 195-206; see also Semmelmann, C., 'Legal Principles' (cit. supra), at p.323: 'legal principles are expressions of a European legal culture that includes norms that are unwritten and open-textured and that have their origin in the national legal systems but are ultimately shaped by the objectives of EU law'

legitimization of certain competences. This is mainly due to the more 'operative' character of the former, as noted by Esteban, who claims that 'values have a more indeterminate configuration, whereas legal principles possess a more defined structure which (...) makes them more suitable for the creation of legal rules through judicial adjudication'<sup>279</sup>.

Blumann makes a differentiation between the concept of objective and principle, noting that the first identifies domains of action and ends to achieve, serving as a legal basis for action, whilst the latter operates in the sphere of the said action, being intimately related to the notion of powers to be exercised<sup>280</sup>. He recognizes, however, that comparisons are inevitable, and that, at best, there seems to be a certain '*porosité des frontières*' between the two in EU law<sup>281</sup>. Rosas sustains that the values enshrined in article 2 TEU form 'the ideological basis for the more precise objectives set forth in article 3 TEU and the basic principles of the constitutional order enshrined in articles 4 and 5 TEU'<sup>282</sup>; Esteban notes that values and principles do in fact share key features, both serving as 'the foundation for a group of other norms'<sup>283</sup>.

Ultimately, the differences beyond the legal force appear to be blurred, and it is the relationship of synergy between the three concepts that has in much contributed to the harmonization of the system and integration of EU law. The Court has undoubtedly played a key role in this development, 'finding' a set of unwritten principles derived from this complex mixture of written sources, so as to bring coherence to the system<sup>284</sup>. General principles are perceived as embodying the very foundations of EC/EU law, the ideas behind its creation, while being dynamic enough to incorporate the changes and adapt to the evolution of the system<sup>285</sup>. The developments observed as regards to the scope of application of EU law are much entwined with the case-law using general

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<sup>279</sup> Esteban, M., *Values and Principles* (cit. supra), at p.39

<sup>280</sup> Blumann, C., Objectifs et Principes en droit communautaire, in *Le Droit de l'union en principes - Liber Amicorum Jean Raux*, p.39 ff, especially at p.39.

<sup>281</sup> *Ibid*, p.50.

<sup>282</sup> Rosas, A., and Armati, L., *EU Constitutional law* (cit. supra), at p.54

<sup>283</sup> Esteban, *Values and Principles* (cit. supra), at p.38/39

<sup>284</sup> *Ibid*, at p.56

<sup>285</sup> See Bengoetxea, J., 'Principia and Teloi', in Besson, S., and Levrat, N. (eds), *Les principes en droit européen - Principles in European Law*, LGDJ – Schulthess Editions Romandes, série Fondements du droit européen, Genève, Zurich, Bâle, 2011, 65-84, especially at p.67

principles, with this call to the underlying values. This comes as no surprise, being that the Court has characterized the Treaties as a 'constitutional charter'<sup>286</sup>; and constitutional orders are based on certain values.

Larik notes that, similarly to Member States' constitutional systems, objectives were not presented as an essential feature to the creation of the polity; however, they have been fortified throughout the years, in coexistence with constitutional principles, towards the 'finalité' praised by Pescatore<sup>287</sup>. Interestingly, the Lisbon Treaty seems to represent both a widening movement, and a 'shift': the fact that, for the first time in the Treaties, the values of the Union are presented before its objectives 'symbolizes a paradigm shift from a legal entity that, in the first place, exists to strive for certain goals to one which, above all, expounds what it stands for'<sup>288</sup>.

### 3.3.2 ... and Fundamental Freedoms

Fundamental freedoms are equally often equated with general principles of EU law. This is an interesting fact, bearing in mind especially the conception of four freedoms present, at the time of their enactment in Europe, on the other side of the world. Indeed, the 'four freedoms' proclaimed by Roosevelt in 1941 were very different from those envisaged as goals of the European Communities, in 1950<sup>289</sup>. Albeit maybe an indicator of the existence of a separate system of fundamental rights protection, this conceptualization is probably also a symptom of the need to stress the economic union goals pursued as main aim of the Communities. The common market would produce the unity envisaged after the shattering provoked by the two wars.

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<sup>286</sup> Opinion of the Court of 14 December 1991 on the Draft Agreement between the EC/EFTA: 'the EEC Treaty, albeit concluded in the form of an international agreement, none the less **constitutes the constitutional charter of a Community based on the rule of law**. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.' (emphasis added)

<sup>287</sup> See Larik, J., 'From Speciality To A Constitutional Sense Of Purpose: On The Changing Role Of The Objectives Of The European Union', *International and Comparative Law Quarterly*, September 2014, p.1-28, especially at p.14/16.

<sup>288</sup> *Ibid.*, at p.17

<sup>289</sup> Franklin Delano Roosevelt, 32nd President of the USA, 1941 State of the Union address - 'the "Four Freedoms" speech' (available at <http://www.let.rug.nl/usa/presidents/franklin-delano-roosevelt/state-of-the-union-1941.php>, last accessed 05.06.2015)

This can explain the qualification of the four fundamental freedoms as general principles. Indeed, they are values which are essential to the conception of the system, underlying all the initial norms of the Treaties. This has been expressed by Pescatore in the early years, when addressing one of the possible categories of principles: 'ceux qui sont propres au droit communautaire (...) quelques principes du droit matériel, comme ceux de libre circulation, de libre établissement...'.<sup>290</sup> It seems, indeed, that the four freedoms are here considered as one of the possible principles underlying the structure of EC law.

This was further underlined by the *Adbhu* case<sup>291</sup>, as well by Advocate General Maduro<sup>292</sup>. The Advocate General makes this remark in relation to article 30 of the EC Treaty, qualifying the freedoms therein enshrined as a general principle of Community law. It should be underlined that, in light of the functionalist approach stressed above, and the primordial objectives of the Communities, this qualification makes absolute sense. The freedoms were envisaged as free trade provisions, based on the GATT model, and, as such, they intended to protect internal market claims; article 30 EC is the perfect example of a free trade agreement provision. It seems that these provisions were designed to regulate market integration in its utmost economic sense, not as norms constitutional character. The interpretation of the Court, and the succession of rulings tackling issues which departed from the exercise of the freedoms, has made them into, if one can say it, items of the economic constitution. Can they be called general principles in the sense that constituted the essential values underlying the system created in Rome? Perhaps.

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<sup>290</sup> See Pescatore, P., 'Le Recours, dans la jurisprudence de la Cour de Justice' (cit. supra), as referred supra at 1.2, p.351.

<sup>291</sup> Judgment in *ADBHU*, 240/83, EU:C:1985:59, at paragraph 9: 'principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance. The above-mentioned provisions of the directive should therefore be reviewed in the light of those principles.' It should be noted, however, that 'the Court has not repeated this passage on freedom of goods as a general principle in other cases where the question of the Community being bound to the free movement rules arises': Mortelmans, K., The relationship between the Treaty rules and community measures for the establishment and functioning of the internal market - a concordance rule, *CMLRev* 39, 2002, 1303-1346, at p. 1313.

<sup>292</sup> Maduro, M., *We the Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing 1998, p.26.

In the *Wolff/Müller* case, on the other hand, a reference had been made to the Court concerning the interpretation of directive 96/71 on the conditions for posting workers in the framework of provision of services<sup>293</sup>. The questions raised related to responsibility as guarantor of the payment of the minimum wage in a situation of subcontracting for construction. The national legislation ought, in the Court's view, to ensure that 'workers posted have available to them adequate procedures in order actually to obtain minimum rates of pay'. In terms of compliance with the directive, however, the Court recognized that Member States have a margin of appreciation to determine the adequate procedures to be undertaken. However, it furthered, in employing such margin of appreciation, Member States are to observe the fundamental freedoms as guaranteed by the Treaty<sup>294</sup>. Here, it becomes equally apparent that the mode of operation present is similar to the mode deployed in the principled reasoning of the Court, that is, whilst acknowledging the application of the legislation, and even the leeway left to the Member States for compliance, there are overarching principles which should guide such action. In this case, the freedom to provide services is to be secured.

Nowadays, albeit the concepts seem to be distinct, we see them being pitted against each other, whichever name one decides to use. Indeed, the swift change from protection of mainly market values to a progressive integration of fundamental rights protection (which, in reality, derives from the consolidation of the freedoms) has relegated freedoms to a more contracted role, connected to this paradigm change between the pursuit of the objectives, which seems now to be in a second plane in relation to the values to be protected and promoted. Mortelmans notes that 'fundamental rights (...) have a more general scope than fundamental freedoms, which in fact are limited to the realization of the internal market and which therefore have a different and more limited objective'<sup>295</sup> - and it is well known that fundamental rights are general principles of EU law expressly recognized as such.

Again, it is a matter of distinction between concepts which interpenetrate in the layers composing EU law. This blurriness is again proof of the fact that taking general

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<sup>293</sup> Judgment in *Wolff & Müller*, C-60/03, EU:C:2004:610

<sup>294</sup> *Ibid.*, at paragraphs 29/31

<sup>295</sup> Mortelmans, K., 'The relationship between' (cit. supra), at p.1314

principles as a concept and category per se, attending to etymological and origin elements, fails flat of enquiring into the deeper implications of their use for EU law and its development.

### 3.4 What Role for General Principles? – with a little help from legal theory

Until now, the structural dynamics of EU law have been considered in relation to the finalité they are to fulfill and other concepts, which intertwine with general principles of EU law. This has presented principles in their facet of underlying values. However, they are expressly used by the Court in its rulings, which raises questions about the practical applicability of such vague concepts. It was defended above that general principles of EU law fill their purpose in combination with other norms. But how is that done? Do they have a binary structure, which allows for a decisive two-step application? Or are they rather vague ideas inflating the reasoning? The difference between principles and rules proposed by legal theorists may be a useful point of departure in the analysis of concrete cases of the Court.

#### *3.4.1 Principles or Rules? Principles as Rules?*

Principles and rules are not the same and, as such, do not lend themselves to the same type of application, nor do they operate in a similar way. This is what legal theory tells us. My work, however, is based on the premise that, in European Union law, there is a deeper degree of assimilation of these two concepts and, as such, no stark contrast can be found in many of the rulings of the Court of Justice<sup>296</sup>.

In legal theory, principles are traditionally opposed to rules and qualified as structurally distinct concepts, with different normative functions. Many authors have descanted on this subject, for what it is worth recalling some of the basic conceptions put forward as regards this dichotomy. Pierre Pescatore borrowed a classification used by Esser, and Dworkin's is also very similar: rules and principles have completely different logical

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<sup>296</sup> See the reference in Ellis, E., and Watson, P., *EU Anti-Discrimination Law* (cit. supra), at p.103: 'therefore, in order to attain the status of a general principle of union law, a **particular principle or rule** must be common to the legal systems of the member states and be 'legally perfect' and capable of being applied by the courts as such.' (emphasis added). It seems patent that the differentiation between principles and rules is not believed to be as clear cut as would be expected.

structures, being strictly separated elements. This distinction, according to Dworkin, is based on the 'all-or-nothing' character of rules<sup>297</sup>.

Alexy calls principles a type of 'optimization requirements', stating that they are especially distinct from rules when cases of conflict are in question: 'principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities'<sup>298</sup>. Indeed, whilst rules, in his view, will have to be invalidated so that one of them can prevail, in the case of conflicting principles, a balancing exercise takes place. This means that one of the principles must be outweighed - albeit it is not deemed invalid per se, nor a priori inferior to the principle to which it gives leeway. As such, 'principles require that something be realized to the greatest extent (...). They are thus not definitive but only prima facie requirements. (...) Principles represent reasons that can be displaced by other reasons'<sup>299</sup>. He does affirm, however, that principles can be 'reasons for decisions and concrete ought judgments'<sup>300</sup>, recognizing that both principles and rules are types of norms<sup>301</sup>.

Guastini presents rules as conditional statements connecting a legal consequence to a category of facts; principles, he says, are more complex and have two essential characteristics: a fundamental character and a certain amount of uncertainty<sup>302</sup>. Beck, moreover, states that while 'a rule is more specific and designed to deal with particular situations, a principle may be described as a general rule or pervasive standard which applies across a field of law'<sup>303</sup>.

Principles are, in conclusion, usually labelled as having a fundamental character and a certain degree of vagueness. They represent a system's axiological bases and their

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<sup>297</sup> Dworkin adopted an approach very similar to the one portrayed by Esser: see Josef Esser, *Grundsatz und Norm in der Richterlichen Fortbildung des Privatrechts*, 1956 ('Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts by Josef Esser' - Review by: Friedmann, Wolfgang G., *Columbia Law Review*, Vol. 57, No. 3 (Mar., 1957), pp. 449-451, and Dworkin, R., *Taking Rights seriously*, Harvard University Press, 1978.

<sup>298</sup> Alexy, R., *A Theory of Constitutional Rights* (translated by J. Rivers), OUP, 2002, p.47 and ff

<sup>299</sup> *Ibid*, p.57

<sup>300</sup> *Ibid*, p.60

<sup>301</sup> Alexy, R., 'On the Structure of Legal Principles', *Ratio Juris* 13: 294-304, at p.295

<sup>302</sup> Guastini, R., *La sintassi del diritto*, G. Giappichelli, Torino, 2011, at p1

<sup>303</sup> According to Beck, G., *The Legal Reasoning* (cit. supra) at p. 194: 'a rule is more specific and designed to deal with particular situations, a principle may be described as a general rule or pervasive standard which applies across a field of law'



generic and non-absolute character allows them to be concretized in various ways. Rules, on the other hand, are conditional statements which connect a certain legal consequence to categories of facts, due to their binary structure. Pierre Pescatore's view is one drawn from a mix of these theories; however, he also defends the existence of a balancing exercise to be struck by the Court whenever two conflicting principles are triggered in the ruling.

In EU law, however, this distinction is not as clear cut. The profusion of legal instruments dictates the existence of both written and unwritten principles, as well as rules with a more vague character, blurring the division. Many of the unwritten principles have moreover become written in the case-law of the Court, even in the cases such evolution has not transpired into the Treaty.

### *3.4.2 (Un)Balancing?*

Both for Esser and Dworkin, principles and rules have different logical structures; Alexy, moreover, conceives principles as imperatives that can be fulfilled to varying degrees, whilst rules are definitive, *ie*, can be fulfilled or not. For all these conceptions, principles seem to naturally involve balancing and a contingent relation of precedence whenever conflict is present.

But what if principles and rules are not as different? Jakab sustains that principles should not be conceived as structurally different from rules, but rather as rules of special importance<sup>304</sup>. Rules and principles would thus have the same type of normativity, with the latter's scope being simply more uncertain because of the vague expressions used in the linguistic form. As such, no real balancing occurs when principles are applied in legal reasoning: the relevant principles are interpreted in such a way that the case in question will only fall within the scope of one. The decision then becomes one on how to interpret a certain rule, which deserved to be labelled as principle due to its particular importance.

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<sup>304</sup> Jakab, A., 'Concept and Function of Principles. A critique of Robert Alexy', in *On The Nature Of Legal Principles* (Arsp Beiheft No. 119) August 2009, pp. 145-159, Martin Borowski, ed., Stuttgart: Steiner, 2009. Available at SSRN: <http://ssrn.com/abstract=1918421> or <http://dx.doi.org/10.2139/ssrn.1918421>

Could this be applicable to the rulings of the Court of Justice? The assessment of a case would, following this approach, be made in relation to the content of the principle in question: it is not prohibited to restrict the content of a principle, but it is rather prohibited to 'breach' that content, that is, to restrict it without having a justification to do so<sup>305</sup>.

General principles, as structural decisions, become very important general rules, due to their value. The use of the designation 'principles' expresses this importance, whether envisaged by the legislator or by the judiciary. From the moment they become written, the differences fade. The discretion is still greater in relation to principles; however, that same discretion is necessarily restricted from the moment the principle in question is held as binding by the judiciary<sup>306</sup>.

The current state of affairs in what concerns the EU legal system is marked by a proliferation of rules and principles which are sustained by the judiciary, be it the CJEU or national courts as its representatives when applying EU law. The crystallization of the general principles in the area of fundamental rights' protection in the Charter of Fundamental Rights, as well as its primary law rank<sup>307</sup>, are proof of exactly that phenomenon. The *sui generis* EU system is consequently composed of both written and unwritten rules and principles. Principles necessarily influence the reading of all instruments of written EU law and the Court, as Bengoetxea notes, applies them in order to deliver concrete results and with a binding effect<sup>308</sup>.

It seems that in certain cases the decision is made with reference to an interpretation of a certain rule so as to give it precedence over others, rather than configuring an exercise of balancing different principles. The principle applied represents a particularly

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<sup>305</sup> *Ibid.*, at p.6: determining the scope of the 'prohibition of breach' at stake.

<sup>306</sup> The latter statement necessarily evokes the use of precedent. It is debatable whether this sort of legal instrument is applied in EU law or not, but it seems possible. See Beck, G., *The Legal Reasoning* (cit. supra), at p. 219/220 and 234/250.

<sup>307</sup> Attributed by the Treaty of Lisbon, which entered into force on December 1<sup>st</sup>, 2009

<sup>308</sup> Bengoetxea, J., Case note on *Audiolux* (cit. supra), at p.1185: 'for a principle to be a truly general principle of EU law, it would need to be capable of delivering some concrete result; (...) it appears that direct, or binding effect becomes a requisite or an indication of the well-defined nature of the general principle of EU law concerned, something that, at least apparently, goes against classic understanding on the issue: being general, principles cannot deliver concrete apodosis or legal conclusions. However, the Court considers principles as binding and capable of yielding legal results or binding obligations.'

important rule, hence its designation; however, the general principle is applied so as to reach a specifically envisaged result. A look at some specific rulings can allow for a closer understanding of this, in order to question whether the mode of operation of principles in the Court's rulings is closer to that of rules.

*Omega* can be used as an example of how a conflict of principles is resolved by giving precedence to a certain principle in detriment of other, rather than from a strict balancing operation. In this ruling the Court identified two conflicting principles: that of freedom to provide services and that of human dignity. Jakab argues that, especially in relation to fundamental rights, the provisions do not concern the prohibition of fundamental rights' restrictions, but rather prohibitions of their breach (a restriction to the content of the right which is not justified). As such, the balancing of the principles in question is a matter of restrictive interpretation of one principle in light of the other, and not a balancing exercise. This is precisely what happens in the ruling in question. Although the Court starts by ascertaining the importance of the fundamental freedom, immediately afterwards, in paragraph 31, there is a shift to enhance the discretion enjoyed by Member States in relation to the measures which can be used as a derogation. In fact, the Court proceeds, this general principle of EU law does not require a specific status to be recognized in a Member State so that its protection is guaranteed<sup>309</sup>.

At this point in the ruling it is clear that a certain precedence is envisaged and pre-established by the Court when deciding which principle is to be applied. This is further proved in paragraph 37, where the Court quickly dismisses the necessity for the principle to be fruit of a 'conception shared by all the Member States' as regards its protection (similarly to what happens when it decided to apply the general principle of non-discrimination on grounds of age in *Mangold*, something recognized merely by two Member States). The CJEU uses here a reading of human dignity as a general principle of EU law, stemming from its teleological reading of the Union's foundations, so as to be able to apply the principle directly. The sort of approach taken presents a principle

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<sup>309</sup>See paragraph 34 of the ruling in *Omega*, cit. supra: There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

which might initially represent a certain general value, but then turns it into a rule which has concrete repercussions. It seems that 'abstract principles are thus transformed by the Court into a specific rule that is to be observed and enforced before national courts'<sup>310</sup>.

This type of a priori choice seems to be moreover patent in *Belgacom*<sup>311</sup>. The Court is therein faced with the clash between the principle of legal certainty and the principle of equal treatment, in its specific expressions of non-discrimination and transparency. This case concerned agreements concluded for the transfer of broadcasting service activities and television subscription contracts, without a call for tenders, between Belgacom and other inter-municipal associations. In paragraph 40, the Court is quite clear in showing an a priori choice of principle. Indeed, there seems to be no balancing operated in light of the particular circumstances of the case; the Court instead blocks immediately the application of the principle of legal certainty when faced with the principle of equal treatment, stating that, albeit the 'principle of legal certainty, which is a general principle of European Union law, provides ample justification for observance of the legal effects of an agreement (...) that principle may not be relied on to give an agreement an extended scope which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom. It is of no import in that regard that that extended scope may offer a suitable solution for putting an end to a dispute which has arisen between the parties concerned, for reasons outside their control, as to the scope of the agreement by which they are bound'.

It is apparent from this excerpt of the case that, when confronted with the principle of equal treatment, the principle of legal certainty is bound to fall. There is no indication, in the reasoning, of a balancing of the principles; on the contrary, it is quite clear that the general principle of equality, even in its specific expressions, will prevail. In this

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<sup>310</sup> Van Gerven, W., 'About Rules and Principles, Codification and Legislation, Harmonization and Convergence, and Education in the Area of Contract Law', in Arnulf, Eeckhout and Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, 2008, p.400-414, at p.404: Francis Jacobs was right to say, as stated above, that European (like other) general principles 'exist only at the level of generality so broad as to be of little practical use', and that 'in practice the Court has had itself to fashion [them]'. (...) Those principles were used to allow claims for compensation to be brought, as a matter of Community law, before a national court by a markedly weaker contracting party against the other contracting party for injury caused to it as a result of a violation by both contracting parties of EC competition rules. Abstract principles are thus transformed by the Court into a specific rule that is to be observed and enforced by national courts.'

<sup>311</sup> Judgment in *Belgacom*, C-221/12, EU:C:2013:736

light, it seems that, in the EU legal system, principles behave more like concrete rules. In fact, in shaping the interpretation of the Treaty and secondary legislation, they tend to evolve and become more and more a rule-type of instrument<sup>312</sup>.

By using an anchorage basis in certain legal instruments, the Court transforms what would be abstract principles into rules with concrete modes of operation.

### 3.5 Modes of Operation

Until this point, this work has been analyzing the concept of general principle and the impact its use as a reasoning tool has had in the development of the European Union. Albeit there seems to be some consensus on the functions general principles exert as legal sources, the same is not true when it comes to the categories of principles proposed by the doctrine, and especially as regards the terminology used by the case-law, legislature and academic analyses. In fact, as was shown, even the use of different languages in the EU and the translations of the cases may become a problem on the understanding of what can be referred to as a general principle of EU law. The lack of coherence stemming from the case law equally undermines the efforts to come to a definition.

In face of these difficulties, and the existence of other concepts that are used with such a degree of entwinement that it becomes difficult to distinguish them from one another, my work purports to shift the focus from the categorization and definition stance to an operative and more dynamic look at these tools. As such, instead of looking at specific general principles and the influence they have had, when individualized, in the case law of the court, I have opted for focusing on the modes of operation of these tools in the case law of the court. By **mode of operation** I am referring to **the interaction of norms, as a result of which one deeply affects the interpretation of the other**. This

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<sup>312</sup> See Rosas, A., and Armati, L, *EU Constitutional Law* (cit. supra), at p.178: 'the distinction sometimes made in legal theory between 'rules' and 'principles', may be difficult, if not impossible, to uphold, especially at an abstract level. In any event, the distinction does not correspond to the distinction between general principles of Union law and other norms of primary or secondary Union law'. On an international law perspective, the same phenomenon seems to be observable. See Voigt, C., 'The Role of General Principles' (cit. supra), at p.12: 'general principles are complementary to Treaty law and a supplement to it. But the role of general principles also goes beyond this. General principles can guide law-makers and shape the content of Treaty law. Thereby, principles can evolve into conventional rules.'

is possible, as referred above, with regard to hierarchical relationships - but not only. The legal techniques the Court has used to make general principles applicable in certain cases are varied and assume different forms. Often, they will also be deeply entwined with the functions attributed to general principles<sup>313</sup>.

The following table purports to expose the modes of operation which I have isolated through case law analysis and their potential effects. This is the structure I have followed in my approach to the topic, which dictates that the principles are not considered in their facet of freestanding norms, but rather, and strictly, in combination with other sources. This table thus presents an attempt to make a correspondence between the functions usually attributed to general principles of EU law and the modes in which they operate in the case law, especially in interaction with other (written) legal sources, as well as the effects produced therewith.

Departing from the functions, I have isolated three different possible interactions<sup>314</sup>, one within their role as grounds for judicial review, and two other anchored on the hermeneutical function. In the first one, the focus is on the technique used to assess the validity or conformity of the norms under review. This is done in relation to EU secondary law, where general principles represent the standard of primary law against which the legality of these is assessed; and national law, in order to determine the compatibility of national law with EU law. The validity assessment is guided, at EU level, by the Rule of Law, whilst in relation to Member State law it represents a consequence of primacy.

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<sup>313</sup> A caveat: in addition to the modes of operation explored throughout this work, many other legal techniques are deployed in parallel, and sometimes as leeway to, general principles. An example which is sometimes confused itself with a general principle of EU law is the duty of consistent interpretation or *intérpretation conforme* – which, in reality, is an end to be achieved to ensure effectiveness and consistency in EU law, many times also by recurring to the application of a general principle. Often it is called a 'general principle of interpretation in conformity', since its aim is to ensure that other legal instruments, be it national law or EU secondary law, are interpreted in a manner which is consistent with primary EU law. As such, this technique ought to be seen as underlying the system, as it became visible already in the previous chapter and will be throughout the examples set out in the next chapters.

<sup>314</sup> Without claiming that these are the only possible interactions of general principles of EU law with other legal sources. In view of the complexity of the topic, it seems impossible to contain general principles of EU law in whichever closed categorization.

In the part, the interpretive or hermeneutical look at general principles is rather focused on the substance or scope of the norms at stake, not their validity. As such, the impact will be different here from the one achieved in the first part. It is precisely within this latter function that the analysis of modes of operation of general principles in combination with other legal sources has guided my findings.

It should be noted that gap-filling function has been omitted, since I believe that, ultimately, it can be traced back to the hermeneutical function. I find it especially so due to doubts raised on whether one can speak of gap filling when to real 'gaps' seem to exist (this will obviously depend on the definition of gap, but I am addressing here the inexistence of real lacunae in the system).





<b>Function of GP</b>	<b>Impact</b>	<b>Where is the impact felt?</b>	<b>How does it operate?</b>	<b>Result</b>	<b>What is it really?</b>
Grounds for judicial review	Controlling the validity of secondary EU law	Throughout EU law/national law	GP as primary law for legality review of secondary EU law	<i>interprétation conforme</i> or conflicting provision is annulled/set aside	Rule of law
	Controlling the compatibility of national law		GP as primary law for compatibility assessment of national law		
Interpretive	Altering the scope of application of EU law	<i>Ratione materiae</i> Or <i>Ratione personae</i>	GP as tools to deviate from the 'provision' at stake	scope of EU law is: extended or restricted	Combined application of primary (general principle) and secondary law (written regime)
	Regulating national authorities' acts in implementation/interpretation of EU law	'EU Civil law' Or 'EU Criminal Law'	GP as indicators of what to 'retain' from the secondary law instrument	scope of EU law is restricted	'Incorporation' of national law principles into EU law (bottom-up and top-down application)

This table represents the different types of interactions of general principles of EU law and other legal sources as structured throughout the next chapters. I shall not deal with the validity control, since much has been written about it. Instead, I will focus on the other modes of operation identified in relation to the interpretive function. The first chapter, chapter IV, will deal with what could be considered the more 'traditional' type of mode of operation of general principles of EU law. It will deal with their use in reading written instruments, either of primary or secondary law level, with the interaction resulting in an expansion or contraction of the scope of application *ratione materiae* of EU law.

Chapter V will then turn to the same type of operation, but this time with impact on the scope of application *ratione personae*. Here lie the most controversial cases on the potential horizontal direct effect of directives and/or general principles of EU law.

Finally, Chapter VI will deal with a different type of interaction: while the first two were mostly dual relationships, which dealt with the general principle, on the one hand, and the written source of EU law (even if national implementing law is at stake), on the other, the relationships analyzed in this chapter, especially in what comes to private law, will have a strong component of national law. This means that national laws and legal concepts assume a much less muted role here than in the other two modes of operation.

The areas chosen are examples of areas where EU law has been expanding its reach, although many doubts remain with regard to the legitimacy of these claims. Here, in the progressive creation and development of both an European private law and an European criminal law, general principles are particularly visible in the way they regulate the way national courts and authorities are to read and interpret EU law - but by restricting the written scope of the instrument at hand in favour of general principles of national origin. Whereas general principles of EU law are generally inspired by national constitutional laws and traditions, here the connection seems to be stronger, with the Court using principles directly from the legal systems of Member States and somewhat provoking their europeanization, in what seems to be an attempt towards harmonization.

## Conclusion

The aim of this chapter was to serve as an opening for the presentation of the identified modes of operation of general principles of EU law when combined with other legal sources. The framework of analysis is thereby launched, showing that the EU legal system should not be seen as a static and rigid hierarchic complex of rules, but rather, in fact, a product of different combinations. These combinations take place not only at the level of legal sources available, but also at the level of the methods of interpretation used by the judiciary.

This endows EU law with a set of dynamics which are not easy to grasp, especially in view of the evolution the system has suffered since its inception. Concepts such as fundamental freedoms and values and objectives of EU law have been juggled with one another, in an attempt to build a strong internal market and, more recently, a space of fundamental rights aimed at individuals, who are not seen as mere production factors anymore.

General principles have played an undoubtedly important role in these developments. And even nowadays, when the amount of other legal sources available seems profuse, covering all areas of influence of EU law, they are still being used. That is precisely the premise from which this work departs: that the role of general principles has also adapted throughout the evolution of the system. As such, the importance of these tools gains a special place in the interpretation of the scope of EU law when they are applied in interaction, or attached to, other legal sources.



## CHAPTER IV: GENERAL PRINCIPLES AND OTHER LEGAL SOURCES: IMPACT ON THE SCOPE OF APPLICATION *RATIONE MATERIAE*

### Foreword

General principles are used, in EU law, as strong interpretation tools, sometimes providing for interpretations that would not, at first glance, be foreseen. This might lead to a type of ‘creative’ interpretation of EU law, one that can be shaped with an extremely thin connection to the legislative instrument in question, be it a directive or a Regulation. Indeed, the Court has done so in certain cases and, by anchoring the reasoning on a general principle of EU law, has reached conclusions that seemed very unlikely in light of the wording, hence extrapolating the scope defined in the instrument<sup>315</sup>. This type of interpretation, guided by a teleological approach, can have several configurations, impacting on the scope of application of EU law in varied ways.

General principles have an important role to play as regards the interpenetration of different norms and levels of EU law. They have been used, in this respect, in order to render EU law applicable in areas not meant to be covered by it, as such contributing ‘towards the pervasive effect of EU law within national legal systems’<sup>316</sup>. Indeed, this strong interpretive facet seems to have been overlooked in the light of their integrative function in case of lacunae; the first, however, bears a critical impact in the definition of the ways EU law is applied<sup>317</sup>.

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<sup>315</sup> See, Hancox, E., *The Scope of Fundamental Rights: An Analytical Approach*, European University Institute, 2012, at p.10: ‘to be applicable they [general principles] must be ‘attached’ in some way to EU law. Hence, the outer limits of EU law determine their boundaries. The need to define clearly the connecting factor between EU law and national law and the rationale behind it is thus of particular importance in relation to general principle.’

<sup>316</sup> Lenaerts, K., ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’ (2010) 33 *Fordham International Law Journal*, 1338

<sup>317</sup> Verrilli refers to a double function of general principles: an integrative one, so as to suppress lacunae in certain areas, but also, and highlighted, an interpretative one – general principles are used to define the scope of EU norms where a literal interpretation does not provide the envisaged solution. Verrilli, A., *Diritto dell’Unione europea aspetti istituzionali e politiche comuni*, Napoli: Esselibri Simone (2007), 15 ed, at p.141

## 4.1 Directives and regulations applied beyond their scope by means of a general principle of EU law

The mode of operation analyzed in this chapter touches upon different areas of EU law, as the reading will reflect. The different sectors will be looked at not in function of the use of a specific general principle, but rather based upon the mode of operation chosen by the Court to make such principles applicable by reading them jointly, or in the light of, a certain instrument of written EU law. This examination intends to show that, in certain cases, the principle based reasoning of the Court will have an impact on the scope of application of EU law which will reflect on the subject matter envisaged. Hence, situations which would not be considered to be covered *a priori* will be perceived as nonetheless encompassed by EU law.

The case law analysed below shows that general principles are still exceedingly being used as tools for the interpretation of written instruments. However, in both general cases or in more specific areas, the interpretation reaches sometimes a level of creative reading which necessarily detaches the application of the instruments from that of the principle as such. This can be traced as far back as the *Casagrande* case which is perhaps the best starting point in understanding the structural impact general principles can have and have achieved within the application of EU law, especially in what comes to the division of powers and the exercise of competences in concordance with EU law<sup>318</sup>.

In very brief terms, Mr. Casagrande, an Italian national son of emigrants in Germany, had lived since his birth in Munich. After his father passed away, his mother applied for a monthly grant which was provided to families with low income by Bavarian law, so as to guarantee that Mr. Casagrande could stay in school. The application was denied, however, since the municipality sustained that only German nationals would be eligible. Mr. Casagrande contested the decision, alleging that the law represented discriminatory treatment and was therefore incompatible with Regulation No. 1612/68, for which it should be declared void. Indeed, article no. 12 of the Regulation stated that 'the children of a national of a Member State who is or has been employed in the territory of another

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<sup>318</sup> Judgment in *Casagrande*, 9/74, EU:C:1974:74

Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'<sup>319</sup>. The Staatsanwaltschaft of the Bayerisches Verwaltungsgericht München alleged that the right to be admitted to educational courses under the same conditions as nationals was guaranteed for children of workers of other Member States; however, this right did not entail a right to receive individual educational grants<sup>320</sup>. Article 7 of the Regulation was considered not to be called into question, since 'the prohibition on discrimination contained in this provision relates only to employment and is for the benefit of the workers themselves, so that advantages intended for members of their family are excluded from [its] scope.'<sup>321</sup>

The Opinion of Advocate-General Warner was very bold, suggesting that the Court should rule favourably to the plaintiff. He proposed that a 'wider' interpretation was to be adopted, albeit the European Community, at the time, did not have 'a power to legislate about educational matters as such': it had the 'power to legislate for the freedom of movement of workers, which includes power to legislate about the education of their children'<sup>322</sup>. He defended furthermore that article 12 of the Regulation should be interpreted as meaning that all educational advantages were to be applied to children of nationals of other Member States, provided they resided in the correspondent territory<sup>323</sup>, inspired by the 'spirit of Regulation No. 1612/68'<sup>324</sup>.

The Court followed this Opinion closely. It began by stating that, although it could not pronounce itself on national legislation, it was, however, competent to interpret article 12 of the Regulation and consider whether educational grants were to be brought within the scope of the article<sup>325</sup>. It then proposed a reading of the said article in the light of the

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<sup>319</sup> Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on free movement for workers within the Community

<sup>320</sup> See *Casagrande*, cit. supra, Observations II.1, p. 776

<sup>321</sup> Article 7 of Regulation No. 1612/68, cit. supra, reads as follows:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work (...) 3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centers.'

<sup>322</sup> Opinion of Advocate General Warner in *Casagrande*, cit., at p. 783

<sup>323</sup> *Ibid.*, at Conclusion, p. 785

<sup>324</sup> *Ibid.*, at p. 784

<sup>325</sup> Ruling in *Casagrande*, cit. supra, at paragraph 5

recitals of the Regulation, considering that the fifth recital's reference to the 'elimination of obstacles to the mobility of workers' and effective integration of their family in the host country's society necessarily meant that children of migrant workers should be given the exact same conditions in what relates to access to educational grants<sup>326</sup>. It hence concluded that 'article 12 refers not only to rules relating to admission but also to general measures intended to facilitate educational attendance'<sup>327</sup>. Subsequently, the Court addressed the statement made by the Staatsanwaltschaft that both educational policy and grants were matters outside the scope of EC law, since they pertained to Member States' competences. Here the Court truly takes a bold approach, which clearly stirs up the definition of powers as regards their existence and exercise<sup>328</sup> - paragraph 12 of the ruling reads as follows:

*'Although educational and training policy is not as such intended in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such nature as to affect the measures taken in the execution of a policy such as that of education and training'*

As Weiler notes, this sole paragraph has a deeper significance, for it enlarges 'the language from Community institutions to the Community as a whole and hence from secondary legislation to the entire Treaty'<sup>329</sup>. But the Court went further, stating, in relation to article 12 of the Regulation, that 'although the determination of the conditions referred to there is a matter for the authorities competent under national law,

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<sup>326</sup> *Ibid.*, at paragraph 6/7

<sup>327</sup> *Ibid.*, at paragraph 9

<sup>328</sup> See Dehousse, R., 'Misfits: EU Law and the Evolution of European Governance', in Joerges, C., and Dehousse, R., *Good Governance* (cit, supra), at p. 60: 'true, at the time, education policy as such was not one of the Community policies covered by the treaty. Was that sufficient to invalidate the Regulation? No, responded the Court, as even if education was not a community competence, 'it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training'. The ECJ thus rejected the idea that the Member States could have reserved competences; namely, areas in which the Community would be completely barred from acting. (...) called upon to choose between the objectives of the measure in question and the defence of Member State prerogatives, the Court, in a remarkable example of teleological reasoning, ruled that the former was more important than the latter.'

<sup>329</sup> Weiler, J. H. H., *The Transformation of Europe*, *Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law. (Jun., 1991), pp. 2403-2483, at p.2440



they must however be applied without discrimination (...)'<sup>330</sup>. This is so since Regulations are directly effective, thus the source from where the conditions of application are derived 'is irrelevant'<sup>331</sup>. Lenaerts remarked that, although the previous lack of provisions on the matter 'should normally have meant that the Community was not to touch educational policy (or individual aspects of it)<sup>332</sup>, this did not deter the Community from exercising its powers whenever education was at stake in connection with other aspects regulated by EC law<sup>333</sup>. Regulation No. 1612/68 was thus interpreted by the Court in light of the general principle of equality and non-discrimination. Although the national court sustained that such prohibition of discrimination, as enshrined in the provisions of the regulation, related merely to employment and workers' personal benefits, the Court understood that such limitation was not in respect of the said principle. This resulted in the accordance of a much wider meaning to the provisions at stake, allowing them to encompass a category of people which would not fall under their scope under a literal or historical interpretation. This case can be considered to establish a first example of this mode of operation, with the Court defending the possibility for action in an extension of the scope of application *ratione materiae*.

But the examples of this mode of operation are not few. In *Impact*<sup>334</sup>, the provisions of a directive and its respective framework agreement were deemed to apply to situations that seemed, at first sight, to be excluded. The reference was brought by an Irish trade union, representing civil servants, against government departments which employed the latter concerning pay and pension conditions of fixed-term workers, relying on clauses of the framework agreement<sup>335</sup> annexed to directive 1999/70/EC. Two different principles were at stake here: the principle of effective judicial protection, regarding access to specialized national courts, and the principle of non-discrimination, relating to employment conditions. As regards effective judicial protection, the Court stated that it

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<sup>330</sup> *Casagrande*, at paragraph 14

<sup>331</sup> *Ibid.*, at paragraph 15

<sup>332</sup> Lenaerts, K., 'Education in European Community after 'Maastricht'', (31) *CMLRev* 1994, at p. 9

<sup>333</sup> *Ibid.*, at p. 10: "the reluctance to take legislative action in respect of matters affecting educational policy directly does not extend to the exercise of powers conferred on the Community in respect of other matters affecting educational policy indirectly"

<sup>334</sup> Judgment in *Impact*, C-268/06, EU:C:2008:223

<sup>335</sup> Framework Agreement of the 18<sup>th</sup> March, 1999

configures a general principle of Community law<sup>336</sup>. As such, although neither the directive nor the implementing provisions designated the national courts having jurisdiction over matters covered during the referred period (that between the implementation of the directive and the entry in to force of the implementing national provisions), the Court considered that, even in the absence of express powers, specialized courts should be available for individuals wanting to bring an action. Doubling the competent courts depending on the period of reference would involve an immense burden for the workers and hence be contrary to the general principle of effective judicial protection. And even though it leaves the final choice to the Member State, the CJEU reminds it of the indirect effect of EU law – when interpreting national law in light of the directive, it is bound by the general principle<sup>337</sup>.

The Court then turned to the issue of whether the concept of ‘employment conditions’, embedded on Clause 4 of the framework agreement, could include remuneration and pensions<sup>338</sup>. Whilst in previous case-law the Court had clearly stated that working conditions cannot encompass pay<sup>339</sup>, here it stated that ‘excluding from the term ‘employment conditions’ for the purposes of that clause financial conditions such as those relating to remuneration and pensions, effectively reduces – contrary to the objective attributed to that clause – the scope of the protection against discrimination for the workers concerned by introducing a distinction based on the nature of the employment conditions, which the wording of that clause does not in any way suggest’<sup>340</sup>. It furthermore added that, even if before it was considered appropriate to exclude determination of the level of wages from harmonisation, this reasoning ‘cannot however be extended to any question involving any sort of link with pay’<sup>341</sup>. Moreover, although this question fell outside the competence of the Community legislature, the exercise of the competence by national authorities was bound by the general principle of non-discrimination.

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<sup>336</sup>*Impact*, at paragraph 43

<sup>337</sup>*Ibid.*, at paragraphs 55/56

<sup>338</sup>*Ibid.*, at paragraph 93

<sup>339</sup> Judgment in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 24; *Wippel*, C-313/02, EU:C:2004:607, paragraphs 29 to 33; and *McKenna*, C-191/03, EU:C:2005:513, paragraph 30 (all referred to in the submissions of Ireland and the United Kingdom – see paragraph 117 of the ruling)

<sup>340</sup>*Impact*, at paragraph 115

<sup>341</sup>*Ibid.*, at paragraph 125

It is quite patent in this case that the interpretation given by the Court is strongly shaped by the reading of the general principles as given expression in the directive and framework agreement. The use of both general principles allowed for the provisions in question to be applied to something which was, at first sight, excluded from their scope and hence rendering them applicable (or at least urging the national court to read national provisions in conformity, giving rise to indirect effect). The general principle was extracted from the directive's objective, triggered by the latter's provisions; however, the principle stands independently. It needs a 'trigger' so as to be invoked, but past that moment, it is applied as such, although the application is shaped by the written norms.

Such use of general principles as 'tools' for an 'extensive' or creative interpretation of directives is also visible in cases like *Del Cerro Alonso*, *DEB* or *Chatzi*<sup>342</sup>.

*Del Cerro Alonso* concerned the interpretation of the same framework agreement and directive at stake in *Impact*, relating to fixed-term workers and economic benefits arising from the length of service. Ms. Del Cerro Alonso claimed the existence of discrimination between temporary and permanent staff in the public health service. The Court underlined the principle of equal treatment and non-discrimination as one of the general principles of Community law, before stating that the directive provisions were of general application since they enshrined 'rules of Community social law of particular importance'<sup>343</sup>. It furthermore added that the principle of non-discrimination, as 'a principle of Community social law', was not to be interpreted restrictively<sup>344</sup>. It is apparent that the scope of application of the directive is determined by the general principle of non-discrimination, in spite of the wording used being that of 'principle of Community social law', rather than general principle of EU law.

This approach is very similar to the one proposed in *DEB*, where the raised question was whether the principle of effective judicial protection requires legal aid to be granted to legal persons which cannot make an advance payment in respect of costs before the

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<sup>342</sup> Judgments in *Del Cerro Alonso*, C-307/05, EU:C:2007:509, *DEB*, C-279/09, EU:C:2010:811, and *Chatzi*, cit. supra.

<sup>343</sup> *Del Cerro Alonso*, cit. supra, at paragraph 27

<sup>344</sup> *Ibid.*, at paragraph 38

court, in the context of a procedure for pursuing a claim seeking to establish State liability under the provisions of directive 2003/8/EC<sup>345</sup>. The CJEU starts by reminding that the principle at stake ‘is a general principle of EU law stemming from the constitutional traditions common to the Member States’<sup>346</sup>, which is not only enshrined in the European Convention on Human Rights, but also in the Charter of Fundamental Rights of the EU. Appealing to all those sources<sup>347</sup>, the Court stated that the fact that the directive did not make any reference to the provision for legal aid to be granted to legal persons could not lead to the conclusion that they were excluded from its scope. Similarly, the principle of effective judicial protection should be interpreted as allowing for such possibility<sup>348</sup>. Also here it becomes clear that the scope of application of the directive – its ‘large’ applicability – was determined by the principle, proving that general principles serve as tools for the expansion of the scope of application of EU law.

*Chatzi* provides a slightly different example, since the final solution is not one of direct application of the principle; however, a similar type of operation is used in the reasoning of the CJEU. In this reference, anchored in directive 96/34/EC and the framework agreement annexed thereto, the Court was asked to pronounce itself on the matter of parental leaves, specifically those relating to the birth of twins. It must be borne in mind that this directive intends to lay down minimum requirements on parental leave, in promotion of family life and equal opportunities and treatment between men and women. However, the Court, in spite of ultimately having redirected the solution to be given to the national court, seems to have embarked upon a very creative interpretation of the instruments –viewing the minimum requirements as maximum ones. It started by acknowledging that ‘the principle of equal treatment for men and women, which forms part of the social provisions of the Treaty, is of general application’<sup>349</sup>; Community measures must thus be interpreted in conformity with ‘primary law as a whole’, including the principle of equal treatment, which has to be

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<sup>345</sup> Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26

<sup>346</sup> *DEB*, cit. supra, at paragraph 29

<sup>347</sup> *Ibid.*, at paragraph 37

<sup>348</sup> *Ibid.*, at paragraph 59

<sup>349</sup> *Chatzi*, cit. supra, at paragraph 30

respected when implementing a directive<sup>350</sup>. This principle configures a general principle of EU law (as well as a fundamental right enshrined in the CFREU) and establishes that ‘comparable situations must not be treated differently and that different situations must not be treated in the same way’<sup>351</sup>. As such, it could never lead to a result where parents having twins would be entitled to two parental leaves, rather meaning that situations which are not comparable to one another must be treated differently. Leaving the resolution as to the concrete measures to establish that difference to the national court and legislature, the Court nonetheless provided very clear guiding steps<sup>352</sup>. Again, an instrument of secondary legislation was given a very specific interpretation by the Court, in light of the underlying general principle.

The Court has followed the same type of approach when reading regulations. *Sturgeon* is a good example, again on the principle of equality, now relating to the right to compensation of passengers of delayed flights<sup>353</sup>. At stake was regulation no. 261/2004/EC, which was framed to give a right to compensation to passengers in cancelled flights, but clearly distinguishing these situations from those of passengers with delayed flights (it should be noted that ‘flight delay’ was not even defined by this instrument, as the Court noticed in paragraph 29). The situation in question concerned a delay of more than 25 hours in a return flight from Toronto to Frankfurt, having the passengers alleged that such a delay would, in fact, represent a cancellation, which the air company refuted.

The CJEU, invoking the principle of equal treatment, considered that the situations of a passenger with a delayed flight and one whose flight has been cancelled are comparable<sup>354</sup>, stating moreover that the aim of the regulation at stake was to prevent both types of situations, in order to increase protection to all air passengers<sup>355</sup>. This

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<sup>350</sup> *Ibid.*, at paragraph 43

<sup>351</sup> *Ibid.*, at paragraphs 63/64

<sup>352</sup> *Ibid.*, at paragraph 73

<sup>353</sup> Judgment in *Sturgeon* (cit. supra). Riesenhuber (as many other authors) has heavily criticised this decision of the Court: ‘He who is intoxicated with love may well read an ambiguity into a brusque rejection so as to find some leeway for a favourable interpretation. The Court’s decision in *Sturgeon* is reminiscent of this.’ (Riesenhuber, K., Interpretation and Judicial Development of EU private law, *European Review of Contract Law*, 4/2010, p.384-408, at p.392). See also Van Dam, C., ‘Air Passenger Rights after *Sturgeon*’, *Air and Space Law* 36, no. 4/5 (2011), 259-274

<sup>354</sup> *Sturgeon*, cit. supra, at paragraph 48

<sup>355</sup> *Ibid.*, at paragraph 60

reading of the regulation in light of the principle of equal treatment represented a quite extensive enlargement of its scope of application, which was not well received by air carriers and national courts<sup>356</sup>. In fact, the preparatory works leading to the enactment of the regulation had clarified the intention of Member States to distinguish the two types of situations.

Similarly, in *France and Others v Commission*, the Court acknowledged that the regulation in question (the Merger regulation) did not provide a textual solution for the case<sup>357</sup>. The case concerned again the control powers of the Commission in case of concentrations between undertakings potentially leading to the establishment of a dominant position in the market. If the instrument was to be interpreted historically, a reductive approach would have been the one chosen. However, in the light of an underlying principle and the purposes of the regulation, 'the fact that the Community legislature did not expressly provide in the regulation for a procedure safeguarding the right to be heard of third party undertakings alleged to hold a collective dominant position together with the undertakings involved in the concentration cannot be regarded as decisive evidence of the regulation's inapplicability to collective dominant positions.'<sup>358</sup>

#### 4.1.1 Restriction of the scope *ratione materiae*?

All the above may erroneously lead to the assumption that the CJEU merely uses its principle-based reasoning as a means to *extensively* read the instrument in question and make the principles operate through its provisions *beyond* the envisaged legislative scope. While it is undeniable that the Court has often opted for a constructive reading of the written instruments, appealing to their teleological bases in order to expand and supplement the latter, in certain situations the contrary has happened. Let us hence look

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<sup>356</sup> Contra, defending that this is a valid, free of criticism, interpretation of the Court, see Lenaerts and Fons, 'To Say What the Law of the EU Is' (cit. supra), at p. 7: 'Stated simply, the ECJ will never ignore the clear and precise wording of an EU law provision'; and, at p. 16, in relation to *Sturgeon*: 'where an EU law provision may be subject to several interpretations, the ECJ must give priority to that which guarantees compliance with primary EU law and ensures its effectiveness.'

<sup>357</sup> Judgment in *France and Others v Commission*, C-68/94 and C-30/95, EU:C:1998:148

<sup>358</sup> *Ibid.*, at paragraph 175 of the ruling

at cases where a restrictive interpretation was the result of the principle-based reasoning of the Court, such as *AM&S*<sup>359</sup>.

This case dates back to the 1980's and concerned the powers of the Commission to take on investigations in undertakings relating to competition matters. Regulation 17, whose aim was to ensure compliance with articles 85 and 86 of the Treaty, established that the Commission was entitled to scrutinize all the relevant documents, including communications between the company and its lawyer. The investigating powers were laid down in article 14 thereof, establishing that the Commission was entitled to analyze all business records, with no distinction. The claim made before the Court contended that this entailed disrespect to the principle of confidentiality between lawyer and client.

The Court stated clearly, in paragraph 27, that 'although interpretation of the Regulation, in light of its wording, structure and aims, empowers the Commission, that power is subject to a restriction – the need to protect confidentiality'. This was anchored on the statement that 'Community law, which derives not only from the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the law of those States concerning the observance of confidentiality'<sup>360</sup>. Here the move is different – Regulation 17 ought to be read, according to the Court, in accordance with the principle, but this teleological approach resulted in a *restrictive* interpretation rather than, as seen in the cases shown above, an extensive reading of the legislation<sup>361</sup>. This restriction has two readings to it: while indeed it significantly restricts the material scope of the said provision, the fact is that such restriction is transposable on the powers of the Commission, which become less broad. As such, it can be argued that, while restricting the material scope of the rules contained in the Regulation, the Court's teleological interpretation in fact aimed at enhancing fundamental rights' protection as an underlying aim to its reading<sup>362</sup>.

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<sup>359</sup> Judgment in *AM & S Europe v Commission*, 155/79, EU:C:1982:157

<sup>360</sup>*Ibid.*, at paragraph 18

<sup>361</sup>*Ibid.*, at paragraph 22

<sup>362</sup> It could thus be argued that the effects achieved are, in a way, of an extensive reading analogous to that present in *Casagrande*. However, if one takes the technical aspect as driver of the methodology, the fact is that the legal technique results in a reductive reading of the written instrument at stake, inspired by an underlying principle.

The significance of this principle should be further explained, especially in its facet of protection of business secrets. In *Akzo Chemie UK*<sup>363</sup>, the Court mitigated against the literal reading of the rules in question. When referring to the lifting of professional secrecy in the communications of the Commission, it acknowledged that the latter could communicate certain parts of the information ‘in so far as it is necessary to do so for the proper conduct of the investigation’<sup>364</sup>. However, it furthered, ‘that power does not apply to all documents of the kind covered by the obligation of professional secrecy’, since the Commission is required to ‘have regard to the legitimate interests of the undertakings. It is so because the provisions protecting business secrets, ‘although they deal with particular situations, (...) must be regarded as the expression of a general principle’<sup>365</sup>.

This case is mentioned in a later ruling, *SEP*, this time on the interpretation of article 10 of the same Regulation<sup>366</sup>. This article establishes that the Commission is obliged to ‘transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents’. However, the Court restricted the interpretation to be given to the wording present here, by stating that ‘Article 10(1) must be interpreted in the light of the general principle of the right of undertakings to the protection of their business secrets, a principle which finds expression in Article 214 of the Treaty and various provisions of Regulation No 17, such as Articles 19(3), 20(2) and 21(2)’<sup>367</sup>. The ‘general principle of the protection of business secrets’ hence works as a limitation to the powers of the Commission<sup>368</sup>.

The recent *Dano*<sup>369</sup> case provides a striking example of what could be seen as a case of 'missed' combination between a general principle and a written source. This case concerned two Romanian nationals, Ms. Dano and her son who were living in Germany but were refused financial benefits by way of basic provision from the Leipzig Jobcenter. Their successive applications were always refused, which resulted in an

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<sup>363</sup> Judgment in *AKZO Chemie and AKZO Chemie UK v Commission*, 53/85, EU:C:1986:256

<sup>364</sup> *Ibid.*, at paragraph 27

<sup>365</sup> *Ibid.*, at paragraph 28

<sup>366</sup> Judgment in *SEP v Commission*, C-36/92 P, EU:C:1994:205

<sup>367</sup> *Ibid.*, at paragraph 36

<sup>368</sup> *Ibid.*, at paragraph 37

<sup>369</sup> Judgment in *Dano*, C-333/13, EU:C:2014:2358



action before the Social Court. This court, albeit considering that no entitlement was found, raised 'doubts as to whether provisions of EU law, in particular Article 4 of regulation no. 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law'<sup>370</sup>.

The Court recurs to the formula of 'specific expression', but in relation to article 18 TFEU, stating that the principle of non-discrimination is specified not only by article 24 of the directive in what comes to EU citizens who have exercised their freedom of movement, but also in article 4 of the regulation at stake<sup>371</sup>. The 'non-discrimination guarantees' are hence interpreted through the lens of primary law<sup>372</sup>; however, there is a departure from the latter, since the essential conditions to be taken into account are those of the secondary law instrument<sup>373</sup>: 'so far as concerns access to social benefits, such as those at issue in the main proceedings, **a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of directive 2004/38**'<sup>374</sup>.

This is an odd reasoning. The Court seems to be oblivious to the impact of one source on the other, appearing to avoid their combined application. Indeed, it leaves the general principle completely aside in the reasoning, using only the directive to decide the application of EU law. This shows that the Court's proclivity to use the combination of sources in order to achieve certain outcomes may dictate exactly the inverse when certain outcomes are to be avoided. There is equally no trace of any sort of proportionality analysis<sup>375</sup>.

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<sup>370</sup> *Ibid.*, at paragraph 43.

<sup>371</sup> *Ibid.*, at paragraph 61.

<sup>372</sup> Thym, D., 'The elusive limits of solidarity: residence rights of And social benefits for economically inactive union Citizens', *CMLRev* 52, 2015, 17-50, at p.23

<sup>373</sup> See Hancox, E., Case Comment on Elisabeta Dano, Florian Dano v Jobcenter Leipzig (2015) 29(1) *Journal of Immigration, Asylum and Nationality Law* 62

<sup>374</sup> *Dano*, cit. supra, at paragraph 69 (emphasis added)

<sup>375</sup> Verschueren defends that, in a narrow interpretation of this judgment, the lack of reference to the proportionality test, as provided for both the Directive's provision and previous case-law (namely the Brey case, C-140/12, EU:C:2013:565), is a way to limit 'the scope of the derogation from the equal

#### 4.1.2 The impact of this mode of operation in the Public Procurement Field: Peculiarities of transparency as an expression of equal treatment

Much like in other sectors of EU law, the public procurement field has also presented a platform for the Court to develop its principle-based reasoning, especially in connection with its core directives<sup>376</sup>. Also here the soil seems to be fertile enough for the Court to use general principles in a way to interfere with the subject-matter of secondary law instruments, and even with the application of certain Treaty provisions. Article 2 of directive 2004/18 overtly establishes some principles which are to be made applicable in the relationships governed thereby. It reads as follows:

##### *Article 2*

##### *Principles of awarding contracts*

*Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.*

It hence establishes, as applicable to the relationships and situations governed by the directive, the principle of equality and non-discrimination. Again, there are references to specific expressions of this principle, provided for by the provisions at stake; the main one is the duty or obligation of transparency. The objectives of public procurement legislation seem, however, to be distinct from the aims sought in the cases above.

##### *a) Cases*

The case law where the principle of transparency is used as an expression of the general principle of equal treatment can provide further detail on the peculiar way this mode of operation assumes in the area. *Commission v. Denmark*<sup>377</sup> concerned a tender proposal for the construction of a bridge. The Commission contended that there was a breach of

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treatment principle to situations in which the Union citizen's sole motive for moving to another Member State is to obtain the social benefits (...) Such limitations would be justified since they are intended to prevent "benefit tourism" (...) In such cases no further proportionality test or "genuine link" test would be required.', p.373. Verschueren, H., 'Preventing "benefit tourism" in the EU: a narrow or Broad interpretation of the possibilities offered by The ECJ in Dano?', *CMLRev* 52, 363-390, 2015.

<sup>376</sup> Directives 2004/17/EC and 2004/18/EC, which replaced the previous ones

<sup>377</sup> Judgment in *Commission v Denmark*, C-243/89, EU:C:1993:257

‘the principle that all tenderers should be treated alike’ for there had been certain factors which favoured a sole tenderer in the negotiations. As such, the Commission deemed the contract to be contrary to the Treaty provisions and directive 71/305/EEC. The Danish government argued that, as such ‘principle’ is not mentioned in the provisions of the directive, and it hence would constitute a different legal basis, this could not be accepted.

The Court, however, interpreted the fact that the directive made no mention of the principle as no hindrance to the latter’s application. In relation to the arguments relating to the establishment of a new legal basis, the Court stated that ‘although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive’<sup>378</sup>. Again, it is the principle underlying the instrument which applies, somewhat broadening the scope of what would be regarded as encompassed by the latter. The violation is assessed in light of the principle of equal treatment, but it is the directive which lends itself to application<sup>379</sup>.

In *Telaustria*<sup>380</sup>, on the other hand, the Court furthered the need to respect the general principle even if the contracts are excluded from the scope of the instrument, enhancing the obligation of transparency which stems from the principle<sup>381</sup>. In this case, concerning the pecuniary interest of a contract in a procedure for the award of public service contracts in the telecommunications sector in Austria, the Court stated clearly that ‘notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular’<sup>382</sup>.

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<sup>378</sup>*Ibid.*, at paragraph 33

<sup>379</sup>*Ibid.*, at paragraphs 38 and 43

<sup>380</sup> Judgment in *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669

<sup>381</sup> This judgment is considered as a hint of the Court’s judicial activism in the field. Treumer, S., ‘Recent trends in the case law from the European court of justice’, in Nielsen and Treumer (eds.), *The New Eu Public Procurement Directives*, p.17-28, at p.27: ‘the *Telaustria* case is (...) [an example] of the European Court of Justice in its well- known role as a law maker, pushing European integration a step further than the ordinary legislator.’

<sup>382</sup> *Telaustria*, cit. supra, at paragraph 60

It furthered, in the following paragraphs, that such a principle necessarily implies ‘an obligation of transparency’ as a condition for the compliance, establishing which other requirements are to be followed for this assessment. As such, and albeit leaving it to the national court to evaluate the materiality of the compliance with such requirements, the Court makes it quite clear that it is the principle which dictates the result to be achieved, even if the situation is excluded from the scope of EU law<sup>383</sup>.

Roughly ten years later, the *Concordia* case<sup>384</sup> presented another opportunity for the Court to apply the equality principle in a public service contract. At stake this time was the awarding of a contract, by the city of Helsinki, for the operation of a route in the urban bus network where one of the categories of criteria set for the punctuation was the operator’s ‘quality and environment management’. *Concordia*, which came below in the qualifications and hence did not receive the contract offer, argued that such criterion was ‘unfair and discriminatory’ for it would only apply to a certain type of vehicle, detained by the winner<sup>385</sup>. The matter was referred for conformity assessment with the public procurement directives 93/38/EEC and 92/50/EEC.

The Court started by analyzing, in paragraphs 53 and following, the criteria referred in the provisions, stating that they ought to be in conformity with the procedural rules laid down in the directive and, moreover, with ‘all the fundamental principles of Community law, in particular de principle of non-discrimination’<sup>386</sup>. The criteria are thus to be aligned with it. Furthermore, the Court notes, in paragraph 81, that ‘the principle of equal treatment lies at the very heart of the public procurement directives’ and hence it is to be applicable to the consideration of which criteria are to be applied in the case<sup>387</sup>.

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<sup>383</sup> *Ibid.*, at paragraphs 61 and 62. At paragraph 61: ‘that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with’

<sup>384</sup> Judgment in *Concordia Bus Finland*, C-513/99, EU:C:2002:495

<sup>385</sup> *Ibid.*, at paragraph 27.

<sup>386</sup> *Ibid.*, at paragraph 62 and 63.

<sup>387</sup> The same wording was used in *ATI EAC e Viaggi di Maio and Others*, C-331/04, EU:C:2005:718, with reference to both the *Concordia* and *SIAC* (C-19/00, EU:C:2001:553) cases. Paragraph 22 reads as follows: ‘In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives (see *Concordia Bus Finland*, paragraph 81) and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed (see Case C-19/00 *SIAC Construction*, paragraph 34).’

The idea that the principle of equal treatment and non-discrimination is fundamental in this field is reiterated in the *Sea* case<sup>388</sup>, with the additional assertion, by the Court, that fundamental principles are to always be applied therein. The Court hence restated the *Telaustria* ruling. In this case, the dispute emerged from the tendering procedure for a contract for the service of collecting, transporting and disposing of solid urban waste in the Italian territory of Comune di Ponte Nossa. The question posed was essentially whether the case in the proceedings concerned a service concession or a public service contract, the latter falling under directive 2004/18.

The Court minimized the question as such, stating in paragraph 33 that both situations could be encompassed by the directive. It reaffirmed the need to use the Treaty provisions and the directive, ‘and also the general principles of which the latter are specific expression’<sup>389</sup>, so as to interpret its previous case-law, recognizing subsequently that, ‘despite the fact that certain contracts do not fall within the ambit of the Community public procurement directives, the contracting authorities concluding them are bound to comply with the fundamental rules of the Treaty’<sup>390</sup>. Academic commentators seem to accept this approach, as was already referred above.

This need of compliance with the fundamental principles of EU law is extended also to the choice of the relevant criteria for the authority to decide to contract with a relevant tenderer. In *EVN AG and Wienstrom*, a case concerning a tender procedure for electricity supply, the decision of the contracting authority of giving preference to renewable energy sources was challenged<sup>391</sup>. The participants in the tender procedure contended that the choice of the most economically advantageous candidate could not take into consideration ecological criteria.

The Court analyzed the situation, stating that such a criterion could in fact be used in the choice procedure. It stipulated merely that the criterion at stake should be ‘linked to the

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<sup>388</sup> Judgment in *Sea*, C-573/07, EU:C:2009:532

<sup>389</sup> *Ibid.*, at paragraph 37.

<sup>390</sup> *Ibid.*, at paragraph 38. See also judgment in *Commission v Italy*, C-260/04, EU:C:2007:508, at paragraph 22; *Medipac - Kazantzidis*, C-6/05, EU:C:2007:337, at paragraph 33; and *Coditel Brabant*, C-324/07, EU:C:2008:621, at paragraph 25

<sup>391</sup> Judgment in *EVN and Wienstrom*, C-448/01, EU:C:2003:651

subject-matter of the contract’, could ‘not confer an unrestricted freedom of choice on the authority’, should be ‘expressly mentioned in the contract documents or the tender notice’ and, above all, and in line with the *Concordia* case, was to be aligned ‘with all the fundamental principles of Community law, in particular the principle of non-discrimination’<sup>392</sup>. It then went on affirming that the conformity with ‘both the procedural rules and the fundamental principles laid down in community law’ was an essential requirement; its non-observance would result in the whole procedure being considered ‘contrary to the principles of Community law in the field of public procurement’<sup>393</sup>.

The potential to expand the public procurement directives field, and not merely its guiding directives, with recourse to general principles, is quite visible in this trend of cases. Indeed, not only do they serve as strong interpretive tools for these instruments, the heart at which they lie, but they seem to have the proclivity to be applicable to contracts which fall outside their scope whenever some connection is found. This can be illustrated by the *Azienda Sanitaria Locale di Lecce* case<sup>394</sup>.

Here at stake was a consultancy contract established, between the Azienda Sanitaria and the Salento University, in view of the study and evaluation of the seismic vulnerability of hospital structures in the Italian province of Lecce, which the appellants deemed to be a public service contract, whilst the defendants claimed that it consisted of a ‘mere cooperation agreement between public administrations in respect of activities of general interest’, where the role of the University would be part of its ‘institutional activities’.

The application of the public procurement directive in question was necessarily attached to the premise that the threshold for economic interest therein proposed was met, which the Court reiterates in paragraph 23 of the ruling. However, it proceeds to state that, in case the directive is considered not to be applicable for failure of the situation to meet such level, the general principles of the FEU apply, ‘provided there is a certain cross

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<sup>392</sup> *Ibid*, paragraph 33 and 34.

<sup>393</sup> *Ibid*, at paragraphs 38 and 52.

<sup>394</sup> Judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817

border interest' (an expression already used before, in the *Brescia*<sup>395</sup> case). It proceeds, in the following paragraph, to state that it is immaterial what rule brings the situation under the scope of application of EU law, for the interpretation to be given would not vary.

On the one hand, it is quite unclear what can represent this 'certain' interest: the jurisprudence does not lay down any criteria, in a way which seems concurrent with the Court's reading of the scope of application of EU law as encompassing 'measures that otherwise fall under the purview of EU law'. The vagueness in these expressions necessarily endows the Court with additional leeway as regards the interpretation of their scope. On the other hand, it seems also that the underlying principle of equal treatment, with the consequent obligation of transparency attached therein, will prevail in the assessment. In this sense, the mode of operation of principles in this area seems to have the same characteristics presented above, with the Court using secondary law as a 'lever' for the application of primary EU law<sup>396</sup>.

*Parking Brixen*<sup>397</sup> reaffirmed the importance of this component in the application of the general principle of equality in the public procurement area<sup>398</sup>. Here the Court addresses nationality as a specific expression of this principle, in a way which is closer to the case law on fundamental rights. Here, however, the anchor provisions pertain rather to the Treaty. This case concerned the award of the management of two car parks in the municipality of Brixen to a particular (company) with affiliation to the municipality. The process was undergone without a call for tenders.

In spite of deciding that the situation in question did not come under the scope of the legislative instruments on public procurement at the time, since public service concessions are excluded, the Court nonetheless proceeded to give an answer to the

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<sup>395</sup> Judgment in *ASM Brescia*, C-347/06, EU:C:2008:416, at paragraph 58

<sup>396</sup> Treumer, S., 'Recent Trends' (cit. supra), p.17-28, at p.27 'secondary community law is used as a lever for the development of primary law. (...) When reading obligations into primary Community law, the Court uses adjacent or merely proposed secondary community law as a lever.'

<sup>397</sup> Judgment in *Parking Brixen*, C-458/03, EU:C:2005:605

<sup>398</sup> See also judgment in *ANAV*, C-410/04, EU:C:2006:237, at paragraph 20; *Medipac*, cit. supra, at paragraph 34; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, C-220/06, EU:C:2007:815, at paragraph 74; *Acoset*, C-196/08, EU:C:2009:628 at paragraph 48.

situation at stake. In addition to referring to the obligation of non-discrimination on grounds of nationality established by article 12 EC, the Court made reference to the Treaty provisions in articles 43 and 49 EC, ascertaining them as ‘specific expressions of the principle of equal treatment’. It then furthers that ‘the prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment’, with the caveat that, in the field of public procurement, ‘the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality’<sup>399</sup>. Then it restates the impact of the duty of transparency – the latter implies and, at the same time, ensures the application of the referred principles by the public authorities.

Also here, the Court acknowledges that situations not falling within this field of EU law are nonetheless capable of being subject to the application of the same principles. Indeed, although the application of the public procurement directives might depend on the existence of a contract, it doesn’t mean that this field is exhausted in that application. In fact, national legislation will be likewise precluded in the absence of such a contract due to its antagonism to Treaty articles and ‘the principles of equal treatment, non-discrimination and transparency associated with them’, which are still applicable, independently<sup>400</sup>. The Treaty provisions at stake here, 12, 43 and 49 EC are then qualified as ‘specific expression’ of general principles<sup>401</sup>.

*Coditel*, relating to public service concession contracts, is also solved in the same manner. Indeed, the piece of secondary legislation in question (directive 92/50/EEC) is set aside as non-applicable and full application is given to ‘the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as of the general principles of which they are the specific expression’<sup>402</sup>.

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<sup>399</sup> *Parking Brixen*, cit. supra, at paragraphs 48/49

<sup>400</sup> *Ibid.*, at paragraphs 52 and 60/61

<sup>401</sup> *Ibid.*, at paragraph 62

<sup>402</sup> Judgment in *Coditel Brabant*, cit. supra, at paragraphs 25 and 26



It has been argued that the principle of transparency should be seen as a principle which can be individualized from equal treatment<sup>403</sup>. Here again the difference versus other specific expressions or grounds for discrimination seems to be highlighted: it seems inconceivable that non-discrimination on grounds of nationality, or even age, can be considered separately from the principle of equal treatment. Transparency, however, does come up as a somewhat different expression: Prechal and De Leeuw argue that ‘while, on the one hand, there is a very close link between the principle of equal treatment and transparency, on the other transparency also has, in certain respects, a more specific meaning of its own. (...) it seems to go beyond of what non-discrimination requires’<sup>404</sup>. This is arguably highlighted by the fact that the public procurement directives make express reference to transparency as a requirement stemming from the principles to be applicable to the procedures.

The mode of operation of this particular principle, or of the specific expressions of the general principle of equal treatment in the field, seems to have affected EU law in an interesting way. Indeed, the case law above shows that, when applied jointly with directives, once again the principle impacts on the subject matter defined by the scope of application of the instruments. However, when the court decides that the matter falls outside of the scope of the directives, it moves to the Treaty provisions, rather transforming them in the anchorage for principle application<sup>405</sup>. This happens equally in what concerns other expressions, or factors of discrimination, as can be illustrated by the case-law<sup>406</sup>. *Commission v. France*<sup>407</sup> indicates that ‘the principle of equal treatment, of which Article 59 of the Treaty is a specific expression, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same

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<sup>403</sup> See Prechal, S., and De Leeuw, E., *Transparency: a general principle of EU law?*, in Bernitz, U. (et al), *General Principles of EC Law in a Process of Development* (cit. supra).

<sup>404</sup> *Ibid.*, at p.230

<sup>405</sup> See also judgment in *Commission v Italy*, C-412/04, EU:C:2008:102, confirming that contracts with a certain cross-border interest, although below the threshold, have to comply with general principles of EU law. See Dragos & Caranta (eds), *Outside the EU procurement Directives – Inside the Treaty?*, DJØF Publishing, 2012

<sup>406</sup> See, on this, Koninck, C. and Ronse, T. (eds.), *European Public Procurement Law – The European Public Procurement Directives And 25 Years Of Jurisprudence By The Court Of Justice Of The European Communities – Texts And Analysis*, Wolters Kluwer, 2008

<sup>407</sup> Judgment in *Commission v France*, C-225/98, EU:C:2000:494

result<sup>408</sup>. Again this points to the specific sectorial objectives of public procurement law, which are to secure first and foremost the fundamental freedoms protected by the Treaties.

*b) New directives, same aims?*

It should be noted that the year 2014 brought about three new instruments in the public procurement field. The existing directives were replaced, and an additional instrument was created – the directive on concession contracts<sup>409</sup>. The period for transposition of these instruments is still ongoing, but it is worth mentioning the important changes envisaged, which lie especially, for the purposes of this analysis, on the fact that there has been an attempt of codification of the public procurement case-law of the Court. Particularly the latter instrument makes the principles of equality, non-discrimination and consequent transparency need quite visible, by keeping them in article 3 (whereas in the other directives such principles have migrated towards the end of the document)<sup>410</sup>.

It is quite clear from the preambles that there has been an effort to codify the case law of the court, and to indicate that interpretation should be made according to the rulings. However, interestingly enough, its wording remains striking in what comes to general principles, in a way, perhaps in deference to the particular aims pursued in this area of EU law. Indeed, it is therein affirmed that 'respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services **and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination**, the principle of mutual recognition, the principle of proportionality and the principle of transparency'<sup>411</sup>. The conception present here is hence that these general principles of EU law derive from the fundamental freedoms. Albeit this can be seen as an indication of matters already addressed in chapter III, of intertwinement and interchangeability of concepts, bearing in mind the objectives of EU law, this statement

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<sup>408</sup>*Ibid.*, at paragraph 80

<sup>409</sup> These are directive 2014/24/EU replacing directive 2004/18/EC; directive 2014/25/EU replacing directive 2004/17/EC; and directive 2014/23/EU, respectively.

<sup>410</sup> The principles of awarding contracts have shifted from article 2 to article 76.

<sup>411</sup> Preamble of Directives 2014/24/EU and 2014/25/EU (emphasis added)

is certainly more blatant than usual. A possible explanation is naturally the niche addressed. Indeed, the specific connection of public procurement to the achievement of the internal market is undeniable.

Indeed, when looking at the principle of transparency as a specific expression of the general principle of equal treatment and non-discrimination, it becomes clear that not only the rationale, but also the essence to be protected are quite different. Whilst in the other cases in this chapter equal treatment is perceived as creating specific expressions which configure particular non-discrimination grounds, here the obligation or principle of transparency seems to operate a bit differently. When the Court refers to the principle of equal treatment and its specific expressions in the area of fundamental rights protection, it seems that the aim is one of strengthening individual protection and fostering the European citizenship domain. The area of public procurement, however, was developed with view to internal market regulation and so as to secure economic freedoms and their consolidation. The case law shows a clear concern with free movement of services and fair competition, in which the principle of non-discrimination on grounds of nationality gains accentuated relevance. That can be illustrated by the ruling in *Pressetext*<sup>412</sup>, where the Court states that ‘the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States’<sup>413</sup>. As such, so as ‘to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom’<sup>414</sup>.

Although the Court refers to equal treatment and non-discrimination in these cases, it is the transparency requirement which gains special relevance, by providing the criterion against which the situation is to be assessed<sup>415</sup>. In addition, the formulations used by the Court seem to be more vague than in other ‘specific’ factors, with ‘the relationship

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<sup>412</sup> Judgment in *Pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351. See also judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, at paragraph 25.

<sup>413</sup> *Pressetext Nachrichtenagentur*, cit. supra, at paragraph 31

<sup>414</sup> *Ibid.*, at paragraph 32

<sup>415</sup> Judgment in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, at paragraph 91: ‘The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with.’

between equal treatment and transparency [not being] entirely clear<sup>416</sup>. This stems from the fact that the Court has acknowledged the application of this general principle also in areas outside the scope of application of the public procurement directives<sup>417</sup>, something which is widely recognized by the doctrine, who asserts that since ‘the principle is directly based on the Treaty, it is hardly surprising that [it] is applicable to all procurements covered by the Treaty’<sup>418</sup>. Notwithstanding this assertion, it is also questioned whether the Court should have the power to create obligations for authorities when the actions take place outside the scope of the public procurement directives<sup>419</sup>.

## Conclusion

The mode of operation of general principles of EU law presented in this chapter is one of the most commonly observed in the case-law of the Court. The relationship of principles, as primary law, and other written norms has shown great proclivity to impact the scope of application of the latter. However, in spite of the many criticisms to the constant ‘expansion’ of the *ratione materiae* scope of application of EU law via this mode of operation, the truth is that, as was shown, the impact can be one of contraction as well.

Many commentators have noted that the Court tends to use general principles in this manner so as to keep the compatibility of secondary law instruments with primary law, without having to declare them unlawful. Syrpis defends that this is usually done by ‘straining the interpretation’ of secondary law ‘so that it is brought in conformity with

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<sup>416</sup> Prechal and De Leeuw, *Transparency: a general principle of EU law?*(cit. supra), at p.230

<sup>417</sup> Such as in the *Telaustria* and *Medipac* cases, cit. supra

<sup>418</sup> Poulsen, Jakobsen and Kalsmose-Hjelmborg, *EU Public Procurement Law – The Public Sector Directive/The Utilities Directive*, Djoef Publishing; 2nd edition, 2012, at p.56. See also Sánchez Mórón, *Public Procurement in the European Union and its Member States*, Univ Alcalá, Thomson Reuters 2012, at p.76: ‘The Court of Justice resolves the majority of cases by taking into account the specific rules contained within the Directives. However, this is not always the case. On the contrary, the Court has been ruling that the general principles established in the Treaties are applicable to all kinds of public contracts (...). In other cases, the abovementioned principles are taken into account to overcome any loopholes or omissions in the Directives (...). Even when the Court applies specific provisions, general principles are frequently used for explanatory and interpretive purposes. It is then, a case law of principles that has been gradually assuming a creative function in law. (...) it is no longer limited to demanding the implementation into domestic law and the application of Directives. (...) whilst directly tied to the general principles, the validity and scope of the principles underlying the Court of Justice’s case-law go beyond the implementation of any directive.’

<sup>419</sup> Poulsen et al, cit. supra, at p.56: ‘On the other hand, it is more surprising that, on the basis of the principle of equal treatment, the Court of Justice has given the outlines of a number of specific obligations to which contracting authorities are subject outside the scope of the procurement directives.’

primary law' (what he labels as a 'constitutionally orthodox position'). However, he notes, the Court has also ensured that primary law prevails by simply deciding that secondary law is inapplicable in a given situation, and thus setting it aside, or reasoning on the basis of the principle of proportionality and its direct application to the national implementing law in question<sup>420</sup>.

This reconciling of the underlying rationale with the letter of the instrument comes sometimes as a forced exercise, as was discussed for example in relation *Sturgeon*: there is a blatant detachment from the text in order to set its compatibility with the general principle of equal treatment. Syrpis equally distinguishes situations where, he argues, secondary law will 'take priority over' primary law. I do not see these as absolutely distinguishable situations. In fact, my understanding of the cases analysed in this chapter is that the mode in which general principles of EU law operate in combination with written instruments can have, as referred above, both a restricting and an expanding impact on the scope of application of the measure at stake. However, this stems from the necessary reading on the basis of an, albeit many times unwritten, primary law norm.

The 'significant impact' secondary law can have in primary law interpretation can perhaps be explained as an attempt to frame the principle in such a way which it may effectively be applied to the situation at stake<sup>421</sup>. It is irrefutable, in any case, that this mode of operation has a deep impact in the functioning and development of EU law. It dictates the way secondary legislation is to be read and applied in the national context and, in that sense, it provides the added legitimacy of primary law stance.

The case of public procurement is particularly interesting, especially due to the contours assumed by the principle of transparency, as an expression of equal treatment. The public procurement directives expressly refer to transparency as a requirement applicable in the procedures, what makes of this expression a peculiar one, an almost self-standing principle on its own, as noted by Prechal and De Leeuw. The Court has

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<sup>420</sup> Syrpis, P., 'The Relationship Between Primary And Secondary Law In The EU', *CMLRev* 52, 2015, 461-488, at p.470

<sup>421</sup> *Ibid.*, at p.480-483

hence developed a particular facet of the principle of equal treatment in the framework of the public procurement procedures, but still uses the general principle in a way that goes beyond the scope of the directives.

## CHAPTER V: GENERAL PRINCIPLES AND OTHER LEGAL SOURCES: IMPACT ON THE SCOPE OF APPLICATION *RATIONE PERSONAE*

### Foreword

The case-law presented in the previous chapter has shown how rulings based on general principles can have a deep impact in the scope of application of European Union law. The cases analyzed present proof that the use of these tools can provoke expansion and contraction of the scope of application of the instruments in terms of *ratione materiae*, that is, influencing the definition of the subject matter covered by certain written instruments. This, as is patent from the above, happens in spite of what is expressly written, bearing a deep impact in the interpretation of the range of situations which can be covered by the latter.

This type of interaction between general principles and written instruments can, however, be said to represent much of the 'traditional' function of general principles: their interpretive aptitude renders them especially attractive tools for the Court to address questions raised on the reading of written legislation so as to surpass any existing gaps, or even go further. This use is more easily reconciled with the powers of the Court, and, in spite of being often criticized, does not clash directly with any previous case law. In fact, an extension of the scope of application as regards the subject matter covered by the instruments is precisely what has made EU law advance since the core rulings in *Internationale*, *Stauder* and *Nold*.

However, this chapter purports to analyze the same type of technique, but this time with a different result: an impact on the scope of application of the written instruments in question with regard to their application *ratione personae*. Certain pieces of legislation, however deemed applicable in terms of the subject matter covered in the situations raised, would nonetheless not be considered applicable to the relationship at stake if a general principle of EU law had not been used. The impact on the type of relationships covered has raised many questions, namely for its potential conflict with previously settled case-law of the Court. Indeed, while relationships between individuals and public authorities will generally be covered, the same does not happen to situations

between private parties. This is especially true in what comes to the possible effects of directives. As such, before entering the analysis of this strand of cases, it is imperative to give a brief account of the conducting lines of the Court's jurisprudence on that matter.

## 5.1 Excursus: directives – their direct effect and the lack thereof

Directives are perhaps the most controversial instrument of EU law in what relates to their effects on national law<sup>422</sup>. Despite the well-known formulation 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'<sup>423</sup>, the jurisprudence of the Court has given different and debatable interpretations to these words, provoking fierce reactions amongst the critics and creating a sometimes difficult task for national courts, when confronted with a claim based on those instruments. One of the accusations the CJEU has faced after cases where it recurred to principle-based reasoning is that of the attribution of horizontal direct effect to directives, an effect which was always denied, by the very Court, to these instruments<sup>424</sup>. Many have seen general principles as a *manoeuvre de diversion* of the Court to temper its consistent jurisprudence on the matter, with the consequent decision to, ultimately, admit that those instruments can produce legal effects in relationships between private individuals<sup>425</sup>.

To start but with a brief explanation, direct effect can be roughly defined as the aptitude of a norm of EU law to be applied in proceedings taking place in national courts. It can be either vertical, and thus binding upon the State, or horizontal, in which case EU law

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<sup>422</sup> Skouris, V., 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives', *EBLR* [2006], 241-255, at p.242/243: 'not all provisions of Community law can have such capacity [of having direct effect], especially not those that leave a margin of discretion to the Member States as to whether, when and how to legislate. Community directives often contain such provisions. They are binding, as to the result to be achieved, upon each Member State to whom they are addressed. (...)Yet, although the means to be used are left to the discretion of the Member States, this discretion is sometimes significantly limited or even non-existent when certain provisions impose a minimum protection to be assured. In such cases, Directives may contain 'directly effective provisions'.

<sup>423</sup> Article 288 TFEU

<sup>424</sup> For a deeper analysis, see Tridimas, T., 'Black, White and Shades of Grey: Horizontality of Directives Revisited', *Yearbook of European Law*, 2002, 327-354

<sup>425</sup> See, among other, Howard, E., 'ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives', *European Public Law* 17, no. 4 (2011), 729-743



will be applicable in proceedings between private individuals. The Court established from the outset that directives were to have vertical direct effect, but could not be relied upon against individuals<sup>426</sup>. In *Marshall* the Court alluded to article 249 (now 288) of the Treaty, relying on the binding nature of the instruments in relation only to the Member States to which it is addressed<sup>427</sup>. This jurisprudence was tempered by the so-called ‘Foster-test’. *Foster*<sup>428</sup> shaped the extension of vertical direct effect by presenting a broad conception of State, in order to include organizations or bodies which are subject to its authority or control, or otherwise had special powers – including tax authorities, local and regional authorities, public authorities providing public health services, etc.<sup>429</sup>

*Pfeiffer* brought about yet another nuance, by establishing that inconsistencies between national law and a directive must be settled in favour of the latter, in name of the effectiveness of EU law<sup>430</sup>. National law is thus to be read in the light of the Directive; however, this applies to all national law and not only the implementing provisions, and is binding on all competent authorities<sup>431</sup>. This ‘indirect effect’ of directives was extended beyond the State and its emanations<sup>432</sup>, and *Marleasing*<sup>433</sup> settled that this obligation of consistent interpretation was due also in proceedings between private

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<sup>426</sup> Judgment in *Van Duyn*, 41/74, EU:C:1974:133; judgment in *Ratti*, 148/78, EU:C:1979:110; judgment in *Marshall*, 152/84, EU:C:1986:84; judgment in *Faccini Dori*, C-91/92, EU:C:1994:292; judgment in *El Corte Inglés*, C-192/94, EU:C:1996:88; judgment in *Carp*, C-80/06, EU:C:2007:327; judgment in *Amia*, C-97/11, EU:C:2012:306. *Ratti* introduced as well the ‘estoppel’ argument, according to which ‘a Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, against individuals, on its own failure to perform the obligations which the Directive entails’ (paragraph 22). See Skouris, V., ‘Effet utile...’ (*cit. supra*), at p.243: ‘Direct effect of the provisions of a directive is only conceivable in so-called vertical relationships, where the individual invokes the provisions of a directive against a Member State or its agencies. Unlike Treaty provisions and regulations, directives cannot have ‘horizontal’ direct effect. In other words, an individual cannot rely on a directive against another individual.’

<sup>427</sup> The denial of horizontal direct effect is justified mainly by arguments of legal certainty and risk of confusion with Regulations. See Emmert, F., and Pereira de Azevedo, M, ‘L’effet horizontale des Directives dans la jurisprudence de la CJCE: un bateau ivre?’, *RTD Eur.*, 1993, 503ff, at p.510: ‘La reconnaissance de l’effet horizontale se heurte à une forte résistance, tant de la CJCE que de la doctrine, pour qui la lettre et l’esprit de l’article 189 CEE [288 TFEU] d’une part, la sécurité juridique d’autre part, et enfin l’effet d’estoppel s’opposent à une telle reconnaissance.’

<sup>428</sup> Judgment in *Foster and Others*, C-188/89, EU:C:1990:313

<sup>429</sup> *Ibid.*, at paragraphs 18/19

<sup>430</sup> Judgment in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584; judgment in *Adeneler and Others*, C-212/04, EU:C:2006:443; and *Impact*, *cit. supra*.

<sup>431</sup> See *Pfeiffer*, *cit. supra*, at paragraphs 108-119

<sup>432</sup> Judgment in *Von Colson and Kamann*, 14/83, EU:C:1984:153

<sup>433</sup> Judgment in *Marleasing*, C-106/89, EU:C:1990:395

parties. The outcome is very similar to horizontal direct effect since, in reality, private parties' obligations are, in substance, determined by the directive; nonetheless, the immediate source is still national law.

This interpretative obligation should be set off by the expiry of the time limit for implementation of the directive in the national legal system – application *ratione tempore*. However, the Court established in *Inter-Environnement Wallonie*<sup>434</sup> that any measures liable to undermine the result envisaged by European Union law, even in the period of transposition, should be avoided. This follows from the primacy of EU law, rather than directly from the instruments in question, as the Court points out in paragraph 48 of the ruling in *Küçükdeveci*: it is demanded by article 288 TFEU, as well as by the need to guarantee effectiveness to EU law.

At least two other types of situations have to be referred to concerning directives: that of the so-called 'incidental effect' and State liability for non-compliance/implementation. The first category occurs when a directive *per se* does not impose a direct obligation on the individual, but the non-compliance of the Member State at stake leads to the setting aside of national law. This, in its turn, results in the imposition of contractual obligations that would not exist if the previous national law was the one in force<sup>435</sup>. The other type of situation is that raised by the failure of a Member State to comply with, and hence fail to implement or correctly implement, a directive<sup>436</sup>. This method surpasses the need for horizontal direct effect, since, if a correct implementation had been applied, the obligations would be imposed through national law. So, after the expiry of the period for implementation, if a Member State has failed to fulfill its obligation of doing so, it may be held liable for damages<sup>437</sup>.

The recognition of such effect does not raise many problems in and of itself. Failure to comply with the obligations ought to be sanctioned, since the contrary would

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<sup>434</sup> Judgment in *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628. See also *Mangold*, cit. supra, at paragraph 67

<sup>435</sup> Judgment in *CIA Security International*, C-194/94, EU:C:1996:172; and judgment in *Unilever*, C-443/98, EU:C:2000:496

<sup>436</sup> Judgment in *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428

<sup>437</sup> See *Adeneler*, cit. supra.

tantamount to denying protection to European citizens for a failure of their Member State. Many doubts are otherwise raised in what concerns the effects of the directive before the expiry of the period for implementation. The notion of direct effect demands that provisions are sufficiently certain, precise, unconditional and clear so as to be invoked directly; nonetheless, it seems that, *per se*, a directive remains deprived of being invoked in proceedings between individuals<sup>438</sup>.

This finding has been put into question in cases where directives operate as a trigger for the application of general principles of EU law, to which they lend 'specific expression'. Before addressing that issue, however, a look at the potential effects of general principles and other types of written trigger instruments is imperative.

## 5.2 'Trigger' instruments

General principles of EU law are widely accepted as having primary law value. As such, the question raised in this context is necessarily whether they can have direct application in both types of situations exposed above, that is, vertical and horizontal direct effect. The recognition of the latter poses numerous problems, due to the often unwritten nature of the principles and their inherent vagueness. Their application becomes furthermore complicated when it is dictated by the regulatory framework of directives which, as seen above, are deprived of horizontal direct effect as result of their nature, and as asserted by the constant jurisprudence of the Court. Indeed, as will be exposed, the application of general principles of EU law is usually 'limited' or shaped by the regulatory written frameworks provided by another instrument; moreover, even if the measures in question would not necessarily imply EU law application, the Court resorts to 'trigger' instruments<sup>439</sup>, which anchor the scope of application *ratione*

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<sup>438</sup> See, among others, *Ratti*, cit. supra, at paragraph 23: 'if the obligation in question is **unconditional and sufficiently precise**' (emphasis added); *Carp*, cit. supra, at paragraph 20: '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 private parties**' (emphasis added); *Amia*, cit. supra, at paragraph 33: 'whenever the provisions of a Directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they **may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly**' (emphasis added)

<sup>439</sup> The use of the word 'trigger' here intends underline the fact that the Court recurs to a written instrument so as to bring the analyzed matter under EU law's scope. It is thus not to be equated to the 'trigger model' advanced by Lenaerts and Gutiérrez-Fons in their piece when referring to Dougan's

*materiae* and then allow the Court to reason in an expansive manner as regards the relationship covered<sup>440</sup>.

### 5.2.1 Principles operating through a Treaty provision

Before engaging in the analysis of the rulings where general principles were applied through secondary legislation, one must note that the principled reasoning of the Court is not confined to such instruments. Indeed, the technique analyzed in this chapter, that of the direct application of general principles to individuals and relationships between private parties via a written regulatory framework, is perceivable already in written primary law.

Although Treaty provisions have the highest rank in the hierarchy of sources in EU law, the jurisprudence of the Court has shown that the prominent place which general principles of EU law occupy can challenge that assumption. Effectively, they have been used to interpret the core of certain Treaty provisions and challenge their apparent meaning. ‘Discovered’ by the Court as underlying values, they have altered the reading of some Treaty articles and significantly influenced the reading of their scope of application<sup>441</sup>.

*Defrenne II* is a good example. This ruling was considered ground-breaking for arguably establishing the direct effect of article 119 EC (now 157 TFEU), a provision which was specifically addressed to Member States. Indeed, the Court stated in this case that the fact that Member States are the addressees of the provisions does in no way

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theory (cf. Lenaerts, K. and Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers’ (cit. supra), at p.1640)

<sup>440</sup> This technique has been especially visible in the case of fundamental rights protected as general principles. See, however, Cappelletti, M., and Golay, D., ‘Judicial Branch in the Federal and Transnational Union: Its impact on Integration’, in Cappelletti, M., Seccombe, M. and Weiler, J.H.H. (eds), *Integration through law: Europe and the American federal experience*, Vol. I, Book 1, EUI Series A.2.1, Walter de Gruyter, Berlin/New York, 1986, pp. 261-351, at p.344, who, in the 80’s, qualified this mode of operation as ‘essentially parasitic’, since it requires a Treaty provision or a piece of legislation to operate (‘on which the fundamental right may be hung’).

<sup>441</sup> ‘The application of the Treaty might also trigger the general principles in another way: here, when the Treaty provisions apply horizontally (such as in the case of the free movement provisions and sex discrimination), private parties have been allowed to rely on the general principles to attempt to resist the application of the Treaty.’ (Spaventa, E., ‘The Horizontal Application of Fundamental Rights as General Principles of Union Law’, in Arnulf et al. (eds.), *A Constitutional Order of States?* (cit. supra), p.199-218, at p.206)

prevent the rights in question from being conferred to individuals, and hence directly relied upon. This decision was reached by considering the nature of the principle enshrined in the Treaty provision – the principle of equality between men and women. Article 119 was interpreted in the light of an underlying general principle, said to form ‘part of the foundations of the Community’<sup>442</sup>. However, what seems to be at stake is rather a direct application of the general principle of equal treatment, having its specific expression in a Treaty provision. In other words: paragraph 19 of the ruling is very clear in showing that what is implemented is not the provision *per se*, but its teleological aim. This aim is provided by the general principle therein ‘contained’: ‘article 119 is mandatory in nature’. Invoking the principle through the Treaty provision was hence essential to guarantee EU law’s effectiveness<sup>443</sup>.

The exact same process is undergone in *Angonese*<sup>444</sup> (with express reference to *Defrenne II* in paragraph 34 of the ruling). In question was a matter concerning freedom of movement of workers under article 48 (now article 54 TFEU). The Court states that the Treaty provision ‘lays down a fundamental freedom’ and ‘constitutes a specific application’ of the general principle of non-discrimination, similarly to article 119<sup>445</sup>. As a consequence, and in spite of the non-applicability of the Regulation implementing the provision, the latter is directly applicable to private individuals. Once again, horizontal effect is given not to the Treaty article but to the principle, ‘mandatory in nature’, of which it is a specific expression: the Court isolates and makes applicable a latent general principle, rather than worrying whether the provision in question is sufficiently clear and precise to produce direct effect<sup>446</sup>.

### 5.2.2 Principles operating through secondary law instruments

The overview of the legal effects of directives made in the beginning of the chapter fails to address the question which has been raised more often lately: that of the legal effect

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<sup>442</sup> See paragraph 12 of the ruling in *Defrenne II*, cit. supra.

<sup>443</sup> *Ibid.*, paragraphs 31 to 39

<sup>444</sup> Judgment in *Angonese*, C-281/98, EU:C:2000:296

<sup>445</sup> *Ibid.*, at paragraph 35.

<sup>446</sup> Lenaerts, K., and Gutiérrez-Fons, J., ‘The Role of General principles’ (cit. supra), at p.191; see, contra: Spaventa, E., ‘The Horizontal application’ (cit. supra), at p.206: ‘in order to be able to invoke the general principles, the Treaty provision which brought the matter within the scope of Union law must be directly effective (...). [This] is demonstrated by the rulings on age discrimination (...) in order to be able to trigger the general principles, the Court had recourse to secondary legislation rather than the Treaty.’

of directives combined with general principles of EU law, or of self-standing general principles in case of directives that ‘flesh-out’ and enshrine them<sup>447</sup>. As noted, situations where vertical direct effect is concerned do not seem to represent a problem in terms of application of EU law, since the situation comes under EU law scope both *ratione materiae* and *ratione personae*. Cases like *Marshall*, *Palacios de la Vila*, *Wolf* or *Petersen* are labeled ‘easy cases’, since the applicant’s claim was brought towards the State or its emanations, with no horizontal relationship being at stake<sup>448</sup>. As the latter are directly bound by EU law, its application *ratione materiae* and *personae* was very straightforward<sup>449</sup>.

Could the same underlying rationale which shaped this type of reasoning be the one justifying the newest developments, where the CJEU faces situations entailing potential horizontal direct effect? Indeed, *Mangold* and *Küçükdeveci* seem to fall accordingly in terms of *ratione materiae* under the scope of EU law – in both cases the situations were somehow covered by EU norms, or within a certain area of substantive EU law interest<sup>450</sup>. Nonetheless, *ratione personae*, and hence creating potential horizontal application of EU law, they have raised much controversy<sup>451</sup>. The Court was immediately accused of attributing what it had always denied to directives: horizontal direct effect.

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<sup>447</sup> As noted by Muir, the application of the general principles of EU law is closely connected to instruments of secondary EU law. See Muir, E., ‘Of Ages in – And Edges of – EU Law’, (2011) 48 *CMLRev* 39, p. 39-62, at p. 56

<sup>448</sup> Judgment in *Palacios de la Villa*, C-411/05, EU:C:2007:604; *Wolf*, C-229/08, EU:C:2010:3; and *Petersen*, C-341/08, EU:C:2010:4

<sup>449</sup> It must, however, be said that, although this classic ‘vertical-effect scenario’ is widely accepted, it also corresponds to a creation of the Court’s jurisprudence in *Van Duyn*, *Ratti* and *Faccini Dori*, amongst other.

<sup>450</sup> It should be pointed out, however, that the trigger operates differently in both cases. Indeed, whilst in *Mangold* a directive which was not in question was used as ‘trigger’ to pull the principle through another directive, in *Küçükdeveci* there is only one such instrument in question and the national provisions did not intend to represent its implementation. See Azoulai, L., ‘The case of Fundamental Rights: a State of Ambivalence’, in Micklitz, H. and De Witte, B. (eds), *The European Court of Justice and the Autonomy of Member States*, Cambridge, Antwerp, Portland: Intersentia, 2012, pp.207/217, at p.211: ‘In the *Mangold* case the Court established the relevance of a general principle of non-discrimination on the ground of age whilst admitting that Directive 2000/78, to which the situation could have been connected, was not fully applicable. How could this solution be justified? By the fact that the German law in question can be considered as a measure of ‘implementation’ of another statute (...)? Again, the connecting factor was tenuous.’

<sup>451</sup> One of the criticisms addresses this question with reference to the core of the creation of the system as an international organization. See Dorsen, N., Rosenfeld, M., Sajó, A., and Baer, S., *Comparative Constitutionalism, Cases and Materials*, American casebook series, West Academic Publishing, 2010, at p.86: ‘how do legal rights and obligations arising out of a treaty among nation states extend rights to private parties?’

In 2003, Mr. Mangold, aged 56, had signed a fixed-term employment contract with a lawyer, Mr. Helm. According to the German law at the time it was prescribed that the conclusion of fixed-term contracts had to be accompanied by a justification, unless the contract at stake concerned a worker who was 52 years old or older. This limit had been temporarily lowered from 58 to 52 until the end of 2006. Mr. Mangold contested the terms of his contract before the local Employment Court, alleging that the law was in breach of directives 1999/70/EC (on fixed-term contracts) and 2000/78/EC (the Framework directive)<sup>452</sup>. The national Court made a reference for preliminary ruling to the CJEU, which stated that implementation of the directive was not restricted to the measures created with that end in view, but rather spread to all the domestic measures intended to pursue the objectives laid down therein<sup>453</sup>. As to the implementation period, the CJEU first started by reminding its *Inter-Environnement Wallonie* doctrine, according to which Member States should refrain, even before the expiry of the implementation period, from taking measures which are contrary to the spirit and objectives of the directive<sup>454</sup>.

Then, the Court proceeded to state that the directive, ‘*in second place and above all*’, did not itself lay down the principle of equal treatment (whose source is to be found in constitutional traditions of Member States and in international instruments), merely providing a framework for its application<sup>455</sup>. Interestingly, in the next paragraph, where the principle of non-discrimination on grounds of age is proclaimed a general principle of Community law<sup>456</sup>, there is a shift in the anchoring of the reasoning back to directive

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<sup>452</sup> Council Directive 1999/70/EC of June 28, 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175 and Council Directive 2000/78/EC, of 27 November 2000, establishing a General Framework for Equal Treatment in Employment and Occupation

<sup>453</sup> *Mangold*, cit. supra, at paragraph 51. This understanding, however, was not exclusive in this case. See Opinion of Advocate General Bot in *Scattolon*, C-108/10, EU:C:2011:211, at paragraph 119: ‘when referring to the specific case of directives, the concept of **implementation** of EU law **should not be restricted merely to measures transposing** that law. Such a concept should, in my view, be understood as referring to **subsequent and specific applications** of rules laid down by a directive, as well as, more generally, to **all situations in which national legislation ‘concerns’ or ‘affects’ a matter governed by a directive** the period prescribed for the transposition of which has expired.’ (emphasis added)

<sup>454</sup> *Mangold*, cit. supra, at paragraph 67

<sup>455</sup> *Ibid.*, at paragraph 74

<sup>456</sup> A heavily criticised move. See Basedow, J., ‘The Judge’s Role in European Integration – The Court of Justice and Its Critics’, in Micklitz, H., and de Witte, B. (eds), *The European Court of Justice (cit. supra)*, at p.78: ‘the Court discovered a principle of non-discrimination on grounds of age as a general principle of Community law which was held to be directly applicable even before the expiration of the transposition period. (...) Such principle does not exist, neither in the international conventions which the court refers to without specification, nor in national law.’

1999/70. Indeed, the Court refers to the Framework directive, in paragraph 74, as laying down the framework to the application of the principle; however, and using the conjunction ‘thus’ to reinforce the elevation of the latter to the status of general principle of EC law, it then interprets the scope of application of EC norms and principles with reference to a different instrument.

Notwithstanding the fact that the ‘trigger’ is provided by the existence of measures which implement directive 1999/7 (and hence fall within the scope of application of EC law), again there is a shift in paragraph 76 back to the Framework directive. The Court here considers that legal protection of EU citizens dictated that observance of the principle could not be made conditional on the transposition deadline, for that would prejudice its full effectiveness. The use of the conjunction ‘consequently’ is merely a diversion, for these three paragraphs do not present such a connection. Effectively, although the principle is anchored in directive 2000/78, the piece of legislation which provides the connection with the scope of application of EU law (the ‘trigger’ instrument) is a different one. And the Court further enhances ‘the legal protection which individuals derive from the rules of Community law’ and their effectiveness in paragraph 77, by referring to disputes ‘involving the principle of non-discrimination in respect of age’ – without making clear what is the extension this ‘involvement’ encompasses.

*Küçükdeveci* appeared years later as a restatement of the former ruling, in spite of all the criticisms (inclusively from inside the Court<sup>457</sup>). The CJEU reaffirmed therein the existence of a general principle of non-discrimination on grounds of age, with precise contours being laid down in the Framework directive. This Directive was to be seen as having the purpose of laying down a general framework for, and giving specific expression to, the general principle<sup>458</sup>. This time, the facts had occurred after the expiry of the period for transposition, so measures implementing the directive would necessarily be brought under the scope of EU law. However, the measures in question were not aimed at implementing the instrument: they affected the conditions of

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<sup>457</sup> See Opinion of Advocate General Mazák in *Palacios de la Villa*, C-411/05, EU:C:2007:106, amongst others.

<sup>458</sup> *Küçükdeveci*, cit. supra, at paragraph 21



dismissal and should hence 'be regarded as laying down rules on the conditions of dismissal'<sup>459</sup>. The link created seems to be rather tenuous, despite the connection made between the paragraphs.

The national court had further asked whether the matter was to be analyzed by reference to primary law or to the directive. Facing this, the Court clearly stated that the general principle, as given expression in the directive, should be the basis for examination, for the directive itself could not impose obligations between private individuals<sup>460</sup>. Then, in spite of proclaiming EU primary law as the law to be applied, the Court nonetheless reiterates that the interpretation should be made in the light of the directive, its wording and purpose, so as to ensure full effectiveness to the principle<sup>461</sup>. Moreover, in cases where national legislation was found to be contrary to the general principle, primacy of EU law dictates that the former should be disapplied<sup>462</sup>.

Again, there seem to be swift shifts in the paragraphs: the Court starts by stating that the situation in question is to be assessed in the light of the principle (EU primary law); however, the application of the latter is to be made according to the wording, purpose and results prescribed by the directive. This operation enhances the importance of the trigger instrument, for it results in an application of the underlying general principle with a broader reach and in a way which could not be achieved by the norms used to anchor it<sup>463</sup>.

It should be added that the Court referred, as before, to the constitutional traditions common to the Member States and to international instruments; it did, furthermore,

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<sup>459</sup> *Ibid.*, at paragraphs 24 to 26. See, in this sense, Hancox, E., *The Scope of Fundamental Rights* (cit. Supra), at p.40/41: 'The national legislation in *Küçükdeveci* did not intended to implement the Directive, which had in fact already been implemented by another provision of national legislation. (...) In *Küçükdeveci*, the directive governed equality as regards employment and occupation and specifically implementing legislation had been introduced by Germany. The contested provision did not relate to equality however but to notice periods. This is the essential difference: in *Küçükdeveci*, the national provision does not give effect to the directive. Rather than ensuring the consistency of national law, the national provision in *Küçükdeveci* goes one step further: it is the type of provision open to challenge for conflicting with national measures giving effect to the directive. The court is implementing the directive into national law and applying it to national laws in one condensed action.'

<sup>460</sup> *Küçükdeveci.*, at paragraphs 46 and 50

<sup>461</sup> *Ibid.*, at paragraph 48

<sup>462</sup> *Ibid.*, at paragraph 54

<sup>463</sup> Spaventa, E., 'The Horizontal application' (cit. supra), at p.210 : 'the Directive triggers the application of general principles in a way that is broader than what could be achieved through the sole trigger'

recur to article 21 of the Charter of Fundamental rights of the European Union, but without basing the ruling in it<sup>464</sup>. This aspect is particularly striking: why would the Court chose the general principle enshrined in the directive instead of a principle/right clearly stated in an instrument with the same legal value as the Treaties? Whereas in *Mangold* the Charter was not available yet with the same legal force, here this is not the case. The answer is thus not easy, nor definitive, but it might represent a statement of the Court versus the horizontal clauses enshrined in this instrument and hence guarantee application of EU law whenever a general principle in the form of the one at stake is found to be applicable.

### *a) The 'deadline for implementation' question*

*Mangold* and *Küçükdeveci*, although very similar (to the point of the latter being labeled *Mangold II*<sup>465</sup>), have one fundamental difference: the deadline for the expiry of the period of implementation of the directive in question had not yet occurred in *Mangold*, whereas in *Küçükdeveci* it had. How could the directive's regime be enforced in the first situation? It is argued that the application of general principles cannot be conditioned or contained by a deadline imposed to an instrument of secondary law – it has to be considered relevant in all situations where EU law is deemed applicable<sup>466</sup>. In *Mangold*, the 'trigger' was presented by directive 1999/70/EC, since directive 2000/78/EC had not yet come to full implementation; as such, provided that the first

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<sup>464</sup> *Küçükdeveci*, paragraph 74. See Laulom, S., 'Non-discrimination en fonction de l'âge: un principe général du droit de l'UE', in *Forum Réflexions – Semaine Sociale Lamy*, n°1432, 08.02.2010, p.5-9, available at [http://www.wk-rh.fr/actualites/upload/SSL1432\\_non\\_discrimination.pdf](http://www.wk-rh.fr/actualites/upload/SSL1432_non_discrimination.pdf), at p.6: 'Pour fonder sa décision, la Cour reprend le même raisonnement que dans l'arrêt *Mangold*. Elle estime que la Directive 2000/78 ne consacre pas elle-même le principe (...). La Directive ne fait donc que concrétiser le principe de non-discrimination en fonction de l'âge que doit être considéré comme un principe général du droit de l'Union. (...) La Cour ajoute un autre élément plus convaincant qu'elle ne pouvait pas utiliser à l'époque de l'arrêt *Mangold*: la Charte des droits fondamentaux de l'Union européenne.'

<sup>465</sup> See Frisch, J., 'Küçükdeveci – a European Case', where it refers to a blogger, Eurostein, who stated the following: 'I am afraid *Küçükdeveci* is *Mangold II*: an even bolder, but simultaneously also more porously argued decision.' (original article, *Mangold II*, no longer available on [adjudicatingeurope.eu](http://adjudicatingeurope.eu)) – available at <http://julienfrisch.blogspot.pt/2010/02/kucukdeveci-european-case.html>

<sup>466</sup> Dougan, M., 'In Defence of *Mangold*', in Arnall et al. (eds), *A Constitutional Order of States?* (cit. supra), pp. 219-244, at p.235: 'provided the deadline for transposition of the Directive has passed, and disputed national measures fall within the material scope of application, there will be no need to show that they constitute implementing provisions'. It thus seems that, before the deadline, interpretation in conformity was launched due to the existence of a 'trigger', Directive 1999/70, since the measures at stake were not implementing provisions. See also Ellis, E., and Watson, P., *EU Anti-Discrimination Law* (cit. supra), at p.128/129: 'the principle of non-discrimination on grounds of age was not used to oust a directive but rather to fulfill the traditional function of general principles as a tool for the review of union law measures and measures taken by member states when acting within the Union law'.

instrument contained a link to EU law, the question is not of application of directive 2000/78/EC, according to the Court, but of the general principle of non-discrimination on grounds of age it enshrines. The contours of the principle are, however, drawn by the directive's provisions.

It should be noted that this is not the first time a directive is said to be an expression of a general principle – *P v S* provides a clear statement in that sense<sup>467</sup>; but the shape of the principle appears to be extremely similar to the directive's provisions, which is rather striking<sup>468</sup>.

As regards the issue of the expiry of the deadline for the implementation of the directive, it seems that the quality of 'trigger' for such instruments will be required only in one type of situations, as the following table aims to show:

<b>Directive</b> <b>National measures</b>	<b>Deadline for transposition has expired</b>	<b>Deadline for transposition has not yet expired</b>
Implementing the Directive	Irrelevant	Irrelevant
Any measures having a bearing on the substantive area of the directive	Measure automatically brought within the EU law scope	Need for ' <i>trigger</i> ' to anchor the 'invokability' of EU law

It seems that, when the national measures in question are designed to put into effect the directive, the fact that the deadline for transposition has not yet expired will not prevent the Court from exercising its adjudication powers upon them, in light of the *Inter-Environnement Wallonie* case law. On the other hand, when the measures in question are not implementing EU law, but somehow fall within the scope of its areas of application (*ie.* there is some sort of substantive EU law impact on the matter), the fact that the deadline for transposition has expired will imply that even such measures will be brought under EU law's scope of application, and hence its purview possibilities.

<sup>467</sup> Judgment in *P. v S.*, C-13/94, EU:C:1996:170, at paragraph 18

<sup>468</sup> Groussot, X., Pech, L. and G. Petursson, *The Scope Of Application Of Fundamental Rights On Member States' Action*, Eric Stein Working Paper No.1/2011, at page 29: 'the Court has been extremely cautious when applying directives and general principles of law simultaneously'

When that timespan has not yet elapsed, however, the Court requires a ‘trigger’ instrument so as to establish a connection. This will correspond, for example, to the role played by directive 1999/70 in *Mangold*.

The reasoning in *Defrenne II* can be used analogously. In that case, in paragraph 64, the Court states that ‘no implementing provision could adversely affect the direct effect of the article’. Comparatively, in *Mangold*, there was no need for implementation of the directive since the principle had direct effect in itself. Furthermore, paragraph 54 in *Defrenne* states that the Treaty provision does not lay down the principles – similarly to what was stated in relation to the directive, in *Küçükdeveci*, where the secondary law instrument merely provided further details on the material scope. Hence, the principles underlying a certain provision seem to be made applicable independently of the nature of the trigger at stake<sup>469</sup>.

#### ***b) Direct application of the principle... or the directive's regime?***

On a different note, in *Mangold* and *Küçükdeveci* the principle is not only applied through the directive, but rather entails additionally an application of the directive’s regime to the situation at stake<sup>470</sup>. These cases would not have been as controversial had the situation involved an organ of State, *i.e.*, had they concerned vertical relations. In such a case, EU law would be deemed directly applicable: had the parties involved represented a claim against public authorities or other State emanations, the rationale used would have potentially been the one used in *Marshall*. This case seems to be, however, the key aspect to the development of the latter approach. In fact, paragraph 48 of *Marshall* is very clear: ‘a directive may not *of itself* impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person’ (emphasis added). Here lays a minimal detail which can potentiate a different reading of the case law. The words of the Court are clear – a directive may not of itself impose obligations on an individual. Of itself means solely, intrinsically,

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<sup>469</sup> See Spaventa, E., ‘The Horizontal application’ (cit. supra), at p.208: ‘*Mangold* seems to imply that general principles (...) are applicable whenever the situation falls within the scope of Union law, regardless of whether the trigger is the Treaty or a Directive, and regardless of whether the litigation is vertical or horizontal’

<sup>470</sup> See Lazzerini, N., ‘(Some of) The Fundamental rights’ (cit. supra), at p.910, where she speaks of a ‘substantial coincidence between the content of article 6(1) of the Directive and the general principle prohibiting discrimination on grounds of age’.

considered alone, ‘when nothing in addition can be identified’<sup>471</sup>. The opposite can be said to occur, thus, when the instrument is combined with a general principle, when it bears the principle underlying the values expressed in both its recitals and articles and settles its contours. Indeed, by saying ‘of itself’, the Court must *a contrario* accept that not alone (*ie*, in combination with a general principle) a directive may have the capacity of imposing obligations on individuals.

That implies accepting that the directive’s regime may be applied when giving expression to a general principle, hence guaranteeing EU law’s effectiveness<sup>472</sup>. It seems that, in using the expression ‘of itself’ in *Marshall*, the Court might have opened space for its own circumvention.

But how should the degree of entwinement between the two norms be assessed in this type of combination? *Audiolux* can again serve as a yardstick to look at this operation, as can *Römer*<sup>473</sup>. Without repeating the factual situation, it suffices to recall that the CJEU stated that it is not sufficient that secondary legislation lays down certain provisions relating to well defined rights for those to qualify as general principles of EU law<sup>474,475</sup>. As such, it is clear that general principles with very specific content cannot be inferred from directive provisions – only self-standing principles underlying the legislative instrument can be applied through its framework<sup>476</sup>.

This means that the existence of the principle is completely independent from the directive, due to its constitutional primary law character; however, the principle finds expression in the directive provisions, without gaining very specific contours, so as to

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<sup>471</sup> Craig, P., ‘The Legal Effect of Directives: Policy, Rules and Exceptions’, *European Law Review* 34 (2009) 349-377, at p. 358. According to the Oxford Dictionary of English language, ‘of’ or ‘by itself’ means ‘considered separately from other things’. The other versions of the text seem to indicate the same understanding: ‘une directive ne peut pas **par elle-même** créer d’obligations dans le chef d’un particulier’, ‘eine Richtlinie **nicht selbst** Verpflichtungen für einen einzelnen begründen kann’ (emphasis added)

<sup>472</sup> Dougan, M., ‘In Defence of Mangold’ (cit. supra), at p.233: ‘legal certainty will prevent an unimplemented Directive of itself from imposing obligations upon an individual, but it will not prevent the exact same Directive from triggering the general principle of Union Law so as to reshape that individual’s obligations in exactly the same manner’.

<sup>473</sup> Judgment in *Römer*, C-147/08, EU:C:2011:286

<sup>474</sup> Paragraph 34 of the ruling in *Audiolux*, cit. supra

<sup>475</sup> Muir, E., ‘Of Ages in’ (cit. supra), at p.59: ‘multiple references in secondary legislation are not enough to trigger reference to a relevant general principle with *Küçükdeveci* effect’.

<sup>476</sup> Paragraph 42 of the ruling in *Audiolux*, cit. supra

maintain the possibility for broad application. Mere reference to the principles in the preamble will hence not suffice to indicate, *per se*, that they enshrine a certain principle and define its particular features.

*Römer* can also shed some light on the fine-tuning of the technique used by the Court as regards this type of operation. Although there is no application of the general principle of non-discrimination on grounds of sexual orientation to the situation referred, the Court still built a careful reasoning around it, even before defining whether the case came within the scope of EU law or not. Application of the principle was closely tied to the directive and its transposition deadline, which had not yet expired, as well as to article 13 (now 19 TFEU)<sup>477</sup>. Paragraph 63 is quite clear in stating that since the provisions were not implementing provisions, the situation was deemed not to be within the scope of EU law. Possibly, had another instrument existed in complementarity with directive 2000/78, as it did in *Mangold*, the ‘trigger’ could have been created<sup>478</sup>.

Does this mean that the application of the general principle depends on full the transposition of a directive in a Member State’s legal order? In *Mangold* whilst the ‘trigger’ directive (directive 1999/70) supported the application of the general principle, the other (directive 2000/78) provided the effective framework through which the latter was applied. This shows that only within a provided framework will a general principle have application, independently from its self-standing characteristics. This might happen when the subject matter falls within the scope of a directive, even if no implementing provisions are at stake. The purpose of the directive is to ‘flesh-out’ the principle, laying the conditions of application that the principle will subsequently fulfill in order to be effective (and horizontally directly effective, as a source of primary law)<sup>479</sup>. This view is expressed in some way by Advocate-General Trstenjak in

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<sup>477</sup> See paragraphs 57/63 of the ruling in *Römer*, cit. supra

<sup>478</sup> See Dougan, M., ‘In Defence of Mangold’ (cit. supra)

<sup>479</sup> This has been defined as an application of the material scope of the Directive, but without an extension of the said scope taking place. See Van Eijken, H., ‘Case note on Case C-391/09, Malgożata Runevic-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others’, *CMLRev* 49: 809–826, 2012, at p.825: ‘In *Kücükdeveci* and *Mangold* the Court closely followed the material scope of the Directive and was therefore in line with the will of the legislature. The material scope of the Directive was therefore not extended by the Court, only its application’

*Rosenbladt*, although it is not particularly developed<sup>480</sup>: the Advocate-General seems to think that the Court, in such cases, will apply the principle under the conditions set out by the directive, even if the latter does not of itself apply to the situation referred.

While both the substantive law and its direct horizontal application are triggered by the legislative instrument, with the primary law-value general principle applying to the matter in question, the substance of the principle does not seem to be determined autonomously but rather with reference to more detailed rules provided for by the directive<sup>481</sup>. This is reiterated in a recent case, *Commission v Vanbreda*, where the Court stated:

*‘Where they take account of the provisions of a directive laying down a general principle of EU law, the EU Courts cannot, however, disregard the content of those provisions, notwithstanding the fact that they do not apply as such in the case in question. More particularly, to the extent that it is apparent from the provisions of such a directive that the EU legislature sought to establish a balance between the different interests involved, the EU Courts must take account of that balance in their application of the general principle thus laid down.’*<sup>482</sup>

Arguably, the facts are looked at with the directive serving as a ‘magnifying glass’, while the derivation of legal consequences reports back to primary law. Notwithstanding that fact, the directive’s provisions, as the Court constantly recalls, can have horizontal direct effect if they are clear, unconditional and the individual invokes

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<sup>480</sup> Opinion of Advocate General Trstenjak in *Rosenbladt*, C-45/09, EU:C:2010:227, at note 27: ‘In that judgment [*Küçükdeveci*] the Court had regard to the general principle of non-discrimination on grounds of age. However, the Court appears to take the view that this principle of primary law can be fleshed out by the secondary-law Directive 2000/78 in such a way that it also applies if the directive cannot be applied between private individuals. In such cases, in examining the general principle, the Court appears to apply conditions which correspond to those under Directive 2000/78, with the result that inferences can be drawn as to the interpretation of the directive.’

<sup>481</sup> See Bell, M., ‘The principle of equal treatment: widening and deepening’, in Craig, P., and De Búrca, G., *The Evolution of EU law*, OUP, 2011, 611, at p.628: ‘Strikingly, the Court embodies the general principle of equal treatment with the detailed contents of the employment equality directive’. See also Fischinger, P., ‘Normverwerfungskompetenz nationaler Gerichte bei Verstößen gegen primärrechtliche Diskriminierungsverbote ohne vorherige Anrufung des EuGH, Entscheidung des Europäischen Gerichtshofs vom 19. Januar 2010’, *Zeitschrift für Europäisches Privatrecht*, 2011 (1)

<sup>482</sup> Order in *Commission v Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, at paragraph 31 (emphasis added).

them in case the directive has not been transposed or been so incorrectly (even if such provisions are not applicable when the governed relationship is one between private individuals, for that would endanger the principle of legal certainty).

### *c) Effects achieved*

The function of the written instrument in these cases seems hence to be a different, bipartite one: it triggers the substantive field of EU law related to the matter, working then as a normative basis for its application. Being that, all by itself, the directive cannot impose obligations in these cases, the question is rather whether the provision at stake is self-sufficient to vest a '*droit subjectif*' in such a way that its respect can be claimed *per se* before a national court. The combination is here deep, with a high level of intertwinement of the directive with the principle must be high, since the first shapes the way the latter's substance will show. The general principle constitutes the rule of law applicable and directly effective on national law, but this connection is so strong that one may question whether the horizontal direct effect of a general principle is possible without an ancillary legislative instrument<sup>483</sup>.

On the other hand, it should be noted that this application leads to the 'exclusion' of the application of the national rules – this is demanded by the primacy of EU law<sup>484</sup>. It is questionable, however, whether the inexistence of national conflicting rules to be displaced can dictate the non-application of a principle<sup>485</sup>.

This approach is confirmed in other cases. In *Prigge* the Court stated (in relation again to directive 2000/78) that, 'where they adopt measures which fall within the scope of the directive, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect the directive'<sup>486</sup>. This is the wording used also in *Hennigs and Odar*<sup>487</sup>. As

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<sup>483</sup> See Muir, E., 'Of Ages in' (cit. supra), at p.57/59; see also Spaventa, E., 'The Horizontal application' (cit. supra), at p.208/209: 'general principles (...) are applicable whenever the situation falls within the scope of Union law, regardless of whether the trigger is the Treaty or a directive, and regardless of whether the litigation is vertical or horizontal'; and Safjan, M. and Miklaszewicz, P., 'Horizontal Effect of the General Principles of EU law in the sphere of Private Law', *ERPL*, 3-2010, p.475-486

<sup>484</sup> Muir, E., 'Of Ages in' (cit. supra), at p.39

<sup>485</sup> See reference to *Audiolux* in Spaventa, E., 'The Horizontal application' (cit. supra), at p.213

<sup>486</sup> Judgment in *Prigge and Others*, C-447/09, EU:C:2011:573, at paragraph 48



such, it seems that, in spite of the substance of the general principle being of primary law level, the application will follow the directive's regime, 'the existing normative framework set out by the EU legislator'<sup>488</sup>. This is in direct opposition with statements which claim that true general principles of EU law with constitutional status are applicable on their own, without needing further legislative intervention<sup>489</sup>. Indeed, it is a fact that the application of a vague principle is extremely difficult, if not impossible, in its unwritten, uncertain shape, whose contours vary; a legislative framework has to be used one way or the other. This is why the assertion that horizontal direct application of general principles of EU law is possible as such seems to be implausible<sup>490</sup>.

Muir has used three cumulative criteria to assert the generality of a principle of EU law<sup>491</sup>. First, the general principle in question must be well circumscribed, although general (not rendered applicable by general considerations but to a specific type of situations, although not as detailed as to dictate a particular choice); secondly, it must be substantiated through secondary legislation and, finally, the sole purpose of the directive is to give effect to the principle, to act as its expression. It thus seems that a general principle will not have its own scope of application as an isolated source of EU law. This suggests general principles need a framework for application, which is, in the analyzed cases, an instrument of secondary legislation which 'fleshes out' and shapes

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<sup>487</sup> Judgment in *Hennigs*, C-297/10 and C-298/10, EU:C:2011:560, at paragraph 68, and *Odar*, C-152/11, EU:C:2012:772, at paragraph 34: 'According to the Court's settled case-law, where they adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect the directive'

<sup>488</sup> See Lenaerts, K., 'Exploring the Limits' (cit. supra), at p.403: 'In *Hennigs* the Court expressly says that the principle is 'enshrined in primary law in Article 21 of the Charter' and given specific expression by the Directive (paragraph 46), adding that the principle is to be 'implemented' by the instrument (paragraph 63).'

<sup>489</sup> See Lenaerts, K. and Gutiérrez-Fons, J., 'The Place of the Charter in the EU Constitutional Edifice', in Peers et al. (eds), *The Charter of Fundamental Rights* (cit. supra), at p.1578: 'As stressed by the CJEU in *Audiolux*, general principles of EU law enjoy 'constitutional status' and may be relied upon without further EU legislative intervention. It follows that a Charter principle does not qualify as a general principle of EU law if the former is 'characterised by a degree of detail requiring legislation to be drafted and enacted at [EU] level by a measure of secondary [EU] law.'

<sup>490</sup> See Ellis, E., and Watson, P., *EU Anti-Discrimination Law* (cit. supra), at p128: 'if the equality directives are all underscored by a directly effective general principle of equality, then why has the court chosen to refuse a remedy to a litigant as against a private employer [referring to *Marshall*]? Further, if the general principle of equality on the ground of age is a directly enforceable right in the hands of an individual, why was it necessary to enact the framework directive at all? And if, as the court asserts, the framework directive merely spells out the detail of the general principle of non-discrimination on the ground of age, are the exceptions contained in that directive to be implied into the general principle? If not, are those exceptions invalid because they conflict with the general principles?'

<sup>491</sup> Muir, E., 'Of Ages in' (cit. supra), at p.60

the contours of the principle. Principles are then applicable through the ‘shaping’ directives, but only when some sort of trigger allows for the situation to be linked to EU law. Moreover, although their contours are presented by the directive, the general principles cannot be so precise as to give rise to specific obligations – so as to keep their general application tamed, according to the cases referred above.

This type of operation, consisting of extracting an underlying value from a provision in a legal instrument, which acts as a specific expression of the first, seems not to be exclusive for invoking general principle. Indeed, it might also consist of reference to another norm, which value and application will be shaped according to the reference trigger. *Viamex*<sup>492</sup> provides a good example of that. In this case, an obligation derived from a directive was imposed on one of the parties. However, the legal basis was provided by a regulation: this instrument contained an express reference to the directive’s provisions, hence making them directly applicable, in spite of their lack of direct effect. It so seems that a directive will be capable of being applied between private individuals due to a reference to its provisions as binding made by a regulation. With the existing references being made and accepted between two instruments of secondary EU law, it is hard to see how this operation can be denied to a similar application of general principles, which constitute primary EU law and hence have a higher legal value.

In this respect, reference must be equally made to the reasoning in *AMS*<sup>493</sup>. In this ruling, the Court discussed whether the right at stake was to be considered a right or a principle, or even a general principle, as was seen in chapter I. Moreover, however, the direct application of the principle was raised. Advocate General Cruz Villalón asserted, in his Opinion, that ‘the Charter confines the justiciability of ‘principles’ to their (...) refined state as rules and acts’. The latter, which are but a specific substantive and direct expression of the first, are ‘incorporated into the criterion for assessing the validity of other acts implementing that ‘principle’. Moreover, he affirms that it is in the light of such criterion (the wording of the principle and the acts which provide its ‘specific

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<sup>492</sup> Order in *Viamex Agrar Handel and ZVK*, C-37/06 and C-58/06, EU:C:2006:118, at paragraph 28: ‘it cannot be precluded, in principle, that the provisions of a Directive may be applicable by means of an express reference in a Regulation to its provisions’.

<sup>493</sup> Judgment in *Association de médiation sociale*, cit. supra.

substance and direct expression’) that the validity of other implementing acts is to be assessed<sup>494</sup>. An example of these implementing acts would be, in his opinion, the rule enshrined in article L.1111-3-4 of the French Labour Code.

This rather elaborate construction led the Advocate General to conclude that the fact that the instrument giving specific expression to the principle in question is a directive and cannot constitute any sort of hindrance. Indeed, after recalling the case law of the Court on the impossibility for directives to be relied upon by private individuals, he asserts that certain (not numerous) provisions are ‘capable of giving specific substantive and direct expression to the content of a principle’; as such, he reiterates that he would see no problem in allowing for certain exceptions to this rule since this would be an extremely individualized *ad hoc* function of the instruments – which he equates to the approach already followed in cases such as *Mangold*, *Küçükdeveci* and *CIA Security*<sup>495</sup>.

He thus stated that, ‘on the basis of the second sentence of article 52(5) of the Charter, article 27 of the Charter, given specific substantive and direct expression in article 3(1) of directive 2002/14, may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation’<sup>496</sup>.

The Court nevertheless recalled, referring to *Pfeiffer* and *Küçükdeveci* as regards the potential effect of the directive at stake, 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 private parties’, and *AMS*, in spite of its social objective, was a private association<sup>497</sup>. It then questioned whether the situation at stake was any similar to the one in *Küçükdeveci*, that is, whether ‘Article 27 of the Charter, by itself or in conjunction with the provisions of directive 2002/14, can be invoked in a dispute between individuals in order to preclude (...) the application of the national provision which is not in conformity with that directive’<sup>498</sup>. In spite of

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<sup>494</sup> Opinion of Advocate General Cruz Villalón in *AMS*, cit. supra, at paragraphs 68 and 71

<sup>495</sup> *Ibid.*, at paragraph 76/77

<sup>496</sup> *Ibid.*, at paragraph 80; see equally paragraph 97.

<sup>497</sup> Ruling of the Court in *AMS*, supra note , at paragraph 36/37

<sup>498</sup> *Ibid.*, at paragraph 41

considering that, since the national provision at stake was a measure conceived to implement directive 2002/14, article 27 of the Charter was applicable to the case, the Court still concluded that the article could not be invoked in a dispute between individuals so as to displace the national legislation at hand<sup>499</sup>. As such, the Court seems to have closed the door for the Advocate General's proposal of permitting an exception to the lack of horizontal direct effect of directives.

The mode of operation under analysis in this chapter, however, can be seen as, rather than a veiled attribution of horizontal direct effect to directives, a consequence of EU law's primacy. General principles, qualified as primary law norms, seem to be capable of vertical and horizontal direct effect<sup>500</sup>. However true this assertion might be, it is a fact that, as noted, by fostering their direct application through the regime of an instrument which is lower in rank, the Court is creating a confusion between the effects of legal norms. Albeit enhancing the legal certainty of an instrument which is unwritten and vague by providing it with a regulatory framework for application, the Court runs the risk of confining directives to a mere 'decorative' function<sup>501</sup>.

### 5.3 Other general principles?

Could *Mangold* and *Küçükdeveci* 'open the door' for all the grounds of discrimination referred to in article 19 TFEU to become overtly general principles of EU law, not merely as specific expressions of the general principle of equality? Can this be done only provided there is a secondary law instrument in the case in question? It is hard to predict how the Court's case-law will progress in this matter. The *Runevič-Vardyn and Wardyn* case raised questions with regard to the principle of non-discrimination on grounds of nationality and, specifically, racial or ethnic origin as a discrimination factor<sup>502</sup>. In this case, it has been noted that 'the fact that the situation of the couple did not fall within the scope of the directive did not exclude their situation falling within the

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<sup>499</sup> *Ibid.*, at paragraphs 42/43 and 48/49

<sup>500</sup> The question of horizontal applicability of the general principle of non-discrimination on grounds of age is now at stake in a reference for preliminary ruling before the CJEU. The national Court expressly asks the Court whether such principle is to be applied in a relationship between private parties. Case C-414/14, *Ajos*.

<sup>501</sup> See Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases *Michaeler and Subito GmbH*, C-55/07 and C-56/07, EU:C:2008:42, at paragraph 21 and following.

<sup>502</sup> Judgment in *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291. This case concerned rules regarding surnames and forenames of natural persons and their different spelling.

scope of EU law as such'<sup>503</sup>. There are many indications in what comes to the importance of this ground of discrimination, since reference is made not only in article 19 TFEU, but also in article 21 of the Charter and indents number 2 and 3 of directive 2000/43's preamble; in addition, 'the protection of the rights of members who belong to minority groups, as well as the protection of human rights, belong to the values of the European Union (art.2 TEU)<sup>504</sup>. Could this be a missed opportunity for the recognition of a general principle of equality on the grounds of ethnic origin?

This is not, however, the only ground for discrimination which has been at stake, as of lately. Take the *FOA* case<sup>505</sup>, which raised the question on whether obesity can be considered a disability and, if so, whether it can configure a prohibited ground on which to discriminate. The Court denied the existence of a general principle of non-discrimination on grounds of obesity, since such ground is not referred to in the Treaty<sup>506</sup>. Moreover, it stated, in relation to article 19 TFEU, that 'it follows from the case-law of the Court that this article only contains the rules governing the competencies of the EU and that, since it does not refer to discrimination on grounds of obesity as such, it cannot constitute a legal basis for measures of the Council of the European Union to combat such discrimination'<sup>507</sup>. Nonetheless, the Court recognized that, in certain cases, obesity can indeed configure a disability<sup>508</sup> – and it seems that it has not 'closed the door' to the recognition of a general principle on grounds of the latter. Could this be an indication that only grounds expressly stated in the competence conferring provision are to be regarded as specific general principles, or specific expressions of the general principle of equal treatment and non-discrimination?<sup>509</sup>

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<sup>503</sup> Van Eijken, H., 'Case note on Case C-391/09' (cit. supra), at p.823

<sup>504</sup> *Ibid.*, p.825

<sup>505</sup> Judgment in *FOA*, C-354/13, EU:C:2014:2463

<sup>506</sup> *Ibid.*, at paragraph 33 'it should be stated that no provision of the TEU or TFEU prohibits discrimination on grounds of obesity as such. In particular, neither Article 10 TFEU nor Article 19 TFEU makes reference to obesity'.

<sup>507</sup> *Ibid.*, at paragraph 34

<sup>508</sup> *Ibid.*, at paragraph 59: in case it 'entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78'. See also paragraphs 60 and following.

<sup>509</sup> It should be noted that, whereas here the ground at stake here was not literally contained in the Treaties, the same is not true with regard to the racial or ethnic origin factor.

There is indeed a discrepancy between the factors contemplated in article 19 TFEU and article 21 of the Charter. While the first seems to be closed, referring to 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', the latter is potentially open-ended, with its reference to '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'.

How are these two to be put in accordance? It should be recalled that both cases concern primary law; the fact that the Charter does not extend the scope of application of the Treaties, in line with its article 52.3, does not diminish the potential of the grounds enshrined in article 21 to be seen as fully fledged fundamental rights, depending on how the Court will address further the division between rights and principles. This will inevitably trigger considerations on their potential direct application.

The truth is that the Court seems to have become adamant to make use of specific general principles whenever another option is available, preferring to indicate the Charter reference and leave the matter for the national court to decide.

#### **5.4 Application of secondary law framework as a way to 'contain' primary law application?**

This chapter has so far analyzed the potential effects achieved by general principles when applied with recourse to the regulatory regime of a secondary law instrument. The particulars of the 'specific expression' technique, however, raise questions which were not yet addressed. Indeed, the latest cases show a tendency to 'contain' the application of general principles, by rendering it confined to the written framework or regime provided for by the ancillary instrument<sup>510</sup>.

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<sup>510</sup> It should, however, be noted that the interpretation of primary law (where general principles of EU law seem to fit) with the help of secondary legislation is a widely observed feature of EU law. It is visible namely in what concerns the interpretation of the content and scope of exceptions invoked by Member States to derogate from the fundamental freedoms. See Mortelmanns, K., 'The relationship between' (cit. supra), at p.1326: 'there is EC legislation that is of indirect importance for the interpretation of primary law. (...) the EC directive is brought into the analysis in order to review the content and scope of the

It should be noted that this technique is not new. In fact, one look at early cases in the 80's will confirm that the principle of non-discrimination has been claiming multiple 'specific expressions', be it in Treaty provisions or secondary legislation. In *Morson*, a freedom of movement case, the Court stated that 'the rule prohibiting discrimination on grounds of nationality which article 7 of the Treaty enunciates in general terms and to which article 48 gives more specific expression'<sup>511</sup>; in *Van Walsun*, article 3 of regulation 3063/78 was found to be but a 'specific expression' of the principle enshrined in article 40.3 TEC 'in the light of the particular facts of the allocation of the quota in question, regard being had to the objectives of economic policy which are pursued in the context of the common organization of the market in beef and veal'<sup>512</sup>. Nonetheless, its use in the recent principle-based cases might show that the technique is being adapted, so as to provide a framework of legal certainty for the application of the principle (or perhaps to counter the accusations of lack of legal certainty).

A first reading will already reveal that this type of restricting trend seems to be parallel, or at least presents substantial similarity, to the one encountered in cases connected to the fundamental freedoms<sup>513</sup>. *Alpine Investments* is a good example, albeit it presents the technique *a contrario*<sup>514</sup>. When realizing that the secondary legislation at hand could not be applicable to the case, since its scope of application would not encompass the situations in question, the Court referred to primary law, in the form of Treaty provisions. The Court noted that neither of the directives in question (directives 93/22/EEC and 85/577/EEC) was applicable to the matter at stake; as such, the questions were addressed 'solely in the light of the Treaty provisions on the freedom to provide services'.

The same is patent in *Inspire Art*: when noting that the analyzed rules could not be encompassed by the Eleventh directive, the provisions 'must therefore be considered in

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exception which is relied on by the Member States. (...) The interpretation of primary law in this way takes place either because the national court has made a link with secondary law, as in *Bluhme*, or because the ECJ has done so itself, as in *Preussen*.'

<sup>511</sup> Judgment in *Morson and Jhanjan*, 35/82 and 36/82, EU:C:1982:368, at paragraph 14

<sup>512</sup> Judgment in *Van Walsum*, 124/79, EU:C:1980:79, at paragraph 14.

<sup>513</sup> For further on this matter, see Mortelmans, K., 'The relationship between' (cit. supra)

<sup>514</sup> Judgment in *Alpine Investments*, C-384/93, EU:C:1995:126, at paragraphs 14 and 15

the light of articles 43EC and 48EC<sup>515</sup>. This happens, according to the analysis of the Court, when no complete harmonisation has taken place in the field of law in question<sup>516</sup> if, however, such harmonisation has occurred, the national measures are to be 'assessed in the light of the provisions of that harmonising measure and not in the light of primary law'<sup>517</sup>. This shows that, had the secondary legislation available covered the matters in analysis, primary law would not have need to be deployed, due to the existence of more specific provisions.

How does any of this apply to the mode of operation analyzed in this chapter?

In line with *Prigge, Tyrolean Airlines* reiterated that social partners adopting measures under directive 2000/78, 'which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age', were to respect that directive<sup>518</sup>. As such, the Court furthered, the questions were to be examined 'solely in the light of directive 2000/78'; that is, albeit the general principle, as primary law, is the underlying applicable law, the question analyzed falls within a certain written framework which provides it with 'specific expression'. *A contrario*, one could argue, in line with the fundamental freedoms cases referred to above, that had it been the case that no specific written expression was available to deepen the primary law reference, the latter would have been directly applied<sup>519</sup>.

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<sup>515</sup> Judgment in *Inspire Art*, C-167/01, EU:C:2003:512, at paragraph 73

<sup>516</sup> Judgment in *Commission v Belgium*, C-421/12, EU:C:2014:2064, at paragraph 64: 'Since, as observed in paragraph 55 above, Directive 2005/29 has effected a complete harmonisation of the rules concerning unfair commercial practices, the national measures at issue must therefore be assessed solely in the light of the provisions of that directive and not of Article 28 TFEU.'

<sup>517</sup> Judgment in *Commission v Belgium*, C-150/11, EU:C:2012:539, at paragraph 79. The Court furthermore refers to *Vanacker and Lesage*, C-37/92, EU:C:1993:836, at paragraph 9; *Daimler Chrysler*, C-324/99, EU:C:2001:682, at paragraph 32; and *Lidl Magyarország*, C-132/08, EU:C:2009:281, at paragraph 42.

<sup>518</sup> Judgment in *Tyrolean Airways Tiroler Luftfahrt Gesellschaft*, C-132/11, EU:C:2012:329, at paragraphs 22/23

<sup>519</sup> See furthermore judgment in *Larcher*, C-523/13, EU:C:2014:2458, at paragraphs 28/3, where the principle of equal treatment is assessed in relation to article 3 of the relevant regulation; and *Dano*, cit. supra, at paragraph 61: the general principle of non-discrimination finds its specific expression in the directive; as such, the Court proceeds to interpret the article containing this expression rather than the general principle itself.



This seems to result as well from the recent *Vital Pérez*<sup>520</sup> case. This case concerned a claim of discrimination on grounds of age as regards the maximum age established to access the police force in Spain. The Court recognized that the situation was to be analyzed in light of the general principle of prohibition of discrimination on grounds of age. Notwithstanding, it furthered that this principle, enshrined in the Charter of Fundamental Rights, 'was given specific expression by directive 2000/78 in the field of employment and occupation' and 'enshrined in article 21 of the Charter'; for this reason, 'when it is ruling on a request for a preliminary ruling concerning the interpretation of the general principle of non-discrimination on grounds of age (...) the Court examines the question solely in the light of that directive'. It thus becomes quite explicit that, if the primary law (the general principle per se or as enshrined in the Treaty/Charter) finds an anchoring expression in written secondary law, it is the latter the one applied. This is moreover confirmed by the fact that the Court urges social partners, in these cases, to respect the directive, albeit the principle at stake finds already a written expression in the Charter<sup>521</sup>.

It is interesting to note, additionally, that the Court has applied the type of reasoning explored here also in relation to directives in cases where the deadline for the implementation period had not yet expired. In *Finalarte*, again the Treaty provisions are applied to the matter at stake, but this time due to the fact that the directive had not yet been implemented<sup>522</sup> (which does fall at odds with the reasoning in *Mangold*, for instance, where the not-yet-expired deadline for implementation did not prevent the Court from applying the general principle, as it seems plausible, but however framing the situation with the aid of the written framework of the directive<sup>523</sup>).

This use of the 'specific expression' technique leaves space to wonder whether the Court is not using it to contain the potential uncertainty stemming from the application of

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<sup>520</sup> Judgment in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraphs 24 and 25

<sup>521</sup> See *Odar*, cit. supra, at paragraph 34; *Schmitzer*, cit. supra, at paragraph 23; and judgment in *Hay*, C-267/12, EU:C:2013:823, at paragraph 27.

<sup>522</sup> Judgment in *Finalarte and Others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, at paragraphs 25/26: 'On this point it should be noted that the time-limit for implementing the directive, 16 December 1999, had not been reached at the time of the facts in the main proceedings. There is therefore no need to interpret the directive (...) It follows that the rules in issue in the main proceedings should be considered solely in the light of Articles 59 and 60 of the Treaty.'

<sup>523</sup> See *Mangold*, cit. supra.

unwritten principles, or to at least counter potential accusations in that sense. If indeed, in line with the fundamental freedoms cases, once there are specialized legislative instruments providing a regulatory framework, the Court will opt for using them rather than the underlying primary law, this could mean added legal certainty and predictability to the Court's principle-based reasoning.

In the field of fundamental freedoms, this was especially the case after harmonisation of the fields in question. When faced with fields of law where the existing regulation had been harmonised at European level, the Court has assessed the matters at stake in light of the provisions of secondary legislation and not the relevant Treaty articles anymore<sup>524</sup>. The only caveat to this type of operation is that, nonetheless, when exercising the powers established through secondary legislation, the Member States must nonetheless respect the Treaties<sup>525</sup>.

It could thus be argued that, when 'specific expressions' of primary law have their contours regulated in a written framework, their application is framed and assessed in the light of the latter, but always with due regard to the primary rules or principles in question. This is so especially if there has been exhaustive harmonization in a certain field of law<sup>526</sup>.

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<sup>524</sup> See judgment in *Vanacker and Lesage*, cit. supra, at paragraph 9: 'since the question of the collection of waste oil has been regulated in a harmonized manner at Community level by the directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of Articles 30 to 36 of the Treaty.' See also judgment in *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, at paragraph 57: 'In that regard, it should be noted that the Court has consistently held that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, inter alia, *Radlberger Getränkegesellschaft and S. Spitz*, C 309/02, EU:C:2004:799, paragraph 53 and the case-law cited).'

<sup>525</sup> Judgment in *Deutscher Apothekerverband*, C-322/01, EU:C:2003:664, paragraph 64: 'A national measure in a sphere which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty. However, the power conferred on Member States by Article 14(1) of Directive 97/7 must be exercised with due regard for the Treaty, as is expressly stated in that provision.'; and judgment in *Verband Sozialer Wettbewerb*, C-315/92, EU:C:1994:34, at paragraph 17: 'The German legislation which transposed Article 6 (2) of Directive 76/768 must in its application be consistent with Articles 30 and 36 of the Treaty, as interpreted in the Court's case-law'.

<sup>526</sup> See Opinion of Advocate General Geelhoed in *Commission v Austria*, C-221/00, EU:C:2002:419, at paragraph 39: 'If a national provision is not harmonised, but also falls outside the scope of the directive, the provision in question must, where appropriate, be examined in the light of the general provisions of the Treaty.' and at §45: 'Only where a national rule must unquestionably be regarded as falling outside the

Harmonization, however, cannot be said to exist or be envisaged as regards non-discriminatory measures, namely in the field of employment and occupation. *Vital Pérez* may represent the corollary of a line of cases where the Court indicates that it is eager to 'contain' the application of general principles, endowing it with added legal certainty. Could a total parallel be drawn in relation to the field of fundamental freedoms?

The status of these areas is often considered the same, with fundamental rights and free movement rights being protected alike. The approach taken in the reasoning of the Court seems equally similar, at least in what concerns the legal source to apply: whenever there is secondary law laying down the regime for the applicability of the relevant norm of primary law, the former is applied over the latter, or at least its regime seems to lend the contours which allow for the application of the latter. This helps to eliminate uncertainties in what comes to the rule of law, by framing the application of often contour-blurred norms. This 'contamination' of both areas of EU law raises, of course, many questions. Indeed, if both seem to have the same status, why is the internalization so different?

In the first place, the fundamental freedoms seem to have given more leeway to the Court in terms of legitimacy. In fact, while the fundamental rights competence was 'acquired' later, and as a consequence of the freedoms, these are one of the essential features of the construction of the Communities and internal market. They are the field where the Court can rule *par excellence*; no other jurisdiction is as well positioned to do so. Fundamental rights protection, on the other hand, has occurred as a spill-over effect, and the Court's arguable competence is not at all the only existing one. Here, it competes with several other instances. Moreover, the asymmetries of power present in

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scope of the directive can there be any justification for assessing it under the provisions of the Treaty.' See moreover judgment in *Tedeschi*, 5/77, EU:C:1977:144, at paragraph 35: 'Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human (...) recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.' In case of minimum requirements' directives, Member States are allowed to introduce more stringent measures, provided they are aligned with primary law. The compatibility with the Treaty will, however, dictate that no assessment will be made in relation to general principles: see judgment in *IP*, C-2/97, EU:C:1998:613, at paragraph 40.

relationships involving fundamental rights, namely non-discrimination and equality, are stronger, with need for added protection of the Union citizen.

This 'recent' move of the Court towards an anchoring in the written instrument can potentially be explained by the proliferation of written norms. Indeed, if the protection of fundamental rights started off as the stage for principled reasoning, the Charter and the Treaty now expressly guarantee the protection. This might also be a way for the Court to signal to national courts that interpretation of fundamental rights in accordance with EU law is made easier and possible, due to the written framework which now forms a basis for the application of general principles. Naturally, a harmonization of the field cannot be expected; as such, this type of 'containment' of the application of general principles leaves leeway for the Court to decide

### **5.5 *Rationale* underpinning this mode of operation**

From the reading of the cases analyzed in this chapter, it seems that this type of interaction operates in a very specific niche. In fact, the direct application of general principles of EU law to horizontal situations, altering the scope *ratione personae* of the written instruments combined therewith, is especially visible in the fields of labour and employment law.

An explanation proposed to this peculiar configuration is Micklitz's theory on access justice (*Zugangsgerechtigkeit*), which he defines as the mission, for the European Union, 'to grant access justice to those who are excluded from the market or to those who face difficulties in making use of market freedoms'<sup>527</sup>. In his view, the social aspects of the European legal order have been gradually established since the creation of

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<sup>527</sup> Micklitz, H-W., *Social Justice and Access Justice in Private Law* (January 2011), EUI Working Paper LAW No. 2011/02, at p.2. He claims all social justice models use 'the law (...) as a means to protect the weaker party against the stronger party' (p.1). See also Hesselink, M., 'A Toolbox for European judges' (cit. supra), at p.21: 'If Europe's internal market has a basic structure that exercises an important distributive role (in terms of wealth, welfare, primary goods or capabilities), which seems undeniable today, then a European civil society, a European demos (not an ethnos) by necessity has to exist. Citizens in Europe belong to (at least) two gradually integrating polities, the national and European ones. Currently, European citizenship is characterised, in particular, by market freedoms and fundamental rights'

the Communities<sup>528</sup>. Consequently, 'the dominating normative construct in EU labour, anti-discrimination and consumer law is (...) the result of a market driven European integration through regulatory law'<sup>529</sup>. The legislative movement was, in his view, 'meant to bring the consumer and the worker into a legal position where she or he is equipped with the necessary set of rights so as to participate and reap the benefits of the internal market and the most competitive economy'<sup>530</sup>. This narrative thus focuses on the understanding of the evolution of the European Communities, first, and the Union, after, as a constant, still ongoing, process. Micklitz notes that consumer law is a recent addition, compared to the social facet, which has been developed throughout the past 50 years. Anti-discrimination, however, has existed as an underlying value since the Treaty of Rome in the areas of labour and employment law, which is reflected in both the legislation and case-law of the Court<sup>531</sup>. According to Micklitz, it operates as a 'bridge', connecting labour law and consumer law<sup>532</sup>.

In developing this line of thought, Micklitz uses *Mangold* and *Küçükdeveci* as examples of the model of access justice. He claims the doctrine stemming from these cases, with the recognition of potential horizontal application of a general principle, 'lies at the heart of the European principle of access justice, as it would allow to guarantee access of EU workers to the labour market, access of EU consumers to the consumer market and access of EU citizens to all sorts of services, so long as they come under the scope of EU law.'<sup>533</sup> The aim is hence not to seek redistributive justice, as happens at national

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<sup>528</sup> Micklitz, H-W., *Social Justice* (cit. supra), at p.1 'Since the adoption of the Single European Act in 1986, the European has assumed a social outlook which has gradually developed over time eventually taking shape in the Lisbon Treaty and the Charter of Fundamental Rights'

<sup>529</sup> *Ibid.*, p.22

<sup>530</sup> *Ibid.*, *ibid.*

<sup>531</sup> *Ibid.*, at p.17 'there is, however, an area of labour law and policy, where the European Union has and is setting the tone more or less since the insertion of article 119 into the Treaty of Rome and independent from the ups and downs of the European integration process via numerous directives in the field of occupation and employment and via a proactive ECJ – the fight against old and new forms of discrimination'

<sup>532</sup> *Ibid.*, at p.15

<sup>533</sup> *Ibid.*, at p.18: 'The *Mangold* judgment has raised a highly controversial debate on whether EU law knows a self-standing binding general principle of anti-discrimination, and whether such a principle is not only applicable vertically in citizen state relations, but also horizontally in citizen-to-citizen relationships. In its broadest reading, the *Mangold* doctrine lies at the heart of the European principle of access justice, as it would allow to guarantee access of EU workers to the labour market, access of EU consumers to the consumer market and access of EU citizens to all sorts of services, so long as they come under the scope of EU law. *Küçükdeveci* seems to grant horizontal direct effect to the Charter of Fundamental Rights.(...) The more general question concerns what extent secondary community law can be submitted to a

level, but rather guarantee that EU consumers and workers are equipped with the set of rights to participate in and enjoy the competitive benefits of the internal market. The regulatory aims are hence turned towards the guarantee of a social dimension to market integration, while also securing that those benefiting from the rules are given access to the system<sup>534</sup>.

With particular regard to the anti-discrimination directives, Micklitz claims that they 'allow for the establishment of equal access conditions', but that the rules enshrined therein 'cannot be used to establish equal standards for men and women at the most favourable level'<sup>535</sup>. This seems to suggest that indeed the objective sought by the legislation may be one of 'access justice', and not the application of social justice throughout the Member States.

While the argument is convincing, in particular due to the peculiar nature of the EU, developed around the concretisation of an internal market, it incurs the risk of presenting a too reductive approach. It is true that, from the 50's, the nationals of the Member States have operated as economic factors, whose fundamental freedoms dictated the ever stretching dimension of the Community market. Notwithstanding, it is apparent that the development of the case law has equally accompanied the affirmation of the individuals as free-moving citizens of the European Union, whose genuine enjoyment of rights is to be safeguarded, sometimes independently from the existence of a cross-border factor<sup>536</sup>.

It is, indeed, true that the interplay between fundamental rights and fundamental freedoms has not always tipped the scale in favour of the first. The *Viking* and *Laval*

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compliance test with the Charter of Fundamental Rights governed by access justice as the overall horizontal yardstick.'

<sup>534</sup> *Ibid.*, at p.23

<sup>535</sup> *Ibid.*, at p.27

<sup>536</sup> See judgment in *Ruiz Zambrano*, C-34/09, EU:C:2011:124. This is also visible in relation to the enactment of the Anti-discrimination Directives. See Wiesbrock, A., 'Legal Migration to the European Union' (cit. supra), at p.174: 'The conclusion can be drawn that Directives 2000/43/EC and 2000/78/EC as opposed to most previous EC anti-discrimination law are not primarily economically motivated but have their main underlying objective a concern for human rights. For this reason the Directives constitute a significant step towards the development of an autonomous principle of equal treatment in the Community legal order.'

saga can attest the difficulties found by the Court in that realm<sup>537</sup>. Nonetheless, the recent developments, together with the now certain accession of the Union to the European Convention on Human Rights, as dictated by Lisbon, seem to foster the understanding of the Union as a fundamental rights polity. The fact that such progression has made its way through areas such as employment and labour law can arguably be explained by the fact that these were the areas triggered more frequently, due to their natural connection to the exercise of the fundamental freedoms. This is especially true in light of the fact that European citizenship is thought of as the corollary of the status to be achieved and enjoyed by the nationals of the Member States.

## Conclusion

This chapter has focused on one of the most controversial areas of use of the principle-based reasoning by the Court. The growth of fundamental rights claims in connection with secondary law instruments, and the way such rulings have been anchored on general principles, which were applied to the situations at stake, raised doubts with regard to the ever denied horizontal direct effect of directives.

Notwithstanding that fact, these cases are a prime example of how the combined application of norms, even of different ranks, in EU law, can lead to results which would not have been achieved by the isolated application of each of them, individually. Indeed, the situation allows for the invocation of the general principle due to the existence of a factor which is capable of bringing it to the scope of application of EU law – the so-called ‘trigger’. The latter provides the bridge between the general principle of EU law and the legislative instrument to be applied, permitting the combination process. Some doubts, however, remain, with regard to the conditions in which this operation is developed.

On another note, it has been questioned whether the application of the framework of the written secondary law instrument as a way to shape the general principle of EU law

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<sup>537</sup> Judgment in *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772 (*Viking Line*), where the Court highlighted the social nature of the Union, albeit giving preponderance to the freedoms, rather than fundamental rights of individuals. It stems equally from the reasoning that the treaty provisions invoked (hence, primary law provisions) were deemed capable of horizontal direct effect.

to which it gives expression can be seen as an attempt, on the CJEU's part, to somewhat 'limit' the application of the principle – or, in other words, allow for added certainty in the application. This was done in parallel with a look at the regime applicable to fundamental freedoms' case-law, where harmonization dictated that the parties would have to invoke the secondary law instrument rather than the Treaty provisions. It is unclear whether the same can be said in relation to the cases analyzed here, especially in the absence of the harmonization possibility; however, it might be that the Court is trying to make it easier for individuals and national courts to shape the application of general principles.

Finally, the potential reasons underlying this mode of operation were discussed, with reference to a theory of 'access justice'. The findings, nevertheless, seem to indicate that something beyond the economic factors of equal market access seems to be at the core of the Court's rulings, especially in light of the position 'citizenship' as a status has achieved in the latest years.



## **CHAPTER VI: GENERAL PRINCIPLES AS TOOLS TO STRUCTURE THE RELATIONSHIPS BETWEEN EU LAW AND NATIONAL LAW, VIA SECONDARY LAW**

### **Foreword**

In the previous chapters, the analysis of the interaction of general principles with other legal sources was focused on the effects achieved therewith, and the impact on the scope of application of EU law in what comes, first, to the subject matter covered and, secondly, to the relationship brought within that same scope. The focus of this chapter is a different one, but it nonetheless purports to show yet another type of interaction of general principles with other legal sources. This is the case where general principles are used by the Court as a tool to structure, via the available secondary legislation, the relationship between EU law and the actions of national authorities towards its application or implementation.

While one can argue that, in fact, the topic of this chapter also covers the relationships tackled in the previous ones, if taken generally, it should be noted that the roles are a bit different here. Indeed, the peculiarity of the mode of operation isolated in this chapter is the role played by national law. In the previous chapters the latter assumed a more muted role, being subject to the application of EU law in a more passive way. Indeed, national law was invoked as an inspiration to the general principles deployed, but there was a certain distancing of the sources – the link was not very direct. This is not the case of the areas analyzed here. In what comes to both general principles of civil law and general principles of criminal law, albeit there is a clear European law component, the role assumed by national law is much more active, with the legal instruments of the Member State providing for a direct and concrete reference to the principle at stake.

This analysis will first start with what could be called a new trend on general principles – the creation or discovery of general principles of civil law. In these cases, the Court abandons the dual relationship between the principle and the written instrument at stake, as seen above, inserting a third element in the game: national legal concepts. The relationship is hence more of a ‘triangular’ nature and the effects are different, with a restrictive reading being given to secondary law, as will be shown further down.

The second strand of interesting cases in what comes to this mode of operation of general principles is that observed when criminal law matters are brought within the scope of EU law. Indeed, it is known that criminal law is a thorny issue and that much has changed post treaty of Lisbon, but the cases analyzed provide us with examples of general principles being used to help national authorities in the implementation of EU law with a very restrictive reading of the objectives contained therein.

This analysis will ultimately show equally that general principles of EU law are not necessarily a tool used for unbridled expansion of EU law and extension of its scope of application. As judicial devices, they serve several different purposes - and here their restrictive capacity is clearly visible. They provide an orientating function, pointing at the underlying objective which shall be given prevalence in the application of EU law. However, more than that, they guide national authorities in this application, permitting a narrow reading which safeguards certain values and objectives of the EU.

## **6.1 General Principles of (European?) Private Law**

When reading the interactions presented in the previous chapters, one might question whether this type of 'behaviour' of the general principles would be confined to very specific expressions thereof contained in secondary law instruments or Treaty provisions. As regards the mode of operation, it has been argued that two types of situations are usually at stake: one where the principle is used as a strong interpretative tool which allows for a modification of the scope of application of the instrument; the other relating to the direct application of the principle to a situation, triggered by the existing regulatory framework and affecting a horizontal relationship. In both cases, the instruments used in combination with the general principles are said to be an expression of the latter.

In recent years, however, a different mode of operation seems to have started surfacing the rulings of the Court. Indeed, especially connected to the development of consumer law, principles typically found in the national legal systems, relating to the structure of private relationships, have been somewhat internalized in the jurisprudence of the

Court<sup>538</sup>. Presented as ‘general principles of civil law’, they pave the way for a different type of principle based reasoning of the Court: the ‘dual’ relationship observed in the previous two chapters gives the floor to a more blatantly ‘triangular’ one, with a potential of correction of national law by EU law which can lead to further development of the scope of application of the latter.

### 6.1.1 General principles with impact in private relationships: a clarification

The debate on General Principles of EU law and European Private or Civil law is often tamed by obscurity. In the first place, the conception of the EU as a private law actor is a more recent thing than the consideration of the system as a constitutional one<sup>539</sup>. On the other hand, most of the literature, when addressing European civil law, looks at the influence of the general principles in private law relationships in general, independently of the nature of the principles at stake. A quick look at scholarly articles on the matter will allow the conclusion that many of the titles which seem to promise an insight on the matter dealt with in this chapter, will be, after all, concerned with the application of general principles of EU law in disputes between individuals in general. They do not necessarily focus on civil law matters *per se*, nor on the principles typically drawn from national private law concepts. This gives rise to a ‘melting pot’ of extremely different case scenarios, where rulings such as *Defrenne* or *Mangold* are addressed as raising the same sets of problems as the cases which will be dealt with in this section.

In my view, this approach is wrong. Whilst it is undeniable that both situations have a bearing on the relationships of private parties, and the fact that one can potentially assume that all the principles at stake have constitutional status in the EU law

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<sup>538</sup> As Gerstenberg notes, ‘the EU does not have a private law system of its own but a multilevel system that must operate in close cooperation with national legal systems’. The role of the Court has thus been crucial in the development of this area of law in its European wide expression. See Gerstenberg, O., ‘Constitutional Reasoning in Private Law: the role of the CJEU in adjudicating unfair terms in consumer contracts’, *ELJ*, doi: 10.1111/eulj.12121, 2015, at p.1.

<sup>539</sup> See Micklitz, H., ‘The EU as a Federal Order of Competences and the Private Law’, in Azoulay, L. (ed), *The Question of Competence in the European Union*, OUP, 2014, p.125-154, at p.130/131: ‘Not a state, the European Union was never concerned with the underpinnings of establishing private law as a national legal order, based on private autonomy or freedom of contract. The overall project of the European integration process was first the common market, later the internal market, and only gradually the building of a legal order that reached beyond mere economic transactions, the shaping of a social order, a citizens’ order or even a constitution.’ and also at p. 144: ‘Let us imagine traditional private law as a cake. What European private law is doing is to cut out of national private law the economically most important and most relevant—in other words, the fattest—slices.’

hierarchy<sup>540</sup>, it is also true that the mode in which they are retrieved from their respective sources differ. Indeed, the civil law principles here addressed concern contractual relations established at national level, mainly connected to consumer law issues. They are treated with reference to the national civil codes or other civil law legislation<sup>541</sup>, being associated with a particular branch of law. Other general principles with a bearing in substantive individual relationships, as presented in chapter IV, have a different formation. In spite of their presentation often being connected to fundamental individual rights (cf., namely, the general principles protected as fundamental rights under the Charter and article 6 TEU) and in which sense they configure, indeed, private rights, they stem from constitutionally protected values. These depend on public recognition and are opposable to individuals and public authorities alike. Their application is made with anchorage in a public law instrument – other written sources of EU law, as seen above – to nevertheless impact on a relationship between private individuals. Their pervasive nature dictates so.

For the sake of clarity, and so as to avoid any confusion, I shall adopt here a distinction, put forward by Reich<sup>542</sup> and mentioned (although somehow not exactly followed) by Groussot and Lidgard<sup>543</sup>, between general principles of EU law which have an impact of civil law relations (and hence potential horizontal direct effect between private parties – the *Defrenne, Mangold, Küçükdeveci* line of rulings) and general principles of EU civil

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<sup>540</sup>See Purnhagen, K., ‘Principles of European Private or Civil Law? A Reminder of the Symbiotic Relationship between the ECJ and the DCFR in a Pluralistic European Private Law’, in *ELJ*, 2012, Vol.18 (6), November 2012, p.844-867, at p.851

<sup>541</sup>In this sense, see as well Comparato, G., and Micklitz, H-W., ‘Regulated Autonomy between Markey Freedoms’, in Bernitz, U. (et al.), *General Principles of EU law and European Private law* (cit. supra), p. 121-153, at p.125 and ff.

<sup>542</sup>Reich, N., *General Principles of EU Civil Law*, Intersentia, 2014, at p.6. Reich, however, puts the emphasis of his analysis on ‘the *acquis communautaire*, that is to general principles not of civil law in the EU or principles common to the Member States based on a comparative analysis (...), but to the specific contribution of civil law provisions of EU law, whether primary or secondary law in the ‘shadow’ of the Charter of Fundamental Rights’ (p.13).

<sup>543</sup>Groussot, X., and Lidgard, H., ‘Are there general principles of community law affecting private law?’, in Bernitz, U. (et al.), *General principles of EC Law in a process of development* (cit. supra), p.155-175, at p.163: ‘two main situations can be distinguished. First general principles may be proactive in the context of European private law, e.g. in such fields as competition law or the law of civil remedies, where judicial review of legislation is in question. Secondly, general principles may be applicable to relations between private parties, the so-called horizontal situations.’

law as retrieved from, and mimicked through, national legal systems which I shall address in this chapter<sup>544</sup>.

It has been pointed out that there should be a differentiation made between civil law and private law, in order to resolve the conceptual confusion patent above. In my opinion, the problematic of this area does not lay here. It should be noted that, in most Member States, the definitions of private law and civil law are concurrent. The term ‘civil law’ is mainly used to mark the distinction versus the common law systems. Bearing in mind the hybridity present in the EU legal system, it seems implausible to try to establish such a distinction, since the Union polity is composed of elements typical of both systems. I shall hence indistinctively use the reference to general principles of civil or private law when addressing this category of principles which find their core in national legal systems.

### 6.1.2 Origin of the general principles of civil law

As seen above, I have focused on the way the Court of Justice has in its rulings ‘discovered’ and used general principles of EU law traditionally seen as constitutional in status. However, especially as regards the newly formed consumer law *acquis*<sup>545</sup>, the principle-based reasoning of the Court seems to be paving its way also in relation to general principles seen as belonging to ‘traditional’ private national law<sup>546,547</sup>. Before

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<sup>544</sup> See, in this sense, Mak, C., ‘Hedgehogs in Luxembourg? A Dworkinian reading of the CJEU’s case law on principles of private law and some doubts of the Fox’, *ERPL*, 2-2012, p.323-346, at p.335, where she refers to principles of private law (*Hamilton, Messner*) and principles of EU law affecting matters of private law (*Audiolux, Mangold, Küçükdeveci*). She furthermore notes that ‘like the principles recognized in *Hamilton* and *Messner*, these latter principles [of the Common Framework of Reference] appear to be of a mainly private law nature, as opposed to, for instance, the ones based on fundamental rights that were at issue in *Audiolux* and *Mangold*’ (at p.341)

<sup>545</sup> Semmelmann, C., ‘The general principles of EU law in light of the public-private-distinction’, in Besson, S., and Pichonnaz, P. (eds.), *Les principes en droit européen – Principles in European Law*, (2011) Zurich, Schulthess

<sup>546</sup> See Hesselink, M., *The General Principles of Civil Law: Their Nature, Roles and Legitimacy* (September 22, 2011), Amsterdam Law School Research Paper No. 2011-35, at p.9: ‘the Court is effectively developing, in dialogue with the Member State courts, European private law principles. This raises the question whether these principles should be categorised as European in the strict sense of being part of EU law (and if so, which part) or merely in the broader sense of belonging, as background principles, to the developing multi-level system of private law in Europe or to a common European private law space.’ Also by Hesselink, M., ‘Private Law Principles, Pluralism and Perfectionism’, in Bernitz, U. (et al.), *General Principles of EU law and European Private law* (cit. supra), p. 21-44, at p.23: ‘although it is not entirely clear what exactly the Court means by (general) private law principles, the wording adopted by the Court nevertheless seems to have been a deliberate choice. The specific principles that have been indicated, so far, by the Court as (general) principles of civil law include, in

analyzing their characteristics and functions in comparison with the broadly recognized general principles of EU public law, one should note that it is undeniable that the influence of national laws of Member States is much more visible in the framing and application of these civil law concepts. Their nature, as their very own terminology, points to a closer link to the national legal systems – a perhaps more entrenched, direct and locatable origin. On the other hand, however, the fact that they are retrieved from national laws and then Europeanized can also provide the Court with a more legitimate leeway to create European principles of private law which can arguably, in the end, represent a detached version of the original national laws.

The general principles of EU private law, seem, on their part, to have been shaped primarily by national laws, and then incorporated as such by the EU adjudicatory system<sup>548</sup>. Due to their intrinsic connection to the national legal systems, they can arguably be used as a departing point for a cross fertilization movement amongst Member States, as opposed to a hierarchical intervention of the European Union. They stem from national practices and are then incorporated by the Court in its rulings as a

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particular, the principles of the binding force of contract, of good faith and of unjust enrichment'. See Weatherill, S., Case Notes 'The 'principles of civil law' as a basis for interpreting the legislative acquis', *ERCL*, 1/2010, p.74-85, at p.81/82: 'Is the Court doing for EU private law what it did long ago for EU fundamental rights? (...) So are *Hamilton* and *Messner* the first stirrings of a judicial shaping of the general principles of EU private law, on the well-known model according to which were judicially shaped EU fundamental rights (and some other principles of public law too)?'. See also Bernitz, U., Groussot, X., and Schulyok, F., 'Vision, Essence and Narratives of general principles and European private law: an Introduction', in Bernitz, U. (et al.), *General Principles of EU law and European Private law* (cit. supra), p.1-17, at p.1: 'freedom of contract, *pacta sunt servanda* or good faith (...) are examples of general principles in private law which could qualify as such general principles – if it can be established that they have been pronounced on by EU courts'.

<sup>547</sup> On the 'discovery' of these general principles, see Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p. 9: 'it is worth pointing out that the Court refers to 'the (general) principles of civil law'. The use of the determinate article (in all language versions) seems to convey the message that these principles already existed before the Court referred to them. This matches with the idea that the Court discovers such principles rather than inventing them.' See also Hartkamp, A., 'The General Principles of EU Law and Private Law', *RabelsZ* Bd. 75 (2011), p.241-259, at p.255: 'the European courts have developed a number of general principles which have their origin in private law. They have been developed in a public context. This argues in favour of their nature as general principles, which is characterised by generality and comprehensiveness, even if that is not to say they necessarily play a role in all branches of union law'

<sup>548</sup> On the 'Europeanisation' of national private law concepts, see Garcia, K., *Le droit civil européen – nouvelle matière, nouveau concept*, Larcier, 2008, at p.170 : 'les règles européennes de droit civil doivent toujours quelque chose à des règles préexistantes. En revanche, l'élément ajouté est, pour sa part, d'origine européenne. Les règles de droit empruntées se trouvent ainsi européanisées par l'ajout d'une interprétation, d'une définition ou d'une limite européenne.'; and at p.179 'c'est d'une réelle appropriation des notions par le droit européen dont il est question (...). À force d'ajouts européens, une notion va disposer d'un sens pleinement européen.'

harmonization tool (in a bottom-up/top-down relationship type<sup>549</sup>). By creating a path to the harmonization of national laws, EU private law concepts can ‘correct’ the development of the Member States legal systems in the said areas; as a result, the latter will progressively be aligned with the objectives pursued by European regulatory intervention<sup>550</sup>.

At the present moment, the European Union has not adopted any sort of Civil Code. Yet, the European Commission has sponsored several projects of a ‘search for post-national principles of private law’<sup>551</sup>: the Lando Commission prepared a set of principles of European Contract Law in 1999 (PECL) and, later on, in 2005, a ‘common frame of reference’ was also commissioned to an academic network so as to set which basic fundamental principles are to be used in contract law (DCFR). This document was published in 2008, being composed of a series of model rules, principles and definitions, with special stress on general principles of contract law. In 2011, the proposal for a Common European Sales Law, deeply inspired on the previous instruments, was launched, containing a section devoted namely to the principles of freedom of contract and good faith<sup>552</sup>. The significance of these instruments is not negligible, and the Court might be inspired by them<sup>553</sup>, as the Opinion of Advocate

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<sup>549</sup> See, on the top-down/bottom-up approach, Hesselink, M., ‘Private Law Principles’ (cit. supra), at p.40: ‘With regard to general principles of EU law, *i.e.* the fundamental principles that are located on the level of primary law and thus have constitutional status, a distinction is usually made as to their origin between principles deriving from the common traditions of the Member States, on the one hand, and principles deriving from that objectives of the EU, on the other. The former could be referred to as bottom-up (inductive) and the latter as top-down (deductive) principles. A similar distinction could be drawn in relation to principles that are not necessarily located at the level of primary EU law. (...) The general principles of civil law, at least the ones that the Court has referred to so far, are examples of bottom-up (inductive) principles that are (or should be) derived from the common private law traditions of the Member States.’

<sup>550</sup> See Gerstenberg, O., ‘Regulating private Law: in search for a Rawlsian Perspective on the EU’ (forthcoming), at p.18/19

<sup>551</sup> Hesselink, M., ‘Private Law Principles’ (cit. supra), at p.23

<sup>552</sup> On the need for a body of recognised ‘civil law principles’, especially in light of internal market consolidation, see Hesselink, M., *Unjust Conduct In The Internal Market: On the role of European private law in the division of moral responsibility between the EU, its Member States and their citizens*, Centre for the Study of European Contract Law, Working Paper Series, No. 2014-14, at p.2: ‘the European Union, given its advanced stage of integration, in particular its internal market, is in need, as a matter of justice, of a set of principles and rules defining basic private rights. Such a European system of private rights and obligations is required as part of the internal market’s basic structure.’

<sup>553</sup> Hesselink, M., ‘If You Don’t Like Our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New “Principles” Section in the Draft Common Frame of Reference’, in Brownsword, R., Micklitz, H-W., Niglia, L., and Weatherill, S. (eds), *Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 59-71, at p.61: ‘The ‘general principles of civil law’ that the European Court of Justice has referred to in a number of recent cases also

General Maduro in the *Hamilton*<sup>554</sup> case indicates. In fact, when, in paragraph 24, the Advocate General referred to the ‘principles common to the Member States’, he footnoted the Lando Commission’s principles. The same paragraph bears equally a mention to the ‘the creation of a common frame of reference for European contract law’,<sup>555</sup>.

### 6.1.3 General principles of civil law in the academic literature

The existence of a legitimate role for the Court in the use of these principles has not, however, been consensual<sup>556</sup> – in this, they seem to trigger the same (if not more) distrust as the ‘discovery’ of general principles of EU law. Several authors have hence questioned whether the CJEU is entitled to intervene in private law matters and ‘Europeanize’ principles which are not of public law origin, but rather belong to the core of national private legal traditions.<sup>557</sup>

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are of a similar nature [to the ‘common fundamental principles of European contract law’ contained in the draft common frame of reference of the European Commission]. In 2007, in *Société Thermale d’Eugénie les Bains*, the Court cites ‘the general principle of civil law’ that ‘each contracting party is bound to honour the terms of its contract and to perform the obligations thereunder’; in 2008, in *Hamilton*, it mentions as ‘one of the general principles of civil law’ the (frankly somewhat opaque) principle ‘that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract’.

<sup>554</sup> Judgment in *Hamilton*, C-412/06, EU:C:2008:215

<sup>555</sup> Opinion of Advocate General Poiares Maduro in *Hamilton*, C-412/06, EU:C:2007:695, at paragraph 24 and footnotes 8 and 9.

<sup>556</sup> Defending the legitimacy of the Court for such task, see Hesselink, M., *Unjust Conduct In The Internal Market* (cit. supra), at p.21/22: ‘in order to fill the normative gap the CJEU, in a series of cases, has started formulating ‘principles of civil law’, such as the principles of binding force of contract, good faith and unjustified enrichment. If the ‘lords of the treaties’, for primary EU law, and the ordinary legislator (Commission, Council and European Parliament), for secondary EU law, fail to take their responsibilities then some other institution has to step in. For, a European internal market requires European principles of civil justice. The internal market cannot be complete and function properly in a justice vacuum.’

<sup>557</sup> Mak, C., *Europe-building through Private Law. Lessons from Constitutional Theory*, Centre for the Study of European Contract Law Working paper Series, n° 2012-02, at p.5: ‘the acknowledgement of such general principles is not unproblematic, insofar as the Court does not specify its relation to more nuanced conceptions and applications of equivalent concepts on the national level.’ See also Groussot, X., and Lidgard, H., ‘Are there general principles of community law affecting private law?’ (cit. supra), at p.175: ‘it may be premature to talk about firmly established general principles of Community law in the field of private law. But it does seem as if we are seeing ‘embryos’ of private law principles starting to develop within the Community legal order’; and at p.163: ‘good faith, unjust enrichment and estoppel are concepts of private law, which are making their way within the Court of Justice – but are they considered as general principles of Community law?’. See also, on the inherent public nature of EC/EU law, Caruso, D., ‘The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration’, *ELJ*, Vol. 3, No. 1, March 1997, pp. 3–32, at p.8/9: ‘The six European nations that signed the Treaty of Rome in 1957 each had an autonomous, self-contained and functionally independent civil code, applied and interpreted by a distinct national judicial system. Even where the codes of two nations, for historical reasons, shared identical black-letter law, there was no reason to assume that the two nations’ courts



Gerstenberg argues that, in the cases where the Court has used general principles of civil law, the latter are derived from national law and appear as a hinge between EU and national private law concepts. He speaks of a ‘jurgenerative influence’ of such principles on the development of EU law, claiming that the ‘general principles derived from national private law operate as a corrective of EU private law’ by establishing ‘reciprocity of mutual obligations between trader and consumer’ and ‘emphasizing contextual limits to consumer rights’, while expressing the Court’s ‘deference to domestic private law’. ‘EU private law’, on the other hand, ‘operates as a corrective of national private law by forcing re-consideration of solutions entrenched under national private law’<sup>558</sup>.

Such a reading of the Court’s jurisprudence implies the acceptance of a two-way corrective function, which will result in the creation of a more proceduralized EU structure, based on a mutual sharing of basic concepts. Through its rulings, the Court can in this manner ensure that the application of EU law is made in a uniform way throughout the Member States, additionally pushing for legislative intervention on EU level<sup>559</sup>.

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would follow identical patterns or even borrow from each other’s experience in adjudicating analogous cases. (...) Given this background, it should come as no surprise that the Treaty of Rome was exclusively public in inspiration and scope. At least in principle, the four freedoms the Treaty was meant to ensure – namely, the free trans-border movement of goods, services, people and capital – could be achieved without reference to the substance and structure of the civil codes’.

<sup>558</sup> See Gerstenberg, O., *Regulating Private Law* (cit. supra), at p.29/30. See also, on the creation of a common ‘private law space’ for the EU, Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.13: ‘Another possibility still, is that the Court deliberately refrains from locating the general principles of civil categorically (i.e. en bloc) and exclusively at either the European or the national level. Maybe the Court envisages a more flexible and chameleonic nature for these principles. (...) they could become the ideal tool for further developing the emerging multi-level system of private law in Europe, or a common European private law space. They could contribute to bringing more coherence and convergence to European private law.’

<sup>559</sup> See Trstenjak, V., ‘The ‘instruments’ for implementing European private law – the influence of the ECJ case law on the development and formation of European private law’, in L. Moccia (ed.), *The Making of European Private Law: Why, How, What, Who*, Sellier, European law Publishers, 2013, at p.90: ‘through its case law on the provisions of the consumer protection directives, the ECJ assures their uniform interpretation and application in all Member States. However, the role of the ECJ is not restricted to controlling and enforcing a uniform application of EU consumer protection law. For the case law of the ECJ also shapes the consumer protection law in force and influences the EU legislator in the development of future provisions of EU law.’ See also Fauvarque-Cosson, B., ‘The relationship between the Political frame of reference (PFR) and the consumer acquis’, in Kleinmann, J. (ed.), *A Common Frame of Reference for European Contract Law*, Stockholm Centre for Commercial Law, at p.56: ‘there is transformation of civil law itself. During the 20th century, many European contract lawyers have observed the emergence of new values in private law (...). In many countries, the concepts of good faith,

Others, however, are skeptical as regards the qualification of the principles used by the Court in these rulings as ‘general principles of civil law’, which would rank in a parallel position to that of the primary-law ranked general principles of EU law<sup>560</sup>. Hartkamp claims that the first type of principles do not have the same value as the so-called public law ones, as used by the Court. They do not present, in his view, the same characteristics of constitutional importance: they are of a lower rank and, as such, should not be considered general principles of EU law<sup>561</sup>. Basedow holds the same impression: he states that the reasons underlying the use of principles of civil law and those recognized by the Court in relation to public law matters are different. The latter are, according to him, incorporated in the rulings due to ‘considerations of normative hierarchy’, *ie*: to ensure the effective application of EU law’s primacy; whilst the first are rather needed for a more negligible role, ‘systematic and interpretive purposes’, only exceptionally being used so as to displace the application of instruments of secondary Union legislation<sup>562</sup>. Hesselink furthermore notes that, whereas certain of the used principles are generally widely accepted, they may not be compatible with both the continental and the common law systems existing in the realm of the EU Member States

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abuse of rights or unconscionability have expanded so as to serve some form of distributive justice. (...) consumer law has thus developed within the realm of private law. Second, there is a transformation of civil law by the *acquis* [communautaire]. (...) the introduction, into private law, of general principles derived from European law, based upon values that have been regarded as the touchstones of Europe: protection of the weakest but also competitiveness of the market.’

<sup>560</sup> Bengoetxea, J., ‘General Principles navigating Space and Time’ (cit. supra), at p.47: ‘such principles of European private law do exist but they are either independent from or lower than those of EU law’. See also Basedow, J., ‘The Court of Justice and Private Law’ (cit. supra), at p.461: ‘according to a wide spread view, the general principles are characterized by their fundamental significance, which is said to explain their rank among the sources of primary Union law. Put in other words, the general principles take priority over secondary Union law. (...) It is doubtful whether this approach to the general principles of union law is appropriate in all contexts and, in particular, in respect of private law matters. It is certainly true that general principles are needed in private law too, when it comes to the interpretation of fragmentary legislation or to the filling of lacunae. But it is difficult to maintain that all general principles ascertained by the Court of Justice are of a fundamental significance.’

<sup>561</sup> See Hartkamp, A., ‘The General Principles of EU Law and Private Law’ (cit. supra), at p.256: ‘The ECJ also recognises principles of civil law which do not possess the status of general principles of EU law, just as there exist principles of taxation law which do not possess that status.’ [referring to *NCC Constructions*]; he adds, however, that cases like *Hamilton* do not amount to the use of general principles of EU law. And at p.257: ‘these principles are not sufficiently important for them to be counted as general principles of EU law’.

<sup>562</sup> Basedow, J., ‘The Court of Justice and Private Law’ (cit. supra), at p. 462. See further p.473: ‘What matters in private law is not the priority of general principles as part of the primary law of the Union over other sources of law, but their hermeneutical function for the understanding of the – secondary – Union private law.’

– and the Court has again failed to give a specific reason as regards their particular choice<sup>563</sup>.

To my mind, the general principles of civil law assume a particularly important role in what comes to the principle based reasoning of the Court. They seem to have a different way of operating in correlation with other sources of EU law, but the analysis of the case law will allow for the conclusion that they provide leeway for ‘legislative’ intervention of the Court. In fact, it is not merely that the Court interprets the instrument with the help of the general principle; it is rather that the Court sets aside a significance which was clearly envisaged by the European legislator and substitutes it with its own assessment by anchoring the judgment in a general principle of civil law<sup>564</sup>.

Moreover, it should be further noted that the type of relationship here developed is of a different nature to that one seen in the previous chapters: while the role of national law is more muted, or distant, in the latter, here its influence is directly identifiable. In fact, in these cases, the Court uses the ‘general principles of civil law’ to ‘correct’ the application of EU directives, by retrieving a general principle from the core of the system in question (anchored in national legal instruments). In such a way, the Court achieves equally a correction of national law through the ‘Europeanization’ of national legal concepts. Read in this way, I fail to see how these principles can be considered to have a different effect of the other general principles of EU law, in spite of the different terminology used (or rather the lack of reference to EU law); in any event, the case law analyzed further down will show that this distinctive mode of operation can possibly endow these principles with primary law value.

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<sup>563</sup> Hesselink, M., ‘Private Law Principles’ (cit. supra), at p.33: ‘especially the principle of freedom of contract and the principle of good faith and fair dealing seem to be rather controversial principles that may fit well within certain world views but are much less well compatible with certain other reasonable conceptions of the good’. And at p.39: ‘the CJEU’s recognition of general principles of civil law, however, has so far been entirely apodictic. The Court has given no reasons for their adoption.’

<sup>564</sup> See contra, and defending a lower rank/purely hermeneutical function, Basedow, J., ‘The Court of Justice and Private Law’ (cit. supra), at p.464: ‘the comparison between these statements of the Court in private law matters and many others dealing with public law reveals a certain misunderstanding by the Court of the role of general principles of private law. They serve primarily hermeneutical purposes. They provide an intellectual link between isolated or even diverse rules of law (...), [they] allow the allocation of certain issues and their specific solutions (...). They are not meant to be a tool for the legal review of Union law or provisions of national law. (...) What is needed for private law are principles of a lower degree of abstraction and generality’

#### 6.1.4 General Principles of Civil Law in the case-law of the Court of Justice

The interaction with secondary legislation is an essential feature in this jurisprudence. These instruments evidently provide the platform for the Court to analyze national implementing provisions. As referred above, however, they are then ‘corrected’ by the application of values which underlie the legal systems in question. This configures a particularly interesting use of general principles by the Court, which can arguably fill the same goals and allow the Court to interpret EU law so as to overcome limitations imposed by the legislature<sup>565</sup>.

Such instruments play a decisive role in the core of the reasoning of the Court so as to anchor the general principle of civil law invoked. The abstract concepts and general clauses used in directives – both in the provisions and, especially, in the preface – provide platforms for the CJEU to analyze the national private law at issue and consider whether it has diverged from the objectives set by EU law, or failed to accompany the development of the latter<sup>566</sup>. The analysis of the following cases aims to show that, equally in what regards general principles of civil law, directives provide an important tool for the application of underlying values which exert a strong bearing in the scope of the instrument. This operation, however, in clear contrast with the majority of the cases presented regarding general principles of EU law, does not result in a broadening of the scope of the instruments as regards the subject matter covered. It is rather the opposite what happens: the restrictive trend is the more noticeable one, as will be showed further<sup>567</sup>.

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<sup>565</sup> On the nature of private law regulation at EU level, see Micklitz, H-W., ‘The EU as a Federal Order of Competences’ (cit. supra), at p.129: ‘European regulatory private law shifts the focus from the national to the European level; it tends to disconnect itself from traditional national private law patterns, thereby establishing a new legal regime standing side-by-side with, though not unrelated to, national private law regimes.’

<sup>566</sup> Opinion of Advocate General Trstenjak in *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:401, at paragraphs 88/98

<sup>567</sup> See, however, Weatherill: ‘The directive’s principal aim [in Hamilton] is acknowledged as consumer protection, but this is not ‘absolute’ and ‘is subject to certain limits’. The Court’s resort to ‘one of the general principles of civil law’ as a basis for approving limits to the duration of the right to withdrawal is remarkable. (...) One is familiar with the Court’s readiness to animate general principles of EC law concerning fundamental rights (...). If such a journey is also to be undertaken in the field of general principles of private law, then the potential for systematisation and/or extension beyond the text of the Directives is evident’ (Weatherill, S., ‘Interpretation of Directives: the role of the Court’, in Hartkamp, A.,

*Société Thermale d'Eugénie les Bains*<sup>568</sup> is usually perceived as presenting the first step taken by the Court in using these principles in the reasoning. Be that as it may, reference should equally be made to the *Werhof* case<sup>569</sup>. This case occurred slightly prior and concerned a labour contract and the effects of a collective agreement in the ambit of the transfer of a business under directive 77/187/EEC<sup>570</sup>. In its reasoning, the Court acknowledged that ‘a contract is characterized by the principle of freedom of the parties to arrange their own affairs, according to which, in particular, parties are free to enter into obligations with each other’<sup>571</sup>. It furthermore reiterated the need for ‘secondary Community legislation to be interpreted in accordance with the general principles of Community law’<sup>572</sup>. In doing so, it directly addressed the principle of contract freedom and proclaimed its necessary impact in the reading of the directive.

Let us turn to *Société Thermale*. The proceedings concerned the charging of VAT taxes over deposits which were kept over advanced payment made by clients for a stay which then was cancelled. *Société Thermale* argued that these sums should not be subject to VAT, since they constituted a compensation for loss deriving from client default, rather than remuneration for the supply of certain booking services and other related, as claimed by the Tax Authorities. After unsuccessful appeals, the case reached the Conseil d’État, which asked the Court, essentially, whether sums which are paid as deposits in sales contracts and subject to VAT should be regarded, in case they are to be retained when the reservation is cancelled, as remuneration for a service (which would be subject to VAT) or rather a compensation for the loss suffered by the vendor with the cancellation of the contract.

When ascertaining the nature of such payments, the Court, after considering that the contractual obligation would exist even without a deposit, relied on the ‘the general principles of civil law’ to state that ‘each contracting party is bound to honour the terms

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Hesselink, M., Hondius, E., Mak, C., Du Perron, E. (eds.), *Towards a European Civil Code*, Fourth Revised and Expanded Edition, Wolters Kluwer 2011, 185-203, at p.192)

<sup>568</sup> Judgment in *Société thermale d'Eugénie-Les-Bains*, C-277/05, EU:C:2007:440

<sup>569</sup> Judgment in *Werhof*, C-499/04, EU:C:2006:168

<sup>570</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

<sup>571</sup> Paragraph 23 of the ruling in *Werhof*, cit. supra

<sup>572</sup> *Ibid.*, paragraph 32.

of its contract and to perform its obligations thereunder'<sup>573</sup>. As such, and as the compensation paid is directly related to the price to be paid by the fulfillment of the service, it cannot be considered as an independent remuneratory sum. Although not directly stating so, the Court seems to have resorted here to the general principle of full contract fulfillment so as to decide the case. Furthermore, as Hesselink notes, even though the instrument at stake was the VAT directive, the Court seems to have rather looked at the notions enshrined in the articles of the French Code de la consommation and the *Code Civile* so as to characterize the situation in analysis<sup>574</sup>. It thus appears that the Court made the decision of shaping a national private law principle into a general principle of civil law with European significance (without, however, explaining the derivation in a clear way<sup>575</sup>).

Advocate General Maduro had not used the expression in his Opinion<sup>576</sup>; however, he did proceed to use it in the *Hamilton* case<sup>577</sup>. *Hamilton* concerned a contract for a loan with a bank. The conditions therein enshrined in accordance with the Law on consumer credit established a notice on cancellation, which provided that 'if the borrower has received the loan, cancellation shall be deemed not to have taken place unless he repays the loan either within two weeks of giving notice of cancellation or within two weeks of the paying out of the loan'. According to the Doorstep Selling directive<sup>578</sup>, consumers have to be given written notice of their right of cancellation, to be exercised within a period of seven days thereon, which will then release the said consumer from any obligations under the cancelled contract<sup>579</sup>. The national law in question stated that, if the said written notice is not provided, 'the consumer's right of cancellation shall not

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<sup>573</sup> Paragraph 24 of the ruling in *Société Thermale*, cit. supra

<sup>574</sup> See Art.L114-1 Code de la consommation and Art.1590 Code civil. See Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.3: 'The issue had arisen in a French dispute and both the French Code de la consommation and the Code Civil contain relevant provisions concerning deposits which were cited in the proceeding. However, the Court's task was to interpret an EEC directive, not French law. Nevertheless, the resolution of the tax law question whether VAT was due could clearly benefit from received classifications and definitions in the area of private law.'

<sup>575</sup> See Hesselink, *ibid.*, at p.4: 'In this case the Court merely postulated the existence of the principle without clarifying where it had found it. On the other hand, however, the principle of the binding force of contract is not a very controversial one in Europe.'

<sup>576</sup> Opinion of Advocate General Poiares Maduro in *Société thermale d'Eugénie-Les-Bains*, C-277/05, EU:C:2006:555

<sup>577</sup> Judgment in *Hamilton*, C-412/06, EU:C:2008:215

<sup>578</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

<sup>579</sup> Articles 4 and 5 of the Directive

lapse until one month after both parties have performed in full their obligations under the agreement'<sup>580</sup>. Ms. Hamilton had applied for the annulment of her loan contract, also asking for the repayment of the interest paid. Following the proceedings, where Ms. Hamilton argued that the national law in question did not constitute appropriate consumer protection measures, the national court asked the CJEU whether placing temporal limits on the exercise right of withdrawal would be contrary thereto.

The Advocate General started by making reference to a principle 'common to the laws of the Member states', which appears also 'in the context of 'the creation of a common framework of reference for European contract law'. He hence categorizes the principles at hand as 'general principles' in a way perfectly consistent with the one adopted by the Court of Justice to refer to general principles of EU law of public and constitutional formation<sup>581</sup>.

The Court began its reasoning by reiterating that the aim of this instrument was indeed to 'protect consumers against the risks arising from the conclusion of contracts away from business premises'<sup>582</sup>. It then reformulated the question as being rather whether the provision establishing that the right of cancellation is to expire one month after both parties have performed their obligations under the contract may be deemed a consumer protection measure, in case the consumer was given defective notice on the conditions for exercising that right. Then, in paragraph 38, it stated that, in line with a general harmonization aim, 'the concept of 'appropriate consumer protection measures' (...) indicates that the Community legislature wished to give those measures a uniform scope at Community level.'<sup>583</sup>.

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<sup>580</sup>Paragraph 2(1) of the national law

<sup>581</sup> See Opinion of Advocate General Poiares Maduro in *Hamilton*, C-412/06, EU:C:2007:695, at paragraphs 24 to 31, especially at paragraph 30: 'those directives suggest the existence of a principle common to the laws of the Member States, and which is also found at Community level'. See also Purnhagen, K., 'Principles of European Private or Civil Law?' (cit. supra), at p.854: 'Advocate General Maduro did not only detect a certain contractual right at EU level, he also categorised it as 'a principle common to the laws of the Member States', thereby using a similar line to the one the ECJ regularly uses in order to detect (public law) constitutional principles such as fundamental rights.'

<sup>582</sup>Paragraph 32 of the ruling in *Hamilton*, cit. supra

<sup>583</sup>Paragraph 38 of the ruling

This appropriateness, the Court added, ought to be read in a non-absolute manner, and thus subject to certain limits: Member States have to be left some discretion regarding the way they define such measures, although always in accordance ‘with the principal aim of the doorstep selling directive’<sup>584</sup>. These limitations flow not from the directive per se, but rather, as stated in paragraph 42, ‘from one of the general principles of civil law’ – the principle of full contract performance<sup>585</sup>.

After *Hamilton*, and the following cases *Messner* and *Friz*<sup>586</sup>, a trend of principle-based reasoning in the area of civil law seemed to set in. In this shift, however, the principles seems to interact with the secondary law instrument aiming at a different move: towards restrictive interpretation. In all these cases, the matter at stake was at the core of consumer protection: the right of withdrawal as guaranteed by either the Doorstep Selling directive or the directive on distance contracts<sup>587</sup>.

*Messner* concerned the exercise of the right of withdrawal within the framework of long-distance contracts. Ms. Messner had made an online buy of a second hand laptop whose display, after some months of use, had started malfunctioning. She sought repairing from the selling firm, which refused to do so free of charge. As such, Ms. Messner claimed her right of withdrawal and reimbursement, but the selling firm nonetheless demanded compensation for the use she had made of the product, which amounted to almost the same price which had been paid initially for the purchase. Ms. Messner introduced an action before the national court, which opted for introducing a preliminary reference before the Court of Justice. It asked in essence whether the provisions of directive 97/7 should be interpreted as precluding a provision of national

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<sup>584</sup> Paragraph 39 of the ruling

<sup>585</sup> Mak, C., ‘Hedgehogs in Luxembourg?’ (cit. supra), at p.332: ‘supports the conclusion that the national legislature may place a time limit on the exercise of the right of withdrawal. The specific rule can, thus, be traced back to a general principle, the existence of which the judges may derive from the constructive interpretation of the Directives in the field of European consumer law’

<sup>586</sup> Judgments in *Messner*, C-489/07, EU:C:2009:502 and in *E. Friz*, C-215/08, EU:C:2010:186

<sup>587</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, respectively.. In fact, Micklitz characterizes consumer law as ‘the gravitational centre of European law making in the field of private law’ (Micklitz, H-W., ‘Review of academic approaches to the European contract law codification project’, in Andenas, M., Alabart, S. (et al., eds), *Liber Amicorum Guido Alpa – Private law beyond the national systems*, British Institute of International and Comparative law, 2007, 699-728, at p.700)



law which established that, for a withdrawal occurring within the allowed period, the seller may claim compensation for the value of the use of the goods acquired under a distance contract. The Court was here forced to strike a balance between consumer protection and the principle of good faith/prohibition of unjust enrichment. It first alluded to the efficiency and effectiveness of the right to withdrawal, which would be hindered in case the exercise of the rights was to be constrained<sup>588</sup>. Nonetheless, the Court recalled that consumer protection does not have an absolute character and that limitations can be applied thereto. Allowing the consumer to exercise his/her right in an abusive manner would go beyond the purpose of this protection and would be ‘incompatible with the principles of civil law’<sup>589</sup>.

*Friz* followed the same type of reasoning, this time as regards the right of cancellation of a contract. In this case, at stake was a partnership contract established by the means of a doorstep selling visit. Mr. Friz had, in light of it, invested in a real property fund; however, after some years of membership, he decided to cancel the participation and demanded retroactive compensation for the entirety of his investment. The effects contemplated by the national law were, however, of *ex nunc* nature – and, as such, the provisions were questioned as to their compatibility with the Doorstep Selling directive.

The Court of Justice was hence again essentially called upon to define the boundaries of consumer protection measures. It started by reminding that the general structure of the directive, as well as its aim, could dictate a limitation to the consumer protection objectives. This restrictive approach closely resembles the reasoning used by the Court in an otherwise expansionist movement in *Sturgeon* – it looks at the general structure and objectives laid down in the instrument, and extracts a conclusion regarding the reading of the overall instrument and corresponding measures<sup>590</sup>. Conversely, whilst in *Sturgeon* the Court engaged in expansionist reading, here the ‘general principles of civil

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<sup>588</sup> Paragraph 24 of the ruling in *Messner*, cit. supra

<sup>589</sup> *Ibid*, at paragraph 26

<sup>590</sup> Case C-402/07, *Sturgeon*, cit. supra

law' were invoked so as to justify a national measure limiting the scope of the directive's provision at stake and to approve the national legislator's decision<sup>591</sup>.

Notwithstanding the fact that the Court accords to these general principles the capacity of dictating a restrictive reading of EU law, it does not preclude it from also containing their reach. That stems clearly from the reasoning in the *Harms* case<sup>592</sup>. Here, the Court, in spite of upholding the principle of contract freedom, established that the latter could suffer limitations imposed by 'European Union rules'. As such, 'commitments which contradict the objectives' of the Regulation at stake could not stand<sup>593</sup>. The Court seems hence ready to recognize the application of civil law principles, but without engaging into unbridled interpretation as regards the scope of the instruments providing the liaison.

### 6.1.5 General Principles of EU Civil Law versus General Principles of EU Law

In order to understand such general principles of civil law and to analyze whether they have the same hierarchical rank as the general principles of EU law recognized by the Court, one must assess them using the same standards. I shall thus point to the existing commonalities and differences between the two categories. Starting with what could be called a 'technical consideration', it should be pointed out that again there seems to be lack of consistency in what concerns the terminology adopted – showing how chaotic the principle-based reasoning of the Court stands as well in this area. As has been showed, in the analyzed cases, the Court does not use the expression 'general principles of EU private law/civil law', leaving the reference to European Union law aside. This could indicate that indeed what is at stake are not principles of EU law, but rather national principles which have to be applied in accordance with an instrument of

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<sup>591</sup> Paragraphs 38 to 42 of the ruling in *Friz*, cit. supra. Interestingly, Weatherill reads this mode of operation as reaching 'beyond the explicit material scope of the legislation in asserting a community content to matters in dispute, including those pertaining to matters of civil procedure'. Albeit understanding what is meant by the author, I think considering this rather as a restriction of the scope of the instrument - since indeed it is a reductive reading the one undergone -, with, yes, the consequent europeanisation of certain national law concepts, is a way to achieve more clarity in the analysis. See Weatherill, S., 'An ever tighter grip: the European Court's pro consumer interpretation of the EC's directives affecting contract law', in Andenas, M., *Liber amicorum guido alpa* (cit. supra), 1035-1055, at p.1035

<sup>592</sup> Judgment in *Harms*, C-434/08, EU:C:2010:285

<sup>593</sup> *Ibid.*, at paragraphs 36 and 37.

secondary EU legislation<sup>594</sup>. Yet, this mere omission can also be read as not constituting a hindrance to the qualification, since the same is verifiable with the so-called general principles of EU law. In fact, as was shown in the previous chapters, the importance the Court attaches to the designation is not always the same, and it varies as well in light of the translations. What seems to be determinant is rather the way the principle is used. Hence, the formulation, or the lack of precision in the denomination attributed, is overcome by the mode of operation present in the reasoning.

In fact, as Hesselink rightly noted, in *Société Thermale d'Eugénie les Bains, Hamilton, Friz and Messner* the general principles of civil law invoked ‘work in support of twin-sister principles existing at national level’<sup>595</sup>. It is true that, when tackling the contracts in question, the Court anchors itself in core private national law, using principles which are inherent to the internal legal systems and widely recognized as interpretive and gap-filling tools therein. In this sense, the general principles of civil law used in the reasoning seem to possess an added value in terms of legitimacy: they are widely recognized in the civil law systems and, albeit not especially used in the common law systems, they are therein recognized<sup>596</sup>. The ‘other’ general principles of EU law, inspired by ‘the national constitutional laws and traditions’ and international instruments, are, on the other hand, still source of a heavy debate on what concerns their true commonality to the Member States’ systems, since the Court has failed to demonstrate what common denominator is used to ‘elevate’ a principle to such status.

As regards their characteristics, as was noted above, the generality of the said principles is assessed in relation to their ‘indeterminate, abstract, programmatic, non-conclusive, or orientative character’<sup>597</sup>. When looking at the principles used in the above mentioned

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<sup>594</sup> Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.12: ‘it is not certain that the Court means to refer to ‘the general principles of civil law’ in the analogical sense of general principles of European Union private law. The Court does not mention the EU in its expression; it speaks of ‘general principles of civil law’, not ‘general principles of EU civil law’.’

<sup>595</sup> *Ibid.*, at p.29.

<sup>596</sup> *Ibid.*, at p.36: ‘The common law traditionally has not recognised a general principle of good faith. Although that fact should not enter some formal calculus of qualified majority voting, nevertheless it does mean that the Court should think twice before claiming it to be a general principle with a pervasive mandatory role.’

<sup>597</sup> See Semmelmann, C., *General Principles of EU Law – The Ghost in the Platonic Heaven in Need of Conceptual Clarification*, Pittsburgh Papers On The European Union, McGill University/University of St. Gallen, Vol. 2 – August 2013, at p.4.

cases, it is indeed true that they do not seem to be sector specific principles, applying rather to the generality of contracts under national private law. In this sense, it appears they possess the generality characteristic so as to qualify as general principles<sup>598</sup>. On the other hand, one must analyze whether they are, by their very nature, ‘substantively unconditional and sufficiently precise’<sup>599</sup>, *ie*: whether they can be applied independently by a national court, free of any additional conditions. The principles of good faith and full contract performance seem to fit this description, for they do not entail further Member State action to be made applicable to whichever contracts are celebrated between private parties. Arguably, hence, they can be applied independently<sup>600</sup>.

With regard to the functions usually attributed to general principles, it is hard to, due to the reduced number of existing rulings up to the present point, assess whether also general principles of civil law can be used in the exact same manner as general principles of EU law<sup>601</sup>. The interpretative function is clearly observable in the cases presented above, with the Court reading the directive in light of the underlying principle. Nonetheless, while the sample provided might seem too narrow to establish whether this type of interaction will strive any further, *Messner* is worth referring to as the most striking ruling and one which better establishes the connection of this type of general principles with the other analyzed in the previous chapters. Indeed, it is this case where a more blatant application of the principle triggers the understanding of this type of principles as legal sources with a force similar to the one of general principles of EU law. The Court states, with all clarity, that ‘the only charge that may be imposed on the consumer’ in the situation at stake is that of the direct cost of returning the goods, as

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<sup>598</sup> Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.10: ‘Most of the principles that the Court has referred to so far indeed seem to be general in this sense: the binding force of contract (*Société thermale*), discharge by performance (*Hamilton*), good faith and unjustified enrichment (*Messner*) are principles of general contract law or (even broader) of the general law of obligations.’

<sup>599</sup> Opinion AG Trstenjak in case C-282/10, *Dominguez*, cit. supra, at paragraph 135

<sup>600</sup> See, contra, Hesselink, M., ‘Private Law Principles’ (cit. supra), at p.24: ‘At first sight it seems self-evident that the principles of the binding force of contract, good faith, and unjust enrichment, even though they are among the most fundamental and general principles of private law are nevertheless not constitutional principles. (...) Still, it is not entirely self-evident what exactly constitutional means in the context of the European Union.’

<sup>601</sup> However, when reading the following quote, related to the information duties in pre-contractual relationships established at EU level, one can perceive that such a broad formulation is likely to encompass both types of general principles: ‘the incomplete nature of the *acquis* (...) there are not only gaps, but frequent references to domestic law to complement the provisions adopted at European level.’ (Wilhelmsson, T., and Twigg-Flesner, C., ‘Pre contractual information duties in the *acquis communautaire*’, *ERCL*, 4/2006, 443 ff, at p.469)

results from the directive<sup>602</sup>. There is no room for a different interpretation here; there could indeed, arguably, be said that there is a gap to be filled, as Hesselink suggests<sup>603</sup>. The situation at stake in the case raised a problem (a duty to pay compensation for the value of the use of consumer goods acquired under a distance contract) which was not contemplated by the directive's provisions nor preamble but which, nonetheless, was considered to be covered by the instrument.

This represents a very peculiar type of operation, one which can only be understood if the general principles analyzed in this chapter can be read as being on equal footing with the other general principles of EU law recognized by the Court. The latter are recognized as of primary law status. They do, in fact, work sometimes as mere interpretive tools, but that does not deprive them from their nature as sources of EU law. Here, in relation to principles of civil law, that aptitude can be equally recognized, providing the only possible explanation for the possibility, for the Court, to set aside other legal instruments and apply the principle instead. Indeed, if one were to deny their quality as legal sources, how could the solution in *Messner* be explained?

It hence seems that, exactly as the principles addressed in the previous chapters, general principles of civil law have the potential to interfere with the scope of other sources of EU law<sup>604</sup>. On the one hand, they seem to be quite particular in their connection to national law and to represent a trend which somehow europeanizes concepts, whilst allowing for deference to the legal systems of Member States. On the other hand, however, they can clearly bear a deep significance in the definition of the scope of the European legislation instruments, with an impact on both the subject-matter and the relationships at stake. Their impact in contractual relations is quite visible in the rulings – undoubtedly, they have potential to interfere not only with the expansion or reduction

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<sup>602</sup> Paragraph 18 of the ruling in *Messner*, cit. supra

<sup>603</sup> Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.17: 'The four cases where the Court has explicitly referred to general principles of civil law are all instances of the interpretation of EC directives against the background of these principles. Indeed, background rules of general private law seem indispensable, in particular, for the interpretation of EC directives that aim at sector specific consumer protection. (...) Arguably, *Messner* could also be regarded as a case of gap filling.'

<sup>604</sup> Mak, C., 'Hedgehogs in Luxembourg?' (cit. supra), p.343: 'irrespective of the nature of the principle ('fundamental' or of a purely private legal character), the methodology for its recognition may, in general, follow the one developed for general principles of EU law, including fundamental rights'.

of the scope contemplated by the instrument, but also with the very core of contractual relationships.

It has been argued that the regulatory aims of national legal orders and the European Union are necessarily different, the first concerned with protection of the individual and its private autonomy, whilst the latter would focus on the effectiveness of EU law<sup>605</sup>. Nonetheless, when reading the cases above, it seems that the principles of EU civil law are used by the Court of Justice in such a way to shape EU secondary law so as to make it compatible with the exercise of private autonomy in the light of the values protected by the national legal systems. The mode of operation used is quite close to the one sought with the use of the ‘traditional’ general principles of EU law – indeed, although the Court’s natural tendency is one of expansion, some of the cases presented throughout this study have shown a restrictive use of principles combined with instruments of secondary EU law<sup>606</sup>.

As regards their scope of application, such as the general principles of EU law recognized as public law, it seems that general principles in the area of EU private law have potential applicability in all areas where EU law is applicable. This naturally entails that also these principles can only be applied in situations where Member States are implementing EU law or derogating from it, or otherwise when the measures at stake fall somehow within the purview of EU law<sup>607</sup>. *A contrario*, this seems to also signify that no new areas of competence shall be created by the application of such principles. However, due to their specificities, as the principles in question are so deeply connected to national private legal traditions and concepts, it is likely that the national

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<sup>605</sup> On this particular point, see Safjan, M., ‘European Law versus Private Law’, in Bernitz, U. (et al.), *General Principles of EU Law and European Private Law* (cit. supra), 155-170, at p.164: ‘the mechanisms of European private law are dominated by the goals to which the Union aspires as a separate, autonomous legal and political body. The classical instruments of private national law on national levels are supposed to regulate the behaviour of individual market participants. (...) they allow for the expression of various individual interests, however, they also protect the freedom and autonomy (...). It has become clear that the goals of these two orders are not the same. The starting point for the regulatory instruments of classical private law is an individual and its autonomy; while the starting point for the European regulatory instruments including the sphere of private law are specific aims related in particular to the Treaty freedoms and to the principles on which the European legal order is based, that is, *eg.*, the priority, effectiveness and unity of European law’.

<sup>606</sup> Cf *eg.* case C-155/79, *AM&S*, cited above.

<sup>607</sup> See Opinion of Advocate General Sharpston in *Bartsch*, C-427/06, EU:C:2008:297, at paragraph 69. See Lenaerts, K. and Gutiérrez-Fons, J., ‘The Constitutional Allocation of Powers’ (cit. supra), p.187-188

measures applying EU law will be further interpreted internally. This might entail the extension of a principle interpreted in accordance with EU law to areas not covered by the latter. As such, the application of a general principle of EU civil law can entail that national measures not contemplated in the request for interpretation envisaged in a certain reference for preliminary ruling will nonetheless be subsequently read in the light of the response given by the Court. Arguably, thus, there is wider potential of expansion and ‘intrusion’ of EU law into national legal systems deriving from the use of general principles of civil law<sup>608</sup>. It seems that the use of these principles as harmonization tools might have as a deep an impact as the principle-based reasoning of the Court has had on the protection of fundamental rights<sup>609</sup>.

The similarities seem hence irrefutable. With the added value they possess in virtue of their particularly entrenched connection to national law, general principles of EU civil law are equally used as strong interpretative tools so as to interfere with the scope of a secondary law instrument. One must further consider the presence of the same types of elements in the rulings: the existence of a general principle which underlies a written provision, with origin in national constitutional laws and traditions (with arguably an even deeper link, in the case of general principles of civil law clearly recognized, and used as such, in national legal orders). The situation is interpreted in the light of the directive’s aims and objectives, which provide the anchorage for the manifestation of an existing general principle; this principle is then applied directly, thus interfering with the scope of the instrument. In these cases, however, the principle is used as a constraint for the scope, whilst in the cases analyzed above relating to directives the results of this interaction vary between both ends of the spectrum. It remains to be seen whether the inverse trend will be used by the Court.

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<sup>608</sup> Hesselink, M., *The General Principles of Civil Law* (cit. supra), at p.11: ‘Therefore, the general principles of civil law are principles that can apply to many (or even all) existing areas of EU law, but do not create new areas of EU private law. To the extent that these principles are national (or similar to national ones), of course, the scope of these national principles (where they exist) may extend, on the national level, as national principles, beyond the areas of private law that are affected by EU private law.’

<sup>609</sup> For a criticism of this approach, see Weatherill, S., Case Notes ‘The ‘principles of civil law’ (cit. supra), especially at p. 85: ‘The best analogy between the Court’s reliance on the ‘principles of civil law’ in *Hamilton* and *Messner* and its case law on fundamental rights is to be found not in the mainstream but instead in that troubling oddity, the decision in *Mangold*. The common lesson: be careful, finding ‘general principles’ really isn’t so simple – or so uncontroversial.’

As the concepts used pertain primarily to national law, and are arguably more deeply enshrined therein, one can wonder if this represents a move of deference towards the national adjudicatory system. While it is true that there is a 'generalisation' of an otherwise national law originated principle, so as to make it recognizable at EU law level, it also seems that the Court is restricting the reach of secondary legislation by according preponderance to a national concept. This can perhaps be dictated by the fact that the Court is trying to potentiate a certain commonality in what comes to consumer law without, however, superimposing EU law over the much sedimented private law systems of the Member States.

All the above raises the question of whether in fact civil law has an important role to play in the EU legal order: is there a niche for EU law to intervene in this field too? It seems apparent that national private law and (forming) European private law have very similar compositions at the core. However, it is also stems quite patently from the above analysis that the creation of the latter, although based on essential values protected by the different legal systems of the Member States, is anchored on the absorption of such concepts, by the EU adjudicatory system, so as to 'Europeanize' them and provide them with an independent value. Only this can explain that the Court uses such principles to correct the implementation of EU law instruments, reversing their literal reading in an almost *contra-legem* way, in some cases.

After examining the mode of operation and characteristics of the general principles of EU civil law, one might question whether they ultimately serve the same purposes as the general principles of EU law 'discovered' by the Court in the public law sphere. The above analysis has shown that, in spite of their potential as gap filling instruments, they are majorly used as instruments of interpretation of directives, in alignment with both national and EU law. They are used as a way to harmonize national legislations and create a uniform 'Europeanized' approach to certain private law matters. One might argue that there are specificities to their mode of operation which dictate a different outcome, *ie*, a constraining approach, as opposed to the usually expanding trend followed by the Court. It should, however, be recalled that, also in relation to the general principles of EU law, the Court has sometimes adopted a restrictive approach



and has read secondary legislation in a reductive manner due to the recourse to a general principle<sup>610</sup>.

It has been argued that general principles of European civil law should be considered to exist merely at secondary law rank, as an unwritten type of the latter<sup>611</sup>. However, I fail to grasp the argument contained in this line of thought. When looking at the reasoning presented in the rulings above, it seems quite clear that the principles invoked trump the instrument of secondary legislation in combination with which they are being used. It is undeniable that they provide for a restrictive interpretation of the directives, imposing a different conclusion than the one which would have been derived therefrom instead – one which was clearly envisaged by the legislator in their making.

Were the two different sources to have the same value, the mode of reasoning used by the Court would necessarily have to be one of balancing. Here, contrarily, one observes that the legislation at issue is superseded by a different source of law. The Court interprets the directives in a way which could not be foreseen – despite the reference to the aim and objectives – by resorting to a general principle retrieved from the core of the national legal systems. This mode of operation is much alike the one used in the rulings based on the general principles of European Union law.

Only primary law norms can surpass and constrain the application of secondary law instruments, due to their superior legal status; as such, in my opinion, the general principles of EU civil law as used by the Court cannot be considered as principles of secondary legislation rank. The way the Court makes these principles operate reveals that it attributes them the same constitutional status it attributes to general principles of EU law. As was argued above, the legitimacy to the ‘discovery’ of such principles

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<sup>610</sup> Cf. *AM&S*, cit. supra.

<sup>611</sup> Hesselink, M., ‘Private Law Principles’ (cit. supra), at p.37: ‘a European constitutional status for the CJEU’s general principles of civil law is neither plausible (as a matter of private law) nor desirable; they are best regarded – within the realm of EU law – (primarily) as unwritten secondary law.’; ‘the general principles of civil law have the mere status of unwritten secondary EU law’. See, also from Hesselink, *A Toolbox for European Judges* (cit. supra), at p.10: ‘Moreover, for these new general principles of civil law it is even not clear whether they are meant to be general principles of EU civil law or rather general principles which the courts ascribes, as it were, to the national law legal systems. And, in the former case, are they meant to be a specific subset of general principles of EU, in which case they would, somewhat surprisingly - in view of the not so fundamental nature of most them -, obtain constitutional status as primary EU law, or are they of a new kind, *ie*: of unwritten secondary EU law?’.

seems even to be further enhanced as regards the first. In fact, due to their closer proximity to national laws of the Member States, the concepts are more clearly derived therefrom, and thus endowed with a firmer legal basis.

An additional query which is necessarily raised regards the nature of the law so 'created': when 'Europeanized', does national private law become European private law? Or are the two, in spite of the assimilation of concepts, two distinct legal fields? The role of private law in the national legal (civil law?) systems seems to follow an aim of redistributive justice, and guaranteeing rights to private parties in an area which ultimately is to escape the State's scrutiny. It is a different type of *demos* the one displayed by the European Union and the Member States, since the interests and conflicts arising therein have different origins. In a way, national private law is one of abstention; while, at European Union level, it appears as a way to safeguard the fundamental freedoms, and in that way consolidates both *demos* and *ethos* in the fundamental status of European citizenship.

The 'Europeanization' of the standards, however, will necessarily create a neutral standpoint for cross border private relationships. In this sense, the establishment of a concept which has common features might lead to a general harmonization of the field<sup>612</sup>. This will further lead to a standardization of legal features, bridging the gap between the civil law and common law traditions present in the EU, permitting the creating of a matured Union private law system<sup>613</sup>.

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<sup>612</sup> Vranken, M., *Fundamentals of European Civil Law and Impact of the European Community*, Blackstone Press, 1996, at p. 219: 'In addition to the written laws of the EC, the European Court of Justice has developed certain general principles of Community law. Interestingly, the development of these principles has been inspired by national law, but sometimes there occurred a 'flow back' in the sense that national courts started to rely on these principles for domestic purposes'. See also Van Gerven, 'European Court of Justice Case Law as a Means of Unification of Private Law?', *Fordham International Law Journal*, 1996, Vol 20, issue 3, article 5, at p.681: 'Similar to the impact of EC directives on private law, the impact of ECJ case law on private law will only be piece-meal; that is, only visible in some limited fields of private law, and will tend to harmonize, rather than to unify, the national rules in those fields. Therefore, ECJ case law will never lead to some kind of a coherent statutory unification of contract law.'

<sup>613</sup> Vranken, M., *Fundamentals of European Civil Law* (cit. supra), at p.218: 'indirectly, at least, the growing 'communitarisation' of national private law has the effect of diminishing the traditional gap between civil and common law.'

## 6.2 Criminal law

As was seen, with regard to civil law, the interpenetration of EU law and concepts borrowed from the national legal systems has an impact also in what comes to the use of general principles. This mode of operation results in a restrictive reading of the secondary law instruments and a look at the national implementing legislation, but in the light of principles extracted from the core of national legal traditions. The result is, as was argued, a 'Europeanization' of the principle deployed, but through a restrictive reading of the supranational legislation. Having analyzed the area of private law and the intervention of the CJEU through its principle based reasoning therein, which affects the relationship with national authorities, let us now turn to yet another field for such interaction: criminal law matters.

Criminal law has represented a problematic field for EU law, one which has naturally evolved with the consolidation of the Union as a polity<sup>614</sup>; this has especially been so in the recent years, with the progressive expansion of its fields of competence and action<sup>615</sup>. The matter has been somewhat settled by the changes envisaged in the Treaty of Lisbon. Indeed, the latter 'expands criminal law competence in granting Union powers to adopt (albeit minimum) rules on criminal sanctions and not merely to require Member States to adopt proportionate, effective and dissuasive penalties'<sup>616</sup>. Particularly noteworthy is now article 83 TFEU, which dictates that EU action can be enacted so as to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'.

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<sup>614</sup> For decades, as the predecessors of the Union developed, there was a denial of European level criminal law. As the Union has developed from a narrow sector governed by the Coal and Steel Community to the present-day European Union, policy fields have been added both by proactive Treaty revision, and by spillover recognised as necessary by the Court of Justice or implied by the Treaty' (Miettinen, S., *Criminal Law and Policy in the European Union*, Routledge, 2013, at p.1)

<sup>615</sup> See Klip, A., *European Criminal Law - An Integrative approach*, 2nd ed, Intersentia, 2012, at p.1: 'The Maastricht Treaty began an ongoing process of the 'Europeanisation' of national criminal law'. The author furthermore notes that the abolition of the pillar structure and consequent merging of internal market and area of freedom, justice and security, imply that the principles developed to the concretisation of the first are now 'fully applicable' to this 'new' area, something which had already been hinted to by the ECJ's case-law (*ibid*, p.20).

<sup>616</sup> See Horvathova, A., *EU Criminal Law and the Treaty of Lisbon – Where Shall We Go Now?* (November 30, 2010). Available at SSRN: <http://ssrn.com/abstract=1836754> or <http://dx.doi.org/10.2139/ssrn.1836754>, at p. 2

Albeit these changes are a product of recent years, the Court of Justice has long defended its standing with regard to the realm of criminal law. Indeed, in *Cowan*<sup>617</sup>, while confirming that criminal law is not within the realm of competences of the EU, the Court introduced a caveat to protect fundamental rights and freedoms. It stated that 'although in principle criminal legislation and the rules of criminal procedure (...) are matters for which the Member States are responsible, the Court has consistently held (...) that Community law sets certain limits to their power. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.'<sup>618</sup> There was, hence, a seed for the development of the case-law also in this area. And much was done with recourse to general principles<sup>619</sup>.

### 6.2.1 General Principles of EU Criminal Law

The role general principles of EU law have played in this development is far from negligible. In fact, faced with the limited competences in the area, the Court has nonetheless resorted to principled reasoning, in line with the mode of operation explored in this chapter, as a way to guide national authorities in the implementation and interpretation of secondary law.

Miettinen notes, however, that general principles in EU criminal law have peculiar characteristics, often presenting themselves as more specific and interchangeable<sup>620</sup>; he furthermore adds that the implications of their use are visible on three different levels: 'they serve to make at least the protective provisions of Union criminal law open-ended', they 'influence the interpretation and validity of Union criminal law instruments' and, finally, they have an impact on domestic criminal law, which can be therewith 'tempered'<sup>621</sup>. While the first two seem to be very much in line with the gap-filling and interpretation functions of general principles in European Union law, the latter seems to

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<sup>617</sup> Judgment in *Cowan*, C-186/87, EU:C:1989:47

<sup>618</sup> *Ibid.*, paragraph 19

<sup>619</sup> Klip denominates this process as a 'liberal interpretation of the powers of the EU in the third pillar', further stating that it was the Court who 'gave the Community legislative powers in the field of criminal law' (Klip, A., *European Criminal Law* (cit. supra), at p.177)

<sup>620</sup> Miettinen, S., *Criminal Law and Policy* (cit. supra), at p.113

<sup>621</sup> *Ibid.*, at p.103

be consistent with the mode of operation explored above. The analysis will thus focus on this type of interaction and its impact in the interplay between EU and national law.

## 6.2.2 The Role of the Court

Before the Treaty of Lisbon, the Court seemed to already be inclined to protect the basic principles related to individual protection in criminal law proceedings, even in detriment of what would stem literally from EU law norms<sup>622</sup>. There are several examples of rulings of the Court where it shaped the reading of secondary law instruments in such a way to limit their scope and interference with national law, as well as to guide the way national authorities were to act in the situations at issue, by recurring to underlying general principles. These principles are, as the other general principles of EU law, deeply inspired by the national traditions; on the other hand, their use by the Court in tackling issues with criminal law impact at EU level has the effect of somehow ‘Europeanizing’ their reading, as well as creating a more cohesive system of protection<sup>623</sup>.

As in other areas of law, the Court seems to be moved by the need to ensure the effectiveness of European Union policies and rules, as well as the further integration of the market in its economic and non-economic facets<sup>624</sup>. Consequently, even in cases

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<sup>622</sup> See Löhms, U., ‘European Criminal Law: can a general part be developed through case law?’, in Klip, A. (ed), *Substantive criminal law of the European Union*, 2011 Maklu Publishers, 199-208, at p.201: ‘Although the Court is first and foremost meant to interpret law and not create it, we have to admit that throughout time the European Court of Justice has participated in law creation. It is also clear that the impact of the Court’s judgments on criminal law does not arise solely from the interpretation of article 83 TFEU’

<sup>623</sup> See France, R., ‘Influence of EC law on criminal law’, in Albrecht, H.J., and Klip, A. (eds.), *Crime, Criminal Law And Criminal Justice In Europe*, MN Publishers, 2013, p.137-180, at p.149: ‘the internal definitions of criminal offences, the determination of penalties and the rules of criminal procedure are all broadened through the substantial influence of Community law’.

<sup>624</sup> The judgment in *Commission v Council*, C-176/03, EU:C:2005:542, is a good illustration of the Court’s self-recognition of lack of competence but need to ensure effectiveness. See paragraphs 47 and 48: ‘As a general rule, **neither criminal law nor the rules of criminal procedure fall within the Community’s competence**’; ‘However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers **necessary in order to ensure** that the rules which it lays down on environmental protection are **fully effective**.’ (emphasis added). See also judgment in *Casati*, 203/80, EU:C:1981:261, and *Lemmens*, C-226/97, EU:C:1998:296. Moreover, on the importance of safeguarding criminal law standards, see Vervaele, ‘Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?’, *Utrecht Law Review*, Volume 9, Issue 4 (September) 2013, available at <http://www.utrechtlawreview.org> (last accessed 27.01.2015), at p.211: ‘In a setting of an integrated internal market and a common area of freedom, security and justice

where the subject matter seems to stray off EU law, the fact that certain policies might have an impact on the latter dictate the need for the Court's interpretation, as a natural consequence of the primacy doctrine.

Indeed, the inexistence of harmonised principles in the area created several difficulties, in connection with the fundamental freedoms. Vervaele makes especial reference to the *ne bis in idem* principle, whose different perceptions at national level created gaps in the protection of citizens at EU level<sup>625</sup>; the Court was hence forced, to deal with situations which triggered such principle, to shape it in an autonomous way, which necessarily evolved with the integration and consolidation of the EU<sup>626</sup>.

This shaping has often been anchored in the reading of secondary EU law instruments; however, as the cases analyzed in this section show, such reading and interpretation was made with a restrictive aim. This testifies to the central role the Court has had in 'creating' or discovering general principles of EU criminal law in the absence of a clear mandate in this area of law. Rulings tackling criminal law provide, thus, an example of general principles dictating the way in which directives are converted into national law, by imposing restrictive conditions to their reading. This is visible particularly as regards the use of underlying general principles of criminal law as a limitation on the principle of consistent interpretation. Again here it becomes quite visible that the adjudicatory intervention of the Court results in a different structuring of EU law/national law relations.

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citizens and legal persons might expect equivalent human rights protection between the Member States of the EU and at the European level'

<sup>625</sup> Vervaele, *ibid.*, at p.212: 'the non-harmonised domestic *ne bis in idem* principle is not able to offer adequate and equivalent protection for citizens and legal persons, either at home, or in the horizontal internal market or the common area of freedom, security and justice'

<sup>626</sup> *Ibid.*, at p.221: 'the ECJ has given an autonomous interpretation to the principle, setting aside the rationale of the Schengen legislator. The new EU context has changed the rationale, scope and function of the *ne bis in idem* principle as it became part of the scheme of mutual trust in the EU area of freedom, security and justice. Due to this case law we can speak of a real transnational principle, as its application did not depend on further legislation or substantive harmonisation. Following this approach the ECJ has opted for an extensive application of the principle by not limiting the *bis* situation to final judgments but including out of court settlements on the merits of the case and by opting for a factual *idem* interpretation and not limiting the *idem* to *de iure* definitions of legal qualifications or *res judicata*'.

### 6.2.3 Case-Law

References to criminal law in the rulings of the Court come as early as the 80's, with *Pretore di Salò*<sup>627</sup>. This case raised the interpretation of directive 78/659/EEC, on the quality of waters for fish life, and concerned criminal proceedings against unknown persons related existence of several dams in river Chiese, which caused changes in the water level and hence led to the death of fish. The question raised by the national court was, in essence, connected to the reading of the Directive, which seemed to provide for a broader sphere of protection to that afforded by national criminal law, with the consequent possibility of determining, of itself, the criminal liability in the proceedings at stake.

The Court was fierce in limiting the ways in which the directive can impinge upon such a delicate area. It recalled *Marshall* and applied the same reasoning, stating that 'a directive may not, of itself and independently of the national provisions, have the effect of determining or aggravating criminal law liability for persons who act in contravention of the regime established by its provisions'<sup>628</sup>. Drawing on the constant jurisprudence of the Court which entails the limitation of the direct effect of directives, one can observe here yet another limitation of the instrument's effects by an implicit reference to the principle of prohibition of retroactive effect of penal provisions<sup>629</sup>.

This principle had been already textually recognized by the Court as a general principle in *Kirk*: 'The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.'<sup>630</sup> Here, the Court limited the retroactivity provided for by the Regulation in question, saying that its provisions could not 'be regarded as validating ex post facto national measures which

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<sup>627</sup> Judgment in *Pretore di Salò*, 14/86, EU:C:1987:275

<sup>628</sup> *Ibid*, at paragraphs 19/20

<sup>629</sup> As Miettinen notes, 'the principle of non-retroactivity of criminal law has a long history in EU law, significantly predating positive EU criminal law measures' (Miettinen, S., *Criminal Law and Policy* (cit. supra), at p.105)

<sup>630</sup> Judgment in *Kirk*, 63/83, EU:C:1984:255, at paragraph 22.

imposed criminal penalties, at the time of the conduct at issue, if those measures were not valid'.<sup>631</sup>

This unequivocal status of general principle was restated in *Fedesa*<sup>632</sup>. It is interesting to note that, somehow, the commonality reference is reinforced beyond the reference to the European Convention on Human Rights due to the formulation 'all the legal orders of the Member States'<sup>633</sup>. Indeed, as was shown above, it is rare that such strong commonality is found in the general principles of EU law 'discovered' by the Court.

On the other hand, the application of general principles often implies rendering the directive's regime applicable to the situations in question, sometimes in spite of national law provisions. In the cases contained in this section, however, general principles act rather as a limit to the instruments of secondary law - they provide an underlying objective which has to be respected in spite of, and beyond, the written instruments. Sevenster has argued that what happens in these cases is a type of interpretation in conformity with the directives – I fail to see where this argument can be anchored, since the Court seems to instead be pushing for a reading that goes against what is expressly written in the instruments<sup>634</sup>.

As such, there is a type of control over the application of EU law, with the Court indicating to the national authorities that they should rather rely on an underlying principle. It is difficult not to notice, in comparison with other cases referred to above, that the Court uses the formulation 'of itself', such as it did in *Marshall* and many others. This could perhaps represent its own possibility of contravention, as was already raised above: *of itself* would shield the possibility for the instrument to have the precluded effect when combined and not acting independently. Arguably, this can be the case observed here as well, with the legislative diplomas pointing at the need to incorporate the underlying principles in the reasoning.

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<sup>631</sup> *Ibid.*, at paragraph 23

<sup>632</sup> Case C-331/88, *Fédesa*, cit. supra.

<sup>633</sup> *Ibid.*, at paragraph 42

<sup>634</sup> Sevenster, H., 'Criminal Law and EC law', *CMLRev* 29, 1992, 29-70, at p.45



This obligation for the national authorities to interpret national law in the light of the directive, provided the underlying general principle is respected, is equally patent in *Kolpinghuis*. In paragraph 13 of the ruling, when referring to the need for national courts to look at the core of the directive and its objectives in order to interpret national law, in line with the doctrine of consistent interpretation, the Court limited such obligation, stating: 'that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law, and in particular the principles of legal certainty and non-retroactivity'<sup>635</sup>. The understanding of this mechanism as a limitation to the behaviour and actions of Member States' authorities is clearly set out in *Arcaro*, and furthered in *Groongaard*, both focusing on the obligation of interpretation in conformity, but highlighting the need for its own limitation, in light of general principles of EU law<sup>636</sup>.

In *Arcaro*, the Court stated first that the obligation of achieving the results imposed by the directive would impend on all the authorities of the Member State<sup>637</sup>. However, it furthered in the following paragraph that this obligation, and the consequent interpretation in conformity, would have to be limited if it were to lead to imposing on an individual an obligation laid down by a non-transposed directive or determining or aggravating criminal liability, on the basis of the directive. *Caronna* follows the same line of reasoning. The 'wording and purpose' of the directive are to be respected so as to achieve the envisaged result; however, in criminal matters, certain limits are imposed to this obligation<sup>638</sup>. The principles of legal certainty and non-retroactivity hence act as a brake to a literal interpretation of the directive.

In *Groongaard*, the Court stated that 'the obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is not unlimited, particularly where such interpretation would have the effect, on the basis of the directive and independently of legislation adopted for its implementation, of

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<sup>635</sup> Judgment in *Kolpinghuis Nijmegen*, 80/86, EU:C:1987:431

<sup>636</sup> Judgment in *Arcaro*, C - 168/95, EU:C:1996:363, and in *Grøngaard and Bang*, C - 384/02, EU:C:2005:708

<sup>637</sup> *Arcaro*, cit. supra, paragraph 41

<sup>638</sup> Judgment in *Caronna*, C-7/11, EU:C:2012:396, at paragraphs 51 and ff

determining or aggravating the liability in criminal law of persons who act in contravention of its provisions<sup>639</sup>.

This is equally stated in *Berlusconi*: after reminding that 'fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures', the Court continued by stating that 'the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law.'<sup>640</sup> Also the right to fair trial is used by the Court to guide the national court's action, even in situations which seem not to directly fall within the scope of EU law. This is patent namely in *Steffensen*<sup>641</sup>.

These general principles operate as a limitation for the domestic legislation which gives effect to EU law, preventing a reading of the directive towards its implementation which would hinder the value to be protected. This was stated in a very clear fashion by Advocate General Colomer, in his Opinion in *X*, where he confirms that the interpretation of a directive cannot violate the principle of prohibition of extensive interpretation in what concerns criminal law matters<sup>642</sup>.

On the other hand, while it was mainly in the area of competition law that the Court has developed general principles of criminal law<sup>643</sup>, as becomes apparent, the protection

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<sup>639</sup> *Groongard*, cit. supra, at paragraph 30

<sup>640</sup> Judgment in *Berlusconi and Others*, cit. supra, at paragraphs 67 and ff.

<sup>641</sup> Judgment in *Steffensen*, C-276/01, EU:C:2003:228, especially at paragraphs 69 to 72.

<sup>642</sup> Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases *X*, C-74/95 and C-129/95, EU:C:1996:239, at paragraph 60

<sup>643</sup> Cf., for example, the reference to the principle of presumption of innocence, in parallel with the case law of the ECtHR, in *Montecatini v Commission*, C-235/92 P, EU:C:1999:362, at paragraphs 175/176: 'The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which (...) are protected in the Community legal order. 176. It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of

fundamental rights represents a non-negligible segment of such the rulings. *Klip* states that, in interpreting the directives in these cases, there are two limitations in what comes to *interprétation conforme*. The first one is that such interpretation 'may not be *contra legem*'; the second is that such 'interpretation in conformity with Union law must not violate the general principles of law'. The latter, he says, 'is of a specifically criminal nature', safeguarding legal certainty and non-retroactivity<sup>644</sup>.

### ***a) The Anchoring Instruments***

Albeit in many cases, directives are the written norms through which the Court manages to intervene in the criminal law area, these are not the only instruments used to do so - which once again proves the assertion that the role of general principles is horizontal in terms of interaction with other legal sources.

In the *X* case, the Court made the precision that even regulations, by their nature not needing any type of implementing measure, should be read in light of the principle of prohibition of retroactive effect of penal provisions. It stated that, 'even though in the case at issue in the main proceedings the Community rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of regulation no. 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, thereby making it possible to transpose to the present case the Court's reasoning in respect of directives.'<sup>645</sup>

Concurrently, the same mode of operation is triggered so as to obviate to the obligation of consistent interpretation. Indeed, after referring to such an obligation in paragraphs 59 and 60 of the ruling, the Court acknowledges that the area of criminal matters possesses peculiarities which make it more difficult to implement such duty without hindering the well-established general principles of EU law: 'that principle finds its

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25 August 1987 Lutz, Series A No 123-A); the rights of defence were equally developed in this field. cf example C-85/87, *Dow*, paragraphs 26 and 27: 'the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures' (with reference to the *AM&S* case-law, *supra*)

<sup>644</sup> *Klip*, A., *European Criminal Law* (cit. *supra*), at p.298. He mentions, in addition to the examples referred to above, the judgment in *Mono Car Styling*, C-12/08, EU:C:2009:466 (paragraphs 61 to 65)

<sup>645</sup> Judgment in *X*, C-60/02, EU:C:2004:10, at paragraph 62

limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity. In that regard, the Court has held on several occasions that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.<sup>646</sup>

Framework decisions are equally subject to this line of reasoning. Advocate General Kokott stated in her Opinion in *Pupino*, that, for the said purposes, framework decisions are structurally identical to directives, and thus prompt the same considerations<sup>647</sup>. The Court considered the same. It followed the 'principle of conforming interpretation', remarking that 'the national court is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues'. However, it inserted the same caveat to that obligation: it is to be limited by general principles of law, 'particularly those of legal certainty and non-retroactivity'<sup>648</sup>.

In all the presented cases, it becomes apparent that general principles are used as a means of restricting the reading of the written instruments. More than that, however, they become essential to the definition of the duties imposed on national authorities when implementing, or complying with, EU law. This confirms their aptitude to play a key role in structuring the interplay between EU law and the domestic legal systems.

The principle of consistent interpretation, one of the main tasks for national authorities when implementing EU law, is hence clearly limited by the general principles of EU law. This general guiding principle for the interpretation of written instruments, whose legitimacy stems from the very primacy of EU law, does not work as a self-standing, invalidating principle, falling before the application of general principles of EU law.

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<sup>646</sup> *Ibid.*, at paragraph 61.

<sup>647</sup> Opinion of Advocate General Kokott in *Pupino*, C-105/03, EU:C:2004:712, at paragraph 28

<sup>648</sup> Judgment in *Pupino*, C-105/03, EU:C:2005:386, at paragraphs 43/44.

## 6.3 *Rationale* underpinning this mode of operation

### 6.3.1 European private law

As was noted in the beginning of this chapter, there is often confusion in what comes to private law in the EU. In fact, the rulings of the Court of Justice more often than ever have an impact on the rights of private parties. However, this section's focus was rather on those principles which are intrinsically connected to the civil law systems which compose the Union (albeit there are naturally, as individualized, influences stemming from the common law systems). In this sense, the matters tackled go beyond the private relationships' focus in the sense that what is considered is not only the individual rights at stake, but rather deference to the development of the civil law systems as codified in the Member States' legislative collection.

It should be further noted that here the trend is also one of restrictive reading of EU law instruments when taking into account the principles extracted from national law. What can be the reasons for the choice of this particular mode of operation in these situations? Safjan refers to a progressive constitutionalization of European Private law. He states that there is a tendency to detach the treatment of certain matters from the public law sphere and methodology, hence furthering the use of private law tools. This is done, he defends, with recourse to a 'hybridization' of legal techniques, where private law mechanisms are used in the public law sphere. There is, he adds, a tendency to 'de-publicize' parts of public law, with the legal mechanisms being used in favour of a private law approach. Here, there are two logics in opposition: classical concepts and structures at the national level, and the very own goals and new structures/methodology of the 'transnational' level. In summation, the private law methodology used is shaped, ultimately, by the public goals to achieve<sup>649</sup>.

This is especially visible in connection with consumer protection and freedom to contract. There seems to be a need to adapt EU law to the national systems and

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<sup>649</sup> Views expressed in the lecture 'Some reflections about the methodology and dilemmas of constitutionalization in European private law, Lecture with Marek Safjan', EUI May 26th 2015.

therewith attempt a harmonized reading of the instruments, so that no hindrance is brought notably to the free movement rules<sup>650</sup>.

### 6.3.2 European Criminal law

As noted by Hinarejos, the aims of the Court when tackling criminal law depart from assumptions which are not the same as the ones underpinning the free movement rights. While the removal of national barriers allowed for further judicial intervention on the regulation, since it gave individuals the possibility to appeal to the Court, hence legitimizing the latter to 'strike down the national barrier in question'<sup>651</sup>, the development of criminal law is not based on the same type of integration aims. Indeed, she notes, '(m)ost cooperation concerning criminal matters does not arise, however, as an 'enhancement' to free movement but, it seems, as a necessary counterpart to it<sup>652</sup>.

In addition to the underlying rationale being seemingly different, this equally points at the need, in this area, for the Court to use a mode of operation of general principles which gives more leeway to national law concepts. Contrary in fact to the functionalist reading in the case of the four freedoms, here the harmonization efforts seem to rely, rather than on an independent, European conceptualization, on the principles as perceived and developed by the national legal systems. This shows, in my view, not only deference to the national sovereignty, but the path for more cohesive criminal law instruments and mechanisms<sup>653</sup>.

## Conclusion

This chapter has joined under one heading two very different areas of EU law. These areas present case-law based in principled reasoning which follows much of the same orientation. The use of general principles in both these areas has revealed mainly two

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<sup>650</sup> On the process of Europeanisation of the private law of Member States of the EU, see Devenney, JP., and Kenny, M. (eds), *The Transformation of European Private Law – Harmonization, Consolidation, Codification or Chaos?*, Cambridge University Press, 2013

<sup>651</sup> Hinarejos, A., *Integration in Criminal Matters and the Role of the Court of Justice*, (2011) 9 European Current Law xi-xx, University of Cambridge Faculty of Law Research Paper No. 13/2012, p.3/4

<sup>652</sup> *Ibid*, at p.6

<sup>653</sup> France, R., 'Influence of EC law on criminal law' (cit. supra), at p.180: 'the Member States share the same basic principles in the area of criminal law. this common basis is an indispensable tool shedding light on the legal problems that the new European Union has to face in the area of criminal law and should therefore be incorporated in increasingly harmonized legislation at community level'

aspects. On the one hand, that there are areas in which EU law intervenes which call for a deeper connection to national law; indeed, if national courts are supposed to act as lower EU courts in that they secure the correct application of EU law within their Member State's legal system, it is also true that, many times, the role played by the national laws is more muted, confined to its consistency with the underlying aims of the instruments it is supposed to implement. Here, however, the role of national law has proved much more dynamic, with a greater degree of influence in EU law.

On the other hand, the analysis of the case-law has shown that here the use of general principles tends to have a more restrictive effect on the reading of EU secondary law, rather than an expansive aim. While the Court has been massively criticized for judicial activism due to an 'ever expanding' reading of the scope of certain instruments in the light of general principles, which resulted in the extension of the scope of application of such written rules, the cases presented in this chapter have shown that general principles can, and will, operate with a different, restrictive aim.

The reasons for the choice of such mode of operation in these areas are easy to grasp. Both criminal law and private law have a great deal of connection to the national legal systems of the Member States. These areas were developed under national sovereignty, and were not envisaged as covered when the Communities, and later the Union, were created. The latter served a purpose of economic union, leaving these matters, which were per se closer to the national legal systems, to the application of the subsidiarity dictums.





## CONCLUSION

*‘By formulating general principles of Community law (...) the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based on a framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal ‘order’.*<sup>654</sup>

General principles of EU law are as *sui generis* a topic as the EU legal system itself. Their use has contributed significantly to the construction and consolidation of the profuse body of rules which now forms the EU legal order. This work has focused on particular legal instruments: general principles of EU law. Naturally, in doing so, questions related to the institutional balance arise: the accusations of judicial activism and competence-creep are much entwined with the affirmation of the CJEU’s role as the supreme court of the Union, expounding a constitutional order. My aim was not, however, to discuss the structural dynamics of EU law in this institutional perspective; the analysis was rather centered on norms and how they are used to serve certain aims, having general principles as reference.

Advocate General Mazak defined general principles as ‘a *source of law* which may embrace rules of widely varying content and degree of completeness, ranging from interpretative maxims to fully fledged norms like fundamental rights or the highly developed body of Community principles of sound administration and procedure’. He further noted that their function ‘varies, too, depending both on the principle in question and the actual context in which it is used’<sup>655</sup>. General principles are thus malleable enough to pervade different areas of EU law.

The interesting fact is that they can do so while combined with other legal sources – and these interactions go beyond a rigid application of EU law. In fact, the types of combinations vary in terms of subject matter, area and effects achieved, which shows the importance of the study of these different dynamics. This is the reason why a static

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<sup>654</sup> Opinion of Advocate-General Mazak in case C-411/05, *Palacios de la Villa*, cit. supra., at paragraph 85.

<sup>655</sup> *Ibid*, at paragraphs 134/135

hierarchical reading of EU law does not provide a comprehensive understanding of the system. My aim was hence to create a framework to understand the diversity of norms and sources at the Court's disposition and, more specifically, how different norms can have different roles and produce different effects, depending on whether they are applied individually or in interaction with other.

## **A. The framework for the analysis**

As mentioned before, this thesis is not about general principles *in general*. Notwithstanding that fact, it would be difficult to address the topic without looking at the existing conceptions relating to these legal sources. The first chapter was thus devoted to the presentation of the traditional definition of general principles of EU law, the suggested categorizations and functions usually attributed thereto. In spite of the profusion of studies of this topic, it soon becomes apparent that certain incongruences persist, deriving either from the case-law or the academic analyses.

The diversity of categories, as well as the functions pointed to general principles, albeit providing an initial framework for the analysis, seem to fall flat of providing an actual account of the complexity of these tools; this is perhaps equally due to the inconsistencies stemming from their use by the judicial bodies of the EU. One example explored is the case of the precautionary principle, which, as elaborated by the case-law, shows that even instruments which seem to address the same type of realities are, in fact, very different. Here, the qualification of such principles as general principles of EU law is clearly proclaimed by the General Court; the Court of Justice, however, seems hesitant to do the same. Moreover, the use of this principle, expressly referred to in the Treaties, possesses peculiarities which turn it into a special case: while its potential application in diverse fields of EU law endows it with the pervasiveness and flexibility characteristic of general principles of EU law, the way in which it operates and is referred to in the Treaties and secondary legislation make it more of a 'governance principle'.

All this is exacerbated by the discrepancies found in the terminology used on the subject. Both the Court and the EU legislator use different expressions with the same meaning or, conversely, very different meanings attributed to the same tool. The

academic comments have not made it necessarily better for, in the attempt to give it more coherence, they have often proposed views that resulted in being out-rightly rejected by the Court. This is blatantly visible throughout the case-law, but has been further aggravated with the division between rights and principles in the Charter of Fundamental Rights, which the Court is still striving to align with general principles. The fact that fundamental rights are recognized and protected as general principles of EU law in accordance with article 6 TEU has raised the question whether all the provisions in the Charter could eventually constitute a general principle; on the other hand, general principles seem to be used beyond the Charter, still, perhaps in reaction to the horizontal clauses (the general provisions enshrined in articles 51 to 54 of the Charter). The case-law of the Court has failed, for now, to make any of this clearer. In addition, the translations of the rulings from French, the working language at the Court, to English are often inaccurate – on a small level, but one capable of deeply altering the understanding of a certain concept as a general principle of EU law, with the inherent rank and legal value.

Furthermore, a disagreement seems to persist on the treatment of general principles of EU law, as legal sources, pertaining to the level of primary EU law, and mere ‘principles of interpretation’, which, as was seen, some Advocates-General and the Court seem to be prone to recognizing at a lower rank, albeit the distinction is not at all clear. All of this creates numerous difficulties in analyzing the concept of general principle of EU law. However, using these conceptions as a departing point, I have tried to shift the focus of the analysis, rather highlighting the *modus operandi* to which these legal sources lend themselves, instead of a purely ontological perspective.

## **B. The Court and General Principles**

Before entering the study of the different modes in which general principles seem to be applied when combined with other legal sources, it was necessary to consider which role they are called upon to play in the case-law of the Court and, hence, the impact they might have on the legal system. This is especially relevant looking back at the foundations of the Communities and the Union, with the development of fundamental freedoms and the role of the objectives and values proclaimed by the Treaties.

The way the legal system was envisaged is deeply based on a set of common goals to achieve. This has allowed the Court to guarantee the application of the Treaties from an EU point of view, while concurrently maintaining the respect of the particularities of the legal systems of the Member States. General principles were a great tool for this teleological approach to EU law: underlying values and express objectives were made operational through the Court's interpretation of norms and gap-filling.

The proclivity of the judiciary to use these tools raises the question of their nature as true rules. Legal theory thus provides a good anchoring basis for the study of principles here, presenting the traditional conceptions and allowing for a comparison with what is effectively done in the case-law of the Court. The division between rules and principles, as suggested by the doctrine makes clear that, in EU law, general principles have a somewhat stronger component, in spite of their vague character. They thus resemble true rules, in the legal theory sense.

### C. The Modes of Operation

In light of the considerations made in relation to the categories and functions, the suggested framework for analysis was centered on three types of interactions, all situated, rather than in the realm of validity control, under the interpretative or hermeneutical function, with the consequent impact on the scope and/or substance of the norms.

The first relates to what can be labelled the 'traditional' use of general principles for teleological interpretation of norms, with an impact on their scope of application *ratione materiae*. It has been argued that the Court does so in order to keep the compatibility of secondary law with primary law, without having to set the latter aside. However, as observed, this poses many problems to legal certainty, since it is unclear when the Court will rely on the provision or bring it to a different result, motivated by a general principle of EU law.

The second has the same type of impact, but this time on the scope of application *ratione personae*. The Court, in these cases, uses the general principle to apply EU law to individuals who, otherwise, would not be subject thereto, which raises a series of

problems relating to the nature and effects of directives. Principles operate by being set by a trigger instrument and then applied to the matter and individuals in question, but through the framework of a secondary law instrument (which is deprived, according to constant jurisprudence, of horizontal direct effect). Here the entwinement of the norms becomes more problematic: the principle is applied to the situation at stake as shaped by the written rules, which the national law was often not designed to transpose. It has been argued that this mode of operation, especially in connection with fundamental rights, could be explained by a need to provide consumers and citizens in general with access to the internal market. It remains to be seen, in this sense, how general principles will be deployed when combined and/or conflicting with the Charter provisions.

On the one hand, this type of interaction might somehow add to the level of legal certainty, since it anchors the general principle in a written instrument, hence making the application more predictable. The fact that this might happen in situations between private individuals, on the other, can arguably pose problems; however, these are easily overcome with the understanding that general principles are but a reflection of principles protected already under the national constitutional laws and traditions.

The third is maybe more nuanced, but shows the deeper inter-penetration of legal systems brought about by the furthering of the integration process. The two areas of focus, civil law and criminal law, pertain in essence to the national legal systems. However, the proliferation of instruments, the capacity of EU law to more and more affect individuals, and the interpretation made by the Court have led to a great development of these areas in what comes to EU intervention. Here, nonetheless, a more profound degree of influence of national law in the 'discovery' of general principles can be noted. Indeed, while in the previous modes of operation the interaction seemed to be more focused on the interpenetration general principle/EU law instrument, here the national law principle clearly exerts a deeper influence in the reading of the European instrument, with the same principle being 'Europeanized' and then applied to the situation. This type of relationship is quite remarkable, especially being that the Court seems to pay extra attention to the letter and spirit of the national law at stake.

Moreover, it is interesting to note that the Court uses such general principles to contain and restrict the application of EU law, what arguably shows a greater deference to Member States in such delicate areas of law.

#### **D. General Principles: propelling the EU law *medley*?**

The Court has been both praised and criticized throughout the years for its rulings, and the case-law involving general principles has often been at the centre of attention. This does not come as a surprise since, as the modes of operation identified above show, their use has the proclivity to produce changes in the scope of application of EU law. Their fertility as legal sources, and their interactions with other norms, have changed the relationship between the legal systems of the EU and the Member States. Indeed, it now seems that ‘no field, even when Member States have retained powers, can be excluded from EU scrutiny’, with the legal systems being affected by mutual interpenetration<sup>656</sup>.

The modes of operation identified show another facet of a peculiar legal system: albeit many times studied from the perspective of a rigid hierarchical legal system, EU law is indeed much more complex than that, with its different sources showing different possible combinations, which lead to different results. The Court has, in great part, been responsible for the construction of these interactions. The richness they bring to the system is, however, tamed by the effects produced on legal certainty.

It becomes apparent from this analysis that, as much coherence one tries to read into the case-law, there are elements which escape any type of taxonomy. It has been questioned whether EU law is becoming a type of ‘total law’<sup>657</sup>, and if the Court of Justice is now a supreme court, or even a fundamental rights’ court, in the Union. However, recent cases seem to show a certain degree of shyness on the Court’s part, perhaps in an attempt to control the effects of certain doctrines. The objective of this work was not to achieve a rigid and automatic answer to the way general principles work, but to address a theory of legal sources in the EU, and make sense of the interactions taking place therein,

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<sup>656</sup> Boucon, L., ‘EU Law and Retained powers of Member States’, in Azoulai, L. (ed), *The question of competence in the European Union* (cit. supra), pp.168-192, at p.186.

<sup>657</sup> See Azoulai, L., ‘The ‘Retained Powers’ formula in the case-law of the European Court of Justice: EU law as total law?’, *EJLS*, Volume 4, Issue 2 (Autumn/Winter 2011), p.192-219

having general principles as a reference norm. This is hence an analysis of one particular type of norm combination. The study of other combinations of norms within the EU legal system would be necessary for a broader understanding of the combination of legal sources its complexity entails.

In any event, if it is true that the birth of the Communities was marked by legislative gaps in need of filling, and that nowadays the legal system has evolved into a more mature form, general principles of law seem to be an ever needed tool to propel the legal and structural dynamics within the European Union forward. In this sense, general principles are indeed to be seen as a basis and an objective, as a beginning and an end, in EU law<sup>658</sup>.

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<sup>658</sup> See Bengoetxea, J., 'Principia and Teloi' (cit. supra), and Bengoetxea, J., 'General Principles navigating Space and Time' (cit. supra)





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## **D. Legislation**

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Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

Council Directive 1999/70/EC of June 28, 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

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

Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

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Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on free movement for workers within the Community

Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods

Regulation (EC) No. 258/97 of the European Parliament and of the Council concerning novel foods and novel food ingredients

Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

## **E. Other**

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