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by

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Analysis and Reflections

Temporal Aspects of the Interaction between National Law and EU Law: Reintroducing the Protection of Legitimate Expectations

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EU law; Legal certainty; Legitimate expectation; Preliminary rulings

Abstract

Preliminary rulings of the European Court of Justice have an ex tunc *effect unless the Court itself specifies otherwise, which it does only in exceptional circumstances. While that approach seems to enhance the uniform and effective application of Union law from a temporal perspective, it sits uneasily with a separate strand of case law concerning the protection of legitimate expectations and legal certainty. In the recent case of* Dansk Industri*, the Court considered the relationship between these lines of case law, and gave complete priority to the temporal effect of its rulings. We argue that this approach is not only normatively unsatisfactory in and of itself, but also that giving more prominence to the protection of legitimate expectations would permit the Court to take more nuanced views on controversial matters in substance.*

Introduction

Legitimate expectations and legal certainty are concepts central to any legal system, if not tied up with the idea of law itself.[1] Many classic debates in legal theory can be viewed through that lens: for example, the debate between positivists such as Hart and constructivists such as Dworkin can be understood as circling around the role that legitimate expectations and legal certainty can and should play in adjudication.[2] The problem is one of foreseeability: the traditional position is that while legislative acts regulate behaviour set in the future, and the executive enforces them in the present, courts deal with cases that are set in the past.[3] Insofar as legal theory has attempted to conceptualise the proper role of courts and their interpretive powers, it can be understood as grappling with this inevitable sense of judicial retroactivity.

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[1] J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996), p.143; X. Groussot, *Creation, Development and Impact of the General Principles of Community Law* (Lund: Lund University Press, 2005), p.281; contra: P. Rodríguez, "The Principle of Legal Certainty and the Limits to the Applicability of EU Law" (2016) 52 *Cahiers de Droit Européen* 115, 140.

[2] Compare e.g. H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), Ch.VII, with R. Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998), Ch.IV.

[3] C. Möllers, *Gewaltengliederung* (Tübingen: Mohr Siebeck, 2005), pp.90–133.

With regard to the applicant and respondent in any given proceeding, the problem seldom emerges as an explicitly temporal issue in practice. Whether one sees the court as bound by legal principles to find one right answer or as exercising its discretion, the result it reaches will almost always be applied to the case before it[4]—hence the sense that the judiciary is concerned with the past.[5] The right to effective judicial protection, in particular, speaks in favour of maintaining such an approach.[6] However, it remains controversial whether judicial rulings should have retroactive effect for cases other than that of the applicant. This is where the temporal issue becomes explicit in practice, for different States have chosen different solutions to the issue. The various stances can be tied back to the theoretical underpinnings mentioned above:[7] If one emphasises the relevance of pre-existing law for a court's conclusions and sees it as an actor that "finds" the law rather than making it, then it makes sense to give its judgments an *ex tunc* effect. If, on the other hand, one follows the Kelsenian understanding of judicial decisions as law-making—the creative setting of a concrete norm[8]—then the tendency will be to give judgments merely an *ex nunc* effect. These views tend to be mitigated both in theory and in practice, but the underlying perspective will influence which approach constitutes the rule and which the exception.[9]

In the case of the European Court of Justice (ECJ), these issues are particularly salient. For one thing, the temporal effects of its judgments are regulated by positive law only for annulment proceedings (art.264(2) TFEU). For preliminary rulings, in particular those concerned with the interpretation of EU law (art.267(1) TFEU), the Court therefore had to develop its own approach and justify it in light of the twin principles of legal certainty and the protection of legitimate expectations. For another thing, the issue is inextricably tied up with what is perhaps the most discussed issue in EU law: the resolution of norm conflicts between EU law and national law. From the trailblazing early judgments on direct effect and primacy of EU law to later controversies on indirect effect or the horizontal direct effect of general principles, the ECJ has always been concerned with ensuring the effectiveness of EU law in cases of conflict.[10] In practice, that means EU law as understood by the ECJ itself. Variation in the temporal effects of its rulings is therefore seen as directly connected to the effectiveness of EU law—an additional, specifically supranational perspective on the issue that does not become relevant in the traditional discussions of national courts.

We will argue in this note that, for all its importance, this latter perspective has become too prevalent in the ECJ's recent jurisprudence, with the protection of legitimate expectations being left by the wayside. To make this point, we begin in the first part by briefly summarising the case law on temporal effects of preliminary rulings, with a focus on its connections to both legal certainty and the effectiveness of EU law. The reach of that case law, and in particular its relationship to the general principle of protection of legitimate expectations, recently came to a head in the case of *Dansk Industri*, which we summarise in the second part. We will argue, in the third part, that the ECJ's judgment in that case was both unsatisfactory in substance and inconsistent with its prior jurisprudence; and, in the fourth part, that giving stronger weight to the protection of legitimate expectations would not compromise the effectiveness of EU law beyond measure. Against that backdrop, we will end by reconstructing the judgment in *Dansk Industri*

[4] T. Koopmans, "Retrospectivity Reconsidered" (1980) 39 C.L.J. 287, 299–300.

[5] C. Waldhoff, "Recent Developments Relating to the Retroactive Effect of Decisions of the ECJ" (2009) 46 C.M.L. Rev. 173, 173 and 177.

[6] Cf. *Roquette Frères SA v Hauptzollamt Geldern* (C-228/92) EU:C:1994:168 at [27]; cf. also S. Verstraelen, "The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity" (2013) 14 G.L.J. 1687, 1701.

[7] Cf. Koopmans, "Retrospectivity Reconsidered" (1980) 39 C.L.J. 287, 288 and 296–297.

[8] H. Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), p.134.

[9] J. Kokott and T. Henze, "Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen in Steuersachen" [2006] N.J.W. 177, 180.

[10] Cf. T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford: Oxford University Press, 2006), pp.418–419.

and consider how a reading that takes legitimate expectations into account connects to the controversies surrounding it.

Temporal effects of preliminary rulings

Of the two theoretical perspectives on the judicial function mentioned above, the ECJ aligns itself with the conservative view of courts as actors that merely "find" the law. In the leading case of *Denkavit Italiana*, it stated that the interpretation which it gives to a rule of EU law,

> "clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force".

It follows from this that, in principle, the ECJ's interpretation "may, and must, be applied by the [national] courts even to legal relationships arising and established before the [ECJ's] judgment".[11] In other words: preliminary rulings have an *ex tunc* effect.

Denkavit Italiana is interesting not only for having established *ex tunc* effect as the ground rule, but also for the context in which it did so. The Court connected the issue to that of direct effect. Citing *Simmenthal*, it emphasised that the rules of EU law must be "fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force".[12] Preliminary rulings are the vehicle through which uniform interpretation and application are ensured, in particular for those provisions which have direct effect.[13] This line of reasoning makes the connection of the *ex tunc* effect of the ECJ's judgments to the effectiveness of EU law particularly explicit.

The rule is not without exceptions, however—and that is where the principle of legal certainty comes in. As the Court put it in the landmark case *Defrenne II*,

> "important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen [the question at issue in that case] as regards the past".[14]

Here the temporal aspect is foregrounded, and the importance of legal certainty outweighs the interest in maintaining the effectiveness of the substantive EU law provisions at issue: the past is in the past, as it were. In such cases, the ECJ's preliminary rulings exceptionally have a mere *ex nunc* effect.

The preconditions for such a limitation were succinctly summarised in *Denkavit Italiana*: there must be "serious effects which [the judgment at issue] might have, as regards the past, on legal relationships established in good faith".[15] While the exact wording has differed somewhat in subsequent cases, the two preconditions contained in this formulation have been retained. First, the case must concern legal relationships established "in good faith": in particular, there must have been good reason to err about the interpretation at issue in the case. Secondly, there must be a risk of "serious effects" (or, later, "serious difficulties"), especially financial consequences, were the judgment's effects not to be limited as regards the past.[16] Finally, and crucially, the interest in a uniform application of EU law makes itself known once

[11] *Amministrazione delle finanze dello Stato v Denkavit italiana* (61/79) EU:C:1980:100; [1981] 3 C.M.L.R. 694 at [16]; cf. also *Pohl v OBB Infrastruktur AG* (C-429/12) EU:C:2014:12 at [30].

[12] *Denkavit italiana* (61/79) at [14]; citing *Amministrazione delle finanze dello Stato v Simmenthal SpA* (106/77) EU:C:1978:49; [1978] 3 C.M.L.R. 263.

[13] *Denkavit italiana* (61/79) at [15].

[14] *Defrenne v SABENA* (43/75) EU:C:1976:56; [1976] 2 C.M.L.R. 98 at [74].

[15] *Denkavit italiana* (61/79) at [17].

[16] E.g. *Santander Asset Management SGIIC SA v Direteur des résidents à l'étranger et des services généraux* (C-338/11) EU:C:2012:386; [2012] 3 C.M.L.R. 12 at [59]–[62].

more in a procedural limitation: only the ECJ itself may limit the temporal effects of a judgment,[17] and it may do so only in the first judgment in which it deals with any given issue of interpretation.[18]

In principle, then, legal certainty has found a place in the ECJ's case law on the temporal effects of preliminary rulings. However, its role is very closely circumscribed. The preconditions for the limitation of a judgment's *ex tunc* effect have been interpreted very narrowly: an *ex nunc* effect is preferred only in "truly exceptional circumstances", as the Court now put it in *Dansk Industri*.[19] In contrast to this circumscribed role, the topoi of legal certainty and the protection of legitimate expectations developed their own prominence in a separate line of case law: as general principles of EU law, they have been made use of in resolving temporal conflicts ranging from the contestation of retroactive statutes to reliance on administrative acts or information. The recent judgment in *Dansk Industri* is of particular interest in this regard because it connects the two lines of case law hitherto usually considered separately: the temporal effects of preliminary rulings on the one hand and the protection of legitimate expectations on the other. We therefore turn to a more detailed consideration of that judgment.

Dansk Industri—claiming primacy for temporal effects over legitimate expectations

Factual and legal background

To provide context for the temporal issues discussed in the judgment, it is necessary first to provide a rough timeline of the events that constitute the facts of the case. In June 2009, the applicant, Mr Rasmussen, was dismissed by Ajos, his employer, at the age of 60. Since he had been with that company for more than 18 years, he was, in principle, entitled to a severance allowance equal to three months' salary under para.2a(1) of the Danish Law on salaried employees. However, para.2a(3) of the said law bars the entitlement to a severance allowance if the employee "will receive" an old-age pension from the employer under a scheme which the employee joined before the age of 50. In Danish case law this latter provision had until then been interpreted broadly, as meaning that an employee is not entitled to a severance allowance whenever they are entitled to an old-age pension, even if the employee does not wish to exercise their right to retirement. Mr Rasmussen was entitled to such a pension payable by Ajos, but decided to stay in the employment sector and was subsequently employed by another undertaking. Thus, he received no old-age pension. In accordance with para.2a(3), as interpreted by the Danish courts, Ajos paid him no severance allowance either.

On 12 October 2010 the ECJ handed down its judgment in *Ingeniørforeningen i Danmark*[20] which also dealt with para.2a(3) of the Danish Law on salaried employees. It concerned a very similar set of circumstances to those under consideration in the present case: the only notable difference was that, rather than two private parties, the dispute was between an employee and a public-sector employer (a so-called vertical relationship). The ECJ held that a provision such as para.2a(3) constitutes a difference in treatment based directly on grounds of age for the purposes of arts 1 and 2(2)(a) of Directive 2000/78.[21] This difference in treatment, it found, cannot be justified: since no severance allowance is payable even when an employee does not retire and therefore receives no pension, an interpretation such as that applied by the Danish

[17] *Denkavit italiana* (61/79) EU:C:1980:100; [1981] 3 C.M.L.R. 694 at [18].

[18] *Meilicke v Finanzamt Bonn-Innenstadt* (C-292/04) EU:C:2007:132; [2007] 2 C.M.L.R. 19 at [36]–[39].

[19] *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [40].

[20] *Ingeniørforeningen i Danmark v Region Syddanmark* (C-499/08) EU:C:2010:600; [2011] 1 C.M.L.R. 35.

[21] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

courts goes beyond what is necessary to achieve any legitimate aim.[22] The Directive therefore precludes such an interpretation.

In March 2012, a trade union brought an action on Mr Rasmussen's behalf against Ajos, claiming payment of a severance allowance and relying on the judgment in *Ingeniørforeningen i Danmark*. The case finally came before the Danish Højesteret (Supreme Court) which decided to stay the proceedings and refer to the ECJ. In its order for reference, the Højesteret pointed out that in a relationship between private persons (a so-called horizontal relationship), it is not possible to give direct effect to the provisions of a directive. Conflicts between domestic law and a directive must be resolved by interpreting the provision of domestic law in conformity with EU law. However, consistent interpretation cannot serve as the basis for an interpretation of domestic law *contra legem*. According to the Højesteret, with respect to the Danish case law on para.2a(3) it would be *contra legem* to interpret that provision consistently with Directive 2000/78. It therefore turned instead to the general principle of EU law prohibiting discrimination on grounds of age, but wondered whether the direct application of that principle in a horizontal relationship might conflict with the general principle of legal certainty and its corollary, the principle of the protection of legitimate expectations.

Based on these considerations, the Højesteret referred two questions to the ECJ: first, whether the general principle of EU law prohibiting discrimination on grounds of age precludes legislation such as para.2a(3) as it had been interpreted by Danish courts; and secondly, if so, whether it is possible, in a horizontal relationship, for a national court to weigh that principle and the issue of its direct effect against the principles of legal certainty and of legitimate expectations and to conclude that the latter must take precedence over the former so that a national provision which is contrary to the principle prohibiting discrimination on grounds of age may still be applied in that horizontal relationship. In this context, the Højesteret also wished to know whether the fact that individuals may claim compensation from a Member State on account of the incompatibility of national law with EU law may be taken into account when weighing the conflicting principles.

The judgment of the Grand Chamber

The Court begins by dealing briefly with the substantive issue raised by the first question: do circumstances such as those under Danish law contravene the general principle of non-discrimination on grounds of age? Against the background of the ECJ's *Mangold* and *Kücükdeveci* line of reasoning,[23] the answer is clear: Directive 2000/78 does not itself lay down that general principle, which is derived instead from the constitutional traditions of the Member States and various international instruments, as well as being now enshrined in art.21 CFR; the Directive does, however, give "concrete expression" to the said general principle. Since *Ingeniørforeningen i Danmark* had already established that the situation under Danish law is in contravention of the Directive (thereby also bringing it within the scope of EU law), it follows that it is also contrary to the general principle of non-discrimination on grounds of age.[24]

The Højesteret's second question was whether that principle and the issue of its direct effect could be weighed against the general principles of legal certainty and legitimate expectations. Before dealing with this question directly, the ECJ took a detour and inserted a passage on consistent interpretation. It reminds the Højesteret that the protection which individuals derive from provisions of EU law must be effectively ensured; that national courts, too, are under the obligation to do so; and that they must therefore interpret national law consistently with EU law so long as such an interpretation is not *contra legem* or contrary to

[22] *Ingeniørforeningen i Danmark* (C-499/08) EU:C:2010:600; [2011] 1 C.M.L.R. 35 at [47].

[23] *Mangold v Helm* (C-144/04) EU:C:2005:709; [2006] 1 C.M.L.R. 43 at [74]–[78]; *Seda Kücükdeveci v Swedex GmbH & Co KG* (C-555/07) EU:C:2010:21; [2010] 2 C.M.L.R. 33 at [20]–[27].

[24] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [22]–[26].

general principles of law.[25] The Court then makes brief work of the supposed *contra legem* limit that the Højesteret proposed in this case: it states very clearly that the duty of consistent interpretation "entails the obligation for national courts to change its [sic] established case-law",[26] and that, accordingly, the Højesteret cannot avoid interpreting para.2a(3) of the Danish Law on salaried employees in accordance with EU law "by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law".[27] Similarly, AG Bot had strongly nudged the Højesteret towards rethinking its stance on consistent interpretation of para.2a(3). Since that provision itself speaks of situations where an employee "will receive" an old-age pension, it could be read narrowly—as "will actually receive" the said pension, rather than "could conceivably receive" it.[28] Circumstances such as those in which Mr Rasmussen found himself would then no longer be covered by the provision and the conflict with Directive 2000/78 eliminated. Without going into as much detail, then, the ECJ effectively echoes the position of the Advocate General on this point. It merely goes on to add that *even if* an interpretation consistent with EU law should not be possible, the national provision at issue would have to be disapplied to give effect to the protection of individuals derived from the general principle of non-discrimination.[29]

Only then does the Court turn to the gist of the Højesteret's second question, concerning the principles of legal certainty and of legitimate expectations—glossed by the Court as only the latter.[30] This section of the judgment presumably refers to both scenarios of consistent interpretation and of disapplication of national law, since the Court does not specifically refer to either. The ECJ makes use of two arguments. The first had already been proposed by AG Bot and pertains directly to the issue we consider in this note: it builds on the case law concerning the temporal effect of preliminary rulings. The Advocate General had recalled that these have an *ex tunc* effect unless the ECJ itself, in its first judgment on the issue (*Ingeniørforeningen i Danmark*, in the present context) has explicitly ruled otherwise. To limit the duty of consistent interpretation based on the principles of legal certainty or the protection of legitimate expectations, as the Højesteret considered doing, would, however, amount to a factual limit of the *ex tunc* effect of *Ingeniørforeningen i Danmark*.[31] Such an understanding of the general principles of legal certainty and legitimate expectations could not therefore, on the Advocate General's view, be correct. The Court once more echoes his conclusions: the temporal effects of its judgments would, "in practice", be limited by applying the principle of legitimate expectations.[32] Moreover, the Court argues, that principle cannot be relied on to deny individuals whose proceedings wind up before the ECJ the benefit of an interpretation in their favour.[33]

The conclusion is that national courts cannot rely on the principle of legitimate expectations in order to continue applying national law which is in conflict with the general principle of non-discrimination.[34] Given this finding, the Court can very succinctly deal with the Højesteret's final query pertaining to the possibility of compensation, which cannot, of course, alter the primary obligation to interpret national law in accordance with EU law or to disapply it if such an interpretation should not be possible.[35]

[25] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [29]–[32].
[26] *Dansk Industri* (C-441/14) at [33].
[27] *Dansk Industri* (C-441/14) at [34].
[28] Opinion of AG Bot in *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [58]–[65]; cf. also Opinion of AG Kokott in *Ingeniørforeningen i Danmark v Region Syddanmark* (C-499/08) EU:C:2010:248; [2011] 1 C.M.L.R. 35 at [84].
[29] *Dansk Industri* (C-441/14) at [35]; cf. also AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [47].
[30] *Dansk Industri* (C-441/14) at [38]–[42].
[31] AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [82].
[32] *Dansk Industri* (C-441/14) at [39].
[33] *Dansk Industri* (C-441/14) at [41].
[34] *Dansk Industri* (C-441/14) at [38].
[35] *Dansk Industri* (C-441/14) at [42].

The underlying rationale—effet utile

The judgment in *Dansk Industri* constitutes the first time that the ECJ has dealt head-on with the relationship between the temporal effects of its judgments, on the one hand, and the general principle of legitimate expectations, on the other.[36] It thereby addresses not only a gap in its own jurisprudence but also one in the academic literature—while much has been written on both topics, their relationship has seldom received more than a passing mention. It is therefore worth considering the way the Court now handles the issue.

The temporal effects of preliminary rulings are clearly a major consideration in answering the Højesteret's second question. In the words of the Court, "the application of the principle of the protection of legitimate expectations" in a case such as this,

> "would, in practice, have the effect of limiting the temporal effects of the Court's interpretation because, as a result of that application, such an interpretation would not be applicable in the main proceedings".[37]

AG Bot had put it similarly, but played down the conflict by emphasising legal certainty rather than the principle of protecting legitimate expectations. As we saw above, legal certainty is used by the Court to argue in favour of exceptionally limiting the temporal reach of its judgments to an *ex nunc* effect. The Advocate General seemed to be implying that there are no further considerations beyond the question of temporal effects, which had already been dealt with: to apply the principle of legal certainty,

> "would amount to limiting the temporal effects of the judgment in *Ingeniørforeningen i Danmark* … even though the Court had not taken the view that that principle justified such a limitation".[38]

Despite the different nuances, then, both lines of argument focus on the fact that allowing national courts to apply the principle of legitimate expectations (or legal certainty) would amount to a factual limitation of the *ex tunc* effect of the ECJ's judgments. The case law on those judgments' temporal effects, however, clearly states that only the ECJ itself, not national courts, may limit the *ex tunc* effect.[39] The conclusion drawn is that national courts may not apply the principle of legitimate expectations in the way envisaged by the Højesteret—postulating, in effect, the complete primacy of the temporal effects of the ECJ's judgments (in this case, the *ex tunc* effect) over the principle of legitimate expectations. This view concords with that of the German Federal Constitutional Court, which had likewise held in *Honeywell* that national courts may not protect legitimate expectations when such a protection would conflict with the *ex tunc* effect of an ECJ ruling.[40]

The rationale for such a one-sided result can presumably be found in the relevance of the issue for the uniform and effective application of EU law. As discussed above using the example of *Denkavit Italiana*, the preoccupation with the effectiveness of EU law may be considered a driving force behind the ECJ's case law on the temporal effects of its judgments. In *Dansk Industri*, too, that consideration clearly shines through: it is striking that both the Advocate General and the Court devote substantial parts of their reasoning to giving EU law effect through consistent interpretation although the Højesteret had not directly inquired after that possibility. The Court explicitly states that consistent interpretation is necessary to ensure that provisions of EU law are "fully effective".[41] If consistent interpretation is not possible, national

[36] It had briefly considered the relationship between its judgments' temporal effects and legal certainty: cf. text to fn.61.

[37] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [39].

[38] AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [82].

[39] AG Bot in *Dansk Industri* (C-441/14) at [82]; cf. *Denkavit italiana* (61/79) EU:C:1980:100; [1981] 3 C.M.L.R. 694 at [18].

[40] Decision of 6 July 2010, BVerfGE 126, 286 at [83].

[41] *Dansk Industri* (C-441/14) at [29].

legislation must be disapplied "to ensure the full effectiveness" of EU law.[42] From that perspective, the main consequence of allowing national courts to apply the principle of protection of legitimate expectations would be to "impose drastic limitations on the principle of interpretation of national law in accordance with EU directives", as the Advocate General put it[43]: the effectiveness of EU law would, from within that mind-set, be compromised.

Reintroducing legitimate expectations

The general principle of the protection of legitimate expectations

We wish to argue that the ECJ has overemphasised the importance of an *ex tunc* effect of its judgments at the expense of protecting legitimate expectations. To do so, we begin by briefly delineating what we understand by the principle of legitimate expectations. While it has long since been established as a general principle of EU law, there are a great many unresolved issues surrounding it. For example, it is clear that as a general principle, it was established by the Court in a critically comparative evaluation of the Member States' legal traditions[44]; but beyond this, its deeper axiological basis remains a matter of controversy. Traditional European doctrine sees the principle of legitimate expectations as following from the principle of legal certainty (and thus rooted, ultimately, in the rule of law).[45] However, more recent literature—particularly the German literature, following similar trends in national constitutional law—also posits a connection to fundamental rights.[46] The aim of such a reconceptualisation is usually not so much to deny the connection to the rule of law as such, but rather to emphasise the principle's importance for individuals and the corresponding importance it should be given in legal argumentation.[47]

In line with this latter approach, a common distinction is that legitimate expectations are focused exclusively on individuals, while legal certainty is of more general relevance for the legal system at large.[48] For example, the considerations of legal certainty that the ECJ has cited in favour of exceptionally limiting the temporal reach of its judgments have been used to argue for a mere *ex nunc* effect in favour of both individuals and States: in the latter case, it is financial consequences that might ensue for a Member State which fulfil the precondition of "serious effects" or "serious difficulties".[49] In contrast, the Court has ruled in a different context that—unlike individuals—the Member States *cannot* rely on the principle of legitimate expectations in their own favour.[50] While counter-examples may be found, and the ECJ often cites both

[42] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [35].

[43] AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [77].

[44] Cf. J. Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" in P. Kapotas and V. Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, forthcoming).

[45] Tridimas, *The General Principles of EU Law* (2006), p.242; J. Raitio, *The Principle of Legal Certainty in EC Law* (Dordrecht: Kluwer, 2003), pp.127 and 200; Groussot, *Creation, Development and Impact of the General Principles of Community Law* (2005), p.282; Waldhoff, "Recent Developments Relating to the Retroactive Effect of Decisions of the ECJ" (2009) 46 C.M.L. Rev. 173, 182.

[46] Esp. W. Frenz, "Grundrechtlicher Vertrauensschutz—nicht nur ein allgemeiner Rechtsgrundsatz" (2008) 43 Eu.R. 468, 477.

[47] Cf. T. Maciejewski and J. Theilen, "Vertrauensschutz" in B. Weitemeyer, M. Achatz and S. Schauhoff (eds), *Umsatzsteuerrecht für den Nonprofitsektor* (Cologne: Otto Schmidt, forthcoming), margin note 6.10.

[48] Cf. Tridimas, *The General Principles of EU Law* (2006), p.252; Groussot, *Creation, Development and Impact of the General Principles of Community Law* (2005), p.287; Rodríguez, "The Principle of Legal Certainty and the Limits to the Applicability of EU Law" (2016) 52 *Cahiers de Droit Européen* 115, 121.

[49] M. Lang, "Limitation of the Temporal Effects of Judgments of the ECJ" (2007) 35 *Intertax* 230, 233.

[50] *Ampafrance SA v Directeur des services fiscaux de Maine-et-Loire* (C-177/99) EU:C:2000:470; [2002] B.T.C. 5520 at [67]; *Commission v Spain* (C-83/99) EU:C:2001:31 at [24]–[25].

principles without differentiating, then the more subjective focus of legitimate expectations finds some basis in its case law. For clarity, it is in that sense that we will be using the term in what follows.[51]

Legitimate expectations and the temporal effects of the Court's judgments

How, then, does the protection of legitimate expectations, thus understood, relate to the temporal effect of the ECJ's rulings? There is a clear thematic connection, given that both topoi are temporal mechanisms of regulation within a legal system. It is therefore unsurprising that the preconditions of protecting legitimate expectations and of restricting a judgment's temporal reach to an *ex nunc* effect are, to a certain extent, comparable: thus, as we saw above, the first condition for the limitation of a judgment's reach to an *ex nunc* effect is that there was good reason to err about a certain interpretation. That precondition echoes the fact that expectations, to be legally protected, must be legitimate—in other words, there must have been good reason to form and retain them. In either case, the core of the issue may be captured by the requirement that the relevant acts were performed in good faith.[52] In assessing that issue, both tests may involve, for example, an analysis of other relevant actors' proclamations on the matter.[53]

Both mechanisms can, moreover, align in their consequences: That is to say, the restriction of a judgment's temporal reach to a mere *ex nunc* effect will usually lead, factually, to the protection of an affected individual's legitimate expectations. The judgment in *Dansk Industri* picks up on these areas of overlap—however, given the Højesteret's questions, it had to deal with the less idyllic scenario in which the overlap may be seen as creating a conflict of norms. The judgment in *Dansk Industri* had an *ex tunc* effect—indeed, as AG Bot rightly pointed out, no other result was possible given the *ex tunc* effect of *Ingeniørforeningen i Danmark*, the prior judgment on the same issue.[54] Certain individuals might nonetheless have formed legitimate expectations—in particular, Ajos may have relied on the state of Danish law at the time it dismissed Mr Rasmussen. In this scenario, the differences between the ECJ's case law on the temporal effects of its judgments and the protection of legitimate expectations become apparent, for, despite the thematic overlap introduced above, the two mechanisms are not identical, neither as regards their underlying ideas nor as regards their preconditions.

The concern is, at heart, that the more subjective aspect of the protection of legitimate expectations, as introduced above, is lost when debating the temporal effects of judgments: the latter are not, on the basis of the ECJ's conceptualisation, concerned with the individual. The fact that "serious difficulties", usually of a financial nature, are a prerequisite for an *ex nunc* limitation makes this particularly clear. A typical formulation is found in *Defrenne II*: "In view of the large number of people concerned", claims reaching back into the past "might seriously affect the financial situation" of the undertakings concerned "and even drive some of them to bankruptcy".[55] These criteria take a broad, non-individualised point of view (many people concerned, financial consequences of the undertakings as a whole, dire financial consequences for some). By contrast, the traditional case law on the principle of legitimate expectations, though applying objectified normative criteria, ultimately focuses on the situation of the individual—and for good reason, especially if one considers that principle's connection to fundamental rights. More generally, the very idea that mere *ex nunc* effects are possible only in "truly exceptional circumstances"[56] conflicts with an

[51] Some commentators have argued instead for a more subjective understanding of legal certainty: cf. e.g. J. van Meerbeeck, "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust" (2016) 41 E.L. Rev. 275; such an approach would yield the same results.

[52] Cf. above, text to fn.15.

[53] Cf. e.g. *Defrenne* (43/75) EU:C:1976:56; [1976] 2 C.M.L.R. 98 at [72]–[73], on the one hand, and *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* (C-143/88) EU:C:1991:65; [1993] 3 C.M.L.R. 1 at [59] on the other.

[54] AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [81].

[55] *Defrenne* (43/75) EU:C:1976:56; [1976] 2 C.M.L.R. 98 at [70].

[56] See above, text to fn.19.

approach based on fundamental rights. The latter would instead imply a more nuanced approach based on a proportionality test—which is how the ECJ's case law on legitimate expectations has hitherto been understood.[57] Such nuance is lost when the protection of legitimate expectations is subordinated to the temporal effects of the ECJ's judgments, as proposed in *Dansk Industri*.[58]

Legitimate expectations and legal certainty in prior case law of the Court

The subordination of the protection of legitimate expectations to the temporal effect of the ECJ's judgments is not only unsatisfactory in substance; it is also not in line with the ECJ's own case law. The Court holds in *Dansk Industri* that "a national court cannot rely" on the principle of the protection of legitimate expectations "in order to continue to apply a rule of national law that is at odds with" EU law since it would limit the *ex tunc* effect of its judgments.[59] However, there are well-established de facto limitations to the *ex tunc* effect and these are, in fact, based on none other than that principle, and on the related principle of legal certainty. Indeed, looking at other cases one might conclude that upholding a national rule or an interpretation of national law which is at odds with EU law is one of the typical consequences deriving from those principles.[60]

One example for this is the increased level of protection conferred on administrative decisions once they become final under national administrative law. While concerned with legal certainty rather than legitimate expectations and thus not necessarily mediating in favour of individuals, the ECJ's case law on this topic is particularly illuminating since it *explicitly* allows de facto exceptions from the *ex tunc* effect of its judgments. For example, in *Kühne & Heitz*, the Court began by recalling that its rulings must be applied "even to legal relationships which arose or were formed before the Court gave its ruling"—it recalls their *ex tunc* effect.[61] It continues that the,

> "finality of administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to […] legal certainty"

and that therefore there is, in principle, no obligation for the authorities of a Member State to "reopen a decision which has become final in that way".[62] The ECJ then defined strict conditions under which finality might be overcome to ensure the application of EU law.[63] An administrative body must have the power to reopen a final decision under national law. That decision must have become final as a result of a judgment of a national court of last resort. That court decision must have been—in light of a subsequent judgment of the ECJ—based on a misinterpretation of EU law and adopted without asking the ECJ for a preliminary ruling. And lastly the individual affected by the administrative decision must then complain to the

[57] E.g. J. Schwarze, *European Administrative Law*, rev. edn (London: Sweet and Maxwell, 2006), p.1130; Maciejewski and Theilen, "Vertrauensschutz" in *Umsatzsteuerrecht für den Nonprofitsektor* (forthcoming), margin note 6.13; cf. also P. Craig and G. de Búrca, *EU Law*, 5th edn (Oxford: Oxford University Press, 2011), p.538; Groussot, *Creation, Development and Impact of the General Principles of Community Law* (2005), p.301.

[58] Cf. the criticism in the early case note by M. Benecke, "Anmerkung" [2016] Eu.Z.W. 469.

[59] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [38].

[60] Cf. Rodríguez, "The Principle of Legal Certainty and the Limits to the Applicability of EU Law" (2016) 52 *Cahiers de Droit Européen* 115, 129–139; J. van Meerbeeck, "De la Généralité in Abstracto Des Principles Généraux à Leur Effet Direct in Concreto" (2016) 52 *Cahiers de Droit Européen* 65, 86.

[61] *Kühne & Heitz v Produktschap voor Pluimvee en Eieren* (C-453/00) EU:C:2004:17; [2006] 2 C.M.L.R. 17 at [22].

[62] *Kühne & Heitz* (C-453/00) at [24].

[63] *Kühne & Heitz* (C-453/00) at [26]–[28].

administrative body immediately after becoming aware of the ECJ's decision.[64] While *Kühne & Heitz* became famous mostly for these criteria,[65] the ECJ repeatedly reaffirmed the principle of finality in subsequent decisions: if there are no exceptional circumstances, an administrative decision may remain valid even if it proves to be at odds with EU law.[66]

The same is true for a national court's decision. This is known as the principle of *res judicata*:

> "In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question."[67]

Thus, EU law "does not require a national court to disapply domestic rules of procedure conferring finality" on judicial decisions.[68] Again, the ECJ held that *res judicata* might be set aside, but only under exceptional circumstances: e.g. if the judgment would also have binding force for future judicial decisions on the same issue[69] or if the application of *res judicata* would prevent the recovery of State aid which had been found to be incompatible with the common market in a final decision of the Commission.[70] The ECJ's case law on finality of administrative and judicial decisions exemplifies that the general principle of legal certainty may, under normal circumstances, very well constitute a limit to the *ex tunc* effect of its own judgments.

The same is true for the principle of legitimate expectations, as may be seen from the case of *Elmeka*. In that case a local tax authority provided information to a company, stating that some of their services were exempt from value added tax (VAT). The company adhered to that statement and did not pass on the tax to its customer. It was subsequently decided by both national courts and ultimately the ECJ that, when interpreting the provisions of the national tax code consistently with the VAT directive, the services were not exempt from VAT and thus the information provided by the local tax authority was erroneous. However, with regard to the general principle of legitimate expectations, the ECJ ruled that, in principle, a taxpayer could rely on the information provided by a competent tax authority and it was for,

> "the referring court to decide whether, in the circumstances of the main proceedings, the taxable person could reasonably have believed that the decision in question had been taken by a competent authority".[71]

[64] To reiterate: the individual's interest, in this case, was antithetical to legal certainty, rather than based on legitimate expectations; our point here is merely that both principles may constitute de facto limits on the *ex tunc* effect of the ECJ's judgments.

[65] Cf. X. Groussot and T. Minssen, "Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?" (2007) 3 Eu.Const. 385, 417 ("erosion of the principle of legal certainty"); on the conflict with *effet utile*, cf. also the case note on *Kühne & Heitz* by R. Caranta in (2005) 42 C.M.L. Rev. 179.

[66] Cf. *i-21 Germany GmbH v Germany* (C-392/04) EU:C:2006:586; [2007] 1 C.M.L.R. 10 at [51]–[54] and [63]–[64]; *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* (C-2/06) EU:C:2008:78; [2008] 2 C.M.L.R. 21 at [37]–[38]; *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* (C-249/11) EU:C:2012:608; [2013] 1 C.M.L.R. 15 at [76]–[77].

[67] *Amministrazione dell'Economia e delle Finanze v Fallimento Olimpiclub Srl* (C-2/08) EU:C:2009:506; [2010] B.V.C. 1019 at [22].

[68] *Fallimento Olimpiclub* (C-2/08) EU:C:2009:506; [2010] B.V.C. 1019 at [23]; cf. also *Kapferer v Schlank & Schick GmbH* (C-234/04) EU:C:2006:178; [2006] 2 C.M.L.R. 19 at [20]–[23]; *Impresa Pizzarotti & C. SpA v Comune di Bari* (C-213/13) EU:C:2014:2067 at [59]–[61], *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen* (C-505/14) EU:C:2015:742; [2016] 2 C.M.L.R. 18 at [39].

[69] *Fallimento Olimpiclub* (C-2/08) EU:C:2009:506; [2010] B.V.C. 1019 at [29]–[31].

[70] *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* (C-119/05) EU:C:2007:434; [2009] 1 C.M.L.R. 18 at [52], [59]–[63]; *Klausner Holz* (C-505/14) EU:C:2015:742; [2016] 2 C.M.L.R. 18 at [41]–[45].

[71] *Elmeka NE v Ypourgos Oikonomikon* (C-181/04) EU:C:2006:563; [2009] B.T.C. 5140 at [36].

So the erroneous information provided by the tax authority could give rise to legitimate expectations protected by EU Law in *Elmeka*—although the interpretation of the Sixth VAT Directive in this judgment came with an *ex tunc* effect.

A further topos connected to the principles of legal certainty and legitimate expectations (here usually used in tandem) is that of non-retroactivity of laws. The leading case is *Racke*, which established the following formula:

> "Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."[72]

While that formula refers to Community measures, the ECJ has confirmed that, as an expression of general principles of EU law, it also applies to Member States when acting within the scope of EU law.[73] In particular, the *Racke* formula applies when a Member State implements an EU directive or adjusts its national law after the ECJ ruled it was incompatible with such a directive. Here, again, the application of the general principles of legal certainty and legitimate expectations leads to a de facto limitation of the *ex tunc* effect of the Court's judgments.[74]

Finally, what of the principles' application by national courts? There is a certain measure of overlap here with the scenarios already discussed: although they relate primarily to executive and legislative acts as the foundation of legitimate expectations, controversial cases may of course be brought before the courts and they will have to reach the final decision on these matters. The orthodox position on how they should act in cases such as *Dansk Industri* (concerned with horizontal relationships, hence with no possibility of giving direct effect to a directive) goes roughly as follows. When acting within the scope of EU law, national courts are required to interpret national provisions as far as possible in accordance with EU law, particularly in accordance with relevant directives, in order to comply with art.288 (3) TFEU.[75] This obligation extends also to the judgments of the ECJ which constitute the authoritative interpretation of EU law—so when the ECJ decides on a certain interpretation, national courts are obliged to interpret domestic law as far as possible in accordance with that judgment. That includes applying the judgment retroactively if its reach was not restricted, by the ECJ itself, to a mere *ex nunc* effect.[76]

However, the ECJ has repeatedly held that there are limits to the obligation of national courts to interpret domestic law consistently with the relevant directives. At least on the face of it, even the judgment in *Dansk Industri* takes up these limits: general principles of law on the one hand and the interpretation of national law *contra legem* on the other.[77] From the case law cited by the ECJ at this point, it is apparent that none other than the principles of legal certainty and the protection of legitimate interests are considered relevant general principles that limit the obligation of consistent interpretation.[78] Such a limitation seems

[72] *Racke v Hauptzollamt Mainz* (98/78) EU:C:1979:14 at [20].

[73] E.g. *Gemeente Leusden and Holin Groep BV cs v Staatssecretaris van Financien* (C-487/01) EU:C:2004:263; [2007] S.T.C. 776 at [57]–[59].

[74] Though not explicitly in the context of ECJ judgments: Prechal, *Directives in EC Law* (2005), pp.28–29 also assumes the applicability of the principle of non-retroactivity despite an obligation, in principle, to implement directives with an *ex tunc* effect.

[75] *Marleasing v Comercial Internacional de Alimentación* (C-106/89) EU:C:1990:395; [1992] 1 C.M.L.R. 305; *Pfeiffer v Deutsches Rotes Kreuz* (C-397/01) EU:C:2004:584; [2005] 1 C.M.L.R. 44.

[76] Cf. *Denkavit italiana* (61/79) EU:C:1980:100; [1981] 3 C.M.L.R. 694 at [16].

[77] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27 at [32]; cf. also AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [49].

[78] *Impact v Minister for Agriculture and Food* (C-268/06) EU:C:2008:223; [2008] 2 C.M.L.R. 47 at [100]; cf. also *Criminal proceedings against Kolpinghuis Nijmegen BV* (C-80/86) EU:C:1987:431; [1989] 2 C.M.L.R. 18 at [13]; *Deutsche Lufthansa AG v Kumpan* (C-109/09) EU:C:2011:129; [2011] I.C.R. 1278 at [54].

entirely adequate and, indeed, necessary, since consistent interpretation may "introduce, without notice, an unexpected change in the law", thus "depriving citizens of their legitimate expectations".[79] When one follows that line of thought to its natural conclusion, it becomes apparent that the application of the principles of legitimate expectations or legal certainty will result in precisely the de facto limitation of the *ex tunc* effect of the ECJ's judgments that it wishes to avoid.

Legitimate expectations and the effectiveness of EU law

Having argued against the ECJ's recent approach of according complete primacy to the temporal effects of its judgments on both the normative and the descriptive level, let us now return to its putative rationale for doing so in the first place: its concern for the uniform and effective application of EU law. As regards effectiveness, two points must be distinguished: the effectiveness of EU law as a whole and the effectiveness of certain substantive provisions.[80] The key point is the realisation that the general principle of the protection of legitimate expectations is itself part of EU law. Any restrictions resulting from its application concern only the relevant provisions of substantive law (e.g. in *Dansk Industri*; Directive 2000/78) but it cannot, by definition, hinder the effective application of EU law as a whole since it forms part of it. For example, AG Bot was correct to note that the protection of legitimate expectations would limit "the principle of interpretation of national law in accordance with EU *directives*".[81] In many cases, the substantive provisions in the relevant directives will indeed be temporally restricted and thereby less effective than they would otherwise be. However, that result follows from the fact that the EU legal order *itself* recognises the value of protecting legitimate expectations and legal certainty, and should not therefore be sweepingly considered a liability.

It is worth noting, furthermore, that allowing national courts to protect legitimate expectations would provide for a more flexible approach which might even end up, in some cases, enhancing the effectiveness of substantive EU law rather than weakening it. These are the cases in which the ECJ would otherwise have limited the temporal reach of its judgment to an *ex nunc* effect. While the argument in favour of such a limitation is generally made with regard to the severe consequences in the Member State primarily involved in the case, the ECJ does not limit the *ex nunc* effect geographically: to do so would be contrary to its own rationale of ensuring a formally uniform application of EU law across Member States. Because of this approach, "serious difficulties" in only one single Member State may preclude the application of the ECJ's judgment in all Member States—thus impairing the effective application of the substantive provision's interpretation as expressed in the respective judgment far more than necessary. Formal uniformity comes at the price of effectiveness. Several commentators have therefore argued in favour of a territorial restriction of the *ex nunc* effect.[82] Allowing national courts to apply the principle of legitimate expectations would achieve the same result.

It is true that such an approach would weaken the ECJ's self-pronounced monopoly on the establishment of a mere *ex nunc* effect, and with it the formally uniform application of substantive EU law. The protection of legitimate expectations by national courts would, in some cases, lead to temporal differences between Member States—with one Member State disapplying a certain rule of national law retroactively and another only doing so in some scenarios, for example. Concerns have been voiced that such an approach

[79] S. Robin-Olivier, "The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections" (2014) 12 *ICON* 165, 180; cf. also, though from the perspective of legal certainty, P. Craig, "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation" (1997) 22 E.L. Rev. 519, 524.

[80] Cf. generally M. de S.-O.-l'E. Lasser, *Judicial Deliberations* (Oxford: Oxford University Press, 2004), p.212.

[81] AG Bot in *Dansk Industri* (C-441/14) EU:C:2015:776; [2016] Pens. L.R. 1 at [77].

[82] Lang, "Limitation of the Temporal Effects of Judgments of the ECJ" (2007) 35 *Intertax* 230, 237; Verstraelen, "The Temporal Limitation of Judicial Decisions: The Need for Flexibility versus the Quest for Uniformity" (2013) 14 G.L.J. 1687, 1718.

would, by vicariously treating the citizens of different Member States differently, constitute a form of discrimination. Waldhoff, for example, has argued in the context of *ex nunc* limitations that,

> "unequal treatment of different Member States should be avoided at all costs since, as a matter of principle, ECJ decisions which eliminate discrimination may not thereby create new discrimination".[83]

However, the argument that differentiating between Member States or individuals creates new "discrimination" assumes what it aims to prove. Discrimination is commonly understood to refer to an unjustified difference in treatment.[84] Protecting legitimate expectations will sometimes lead to a difference in treatment, indeed—but it should do so only when such an approach can be justified. Thus, different Member States might apply the principle differently; however, such differences would have to be based on and justified by different factual backgrounds within the Member States, leading to differing expectations or differing legitimacy of expectations of individuals.[85] It should also be noted that concerns about equal treatment have been raised, thus far, only in the context of *ex nunc* limitations in favour of Member States.[86] By contrast, as explained above, we take legitimate expectations to be connected to fundamental rights and focused exclusively on the protection of *individuals*, thus becoming relevant in cases in which the ECJ's interpretation leads to a disadvantage for (some) individuals. We are thus concerned with cases which differ from the constellations which Waldhoff has in mind—cases in which the more complicated relationship between effectiveness of EU law and individual rights calls for more attention to legitimate expectations and the differentiations that follow from their protection.

This is not to deny that difficult questions remain—as with any legal categorisation, there will be a measure of over- and under-inclusiveness that will continue to be contested.[87] In order to face these difficulties, however, the principle of the protection of legitimate expectation first needs to be reintroduced into the ECJ's jurisprudence—in contrast to its position in *Dansk Industri*. Insofar as worries about the uniform application of EU law arise, it should be kept in mind that the normative standard for assessing the controversies that will inevitably arise would continue to be the European principle of legitimate expectations, the contours of which would, of course, continue to be uniformly decided on by the ECJ itself.[88] This would also correlate with the distribution of responsibilities between the ECJ and a national court in general: while the former defines the rules of EU law, the latter applies them to the factual circumstances in the respective Member State. Substantively speaking, then, uniformity would be preserved by reintroducing legitimate expectations: it is *only* the formal uniformity ensured by the ECJ's monopoly on *ex nunc* limitations that would be weakened.

[83] Waldhoff, "Recent Developments Relating to the Retroactive Effect of Decisions of the ECJ" (2009) 46 C.M.L. Rev. 173, 189.

[84] The *locus classicus* is *Belgian Linguistic* (1474/62) (1979–80) 1 E.H.R.R. 252 at [10]; the ECtHR's terminology seems particularly apt here since Waldhoff, too, makes reference, at first, only to "unequal treatment" before transforming it into the more loaded "discrimination".

[85] Cf. C. Latzel, "Schutz vor rückwirkendem Recht kraft Unionsrechts" [2015] Eu.R. 415, 435–437; A. Sagan, "Nationaler Vertrauensschutz nach Junk: Das Ende eines deutschen Alleingangs" (2015) 6 N.Z.A. 341, 343.

[86] Waldhoff is concerned primarily with the judgments in *Meilicke* (C-292/04) EU:C:2007:132; [2007] 2 C.M.L.R. 19, and *Banca popolare di Cremona v Agenzia Entrate Ufficio Cremona* (C-475/03) EU:C:2006:629; [2007] 1 C.M.L.R. 31, as are his sources, Kokott and Henze, "Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen in Steuersachen" [2006] N.J.W. 177, 182; M. Lang, "Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen im Lichte des Urteils Meilicke" (2007) 7 I.St.R. 235, 237–238.

[87] Cf. Koopmans, "Retrospectivity Reconsidered" (1980) 39 C.L.J. 287, 301 ("some element of chance").

[88] A. Sagan, "Europäischer und nationaler Vertrauensschutz bei Rechtsprechungsänderungen im Arbeits- und allgemeinen Privatrecht" [2010] *Jahrbuch junger Zivilrechtswissenschaftler* 67, 79.

The way forward

Our argument may be summarised as follows. In its case law on the temporal effects of its judgments, the ECJ was driven in large part by the desire to ensure the effective and uniform application of substantive EU law, therefore giving only a very constricted role to legal certainty and none to legitimate expectations. It counterbalanced this approach by developing the latter principles in separate lines of case law. Now pressed to consider the relationship between these strands of case law in *Dansk Industri*, it gave complete primacy to the temporal effects of its judgments, thereby leaving the protection of legitimate expectations by the wayside. That result is unsatisfactory both from a normative perspective and in light of the ECJ's prior case law. Insofar as it was reached in the name of an effective and uniform application of EU law, it overlooks both the fact that the general principle of the protection of legitimate expectations itself forms part of EU law and the normative value of that principle.

The Højesteret has not reacted favourably. Given the choice between interpreting para.2a(3) of the Danish Law on salaried employees in accordance with Directive 2000/78 or disapplying it owing to a conflict with the general principle of non-discrimination on grounds of age, the Højesteret retreated instead to national law and argued that, on that ground, it had no competence to do either and could not therefore pay heed to the ECJ's judgment.[89] The relationship between EU law and national law once more comes to the fore, this time considered from the perspective of the latter. The Højesteret has thus joined the ranks of national courts such as the German Federal Constitutional Court and the Czech Constitutional Court in what is optimistically conceptualised as a dialogue between courts, or pessimistically understood as a power play between European and national institutions with an adverse effect on European integration. The development of the general principle of non-discrimination on grounds of age and its horizontal application, much criticised since its inception in *Mangold*,[90] once more sets the scene for constitutional conflict.

We cannot engage in that debate in substance here, but we would like to close by considering how it fits in with the stronger emphasis on the principle of legitimate expectations that we have been advocating. Giving more prominence to that principle does not imply that it should be considered absolute: on the contrary, as mentioned above, it involves a proportionality test in which even legitimate expectations may yet be outweighed by other considerations. The kinds of considerations that become relevant will vary on a case-by-case basis, but some general guidelines may be adduced. One important aspect will be the predictability of the ECJ's interpretation—already in evidence in its current case law as the good faith requirement.[91] One might argue that while *Defrenne*, for example, constituted a fairly "clear break" (in the terminology of the American Supreme Court) compared to prior case law,[92] the substantive result in *Dansk Industri* was foreshadowed as early as *Mangold*, and certainly heralded quite clearly in the closely connected case of *Ingeniørforeningen i Danmark*.[93] However, the ECJ's judgment in the latter case was not handed down until after the relevant facts for *Dansk Industri* (the dismissal of Mr Rasmussen) occurred—so while there is room for differentiation, the timeline does not speak all too strongly against protecting the legitimate expectations of Ajos.

[89] Decision of 6 December 2016, Case 15/2014.

[90] Cf. E. Spaventa, "The Horizontal Application of Fundamental Rights as General Principles of Union Law" in A. Arnull et al. (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), p.199 at p.208 with further references; from German academia see esp. L. Gerken et al., *"Mangold" als ausbrechender Rechtsakt* (Munich: Sellier, 2009).

[91] Cf. text to fn.52.

[92] Cf. Koopmans, "Retrospectivity Reconsidered" (1980) 39 C.L.J. 287, 291.

[93] On the difficulties involved in such assessments of similarity, well known already from the case law on *ex nunc* effect, cf. Kokott and Henze, "Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen in Steuersachen" [2006] N.J.W. 177, 181–182.

A different aspect may be more relevant, and it is here that the proximity to *Mangold* becomes particularly clear. It will be highly important for the outcome of the proportionality analysis whether the case concerns a horizontal or a vertical constellation, i.e. on the one hand, disputes between two private parties such as employer and employee, and, on the other hand, between a private person and the State.[94] Vertical constellations are more clear-cut: either the ECJ's judgment is to the detriment of the State, in which case legitimate expectations in the subjective sense in which we have understood them do not become relevant, or it is to the detriment of the individual, in which case the proportionality analysis will pit their legitimate expectations against the countervailing interests of the State. However, in horizontal constellations, the second private party involved has an additional interest opposed to the legitimate expectations brought forward. Thus, in the case of *Dansk Industri*, while Ajos was claiming legitimate expectations based on Danish case law, Mr Rasmussen (and his legal heirs) had an interest in claiming the severance payment hitherto denied.

The ECJ emphasised throughout its judgment in *Dansk Industri* that it was dealing with a horizontal constellation.[95] In particular, it argued that Mr Rasmussen was making his claim based on the "individual right" of non-discrimination on the grounds of age.[96] On a sympathetic reading, it was the effective protection of that right that the Court was aiming to protect[97]: it considered Mr Rasmussen more sinned against than sinning. The negative factual consequences for Ajos would then have to be accepted, since they would be normatively considered an elimination of privilege.[98] We would be faced with a situation where the protection of legitimate expectations is considered disproportionate owing to the fundamental importance of ensuring the effectiveness of the substantive law at issue in the case.

In this way, one could reconstruct the ECJ's result in *Dansk Industri* without succumbing to its over-generalising argument from the temporal effects of its judgments. There would be room to incorporate the ECJ's case law in other areas and in particular to give effect to legitimate expectations in vertical constellations—for example in VAT cases, where the opposing interests are not based on an "individual right" but merely consist of the financial interests of the State. The distinction turns, however, on recognising the normative importance to be attached to the "individual right" at issue. Since *Dansk Industri* was concerned with the principle of non-discrimination on the grounds of age, it imported all the controversies attached to that principle. If one adopts the stance now taken by the Højesteret and disagrees with the normative premise, then one will not agree with the result either. In light of that position, it is clear that the debate will continue. If one subordinates legitimate expectations to the temporal effects of the ECJ's judgments, as the ECJ did in *Dansk Industri*, then one is precluded from taking a nuanced view and dealing with these substantive issues head-on.

[94] Cf. Rodríguez, "The Principle of Legal Certainty and the Limits to the Applicability of EU Law" (2016) 52 *Cahiers de Droit Européen* 115, 123.

[95] *Dansk Industri* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27, e.g. at [28] and [43].

[96] *Dansk Industri* (C-441/14) at [36]; referring to *Association de médiation sociale v Union locale des syndicats CGT* (C-176/12) EU:C:2014:2; [2014] 2 C.M.L.R. 41 at [47].

[97] *Dansk Industri* (C-441/14) at [29] and [35].

[98] Cf. generally Habermas, *Between Facts and Norms* (1996), p.401.