

General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?

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Working Papers

Paper:

05/2016



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Introduction

With the purpose of appreciating why, how and to what extent general principles enhance the protection of fundamental rights within the European Union, and therefore its constitutionalization¹, at least three points should be considered.

In order to understand the rationale which led the European Court of Justice (hereinafter ECJ) to introduce a new source of law in the EU legal system, it is first of all essential to analyze the genesis and the content of general principles (1).

Secondly, the question whether the new binding *status* of the Charter of fundamental rights² has *de facto* deprived the importance of general principles as a separate source of protection of fundamental rights should be solved (2).

Thirdly, assuming that general principles of EU law still have a role to play in the protection of fundamental rights, the paper will focus on the three typical functions carried out by general principles³ and the related case-law (3).

The chosen approach aims at assessing, on the one side, whether general principles of EU law are not only a valuable source of protection of fundamental rights, but also a *passe-partout* key enabling the EU legal order the degree of *flexibility* to cope with the challenges an always more integrated Union entails. On the other side, such a structure will finally disclose the possible risks that the other inner aspect of general principles⁴, i.e. their *vagueness*, involves in terms of uniformity and legal certainty within the protection of fundamental rights (4).

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¹ On the constitutional value of general principles of EU law, see AG Trstenjak, 8 September 2008, case C- 282/10, *Dominguez*, ECLI:EU:C:2011:559, para. 94, which refers to the definition given by V.M. SCHWEITZER, W. HUMMER, W. OBWEXER, *Europarecht. Das Recht Des Europäische Union*, Vienna, 2007, p. 65, to observe that «general principles include the fundamental provisions of unwritten primary EU law which are inherent in the legal order of the European Union itself or are common to the legal orders of the Member States».

² Charter of fundamental rights of the European Union, O.J. 14 December 2007, C 303, p. 1 ff.

³ K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The role of general principles of EU Law*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA, *A constitutional order of States? Essays in honour of Alan Dashwood*, Oxford, 2011, p. 179 ff.

⁴ See L.S. ROSSI, *How fundamental are fundamental principles? Primacy and fundamental rights after Lisbon*, *Yearbook of European Law*, 2008, p. 65 ff., spec. p. 87, who affirms that «after Lisbon, in spite of the enhanced protection of fundamental rights and of national constitutional traditions, fundamental principles remain a sort of grey area, where vagueness and flexibility are two sides of the same coin».

1. Genesis and content of general principles of EU law

The process of creation, *rectius* recognition⁵ of general principles is by now consolidated: since the first decision of the ECJ on this topic⁶, both the ECJ and the doctrine have clarified the main features of such a peculiar source of law.

First of all, with specific regard to the origin of general principles of EU law, two different paths lead to the recognition of fundamental rights as general principles. According to an exogenous process⁷, the common constitutional traditions of Member States (hereinafter MS), as well as the European Convention on Human Rights (ECHR)⁸, represent a source of inspiration for the Court of Justice to test whether a given fundamental right is worth to be considered a general principle of EU law. In other words, according to art. 6(3) TEU, those fundamental rights which have already received a certain degree of consensus across Member States – via the constitutional traditions or the ECHR – are “imported” into the EU legal system as general principles of law.

Conversely, through an endogenous process, general principles are expressly discovered within the values and the rights protected by the Treaties themselves: among fundamental rights, for instance, both general principles of non discrimination on grounds of nationality and sex have been respectively inferred from articles 7 and 119 of the EEC Treaty⁹.

Notwithstanding their unwritten nature and their genesis, general principles of EU law enjoy the status of primary law as long as they represent the (or – as stressed below – one of the) bill(s) of rights¹⁰ of the European Union. On the one side, this means that any act adopted by the EU institutions, being subject to judicial review, must comply with general principles¹¹, since it falls into the ECJ’s jurisdiction according to art. 19 TEU. Such an obligation – which is constantly stressed within the Court’s case-law – is now formalized with regard to those general principles protecting fundamental rights that have been included in the Charter¹².

On the other side, general principles of EU law bind all Member States when they are acting within the scope of application the Treaties¹³. As it will be explained in the following paragraphs, it is precisely within this latter field that general principles of EU law have been challenging the

⁵ According to both the ECJ case-law and the academia, and respecting the nature of general principles, they do not constitute judicial-made provisions, being instead already existing provisions that the Court of justice discloses. On this topic, see T. TRIDIMAS, *The General Principles of EU Law*, Oxford University Press, 2006. A different perspective is suggested by C. SEMMELMANN, *General Principles in EU Law between a Compensatory Role and an Intrinsic Value*, *European Law Journal*, 2013, p. 457 ff., spec. p. 462 who argues that those principles coming from positive (either national or EU) law are actually invented or created by the ECJ.

⁶ See ECJ, 12 November 1969, C-29/69, *Stauder*, Rep. 1969, p. 419 ff. The importance of respecting fundamental rights has been gradually improved by the ECJ by *i*) affirming that the constitutional traditions common to the Member States are a source of inspiration for the protection of fundamental rights as general principles of Union law (ECJ 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*, Rep. 1970, p. 1125ff., spec. p. 1134); *ii*) stating that «international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law» (ECJ 14 May 1974, case 4/73, *Nold*, Rep. 1974, p. 491 ff., spec. p. 507); *iii*) electing the European Convention on Human Rights as a preferred standard to assess the respect of fundamental rights within the European Union (ECJ 28 October 1975, case 36/75, *Rutili*, Rep. 1975, p. 1219 ff., and ECJ 13 December 1979, case 44/79, *Hauer*, Rep. 1979, p. 3727 ff.).

⁷ S. ROBIN-OLIVIER, *Le principe d'égalité en droit communautaire. Etude à partir des libertés économiques*, Presses Universitaires d'Aix-Marseille - P.U.A.M., 1999, p. 329.

⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.

⁹ Art. 7 of the EEC Treaty then became art. 12 of the EC Treaty; today, it is art. 18 TFEU. See, ECJ 12 December 1974, case C-36/74, *Walrave and Koch*, Rep. 1974, p. 1405 ff., spec. p. 1417. While art 119 of the EEC Treaty remained art. 119 within the EC Treaty, and today it is art. 157 TFEU. See, ECJ 8 April 1976, case C-43/75, *Defrenne (II)*, Rep. 1976, p. 455 ff., spec. p. 474.

¹⁰ R. SCHÜTZE, *European Constitutional Law*, Cambridge University Press, 2012, p. 409 ff., spec. p. 411.

¹¹ T. TRIDIMAS, *The General Principles of EU Law*, cit., p. 50 ff.

¹² On the formalization of fundamental rights and the gradual creation of «legislative general principles», see T. TRIDIMAS, *The General Principles of EU Law*, cit., pp. 11-12.

¹³ EDITORIAL COMMENTS, *The scope of application of the general principles of Union Law: An ever expanding Union?*, *Common Market Law Review*, 2010, p. 1589 ff.

implementation of the EU system of protection of fundamental rights. At times general principles lead to an implicit enlargement of the field of application of EU law, or they increase the effectiveness of EU fundamental rights by producing horizontal direct effect.

2. Fundamental rights as general principles of EU law *v* fundamental rights in the Charter: why the former outlive the latter?

Before entering the analysis of the different functions usually carried out by general principles within the EU legal order, a preliminary question, among the several raised in the aftermath of the entry into force of the Treaty of Lisbon¹⁴, has to be tackled. Specifically, given the new wording of art. 6 TEU which ascribes the Charter to the primary sources of EU law¹⁵, the new legal status of the Charter of fundamental rights seems to challenge the role and the impact of general principles of law as a source of protection of fundamental rights.

Even if the Charter was originally conceived as the “bill of rights” of the European Union¹⁶, before the Lisbon Treaty it could at most add a constitutional support to legal reasoning. Therefore, its potential was considerably diminished by its soft law status. On the contrary, since it turned into a binding instrument, the crystallization of fundamental rights in the Charter became an actual issue as long as it could jeopardize the relevance of general principles as an autonomous source of protection of fundamental rights¹⁷. In other words, the new binding character of the Charter questioned the opportunity¹⁸, and before that the necessity, to rely on general principles for the protection of human rights.

The argument supporting the prevalence of the Charter over general principles was grounded on the following elements. First, the written nature of the Charter improved the legal certainty and, therefore, was suitable to protect the reliability of those public (or even private) subjects bound by the Charter itself. Furthermore, considering that the Charter sees the ECHR as its preferred source of inspiration and guideline of application, the coexistence of those two legal instruments, plus the foreseen accession of the European Union to the ECHR, was supposed to ensure a complete and effective protection of fundamental rights.

A further analysis of the intrinsic limitations of both the Charter (and the ECHR), however, led to an opposite argument asserting the necessary coexistence between the Charter and general principles to improve the protection of fundamental rights, and showing the supplementary role¹⁹ that latter still have in granting their effective protection. This latter argument focuses on the boundaries of and in the Charter which largely frustrate its applicability.

Among them, it has to be recalled that the Protocol No 30, concerning the application of the Charter to the United Kingdom and Poland, seriously interferes with the uniform protection of

¹⁴ Leaving aside the proposed accession of the EU to the ECHR, whose terms should be rethought after the Court’s opinion of the 18th December 2014, No 2/13, on the *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454. At this regard, see P. EECKHOUT, *Opinion 2/13 on EU accession to the ECHR and judicial dialogue: autonomy or autarky?*, *Fordham International Law Journal*, 2015, p. 955 ff.

¹⁵ See S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014.

¹⁶ K. LENAERTS, E. DE SMIJTER, *A “Bill of Rights” for the European Union*, in *Common Market Law Review*, 2001, p. 273 ff. For an analysis in the aftermath of the Lisbon Treaty, see A. ROSAS, L. ARMATI, *EU constitutional law. An introduction*, Hart Publishing, 2012, p. 160 ff., spec. p. 172.

¹⁷ A. BERRAMDANE, *Considérations sur les perspectives de protection des droits fondamentaux dans l’Union européenne*, *Revue du droit de l’Union européenne*, 2009, p. 441 ff.

¹⁸ See C. SEMMELMANN, *General Principles in EU Law between a Compensatory Role and an Intrinsic Value*, cit., p. 468, who suggests that «general principles may become less necessary in the future and may take the role of a default instrument if no Charter provision is applicable, and there is no secondary legislation».

¹⁹ M. DOUGAN, *Judicial review of Member State action under the general principles and the Charter: defining the “scope of Union law”*, *Common Market Law Review*, 2015, p. 1201 ff., spec. p. 1205.

fundamental rights²⁰. Although the Protocol does not represent a *tout court* opt-out measure from the Charter's articles dedicated to solidarity (Title IV), it is clear from its article 1(2) that the Protocol diminishes the protection of certain fundamental rights at least by limiting their justiciability²¹.

Secondly, the uniform and effective protection of fundamental rights is challenged by the general provisions of the Charter, i.e. articles from 51 to 53.

With regard to art. 51(1) of the Charter, the fact that it seems to require a strict interpretation of the field of application of the Charter reduces the extent of the protection ensured by the Charter. Nevertheless, two points demonstrate that, thanks to general principles of EU law, the level of protection of fundamental rights is not affected by the wording of art. 51(1). Firstly, emphasizing both the wording of the explanations accompanying art. 51 of the Charter and the clarifications given by the ECJ in *Åkerberg Fransson*²², it has been stated that the field of application of the Charter and general principles shall be considered as an unitary concept²³, at most being the former calibrated on the latter. Secondly, since general principles of EU law are unwritten rules «all-pervasive in EU law»²⁴, it has been argued that they still have room to apply – either as interpretative tool or as grounds for review – «where the scope of application of the Charter ends»²⁵.

Considering art. 52(3) of the Charter, it recalls that «in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection». Given that the European system of protection of fundamental rights is informed to a maximum standard of protection and considering that the application of general principles would not compromise the primacy of the Union law²⁶, a general principle offering a broader or a stronger protection than that foreseen within the Charter would probably take prevalence.

Finally, art. 52(5) stresses the distinction between rights and principles, stating that the latter, being judicially cognizable only when implemented by EU institutions and/or MS, are not directly enforceable. As a consequence, any direct effect of the principles of the Charter shall be excluded²⁷. Again, and as demonstrated by the ECJ case law, general principles can enhance the protection of

²⁰ See J. KROMMENDIJK, *Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice*, *European Constitutional Law Review*, 2015, p. 321 ff.; L.S. ROSSI, *How fundamental are fundamental principles? Primacy and fundamental rights after Lisbon*, cit., p. 65 ff.; C. BARNARD, *The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, in S. GRILLER, J. ZILLER (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, 2008, p. 257 ff.

²¹ A. ROSAS, L. ARMATI, *EU constitutional law. An introduction*, cit., p. 1733 ff.; A. BULTRINI, *I rapporti fra Carta dei diritti fondamentali e Convenzione europea dei diritti dell'uomo dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, *Il Diritto dell'Unione europea*, 2009, p. 700 ff.

²² ECJ 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105. See, T. TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, *Cambridge Yearbook of European Legal Studies*, 2014, p. 361 ff., spec. p. 382 ff.

²³ M. DOUGAN, *Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law"*, cit., p. 1206. See also ECJ 6 March 2014, case C-206/13, *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, ECLI:EU:C:2014:126.

²⁴ P. EECKHOUT, *The EU Charter of fundamental rights and the federal question*, *Common Market Law Review*, 2002, p. 977.

²⁵ K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The constitutional allocation of powers and general principles of EU law*, *Common Market Law Review*, 2010, p. 1629 ff., spec. p. 1659.

²⁶ The reference, here, is to the *Melloni* case (ECJ 26 February 2013, case C-399/11, *Stefano Melloni v Ministero Fiscale*, ECLI:EU:C:2013:107, para. 60), where the ECJ affirmed that «article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised», therefore excluding the possibility for any Member State to give priority to the higher standard of protection of fundamental rights guaranteed by its constitution over the application of the Charter or other provisions of EU law protecting the same right.

²⁷ See AG Villalón, 18 July 2013, case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboufi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, ECLI:EU:C:2013:491.

fundamental rights as far as a principle of the Charter being also a general principle of EU law could produce horizontal direct effect²⁸.

For all the reasons enounced, both the doctrine and the ECJ case-law have eventually demonstrated that the role of general principles as a source of protection of fundamental rights is still of a paramount importance, given that – notwithstanding the importance of the EU Charter as a primary reference within the protection of fundamental rights²⁹ – only general principles can act as a “safety valve” in the EU system of protection of human rights.

3. The threefold function of general principles within the constitutional edifice of the European Union: “gap-filling”, interpretation and judicial review

Once clarified that general principles of EU law preserve their relevance in the protection of fundamental rights, it becomes essential to assess their impact. To this purpose, the analysis of the three typical functions of general principles and the related case-law of the ECJ will illustrate the large benefits – and some related side effects – of employing general principles of EU law to improve the protection of fundamental rights.

I. The “gap-filling” function

The more natural, or at least less controversial, task of general principles of EU law is the so-called gap-filling function. Thanks to their unwritten nature, general principles can easily fill the *lacunae*³⁰ that do emerge when applying EU law or implementing EU law at national level³¹.

That function of general principles of law is well known among national constitutional courts, given that general principles of law ensure – both at national and supranational level – the achievement of the normative goals by compensating the gaps that any legal provisions entails. Since, in *Van Gend & Loos*³² case, the ECJ stated that the European Union is a distinct and autonomous legal order, it seemed logical to attain such autonomy by arguing that the «solutions intended to fill the gaps must come from within the Union legal order itself»³³.

Therefore general principles of EU law act first of all as judicially driven norms³⁴, spontaneously inferred by the ECJ from the whole of the primary and secondary provisions of EU law to complete the legal order established by the Treaties³⁵.

II. The interpretative function

²⁸ This seems to be the case general principle of non discrimination on grounds of age, whose horizontal direct effect has been recognized by the ECJ. The *obiter dictum* of the Court in the case *Association de médiation sociale* (15 January 2014, case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, ECLI:EU:C:2014:2, para. 47), where the ECJ affirmed that «the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such» does not challenge the fact that it should be considered a “principle” within the meaning of the EU Charter of fundamental rights. If the intention of the Court was to expressly ascribe the principle of non discrimination on grounds of age within the “rights” of the Charter, such characteristic of art. 21 of the Charter would have been at least mentioned within the case-law concerning age discrimination. Instead, within the case-law related to age discrimination only the direct effect of the general principle – not of art. 21 of the Charter – is invoked.

²⁹ T. TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, cit., p. 377.

³⁰ Even in those fields where EU law has almost no influence, such as private and criminal law. See, T. TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, cit., p. 379.

³¹ ECJ 25 November 1986, Joined cases 201 and 202/85, *Marthe Klensch and o. v Secrétaire d'État à l'Agriculture et à la Viticulture*, Rep. 1986, p. 3477.

³² ECJ 5 February 1963, case 26/62, *Van Gend & Loos*, Rep. 1963, p. 3 ff.

³³ K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The constitutional allocation of powers and general principles of EU law*, cit., p. 1632.

³⁴ C. SEMMELMANN, *General Principles in EU Law between a Compensatory Role and an Intrinsic Value*, cit., p. 457 ff., spec. p. 461.

³⁵ K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The constitutional allocation of powers and general principles of EU law*, cit., p. 1632.

Another role played by general principles of EU law is that of being essential tools for interpretation of both EU law and national law anytime the latter is falling within the scope of EU law.

To promote the protection of fundamental rights within the EU, the ECJ has widely referred to general principles following a triple trend: *i*) engaging the concept of “consistent interpretation”; *ii*) broadening the interpretation of EU primary and secondary law, and *iii*) extending the field of application of EU law.

i) The notion of “consistent interpretation” refers to the obligation pending on national courts to interpret both EU law and relevant national law in order to preserve the consistency and coherence of the Union legal system. With regard to general principles, since they constitute primary law provisions, the doctrine of the consistent interpretation implies that any of the abovementioned acts must be interpreted in compliance with them. Over the years, ECJ’s case-law has particularly stressed the importance of the duty that national jurisdictions are required to accomplish. For instance, in *Chatzji*³⁶, the interpretation of national measures transposing directive 96/34³⁷ in the light of the principle of equal treatment led the Court to consider that, even in the absence of another comparable situation, the national parental leave regime should enable twins’ parents to receive a treatment taking due account of their particular needs³⁸.

In most cases, however, the doctrine of the consistent interpretation is employed simultaneously with that of direct effect³⁹. As recently confirmed by an ECJ’s decision on the horizontal application of the general principle of non discrimination on grounds of age⁴⁰, the consistent interpretation’s doctrine seeks to ensure the uniformity of EU law before challenging the validity of national law through the involvement of the direct effect principle. This means that, in so far as the consistent interpretation of national law prevent the national measure from violating an EU provision (such as a general principle of law), the doctrine of direct effect does not arise⁴¹.

ii) To explain the broad interpretation of EU law provided by the ECJ through general principles, an example concerning the protection against discrimination grounded on the sexual orientation can be made. After a first very cautious decision where the ECJ stressed the remarkable differences existing at national level to exclude that same-sex couples were entitled to have the same status as married couples⁴², the Court revisited its previous position enhancing the role of the equal treatment principle.

In *Maruko*, the ECJ interpreted both art 141 TEC⁴³ and directive 2000/78⁴⁴ in the light of the principle of equal treatment. Being asked whether a survivor’s benefit paid under an occupational pension scheme fell within the scope of directive 2000/78, the Court did not hesitate in identifying it as a form of “pay” within the meaning of art. 141 TEC and, therefore of directive 2000/78. Furthermore, the Court dismissed the question whether the application of directive 2000/78 could be affected by its recital 22 stating that «the Directive is without prejudice to national laws on marital status and the benefits dependent thereon». At this regard, and especially considering that some MS had transposed recital 22 turning it into a binding provision, the enhancement of the principle of equality led the Court to revisit its precedent *Grant*⁴⁵ despite the still existing divergences among MS.

³⁶ ECJ 16 September 2010, case C-149/10, *Zoi Chatzji v Ypourgos Oikonomikon*, Rep. 2010, p. I-8489.

³⁷ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave, concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, p. 4 ff.

³⁸ ECJ 16 September 2010, case C-149/10, *Zoi Chatzji v Ypourgos Oikonomikon*, cit., paras. 63-68.

³⁹ See, G. BETLEM, *The Doctrine of Consistent Interpretation—Managing Legal Uncertainty*, *Oxford Journal of Legal Studies*, 2002, p. 397 ff.

⁴⁰ ECJ 19 April 2016, C-441/14, *Dansk Industri (DI) v Succession Karsten Eigil Rasmussen*, cit., para. 28 ff.

⁴¹ G. BETLEM, *The Doctrine of Consistent Interpretation—Managing Legal Uncertainty*, cit., p. 399. See also AG Darmon, 14 November 1989, case 177/88, *Dekker*, Rep. 1990, p. I-3941, para. 15. The relationship between consistent interpretation and direct effect is also tackled by M. DOUGAN, *When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy*, *Common Market Law Review*, 2007, p. 931 ff.

⁴² ECJ 17 February 1998, case C-249/96, *Grant v South West Trains*, in Rep. 1998, p. I-621 ff.

⁴³ Now, art. 157 TFEU.

⁴⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 02 December 2000, p. 16 ff.

⁴⁵ ECJ 17 February 1998, case C-249/96, *Grant v South West Trains*, cit.

iii) Finally, a recent decision dealing with obesity discrimination within the employment and occupation fields, the *Kaltoft* judgment⁴⁶, illustrates how the Court has broadened the field of application of EU law through general principles. In this recent decision of the ECJ the potential of general principles of EU law as a tool for increasing the protection of fundamental rights has been challenged under two points of view. First, the Court has been asked whether EU law enounces a general principle of non discrimination on ground of obesity. At this regard, since none of the 'Treaties' articles mention obesity as a discriminatory ground, the Court has affirmed that neither the Charter, nor directive 2000/78 were applicable to the case and thus acknowledged that the «EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation»⁴⁷. Although it appears as to be a restrictive approach, the solution offered by the ECJ was, *de facto*, the only admissible according to EU law: considering the principle of conferred competence on which the relationship EU/Member States is grounded, and stressing that general principles of law shall apply within the field of application of EU law, there seems to be no room for a general principle of non discrimination on grounds of obesity.

However, such “self-restraint” of the Court is definitely overridden as soon as the second preliminary ruling is examined: the Court in fact clarifies that, although under precise conditions, obesity can be considered as a disability within the meaning of directive 2000/78 and therefore rely on the protection foreseen by the directive itself. In *Kaltoft*, the flexibility of the general principle of non discrimination, beyond the broad interpretation of an already existing provision (like in *Maruko* decision), led to a real judicial participation in lawmaking. Through the Court's decisions, the principle of non discrimination on grounds of disability – which applies not only to people who are themselves disabled but also to those individuals taking primarily care of them⁴⁸ – has been entitled to cover obesity and, if the Court keeps following the *Kaltoft* approach, will probably cover temporary working incapacity too⁴⁹.

III. General principles as grounds for judicial review

The already remarkable judicial activism of the Court within the interpretation of general principles of EU law becomes astonishing anytime general principles are contemplated as grounds for judicial review, especially since when the ECJ has recognized that this third function of general principles is admissible even in horizontal disputes⁵⁰. As a matter of fact, according to the *Mangold-saga*⁵¹, when MS measures fall within the scope of application of EU law, general principles' binding effect involves also the individuals⁵². Admitting that the individuals are entitled to sue other individuals in front of their national jurisdictions claiming for the protection ensured by a general principle means,

⁴⁶ ECJ 18 December 2014, case C-354/13, *Fag og Arbejde (FOA) acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL)*, ECLI:EU:C:2014:2463. See, D. SCHIEK, *Intersectionality and the notion of disability in EU discrimination law*, *Common Market Law Review*, 2015, p. 35 ff.

⁴⁷ ECJ 18 December 2014, case C-354/13, *Fag og Arbejde (FOA) acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL)*, cit., para. 40.

⁴⁸ See ECJ 17 July 2008, case 303/06, *S. Coleman v Attridge Law and Steve Law*, Rep. 2008, p. I-5603.

⁴⁹ See AG Bot, 26 May 2016, case C-395/15, *Daouidi*, ECLI:EU:C:2016:371.

⁵⁰ At this regard, see T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU Law and European Private Law*, The Netherlands, 2013, p. 213 ff., spec. p. 215 which suggest a number of reasons justifying general principles' horizontal effect.

⁵¹ ECJ 22 November 2005, C-144/04, *Mangold*, Rep. 2005, p. I-9981. The horizontal effect of non discrimination on grounds of age has been discussed in four other judgments: ECJ 23 September 2008, C-427/06, *Bartsch*, Rep. 2008, p. I-7245; ECJ 19 January 2010, C-555/07, *Seda Küçükdeveci*, Rep. 2010, p. I-365; 19 April 2016, C-441/14, *Dansk Industri (DI) v Succession Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278. In another case the Court was asked to state on the horizontal direct effect of the general principle of non discrimination on grounds of age, but the judges observed that two situations presented in the main proceeding were not objectively comparable, and therefore «the difference in treatment between those two categories of workers therefore [did] not constitute discrimination on grounds of age» (ECJ 1 October 2015, C-432/14, *O. v Bio Philippe*, ECLI:EU:C:2015:643, para. 39). Hence, in that case the horizontality of the general principle did not arise.

⁵² EDITORIAL COMMENTS, *The scope of application of the general principles of Union Law: An ever expanding Union?*, cit., p. 1589 ff.

of course, spreading the protection of fundamental rights to further situations than those expressly conceived within the EU law.

In *Mangold* the intention of the Court was clearly to promote the effectiveness of fundamental rights, employing general principles of law as a means to enforce the EU standards of protection of fundamental rights in circumstances otherwise excluded by the field of application of EU law⁵³. Nevertheless, that judgment and the following case-law raised several questions (and a number of criticisms) concerning *i*) the scope of application of general principles of EU law; *ii*) the conditions, the limits and the impact of the horizontality of general principles⁵⁴.

Tackling these questions is essential to evaluate general principles' added value towards the improvement of fundamental rights.

i) The issue related to the scope of application of general principles emerged when the ECJ affirmed that, as long as the source of the principle of equality had to be found «in various international instruments and in the constitutional traditions common to the Member States»⁵⁵, equality should be considered a general principle of EU law. Since the Court did not explain that statement, it was unclear whether general principles had been intended as self-standing sources of law, to be applied with no regard to the applicability, or non applicability, of other EU or national written provisions.

Thanks to the further decisions of the ECJ, and mainly to the opinion of several Advocates General and the academic debate⁵⁶, the question concerning the scope of application of general principles has been partially clarified by specifying, once for all, that general principles of law do apply only in those situations where EU law does apply.

Hence, general principles of EU law cover four different situations. In addition to the case of EU acts and Treaties' provisions, three other situations have been recognized to enable the applicability of general principles of EU law: the "agency situation", i.e. those hypothesis where a MS is implementing a EU provision⁵⁷; the "derogation situation", occurring when MS adopt any measure derogating from a EU provision⁵⁸; the "substantive EU law situation", covering those national measures which otherwise fall within the scope of application of EU law⁵⁹.

Whereas the first two situations are relatively easy to define and therefore to assess, the assessment of the third situation raises the problem of distinguishing those national rules, covered by some specific substantive EU provision and thus falling within the scope of application of EU law, from the others escaping the EU jurisdiction. Solving this question means isolating the situations where general principles can apply, bind public authorities and possibly be invoked in horizontal disputes.

While waiting for further clarifications from the ECJ, its case-law concerning the Charter of fundamental rights could help in identifying the third group of situations covered by general principles of EU law. Given the osmotic relationship between the Charter and general principles of law and considering that general principles are *extrema ratio* provisions within the protection of fundamental rights, it seems that the reasoning that the Court followed in *Åkerberg Fransson*⁶⁰ case should be extended to general principles, arguing that they are applicable any time when a given national legislation falls within the scope of European Union law. This path, of course, particularly enhances the

⁵³ S. ROBIN-OLIVIER, *The Evolution of direct effect in the EU: Stocktaking, problems, projections*, *International Journal of Constitutional Law*, 2014, p. 165 ff.

⁵⁴ See E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA, *A constitutional order of States? Essays in honour of Alan Dashwood*, cit., p. 199 ff.

⁵⁵ ECJ 22 November 2005, C-144/04, *Mangold*, cit., para. 74.

⁵⁶ AG Geelhoed, 16 Mars 2006, case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*, Rep. 2006, p. I-6467; AG Mazak, 15 February 2007, case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, Rep. 2007, p. I-8531; AG Ruiz-Jarabo Colomer, 24 January 2008, joined cases C-55 and 56/07, *Michaeler and o.*, Rep. 2008, p. I-3135; AG Kokott, 8 May 2008, case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, Rep. 2008, p. 9831. T. PAPADOPOULOS, *Criticising the horizontal direct effect of the EU general principle of equality*, in *European Human Rights Law Review*, 2011, p. 437 ff.; F. FONTANELLI, *General Principles of EU Law and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci*, in *European Public Law*, 2011, p. 225 ff., spec. p. 228;

⁵⁷ See ECJ 13 July 1989, case 5/88, *Wachauf*, Rep. 1989, p. 2609.

⁵⁸ See ECJ 18 June 1991, case C-260/89, *ERT*, Rep. 1991, p. I-2925.

⁵⁹ Approach suggested by AG Sharpston in case C-427/06, *Bartsch*, cit., para. 69.

⁶⁰ ECJ 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, cit.

protection of fundamental rights within the EU since the EU sources of protection of fundamental rights would impact to any situation covered by a substantive EU provision⁶¹.

ii) Once defined the situations falling in the “scope of application” of EU law, further emerging questions focus on the direct effect of general principles. Quite a long time ago the Court of justice found out that general principles of EU law – as a source of protection of fundamental rights – had to be respected in both vertical and horizontal disputes⁶². Stressing the constitutional status of general principles, the ECJ recognized that these unwritten norms are enshrined in several written provisions of EU law both of primary and secondary law. Hence, when general principles are triggered by of EU law, they could become directly enforceable within vertical and horizontal disputes.

Among the sources of primary law, only Treaties’ articles could have a role in assessing the field of application of EU law given that the other primary law written instrument, i.e. the Charter of fundamental rights, is in itself subordinated to «the powers and tasks defined by the Treaties». When the application of a general principle of law is triggered by a directly effective article of the Treaty⁶³, the Court can either refer to both written and unwritten provisions, or apply directly the written norm, merely recalling that the general principles is enhanced in it. In both cases, the constitutional allocation of powers within the EU is still respected since both sources of law have a primary status, and, the jurisdictional activism of the Court by affirming a general principle of law is already acknowledged by a normative act giving expression to that specific principle⁶⁴.

On the contrary, when the application of a general principle of EU law is linked to the application of a secondary instrument of EU law, a directive in particular, further observations have to be made. In those hypothesis, in fact, the attempt to increase the protection of fundamental rights within the EU could jeopardize the constitutional edifice of the European Union, meaning that the hierarchy of norms within the EU and the constitutional allocations of powers can be challenged⁶⁵. As a matter of fact, according to art. 288 TFEU, directives are secondary provisions whose structure and function prevent them from being directly applicable and therefore from having direct effect. If some particular directive is entitled to produce direct effect in vertical disputes, the Court has always excluded any horizontal effect⁶⁶.

Moving from this remark, after *Mangold*, it became essential to understand the exact connection between directive and general principles in order to assess whether the Court’s quest for improving the effectiveness of fundamental rights led the ECJ to indirectly recognize the horizontal effect of directives⁶⁷ and thus to encroach into the normative power.

Some of the questions that raised after *Mangold* judgment have progressively found an answer thanks to the following case-law and the academic debate on the horizontality of general principles. In particular, it has been specified that the horizontal direct effect of general principles does not impact on

⁶¹ See S. ROBIN-OLIVIER, *The Evolution of direct effect in the EU: Stocktaking, problems, projections*, cit., p. 183 ff.; S. VASSILIOS, *Développements récents de la protection des droits fondamentaux dans l’Union européenne: les arrêts Melloni et Akerberg Fransson*, *Il Diritto dell’Unione Europea*, 2013, p. 229 ff.

⁶² ECJ 12 December 1974, case C-36/74, *Walrave and Koch*, cit.; ECJ 8 April 1976, case C-43/75, *Defrenne (II)*, cit.

⁶³ As stresses by E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, cit., p. 199 ff., spec. p. 206, a Treaty provision is suitable to enable the application of a general principle insofar as it is directly effective. Otherwise, as demonstrate by the court’s case-law on art. 19 TFEU, neither the Treaty nor the general principle can be invoked to claim the jurisdictional protection of a fundamental right.

⁶⁴ At this regard, see S. PRECHAL, M.E. DE LEEUW, *Transparency: A General Principle of EU Law?*, in U. BERNITZ, J. NARGELIUS, C. CARDNER, *General Principles of EC Law in a Process of Development*, The Netherlands, 2008, p. 203, which affirm that «while the recognition by the ECJ/CFI of a general principle is an important factor, we believe that this should not be considered as a *conditio sine et qua non*. In our view, the very existence or at least a gradual development of a general principle may also be deduced from legal writing, the opinions of Advocates General and the acts of EU. [...] This also implies that the principle itself, or at least some aspects thereof, may very well be written».

⁶⁵ See T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, cit., p. 219, who refers to an attempt to «the vertical allocation of powers between the EU and Member States by bypassing the legislative process».

⁶⁶ See ECJ 26 February 1986, case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Rep. 1986, p. 723 ff. P. CABRAL, R. NEVES, *General Principles of EU Law and Horizontal Direct Effect*, *European Public Law*, 2011, p. 437 ff., spec. p. 445.

⁶⁷ See : E. HOWARD, *ECJ Advances Equality in Europe by giving Horizontal Direct effect to Directives*, in *European Public Law*, 2011, p. 729 ff.

directives: the latter confer general principles the due degree of specification to be binding in horizontal disputes, but they do not have in themselves direct effect⁶⁸. The assessment on the direct enforceability of a general principle is thus related to the characteristics of the principle in itself. At this regard, the Court has also specified that, on the one hand, not all general principles of EU law meet the requirements to that purpose⁶⁹, on the other hand, once a general principles has been recognized as having horizontal direct effect, any provision of national law that is contrary to that principle shall be disapplied.

Despite the clarifications concerning the conditions under which general principles produce horizontal effect, other questions regarding the extent and the impact of general principles' horizontality are still unsolved. Nevertheless, as it will be better explained in the following paragraph, finding the answer to these questions is of a paramount importance since it means testing whether the constitutional ramifications⁷⁰ originating from general principles' direct effect can be accommodated by the EU legal order.

4. Concluding remarks

As illustrated throughout the paper, general principles of EU law are an unlimited source of protection of fundamental rights as far as – thanks to their inner flexibility – their content and their effects can be easily adapted to any situation where the respect of a fundamental right is questioned.

However, the flexibility, which makes of the general principles of law an incomparable tool for the improvement of fundamental rights, involves several side effects. Part of the issues arising from the ECJ case-law on general principles have been explained by the Court itself: for instance, although the terms of the relationship between directives and general principles are not completely solved, the Court has definitely excluded the horizontal effect of directives.

Several other issues, vice-versa, are still seeking for an accommodation by the ECJ. A first question deals with the possibility to extend the recognition of horizontal direct effect to further general principles⁷¹ than the one (non discrimination on grounds of age) that has already received an assessment by the ECJ. At this regard, if, on the one side, the idea of extending this characteristic to all fundamental rights protected by the European Union would be tempting, on the other side, its concrete application would probably bring both the EU and the national jurisdictional systems to collapse.

A second, but absolutely important, concern deals with the necessity to balance the enhancement of general principles as a tool for protecting fundamental rights with the respect of other fundamental principles of EU law, such as the fundamental rights of the counterparty within an horizontal dispute. At this regard, the recent case law of the Court of Justice⁷² demonstrates that the main effect of the so called *Mangold* approach is to impose on private parties the obligation to respect fundamental rights that the State was in the first place unable to ensure, and, as a consequence, to transfer the related liability from States onto individuals⁷³.

Despite the Court's profession that the horizontal direct effect of a general principle of EU law – like that of non discrimination on grounds of age – shall prevail over the principles of legal certainty

⁶⁸ This being the meaning of the *Mangold* judgment itself according to AG Sharpston, 30 November 2006, case C-227/04 P, *Lindorfer*, ECLI:EU:C:2006:748, para. 58, as long as the AG suggested that «the better reading of *Mangold* is not that there was in Community law a specific pre-existing principle of non-discrimination on grounds of age, but rather that discrimination on such grounds had always been precluded by the general principle of equality, and that Directive 2000/78 introduced a specific, detailed framework for dealing with that (and certain other specific kinds of) discrimination».

⁶⁹ See ECJ 15 October 2009, case C-101/08, *Audiolux SA and o. v Groupe Bruxelles Lambert SA (GBL) and o. and Bertelsmann AG and o.*, Rep. 2009, p. I-9823, where the Court excluded the existence of a general principle of equal treatment of minority shareholders; AG Trstenjak, 8 September 2008, case C- 282/10, *Dominguez*, cit., para. 88 ff., with regard to the entitlement to paid annual leave.

⁷⁰ This expression is taken from P. CABRAL, R. NEVES, *General Principles of EU Law and Horizontal Direct Effect*, cit., p. 437 ff.

⁷¹ T. TRIDIMAS, *Horizontal Effects of General Principles: Bold Rulings and Fine Distinctions*, cit., p. 213.

⁷² ECJ 19 April 2016, C-441/14, *Dansk Industri (DI) v Succesion Karsten Eigil Rasmussen*, cit., para. 28 ff.

⁷³ E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, cit., p. 217.

and the protection of legitimate expectations⁷⁴, it has to be noticed that this approach does not maximize the protection of fundamental rights, but rather jeopardizes it.

Finally, considering that the principles of legal certainty and the protection of legitimate expectations have been recognized as general principles of the EU in themselves⁷⁵, the Court should, at least, elaborate a methodology for the horizontal application of general principles of EU. Otherwise, notwithstanding the efforts to increase the protection of fundamental rights by foreseeing different but connected paths, the risk is to see the constitutional edifice of the European Union imploding⁷⁶.

⁷⁴ ECJ 19 April 2016, C-441/14, *Dansk Industri (DI) v Succession Karsten Eigil Rasmussen*, cit., paras. 38-43.

⁷⁵ See F. FONTANELLI, *General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci*, cit., p. 234.

⁷⁶ E. SPAVENTA, *The horizontal application of fundamental rights as general principles of Union law*, cit., p. 218, expresses her concern by affirming that «the Court risks transforming the constitutional “order” of states in a constitutional chaos».