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# **Are there General Principles of Community law affecting Private law?**

by Xavier Groussot and Hans Henrik Lidgard

The purpose of the 2007 Swedish Network conference was to detect and evaluate general principles of European Community law. The conference was a follow up to the 1999 Malmö conference on the subject and the question was if there had been any new development. In 1999 general principles of Community law were discussed from the perspective of human rights and administrative law. This time the purpose was broadened and included consequences of the enlargement of the Union and if general principles were emerging, which could impact the sphere of private law.

These two questions added new participants, dimensions and perspectives. Old questions resurfaced in a new environment: What is a general principle, how does it develop and what impact does it have as it relates to private law?

This article argues that the question of general principles is not just a matter of detecting important principles of Community law, but that the development signifies an ongoing convergence of interpretation of the law, which will tend to harmonize the private law field in both civil and common law countries. Firstly, the article will define the general principles of private law in a more general sense. Secondly, it will analyze the impact of these principles on the European Court of Justice (ECJ) case-law affecting private law, concluding with a brief discussion of the effects on harmonization of European law.

# 1. Defining General Principles of Private law

## *Civil or common law*

Sweden is a civil law country. Law is established by the legislator and the courts interpret the laws as they are written – using preparatory work and other sources of law to fill out the gaps. The legislator aims to be precise, leaving as small a margin of discretion to the judge as possible. In instances where some such margin is needed, the legislator may enact what are referred to as “general” clauses indicating that e.g. unreasonable contracts may be modified or that the court has indeed a margin of discretion in determining damages. Otherwise, the judge has primarily to out seek the will of the legislator.

The common law judge has a wider task. S/he is in search of the principle of law, which is to be applied to the specific circumstances. If the legislator has spoken, the statutory material controls, but non-statutory principles of law will still be employed to construe the law or, of course, to establish rights and obligations in individual cases where there is no relevant legislation. One consequence is that the judge-made law becomes of paramount importance in the common law system, whereas it has an auxiliary function for civilians. Legal argumentation is naturally affected by these different attitudes.

In the development of the European legal order, civilians and common law lawyers now have, to some extent, to function in the same manner. Statutory provisions are enacted at the Community level and may replace common law principles. For example, after the adoption of the directive on commercial agency, the Anglo-Saxon approach to the concept of agency is no longer the same. Likewise, judgements of the European Court of Justice are binding in the Member States and legal education in civil law countries now has to analyse them and the interplay between statutory law and case-law, in general.

As long as the Community courts were merely delivering narrowly-crafted interpretation of statutory provisions, this was easily accepted as a result of the EU treaty itself. However, during the last few decades, and perhaps especially since the United Kingdom and Ireland became members of the Community, we have witnessed a development in which the Community courts, perhaps in line with the common law tradition, have been in search of overriding general principles of law, which affect the interpretation of European law.<sup>1</sup> For example “a principle of proportionality” has been discovered, explained and used. After some time this line of reasoning is so well established at both the Community and

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<sup>1</sup> It can be argued that the accession in 1973 gave extra sources for the elaboration of general principles of Community law. In that sense, the common law has been relied on extensively for guidelines as to the shaping of the rights of the defence – which are also general principles of Community law.

national levels that it has turned into “the proportionality principle”, which is broadly affecting legal interpretation.<sup>2</sup>

### ***Fundamental provisions are not General Principles***

Many features of European law are important and have an impact on national policy and legislation. As examples one immediately thinks of free movement of goods and an open and competitive market, to name but two, but are they general principles of law? Are there not compelling reasons to distinguish between fundamental Community law and general principles of European law?<sup>3</sup>

During the conference, there was discussed as to whether the *requirement of loyalty* defined in Article 10 EC should be regarded as a general principle of European law. It was also suggested that the notion of *direct effect* is not such a principle. The two positions are not easy to reconcile. Why would an important provision regarding the loyalty obligation binding on Member States be regarded as a general principle, but not the principle of direct effect? The first is a principle established in the Treaty, the second a judge-made concept; one is a provision of the Treaty, the other a far-reaching principle regarding its interpretation. Could either or both of them be referred to as a general principle? Or is it not rather the *interpretation* of important provisions that creates general principles?<sup>4</sup> Many acceptable classifications have been suggested.<sup>5</sup> But not every important provision

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<sup>2</sup> See Lord Justice K. Schiemann, “The Application of General Principles of Community Law by English Courts”, in Andenas and Jacobs (eds.), *European Community law in the English Courts* (OUP, 1998), pp-137-148.

<sup>3</sup> See H. G. Schermers, *Judicial Protection in the European Communities* (Kluwer, 1976) and J. Boulouis, *Droit institutionnel des communautés européennes* (Domat Droit Public, 1993), 4<sup>th</sup> edition. Schermers distinguishes: the “compelling principles” stemming from the legal heritage of Western Europe, the regulatory rules common to the laws of the Member States and the general rules, native to the Community legal order (indigenous principles). Boulouis identifies: “principes généraux communs aux droits des Etats membres”, “principes inhérents à tout système juridique organisé”, “principes déduits de la nature des Communautés”. It is conceivable to use different types of classification of the general principles of EC law. While one may generally resort to the origin-based, functional or subject-matter classification, the one predominantly used is the first-classification based on the origin of the general principles.

<sup>4</sup> See T. Tridimas, *General Principles of EU Law* (OUP, 2006) at pp. 4-5. According to Tridimas, In Community law, the term “general principles” is manifold. In that sense, one may identify many principles and draw various classifications. A possible classification by subject matter is the following: Principles which underlie the constitutional structure of the Community; Principles of substantive Community law; Principles which derive from the rule of law. The principles which derive from the rule of law indeed constitute the general principles of Community law: proportionality, legal certainty, equal treatment, rights of the defense and the fundamental rights. They are said to be quintessentially principles of public law. Direct effect falls under the principles which underlie the constitutional structure of the Community such as supremacy and loyalty.

<sup>5</sup> In a much applauded presentation at the conference Professor Bengoetxea argued that general principles were judge made norms emanating from the interpretation of statutory provisions.

of the Treaty nor every method shaped by the Community courts should be regarded as general principles of European law.

**Fundamental provisions.** Article 10 EC is a statutory provision contained in the introductory part of the EC Treaty (referred to as “Principles”) which has a constitutional ring to it.<sup>6</sup> Loyalty is a basic policy norm from which the ECJ has deduced consequences for all areas of Community law.<sup>7</sup> It enshrines a duty to cooperate in good faith which, according to ECJ case law, is incumbent on both the judicial authorities of the Member States acting within the scope of their jurisdiction<sup>8</sup> and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States.<sup>9</sup> In that sense, it may be said that Article 10 EC [ex Article 5] constitutes a *lex generalis*. The extensive use of Article 10 EC by the ECJ began in the late 1980s and is often used when considering cases involving the efficiency of the Community system.<sup>10</sup> It provides power to national courts which may be lacking under national law. They have a duty not to apply conflicting national laws. The principle even extends to relations between private parties, who may rely on directives, which have not been correctly implemented within the national legal order.<sup>11</sup>

Community law, as expressed in primary and secondary legislation, consists of important legal norms, which have considerable impact on the development of law in general. The Treaty makes a distinction by referring to the more general as “principles”, thereby distinguishing them from the operative rules which may have direct effect. Article 51 of the EU Charter of Human Rights makes an analogous distinction between rights and principles. This is a different type of distinction, but still a distinction: Rights under the Charter are to be respected, but principles must only be observed.<sup>12</sup> Principles are regarded as unenforceable.<sup>13</sup>

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<sup>6</sup> Article 10 EC (ex Article 5) provides that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

<sup>7</sup> Article 10 EC was the topic of Professor Temple Lang’s presentation during the conference.

<sup>8</sup> Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, para. 26; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para. 12; Case C-453/00 *Kühne & Heitz NV* [2004] ECR I-837, para. 27.

<sup>9</sup> Case 230/81 *Luxembourg v. Parliament* [1983] ECR 255, para. 38; Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365, para. 17.

<sup>10</sup> See J. Temple Lang, “The Sphere in which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles”, (1991) LIEI 23, at p. 31. See also of the same author “Community Constitutional Law: Article 5 EEC Treaty”, (1990) CMLRev. 645, at pp. 654-656; “The Duties of National Authorities under Community Constitutional Law”, (1998) E.L.Rev. 109, at pp.119-121; “The Core of the Constitutional Law of the Community-Article 5 EC Treaty”, 1995, at p. 9, [europa.eu.int/comm/dg04](http://europa.eu.int/comm/dg04).

<sup>11</sup> Case C-106/89 *Marleasing* [1990] ECR I-4135.

<sup>12</sup> Article 51(1): “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they

Fundamental Community law provisions establish the central concepts of EU law: free movement of goods and the directly applicable competition rules have been declared to have such fundamental character. These provisions are of paramount importance and influence the interpretation of the law, but they are not general principles of law. They are statutory norms with far reaching implications. The Court may be more or less “activist” in its interpretation, but it is trying to determine the law as enacted by the legislator. The ECJ has been involved in this activity since its first case.

**General principles.** The derivation of a general principle is something else. It is more the production of a rule of law and a rule not to be found expressly in the Treaty. Should judge-made rules be evaluated differently? The concept of *direct effect* is a judge-made method to determine which provisions in the Treaty may give rise to rights and obligations for individuals. There may be reasons to distinguish between methods employed by the courts when investigating the law and principles of law, which provides overarching norms, which must be adhered to. Article 288 EC<sup>14</sup> provides that in cases of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage. Again, the provision indicates the method. But once the courts have determined what the common heritage is, a general principle of EU law may emerge.

General principles must be detected, understood and recognized. They are not to be found in the statutory provisions. If they did, there would only be a question of interpreting the law. They are rather created and pronounced by the judge. They have a general reach and do not just deal with a specific situation. They are rooted in traditions common to the Member States whether or not they flow out of national legislation as such or find their basis in international conventions. Member States do not all have to agree with the principle, but it must still have a solid foundation in the prevailing opinion of several of them. It must then make the return journey and be accepted by national courts. A general principle must also be effective and justifiable. It is ordinarily a deeply rooted principle, without which a democratic civilized society could not exist.

In general the Court will search for and identify principles inspired by national law or international treaties ratified by all Member States - with particular significance given to the European Convention on Human Rights; it will formulate the principle in relation to Community needs and purposes; and it will

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are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

<sup>13</sup> Under Article I-9 of the Constitutional Treaty (CT), the Charter of Fundamental Rights should have become binding. It seems also that the Reform Treaty of 2007, will render the CFR binding through the transfer of Article I-9 CT within Article 6 TEU.

<sup>14</sup> Article 288(2) EC (ex Article 215) provides that, “[t]he contractual liability of the Community shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties...”

derive the specific rule from this process. Discussion of general principles of law is a fairly recent phenomenon, which began during the 1970s and gradually being more precise during the 80s and 90s. In the early days, the Court used fairly cautious language, dealing with overriding general principles in an almost generic way: general principles of proportionality, legal expectations, equal treatment, good administration etc. These principles were introduced into the legal argumentation in a more or less pronounced but subtle dialogue with Member States and national courts.

A general principle still needs to be accepted. The court refers to common traditions in the Member States, human rights conventions etc. If the underlying rationale is strong, the likelihood is that the principle will pass. It becomes an overriding norm against which relevant legislation will be assessed both at the Community and national levels.

### ***General Principles in Private law***

Is it only in respect of “constitutional” law that general principles of European law exist? Could they also cover an area which is primarily outside Community competence, like much of private law?

Article 295 EC establishes that Community law shall not affect the right to property. Accordingly, questions regarding ownership of real and intellectual property fall outside the Treaty competence and the reach of the Community courts. Equally outside its competence are disputes regarding how an owner may dispose of the rights and the effects such activities may have on third parties. These matters are not Community affairs, even if it is quite clear from all the efforts put into creating a European private law that Europe is heading in that direction.

Still, there may be traces of general principles emerging in Community law, which can affect the private law sphere. All private relations have a public law component. First of all, overriding general principles will, of course, affect the private law sphere when issues like proportionality and legal expectations arise. The question though is whether there are any more specific principles of Community law, which have such an impact? What come to mind would be principles of law established by the Community courts, which in a very general way affect or regulate relations between private parties - rather than just being motivated by general welfare interest. Not legislative enactments, but judge-made principles. Right to property is already an established principle.<sup>15</sup> One would also think of the freedom to contract and *pacta sunt servanda*. They are examples of general principles in private law, which could qualify as such general principles – if it can be established that they have been pronounced on by the Community

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<sup>15</sup> Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

courts. But have the courts made statements, which specifically relate to them or to the private law sphere in general?

### **Competition law does not offer guidance**

An area that comes to mind is competition law. Regulating competition is certainly a way of affecting property and the freedom to contract. The main purpose is to regulate the market for the protection of the public, but the spill-over effects are obvious. The Community courts operate with notions well known in private law. There has to be an “agreement”, for example, if Article 81 EC is to apply. However, the ECJ has carefully carved out an interpretation of this notion, which is specific to competition law. It embraces far more than the narrow private law notion. The ECJ has never really expressed itself regarding the consequences of nullity of the contract as prescribed by the same Article. If a contract is null *ab initio* it might be asked whether the parties should return all consideration exchanged during the period they implemented this non-existing contract, some or none. The matter will most likely be referred to national law without guidance from the Community courts.

### **Certain principles are emerging in the field of intellectual property law**

If the discussion is transferred to the field of intellectual property rights, one might consider that the “*exhaustion principle*”, now firmly established in Community law by the Community courts, could be a general principle.<sup>16</sup> It is judge-made; it is based on national law foundations; it regulates; and it has wide-reaching private effects. When the exhaustion principle is combined with the competition law prohibition on market-dividing activities, contracting with intellectual property rights is substantially affected.

Exhaustion could be held to be an important general principle of private law, which has made the journey from national law to Community law. Having been reconfirmed in the Community legal order, it has made its way back into national law in all Member States. As further confirmation, it has now been included in new legislative enactments and is thereby a part of the fundamental rules governing the exploitation of non-real property.<sup>17</sup> Perhaps even more important: in relation to parallel trade cases the ECJ has determined that the product must have been put on the market by the proprietor or with his *consent*.<sup>18</sup> Here we have a solid private law notion. The ECJ clarified that consent is not the British

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<sup>16</sup> Case 15/74 *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 1147; Case 16/74 *Centrafarm v. Wintrop* [1974] ECR 1183.

<sup>17</sup> All IPR directives and regulations.

<sup>18</sup> Joined Cases C-414/99, C-415/99 and C-416/99 *Zino Davidoff SA v A&G Imports Ltd Levi Strauss & Co., and Levi Strauss (UK) Ltd v Tesco Stores Ltd, Tesco plc Levi Strauss & Co., Levi Strauss (UK) Ltd v Costco Wholesale UK Ltd* [2001] ECR I-8691.



“implied consent” – it should be clear and unequivocal and consent must not be presumed.

The ECJ has expressed itself in relation to parallel trade only. Such a clarification is not binding on national courts in other, more general contexts where Community law has no real authority. Still, there can be little doubt that such a clear expression of a general norm will have an effect on how this notion is dealt with in other fields. National law cannot easily take a different stance on the meaning of “consent” in other areas of law. So even if it is not a binding norm in the field of private law, it will certainly have “spill-over” effects and thereby encourage the convergence of legal reasoning in areas strictly outside the competence of the Community.

The list of examples may be continued. Subsequent parallel trade cases have established that the *burden-of-proof* is normally on the parallel importer. This burden is shifting in situations where it would be unfair to put it on a party which cannot prove it. This is a principle which may well affect private procedural law.<sup>19</sup>

### Other areas

Similar developments can be discovered in other areas of law. The European court has been reviewing company law and has expressed itself with regard to golden shares. Will these cases eventually influence national law and/or the handling of purely private relations? As already mentioned, the right to damages is under development within the EU. Community responsibility is to be based on common principles stemming from the national laws. This is not a general principle of law in itself, but rather a general rule allowing the court to arrive at a principle. There are divergent opinions in Europe on how fair a contract must be if parties are to be entitled to rely on it. Common law does not normally accept any theory of unjust enrichment, whereas civil law countries are more open to interpretations based on this underlying idea. The equitable jurisdiction in UK may also, however, give rise to similar compromises. Has the ECJ or the CFI addressed the issue in such a way that an embryo of a principle can be detected which may then apply back to the Member States?<sup>20</sup>

It has been suggested that parties to a dispute should have “clean hands” if they wish to invoke a right to compensation from another party. The matter was dealt with in *Courage*.<sup>21</sup> The right to legal representation was an issue in the *AM&S* case, and consumer protection is yet another field where European concepts are

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<sup>19</sup> Case C-244/00, *Van Doren + Q.GmbH and Lifestyle sports + sportswear Handelsgesellschaft mbH, Michael Orth* [2003] ECR I-3051.

<sup>20</sup> Case T-171/99 *Corus UK Ltd v. Commission* [2001] II-ECR-2967 (Fines reduced based on a principle of unjust enrichment) and Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165 (Spill-over effects of unjust enrichment. Repayment of taxes levied in breach of Community law).

<sup>21</sup> Case C-453/99 *Courage Ltd and Bernard Crehan* [2000] ECR I-11179.

emerging which may well spill over into the ordinary private law.<sup>22</sup> Under the last heading, the court now defines the “average consumer”- a new notion - who is felt to be in need of specific protection. “Good faith”, “unjust enrichment” and “estoppel” are concepts of private law, which are making their way within the Court of Justice – but are they considered as general principles of Community law?

It is now time to look more closely at the case-law of the Court of Justice for situations where general principles of Community law may be said to be having an impact on private law.

## **2. ECJ case-law affecting Private law**

The case-law illustrates the link between the general principles of Community law and private law. Two main situations can be distinguished. First, general principles may be proactive in the context of European private law, e.g. in such fields as competition law or the law of civil remedies, where judicial review of legislation is in question. Secondly, general principles may be applicable to relations between private parties, the so-called horizontal situations.

### ***General Principles in the Private Law Context***

The general principles constitute effective tools for the European judge reviewing acts of the Community institutions or the Member States falling which have an impact on the private law context. The rights of the defense, which are backed by general principles of Community law, are often in issue in competition law proceedings. Likewise, the general principle of effective judicial protection is extensively used in the field of civil remedies.

### **Rights of the Defence in Competition Law Proceedings**

In the *TMP* case,<sup>23</sup> the ECJ established the existence of a right to be heard in competition law proceedings. More exactly, the Court considered that the right to be heard applied in the context of Article 85(3) EC [new 81(3)] and Regulation 17. The major question to be answered by the Court was whether the right to be heard could be applied in a proceeding relating to an exemption (ex Article 85(3)), whereas Articles 2 and 4 of Regulation 99, did not relate to such decisions.<sup>24</sup> Significantly, A.G. Warner undertook a general comparative analysis of the laws

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<sup>22</sup> Case 155/79 *AM&S* [1982] ECR 1575 and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

<sup>23</sup> Case 17/74 *Transocean Marine Paint v. Commission* [1974] ECR 1063.

<sup>24</sup> *Ibid.*, para. 9.

of the Member States, in relation to the right to a fair hearing. He confirmed the existence of the *audi alteram partem* principle in the law of the UK, (where it is a principle of natural justice), and also in Denmark, Germany, Ireland and Scotland.<sup>25</sup> The A.G. then analyzed the situation in France, Belgium and Luxembourg, where the respective *Conseils d'Etat* have developed *principes généraux du droit de la défense* in administrative law, applicable in the absence of any specific legislative provisions. Finally, Warner came to the third group, composed of Italy and the Netherlands, where the principle does not exist in administrative proceedings.<sup>26</sup> Even though the principle was not found in all the Member States of the Community, the Court emphasized it was a general principle in the Community legal order, thus displaying a progressive approach.

As to legal privilege, A.G. Slynn in the *AM&S* case<sup>27</sup> observed that “the question is not whether legal professional knowledge is identical with the secret *professionnel*, but whether from various sources a concept of the protection of legal confidence emerges”.<sup>28</sup> In the words of Slynn, what matters is the overall picture. The Court, in ruling on the existence of a principle of confidentiality in relation between lawyers and clients, was clearly influenced by the common law, which represents the most advanced system of protection. In that regard, “the Court has to weigh up and evaluate the particular problem and search for the best and most appropriate solution”.<sup>29</sup> The Commission, using the same reasoning (evaluative approach) as A.G. Slynn, argued that “even if there exists in Community law a general principle protecting confidential information between lawyer and client, the extent of such protection is not to be defined in general, in abstract terms, but must be established in the light of the special features of the relevant Community rules, having regard to their wording and structure, and to the needs which they are designed to serve”.<sup>30</sup>

The United Kingdom supported the A.G.’s and the applicant’s views, maintaining that “the principle of legal protection of written communications between lawyer and client is recognized as such in the various countries of the Community, even though there is no single harmonized concept the boundaries of which do not vary. It accepts that the concept may be the subject of different approaches in the various Member States”.<sup>31</sup> However, the French government argued that the application of the principle might lead to important dissimilarities between the Member States in the application of the rules of competition.<sup>32</sup> The

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<sup>25</sup> Ibid., A.G. Warner in *TMP*, at p.1088.

<sup>26</sup> Ibid., at pp. 1088-1089.

<sup>27</sup> Case 155/79 *AM&S* [1982] ECR 1575.

<sup>28</sup> A.G. Slynn in *AM&S*, at p. 1649.

<sup>29</sup> Ibid., A.G. Slynn made direct references to A.G. Lagrange in *Hoogovens v. High Authority*.

<sup>30</sup> *AM&S*, *supra*., para. 9.

<sup>31</sup> Ibid., para. 6.

<sup>32</sup> Ibid., para. 12.

Court then complemented its teleological interpretation with an analysis of the respective laws of the Member States.<sup>33</sup> Since the principle of confidentiality is well known in common law and is not developed to the same extent in the continental legal orders, the Court had to analyze the different national approaches, to find a common principle, which could fit into the European legal order. Indeed, the Court had to synthesize the dual conditions of protection of the client's rights of defence, on the one hand, and the protection of the very nature of the legal profession on the other.<sup>34</sup> The Court combined the two concepts and created a European concept, while drawing guidance from the national laws. Recently on 17 September 2007, the Court of First Instance in *Akzo Nobel* dealt once again with the question of extension of the legal profession privilege (LPP) to in-house lawyers.<sup>35</sup> After a thorough analysis of the *AM&S* case, the CFI did not extend the protection of the LPP to in-house counsel providing legal advice or client communication soliciting this advice. It also clarified the conditions under which the confidentiality of written communications between lawyer and client should be applied.

### **Effective Judicial Protection and Civil Remedies**

It is clear from the case-law that the issues of civil remedies and the general principle of effective judicial protection are closely linked. Indeed, the general principles allow the assessment of national civil legislation that falls within the scope of Community law, e.g. *Cowan* (civil procedural rules) and *Data Delecta* (rules of security for costs), and even the elaboration of civil remedies based on Community law but relied on at the domestic level, e.g. *Muñoz* (creation of a civil action in relation to the breach of a Community regulation by a trader).<sup>36</sup> In the words of A.G. Jacobs in *UPA*, the case-law on the principle of effective judicial protection is evolving. The AG considered that, “[w]hile that principle was enunciated in 1986, in the case of *Johnston*, its implications have only gradually been spelt out in the Court's case law in the subsequent period”.<sup>37</sup> The conclusion is given further support by the *Cowan* and *Data Delecta* cases (non-discrimination)

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<sup>33</sup> *Ibid.*, para. 27.

<sup>34</sup> *AM&S*, *supra*, paras. 18-22.

<sup>35</sup> Joined Cases T-125/03 and T-253/03 *Akzo Nobel* [2007] n.y.r.

<sup>36</sup> Case 186/87 *Cowan* [1989] ECR 195; Case C-43/95 *Data Delecta* [1996] ECR I-4661; and Case C-253/00 *Muñoz* [2002] ECR I-7289. The ruling in *Muñoz* sets up a right to a civil action (remedy). It is indeed possible to bring civil proceedings against a trader who fails to comply with Community law - quality standard and packaging standard for grapes enshrined in a Regulation even though it did not contain any express rights. Arguably, this rationale does not apply to directives since they only impose obligations on the Member States. Regulations are always directly effective in relation to individuals. See, for comments, J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing, 2007), at pp. 205-206.

<sup>37</sup> Opinion of A.G. Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677, para. 97.

and by the *Johnston* case (effective judicial protection).<sup>38</sup> In addition, the relationship between the general principles of Community law and the principles of effectiveness and equivalence was clearly established in the *Pflücke* case.<sup>39</sup> In that case, the ECJ assimilated effectiveness with effective judicial protection and equivalence with the principle of equal treatment.<sup>40</sup> The relationship between effective judicial protection and civil remedies will be exemplified by two recent ECJ cases: the *Unibet* and *Lucchini* cases.<sup>41</sup>

### **Self-standing Actions in Civil Proceedings and Community law**

The *Unibet* case concerns a gambling services provider, who sought to market those services in Sweden. As in many other Member States, legislation in Sweden places far-reaching restrictions on the provision and marketing of gambling services. According to Swedish law, it is impermissible to promote, for the purpose of profit, participation in lotteries arranged abroad. In some limited cases, however, the Government may grant an exemption from this prohibition.<sup>42</sup> In November 2003, following the *Gambelli* judgment,<sup>43</sup> Unibet placed advertisements for its Internet gambling services in several Swedish mass media outlets. As provided for in the Lotteries Act, criminal proceedings were initiated against the newspapers concerned.<sup>44</sup> Importantly, none of these measures was directed at Unibet itself.

Unibet brought an action before the District Court (*Eskilstuna tingsrätt*). It asked for a declaratory judgment stating that, under Article 49 EC, the companies had the right to promote its gambling and betting services in Sweden and that it was not prevented from doing so by the prohibition in the Lotteries Act. Unibet's request was based on a provision in Swedish procedural law, which, in some instances, makes a declaratory judgment possible in a civil action.<sup>45</sup> It argued that, in the light of Community law, this provision must be interpreted as including the possibility of obtaining a declaratory judgment based on the failure of Swedish law to comply with Community law. The Swedish State, represented by the

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<sup>38</sup> *Supra* and Case 222/84 *Johnston* [1986] ECR 165.

<sup>39</sup> Case C-125/01 *Pflücke* [2003] ECR I-9375; Case C-34/02 *Pasquini* [2003] ECR I-6515.

<sup>40</sup> See Opinion of A.G. Sharpston in the *Unibet* case, *supra*, para. 40.

<sup>41</sup> Case C-432/05 *Unibet* [2007] n.y.r.; Case C-119/05 *Lucchini Siderurgica* [2007] n.y.r.

<sup>42</sup> Sections 38 and 54 of the Lotteries Act, *Lotterilagen (SFS 1994:1000)*. According to Section 38, an exemption may be granted if the lottery is arranged as a part of an international cooperation with Swedish participation.

<sup>43</sup> See Case C-243/01 *Gambelli* [2003] ECR I-13031. The ECJ ruled that national legislation prohibiting the pursuit of certain gambling activities without authorization from the Member State concerned could be contrary to Articles 43 and 49 EC.

<sup>44</sup> See e.g. Case B 4104-05 from Stockholm District Court (*Stockholms tingsrätt*), judgment of 6 September 2005 and Case B 1884-04 from Göta Court of Appeal, (*Göta hovrätt*), judgment of 20 September 2005.

<sup>45</sup> Chapter 13, Section 2 of the Swedish Code of Procedure, *Rättegångsbalken*.

Chancellor of Justice (*Justitiekanslern*), considered that Unibet's claim should be dismissed. The District Court and the Svea Court of Appeal (*Svea hovrätt*) both sustained the State's arguments and thus rejected Unibet's claim. After Unibet had appealed the decision, the Supreme Court (*Högsta domstolen*) decided to refer a request for a preliminary ruling to the ECJ.

The Supreme Court essentially asked whether Member States' legal systems are obliged under Community law to provide a self-standing (abstract) judicial review, like the one Unibet had claimed in the case. According to Swedish law and its settled interpretation, there must be a specific legal relationship between the parties in order to obtain a declaratory judgment. Thus, the legislation does not allow for a self-standing action aiming at a declaration that a legislative provision does not comply with a higher-ranking legal norm. The method followed by the ECJ in assessing the case was based on its well-established case law. First, the ECJ analyzed the situation from the perspective of the general principle of effective judicial protection and then moved on to assessing the case in the light of effectiveness and equivalence. The ECJ concluded that the general principle does not impose on Member States any obligation to provide for a self-standing action for an examination of the compatibility of Swedish law with Community law as long as the requirements of the two principles of effectiveness and equivalence are met.<sup>46</sup>

Balancing effectiveness with national procedural autonomy, the ECJ in *Unibet* considered that the Swedish system appears to offer sufficient legal protection. Indeed, the Constitution provides for judicial review as a preliminary issue both in relation to the possibility of bringing an action for damages – in fact, Unibet had already an action for damages pending before the District court – and in cases concerning a Supreme Administrative Court review of a Governmental administrative decision over the application of an exemption from the prohibition on promotion.<sup>47</sup> Thus, in contrast to the *Muñoz* case, invoked by Unibet, there was a possibility of obtaining judicial protection for an alleged Community right and the national court was therefore not required to grant an additional possibility for judicial review.<sup>48</sup> However, the ECJ pointed out that it was the task of the Supreme Court to ensure that the assessment of the merits of the case did not in practice impede the possibility of obtaining judicial review.<sup>49</sup> Put simply, this leads the national court to find a balance between effectiveness and national

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<sup>46</sup> *Unibet*, *supra*, paras. 37–43 of the present judgment, referred to Case 33/76 *Rewe* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2043, para. 12; Case 158/80 *Rewe* [1981] ECR 1805, para. 44; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 29; Case C-13/01 *Safalero* [2003] ECR I-8679, para. 49.

<sup>47</sup> *Ibid.*, *Unibet*, paras. 58–62.

<sup>48</sup> *Ibid.*, the Opinion of AG Sharpston in *Unibet*, para. 53, and Case C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289.

<sup>49</sup> *Ibid.*, *Unibet*, para. 59.

procedural law.<sup>50</sup> A more intrusive example regarding the application of effective judicial protection in the context of civil remedies is given by the *Lucchini* case.

### ***Res Judicata* and Article 2909 of the Italian Civil Code.**

The *Lucchini* case deals with the question of determining under what circumstances a judgment that has become final and conclusive on the national level can be challenged by European law.<sup>51</sup> The case has a very long and complex history, which can be briefly summarized as follows: it concerns a State aid procedure that had been initiated in 1985 on request by the predecessor of the Italian steel company Lucchini. In April 1988 the Italian state followed its obligation under article 6 (1) of the third EC code of conduct on State aid and notified the Commission of the plan to grant Lucchini an (additional) aid. However, the Commission claimed that the information given was not sufficient and that therefore Italy was obliged to give further information about the aid in question. In a letter dated June 1988, the Commission informed the competent Italian authorities of its point of view. Despite this information, the Italian authorities did not react and in November 1988 they decided to grant the aid in question. Subsequently, the Commission initiated proceedings under the applicable State aid rules since, in the view of the Commission, the missing information made it impossible to check if the aid granted complied with the EC rules on State aid. In 1990 this resulted in a Commission decision explicitly prohibiting the aid. In that context, it is important to note that this decision had never been challenged by Lucchini or the Italian government before the competent Community courts. Instead, Lucchini had decided to initiate proceedings in the Italian courts since the aid granted had not been paid. This led to several judicial proceedings at the national level resulting in series of conflicting decisions, but in 1994 the Italian government was ordered by way of a civil judgment from the *Corte d' Appello*, which was based on the interpretation of national law, to pay certain sums in State aid to Lucchini. After further disputes the Italian authorities complied with the judgment, which had thus become final and conclusive, and indeed paid over certain sums in 1996. However, the Italian authorities only made these payments under the reservation that the aids could be revoked completely or partially, if this was required by a negative EC decision.

The ECJ considered that Article 2909 of the Italian Civil Code precludes not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also the examination of matters which could have been raised in earlier proceedings but were not.<sup>52</sup> On

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<sup>50</sup> See for developments, X. Groussot and H. Wenander, “Self-standing Actions for Judicial Review and the Swedish *Factortame*, (2007) 26 Civil Justice Quarterly 376.

<sup>51</sup> Case C-119/05 *Lucchini Siderurgica* [2007] n.y.r.

<sup>52</sup> Ibid., paras. 14 -16, “[a]rticle 2909 of the Italian Codice Civile (Civil Code), entitled ‘Final judgments’, provides as follows: ‘Findings made in judgments which have acquired the force of *res judicata* shall be binding on the parties, their lawful successors and assignees.’ According to the *Consiglio di Stato* (Council of State), that provision covers not only the pleas in law actually

this interpretation of Article 2909, in the circumstances of the case, it would be impossible to recover State aid that was granted in breach of Community law which would, therefore, frustrate the application of Community law.<sup>53</sup> The Court then gave a set of guidelines to the national courts for applying (implementing) Community law. Though formulated in terms of guidelines, the Court, arguably, established two types of duties: see the operative part of the judgment (paras. 60-61):

“In that context, it should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law...[i]t also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24; Case 130/78 *Salumificio di Cornuda* [1979] ECR 867, paragraphs 23 to 27; and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraphs 19 to 21).”

It may be said that those two paragraphs impose heavy duties on national courts. Indeed, one can find, in paragraph 61, a duty regarding interpretation and, in paragraph 62, a duty to give full effect to Community law, a duty to apply Community law *ex officio* and a duty not to apply conflicting domestic legislation.<sup>54</sup> However, as said before, these duties are disguised in terms of guidelines. This assertion seems correct if one considers that the Court does not expressly mention Article 10 EC (duty of loyalty) which is the basis of both the *Simmenthal* (full effectiveness and setting aside conflicting national law) and *Von Colson* (interpretative duty) lines of case law. The Court concluded that since the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law where this has been found to be incompatible with the common market by way of a final decision of the Commission.<sup>55</sup>

In this case, it is clear that the ECJ gives more weight to Community law than to legal certainty. The *Simmenthal* case and the principle of supremacy constitute powerful justifications for the non-application of the national legislation, which

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invoked in the course of the proceedings in question but also those which could have been invoked. In procedural terms, that provision precludes all possibility of bringing before a court a dispute in respect of which another court has already delivered a final judgment”.

<sup>53</sup> *Ibid.*, para. 59.

<sup>54</sup> It is interesting to note that the duty to apply Community law *ex officio* is not backed up by any case law, since the *Simmenthal* line of case law only concerns the duty to set aside conflicting national legislation in order to ensure the full effectiveness of Community. Moreover, it is worth noting that the Court does not mention the expression “to set aside” and prefers instead, the phrasing: “refusing...to apply” (para. 61) or “precludes the application of Community law” (para. 64).

<sup>55</sup> *Ibid.*, paras. 62-63.



rather favours *res judicata* and legal certainty. It may be said that the use of the primacy argument leads to judicial activism since it creates a kind of “euro-exception” by allowing the national court to set aside (or not apply) Article 2909 of the Italian civil code which precludes the review of final judicial decisions. In that sense, it establishes an exemption to the text of the national provision. It is also worth remarking that the *Simmenthal* jurisprudence helps to avoid the disparities created by the application of the principle of the *Kühne & Heitz* and *Arcor* cases in the context of administrative decisions.<sup>56</sup> As seen in those cases, the ECJ judge was not ready to base the reopening of a decision on a pure Community law obligation and preferred to rely on national law. This is evidently not the case in *Lucchini*. This reasoning in the case is justified both by the fact that exclusive competence in the field of State aids belongs to the Commission and that the ECJ has jurisdiction over it.

## ***General Principles and Private Parties***

### **Private parties, Liability and Damages**

The issue of individual liability for breaches of Community law by individuals was brought for the first time in the *Banks* case in the context of the ECSC Treaty and the grant of licenses.<sup>57</sup> A.G. van Gerven opined that it is possible to ground individual liability on breaches of horizontal directly effective provisions. The ECJ, however, considered that competition provisions were directly enforceable by private parties in proceedings before the national courts. By contrast, in *Courage*, the Court held that a party to a contract liable to restrict or distort competition can rely on the breach of Article 81 EC to obtain damages from the other contracting party.<sup>58</sup> It is for national law to provide in principle for an action for damages against a private party for breach of a particular provision of Community law. It remains to be seen whether the implications of this may expand beyond breach of competition law rules to breaches of other horizontally effective provisions of the EC Treaty, e.g. Article 141 EC – which covers the fundamental rule of equal treatment between male and female. Another situation where the issue of damages and the application of the general principles of Community law arose, is to be found in the *Bostock* case.<sup>59</sup>

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<sup>56</sup> Case C-453/00 *Kühne & Heitz* [2004] ECR I-10239 and Joined Cases C-392/04 and C-422/04 *i-21 and Arcor* [2006] ECR I-8859.

<sup>57</sup> Case C-128/92 *Banks v. British Coal* [1994] ECR I-1209.

<sup>58</sup> Case C-453/99 *Courage Ltd. v. Crehan* [2001] ECR I-6297. See also Case C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

<sup>59</sup> Case C-2/92 *R v. MAFF, ex parte Bostock* [1994] ECR I-35. See also for the application of right to compensation in a vertical situation, Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411.

In this case, the High Court of Justice (Queen's Bench Division) referred a preliminary ruling to the ECJ concerning a dispute on an alleged obligation of compensation after the transfer of a quota to the landlord, due to the expiry of the tenant's lease. English legislation did not offer compensation to the tenant upon the surrender of his milk quota to the landlord and the consequent loss flowing from the transfer of the reference quantity. Mr Bostock, a dairy farmer, argued that under Community law such principles are binding on the Member States and that they include the prohibition of discrimination and respect for property. More specifically, Bostock claimed that the right to property is a general principle that requires a Member State to introduce a scheme for payment by a landlord of compensation to an outgoing tenant, or indeed confers directly on the tenant a right to compensation from the landlord.<sup>60</sup> In other words, according to the plaintiff, the UK government was in breach of those general principles by not providing the tenant with a system of compensation.

According to A.G. Gulmann, the decisive question was "whether a positive duty may be derived from Community law principles on the protection of the fundamental rights for Member States to protect the economic interests of tenants when a tenancy comes to an end".<sup>61</sup> The ECJ emphasized again that the Member States had a duty to respect fundamental rights when they implement Community law (citing *Wachauf*).<sup>62</sup> However, the Court did not follow the argument of the appellant. Indeed, according to the court, "the right to property safeguarded by the Community legal order does not include the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the context of the common organization of a market, which does not derive from the assets or occupational activity of the person concerned".<sup>63</sup> Consequently, the Court considered that the protection of the right to property did not oblige a Member State to introduce a scheme for payment of compensation nor was a right to compensation conferred to the tenant.<sup>64</sup> Interestingly, in *Wachauf* the ECJ considered that the protection of fundamental rights may require that the outgoing lessee be entitled to compensation. A.G. Gulmann pointed out that there were major differences between the *Wachauf* and the *Bostock* cases.<sup>65</sup>

The key difference between the two cases is that, in *Bostock*, compensation was sought from the landlord. It may be argued that the ECJ was not willing to

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<sup>60</sup> Ibid., para. 18.

<sup>61</sup> Ibid., A.G. Gulmann in *Bostock*, para. 16.

<sup>62</sup> Ibid., *Bostock*, para. 12.

<sup>63</sup> Case 5/88 *Wachauf* [1989] ECR 2609, paras. 18-19. See also Case C-44/89 *Von Deetzen* [1991] ECR I-5119, para. 27.

<sup>64</sup> *Bostock*, *supra*, para. 20.

<sup>65</sup> Ibid., A.G. Gulmann in *Bostock*, para. 16.

accept that the general principles impose obligations on individuals.<sup>66</sup> Concerning the relationship between the private parties, the applicant argued that the landlord was under an obligation to pay compensation, as the fruits of his labour and his investments contributed to the acquisition or the increase in the reference quantity.<sup>67</sup> Nevertheless, the ECJ stressed that the law of the Member State governed the legal relations between the landlord and the tenant and that the consequences of unjust enrichment were not a matter of Community law.<sup>68</sup> The ECJ appears reluctant to impose the general principles on horizontal relationships between private parties.<sup>69</sup>

### **Horizontal Situations in Community Law**

A Treaty provision or a general principle of Community law may nonetheless affect the legal situation of two private parties. Such an assertion is particularly pertinent if one looks at Article 141 EC, which embodies the fundamental rule of equal treatment between male and female.<sup>70</sup> It is also clear that a fully implemented directive may create such a horizontal effect. By contrast, where an unimplemented directive is concerned, the ECJ has generally avoided allowing that such horizontal effect exists. Indeed, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.<sup>71</sup> The main arguments used by the Court are as follows: The directive is addressed to the Member States and not to the individuals. Furthermore, if the non-implemented directive is given such an immediate effect between private parties there will be no way to distinguish them from Regulations.<sup>72</sup> One may agree with such reasoning. However, it is common knowledge that the Advocates General at the ECJ have often argued for the horizontal effect of non-implemented Directive. Their strongest argument, in this respect, is based on the principle of non-discrimination. According to A.G. Lenz in *Faccini Dori*, “[t]he principle of the prohibition of discrimination, which ranks as a fundamental right also militates in favour of directives being given horizontal effect, from several point of view”.<sup>73</sup> First of all, it is inequitable that individuals should obey disparate rules, depending on whether they have legal relations with a

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<sup>66</sup> Tridimas, *The General Principles of EC Law* (OUP, 1999), at pp. 31-32 (for comments on the application of the general principles against individuals) and pp.227-228 (for comments on *Bostock*).

<sup>67</sup> *Bostock*, *supra*, para. 25.

<sup>68</sup> *Ibid.*, para. 26.

<sup>69</sup> Tridimas, *supra*, at pp. 31-32.

<sup>70</sup> Case 43/75 *Defrenne II* [1976]. See also Case C-281/98 *Angonese* [2000] ECR I-4139, para. 36. Article 39 EC (free movement of workers) can be invoked by private parties.

<sup>71</sup> Case 152/84 *Marshall* [1986] ECR 723, para. 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para. 20; and Case C-201/02 *Wells* [2004] ECR I-0000, para. 56.

<sup>72</sup> *Ibid.*, *Faccini Dori*, paras. 22-24.

<sup>73</sup> *Ibid.*, A.G. Lenz in *Faccini Dori*, para. 51.

body connected with the state (vertical effect) or with a private individual (horizontal). Secondly, individuals should not be subject to disparate laws when harmonizing measures have been adopted by the EU institutions.

The issue of the horizontal effect of non-implemented directives reappeared recently in the *Mangold* and *Palacios de la Villa* cases.<sup>74</sup> In *Mangold*, a 56 year old man concluded a fixed term contract with a lawyer (Mr Helm) that took effect on July 2003 and lasted until February 2004. National law authorized the conclusion of fixed-term contracts of employment once the worker has reached the age of 52, without any restriction. Mr Mangold argued that, although the period prescribed for transposition of that directive had not yet expired, the contract was incompatible with Directive 2000/78. Now, according to the *Inter-Environnement Wallonie* case, a Member State to which a directive is addressed may not, during the period prescribed for transposition, adopt measures that may seriously compromise the attainment of the result prescribed by the directive.<sup>75</sup> The main question at stake in the case was whether the general principle of non-discrimination on grounds of age can be applied to the situation between Mr Mangold and Mr Helm. The Court first noted that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation.<sup>76</sup> Then it stated that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. Consequently, where national rules fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the principle.<sup>77</sup> The Court emphasized that it is the responsibility of the national court hearing a dispute involving the principle of non-discrimination in respect of age, to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, even if this means setting aside any provision of national law which may conflict with that law.<sup>78</sup> It concluded that Community law precludes the provision of domestic law which authorizes the conclusion of the kind fixed-term contracts of employment here in question.

This reasoning has been severely criticized for having created horizontal direct effect for non-implemented directives. One commentator notably accused the ECJ of having interpreted the EC Treaty in such a way that any coherence regarding

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<sup>74</sup> Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-411/05 *Palacios de la Villa*, Opinion of AG Mazák of 15 February 2007, n.y.r.

<sup>75</sup> Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para. 45. Yet this case concerns a vertical situation. Can one transpose the *Inter-Environnement Wallonie* reasoning in the context of horizontal situations?

<sup>76</sup> *Mangold*, *supra*, para. 74.

<sup>77</sup> *Ibid.*, para., 75. See Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paras. 30-32.

<sup>78</sup> *Ibid.*, 77. See, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, para. 21, and Case C-347/96 *Solred* [1998] ECR I-937, para. 30.

one of the most central doctrines of EC law, i.e. direct effect, has been lost.<sup>79</sup> By contrast, Jans welcomed the *Mangold* decision by analyzing the case in the light of the hierarchy of norms.<sup>80</sup> He considered that it is not shocking that general principles of Community law can have direct effect and may also be relied on in relationship of a purely civil nature.<sup>81</sup> Moreover, the Court did not say that the prohibition of age discrimination, as a general principle of Community law, has real horizontal effect. It merely says that this general principle of Community law can be relied on before a national court in order to challenge the validity of national legislation that conflicts with it. *Mangold* is thus about *invocabilité d'exclusion*.<sup>82</sup> The coherence of the doctrine of direct effect is preserved since what is at issue is whether the directive reflects a fundamental right (general principle of Community law) as is pointed out in paragraph 74. Indeed, the Court came to the conclusion that the purpose of the Directive is to lay down a general framework for combating discrimination in various forms.

In addition, it may be contended that the ECJ implicitly relied on Article 25 of the EU Charter of Fundamental Rights in order to affirm the existence of a right of non-discrimination of the elderly.<sup>83</sup> The reasoning of the Court was still severely criticized by A.G. Mazák in his Opinion in *Palacios de la Villa*.<sup>84</sup> The A.G. pointed out that a comparative analysis of the constitutional legislation of the Member States does not demonstrate the existence of a principle common to the laws of the Member States. In other words, he considered that a true general principle needs to be deeply rooted in the constitutional traditions of the Member States. This was clearly not the case in *Mangold*. At first glance, this reasoning may appear to be valid. On the other hand it is argued here that the mere existence of a right enshrined in the EU Charter of Fundamental Rights, a document which reflects the highest level of political consensus, is sufficient to back up the moulding of a fundamental right.

Overall, this case demonstrates that the general principles of Community law may constitute very effective tools in proceedings between private parties. In horizontal situations, the role of the national courts appears crucially important. This is confirmed by the *Pfeiffer* case which also concerns a horizontal situation but this time in relation to a mis-implemented directive.<sup>85</sup> The German Red Cross, a private-law body, employed Mr Pfeiffer as an emergency worker. These employees were subject to a collective agreement extending their duty time to 49

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<sup>79</sup> Editorial Comments, "Horizontal Direct Effect – A Law of Diminishing Coherence", (2006) 43 CMLRev. 1.

<sup>80</sup> J. Jans, "The Effect in national Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law", (2007) 34 LIEI 53, at p. 59.

<sup>81</sup> *Ibid.*, at p. 66.

<sup>82</sup> *Ibid.*, at p. 62.

<sup>83</sup> Case C-144/04 *Mangold* [2005] ECR I-9981.

<sup>84</sup> Case C-411/05 *Palacios de la Villa*, Opinion of A.G. Mazák of 15 February 2007, n.y.r.

<sup>85</sup> Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835.

hours per week. Mr Pfeiffer brought an action before the national court for a declaration that their average working time should not exceed the 48-hour limit laid down by the Working Time Directive. The Court recalled the no-horizontal effect rationale established by its settled case-law. It considered that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.<sup>86</sup> Notwithstanding this, it underlined the obligation of the national courts in such a horizontal situation which stemmed from Article 10 EC. Indeed, it is the duty of the national courts to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.<sup>87</sup> Therefore, the so-called principle of indirect effect obliges the court to do whatever lies within its jurisdiction, to ensure that the Working Time Directive 93/104 is fully effective, so as to prevent the maximum weekly working time laid down from being exceeded. National courts have thus a key role in horizontal situations involving mis-implemented and non-implemented directives.

## Conclusion

The case-law analysis clearly shows that the general principles of Community law may affect private law. This seems to be clear, for instance, from the jurisprudence of the Court of Justice in the context of civil remedies and horizontal situations. Going further, it may be premature to talk about firmly established general principles of Community law in the field of private law. But it does seem as if we are seeing “embryos” of private law principles starting to develop within the Community legal order. This may especially be so with respect to procedural civil law matters, but there is also evidence with respect to substantial law. Considering the trend, it appears more than likely that if we search, we will be able to find additional arguments tending in the same direction and we should expect more to come in the future.

Civil lawyers can benefit from the “joker”<sup>88</sup> in the card deck that an overriding general principle provides. It will lead to an indirect harmonization of legal reasoning and provide a way for national systems to converge which is in line with the overall aim of shaping an ever closer Union. This *convergence* or *concordentia* is fostered by the obligation for the national courts to apply the general principles in the EU law context. By contrast, it is worth remarking that such an obligation does not exist in matters falling within purely internal matters, but indirect effects should not be underestimated. This spill-over phenomenon is,

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<sup>86</sup> Ibid., paras 108-109.

<sup>87</sup> Ibid., paras 110-111.

<sup>88</sup> A concept used by Professor Bengoetxea during the conference.

indeed, voluntary and based on the need to ensure the integrity or coherence of domestic law. The beauty of all this is that the *Ius Commune* that once existed will gradually be reconstructed.