review of european administrative law; vol. 3, nr. 1, 5-22, europa law publishing © 2010

Competence Creep and General Principles of Law

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Abstract

The application of general principles of law may lead to an extension of EU competences. The present contribution analyses this subtle process of creeping competences. A number of more specific themes illustrate both the mechanisms and concerns at stake: the circumstances under which general principles of law apply to Member State's actions, the effect of general principles on the procedural autonomy of the Member States, the creation of positive obligations through general principles of law and the review of national measures in the light of general principles. During the drafting of the EU Charter of Fundamental Rights, creeping competences through general principles was very clearly an important issue. Various provisions have been adopted which aim at stopping the creep. Therefore, the final paragraph of this contribution reflects briefly on the relationship between the competence creep, general principles of law and the Charter of Fundamental Rights.

1 Introduction

It is by now a hardly disputed matter that general principles of EU law may serve as an aid to interpretation of other legal – EU or national – provisions, as a gap filling mechanism or that they may operate as a standard of review for both EU and Member States action. Less explored is the very fact that general principles may also serve as a vehicle to competence creep.

Usually, competence creep is first and foremost associated with the liberal interpretation of the legal basis provisions by both the EU institutions and the ECJ. Often this is induced by the rather vague and open wording of the legal basis provisions themselves. This form of competence creep concerns primarily *positive intervention* by the EU institutions, i.e. notably the exercise of legislative powers, although other methods of intervention by the EU may be included as well.[1] However one may also conceive competence creep in a broader sense. Here is rich case law on, for instance, direct taxation, social security, health, education and criminal law, where the ECJ reiterates again and again:

[*] The present contribution is an edited and updated version of a keynote speech made at the *First REALaw Research Forum* that took place on 3 June 2009 in Groningen. The author would like to thank Marloes Ramp for her assistance.

[1] Such as the use of soft law instruments or OMC, financial incentives, co-ordination, development of policies etc.

> '[...] even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law'.[2]

The result of this case law is, in the first place, a perception by Member States and ultimately also probably by citizens, is that there is loss of competence on national level and that what is left is often rather strictly circumscribed by EU law. Illustrative in this respect are the fears expressed by the UK government and contradicted as follows by the ECJ in *Tum and Dari*, concerning the standstill clause in Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement:

> 'However, that "standstill" clause does not call into question the competence, as a matter of principle, of the Member States to conduct their national immigration policy. The mere fact that, as from its entry into force, such a clause imposes on those States a duty not to act which has the effect of limiting, to some extent, their room for manœuvre on such matters does not mean that the very substance of their sovereign competence in respect of aliens should be regarded as having been undermined (see, by analogy, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 121).'[3]

As soon as Member State action or, in more neutral term, 'a situation' can be situated within the scope of EU law, various limits have to be observed, including those imposed by general principles of law. These limits are often perceived as a loss of sovereign powers and for that matter creeping competences of the EU.

A technical legal reaction to this might indeed be that such an understanding of competence creep does not make a proper distinction between the scope of application of EU law on the one hand and the matter of competence to act, often legislate on the other. The fact remains, however, that this changes nothing to the perception of competence or, somewhat differently put, EU law creep. Moreover, there is a subtle relationship between the scope of EU law and the competence to act. There are various instances where the ECJ decided that a matter was within the scope of EU law which next resulted in legislative action. In other words, a legal basis was subsequently

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2 This quote is taken form Case C-438/05 *Viking* [2007] ECR I-10779, para. 40, but variations on this theme can be found in numerous other cases.

3 Case C-16/05 *Tum and Dari* [2007] ECR I-7415, para. 58.

'activated'.[4] And the other way round: competences laid down in the Treaty may serve as arguments for bringing a matter within the scope of EU law.[5]

While the phenomena just briefly pointed at here above concern many domains of EU law, the present contribution focuses on the relationship between competence creep in the broad sense and general principles of EU law.[6] Part of the discussion will touch upon administrative law, but there are also examples from other areas, such as labour law. Indeed, for the underlying problems and questions this makes no difference.

The very first question to be addressed, since it is where the 'creep' starts, is when do general principles apply to Member States action? Next I will discuss a number of different effects that the application of general principles of law may produce and how these may result in extending, in a subtle manner, the EU competence: the effects of general principles of EU law on procedural autonomy of the Member States, the creation of positive obligations through general principles of law and the review of national (legislative) measures in the light of general principles. Finally, in the concluding paragraph I will reflect briefly on the relationship between competence creep, general principles of – administrative – law and the EU Charter of Fundamental Rights.

The last point brings me to another preliminary issue to be briefly addressed, namely the relationship between general principles of law and fundamental rights. Fundamental rights form a separate category of general principles of law. As is well-known, initially the reason for this classification was the non-existence of a catalogue of fundamental rights in the – then – E(E)C. Although the Lisbon Treaty reforms raise the Charter of Fundamental Rights to the level of primary law, to an extent the protection of fundamental rights as general principles will remain. Article 6(3) TEU retains the provision that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

While fundamental rights as such are not the primary focus of this contribution, it must be pointed out that there exist various commonalities and that approaches applicable to fundamental rights hold also true for general principles and vice versa. One of these common features is, *inter alia*, the question when do fundamental rights and general principles of law bind the Member States. Moreover, note that the distinction between funda-

4 Cf. for instance the case law of the ECJ on medical services as economic activities within the scope of free movement and the subsequent proposal of the European Commission for a directive on patients' rights in cross-border healthcare.

5 Case C-122/96 *Saldanha* [1997] ECR I-5325.

6 For a more extensive analysis of the various mechanisms see Prechal, Van Eijken and De Vries, 'The principle of attributed powers and the "scope of EU law"', in Besselink, Pennings and Prechal (eds.), *The Eclipse of Legality*, Kluwer Law International (forthcoming).

mental rights and 'ordinary' general principles is not always clear-cut. It will sometimes be clear that we are dealing with a 'true' fundamental right, such as the freedom of expression; in other cases, such as the prohibition of discrimination, the classification is less self-evident.[7] Another example are the rights of the defence, sometimes regarded as a principle, sometimes a fundamental right, often coupled to Article 6 ECHR.[8]

2 General Principles of EU Law and Member States Action

General principles of EU law do not bind the EU institutions, agencies or other bodies only. Also the Member States must observe these principles when they act within the scope of the law of the Union. Three categories of situations can be distinguished here: i) the measures at issue implement EU law, implementation to be understood in a broad sense; ii) the Member State relies on some permitted derogation under EU law; iii) the measures fall otherwise within the scope of the law of the Union, e.g. some other connecting factor exists between the national measures at stake and EU law.[9]

The first category, where the Member States act as 'agents' of the Union is relatively well-defined and the least contested. The activities involved include the transposition of directives,[10] adoption of measures aimed at giving effects to regulations[11] or other EU law provisions,[12] the application of EU rules[13] and the enforcement of Union law.[14] The fact that the Member State enjoys discretion and the degree of that discretion is irrelevant.[15] Also,

[7] For instance, in Case C-423/04 *Richards* [2006] ECR I-3585 the principle of equal treatment of men and women is called 'one of the fundamental principles of Community law' and the prohibition of discrimination on grounds of sex is 'one of the fundamental rights' the ECJ has to protect.

[8] Case C-28/05 *Dokter* [2006] ECR I-5431.

[9] Cf. the Opinion of AG Sharpston in Case C-427/06 *Bartsch* [2008] ECR I-7245, in particular point 69.

[10] Joined Cases C-20/00 and C-46/00 *Booker Aquaculture* [2003] ECR I-7411; Case C-144/04 *Mangold* [2005] ECR I-9981; C-442/00 *Caballero* [2002] ECR I-11915.

[11] Case C-345/06 *Heinrich*, Judgment of 10 March 2009, n.y.r. in ECR, Case C-384/05 *Piek* [2007] ECR I-289.

[12] Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, concerning the detailed determination of who has the right to vote and to stand as a candidate in elections to the European Parliament.

[13] Case C-349/07 *Sopropé* [2008] ECR I-1036; Case C-107/97 *Rombi* [2000] ECR I-3367; Case C-28/05 *Dokter* [2006] ECR I-5431.

[14] Case C-276/01 *Steffensen* [2003] ECR I-3735; Case C-262/99 *Louloudakis* [2001] ECR I-5547.

[15] Joined Cases C-378/07 to C-380/07 *Angelidaki,* Judgment of 23 April 2009, n.y.r in ECR; Case C-81/05 *Alonso* [2006] ECR I-7569

when Member States exercise the powers conferred on them by a directive and even where they enjoy a wide discretion in regard to the method of attaining the objectives, they must respect the general principles of law.[16] Similarly pre-existing national provisions which are deemed capable of ensuring that the national law is consistent with the directive at issue must be considered to fall within the scope of that directive and the obligation to observe general principles in relation to these pre-existing provisions applies.[17]

The leading case of the second – a slightly more contested – category is the *ERT* case,[18] concerning the Greek television monopoly. One of the issues in this case was the scope of the freedom to provide services. The disputed state restriction on broadcasting was at first sight incompatible with the freedom to provide services and therefore it had to be justified. In this process of justification, Article 10 of the ECHR, the freedom of expression, had to be taken into account. The ECJ found that the public policy, public security and public health derogation must be interpreted and applied in such a way as to respect Article 10 ECHR. In the cases that followed upon *ERT* the ECJ either imposed additional – general principles or fundamental rights based – requirements upon the Member States[19] or it accepted that the fundamental rights may themselves be relied upon as derogation to a Treaty freedom.[20]

The third category is the most difficult to grasp. The cases do not provide much guidance as to the question when a situation falls within the scope of EU law. A number of connecting factors with EU law can be identified, but a degree of imagination is sometimes needed. One of these cases is *Karner,*[21] which concerned an Austrian restriction on commercial advertisement. As the Austrian provision at issue was not covered by Article 28 EC Treaty (now 34 TFEU) since it was considered a selling arrangement within the meaning of *Keck*, there was no need to review whether the restriction was justified under the EC Treaty or the rule of reason. Nevertheless, the ECJ proceeded with an independent test under Article 10 ECHR. Apparently (but 'why' was not substantiated by the ECJ) the national rules were believed to be 'within the field of application of Community law'. A possible explanation could lie in the fact that the *potential qualification* of a measure as a restriction prohibited under Article 28 suffices to consider the matter to be within the scope of EU law.

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[16] Case C-376/02 *Stichting Goed Wonen* [2005] ECR I-3445*;* Case C-201/08 *Plantol,* Judgment of 10 September 2009, n.y.r. in ECR.

[17] Case C-81/05 *Alonso* [2006] ECR I-7569.

[18] Case C-260/89 *ERT* [1991] ECR I-2925.

[19] Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-109/01 *Akrich* [2003] ECR I-9607; Case C-368/95 *Familiapress* [1997] ECR I-3689; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; C-441/02, *Commission* v. *Germany* [2006] ECR I-3449; C-370/05 *Festersen* [2007] ECR I-1129.

[20] Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-438/05 *Viking* [2007] ECR I-10779.

[21] Case C-71/02 *Karner* [2004] ECR I-3025.

In *Garage Molenheide*[22] the exercise of a Member State's autonomous powers in relation to VAT (retention of tax credit by the tax authorities, *inter alia* in cases where there are grounds for presumption of tax evasion) was as such not governed by the 6th VAT Directive. Nevertheless, the Court pointed out that the Member States must observe the principle of proportionality and must employ such means which are the least detrimental to the objectives and the principles laid down by the relevant EU legislation. Some specific substantive rule of EC law happened to be applicable to the situation.

The case of Ms. *Bartsch*[23] concerned a refusal to pay her a widow's pension on basis of a 'age-gap clause' in an occupational pension scheme, which provided that payments will not be made if the widow/widower is more than 15 years younger than the former employee. The national court wondered whether such a clause is compatible with the general principle prohibiting age discrimination, as identified by the ECJ in *Mangold*.[24] The transposition period of the relevant Directive, Directive 2000/78 on equal treatment in employment and occupation, was at the material time still running. The Commission relied on the judgment in *Saldahna*, where an empowering Treaty provision[25] made the ECJ decide that the case was within the scope of the Treaty for the purposes of then Article 12 TEC (now 18 TFEU).[26] However, neither the AG nor the ECJ found a comparable connecting factor to be present in *Bartsch*. Article 13 TEC (now Article 19 TFEU) itself could not serve as such a connecting factor.[27] In a way, the Court's finding is remarkable in so far as the matter of occupational pensions is rather extensively dealt with in Directives 86/378, 96/97 and 2006/54 (all concerning equal treatment of men and women in occupational pension schemes) and in fact also in Article 157 TFEU (ex 141 TEC).[28] Moreover, the treatment of Ms Bartsch could have been qualified as indirect sex discrimination. Either this point escaped the parties and the ECJ in the case or the connecting factor was too remote. Yet it is dangerous to speculate on basis of arguments that have been ignored.

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[22] Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Garage Molenheide* [1997] ECR I-7281.

[23] Case C-427/06 *Bartsch* [2008] ECR I-7245.

[24] Case C-144/04 *Mangold* [2005] ECR I-9981.

[25] The provision – then Article 54(3)(g) TEC – empowered the Council to coordinate the safeguards for the protection of the interests of *inter alia* shareholders, in the context of company law for the purposes of freedom of establishment. The protection of shareholders was also a problem in *Saldahna* case itself.

[26] Case C-122/96 *Saldanha* [1997] ECR I-5325. Cf. also Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145. The effects of copyright and related rights on intra-Community trade in goods and services was sufficient to bring the case within the scope of then Community law. A connection with the specific provisions of then Articles 30, 36, 59 and 66 of the Treaty was not even necessary.

[27] Confirmed in C-217/08 *Mariano*, Order of 17 March 2009, not reported in the ECR.

[28] Case 80/70 *Defrenne I* [1971] ECR 445; Case C-262/88 *Barber* [1990] ECR I-1889.

Some further – though also uncertain – guidance as to the linkages with EU law that make that Member States can be said to act within the scope of EU law and therefore bound by general principles of law can be found in cases concerning the applicability of the Charter of Fundamental Rights. In *Vajnai*[29] the ECJ declined jurisdiction because the national provision at stake, a national ban on wearing symbols linked to Communism, was outside the scope of then Community law and subject-matter of the dispute was not connected in any way with any of the situations contemplated by the provision of the treaties. A number of other cases where the parties relied on the Charter was decided similarly and by orders only. *Polier*[30] seems to confirm that an empowering provision (then Article 136 TEC) does not suffice and that the situation at stake must be governed by some concrete EU rules in order to establish the necessary connection with EU law.[31] In *Kowalsky*[32] the ECJ refers to two potential connection factors, namely that the *national legislation* falls within the scope of EU law or that the *subject-matter of the dispute* is otherwise connected to EU law. None of the two was present in the case at hand since the preliminary questions did not concern the interpretation of the Treaty or an act adopted by the institution. Moreover, the national courts did not indicate any other possible connecting factors.

Summing up, the potential connecting factors of the third category seem to be, up until now, that some EU law rules adopted by the institutions apply to the case or that the subject-matter is otherwise governed by EU law, for instance by the Treaty freedoms. Empowering bases in the Treaties are, however, not sufficient.

3 Inroads into National Procedural Autonomy?

As was briefly explained above, general principles of EU law should be observed wherever national authorities apply and enforce EU law rules. This gives rise to various questions as to what does it imply for national procedural autonomy which the Member States enjoy, as a rule, when they apply or enforce EU law. Indeed, unless there are specific provision of EU law on the matter. If there are not, the limits to be observed are the principles of equivalence and effectiveness. What is the relationship between procedural autonomy and the obligation to observe general principles as well? Do these principles invade the area that was believed to be a matter of national procedural autonomy? I will discuss three examples.

[29] Case C-328/04 *Vajnai* [2005] ECR I-8577. Cf. also the much older case C-299/95 *Kremzow* [1997] ECR I-2629.

[30] Case C-361/07 *Polier* [2008] ECR I-6 (summary publication).

[31] Cf. also C-217/08 *Mariano*, Order of 17 March 2009, not reported in ECR. In the same vain already Case C-144/95 *Maurin* [1996] ECR I-2909.

[32] Case C-302/06 *Kowalsky*, Order of 2 January 2007, not reported in ECR.

The first example concerns evidence. In so far as EU law does not lay down specific rules on evidence, the principle of national procedural autonomy applies and indeed the requirements of equivalence and effectiveness.[33] This was also confirmed in *Steffensen*,[34] a case that concerned, more particularly, the right to a second opinion. The national rules on taking evidence had to be tested against the principles of equivalence and effectiveness. However this was not the end of the story. The national rules of evidence also had to be examined in the light of the requirement of a fair hearing provided for in Article 6 ECHR. In order for the proceedings to reach the standard of fairness required by Article 6(1) ECHR, according to the ECrtHR the parties must be afforded a real opportunity to comment effectively on a piece of evidence. In the case at stake the national court had to assess whether there was a risk of an infringement of the adversarial principle and, thus, of the right to a fair hearing. If that would be the case, the material that was used as evidence and on which one of the parties could not effectively comment, could not be admitted as evidence in the case before the national court. So, briefly put, the observance of the adversarial principle adds up to the requirements of equivalence and effectiveness that traditionally put limits to national procedural autonomy.

As to the second example, it must be noted that there was – and still is – well-established case law which allows, as a matter of this procedural autonomy, the application of *national general principles of law*.[35] So, for instance, the principle of legitimate expectations is part of the legal order of the Union; the fact that national law or legislation also provides for the principles of the protection of legitimate expectations and assurance of legal certainty to be observed can therefore not be considered contrary to that same legal order. However, the application of national law, the principles included, must observe the principles of equivalence and effectiveness. The recovery of sums improperly granted, e.g. in violation of EU law provisions, must take place in a non-discriminatory manner when compared to procedures for deciding similar national disputes. Moreover the application of the rules must not make it impossible in practice to recover the sums at stake.

In contrast to this well-established case law, in a number of Dutch cases concerning fraud or at least maladministration of ESF subsidies,[36] the ECJ does not seem to consider the national principle of legitimate expectations

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[33] Case 199/82 *San Giorgio* [1983] ECR 3595 or Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165.

[34] Case C-276/01 *Steffensen* [2003] ECR I-3735.

[35] Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633; Joined Cases C-80/99 to C-82/99 *Flemmer* [2001] ECR I-7211; Case C-336/00 *Huber* [2002] ECR I-7699; Case C-158/06 *ROM-projecten* [2007] ECR I-5103.

[36] Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2009] ECR I-1561.

and its limitations resulting from the requirement of effectiveness,[37] but is rather heading for the application of the principles of legal certainty and the protection of legitimate expectations, as they are understood in EU law. It is not clear as yet whether this judgment has to be understood as saying that national principles of legal certainty and legitimate expectations have to yield to EU principles. Perhaps the very unfortunate facts of the cases – the rules in the ESF Regulation were, more or less deliberately, not complied with by both the recipients and the national administration – are at the origin of this severe judgment. In any case, the distinction between the two approaches, i.e. the application of national principles in the context of national procedural autonomy or the application of EU principles, is important in so far as the contents and modalities of application of the respective principles may differ.[38]

The third example, the *Sopropé* case,[39] is again another variation on the same theme. It concerned the observance of the rights of the defence by national custom authorities and, in particular, the possibility for the addressee of a decision to effectively make known its view before the decision is taken. In this case the ECJ framed the exercise of these rights as a matter of national procedural autonomy. As the implementation of the rights of defence and the periods within which the rights of the defence must be exercised were not fixed by Community law, they were governed by national law. As such they had to satisfy the well known requirements of equivalence and effectiveness: the periods must be the same as those to which individuals or undertakings in comparable situations under national law are entitled and they may not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by EU legal order. Although the actual assessment whether equivalence and in particular effectiveness were satisfied was a matter left to the national court, the ECJ formulated a whole range of rather concrete criteria to be taken into account in the case at hand.

These three examples show that general principles bring about additional requirements which narrow down, in different degrees and different modalities, the principle of national procedural autonomy. As such they structure further the scope for manoeuvre that was left to the Member States. Although there is nothing wrong with that, a more coherent and better substantiated approach would be welcome.

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37 Case C-298/96 *Oelmuhle Hamburg* [1998] ECR I-4767; Case C-158/06 *ROM-projecten* [2007] ECR I-5103

38 Cf. on the differences existing between Dutch or German law and EU law with respect to the principle of legal certainty, Jans et. al., *Europeansation of Public Law*, Europa Law Publishing, Groningen 2007, at p. 180-184.

39 Case C-349/07 *Sopropé* [2008] ECR I-1036.

4 Positive Obligations Through General Principles

General principles of EU often function as 'negative' rules, i.e. as provisions aimed at the regulation of powers of the Member States by setting limits to the exercise of these powers. However, there are instances where these negative rules seem to turn into norms that create new, positive obligations for the Member States. From the perspective of the Member States it may make quite some difference whether they have to observe limits or actively take measures.

This is indeed not an entirely new phenomenon. Certainly not when we take into consideration the protection of fundamental rights proper. In this area many instances exist where provisions that have been considered or even drafted as prohibitions for the public authorities are construed as positive obligation, sometimes even obligations to take pro-active measures. From EU law the *Booker Acquaculture* case[40] may serve as an example. In that case the ECJ made clear that when a Member State is implementing a directive it has to do so while observing property rights. Under certain circumstances this may imply that the Member State has to make provisions for compensation.

However, also 'ordinary' general principles of EU law may produce such effects. The most clear-cut example of this transformation from 'negative' to 'positive' rules can be found in areas where the non-discrimination principle operates, either as a general principle of law, or as its written 'expression' laid down in the Treaty.[41] A case in point is *Coname* and its progeny.[42]

Coname concerned the award of concession contracts which are governed by the Treaty provisions on the free movement of services and establishment. The ECJ found that the principle of equal treatment enshrined in these provisions implies an obligation of transparency. What matters here is the *creation* of equality of opportunity, thus to place all potential bidders on an equal footing. According to the ECJ transparency affords all interested parties equality of opportunity in formulating the terms of the applications for and participation in the tenders. The absence of any transparency may amount to indirect discrimination on the ground of nationality which is prohibited by the Treaty, in particular under Articles 43 and 39 (now Articles 49 and 45 TFEU). The obligation of transparency involves a whole list of more specific requirements to be satisfied, including the obligation of publicity: There must be at least a certain degree of publicity or advertising in order to enable the market in question to be opened up to competition.

Considered against the background of a substantive understanding of equality, the very fact that positive obligations may flow from the (negative)

40 Joined Cases C-20/00 and C-46/00 *Booker Aquaculture* [2003] ECR I-7411, in particular para. 88-93.

41 Thus in particular Articles 18, 45, 49 and 57 TFEU (ex 12, 39, 43and 50 TEC).

42 Case C-231/03 *Coname* [2005] ECR I-7287.

prohibition of discrimination is not that surprising. While, according to well-established case law of he ECJ, both the principle of equality and the prohibition of discrimination require that, save where there is an objective justification, comparable situations must not be treated differently and that different situations must not be treated in the same way, there may be situations which are so different that treating them equally may amount to discrimination. The device is then to treat those cases differently, in other words: differentiation. In brief, the prohibition of discrimination, which is an expression of the principle of equality, may involve positive obligations. However, one may wonder whether the principle of equality is a sufficiently solid basis for a whole range of detailed requirements formulated in this (post) *Coname* case law.

Another illustration draws upon the application of the principle of proportionality, again in the context of the Treaty freedoms. In that area, proportionality is used by the ECJ as an instrument to impose, *inter alia*, certain procedural requirements on the Member States. In particular, the specific requirements that are laid down in the case law in relation to prior authorisation procedures are exemplary:

a) the procedure in question must be readily accessible and concluded within reasonable time;
b) the relevant rules and conditions must be set out clearly and made known in advance;
c) the criteria used in the procedures must be objective and non-discriminatory;
d) decisions must be backed by a statement of reasons;
e) any negative decision, in particular refusing an authorisation, must be open to challenge before the courts.[43]

All these matters, that impose positive obligations in the Member States, are considered by the ECJ primarily as a matter of the proportionality test and therefore the application of the principle of proportionality.

Both examples give rise to the question whether by, transforming the negative obligations into *fairly detailed* positive ones, the ECJ is not overstretching the scope of the principles at stake. Should this not be a matter to be addressed by the legislature? Paradoxically, it is rather the legislature that copies the requirements formulated by the ECJ.[44] Another, closely related, matter is that 'the royal road' to impose obligations to act upon for the

[43] Cf. for instance Case C-205/99 *Analir* [2001] ECR I-1271; C-372/04 *Watts* [2006] ECR I-4325 and Case C-169/07 *Hartlauer* [2009] ECR I-1721. Cf. also the 'golden shares' cases, e.g. Case C-503/99 *Commission v. Belgium* [2002] ECR I-4809 and Joined Cases C-282/04 and C-283/04 *Commission* v. *The Netherlands* [2006] ECR I-9141. For a more detailed discussion and analysis see Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered', *LIEI* 2008, p. 201-216.

[44] Cf. Articles 10 and 12 of the Services Directive (Directive 2006/123, OJ 2006, L 376/36).

Member States is the implementation of EU legislation which was adopted first by the Union legislator, with a basis in the Treaties and according to the rules prescribed. Yet, the case law just briefly described may generate effects that in fact replace the exercise of legislative competences by the institutions.

5 Review of National Measures – Playing with Constitutional Fire?

The review of national measures in the light of general principles of EU law may produce effects that might be perceived as interfering with the division of competences as laid down in the Treaties.

A well known and much debated example in his respect is the *Mangold* case.[45] In that case the ECJ found that the principle of non-discrimination on grounds of age is a general principle of Community which the Member States have to observe when they act within the scope of Community law, such as is the case with the implementation of a directive, in that case Directive 99/70 (fixed term contracts). For that same reason, the observance of the principle could not be made conditional on the expiry of the transposition date of Directive 2000/78.[46] The national court was asked to set aside any provision of national law which may conflict with the principle of non-discrimination on grounds of age.

In general terms, this finding squared fairly well with the well-established fundamental rights/general principles case law of the ECJ, briefly discussed above, in paragraph 2. However, the judgment turned out to be highly controversial for a number of reasons. The various prohibitions of discrimination that exist in EU law, discrimination of grounds of age included, might be expressions of the general principle of equality, the fact remains that the authors of the Amsterdam Treaty – i.e. when Article 13 TEC (now Article 19 TFEU) was inserted into the EC Treaty – made a conscious choice not to impose a directly effective prohibition of non-discrimination, but to leave the further elaboration of the various non-discrimination principles to the then Community legislature. The latter made a number of choices, translated in, *inter alia*, more precise provisions of the 2000/78 Directive. In that respect and arguably also due to a not very well articulated reasoning in *Mangold*, it was feared that by using general principles of law the ECJ would widen the scope of the directives, bypass democratic decision-making processes and indirectly also the division of powers between the

[45] C-144/04 *Mangold* [2005] ECR I-9981. For a discrete and not very much debated follow up see Case C-246/06 *Navarro* [2008] ECR I-105.

[46] Directive 2000/78 (general framework for equal treatment in employment and occupation), OJ 2000, L 303/16, including the prohibition of discrimination on ground of age.

Union and the Member States.[47] So, was the ECJ playing with constitutional fire?[48]

There is indeed much into the argument that where the Community legislature adopts express provisions elaborating more precisely the contours of the prohibition of non-discrimination at stake and providing for a period for adjustment of national law, these cannot be ignored by the application of a general principle. This is at least what the judgement suggested. However, upon closer reading, the judgement is more nuanced, at least on the first point. In fact, the ECJ relied on the relevant provisions of the Anti-discrimination Framework Directive in order to give the national courts a helpful answer. In other terms, the ECJ kept closely to the terms of the Directive and in so far it may be argued that it kept in line of what the legislator wanted, without widening the scope of the Directive in this sense. A bit more problematic is the second issue. The obligations contained in a directive are obligations to act within a stated period and the purpose of that period is to give the Member States the necessary time to adopt transposition measures.[49] It is somewhat difficult to understand that where the Member States are explicitly given certain latitude by a directive, this can be overruled by virtue of a general principle of law.

A third point of criticism of the *Mangold* judgment was that the in other cases firmly upheld denial of horizontal direct effect of directives could be bypassed by ascribing horizontal direct effect to general principles of law. In the more recent case of *Seda Kücükdeveci*[50] the ECJ indeed confirmed that a national court, hearing a dispute involving the principle of non-discrimination on grounds of age, must provide the legal protection which individuals derive from European Union law and ensure the full effectiveness of that law. If need be, the national court must disapply any provision of national legislation contrary to that principle.

Striking in the *Kücükdeveci* case is, in the first place, the very careful reasoning of the ECJ, referring almost permanently to 'the principle of non-discrimination on grounds of age as given expression in Directive 2000/78'. When it is examining whether European Union law precludes national legislation at issue, namely age discrimination in relation to conditions of dismissal, the ECJ is in fact not doing more than giving interpretation to

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[47] This type of criticism did not come only from academia, but also from the Court's Advocates General. Cf. AG Geelhoed in his Opinion in Case C-13/05 *Chacón Navas* [2006] ECR I-6467, point 54, AG Mazák in his Opinion in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, point 138 and AG Ruiz-Jarabo Colomer in Joined Cases C-55/07 and C-56/07 *Michaeler and Subito* [2008] ECR I-3135, point 21.

[48] Cf. Gerken et.al., *"Mangold" als ausbrechender Rechtsakt*, Sellier, Munich, 2009.

[49] Cf. Case C-129/96 *Inter-environnement Wallonie* [1997] ECR I-7411 and Case C-212/04 *Adelener* [2006] ECR I-6057 and the specific obligations laid down in these cases during the period between the entry into force of a directive and the deadline for its implementation.

[50] Case C-555/07, Judgment of 19 January 2010, n.y.r. in ECR.

the detailed provisions of the Directive itself. In so far, like in *Mangold*, it is keeping to the express provisions elaborating more precisely the prohibition of non-discrimination on grounds of age. More problematic seems the use of the general principle at issue as a standard for review that may result in setting aside of the national provisions, seemingly amounting to a sort of horizontal direct effect of directives which was, for instance, denied in *Pfeiffer*.[51] This is not the proper place to embark upon the discussion whether setting aside is or is not a matter of direct effect and whether a case like *Kücükdeveci* amounts to horizontal effect or not.[52] From the perspective of competence creep, however, the question may be posed whether the authority of the Union legislator and indirectly the powers of the Member States are affected. In that context it should be recalled that some decades ago the direct effect of directives as such was a constitutional issue in Germany.[53] Moreover, in 1994 the ECJ itself used a sort of constitutional argument to deny horizontal direct effect in *Faccini Dori* when it held that the acceptance of horizontal direct effect would mean "to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations."[54] Against this background, how should one asses the application of the general principle of non-discrimination in *Kücükdeveci*? General principles of EU law may serve as a standard to review national legislation and other measures – that is a well-established matter, provided that the principle at hand is justiciable, i.e. it must provide a manageable standard for the courts. Apart from the fact that the principle of non-discrimination is often as such sufficiently 'operational' to be applied by the courts as a standard for review, Directive 2000/78 elaborates the substance of the various non-discrimination principles and instructs the Member States to transpose its content within a prescribed period of time. When the Member State has had the opportunity to adjust its national law and at the end of the transposition period, it did not do so properly, the 'normal' effects of the underlying principle should not be curbed by the very fact that it has been made more

[51] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835.

[52] Cf. the Opinion of AG Bot in this case. For a considerable part this discussion is a matter of definition of direct effect and the distinction between direct effect and supremacy. For another part it is blurred by the closely related question whether there exists something like – permitted – exclusionary effect, as opposite to substitution effect. Cf. on this Dougan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', *CMLRev.* 2007, p. 931-963.

[53] In its judgment 16 July 1981 (EuR 1981, 442) the *Bundesfinanzhof* held that there could be no reasonable doubt that a directive was incapable of creating legal rules directly applicable in a Member State. Some years later it was however overruled by the BverfG (judgment of 8 April 1987, EuR 1987, p. 333). See on this 'Kloppenburg-saga', Hilf, 'Der Justizkonflikt um EG-Richtlinien: gelöst', *EuR* 1988, p. 1.

[54] Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para. 24.

concrete by a directive. After all, the Directive should facilitate the application and implementation of the principle and not limit it. The disapplication of contrary national provisions should in such circumstances be considered as a sanction for the failure of the Member State.

The *Mangold* and *Kücükdeveci* illustrated the *potential* of general principles of law to upset the balance between the Union and Member States and between the ECJ and Union legislator. It is submitted that an unbridled application of general principles would undoubtedly create constitutionally untenable situations. However, in the two cases the application of the principle of non-discrimination is certainly not unbridled. The ECJ followed very closely the letter of the Directive and as such it remained nearly entirely within the scope of what the legislator has provided for. The only weak point is that it did not manage to reconcile, on grounds of clear and persuasive arguments, the effects a directive may produce and the effects of the application of general principle of non-discrimination. In other words, we have witnessed 'controlled fireworks', with some very minor collateral damage.

6 Evaluation and Outlook

For the purposes of the present contribution, competence creep was defined in rather broad terms. In the first place, it relates to the 'traditional' problem *positive intervention* by the EU institutions. However, it also comprises situations of negative *limits* to Member State's action since these are often perceived as a loss of sovereign powers and for that matter creeping competences of the EU. This broader angle has not been chosen for reasons of this perception only. Another reason is, as was pointed out in paragraph 1, that there exists a relationship between the two.

Understood in this broader sense, there is no doubt that general principles of Union law 'do creep', though – as is characteristic to any creep – they often do so by stealth.[55] They structurally limit the Member States freedom to act and their margin of – political or otherwise – appreciation. They also do so where it was not expected, like in the area of what is believed to be a matter of national procedural autonomy or in case of autonomous Member State's action. Here the major problem seems to be that the connecting factors that make that general principles of EU law apply are not unambigu-

[55] It should be noted that the examples discussed are only a selection. After all cases like the Joined Cases C-402/07 and C-432/07 *Sturgeon*, Judgment of 19 November 2010, n.y.r. in ECR, can also be considered as a problem of competences creep. The ECJ has extended, on the basis of the principle of equal treatment, the right to compensation under Regulation 261/2004 (common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights), OJ 2004 L 46/ 1, to passengers whose flights are delayed, since their situation is, according to the ECJ, scarcely distinguishable from that of passengers whose flights are cancelled and who have been re-routed.

ous. General principles of EU law also have the potential to create positive obligations and, as such, turn into a source of further regulation imposed by the EU.

The *potential* of general principles of law to upset the balance between the Union and Member States and between the ECJ and Union legislator, was illustrated by the fears voiced after the *Mangold* judgment. For the time being, the consequences seem to be less dramatic than was argued by many. However, much will depend how this line of case law is going to evolve.

Can we then speak about competence creep *through* general principles of law? If competence creep is understood broadly, then we certainly can. There is no doubt that the application of general principles of law may result in extending, in a subtle and incremental fashion the EU competence. How to asses these effects? On the one hand, one can discern acceptance of this case law, though to a certain extent only. The ECJ's 'discovery' of general principles of law on basis of Article 19 TEU (ex Article 220 TEC) and the obligation to ensure the observance of these, also by the Member States, was for instance confirmed in the various versions of Article 6 TEU which exist and were expanded ever since the Maastricht Treaty. Similarly, in agreeing on the Charter of Fundamental rights, the Member States have accepted explicitly the consequences of this case law, also for themselves.

On the other hand, the negotiations of the Charter have also prominently shown that competence creep through general principles is perceived as a problem; at least as far as fundamental rights are concerned. The potential extension of fundamental right protection and, in the wake of that, EU law, was for the Member States a reason to make various efforts during the drafting of the Charter of Fundamental Rights, the Constitutional Treaty and the Lisbon Treaty to set clear limits to any possible expansion. The most striking examples of these endeavours are Article 51 of the Charter and Article 6 (1) TEU. Similarly, Article 51 (1) seems to indicate that the Member States have to observe the fundamental rights laid down in the Charter "only when they are implementing Union law". Somewhat oddly, however, the explanations to the Charter Articles, that should guide the interpretation of the provisions, refer to the broader '*ERT* case law'. Another effort in the same vain is Article 52 (5) which seems to curtail the justiciability of the Charter provisions.

As far as the Charter is concerned, the plentiful references to the limits of the powers of the Union and the field of application of Union law give a clear message. Indeed, the interpretation and impact of the limitations which are so clearly worded in the Charter has to be awaited. However, what consequences should or may all this have for general principles of law? Perhaps one should, in this context also pose another question: is the time there to separate fundamental rights on the one hand and 'ordinary' general principles of law or, for instance, general principles of administrative law, on the other?

There is no doubt that when the jurisprudential construct of protecting fundamental rights under the flag of general principles of law was thought up it had a touch of genius. At the same time it also had something strained. With the Charter of Fundamental Rights becoming binding, the position of fundamental rights in the EU legal order has changed considerably. Fundamental rights have now their own written legal framework and the rights themselves and their scope are in a number of respects more sharply defined. This in contrast to general principles of law which are often unwritten, rather indeterminate and have to be fleshed out in a concrete case. There is, indeed, an overlap between fundamental rights and general principles of law. However, on the other hand, far from all general principles include general obligations of constitutional nature.[56]

What implications should the coming into force of the Charter have for general principles of law? I limit myself to three observations. First, general principles will probably still accommodate fundamental rights, last but not least because Article 6 TEU says so. However, they will do so in a more complementary fashion, as a sort of safety net for cases where the Charter is silent.[57] Second, there is an inherent risk that general principles might be used or at least give the impression of being used as bypassing the limitation provisions of the Charter. Such *'incidents de parcours'* should be avoided. On the other hand, and this is the third point, general principles of law and their application should be kept out of the specific regime of the Charter and its limitations. What applies to fundamental rights should not necessarily hold true for general principles of law. After all, also in national legal order general principles of law have to play their own role, in addition to constitutional fundamental rights guarantees.

What can be further said about competence creep and 'ordinary' general principles of law? For a part, competence creep cannot be avoided. For another part, although the term has a negative connotation, it is often nothing more then a side effect of the interpretation and application of general principles of law which are as such valuable and often even inevitable for reaching a satisfactory solution to a concrete legal problem.

What is needed is to proceed with caution and careful consideration that will make the case law more transparent, predictable and ultimately also more acceptable. Such an approach might also help to counter false allegations of competence creep. In this respect I would like to make the following points, which largely build upon the previous paragraphs.

[56] In this respect, I disagree with the somewhat sweeping statement of the ECJ in para. 63 of the judgment in *Audiolux* (Case C-101/08, Judgment of 15 October 2009, n.y.r. in ECR) where it stated that '[t]he general principles of Community law have constitutional status…'.

[57] Cf. in this respect Article 6 TEU where the fundamental rights, as guaranteed by the ECHR and by national constitutional traditions are still categorized general principles of the Union's law. Similarly, general principles of law may serve as vehicles for international human rights conventions which the EU Treaties persistently suppress as potential sources of fundamental rights.

When deciding on the scope and effects of the principles, the ECJ should take into account the constitutional realities and leave more scope for options for the Member States where there is no real need for firm and far reaching interference. Where there is such a need, like for instance in case of recovery of state aid, a clear, coherent and convincing reasoning is necessary. Similarly, there is a need for a more clear, predictable and for the outside world comprehensible 'doctrine' of what the scope of EU law actually means and when does a matter actually fall within this scope. Third, double standards in application of general principles should be avoided: judicial review of the Member States legal acts should not be stricter than the review of the EU legal acts. As yet, a comparison of cases like *Mangold* and *Rinke*,[58] for instance, point to another – unsatisfactory – direction. Where the application of general principles will result in imposing detailed positive obligations, legislative intervention should be preferred in order not to disturb the division of powers between the legislator and the judiciary and, indirectly, the EU and the Member States. In case a general principle has been elaborated in EU legislation, judicial restraint commands to stick as much as possible to the terms of this legislation, even when formally applying, for what ever reason, the principles at stake. Deviations should be duly motivated. Finally, wherever possible, a softer solution, for instance through interpretation instead of setting aside, should be preferred.

[58] Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-25/02 *Rinke* [2003] ECR I-8349.