Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law

Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, *Seda Kücükdeveci* v. *Swedex GmbH & Co. KG*

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Introduction

On 22 November 2005 the European Court of Justice (hereafter, the Court) rendered its *Mangold*-ruling[1] on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter, Directive 2000/78).[2] The most striking part of this judgment, rendered in a private dispute, was the following conclusion:

> Community law and, more particularly, Article 6(1) of (…) Directive 2000/78/EC (…) must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings (…) It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

The judgment evoked a great amount of criticism from the media,[3] academia,[4]

* Maastricht University. In the present case, I acted as an agent of the Netherlands Government, however this commentary only reflects my personal opinion. I am grateful to Hildegard Schneider, Hanna Sevenster and Bruno de Witte for their comments. All errors remain of course mine. Comments are welcome at mirjam.demol@maastrichtuniversity.nl.

[1] ECJ 22 Nov. 2005, Case C-144/04.

[2] *OJ* [2000] L 303/16, 2.12.2000.

[3] *See* for example, R. Herzog and L. Gerken, 'Stop the European Court of Justice', *EU Observer*, 10 Sept. 2008 and F. Kuitenbrouwer, 'Onbescheiden rechters', *NRC Handelsblad*, 7 Feb. 2006.

[4] *See* for example, 'Editorial Comments', 43 *CMLRev.* (2006), p. 1-8; M. Schmidt, 'The Principle of Non-discrimination in respect of Age: Dimensions of the ECJ 's Mangold Judgment', 7 *German*

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several advocates-general[5] and the member states.[6] An accurate summary of those criticisms is given by Advocate-General Sharpston:

> 31. (…) The general theme of the criticism is that the Court (of its own volition, without good reason and against the wishes of the legislature) extended the scope of a directive, to give it effect before the end of its transitional period and in horizontal circumstances, by making an innovative reference to a general principle of Community law. Consequently, a number of commentators have expressed the opinion that the Court has undermined the purpose of direct effect. Furthermore, the ruling is criticised for having produced a situation of considerable legal uncertainty.[7]

The *Mangold* case is also relevant with regard to the 'dialogue' between the *Bundesverfassungsgericht* and the ECJ. In its Lisbon judgment of 30 June 2009 the *Bundesverfassungsgericht* stressed that legal instruments violating national sovereignty constitute '*ultra vires*' acts that are not applicable in Germany. At the moment a constitutional complaint is pending before the Federal Constitutional Court in which it is claimed that the *Mangold* case is an '*ultra vires*' legal instrument and is therefore not applicable in Germany.[8] [Meanwhile, the Court has decided that *Mangold* was not *ultra vires*; *see* addendum to editorial, *supra* p. 174 – EuConst.]

Since *Mangold* the ECJ rendered five judgments (*Bartsch*, *Petersen, Wolf*, *Hütter*, *Age Concern England* and *Palacios de la Villa*) on age-discrimination without making reference to the most striking paragraphs of *Mangold* (74-77).[9] Especially after

Law Journal (2005), p. 506-524; D. Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', 35 *Industrial Law Journal* (2006), p. 329-341.G.

[5] A large number of advocates-general have commented on the *Mangold*-case, the most substantial comments came from: AG Geelhoed 16 March 2006, Case C-13/05, *Chacón Navas*; AG Mazák 15 Feb. 2007, Case C-411/05, *Palacios de la Villa*; AG Colomer 24 Jan. 2008, Joined Cases C-55/07 and C-56/07, *Michaeler*; AG Maduro 31 Jan. 2008, Case C-303/06, *Coleman*; AG Trstenjak 29 March 2007, Case C-80/06, *Carp*; AG Sharpston 22 May 2008, Case C-427/06*; Bartsch* and 30 Nov. 2006, Case C-227/04 P, *Lindorfer* and AG Bot 7 July 2009, Case C-555/07, *Kücükdeveci*.

[6] In the present case *Kücükdeveci*, observations were submitted on behalf of Germany, Czech Republic, Danmark, Ireland, the Netherlands and United Kingdom.

[7] *Bartsch*, *see supra* n. 5.

[8] 2 BvR 2661/06, *Honeywell Bremsbelag GmbH*. *See also* J. Kokott, 'The Basic Law at 60 – From 1949 to 2009: The Basic law and Supranational Integration', 11 *German Law Journal* (2010), p. 100 at p. 109-112. L. Gerken, et al., *'Mangold' als ausbrechender Rechtsakt* (Munich, Sellier European Publishers 2009); U. Preis and F. Temming, 'Der EuGH, das BVerfG und der Gesetzgeber – Lehren aus Mangold II', 27 *Neue Zeitschrift für Arbeitsrecht* (2010), p. 185.

[9] ECJ 23 Sept. 2008, Case C-427/06, *Bartsch;* ECJ 12 Jan. 2010, Case C-341/08, *Petersen;* ECJ 12 Jan. 2010, Case C-229/08, *Wolf;* ECJ 18 June 2009, Case C-88/08, *Hütter;* ECJ 5 March 2009, Case C-388/07; *Age Concern England* and ECJ 16 Oct. 2007, Case C-411/05, *Palacios de la Villa*.

Palacios de la Villa, also a horizontal dispute, it appeared that the approach taken in *Mangold* was exceptional. However, on 19 January 2010, the Court passed its judgment in the *Kücükdeveci* case. This case is a firm confirmation of the *Mangold*-approach. At the same time the present case clarifies a number of issues. As a result the *Mangold*-approach can be better outlined. In spite of this (or thanks to this) a number of further questions arise.

Facts and national context

The main proceeding concerns a German civil dispute between two individuals, an employee, Ms Kücükdeveci and a private employer, Swedex. At stake is the period of notice for dismissal. This period is related to the length of service of Ms Kücükdeveci. In the calculation no account has been taken of periods prior to the completion of the employee's 25th year. This way of calculation was adopted on the basis of the national German legislation. Paragraph 622(2) of the German Civil Code [Bürgerliches Gesetzbuch, hereafter, the BGB] provides as follows:

> (2) For termination by the employer, the notice period, if the employment relationship in the business or undertaking
>
> 1. has lasted for two years, is one month to the end of a calendar month,
> 2. has lasted five years, is two months to the end of a calendar month,
> 3. has lasted eight years, is three months to the end of a calendar month,
> 4. has lasted ten years, is four months to the end of a calendar month,
> 5. has lasted 12 years, is five months to the end of a calendar month,
> 6. has lasted 15 years, is six months to the end of a calendar month,
> 7. has lasted 20 years, is seven months to the end of a calendar month.
>
> In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account.

The referring court considered that paragraph 622 of the BGB contains a difference of treatment directly linked to age, and, while it is not convinced that it is unconstitutional, it regards its compatibility with European Union law as doubtful. Its two preliminary questions can be summarised as follows. (1.a) What should be the reference of examination: the general principle of non-discrimination based on age or Directive 2000/78? (1.b) Does national legislation such as that at issue in the main proceedings constitute a difference of treatment on grounds of age prohibited by European Union law? (2) If so, should that national legislation be left unapplied in a dispute between private individuals?

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Judgment of the Court: first question

Examination by reference to primary European Union law or to Directive 2000/78?[10]

The Court first considers that the alleged national legislation should be examined on the basis of 'the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78.' The Court confirms *Mangold* by stating that:

> 20. In the first place, Directive 2000/78 (…) does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age (*see Mangold*, para. 74).
> 21. In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (*see*, to that effect, *Mangold*, para. 75) (…)

The Court adds in the same paragraph that

> (…) Directive 2000/78 gives specific expression to that principle (*see*, by analogy, Case 43/75 *Defrenne* [1976] *ECR* 455, paragraph 54).

Then the Court considers as follows:

> 22. It should also be noted that Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the charter, '[a]ny discrimination based on … age … shall be prohibited'.

Subsequently the Court explains why and when the general principle of non-discrimination on grounds of age can apply:

> 23. For the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.
> 24. (…) the allegedly discriminatory conduct adopted in the present case on the basis of the national legislation at issue occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78 (…)

[10] Paras. 19-27.

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> 25. On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.

Difference of treatment on grounds of age[11]

For the question whether the legislation at issue in the main proceedings contains a difference of treatment on grounds of age, the Court considers:

> 28. (…) it should be recalled that under Article 2(1) of Directive 2000/78, for the purposes of that directive, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 (*see* Case C-411/05 *Palacios de la Villa* [2007] *ECR* I-8531, para. 50, and Case C-388/07 *Age Concern England* [2009] *ECR* I-0000, para. 33).

The Court concludes that the national legislation at issue contains a difference of treatment on grounds of age. The Court considers that in this case the national legislation in question affords less favourable treatment to employees who entered the employer's service before the age of 25. Therefore, the national provision introduces a difference in treatment between persons with the same length of service, based on the age at which they began their employment. Moreover, the national legislation at issue in the main proceedings places younger workers at a disadvantage when compared to older ones.

Justification of the difference in treatment[12]

Next the Court considers that

> 32. (…) it must be examined whether that difference of treatment is liable to constitute discrimination prohibited by the principle of non-discrimination on grounds of age given expression by Directive 2000/78.

In order to perform this examination the Court turns to Article 6(1) of Directive 2000/78 which states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is: (1) objectively

[11] Paras. 28-31.
[12] Paras. 32-42.

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and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives, and (2) if the means of achieving that aim are appropriate and necessary. The Court considers that the aim of the national legislation at issue is to afford employers greater flexibility in personnel management by alleviating the burden on them for the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility. This provides for a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. However the Court finds that the legislation is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal. The Court adds that the national legislation at issue in the main proceedings affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training, but not those who enter later after a long period of training.

The answer to the first question is:

> European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

Judgment of the Court: second question

The Court recalls its jurisprudence according to which:

> 45. As regards (…) the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to European Union law, the court has held that it is for the national courts to provide the legal protection which individuals derive from the rules of European Union law and to ensure that those rules are fully effective (…)

In this regard the Court refers to its rulings *Pfeiffer* and *Impact*.[13] The Court explains that, in proceedings between individuals, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. The Court refers to the cases *Marshall*, *Faccini Dori* and *Pfeiffer*.[14] How-

[13] ECJ 5 Oct. 2004, Joined Cases C-397/01 to C-403/01, *Pfeiffer*, para. 111 and ECJ 15 April 2008, Case C-268/06, *Impact*, para. 42.

[14] ECJ 8 Feb. 1996, Case 152/84, *Marshall,* para. 48; ECJ 14 July 1994, Case C-91/92, *Faccini Dori*, para. 20 and *Pfeiffer, see supra* n. 13, para. 108.

ever a national judge does have the duty of interpreting the national law in conformity with the directive. Like the referring court stated, the BGB is not open to an interpretation in conformity with Directive 2000/78. In reaction to this point the Court considers as follows.

> 50. It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (*see*, to that effect, *Mangold*, paras. 74 to 76).
> 51. In those circumstances it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (*see*, to that effect, *Mangold*, para. 77).

After having said this, the Court moves to the (sub)question of the referring Court whether in proceedings between individuals a reference to the Court for a preliminary ruling on the interpretation of European Union law should be made before it can disapply a national provision, which it considers to be contrary to that law. The Court considers that it is apparent from the order for reference that this aspect of the question has been raised because, under national law, the referring Court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the *Bundesverfassungsgericht* (Federal Constitutional Court). The Court states that

> 53. The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.
> 54. The possibility thus given to the national Court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before disapplying the national provision that is contrary to European Union law cannot, however, be transformed into an obligation because national law does not allow that Court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court. By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legisla-

> tion which falls within the scope of European Union law must be disapplied (*see*, to that effect, *Mangold*, para. 77).

The answer to the second question reads as follows:

> It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.

Commentary

The approach taken in *Mangold* and *Kücükdeveci* can be summarised as follows. The central point made by the Court is the obligation of the national judge to apply a general principle of EU law, as an autonomous[15] ground for judicial review, in a dispute between private parties and the corresponding obligation not to apply national legislation that conflicts with the general principle.[16] Moreover, this review on ground of the general principle is possible, despite of the fact that specific EU legislation (Directive 2000/78) applies.[17] Even though the general principle is the *de jure* basis of examination, the expression of the general principle given in EU legislation[18] plays an important role, as Articles 2 and 6 of the Directive 2000/78 serve as means to express the general principle. They are the *de facto* standard for review.[19] As a result, those provisions are applied independently[20] of their source (the directive) as part of the general principle.[21]

This commentary will discuss the *Mangold* and *Kücükdeveci* approach from four different angles: horizontal effect of a court-made fundamental right, impact on the application of EU legislation expressing general principles, institutional balance and legal certainty.

[15] The term 'autonomous' is used in contrast to the function of a general principle as tool of interpretation of legislation.

[16] *Kücükdeveci*, paras. 27, 50-51.

[17] *Kücükdeveci*, paras. 25 and 27. In *Mangold* Directive 2000/78 did not apply, because the period of transposition did not expire yet.

[18] The authentic German language version uses the words '*Konkretisierung durch die Richtlinie*'.

[19] *Kücükdeveci*, paras. 27, 28, 33 and 43.

[20] *See* AG Mázak, *Palacios de la Villa*, *supra* n. 9, para. 137.

[21] In fact the directive is used as tool of interpretation of the general principle instead of the usual way around.

Horizontal direct effect of court-made fundamental rights

The approach of the Court in *Mangold* and *Kücükdeveci* shows that *general principles* of EU law (and therefore EU fundamental rights) can have horizontal direct effect.[22] The same conclusion can be drawn from the recent case *ČEZ*.[23] The granting of horizontal effect to a general principle of EU law is remarkable. General principles are normally means to protect private individuals *vis-à-vis* public authorities. Furthermore, general principles are abstract in the sense that they point in a certain direction rather than giving concrete rules of law. Besides that, they are unwritten and unpublished. These features could be reason for denying horizontal direct effect to general principles.[24] Arguably, general principles need to be expressed in legislation before they can apply with regard to private individuals. The Court does not address these issues, but simply assumes that general principles can have horizontal direct effect.

In addition, the approach in *Mangold, Kücükdeveci* and *ČEZ* also assumes that a *fundamental right* can have horizontal direct effect. It is disappointing that the Court does not explain the reasons for this assumption, because it is not at all self-evident. It is true that within the European Union legal order the horizontal direct effect of the right of equal treatment has been recognised before.[25] However, those cases with regard to the right of equal treatment based on nationality and sex concerned the direct effect of *Treaty* provisions. In *Mangold*, *Kücükdeveci* and *ČEZ* it concerns the effect of an *unwritten, court-made fundamental right*. Moreover, the horizontal direct effect of the Treaty prohibitions of discrimination was reasoned by textual and teleological arguments based on the Treaty. Hence, the Court linked the rationale of the horizontal direct effect of those prohibitions to their sources, the Treaty. This link is missing in *Mangold* and *Kücükdeveci*. The general principle of non-discrimination based on age is derived from the various interna-

[22] In the meaning of that a national court is obliged to apply the general principle as a standard for legal review. *See also* S. Prechal, *Directives in EC Law*, 2nd edn. (Oxford, Oxford University Press 2005), p. 241. Cf. K. Lenaerts and T. Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law', 31 *European Law Review* (2006), p. 287.

[23] ECJ 27 Oct. 2009, *CEZ*, Case C-115/08, paras. 41 and 138-139. The case concerned the application of the principle of non-discrimination based on nationality as a general principle of law in the context of the EAEC Treaty. *See also* M. de Mol, 'C-115/08, Land Oberösterreich/CEZ', *Tijdschrift voor Europees en economisch recht*, *SEW* (2010), p. 124-129.

[24] In fact the same reasoning for denying horizontal direct effect to directives could apply. *See Marshall*, *supra* n. 14, para. 48; *Faccini Dori*, *supra* n. 14, para. 22; ECJ 7 Jan. 2004, Case 201/02, *Wells*, para. 56.

[25] *See* for example, ECJ 12 Dec. 1974, Case 36/74, *Walrave and Koch*, paras. 17-21; ECJ 8 April 1976, Case 43/75, *Defrenne II*, paras. 37-40; ECJ 7 June 2000, Case C-218/98, *Angonese*, paras. 32-35; ECJ 15 Dec. 1995, Case C-415/93, *Bosman*, paras. 82-87 and ECJ 17 July 2008, Case C-94/07, *Raccanelli*, paras. 44-48.

tional instruments and the constitutional traditions common to the member states. However, within the international and national legal orders, the horizontal direct effect of the principle of equality or of other fundamental rights is not common.[26] Also the reference to the Charter of Fundamental Rights of the European Union (hereafter: Charter) does not explain the horizontal effect, because the Charter is only declared to be binding upon the Union public authorities and member states.[27] Advocate-General Bot considers the outcome as a consequence of the hierarchy of norms. According to him

> a directive which has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle.[28]

However, also this position assumes that the application in the private sphere is included in the scope of the general principle of non-discrimination based on age. It is precisely this assumption that is questionable.

Now that it is clear that general principles of EU law can have horizontal direct effect, the question arises which general principles do have this effect.[29] Because of the lack of explanation with regard to the horizontal direct effect it is not possible to be conclusive. What is decisive?

The mere fact that the prohibition of discrimination based on age is a general principle of law? In that case, the presumption of horizontal direct effect will probably apply to all prohibitions of discrimination on specific grounds, which must be considered as general principles of EU law.[30] Hence, besides age and nationality, the following grounds of discrimination will have horizontal direct

[26] *See* D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere – A Comparative Study* (London, Routledge-Cavendish 2007) p. 467-520. B. de Witte, 'The crumbling public/private divide: horizontality in European anti-discrimination law', 13 *Citizenship Studies* (2009), p. 515. But *see* AG Trstenjak, *Carp, supra* n. 5, paras. 69-70 and AG Bot, *Kücükdeveci*, *supra* n. 5, end of footnote 49.

[27] Art. 51 entitled 'Field of application' does not mention private individuals.

[28] AG Bot, *Kücükdeveci*, *see supra* n. 5, para. 70.

[29] Cf. AG Kokott 6 May 2010, Case C-104/09, *Roca Álvarez*, para. 55.

[30] In other words: it must concern grounds, which are *a priori* forbidden in the sense that a specific ground of differentiation is deemed beforehand to be unacceptable or suspect. A step further would be to grant the general principle of equal treatment horizontal direct effect. Under this principle the question whether a certain grounds of differentiation is acceptable or not has to be examined case-by-case. *See also* for the difference between the general principle of non-discrimination and a specific prohibition of a particular type of discrimination AG Mázak, *Palacios de la Villa*, *see supra* n. 5, paras. 79-97. It must be noted that some read the approach of the Court as an application of the general principle of equality instead of the establishment of a specific general principle of non-discrimination based on age, e.g., AG Sharpston, *Lindorfer*, *see supra* n. 5, para. 58 and L. Senden, 'Case C-227/04 P, Lindorfer', 47 *Common Market Law Review* (2010), p. 521 at p. 532.

effect: religion or belief, disability, sexual orientation,[31] racial or ethnic origin[32] and sex.[33] In addition to those grounds the Charter mentions also the grounds: language, political or any other opinion, membership of a national minority, property and birth. Depending on whether they must be considered as general principles of law, they also might have horizontal direct effect. In this scenario it will be interesting to see whether also the general principle of equal treatment or other fundamental rights, which must be considered as general principles of law, have horizontal direct effect.

Another possibility is that the horizontal direct effect of the principle of non-discrimination based on age results from the fact that Directive 2000/78 applies both in public and in private sectors.[34] Consequently, in this scenario only general principles of law of which the EU legislature decided that they apply in (certain) private sectors might merit horizontal direct effect (in that sectors). When it is clear that a certain general principle of EU law has horizontal direct effect, the next question is under which circumstances this may be the case. In *Mangold*, *Kücükdeveci* and *ČEZ* it concerned a review of national legislation. Would it also be possible to challenge private behaviour directly on the basis of violation of a general principle?

Impact on the application of EU legislation expressing general principles

The approach taken in *Mangold* and *Kücükdeveci* does also affect the invocability of Union legislation expressing or implementing general principles of EU law. As mentioned before, it follows that expressions of general principles in legislation can be used independently of that legislation. This independent invocability of expressions of general principles is especially relevant for directives. The cases *Mangold* and *Kücükdeveci* show already two consequences. Firstly, they effectively convey a right to rely on provisions of a directive in private disputes. So, in fact the *Mangold* and *Kücükdeveci* approach means another qualification to the prohibition of horizontal direct effect of directives.[35] Secondly, they convey a right to rely on

[31] These are the other grounds of Directive 2000/78. It follows from para. 74 of *Mangold* that the prohibitions of discrimination on those grounds also must be regarded as general principles of EU law. *See also* AG Mázak, *Palacios de la Villa*, *supra* n. 5, para 96.

[32] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* [2000] L 180/22, 19.7.2000 (hereafter: Directive 2000/43). The considerations 2 and 4 of that are the same as the considerations 1 and 4 of Directive 2000/78 to which is referred in para. 74 of *Mangold*. Therefore the prohibition of discrimination based on racial or ethnic origin also constitutes a specific general principle of law.

[33] ECJ 15 June 1978, Case 149/77, *Defrenne III*, para. 27.

[34] Art. 3.

[35] *See also* P. Craig, 'The legal effect of Directives: policy, rules and exceptions', 34 *European Law Review* (2009), p. 349 at p. 372-375.

provisions of a directive before the period of transposition of that directive has expired, provided that there exists another link with EU law.[36] In addition to that, expressions of general principles might also be relied upon in situations falling outside the material scope of the legislation in which they are expressed. In the cases *Kücükdeveci* and *Mangold* the discriminations at issue happened to be in the field of employment, a field that is covered by Directive 2000/78. However inherent to general principles of law is their general and comprehensive nature.[37] Hence, their applicability (at least their vertical applicability) is not limited to a specific field of EU law.[38] The independent use of specific legislative expressions of general principles can also have an impact on the Charter. As mentioned before, the Charter is possibly not binding on private individuals. However, Charter provisions that may be considered to be expressions of general principles of Union law can possibly be invoked in private disputes by virtue of the *Mangold* and *Kücükdeveci* reasoning.[39]

Institutional balance

It follows from the foregoing considerations that there is a considerable interaction between the general court-made principle and Directive 2000/78. Actually, it turns out that the material outcome of the case would have been exactly the same if the national legislation had been reviewed with sole reference to Directive 2000/78. In view of the principle of institutional balance, this interaction between the court-made principle and the directive is highly questionable.[40] First of all, there

[36] This follows from the *Mangold* case in which the general principle of non-discrimination based on age applied before the period of transposition of Directive 2000/78 had been expired (para. 76). The reason was that the case at issue came within the scope of EU law through another directive (Directive 1999/70). Paras. 24 and 25 of *Kücükdeveci* clarify that whereas Directive 2000/78 serves as the only link with EU law, the period of transposition has to be expired in order to be able to apply the general principle. *See also* M. de Mol, 'Case-Note, Case C-555/07, *Kücükdeveci',* 11 *European Human Rights Cases* (2010), p. 510 at p. 518.

[37] *See* ECJ 15 Oct. 2009, Case C-101/08, *Audiolux*, paras. 42 and 50.

[38] *See* further *infra* 'Institutional balance'. But *see*, AG Trstenjak 28 April 2010, Case C-45/09, *Rosenbladt*, note 27.

[39] Provided that there is (another link) with EU law, which brings the case within the scope of EU law (*Kücükdeveci*, para. 23). And provided that the fact that Directive 2000/78 applies both in public and private sectors was not decisive (*see supra* 'horizontal direct effect of court-made fundamental rights'). Cf. S. Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010), p. 5 at p. 21: '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.'

[40] Cf. AG Trstenjak 30 June 2009, Case C-101/08, Audiolux: '107. (…) the Court also forms part of that institutional balance. This fact implies that (…) in its capacity as a Community judicial body (…) it respects the rule-making powers of the Council and of the Parliament. (…) This neces-

is no need for an autonomous review of national legislation on ground of a court-made principle if that principle is specified in Union legislation. This is precisely what Advocates-General Mázak and Colomer[41] argued. According to them only in a situation in which there are no applicable directives, the general principles of Union law should be able to apply as autonomous rules of law. In cases where there is an applicable directive (in the meaning that a directive is applicable *ratione materiae* to the circumstances of a certain case) the general principles should be used exclusively as tools for interpreting the directives, because otherwise

> 137. A problematic situation could arise, (…) by allowing a general principle of Community law which (…) may be considered to be expressed in specific Community legislation, a degree of emancipation such that it can be invoked instead or independently of that legislation.
> 138. Not only would such an approach raise serious concerns in relation to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general (…)[42]

In *Kücükdeveci* Directive 2000/78 clearly applied in the sense that the national legislation at issue came within the material scope of the directive and the facts of the main proceedings occurred after the expiration of the period of transposition. Nevertheless, the general principle is used as the basis for the analysis. This in itself is already odd. The recourse to the general principle gets even more obscure by the fact that the principle is practically identified with Directive 2000/78.[43] The court-made ground for review turns out to be a specific and concrete rule instead of an abstract and general principle of law.

Moreover, the actual result is judicial law making by way of a pick and choose from Directive 2000/78. Hence, some political decisions of the Union legislature are respected, such as that a direct discrimination based on age can be justified (Article 6 of Directive 2000/78), and other legislative choices are ignored. The most striking is the circumvention of the intent of the Union legislature that pri-

sarily presupposes that it (…) observes the necessary self-restraint in developing general principles of Community law which might possibly run counter to the legislature's aims. The Court may have recourse to general principles in order to find solutions, which are appropriate having regard to the aims of the Treaty, to the problems of interpretation on which it is required to decide. However, it may not assume the role of the Community legislature if a gap in the law can be filled by the Community legislature (…)'

[41] AG Mázak, *Palacios de la Villa*, *see supra* n. 5, paras. 136-138 and AG Colomer, *Michaeler*, *supra* n. 5, paras. 21-23 and 25. *See also* AG Sharpston, *Bartsch*, *supra*, n. 5, para. 88.

[42] AG Mázak, *Palacios de la Villa*, *see supra* n. 5

[43] But *see* Prechal, *supra* n. 39, at p. 17: '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 legislature wanted (…)'.

vate parties would be bound by the principle of non-discrimination on the grounds mentioned in Directive 2000/78 by virtue of the *national* law and not by virtue of a *Union* prohibition of discrimination based on age.[44] Furthermore, the legislature's choice with regard to the scope *ratione temporis* is thwarted, as Directive 2000/78 can also apply before the period of transposition of that directive has been expired.[45]

In addition to that the Union legislature deliberately made a distinction between the different grounds of discrimination mentioned in Article 19 TFEU with regard to the scope *ratione materiae*. Discrimination based on race or ethnic origin is prohibited in employment, occupation and vocational training, as well as in non-employment areas such as social protection, health care, education and access to goods and services, including housing, which are available to the public (Directive 2000/43).[46] Discrimination based on sex is prohibited in the same range of areas, with the exception of education and media and advertising (Directive 2004/113).[47] In contrast, discrimination based on age, religion and belief, sexual orientation and disability is prohibited only in employment, occupation and vocational training.[48] At present there is a Commission proposal that aims to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market.[49] However, the cases *Mangold* and *Kücükdeveci* render these existing distinctions and the ongoing political debate less relevant. Since general principles apply within the (broad) scope of EU law, national legislation governing matters falling within the scope of Directive 2000/43 will arguably also have to comply with the general principles of Union law, including the prohibitions of discrimination on the grounds mentioned in Directive 2000/78. Hence, the limitation of the scope of application of Directive 2000/78 would only remain relevant with regard to the provisions that go beyond expressing the general principle. These are most probably the proce-

[44] This follows from the fact that Art. 19 TFEU (before Art. 13 TEC) only provides for a base to take appropriate action and from the choice to take action by virtue of the directive.

[45] *See supra* 'horizontal direct effect of court-made fundamental right'.

[46] Directive 2000/43, *see supra* n. 32.

[47] Council Directive 2004/113/EC of 13 Dec. 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ* [2004] L 373/37, p. 37-43.

[48] Art. 3, Directive 2000/78.

[49] *See* Art. 3 of the Commission's Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final: 'that discrimination based on religion or belief, disability, age or sexual orientation is prohibited by both the public and private sector in: – social protection, including social security and health care; – social advantages; – education; – access to and supply of goods and services which are available to the public, including housing.'

dural provisions from part II (entitled 'remedies and enforcement'), such as the burden of proof (Article 10).

Legal certainty

The focus of the Court is on the most effective enforcement of the right of equality.[50] Justice is done to the employees Mr. Mangold and Ms. Kücükdeveci by granting them a Union right of equal treatment based on age *vis-à-vis* their employers. What about the employers Mr. Helm and the company Swedex? Their legal position is negatively affected as a result of the invocation of the Union general principle of non- discrimination based on age. Mr Helm faces the invalidity of his contract and Swedex has to deal with a longer period of notice. Formally speaking, these obligations follow from the national law, namely from the rule that revived after the preclusion of the conflicting national law.[51] Nevertheless, this does not change the fact that the application of the principle was a *conditio sine qua non* for this to happen. So it turns out that private individuals cannot rely on their (written) national laws. Instead they need to take into consideration the possible effects of the Union's (unwritten) principle of equality. How does this relate to another general principle of Union law, the principle of legal certainty?[52] In the recent case *Stadt Papenburg*, the Court considered that:

> 45. (…) The principle of legal certainty, (...) requires (…) that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (…).[53]

Would general principles in general be apt to fulfil those requirements? As Advocate-General Mázak rightly considers:

> 86. (…) it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty.[54]

[50] *See* AG Bot, *Kücükdeveci, supra* n. 5, para. 69: '(...) In that perspective, effective action to counteract discrimination which is contrary to Community law implies that the national courts having jurisdiction can grant to persons within the disadvantaged category, immediately and without being required to call upon the victims to bring a civil liability action against the State, the same advantages as those enjoyed by persons within the favoured category.(...)'

[51] Like, for example, in the present case, leaving aside the discriminatory exception within Art. 622, 2 BGB ('In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account') means that the basic national rule of taking into account all years of service applies (exclusion effect).

[52] *See also* Craig, *supra* n. 35, at p. 373-374.

[53] ECJ 14 Jan. 2010, Case C-226/08.

[54] *Palacios de la Villa*, *see supra* n. 5.

These characteristics therefore make it rather difficult to fulfil the conditions of being clear, precise and predictable. Even assuming that the existence of a prohibition of discrimination based on age by now is or must be clear,[55] it is doubtful whether the practical consequences of the prohibition are sufficiently precise and predictable. In particular with regard to age discrimination it is difficult to predict whether a national rule of law is compatible or not with the principle. As we have seen, the application of the general principle amounts to a *de facto* application of Directive 2000/78. It turns out that member states enjoy a broad discretion not only with regard to the possible aims, but also in the definition of measures capable of achieving them.[56] Furthermore, the national legislation does not need to be very precise in order to be justifiable.[57] Finally, in order to identify the underlying aim of a national measure and in order to establish whether the means put in place to achieve that aim are appropriate and necessary, the general context of the measure concerned can be taken into account.[58]

So, a complex assessment is required. It will be difficult for private parties to estimate whether or not it is safe to rely on a national measure. It is obvious that the Court does not consider these uncertainties as an obstacle. It did not even address them. This is unfortunate because this makes it difficult to assess whether there are limitations to the horizontal applicability of a court-made general principle and if so, what these limitations are.

Final remarks

From the foregoing it follows that the approach of the Court is far-reaching and daring. As a result a considerable impulse is given to the European Union fundamental rights protection. It would seem that anything that strengthens the enforcement of fundamental rights is something positive. However, the arguments above show that this is not necessarily the case. From a point of view of institutional balance and legal certainty the approach taken is disputable. Moreover, the lack of a sound reasoning with regard to the recognition and horizontal effect of the court-made principle is disappointing. It certainly does not promote the legitimacy of the approach and it creates legal uncertainty.[59]

[55] Because today we do have *Mangold*, *Küçükdeveci* and Art. 21 of the Charter.

[56] *Palacios de la Villa*, *see supra* n. 9, para. 68.

[57] Ibid., para. 56. *Age Concern, see supra* n. 9, para. 44.

[58] *Palacios de la Villa*, *see supra* n. 9, para. 57.

[59] *See also* M. Herdegem: '(…) the legitimacy of the European Court of Justice's jurisprudence depends on a transparent methodological approach in developing and applying general principles of law and a judicial process (…)'. M. Herdegem, 'The Origins and Development of the General Principles of Community Law', in U. Berntiz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer Law International 1999), p. 3 at p. 1.