Case Note

Dominguez: A Deafening Silence

Court of Justice of the European Union (Grand Chamber)

Judgment of 24 January 2012, Case C-282/10, *Maribel Dominguez* v. *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*

Mirjam de Mol*

Introduction

Since *Kücükdeveci* it is clear that *Mangold* is not an exceptional case, but the start of a novel approach towards the application of Union fundamental rights in disputes between private parties.[1] At the same time many questions are still open with regard to the exact implications of the approach: Does *Mangold/Kücükdeveci* only apply to the principle of non-discrimination or also to other fundamental rights? Does it only apply to general principles of Union law or also to the Charter of Fundamental Rights of the European Union (hereinafter: Charter)? What are the exact formal conditions for the application of *Mangold/Kücükdeveci*?

Dominguez appeared to be a case that would shed light on the *Mangold/Kücükdeveci*-approach. The central constitutional question on which the Court of Justice of the European Union (hereinafter: Court of Justice) had the opportunity to rule in this preliminary ruling case is that of the horizontal direct effect of the Union right to paid annual leave, laid down in Article 31(2) of the Charter.[2]

* Maastricht University. I am grateful to Bruno de Witte and the editors of EuConst for their useful comments. All errors remain mine of course. Comments are welcome at mirjam.demol@maastrichtuniversity.nl.

[1] ECJ 19 Jan. 2010, Case C-555/07, *Kücükdeveci*. ECJ 22 Nov. 2005, Case C-144/04, *Mangold*. The *Mangold/Kücükdeveci-* approach will be described more in detail in the commentary below.

[2] According to Art. 31(2) of the Charter: '2. Every worker has the right to (…) an annual period of paid leave.' This right is also laid down in Art. 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* [2003] L 299/9: 'Annual leave – 1. member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance

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Horizontal direct effect means here that the right to paid leave can apply as an autonomous ground for review before a national court in a dispute between private parties.[3] This definition of direct effect includes two kinds of review. The difference concerns the object of review. Direct effect can firstly concern the direct review of private acts (*horizontal substitution effect*).[4] The effect of this kind of review is that the right to paid annual leave becomes a substitute for national (private) law by directly creating obligations, regulating private legal relationships, or by modifying or extinguishing such obligations.[5] The second form of direct effect involves the review of national public acts that regulate private legal relationships (*horizontal exclusionary effect*).[6] The effect of non-compliance with Union law is the setting aside (exclusion) of national law provisions.[7] The case of *Dominguez* concerns the review of national legislation and therefore qualifies as a horizontal exclusionary effect case.[8]

The traditional – and pre-*Mangold* – line of reasoning would be to deny horizontal direct effect, because Directive 2003/88 applies and directives are not apt of having horizontal direct effect.[9] However, the Commission took the position that the (controversial) approach developed by the Court of Justice in the *Mangold/Kücükdeveci* cases, recognizing a horizontal (exclusionary) direct effect to a fundamental right, should apply *mutatis mutandis* and proposed to grant the right to

with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

[3] On this definition of direct effect *see also* De Witte, 'Direct effect, supremacy, and the nature of the legal order', in P. Graig and G. de Búrca, *The Evolution of EC Law*, 2nd edn. (Oxford University Press, Oxford 2011) p. 329-333; S. Prechal, *Directives in EC Law* (2 edn., Oxford University Press, Oxford 2005) p. 226-270. The use of EU law as an autonomous ground for review can be contrasted with the use of EU law as tool of interpretation of legislation (indirect effect).

[4] One example could be a contractual clause reviewed for its consistency with the Union right to paid annual leave.

[5] *See* Hartkamp, 'The General Principles of EU Law and Private Law', 75(2) *RabelsZ* (2011) p. 241-259, at p. 249.

[6] One example would be a case in which the validity of a contractual clause depends on compliance of national private law with the Union right to paid annual leave.

[7] Some EU lawyers argue that horizontal exclusion effect of EU law should not be considered as direct effect, but as an expression of the principle of primacy. *See* e.g., Lenaerts and Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31(3) *European Law Review* (2006) p. 287-315. *See* for a useful overview between the two visions on the concept of horizontal direct effect: Muir, 'Of Ages in – and Edges of – EU Law', 48(1) *CMLR* (2011) p. 42-47. *See also* Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47(6) *CMLRev* (2010) p. 1640-1644.

[8] *Mangold* and *Kücükdevec*i are also horizontal exclusionary effect cases.

[9] ECJ 8 Feb. 1996, Case 152/84, *Marshall*, para. 48; EJC 14 July 1994, Case C-91/92, *Faccini Dori*, para. 20.

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paid annual leave horizontal direct effect.[10] The case was referred to the Grand Chamber and the parties were asked to focus their pleadings on the issue of horizontal direct effect and Article 31(2) of the Charter.[11] All participating member states pleaded against the applicability of the *Mangold*/*Kücükdeveci*–approach and so did the Advocate-General.[12] She also stated that the *Dominguez* case gives the Court of Justice an opportunity to examine this approach in doctrinal terms and, if necessary, to refine it.[13] Besides that, other interesting sub-questions were raised during the hearing and in the opinion of the Advocate-General, such as the qualification of Article 31(2) of the Charter as a general principle and the distinction between Charter 'rights' and Charter 'principles'. However the Court of Justice in *Dominguez* left all options open. It opted for the traditional 'no-horizontal-direct-effect-of–directives' line without giving any further explanation. The silence regarding *Mangold*/*Kücükdeveci* and the Charter is deafening.

Facts and national context

The case concerned a dispute before the French *Cour de Cassation* (hereinafter: the referring court) between Ms Dominguez and her employer, the *Centre informatique du Centre Ouest Atlantique*, concerning Ms Dominguez's claim for entitlement to paid annual leave. Following an accident on the journey between her home and her place of work, Ms Dominguez was absent from work during more than 14 months between 3 November 2005 and 7 January 2007. Ms Dominguez brought a claim before the court for 22.5 days' paid leave in respect of that period and, in the alternative, a payment in lieu of leave. According to the national legislation at issue (*Code du travail* (Labour Code)) the entitlement to paid annual leave was made conditional on a minimum period of ten days' or one month's actual work during the reference period. Ms Dominguez did not fulfil this requirement.

The referring court expressed doubts as to whether the relevant French provisions are compatible with Article 7 of Directive 2003/88. Furthermore, it had doubts about the consequences to be drawn in case of incompatibility in a dispute between private parties.

[10] Written observations Commission 21 Sept. 2010, p. 14 and 18: 'Il incombe au juge national d'assurer dans le cadre de ses compétences la protection juridique découlant pour les justiciables du droit de l'Union et de garantir le plein effet de celui-ci en laissant au besoin inappliquée la disposition de la réglementation nationale contraire à ce principe.'

[11] Convocation Court of Justice 29 March 2011, 870402.28 FR, annexe 'Question pour réponse lors de l'audience – concentration des plaidoiries': 'Les parties à l'audience sont priées de concentrer leurs plaidoiries sur la deuxième question en évoquant, dans ce cadre, l'article 31 de la Charte des droits fondamentaux de l'Union européenne.'

[12] A-G Trstenjak 8 Sept. 2011, Case C-282/10, *Dominguez.*

[13] A-G Trstenjak, *Dominguez,* para. 4.

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First element of the judgment of the Court of Justice: Compatibility of national legislation with Directive 2003/88 (first and third question)

First question

By its first question, the national court asked whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period. The Court of Justice answers in the affirmative. It first recalls its jurisprudence according to which the entitlement of every worker to paid annual leave must be regarded as a 'particularly important principle of European Union social law' from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directives 93/104[14] and 2003/88. It therefore considers that the member states cannot unilaterally limit the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

In this context, the Court of Justice distinguishes between, on the one hand, the exercise and implementation of the right to paid annual leave and, on the other hand, the very existence of that right. The member states are allowed to lay down conditions for the exercise and implementation of the right to paid annual leave, but they are not entitled to make the very existence of that right subject to any preconditions whatsoever. It is not allowed to exclude the very existence of a right expressly granted to all workers. In this regard the Court of Justice refers to *BECTU* and *Schulz-Hoff*.[15] Furthermore the Court of Justice points out that the fact that Directive 2003/88 does not make any distinction between workers who are absent from work on sick leave during the reference period and those who have in fact worked in the course of that period. It therefore concludes that workers on sick leave which has been duly granted, have the right to paid annual leave and that that right cannot be made subject by a member state to a condition that the worker has actually worked during the reference period laid down by that state.

[14] Council Directive 93/104/EC of 23 Nov. 1993 concerning certain aspects of the organization of working time, *OJ* [1993] L 307/18.

[15] ECJ 26 June 2001, Case C-173/99, *BECTU;* ECJ 20 Jan. 2009, Joined Cases C-350/06 and C-520/06, *Schultz-Hoff and Others*.

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Third question

By its third question, the national court asked, essentially, whether Article 7 of Directive 2003/88 must be interpreted as precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive. The Court of Justice rules that this kind of legislation is compatible with the Directive. It first stresses that according to Directive 2003/88, every worker is entitled to at least four weeks' paid annual leave regardless of the grounds of the reason for the worker's absence on sick leave, duly granted. However the purpose of the directive is merely to lay down minimum requirements. It therefore does not preclude national provisions giving entitlement to more than four weeks' paid annual leave, granted under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by that national law. Thus it is permissible for member states to provide that entitlement to paid annual leave under national law may vary according to the reason for the worker's absence on health grounds, provided that the entitlement is always equal to or exceeds the minimum period of four weeks laid down in Article 7 of that Directive.

Second element of the judgment of the Court of Justice: Obligation of the national court to disregard incompatbible legislation in a horizontal dispute (second question)

By its second question, the national court asked, essentially, whether Article 7 of Directive 2003/88 must be interpreted as meaning that in proceedings between individuals a national provision which makes entitlement to paid annual leave conditional on a minimum period of actual work during the reference period, which is contrary to Article 7, must be disregarded. The Court of Justice answers that the national court in such circumstances is not obliged to set aside the national provision. It recalls its jurisprudence according to which directives cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.[16] Even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. At the same time the Court of Justice emphasises the other tools of the national court to render effective Ms Dominguez' right to paid annual leave.

[16] *Faccini Dori*, *supra* n. 9, para. 20; ECJ 7 March 1996, Case C-192/94, *El Corte Inglés*, para. 15; ECJ 5 Oct. 2004, Joined Cases C-397/01-C-403/01, *Pfeiffer*, para. 108; and *Kücükdeveci*, *supra* n. 1, para. 46.

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Duty of conform interpretation

First of all, the Court of Justice points to the obligation to interpret national law in conformity with European Union law.[17] When national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. It recalls that the duty of conform interpretation also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.[18] Even though the referring court had stated that conform interpretation was not possible, the Court of Justice insists it is by suggesting concrete possible solutions.

Vertical direct effect and legal nature of the respondents

Secondly, if such interpretation would not be possible, the Court of Justice points at the possibility of qualifying the employer, the *Centre informatique du Centre Ouest Atlantique*, as a state body. The Court of Justice notes that the *Centre* is a body operating in the field of social security. It recalls that a person is able to rely on a directive against the state regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with European Union law.[19]

Therefore, if the Centre is a state body, the national court would have to disregard any conflicting national provision, as Article 7(1) of Directive 2003/88 has direct effect. It fulfils the conditions required to produce a direct effect, as it imposes on member states, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave. The fact that Article 7 of Directive 2003/88 leaves the member states a degree of latitude when they adopt the conditions for entitlement to, and granting of, the paid annual leave which it provides for, that does not alter the precise and unconditional nature of the obligation laid down in that article. This is especially so since the Directive does not allow derogations from Article 7 of

[17] *Pfeiffer*, *supra* n. 17, para. 114; ECJ 23 April 2009, Joined Cases C-378/07 to C-380/07, *Angelidaki*, paras. 197 and 198; and *Kücükdeveci*, *supra* n. 1, para. 48.

[18] ECJ 4 July 2006, Case C-212/04, *Adeneler*, para. 111, and *Angelidaki*, *supra* n. 17, para. 200.

[19] *Marshall*, *supra* n. 9, para. 49; ECJ 2 July 1990, Case C-188/89, *Foster*, para.17; and ECJ 14 Sept. 2000, Case C-343/98, *Collino and Chiappero*, para. 22.

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Directive 2003/88. It is therefore possible to determine the minimum protection which must be provided in any event by the member states pursuant to Article 7.

State responsibility

Finally, if consistent interpretation would not be possible and if the *Centre* would turn out to be a private party, then the Directive cannot apply in the proceedings. In such a situation, the party injured as a result of domestic law not being in conformity with European Union law can nonetheless rely on the *Francovich* ruling in order to obtain, if appropriate, compensation for the loss sustained.[20]

Opinion Advocate-General

The Court of Justice followed the Advocate-General with regard to the compatibility of the national legislation with Directive 2003/88 (first and third question). The ruling of the Court of Justice and the opinion of the Advocate-General also have in common that a duty of the national court to disregard the incompatible legislation in a horizontal dispute (second question) is rejected. However, whereas the Court of Justice pussyfoots around the central constitutional questions, the Advocate-General provides for an extensive analysis that is worth reading. The line of argumentation of the Advocate-General can be summarized as follows.

Second question: obligation of national court to disregard the incompatible national legislation at issue in a case between private individuals

According to the Advocate-General, the national court hearing proceedings between individuals is not obliged to disregard a national provision which makes entitlement to paid annual leave conditional on at least 10 days' actual work during the reference year. She unfolds the following line of argumentation.

i) No horizontal direct effect of the Directive[21]
According to the case-law of the Court of Justice even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. According to the Advocate-General this case-law should be followed. In addition to that, she states that a distinction between positive and negative direct effects of directives[22] variously put forward in relation to horizontal situations must be re-

[20] ECJ 19 Nov. 1991, Joined Cases C-6/90 and C-9/90, *Francovich*.

[21] Paras. 61-68.

[22] In this contribution defined as 'horizontal substitution effect' and 'horizontal exclusionary effect'.

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jected, since this would be detrimental to the principle of legal certainty. It therefore follows that the claimant in the main proceedings could not rely on Article 7(1) of Directive 2003/88 in order to require the referring court to disregard the national legislation contravening EU law.[23]

ii) No direct application of the fundamental right in Article 31(2) of the Charter[24]

According to the Advocate-General the referring court cannot rely on Article 31(2) of the Charter to decline, in a dispute between private individuals, to apply national legislation in breach of EU law that is not open to interpretation in conformity with the directive. The reason for this is the lack of horizontal effect of the Charter. The Advocate-General points to Articles 51 and 52(1) of the Charter. Under the first sentence of Article 51(1), the Charter only applies to 'the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law'. Article 52(2) also provides that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. In her view, these provisions indicate an intentional restriction of the parties to whom fundamental rights are addressed, which again sheds light on the mode of protection of fundamental rights sought by the legislature of the European Union. She also points at the fact that the function of Article 31(2) of the Charter, according to its regulatory purpose, amounts to nothing more than the establishment of a duty of protection on the European Union and the member states. She also notes that according to Articles 52(3) and 53 of the Charter, the level of protection of fundamental rights guaranteed in the Charter must not lag behind the minimum standards in the ECHR. In her opinion, the denial of horizontal effect of the Charter would not amount to such a diminishment of the level of protection.

iii) No direct applicability of a general legal principle[25]

The Advocate-General estimates that there are several arguments in favour of granting entitlement to annual leave the status of a general principle within the legal system of the European Union. However, the referring court cannot, in a dispute between private individuals, use a general principle as a basis for disregarding national law in breach of EU law. She considers that in light of the case-law, the direct application of fundamental rights in the form of general principles in

[23] Other than the Court of Justice, in her opinion there is absolutely no doubt that the main proceedings are being brought between private individuals.

[24] Paras. 71-88.

[25] Paras. 89-143.

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relationships between private individuals cannot be ruled out in principle.[26] Horizontal direct effect should in this case nevertheless be denied. Her main argument is the requirement of coherent protection of fundamental rights. This requirement demands that where a parallel application of fundamental rights under the Charter and general principles within the Union legal system is to be assumed, both fundamental rights should be interpreted, as far as possible, in a coordinated fashion. There must be no substantive inconsistency between the two categories of fundamental rights. So, where a Charter provision does not have horizontal direct effect, the equivalent court-made general principle of law (the same fundamental right or fundamental rights with the same scope of protection) should not have such effect either.

iv) No application of the general principle, as given specific expression in Directive 2003/88[27] (Kücükdeveci-approach)

The Advocate-General admits that from the formal aspect, the requirements for a direct application of entitlement to annual leave in the form of a general principle, as given specific expression in Directive 2003/88, are satisfied. However, direct application of the entitlement to annual leave in the form of a general principle, as given specific expression in Directive 2003/88, such as in the *Kücükdeveci* case, so as to supersede national law that is in breach of EU law, would not be possible in the main proceedings here. She expresses several reservations regarding the theoretical accuracy of this approach.

Her first reservation concerns the risk of an improper mixture of sources of law having different status within the Union legal system as a result of the combined application of a general principle and a directive. The approach implies that the Directive serves as a starting point for ascertaining the scope of protection of the general principle of law. Doctrinally this is incorrect. It should be the other way around. The first step should be an autonomous determination of the content of the general principle. The result of this turned-round approach is that a directive could develop into an inexhaustible source of inspiration for the enhancement of the scope of protection of a general principle. In the long run this would lead to an amalgamation of sources of law with different statuses. Ultimately this mode of procedure would lead to irreversible 'ossification' of the legislative content of a directive. As a result of incorporating more and more legislative content from a directive within the scope of protection of a general principle, the legislature would be deprived of the ability to make amendments to the directive, especially as such legislative content would then be elevated to the status of primary law, upon which it cannot impinge.

[26] The A-G refers to *Defrenne*, *Walrave and Koch*, *Angonese* and *Kücükdeveci*.
[27] Paras. 144-170.

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The Advocate-General secondly notes that Directive 2003/88 does not give sufficient specific expression to the general principle to enable it to apply directly in a relationship between private individuals. She points to a significant difference compared to the prohibitions on discrimination, for which the approach applied in *Kücükdeveci* was developed. The distinctive feature of prohibitions on discrimination is that their substantive core is essentially identical at both primary and secondary-law levels. It is also possible to ascertain what discrimination is by interpreting prohibitions on discrimination under primary law. The rules in directives in this respect are no more than detailed formulations of primary-law principles. The situation with regard to employees' fundamental rights under Article 27 et seq. of the Charter is different as they are designed to be given specific expression by the legislature from the start. She also notes that Directive 2003/88 does not conclusively regulate annual leave but makes considerable reference to national law.

Thirdly, the Advocate-General points to problems of legal certainty for private individuals. It will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law. From this point of view, there would be uncertainty as to the application of national law similar to where a directive is directly applied in a relationship between private individuals. This would have serious consequences, in particular in the field of employment law where the details of an almost immeasurable number of employment relationships are regulated. It is doubtful whether this is in conformity with the legislative and judicial system established by the Treaties.

Finally she notes that her objection raised in connection with the direct application of general principles as regards the risk of an inconsistency with Article 51 of the Charter applies *mutatis mutandis* in the event of recourse to this approach. The limit established in the first sentence of Article 51(1) of the Charter on the parties to whom fundamental rights are addressed (the Charter just applies to 'the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law') therefore also precludes the application of the general principle, as given specific expression in Directive 2003/88.

Commentary

This commentary will focus on two constitutional issues: the dynamics of preliminary ruling procedures and the question of horizontal direct effect.

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Dynamics of preliminary ruling procedures

The reasoning and ruling of the second question provides for an interesting example of how preliminary ruling proceedings can develop. When reading the starting point of the procedure (the reference for a preliminary ruling)[28] together with the ruling of the Court of Justice, *Dominguez* appears to be a traditional case on the horizontality of *directives*. For both the preliminary reference of the national court and the ruling of the Court of Justice only refer to the Directive and to classic jurisprudence with regard to the legal effects of directives in a horizontal setting. Article 31(2) of the Charter is not mentioned as part of the legal context and no reference is made to the novel approach of *Mangold/Kücükdeveci* as defined more in detail below. In addition to that, the heading of the Court of Justice ruling mentions that the case concerns 'national rules incompatible with *Directive 2003/88* – Role of the national court (italicisation by author)'. The circle seems to be round; the national court asks and the Court of Justice answers.

However, a closer look at the whole course of the preliminary procedure in *Dominguez* does not convey a round circle, but the Court of Justice circling around. In between the reference for a preliminary ruling and the Court's ruling, the discussion centres on *Mangold/Kücükdeveci* and the horizontal direct effect of the Charter. It is the Commission that brings the *Mangold/Kücükdeveci* 'solution' in the procedure. It does so in resolute wordings; it states that there is no reason not to apply this jurisprudence *mutatis mutandis*.[29] Meanwhile it does not take position in any of the tricky underlying questions. Particularly remarkable in this regard is that the Commission neither qualifies the right to paid annual leave as a general principle of Union law nor does it explicitly mention Article 31(2) of the Charter as part of the legal context. It only refers to this Charter provision in a footnote without taking position as to whether it applies.[30] The Commission is also silent upon the question of horizontal direct effect of the Charter.

The next step is taken by the Court of Justice itself. The convocation and report of the hearing seems to be the kick-off for a fundamental constitutional ruling. For the case was referred to the Grand Chamber. Furthermore Article 31(2) of the Charter is launched as part of the procedure: the parties are asked to focus their pleadings on the issue of horizontal direct effect in conjunction with Article 31(2)

[28] Reference for a preliminary ruling from the *Cour de cassation* (France) of 2 June 2010 lodged on 7 June 2010. The Dutch version can be found on <www.minbuza.nl/ecer>.

[29] Para. 54, p. 14, written observations Commission.

[30] Note 3 (p. 5) of the written observations of the Commission: 'À compter du 1er décembre 2009 (date de l'entrée en vigueur du TFUE), la Charte des droits fondamentaux de TUE prévoit également, en son article 31, paragraphe 2, que "Tout travailleur a droit à une limitation de la durée maximale de travail et à des périodes de repos journalier et hebdomadaire, ainsi qu'à une période annuelle de congés payés" (…).'

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of the Charter, and the report of the hearing does mention Article 31(2) of the Charter as part of the legal context.[31] In addition to that, the heading of the report of the hearing mentions as subject matter the 'obligation pour la juridiction nationale d'écarter l'application de dispositions contraires au *droit de l'Union* (italicisation by author)'. So the case is taken to the level of horizontal direct effect of primary law instead of that of directives. Subsequently, the opinion of the Advocate-General does reflect the apparent fundamental nature of the case. She deals with issues such as the qualification of the right to paid annual leave as general principle of Union law, the horizontal direct effect of the Charter and an analysis of *Mangold/Kücükdeveci*. It can be concluded that with a view on the entire course of the preliminary procedure, the Court's ruling is an anti-climax in the sense that it does not deal with any of the pending constitutional questions.

The question of horizontal direct effect

The silence of the Court of Justice is most deafening with regard to its own *Mangold/Kücükdeveci* jurisprudence. In the light of the controversies on this jurisprudence, it is in itself positive that the Court shows judicial restraint by – silently – not applying it.[32] However it is a missed opportunity that it does not explain why the approach does not apply. In fact *Dominguez* does not convey anything on this issue and only permits the conclusion that the *Mangold/Kücükdeveci* approach does not apply *in this particular case*.

The question as to why the *Mangold/Kücükdeveci* approach does not apply remains guesswork. Since *Kücükdeveci* is a recent and deliberate confirmation of *Mangold*, it seems safe to assume that *Dominguez* should not be seen as an abolishment of the *Mangold/Kücükdeveci* approach as such. Probably *Mangold/Kücükdeveci* is still applicable case-law. So, there must be one or several reasons why the Court of Justice did not want to apply the approach in this case. Moreover, it seems also realistic to assume that there was no consensus amongst the members of the Grand Chamber on this 'why not'. If there had been a sound and convincing line of reasoning, it would have probably been mentioned in the judgment. This is especially so if one takes into account all the attention that the issue of the applicability of the *Mangold/Kücükdeveci* approach received during the proceedings

[31] Para. 2 Rapport d'audience.

[32] *See* for a more extensive analysis and further references M. de Mol, 'The Novel Approach of the Court of Justice on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?', 18 *Maastricht Journal of European and Comparative Law* (MJ) 1-2 (2011) p. 109-135; M. de Mol, '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 Jan. 2010, Case C-555/07, *Seda Kücükdeveci* v. *Swedex GmbH*', *EuConst* (2010) p. 293-308.

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and in the opinion of the Advocate-General. The absence of a reference to Article 31(2) of the Charter is also revealing. Not only because the report of the hearing does mention this provision, but also because other rulings on the right to paid annual leave do mention this Charter provision.[33] This commentary can therefore only discuss possible explanations. Before doing so, the *Mangold/Kücükdeveci* approach will shortly be explained and applied to *Dominguez*.

Horizontal direct effect by virtue of the Mangold/Kücükdeveci approach

The *Mangold/Kücükdeveci* approach can best be outlined on the basis of the *Kücükdeveci* case, since this case is a clarification of the *Mangold* case.[34] *Kücükdeveci* concerned a German dispute between an employee and a private employer regarding the period of notice for dismissal. This period had been calculated on the basis of the length of service of the employee. However, in accordance with German law, no account was taken of periods of employment prior to the completion of the employee's 25th year. First of all, the Court of Justice established that the basis of examination was 'the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78'.[35] It ruled that 'the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC (…) must be interpreted as precluding national legislation, such as that at issue in the main proceedings'. The Court of Justice confirmed the case law prohibiting the horizontal direct effect of directives, but did not consider this as an obstacle to oblige the national judge to set aside the relevant national legislation:

> 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 (…). In those circumstances it is 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, (…) 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.[36]

[33] ECJ 15 Sept. 2011, Case 155/10, *Williams*, para. 18; ECJ 22 Nov. 2011, case C-214/10, *KHS*, para. 31; ECJ 3 May 2012, case C-337/10, *Neidel*, para. 40.

[34] *See also* A-G Trstenjak, *Dominguez*, para. 146: 'In doctrinal terms this approach constitutes a refining of the *Mangold* case-law.'

[35] *Kücükdeveci, supra* n. 1, para. 27.

[36] *Kücükdeveci, supra* n. 1, paras. 50-51.

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The prohibition of discrimination based on age was thus given horizontal direct effect, and more specifically horizontal exclusionary effect. Even though the *de facto* result was the horizontal direct effect of Directive 2000/78, it follows from the reasoning of the Court of Justice that it was the general principle of non-discrimination based on age that produced this effect.[37] The horizontal direct effect was deduced from 'the need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78' (hereinafter: effectiveness-rationale).[38]

One of the central questions in *Dominguez* was whether the *Mangold/Kücükdeveci* approach should also apply with regard to the right to an annual period of paid leave. This, for example, because the right to annual paid leave is a general principle of law or because the *Mangold/Kücükdeveci* approach applies also to fundamental rights laid down in the Charter. If so, the national court would be obliged to set aside the conflicting national provisions. The Court of Justice did not follow this road. It did not qualify the right to annual period of paid leave as a general principle of Union law and it did not refer to the Charter. It confined itself to an examination on the basis of Directive 2003/88.[39] The question of horizontal direct effect was thus solved on ground of the traditional 'no-horizontal-direct-effect of directives' rule of *Faccini Dori*.

Possible explanations for the non-applicability of the *Mangold/Kücükdeveci* approach

(1) Mangold/Kücükdeveci *only applies to the principle of non-discrimination*

A restrictive interpretation of *Mangold/Kücükdeveci* would be that it only applies to prohibitions of non-discrimination based on specific grounds and not to other fundamental rights. This interpretation could be an explanation for the *Dominguez* denial of horizontal direct effect of the right to paid annual leave. A reason for this special treatment might be that the horizontality of non-discrimination is more common within the Union legal order. In the pre-*Mangold/Kücükdeveci* era, the Court of Justice had already recognized the horizontal direct effect of certain Treaty provisions expressing the principle of non-discrimination.

[37] *Kücükdeveci, supra* n. 1, paras. 50-51 and 56.

[38] *Kücükdeveci, supra* n. 1, para. 53.

[39] Like said before it is remarkable that Art. 32(2) of the Charter is not mentioned, since in other cases on the right to paid annual leave the Court of Justice does mention this provision, *Williams, KHS* and *Neidel supra* n. 33.

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Firstly, it had recognised the 'full (or unconditional) horizontal direct effect' of ex-Article 119 EC (now Article 157 TFEU)[40] and ex-Article 48 EC (now Article 45 TFEU)[41] in *Defrenne II*[42] and *Angonese.*[43] These non-discrimination clauses can be invoked against all types of discrimination falling within their scope of application, regardless of whether the discrimination at issue appears in a vertical or a horizontal setting. As a result, private parties are bound by these expressions of the principle of non-discrimination in the same situations as public parties. Secondly, the Court of Justice had recognized a 'limited horizontal direct effect' with regard to the general prohibition against discrimination based on nationality (Article 18 TFEU) in *Walrave and Koch* and *Ferlini*.[44] This horizontal direct effect is confined to situations in which the discriminating party has the power to influence the exercise of free movement rights.

Arguably the *Kücükdeveci* approach must be placed in this line of jurisprudence. There are, however, also strong arguments for considering the approach in *Mangold/Kücükdeveci* as novel with respect to the earlier case law on the horizontal direct effect of the principle of non-discrimination.[45] The horizontal direct effect of Article 18 TFEU (*Walrave and Koch* and *Ferlini*) differs, because it is related to the power of the discriminating party to influence the exercise of free movement rights. The parallel with cases *Defrenne II* and *Angonese* seems more plausible, as these cases, like *Mangold* and *Kücükdeveci,* also concern full (unconditional) horizontal direct effect. However there is an important difference between on the one hand *Mangold* and *Kücükdeveci* and on the other hand *Defrenne II* and *Angonese.* These latter cases concerned the full horizontal direct effect of non-discrimination clauses with only specific fields of application (employment conditions and pay respectively), while horizontal direct effect of the general principle of non-discrimination based on age applies across the entire scope of Union law.[46] Moreover, the effectiveness rationale of *Mangold/Kücükdeveci* is novel. This rationale might also apply to other general principles of law or other fundamental rights.

[40] The principle of equal pay for male and female workers for equal work or work of equal value.

[41] The principle of non-discrimination based on nationality between workers as regards employment, remuneration and other conditions of work and employment.

[42] Case 43/75 *Defrenne II* [1976] *ECR* 455, para. 39.

[43] Case C-218/98 *Angonese* [2002] *ECR* I-04139, para. 36.

[44] Case 36/74 *Walrave and Koch* [1974] *ECR* 01405, paras. 16 and 18 and Case C-411/98 *Ferlini* [2000] *ECR* I-08081, para. 50.

[45] Compare A-G Trstenjak, *Dominguez*: she notes in para. 125: 'in this context that the Court has taken its own individual approach' (in the original language German: 'innovativen Charakters'). *See* for a more extensive analysis of the novel features of the *Mangold/Kücükdeveci*-approach: De Mol 2011, *supra* n. 32, p. 113-121.

[46] *Kücükdeveci*, *supra* n. 1, paras. 23 and 53 explicitly refer to the entire scope of Union law.

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(2) Mangold/Kücükdeveci *only applies to fundamental rights that are general principles (no horizontal direct effect of the Charter)*

So far, the Court of Justice has not qualified the entitlement to paid annual leave as a general principle of Union law, but only as a 'particularly important principle of European Union social law'.[47] Because the qualification of the entitlement to paid annual leave as a general principle of Union law has been a prominent subject of discussion during the proceedings,[48] it seems likely that the Court of Justice deliberately did not upgrade this 'particularly important principle of European Union social law' to the status of a general principle of Union law. The question might be whether this principle is general (broad, comprehensive) enough to qualify as a general principle of law. For it has a specific nature and it is limited to a specific area of law, employment law. On the other hand, there are other general principles of law that do not apply to the legal system as a whole, such as the principles of *ne bis in idem* and of *pacta sunt servanda*. These general principles of law, however, still seem more general than the entitlement of an employee to periodic rest time.[49]

Presuming that the right to paid annual leave is not a general principle of Union law, the question of horizontal direct effect of this right boils down to the question of whether the provisions of the Charter are capable of having such effect. As the Advocate-General rightly points out, Article 51 seems to exclude the horizontal direct effect of the Charter.[50] The Charter is explicitly only declared to be binding upon the Union public authorities and the member states, and not upon private individuals.[51] Article 52(1) of the Charter seems to confirm this presumption. According to this provision:

> limitations on the exercise of the rights and freedoms recognised by the Charter must be provided for by law

[47] *Dominguez*, para. 16. *See also* in the more recent case *Neidel*, *supra* n. 33, para. 40 in which the right to paid annual leave is again qualified as a principle of European Union social law.

[48] Both the French and Dutch government took the position that the entitlement to paid annual leave does not qualify as a general principle of law; A-G Trstenjak, *Dominguez,* paras. 30 and 33.

[49] But *see* A-G Trstenjak, *Dominguez*, paras. 99-114. She concludes that there are several arguments in favour of granting entitlement to annual leave the status of a general principle within the legal system of the European Union.

[50] A-G Trstenjak, *Dominguez*, para. 80. In her view, Art. 51 indicates an intentional restricting of the parties to whom fundamental rights are addressed, which again sheds light on the mode of protection of fundamental rights sought by the legislature of the European Union.

[51] Art. 51 entitled 'Field of application' does not mention private individuals. In fact the same reasoning for denying horizontal direct effect to directives could apply. *See Marshall*, *supra* n. 9, para. 48; *Faccini Dori*, *supra* n. 9, para. 22; ECJ 7 Jan. 2004, Case 201/02, *Wells*, para. 56. *See also* De Mol, *supra* n. 32, p. 301 and 302.

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This provision is clearly also only directed at the European Union and its member states and not to private individuals.[52]

Possibly *Dominguez* confirms the lack of horizontal direct effect of the Charter as such and the assumption that the *Mangold/Kücükdeveci* approach only applies to (certain) general principles. This would be positive with a view on the principle of allocation of powers. As the Charter, according to its Article 51, explicitly only applies to public parties and not to private parties.

However, at the same time, a two-track approach regarding the horizontal direct effect of Union fundamental rights according to the source (general principles or Charter) seems unwelcome from the perspective of coherence of the system of the Union system of fundamental rights protection.[53] Moreover, the result would still be that a great part of the Charter provisions would *de facto* be apt of having horizontal direct effect, namely all provisions that must be qualified as general principle of law.[54] In any case it is not possible to draw definite conclusions on this issue, because there can be other reasons for the denial of horizontal direct effect.

(3) Mangold/Kücükdeveci *can apply to the Charter, but the Charter does not apply* ratione temporis

Ms Dominguez's claim for entitlement to paid annual leave is related to a period of absence from work from 3 November 2005 until 7 January 2007. The Charter only became binding with the entry into force of the Treaty of Lisbon, 1 December 2009. So arguably the Charter does not apply *ratione temporis*, or at least not directly, as an autonomous ground for review.[55] It must be noted that in *Kücükdeveci* the dismissal also dated from before 1 December 2009, namely from 19 December 2006. However in that case the source of the prohibition of discrimination based on age was not the Charter, but the general principles of Union law. Presumably, the Court of Justice found that at that time there already existed a general principle of non-discrimination based on age.[56] For in that case, the Court

[52] A-G Trstenjak, *Dominguez*, para. 83

[53] *See* A-G Trstenjak, *Dominguez*, paras. 127-132. It must be noted that the principle of non-discrimination based on age is also laid down in Art. 21 of the Charter.

[54] E.g., probably all Charter provisions that correspond to rights guaranteed by the ECHR (*see* Explanations to Art. 52(3) Charter).

[55] Compare A-G Trstenjak, *Dominguez,* para. 73. She notes that no objection can be raised to enlisting the Charter as an aid to interpretation.

[56] *See* for the scope *ratione temporis* of the general principle of non-discrimination based on age: A-G Sharpston 22 May 2008, Case C-427/06, *Bartsch*, paras. 42-65; *see Mangold* , *supra* n. 1, which concerned facts in the period between 1 July 2003 to 28 Feb. 2004.

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of Justice only dealt with the temporal scope of *Union law* as such, but not with the temporal scope of the *general principle* of non-discrimination based on age.[57]

This uncertainty regarding the applicability '*ratione temporis*' of the Charter, is one of the reasons why it is not possible to conclude that the horizontal direct effect of the Charter as such or of Article 31(2) of the Charter has been rejected in *Dominguez*.

(4) Mangold/Kücükdeveci *can apply to the Charter, but Article 31 of the Charter does not fulfil the technical requirements for direct effect*

Another possibility for the denial of 'horizontal direct effect' of Article 31 of the Charter could be that it does not fulfil the technical (formal) requirements of 'direct effect'.

This however seems unlikely. Even though this provision, in contrast with the Directive, does not define how long the period of annual leave should be, the provision does fulfil the usual conditions required to produce direct effect. It imposes, in unequivocal terms, a precise and unconditional obligation as to the result to be achieved, which gives every worker the right to an annual period of paid leave.[58] So with regard to *the existence* of the right to annual paid leave as such Article 31 of the Charter presumably is capable of having direct effect. It is precisely on this point that the national legislation at issue was found to be inadequate. For the precondition in the national legislation had the effect of not giving any annual period of paid leave at all.[59]

(5) Mangold/Kücükdeveci *can apply to the Charter, but Article 31 Charter is a Charter 'principle'*

It is also interesting to note that the Advocate-General investigates whether Article 31(2) of the Charter must be qualified as a Charter 'principle' or as a Charter 'right'.[60] Her arguments to qualify the provision as a Charter 'right' are convincing

[57] *Kücükdeveci*, *supra* n. 1, paras. 23-25.

[58] It must be noted that Art. 52(1) allows limitations on the exercise of the fundamental rights in the Charter. It is however unlikely that this possibility as such leads to the conclusion that Art. 31(2) Charter does not fulfil the formal requirements of direct effect. Otherwise none of the Charter provisions would be apt of having direct effect. Moreover the Court of Justice has already accepted the direct effect of fundamental rights that derive from the general principles of law, while these also contain limitation clauses. E.g., ECJ 26 June 1997, Case C-368/95, Familiapress (Art. 10 ECHR, freedom of expression). *See* for direct effect of the Charter, e.g., ECJ 22 Dec. 2010, Case C-279/09, *DEB*, paras. 33 and 45.

[59] It would be different if the case would not concern the *existence* of the right to paid annual leave but the *length of the period of* paid annual leave.
Dominguez, paras. 23-25.

[60] A-G Trstenjak, *Dominguez*, paras. 75-79. *Dominguez* had also been spotted by T. Von Danwitz as a case in which 'a question might arise to what extent Art. 31, paragraph 2 of the Charter

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and offer a bit more insight into the qualification of the Charter provisions as a 'principle' or as a 'right'. This insight must be welcomed, since the distinction between 'principles' and 'rights' is certainly not one of the most illuminating parts of the Charter.[61] In fact the concept of Charter 'principles' is neither defined nor does it offer many leads for the identification of principles.[62]

According to the Advocate-General the classification of Article 31(2) of the Charter as a 'right' is obvious. She considers that a significant feature of principles is that their application often requires implementing measures to be adopted. Article 31(2) of the Charter, in her view, clearly concerns a subjective right.[63] The Court of Justice does not deal with the qualification of Article 32(2) of the Charter as a 'right' or 'principle'.

It is anyway questionable whether the possible qualification of Article 31(2) as a Charter 'principle' would have influenced the non-applicability of the *Mangold/Kücükdeveci* approach. Article 52(5) Charter does not contain specific restrictions regarding the horizontality of Charter 'principles'.[64] So it does not cause further complications with regard to the question of 'horizontal' effect. It might do so with regard to the question of direct effect as such. According to Article 52(5) of

contains a right or a principle'; Answer of Von Danwitz on the questionnaire of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA) with regard to the Seminar on the Charter of Fundamental Rights of the European Union, The Hague, 24 Nov. 2011, p. 13. This report can be found on: <www.aca-europe.eu> (activities 2011, 4. Seminar on the Charter of Fundamental Rights of the European Union in The Hague on 24 Nov. 2011.)

[61] *See* general ACA-report, themes E and F, p. 8-14. This report can be found on: <www.aca-europe.eu> (activities 2011, 4. Seminar on the Charter of Fundamental Rights of the European Union in The Hague on 24 Nov. 2011.)

[62] The Explanations of the Charter to Art. 52(5) do mention that Arts. 25 (rights of the elderly), 26 (integration of persons with disabilities) and 37 (environmental protection) are 'principles'. For the rest the identification of Charter 'principles' can be difficult. E.g., they are not separately classified in the Charter. Some provisions of the Charter may even contain both elements of a right and of a principle (*see* Explanations to Art. 52(5) that mention Arts. 23 (equality between women and men), 33 (Family and professional life) and 34 (social security and social assistance) as examples). Sometimes it is possible to deduce from the Explanations of a specific provision that it is a 'principle' (e.g., Arts. 34(1), 35, 36, 37 and 38), but not always. Besides that one should be careful with drawing conclusions of the word 'right' in Charter provisions. This does not automatically mean that the provision at issue is a Charter 'right' (e.g., Arts. 25 and 26). Further reading on the qualification of Charter 'principles': M. Dougan, 'The Treaty of Lisbon 2007, Winning Minds, Not Hearts', 3 *Common Market Law Review* (2008) p. 663-664; General ACA-report, *supra* n. 61, theme E.10; M. de Mol et al., 'Inroepbaarheid in rechte van het Handvest van de Grondrechten van de Europese Unie: Toepassingsgebied en het onderscheid tussen "rechten" en "beginselen"' [Legal Invocability of the Charter of Fundamental Rights of the European Union: Area of Applicability and the Distinction between 'Rights' and 'Principles'], 6 *SEW* (2012, forthcoming) para. 3.2.

[63] A-G Trstenjak, *Dominguez*, paras. 76-78.

[64] Which is logical assuming that the Charter is not meant to have horizontal direct effect. *Supra* Explanation 2.

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the Charter, the qualification of a Charter provision as as a 'principle' influences the possibilities for judicial review.[65] However, this restriction seems not to cause particular obstacles in *Dominguez.*[66] Article 52(5) does not seem to exclude the kind of direct effect at stake in *Dominguez.* The provision clearly states that Charter 'principles' can serve as autonomous grounds for legality review. This is exactly the kind of review at stake in *Dominguez.*[67] Arguably, the possibility for this kind of review, according to Article 52(5) of the Charter, is only allowed with regard to acts that implement principles.[68] If this would indeed be the right interpretation of Article 52(5) of the Charter, it would not cause problems in *Dominguez.* The national legislation at issue does (via Directive 2003/88) implement Article 31 of the Charter.[69]

(6) Mangold/Kücükdeveci *can apply to the Charter, but (Article 7 of) Directive 2003/88 is not a mere expression of Article 31 Charter*

If we assume that *Mangold/Kücükdeveci* could in principle apply to other fundamental rights, there could be another possible explanation for the non-application of this approach in *Dominguez*. This explanation could be that the *Dominguez* relationship between the fundamental right (Article 31(2) of the Charter) and the Directive (Article 7 of Directive 2003/88) is not comparable to the *Mangold/Kücükdeveci* relationship between the fundamental right (the general principle of non-discrimination based on age) and the Directive (Articles 2 and 6 of Directive 2000/78). The preliminary question is whether the specific interplay between fundamental right and the applicable directive was constitutive for the *Mangold/*

[65] Art. 52(5): 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of member states when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

[66] *See* for possible interpretations of the restriction of the judicial review clause of Art. 52(5) of the Charter: ACA discussion paper II, from which the author was co-drafter. This discussion paper can be found on: <www.aca-europe.eu> (activities 2011, 4. Seminar on the Charter of Fundamental Rights of the European Union in The Hague on 24 Nov. 2011). *See also* De Mol et al., *supra* n. 62, para. 3.3.

[67] *See also* Court of Justice 24 April 2012, Case C-571/10, *Kamberaj*, para. 92. It seems to concern the direct effect of Art. 34(3) Charter that most probably is a Charter 'principle' (*see* explanation of Art. 52(5) in conjunction with explanation Art. 34).

[68] Support for this interpretation can be found in the final sentence of Art. 52, para. 5 of the Charter. That sentence says that the competence of the courts is limited to 'such acts', which is a reference to 'legislative and executive acts (…) of the Union, and by acts of member states when they are implementing Union law'.

[69] Actually it is the other way around. According to its Explanation Art. 31(2) is based on Directive 93/104/EC. Directive 2003/88 is a codification of Directive 93/104/EC (*Dominguez*, para. 16).

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Kücükdeveci horizontal direct effect. Possibly, it was not 'the principle of non-discrimination on grounds of age' as such that produced the horizontal direct effect in *Mangold/Kücükdeveci*, but 'the principle of non-discrimination on grounds of age as given expression in Directive 2000/78' that did so.[70] The rulings are not conclusive on this point.[71]

If the latter option would apply, one of the conditions for applying *Mangold/Kücükdeveci* could be that the fundamental right at issue is expressed in a directive (or specific provision of a directive) that applies to the facts of the case. Furthermore it should concern a directive (or specific provision of a directive) that *merely* gives expression to the fundamental right at issue. The question is whether these conditions are fulfilled with regard to Article 31(2) of the Charter and (Article 6 of) Directive 2003/88. In the case *KHS,* the Court of Justice considered that

> 31 The right to paid annual leave, as laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union and in Article 7 of Directive 2003/88, has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (…)[72]

It seems to follow that Article 31(2) of the Charter and Article 7 of Directive 2003/88 in essence contain the same right. They both lay down the right to paid annual leave.[73] However, at the same time Article 7 of Directive 2003/88 adds something to Article 31(2) of the Charter. It lays down that the right to paid annual leave consists of four weeks. This is a difference with Articles 2 and 6(1) of Directive 2000/78. They only express (or explain) what the principle of non-discrimination based on age means and do not add new elements.[74] So the different relationship between fundamental rights and the applicable directive at issue could serve as an explanation for the non-applicability of the *Mangold/Kücükdeveci* approach.

Nevertheless, if this explanation would apply, it would not help very much in understanding or welcoming the *Mangold/Kücükdeveci* approach. Why should this kind of differences matter? Especially in cases where the fundamental right at issue as such is technically apt of having direct effect, as is the case in *Dominguez*.[75] This

[70] *See Kücükdeveci*, *supra* n. 1, paras. 20 en 50.

[71] There are however strong arguments in support of the conclusion that it is the general principle as such that produces the horizontal direct effect. *See* De Mol (2011), *supra* n. 32, p. 112.

[72] ECJ 22 Nov. 2011, Case C-214/10, *KHS*.

[73] *See also* Explanation to Art. 31(2).

[74] *See also* A-G Trstenjak, *Dominguez*, para. 162.

[75] As explained above in this case it was not the duration of four weeks that was at issue but the very existence of the right at issue.

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approach would furthermore be unwelcome from a point of view of legal certainty. Private parties would have to analyse the exact relation between the fundamental right and the directive at issue.[76]

Final remarks

Dominguez conveys that the *Mangold/Kücükdeveci* approach raises many questions. There are (at least) six possible explanations as to why the approach did not apply in this case. Some of them are more likely or desirable than others. They all show that it will be very difficult, if not impossible, to shape the *Mangold/Kücükdeveci* approach in a convincing and solid manner.

Assuming that the *Mangold/Kücükdeveci* approach is still applicable case-law, in my opinion the best solution would be that it only applies to (i) *prohibitions* of discrimination (ii) based on the *specific* grounds mentioned in Article 21 of the Charter[77] and (iii) exclusively in fields in which the Union legislator has explicitly declared the prohibition at issue applicable in the private sector.[78] As a result all Union anti-discrimination directives that apply in the private sector would have *de facto* horizontal exclusionary effect. It would, however, not be possible to apply horizontally *e.g.* the prohibition of discrimination based on age in the field of housing.[79]

In addition to that, the Court of Justice should be careful with regard to horizontal substitution effect. I am not an advocate of a rejection on principle of that effect, because that will lead to a (novel) disconnection between the two versions of direct effect.[80] Nevertheless it must be noted that there is an essential difference between the two versions of direct effect in the context of applying the general principle of non-discrimination. This difference is related to the field of application of the principle; it only applies within the scope of Union law. Only measures that qualify as 'implementing' measures (à la *Wachauf*) or as measures that are based on Union derogations (à la *ERT)* can fall under the scope of Union law.[81] As said

[76] *See also* A-G Trstenjak, *Dominguez*, paras. 164-167.

[77] Sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

[78] However it must be noted that the wording of *Kücükdeveci* can be interpreted much broader; De Mol, s*upra* n. 32, p. 118-123 and 132-134.

[79] That prohibition is only expressed in the field of employment and occupation (Directive 2000/78).

[80] *See* for example the arguments of A-G Trstenjak, *Dominguez*, para. 63.

[81] ECJ 13 July 1989, Case 5/88, *Wachauf* and ECJ 18 June 1991, Case C-260/89, *ERT. See* for an extensive analysis and further references of the scope of application of general principles and the Charter: De Mol et al., *supra* n. 62, para. 2.

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in the introduction, exclusionary effect cases concern the review of *public* acts, whereas substitution effect cases involve the review of *private* acts. Consequently, in those cases, it is the private act that has to be brought under the scope of Union law. These acts will be less likely to qualify as 'implementing' measures or as measures that are based on Union derogations. Take for example *Kücükdeveci*.

The Court of Justice in *Kücükdeveci* applied the general principle of non-discrimination based on age with regard to the national legislation at issue. It could do so because the legislation at issue came within the temporal and material scope of Directive 2000/78. So it was the Directive that triggered the applicability of the general principle, even though the national legislation did not qualify as an implementation measure *stricto sensu*.[82] The underlying logic of this approach is a broad understanding of the obligation of the member states to implement the directive,[83] as the national legislation in *Kücükdeveci* in fact qualifies as a failure to implement the directive. Imagine that *Kücükdeveci* had been a substitution effect case in which the difference of treatment would have been purely based on a contractual clause. In that context, the Directive as such would not have been a sufficient connection with Union law to trigger the application of the general principle of non-discrimination. For the underlying (failure of) 'implementation' logic does not apply to private parties, since they are not obliged to implement or comply with Directives. So with regard to private acts there needs to be an additional factor that activates general principles of law. This could be for example the fact that the private party is involved with implementation.[84] Another example could be the fact that a private party relies on a Union derogation.[85] Consequently, Union anti-discrimination directives that apply in the private sector would only have *de facto* horizontal substitution effect in exceptional circumstances.

This proposed interpretation would not solve the deficits of the approach with regard to the principles of legal certainty and the allocation of powers, but it would mitigate the negative effects as much as possible.[86] *Dominguez* might be seen as a first step in the direction of a restrictive interpretation of *Mangold/Kücükdeveci*. For it seems not to apply to Article 31(2) of the Charter. However it is not possible to be conclusive. The judgment does not confirm that this provision applies

[82] *Kücükdeveci, supra* n. 1, paras. 23-25.

[83] *See also* Editorial comments, 47 (2010), p. 1593, footnote 26. *See* for a more extensive analysis of this method of bringing public acts under the scope of Union law: De Mol et al., *supra* n. 62, para. 2.4.

[84] *See* e.g., Art. 18 Directive 2000/78 that allows the member states to entrust the social partners with the implementation of collective agreement provisions of the Directive.

[85] That private parties can also rely on Union derogation results from the fact that private parties are bound by free movement provisions and thus also can invoke EU derogations. *See* ECJ 11 Dec. 2007, Case C-438/05, *Viking Line* and ECJ 18 Dec. 2007, C-341/05 *Laval*.

[86] *See* for an extensive analysis De Mol 2011, *supra* n. 32, p. 132-135.

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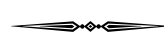
ratione temporis. Consequently it is only safe to say that the *Mangold/Kücükdeveci* approach did not apply in this particular case. This implies that for future cases the (non-)applicability remains casuistic. Instead of developing a doctrine, as the Advocate-General suggested, the Court of Justice opted for a puzzle. It might take some time before the *Mangold/Kücückdeveci* puzzle is complete.[87]



[87] The next pieces of the puzzle might follow in pending Cases C-317/11, *Reimann* (reference of German Landesarbeisgericht Berlin-Brandenburg on Art. 31 of the Charter) and C-176/12, *AMS* (reference of the French Cour de Cassation on Art. 27 of the Charter).

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