Developments

Case Note – Case C-555/07, *Kücükdeveci v. Swedex*, Judgment of the Court (Grand Chamber) of 19 January 2010

By Anja Wiesbrock[*]

A. Introduction

On 19 January 2010 the European Court of Justice (ECJ) was asked to rule on the application and scope of the general principle of non-discrimination under Community law. In *Kücükdeveci* the Court had the opportunity to clarify a number of questions concerning the principle of non-discrimination and the application of Directive 2000/78[1] that had remained unanswered after the famous *Mangold*[2] judgment and subsequent case law. The case was particularly apt to clarify the scope of *Mangold*, as it concerned a similar factual situation, albeit after the implementation period of Directive 2000/78 had expired. Consequently, many issues addressed in that judgment arose anew. The Court had to deal with the relationship between Directive 2000/78 and the general principle of non-discrimination on the grounds of age, the possibility of justifying differential treatment on the basis of national social and employment policies, the extent of the doctrine of indirect effect, and the direct horizontal effect of directives.

B. Factual and Legal Background

The case concerned a legal dispute between Ms. Kücükdeveci and her former employer Swedex regarding the calculation and duration of the period of notice applicable to her dismissal. Swedex employed Ms. Kücükdeveci for more than ten years, starting in June 1996 at the age of 18. In December 2006 she was dismissed with one month notice, instead of the four months that is generally obligatory for the dismissal of employees who have been in ten years of service. Swedex acted on the basis of Section 622(2), second indent of the German Civil Code (BGB), according to which periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period. In the proceedings before the national courts, Ms. Kücükdeveci argued that the relevant provision in the BGB constituted discrimination on grounds of age contrary to EU law.

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[1] Council Directive 2000/78, 2000 O.J. (L303) 16 (EC).

[2] Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981.

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The Appeals Court, the *Landesarbeitsgericht*, posed two questions to the ECJ. The first question concerned the compatibility with EU law of a national provision, under which periods of employment completed before the age of 25 are not to be taken into account, when calculating the notice period in cases of dismissals. In this context, the national court asked whether the case at hand should be assessed by reference to primary EU law or by reference to Directive 2000/78. In material terms, the court was doubtful about the possibility of justifying such a difference in treatment on the basis of employers' operational interest in flexibility in regards to staffing and/or the assumption that younger employees have a greater occupational and personal flexibility and mobility. The second question concerned the possibility of disapplying national provisions, considered to be in violation of EU law in a dispute between private individuals. The *Landesarbeitsgericht* inquired whether national courts were obliged to request a preliminary ruling from the ECJ before deciding to disapply a national provision.

C. The Opinion of the Advocate General

Advocate General (AG) Bot submitted his opinion on 7 July 2009. First, the AG stated that the main legislative framework under which to analyze this case was Directive 2000/78, rather than the general principle of non-discrimination on grounds of age. The AG reiterated that the case arose after the expiry of the time-limit for implementing Directive 2000/78. Subsequently, he identified the Directive as the applicable legal framework to assess the existence of age discrimination in employment matters.[3]

In respect of the material question at hand, the AG considered that the relevant provision of the BGB amounted to direct discrimination on grounds of age. Regarding possible justifications for such a difference in treatment, he could not find a legitimate policy objective that would justify the exclusion of periods of employment completed before the age of 25 from the calculation of the period of notice in cases of dismissal. The AG challenged the assumption that young employees are able to find new employment more easily and quickly.[4] He considered the measure to be disproportionate to the aim pursued and therefore contrary to Article 6(1) of Directive 2000/78.

Concerning the question of how to deal with the obligation to disapply national law in proceedings between private parties, AG Bot made clear that the Court's case law leaves no room for doubt regarding the obligation of national courts to set aside any national

[3] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, para. 31-35, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:62007C0555:EN:HTML.

[4] In this context the AG referred to Case C-388/07, The Queen, on the application of The Inc. Trs. of the Nat'l Council on Ageing (Age Concern England) v. Sec'y of State for Bus., Enter. & Regulatory Reform, 2009 E.C.R. I-01569, where the Court made a clear distinction between legitimate interests of a public nature and purely individual interests of the employer.

provisions conflicting with Community law.[5] This duty is not subject to any obligation to make a prior reference to the Court for a preliminary ruling.

Furthermore, the AG addressed the question of whether an incorrectly transposed directive can be directly relied upon in proceedings between private parties. He argued that all directives with the objective to fight against discrimination should be relied upon in the context of disputes between private individuals, in order to prevent the application of conflicting national rules.[6] Recalling that in *Mangold* the Court allowed the principle of non-discrimination on grounds of age to be invoked in proceedings between individuals,[7] the AG considered that the expiry of the time limit for the transposition of Directive 2000/78 could not have the effect of weakening the protection against discrimination from individuals. The non-discrimination Directives should thus constitute an "exception" to the prohibition of direct horizontal effect, due to the role of the principle of non-discrimination as a fundamental principle of Community law. The AG qualified his statement by stressing that the Directive could only be relied upon in order to disapply a provision of national law in proceedings between private parties, excluding the application of Directive 2000/78 in situations of independent private conduct not subject to any state rule.

D. The Judgment of the Court

The ECJ issued its judgment on 19 January 2010. Regarding the first question, the Court came to a different conclusion than the AG, ruling that the basis for the examination in the case at hand should be the general EU principle of non-discrimination, "as given expression in Directive 2000/78".[8] Referring to its decision in *Mangold* as well as the right to non-discrimination contained in Article 21(1) of the Charter of Fundamental Rights, the Court underlined the existence and applicability of a general principle of non-discrimination on grounds of age. Directive 2000/78/EC merely "gives specific expression" to this general principle, bringing national legislation on dismissal within the scope of EU law.

The Court agreed with AG Bot that excluding periods of employment completed before the age of 25 from the calculation of the period of notice in the case of dismissal constituted direct discrimination on grounds of age.[9] As opposed to the AG, however, the Court accepted the flexibility of personnel management and the reasoning that young workers

[5] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629.

[6] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, para. 70, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:62007C0555:EN:HTML.

[7] Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981, para. 76.

[8] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, para. 27, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0555:EN:HTML.

[9] *Id.* at para. 29.

react more easily and rapidly in the case of unemployment as legitimate policy objectives within the meaning of Article 6(1) of Directive 2000/78. However, the Court found that the age threshold of 25 was not an appropriate mean to reach these objectives, as it affects all persons who joined an undertaking before the age of 25, irrespective of their age at the time of dismissal.[10] Consequently, the Court ruled the measure to be disproportionate and in violation of the principle of non-discrimination on grounds of age (as expressed by Directive 2000/78).

Addressing the second question, unsurprisingly, the Court did not follow the AG in exempting the non-discrimination Directives from the general rule of non-horizontal direct effect of directives. In fact, the Court did not even mention this possibility in its judgment. In paragraph 46 the Court briefly reiterated that directives cannot be directly relied upon in proceedings between individuals. However, it did not take up the issue of a possible exemption to this principle for directives, embodying the right to non-discrimination. Instead, the Court provided an in-depth interpretation of the principle of indirect effect. At several points the ECJ stressed the duty of national courts to provide the legal protection, which individuals derive from the rules of EU law, to take "all appropriate measures to ensure the fulfillment of obligations arising from a directive, even in proceedings between individuals".[11] This may include refusing to apply a provision of national law.

Moreover, the Court made clear that the obligation to disapply a national provision exists independent of the possibility to refer a question to the ECJ for a preliminary ruling under Article 267 TFEU.[12] National courts are thus obliged in any case to decline to apply a national provision conflicting with EU law. Independent of this duty, they have the possibility—but no obligation—to pose a question to the ECJ before doing so.

E. Comments

I. Direct Horizontal Effect of Directives?

What are the implications of this judgment for the employers and employees concerned? The *Kücükdeveci* case offered the Court the possibility to address the question of relying directly on the non-discrimination Directives in proceedings between private parties. Traditionally, the Court has categorically excluded the direct horizontal effect of

[10] *Id.* at para. 41.

[11] *Id.* at para. 45, 47, 51.

[12] *Id.* at para. 53–55.

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directives.[13] The question arises whether the ruling in *Kücükdeveci* has challenged this principal rule.

Instead of enabling individuals explicitly to rely on certain types of directives in horizontal situations, as suggested by the AG, the Court relied on a broad interpretation of the principle of indirect effect. The principle implies an obligation on national authorities on the basis of Article 4(3) TEU to take all appropriate measures to ensure fulfillment of their Community obligations.[14] This includes a duty of national courts to refuse to apply national provisions that are in conflict with EU law.[15] Originally developed in the context of a vertical situation, it has long been established[16] that the doctrine also applies in cases between individuals, thus circumventing the exclusion of horizontal direct effect to a certain extent.[17]

It is open to debate whether the mere fact that a Community provision can be invoked before a national court in proceedings between private parties is sufficient to be called direct horizontal effect.[18] The discussions intensified after *Mangold*, which raised the question whether one can speak of direct horizontal effect in a case where national

[13] *See* Case 152/84, Marshall v. Southampton and S.-W. Hampshire Area Health Auth. (Teaching), 1986 E.C.R. 723, para. 48; Case C-91/92, Faccini Dori v. Srl, 1994 E.C.R. I-3325, para. 20; Case C-192/94, El Corte Inglés SA v. Rivero, 1996 E.C.R. I-1281, para. 16–17; Case C-201/02, The Queen, on the application of Wells v. Sec'y of State for Transp., Local Gov't & Regions, 2004 E.C.R. I-723, para. 56; Joined Cases C-397-403/01, Pfeiffer, et al. v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, 2004 E.C.R. I-8835, para. 108–09; Case C-80/06, Carp Snc di L. Moleri e V. Corsi v. Ecorad Srl, 2007 E.C.R. I-4473, para. 20.

[14] Case 14/83, von Colson and Kamann v. Land Nordhein-Westfalen, 1984 E.C.R. 1891, para. 26.

[15] This obligation of national courts was for the first time established in Case 35/76, Simmenthal SpA v. Ministero delle Finanze italiano, 1976 E.C.R. 1871 and confirmed in cases such as Joined Cases C-13/91 and C-113/91, Criminal proceedings against Debus, 1992 E.C.R. I-3617, para. 32; Joined Cases C-397-403/01, Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, 2004 E.C.R. I-8835, para. 111–15; Case C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianto v. Lucchini SpA, 2007 E.C.R. I-6199, para. 61; Case C-115/08, Land Oberösterreich v. ČEZ as, para. 138, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0115:EN:HTML; Case C-314/08, Filipiak v. Dyrektor Izby Skarbowej w Poznaniu, para. 81, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0314:EN:HTML; Joined Cases C-378-380/07, Angelidaki v. Organismos Nomarchiakis Autodioikisis Rethymnis, para. 106 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0378:EN:HTML.

[16] Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, 1990 E.C.R. I-4135.

[17] Marc Amstutz, *In-Between Worlds : Marleasing and the Emergence of Interlegality and Legal Reasoning*, 11 EUR. L.J. 766, 766 (2005).

[18] *See generally* Peter Oliver and Wulf-Henning Roth, *The Internal Market and the Four Freedoms*, 41 COMMON MKT. L. REV. 407 (2004).

provisions that violate EU law must be set aside in proceedings between private parties.[19] On the one hand, it has been underlined that the direct effect of a legislative activity that impacts on horizontal relations must be distinguished from a pure form of direct horizontal effect.[20] Even though the dispute in *Kücükdeveci* involved a horizontal relationship between an employer and an employee, the questions conferred to the Court concerned the compatibility with Community law of a provision of German labor law, providing employers with the possibility to discriminate on grounds of age.

On the other hand, it must be emphasized that the dividing line between direct horizontal effect and indirect effect has become increasingly blurred. The non-application of national law in a horizontal situation has been labeled "incidental horizontal effect" or a "limited form of horizontal effect."[21] Yet, as argued by AG Maduro in *Viking*,[22] there is a formal, but not substantial difference between incidental horizontal effect and direct horizontal effect. It could be argued that in *Kücükdeveci* the Court relied on a concept of "procedural horizontal effect" rather than "material horizontal effect."[23] Whereas a horizontal relationship was involved in procedural terms, the provisions of the Directive did not have direct horizontal effect in the sense of determining the legal relationship between the parties. *Kücükdeveci* demonstrates that the boundaries of direct effect are no longer clear. The key feature of direct horizontal effect is the legal provisions in questions are capable of directly determining the rights and obligations of the parties in a horizontal dispute. Yet, there is a very thin line distinguishing between being subject to rights and obligations under a Community provision (direct effect) and the non-application of national law, which has the effect of preventing a party from relying on certain rights provided by national law. What it comes down to in both situations is a weighing of interests of the two parties involved.

It has been argued that in *Kücükdeveci* the Court has *de facto* recognized horizontal direct effect of Directive 2000/78/EC by relying, in proceedings between private parties, on the

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[19] For criticism on *Mangold* see Antoine Masson and Claire Micheau, *The Werner Mangold Case: An Example of Legal Militancy*, 13 EUR. PUB. L. 587 (2007); Karl Riesenhuber, *Case: ECJ-Mangold*, 3 EUR. REV. CONT. L. 62 (2007); Jobst-Hubertus Bauer and Christian Arnold, *Auf Junk folgt Mangold: Europarecht verdrängt Arbeitsrecht*, 59 NEUE JURISTISCHE WOCHENSCHRIFT 6, 12 (2006).

[20] Dagmar Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35 INDUS. L.J. 329, 337 (2006).

[21] PAUL CRAIG & GRAINNE DE BÚRCA, EU LAW : TEXT, CASES AND MATERIALS 296 (4th ed. 2007); SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 308 (2002); NORBERT REICH, UNDERSTANDING EU LAW 22–23 (2005).

[22] Case C-438/05, Int'l Transp. Workers' Fed'n and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, 2007 E.C.R. I-10779, para. 40 (AG's opinion), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0438:EN:HTML.

[23] ARTHUR HARTKAMP, DE WERKING VAN HET EG-VERDRAG IN PRIVAATRECHTELIJKE VERHOUDINGEN. OPMERKINGEN OVER DIRECTE EN INDIRECTE HORIZONTALE WERKING VAN HET PRIMAIRE GEMEENSCHAPSRECHT 13 (2009).

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general principle of non-discrimination, which finds its concrete expression in the Directive.[24] In a recent case concerning the compatibility of national law on breastfeeding leave with Directive 76/207/EEC[25], Advocate General Kokott referred to the obligation of setting aside any provision of national law that is contrary to the principle of non-discrimination in respect of age as a form of horizontal direct effect. According to the AG "it remains to be seen whether the Court will extend such *horizontal direct effect* to other general legal principles such as the principle of non-discrimination in respect of sex".[26] However, the Advocate General also identified the problematic aspects of relying on general principles in horizontal situations, stating that "it would be necessary to discuss the dogmatic foundations of that contested horizontal direct effect and its limits".[27] This brings us to the second problem: How should the Court evaluate possible justifications that would allow employers to discriminate against employees on the basis of national labor law?

II. The Justification of Discriminatory Treatment in Employment

In assessing the justifications for discriminatory treatment in employment matters, the ECJ followed its earlier case law.[28] It recognized the broad discretion enjoyed by Member States in formulating social and employment policy objectives.[29] It appears that the Court is inclined to accept almost any policy choice of the national legislator in this respect. Possible acceptable justifications range from reducing unemployment rates amongst the elderly (*Mangold*) to freeing jobs in the employment market by encouraging full-time workers to accept reduced working hours (*Steinicke*) to guaranteeing the proper functioning of the professional fire service (*Wolf*).[30]

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[24] Mirjam de Mol, ZAAK C-555/07, EUROPEAN HUMAN RIGHTS CASES (forthcoming 2010).

[25] Council Directive 76/207, 1976 O.J. (L39) 40 (EC).

[26] Case C-104/09, Roca Álvarez v. Sesa Start España ETT SA, para. 19, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0104:EN:HTML.

[27] *Id.*

[28] *See* Case C-167/97, Regina v. Sec'y of State for Employment, ex parte Seymour-Smith and Perez, 1999 E.C.R. I-623, para. 71, 74; Case C-187/00, Kutz-Bauer v. Freie und Hansestadt Hamburg, 2003 E.C.R. I-2741, para. 55; Case C-77/02, Steinicke v. Bundesanstalt für Arbeit, 2003 E.C.R. I-9027, para. 61–62; Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981, para. 63; Case C-411/05, Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. I-8531, para. 68; Case C-229/08, Wolf v. Stadt Frankfurt am Main, para. 30–39, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0229:EN:HTML.

[29] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, para. 38, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0555:EN:HTML; *see also* Elise Muir, *Enhancing the Effects of Community Law on National Employment Policies: The Mangold Case*, 31 EUR. L. REV. 879 (2006).

[30] The same tendency of granting broad discretion to Member States in the area of employment policies can be observed in the context of the free movement of persons, as illustrated in the *ITC* case (Case C-208/05, ITC Innovative Technology Center GmbH v. Bundesagentur für Arbeit, 2007 E.C.R. I-181, para. 39).

In *Kücükdeveci*, the Court did not question the assumption that young workers below the artificial threshold of 25 years react more easily and rapidly in the case of unemployment. It also failed to address the concern of the AG that, in line with the so-called *Heyday* case, purely individual reasons particular to the employer's situation cannot by themselves constitute legitimate objectives within the meaning of Article 6(1) of Directive 2000/78.[31]

Thus, the Court took an extremely lenient approach in accepting national policy choices as legitimate policy objectives. It seems to accept any kind of reasoning of the national legislator, without questioning the legitimacy of the arguments made. The way the ECJ deals with the question of justifying discriminatory treatment in *Kücükdeveci* and similar cases is problematic. It is questionable that the policy objectives put forward in *Kücükdeveci* pursue any public goals beyond granting flexibility to individual employers. The reasons put forward by the German legislator are hardly convincing and the arguments dating from the late 1920s are outdated. Yet, the Court does not review the reasons put forward with a sufficient degree of scrutiny.

Instead, the Court relies on the application of a strict proportionality test, finding that the measure is disproportionate to the aim pursued. There seems to be a general tendency of the Court to shift the assessment of justifications to the stage of the proportionality test. This tendency can be observed not only in non-discrimination cases, but also in the Court's case law on the free movement provisions (Articles 34, 45, 49, 56 TFEU).[32] This approach prevents a rigorous assessment of national policy objectives.

III. Applying the General Principle of Non-Discrimination

The most noteworthy outcome of this case is the choice of the Court to rely primarily on the principle of non-discrimination on grounds of age, rather than Directive 2000/78. It is striking that in a case, where Directive 2000/78 provides an adequate framework for analysis and where the period of implementation has expired, the Court decides to rely primarily on the general principle of non-discrimination, contrary to the suggestion of the Advocate General. Arguably, there is a significant difference between the assumption that the general principle of non-discrimination can only be applied as a means of interpreting Directive 2000/78 (as suggested by the AG) and the statement made by the Court that the Directive merely gives expression to the general principle of non-discrimination, which

[31] Case C-388/07, The Queen, on the application of The Inc. Trs. of the Nat'l Council on Ageing (Age Concern England) v. Sec'y of State for Bus., Enter. & Regulatory Reform, 2009 E.C.R. I-01569, para. 46. For details on this case see Michael Connolly, *Forced Retirement, Age Discrimination and the Heyday Case*, 38 INDUS. L.J. 233 (2009).

[32] *See, e.g.,* Case C-438/05, Int'l Transp. Workers' Fed'n and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, 2007 E.C.R. I-10779, para. 40; Case C-341/05, Laval und Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767 (applying equally a rather wide scope for potentially acceptable legitimate objectives, but a strict proportionality test).

must form the basis for the examination of the case at hand. The explicit choice of the Court's wording seems to imply that the general principle of non-discrimination has an autonomous scope of application that goes beyond the scope of Directive 2000/78.

By relying on the general principle of non-discrimination, in a case where Directive 2000/78 provides an adequate legal framework, the Court confirms its decision in *Mangold*[33] and deviates from the more restrictive approach adopted in its post-*Mangold* case law. The decision in *Mangold* to rely on a general principle of non-discrimination on grounds of age before the period of implementation of Directive 2000/78 had expired invoked criticism and a significant degree of legal uncertainty.[34] In cases such as *Palacios de la Villa*[35], *Maruko*[36] and *Bartsch,*[37] questions on the precise scope of the principle of non-discrimination and its application arose anew. In all three cases, the AGs struggled to distinguish their cases from *Mangold* and to clarify the scope of that judgment.[38] Yet, in both *Palacios de la Villa* and *Maruko*, the Court avoided ruling directly on the scope of application of the general principle of non-discrimination. Notably, in *Palacios de la Villa*, it considered the problem exclusively on the basis of Directive 2000/78.[39] In *Kücükdeveci* the Court clarified that the application of general principles of law as developed in *Mangold* was not a "mistake" or an "adventurous construction," but that the general principle of non-discrimination must be the basis for the examination of non-discrimination cases.[40]

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[33] Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981.

[34] *See* Marlene Schmidt, *The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment*, 7 GERMAN L.J. 505, 520 (2006).

[35] Case C-411/05, Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. I-8531 (Opinion of the Court), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0411:EN:HTML.

[36] Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-1757 (Opinion of the Court), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0267:EN:HTML.

[37] Case C-427/06, Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, 2008 E.C.R. I-7245.

[38] In *Palacios de la Villa,* Advocate General Mazák criticized the *Mangold* judgment on the basis of the fact that the Court had inferred a *specific* principle prohibiting age discrimination from the *general* principle of equal treatment enshrined in international instruments. In *Maruko,* Advocate General Ruiz-Jarabo Colomer submitted that the principle of non-discrimination on grounds of sexual orientation must be distinguished from the prohibition of age discrimination, which was classified by the Court as a general principle of Community law. *See* case C-411/05, Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. I-8531 (AG Opinion), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0411:EN:HTML; case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-1757 (AG Opinion), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0267:EN:HTML.

[39] Case C-411/05, Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. I-8531, para. 77.

[40] Roman Herzog and Lüder Gerken, *Stoppt den Europäischen Gerichtshof*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 8, 2008 .

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Whilst clarifying *Mangold* to a certain extent, *Kücükdeveci* has given rise to new questions concerning the application of the general principle of non-discrimination. If the scope of the general principle of non-discrimination is wider than the scope of the two non-discrimination Directives, as the judgment implies, can it be applied in a situation that has a clear link to EU law, but that falls outside the material or personal scope of the non-discrimination Directives? Should this question be answered in the affirmative, it would open the door for a vast number of non-discrimination cases.

It is beyond doubt that there are certain limitations to relying on general principles. It is clear from the judgment that the condition still applies that in order for a general principle to be invoked, the case must fall within the scope of European Union law.[41] Thus, in cases where the alleged discrimination does not provide a clear connection to EU law, individuals cannot rely on the general principle of non-discrimination under EU law, in order to challenge national provisions. Moreover, in *Audiolux* the Court clarified that in order to qualify as a general principle of Community law, a principle must have a "constitutional status," rather than being "characterised by a degree of detail requiring legislation to be drafted and enacted at community level by a measure of secondary community law."[42] According to AG Trstenjak, in order to establish the existence of a general principle of EU law, it is required that the principle has constitutional status in EU law and the national legal orders and that the alleged principle boasts general validity within the EU legal order.[43] The general principle of equality in particular can only be applied if it has such crucial importance that it has found expression in primary and/or secondary Community law.[44] Thus, whereas one cannot speak of a general principle of equality as such, it can serve as a foundation for a specific requirement of equal treatment embodied in primary or secondary Community legislation. Yet, in a recent case in the area of competition law,[45] AG Kokott refined this precondition by stating that the establishment of a general principle requires by no means that the practice constitutes a tendency that is uniform or has clear majority support amongst the Member States. Due account must be taken of the aims and tasks of the European Union and the special nature of European integration and of EU law.

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[41] Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, para. 23, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0555:EN:HTML; *see also* Case C-427/06, Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, 2008 E.C.R. I-7245, para. 27.

[42] Case C-101/08, Audiolux SA e.a v. Groupe Bruxelles Lambert SA (GBL), para. 63, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0101:EN:HTML; *see also,* Case C-174/08, NCC Construction Danmark A/S v. Skatteministeriet, para. 42, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0174:EN:HTML.

[43] Case C-101/08, Audiolux SA e.a v. Groupe Bruxelles Lambert SA (GBL), para. 84–88 & 94–96, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0101:EN:HTML.

[44] *Id.* at para. 74.

[45] Case C-550/07, Akzo Nobel Chemicals and Akcros Chemicals v. Commission, para. 93–96, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0550:EN:HTML.

This means that even a legal principle which is recognized in only a minority of national legal systems can be identified as a general principle of EU law due to its significance in respect of the aims and tasks of the Union, such as the task of combating discrimination.

It appears from *Mangold* that in order to provide the necessary link with EU law, it is sufficient for a provision to be implementing any kind of Community obligation (not necessarily Directive 2000/78 or Directive 2000/43). Moreover, following AG Sharpston's opinion in *Bartsch*, national measures fall within the scope of EU law not only when they are implementing EU law, but also when a "specific substantive rule of EC law is applicable to the situation".[46] Such substantive rules of EU law must include not only directives embodying the principle of equal treatment, but also other rights contained in the Treaties.

The implications of *Kücükdeveci* are immense. By requiring national courts to disapply conflicting national law in a private dispute without considering the question of direct effect, the Court has left many questions unanswered. It is still unclear whether the Court is moving away from its earlier case law on the non-horizontal direct effect of directives. In that case, it should do so explicitly rather than indirectly by relying on a broad interpretation of the principle of indirect effect. As rightly pointed out by AG Bot, the Court will inevitably be confronted with the issue of applying EU law in relations between private parties in the future. This concerns in particular directives that serve as an embodiment of more general fundamental rights.

By relying on the general principle of non-discrimination in order to ensure the non-application of national law, private individuals are effectively enabled to circumvent the principle of non-direct horizontal effect of directives. Allowing individuals in horizontal circumstances to rely on general principles, which are anything but clear, precise and unconditional, engenders a substantial degree of legal uncertainty for the parties involved. Arguably, the very purpose of direct effect is undermined if individuals can bypass the absence of direct effect of Community Directives by relying on general principles of EU law in proceedings between private parties.

[46] Case C-427/06, Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, 2008 E.C.R. I-7245, para. 60 (AG Opinion), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0427:EN:HTML.