

# Recent Development and the Non-Discrimination Directive

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# RECENT DEVELOPMENTS AND THE NON-DISCRIMINATION DIRECTIVES: *MANGOLD* AND MORE

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## ABSTRACT

*The concluding paper of this special issue seeks to reflect on recent developments with regard to the non-discrimination Directives and their possible relevance for the United Kingdom and the Netherlands. Particular attention will be paid to the first case decided by the European Court of Justice on the basis of the Directives, Mangold.<sup>1</sup> This case concerned the tricky question of the limits of the extended scope for justifying discrimination on the grounds of age, and the standards against which such exceptions to the non-discrimination principle should be measured. In addition, the attention currently being paid to the broader policy question of the need for, and desirability of, further EC non-discrimination directives will be noted.*

**Keywords:** Transposition and enforcement of equality directives, Non-discrimination law, the Netherlands, United Kingdom, *Mangold*

## §1. COMMISSION COMMUNICATION ON NON-DISCRIMINATION AND EQUAL OPPORTUNITIES – A FRAMEWORK STRATEGY<sup>2</sup>

In 2004 the Commission consulted widely on the future of EC equality and non-discrimination policy through its Green Paper *Equality and non-discrimination in an*

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<sup>1</sup> Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981.

<sup>2</sup> COM (2005) 224 final.

*enlarged EU*.<sup>3</sup> This was followed, in 2005, by a Communication in which the Commission designated 2007 as the European Year of Equal Opportunities for All and put forward a Framework Strategy to promote the effective transposition and enforcement of EC non-discrimination legislation. A key element of the Strategy involves a feasibility study to look at possible new measures to complement existing EC non-discrimination instruments. The Communication notes that whilst racial discrimination is prohibited in a broad swathe of areas, protection from discrimination on the grounds of religion or belief, age, disability and sexual orientation is limited to employment, occupation and vocational training. Whilst the Commission recognised that there have been calls to 'address the differences in the level and scope of protection against discrimination on different grounds', it felt, given the need to ensure the proper transposition of the current legislation, that no further Article 13 proposals should be considered at this stage. Instead:

'the Commission will undertake an in-depth study into the relevance and feasibility of possible new measures to complement the current legal framework. This study will examine national provisions, which go beyond the requirements of the EC Directives, in Member States and in some third countries. It will consider the relative merits of legislative and non-legislative measures. It will also produce a synthesis of cost/benefit analysis of different policy options carried out at the national level. ... On the basis of this material, the Commission will assess the feasibility of possible new initiatives to complement the current legal framework.'<sup>4</sup>

This clearly opens the door, if only slightly, to further non-discrimination directives that would seek to reduce the current differences in protection afforded to the various grounds. These differences have frequently been criticised as unjustified and for creating an inappropriate hierarchy between the various protected grounds.

The adoption of further legislation could well have an impact in the Netherlands. Whilst, in some respects, Dutch non-discrimination legislation goes beyond the requirements set out in the Directives (e.g. the Equal Treatment Commission can consider complaints of discrimination on all covered grounds), at least in terms of disability and age non-discrimination, Dutch legislation is in line with, but, on the whole, no more generous than, the Directives. The Dutch authorities adopted a 'minimal Directive conform' approach to the transposition and new non-discrimination Directives would therefore probably lead to increased levels of protection in the Netherlands.<sup>5</sup>

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<sup>3</sup> COM(2004) 379. See also Lisa Waddington, 'Taking Stock and Looking Forward: The Commission Green Paper on Equality and non-discrimination in an enlarged European Union', 33 *Industrial Law Journal* 4 (2004), 367-373.

<sup>4</sup> *Ibid.*, 6.

<sup>5</sup> See Janneke Gerards in this issue.

The adoption of broader non-discrimination directives would be likely to have less of an impact in the United Kingdom, given that existing UK non-discrimination legislation already adopts a broader personal, and, in particular, material scope, than the existing directives.<sup>6</sup> Indeed, any new Directives would probably be influenced by existing UK standards, in that the British government would bring this experience to the negotiating table, although some fine-tuning of British legislation in response to new directives should not be excluded.

## §2. CASE C-144/04 *MANGOLD v. HELM*

The European Court of Justice has now decided its first case concerning the Equality Directives. At issue in *Mangold*<sup>7</sup> was the compatibility of a provision of German Law with Article 6 of the Employment Equality Directive, relating to justifications for age discrimination.<sup>8</sup> The challenged law, (TzBfG<sup>9</sup> as amended), provided that fixed term employment contracts could be concluded as long as there existed objective grounds for doing so. In the absence of such grounds, these contracts were authorised for a maximum period of two years and, within that period, the contracts could be renewed three times at the most. However, an exception was made for fixed term employment contracts with workers aged 52 or over. In such cases, no objective justification was required in order to establish a fixed term contract, as long as there did not exist a close connection with a previous indefinite contract with the same employer.

Mr Mangold, aged 56, was employed on a fixed term contract, and it was accepted by all parties that no objective justification existed for establishing such a contract. He challenged the legal basis for the contract, namely the relevant provision of the TzBfG, on the grounds that it was not compatible with Article 6(1) of the Employment Equality Directive, and the German court made a preliminary reference to the ECJ to seek clarification.

Article 6(1) of the Directive provides:

‘... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy,

<sup>6</sup> Age discrimination is an exception where UK legislation only covers employment and vocational training. See, further, Lucy Vickers in this issue.

<sup>7</sup> For a more detailed commentary see, Marlene Schmidt, ‘The Mangold Case before the European Court of Justice’, 7 *German Law Journal*, No. 5, (1 May 2006), available at: <http://www.germanlawjournal.com/article.php?id=728>.

<sup>8</sup> The Court also considered the compatibility of the challenged provision with the Framework Agreement on fixed term contracts implemented by Council Directive 1999/70/EC. The Court found the measure to be compatible with the Framework Directive and this aspect of the judgment is not considered further here.

<sup>9</sup> Law on working and fixed term contracts amending and repealing provisions of the employment law – Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Aenderung und Aufhebung arbeitsrechtlicher Bestimmungen of 21 December 2000 (BGBl. 2000, 1966).

labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.’

The Article then goes on to list a number of forms of differences in treatment on grounds of age that may be compatible with the Directive.

In its decision the Court began by noting that the purpose of the Employment Equality Directive is to lay down a general framework for combating discrimination and that the TzBfG, by permitting employers to conclude fixed term employment contracts with workers over 52 without restriction, introduced a difference in treatment on the grounds of age. The question was whether such an exception to the non-discrimination principle was justified under Article 6(1) of the Directive. In order to comply with the requirements of Article 6(1), the measure in question had to be both ‘objectively and reasonably justified by a legitimate aim’ and the means of achieving that aim had to be ‘appropriate and necessary’. The Court found that the purpose of the legislation was to promote the vocational integration of older workers, which was regarded as legitimate, and that ‘an objective of that kind must as a rule, therefore, be regarded as justifying, “objectively and reasonably” ... a difference of treatment on grounds of age’. (para. 61)

With regard to the second element of the test, the Court noted that Member States enjoy a broad discretion in their choice of measures to achieve objectives in the field of social and employment policy. However, this provision of German law exposed workers to the risk of being excluded from stable employment solely on the grounds that they had reached the age of 52. The Court therefore concluded:

‘In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of the unemployed older worker, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.’ (para. 65)

The Court recalled the principle of proportionality that requires that every derogation from an individual right to reconcile the requirements of the principle of equal treatment with the aim being pursued, and found that such national legislation could not be justified under Article 6(1).

The fact that the date for full transposition of the age provisions of the Directive (Germany had requested an extended deadline of December 2006) had not yet been reached was found not to be decisive. The law in question had been amended in 2002 to reduce the age at which fixed term contracts could be concluded without an objective justification. The Court noted that, during the transposition period, Member States must refrain from taking any steps liable to compromise seriously the attainment of the goals of the Directive. Whilst this is established case law, it has been argued that the Court has gone beyond its previous judgments by allowing the applicability of the exceptions

in the Directive independently of national implementation (and therefore the creation of rights which individuals can directly invoke before national courts).<sup>10</sup> In addition, it has been suggested that the Directive has horizontal direct effect prior to the deadline for transposition, because it was taken to be applicable to the contractual relations of two private parties: ‘This would mean that – independent of existing and future secondary legislation – discrimination can be challenged with recourse to the principle of non-discrimination even between private parties, if Community law is applicable’.<sup>11</sup>

Arguably, the Court could have concluded its judgment at this point. However, the Court went on to make some interesting comments concerning the source of the principle of non-discrimination on the grounds of age. The Court noted that the Employment Equality Directive does not actually lay down the principle of equal treatment in the field of employment and occupation. Instead, the Directive is merely designed to lay down a framework to combat discrimination, and the source of the non-discrimination principle is instead to be found in provisions of international law and the constitutional traditions common to the Member States. The principle of non-discrimination on the grounds of age is therefore a general principle of Community law, and this is presumably the case for the other grounds covered by the two Directives. The impact of such a finding is potentially wide ranging, and time will tell what the Court has unleashed with this conclusion.

### §3. IMPACT OF THE *MANGOLD* CASE IN THE NETHERLANDS

*Mangold* has had no immediate impact in the Netherlands as Dutch law provides no exceptions regarding the rules on fixed-term work with regard to older (or younger) workers.<sup>12</sup> However, *Mangold* is clearly of broader relevance, as it concerns the scope for justifying measures that would otherwise amount to age discrimination under Article 6. In line with Article 6, Dutch law prohibiting age discrimination<sup>13</sup> in the area of employment allows far more room for justifying differences in treatment on the grounds of age than is the case for other grounds covered by the Employment Equality Directive. The law provides that the prohibition on different treatment does not apply if the difference is:

<sup>10</sup> European Court of Justice Case Law Update, *European Anti-Discrimination Law Review*, Issue No.3, April 2006, 42-46. See also Editorial Comments, ‘Horizontal direct effect – A law of diminishing coherence?’, 43 *Common Market Law Review* 1 (2006), 1-8.

<sup>11</sup> *Ibid.*, 46.

<sup>12</sup> The Framework Agreement on fixed-term contracts was transposed into Dutch law by the Wet van 7 november 2002 tot uitvoering van de richtlijn 1999/70/EG betreffende de door het EVV, de UNICE en het CEEP gesloten raamovereenkomst inzake arbeidsovereenkomsten voor bepaalde tijd, *Staatsblad* no. 560, 7.11.2002, which amended provisions of the Burgerlijk Wetboek (Civil Code).

<sup>13</sup> Wet Gelijke Behandeling op Grond van Leeftijd bij de Arbeid (Equal Treatment in Employment (Age Discrimination) Act).

- a. based on employment or labour market policy designed to promote the labour market participation of workers with a specific age, as long as this policy is established by law;<sup>14</sup>
- ...
- b. an otherwise objective justification that serves a legitimate aim and the means used to achieve that goal are appropriate and necessary.<sup>15</sup>

Both exceptions bear clear similarities to the arguments which the German authorities sought to rely on to justify the relaxed rules for concluding fixed term contracts with older workers in *Mangold*. As noted above, the ECJ responded, not surprisingly, by making it clear that promoting the vocational integration of older unemployed workers is a legitimate goal, but took a strict approach when determining whether the policy was appropriate and necessary. Such a strict approach also seems to have been taken by the Dutch Equal Treatment Commission thus far.

The Commission has been asked to adjudicate in a number of cases concerning the failure to renew a fixed-term contract,<sup>16</sup> and specifically to transform such a contract into a permanent contract, on the grounds of age. Dutch law provides that fixed term contracts can be renewed a maximum of three times. If such a contract is renewed for a third time or if the total length of the series of fixed term contracts is above 36 months, the contract is automatically converted into a permanent contract. A number of younger workers have argued that their employer refused to convert their fixed term contracts into permanent contracts on the grounds of age, claiming the employer preferred to employ even younger workers who could be paid lower wages. The Commission found that this amounted to a difference in treatment on the grounds of age, and that this difference could not be objectively justified. Justifications given by employers, such as the need for flexibility of the workforce, were regarded as legitimate, but the means chosen to pursue this aim (failure to transform a contract into a permanent arrangement) were regarded as inappropriate by the Commission. Other reasons given, such as the lower costs of employing even younger workers on fixed term contract, were regarded as not legitimate and only relevant in exceptional circumstances such as a threatened bankruptcy. The argument that the Dutch legislator, not the employer, had related salaries to age, with the youngest workers earning less, and that this justified the employer's policy, were not

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<sup>14</sup> It is worth noting that an inventory made by the Dutch Expert Centre on Age Discrimination revealed that the criteria of being aged 65 is referred to 898 times in 386 official Acts, regulations and decrees. E. Smolennars, *65 jaar als uiterste houdbaarheidsdatum*, (LBL, 2005). In addition, in 2004-2005 every government department was obliged to provide an overview of all age criteria referred to in legislation and to justify the use of such criteria.

<sup>15</sup> Article 7 (translations are unofficial and by the author).

<sup>16</sup> See e.g. Opinions 2005-139, 2005-179 and 2006-27.

accepted given that not renewing contracts with the workers was in conflict with the aims of the laws in question, which was to promote the employment of younger workers.

The Commission has also been reluctant to accept age related treatment that clearly benefits older workers. It is not uncommon for Dutch employers to allow older workers extra days leave or to reduce their working hours, whilst still retaining some financial benefits, in the years immediately prior to retirement. In Opinion 2004-118, the Commission found that allowing older workers (over the age of 45), 1-3 extra days of annual leave amounted to a difference in treatment on the grounds of age. The employer's justification, namely that the provision reduced the pressure on older workers so that they were less likely to take sick leave, was not accepted, in that the Commission pointed to academic research which undermined this theory. The aim was therefore regarded as not legitimate and no objective justification was seen as existing. A second provision, which allowed workers who had worked for the company for a specific period extra time off, was regarded as amounting to an indirect difference in treatment on the grounds of age, and also regarded as not objectively justified. Whilst the aim of the policy, namely rewarding loyalty, was regarded as legitimate, the Commission felt that this could be achieved by measures unrelated to age. A further provision,<sup>17</sup> allowing older workers to reduce their working time, whilst still retaining some of their salary, was also regarded as unacceptable. Whilst the aim of this policy, namely to allow workers to prepare for retirement, was regarded as legitimate, the Commission found it was not objectively justified as the aim could be served by offering workers a special course on retirement. However, in later cases,<sup>18</sup> the Commission held that it did not have sufficient information to establish if similar measures (increased leave and reduced working time with salary for older workers) were objectively justified, and commissioned academic research on this matter prior to rendering its Opinion. That research has recently been published and argues that there is in fact a correlation between age and the need for a reduced work load.<sup>19</sup>

The ECJ's approach in *Mangold*, requiring both a legitimate aim, and that the means of achieving that aim be appropriate and necessary, is already reflected in the case law of the Equal Treatment Commission. The Commission also takes a strict approach when deciding whether to permit a measure which derogates from an individual right to equal treatment and, as a result, measures, which clearly benefit older workers, have been found to be incompatible with the non-discrimination law. However, as noted by Gijzen,<sup>20</sup>

<sup>17</sup> Opinion 2004-150.

<sup>18</sup> See, e.g., Opinion 2005-66 and 2005-110.

<sup>19</sup> Report by M. van den Bogaart, W. de Lange and W. van Poppel, *De wenselijkheid van het maken van onderscheid naar leeftijd*, Tilburg, 2005. The research is accompanied by a checklist to help the Commission decide on the compatibility of such provisions with the non-discrimination law. The report and checklist are available via the homepage of the Equal Treatment Commission ([www/cgb.nl](http://www/cgb.nl)).

<sup>20</sup> Marianne Gijzen, *Selected Issues in Equal Treatment Law: a multi-layered comparison of European, English and Dutch law*, (Intersentia, forthcoming).

Article 7 of the Dutch statute (cited above), which regards as justified *a priori* different treatment on grounds of age as long as that difference is sanctioned by statute, may be a breach of EC law following *Mangold*. Gijzen argues that *Mangold* requires that the assessment of whether any difference in treatment is 'objectively justified' must be carried out by the domestic courts, and ultimately the ECJ. She therefore argues that the 'objective justification' examination calls for a judicial rather than a political assessment, contrary to what seems to be implied in the Dutch Equal Treatment in Employment (Age Discrimination) Act.

#### §4. IMPACT OF THE *MANGOLD* CASE IN THE UNITED KINGDOM

As in the Netherlands, non-discrimination legislation relating to fixed term workers<sup>21</sup> makes no exceptions with regard to age, and *Mangold* will have no direct impact as such in the UK. Taking the broader perspective, the age provisions of the Employment Equality Directive have only recently been transposed, and the British government has made use of the extended transposition deadline of December 2006.

The Employment Equality (Age) Regulations<sup>22</sup> entered into force on 1 October 2006.<sup>23</sup> The Regulations provide that both direct and indirect discrimination on the grounds of age can be justified, subject to certain criteria. In line with the Directive, a measure can only be justified if it fulfils a legitimate aim and it is a proportionate means of achieving that aim (Reg. 3(1)). The guidance provided by ACAS emphasises that an employer will need 'real evidence' to support a justification claim, which demonstrates that 'no reasonable alternative' existed.<sup>24</sup> Whilst the draft Regulations provided a non-exhaustive list of examples of possible justifications,<sup>25</sup> these were omitted from the final version. This places considerable discretion in the hands of tribunals and courts, underscoring the relevance of *Mangold* in directing their interpretation of the justification test.

#### §5. CONCLUSION

The past six years have seen significant developments with regard to non-discrimination law in the EU, the Netherlands and the UK. All the signs are that the coming years

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<sup>21</sup> The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

<sup>22</sup> S.I. 1031. See, also, Lucy Vickers in this issue.

<sup>23</sup> I am grateful to Mark Bell for the following information on the Employment Equality (Age) Regulations.

<sup>24</sup> Advisory, Conciliation and Arbitration Service, 'Age and the workplace – putting the Employment Equality (Age) Regulations 2006 into practice', 30, available at: [http://www.acas.org.uk/media/pdf/d/t/6683\\_Age\\_and\\_the\\_Workplace\\_AWK.pdf](http://www.acas.org.uk/media/pdf/d/t/6683_Age_and_the_Workplace_AWK.pdf).

<sup>25</sup> <http://www.dti.gov.uk/files/file24278.pdf>.

will also be eventful. The European Commission will be considering the possibility of further equality directives, which will, if adopted, extend the material scope of non-discrimination law significantly. Even in advance of the Feasibility Study, it is clear that the pattern of non-discrimination legislation is varied and complicated across the EU. Should new directives be proposed, they will of course have to overcome the hurdle of receiving unanimous support from all Member States, as this continues to be a requirement under Article 13 EC, and it is too early to know how Member States would respond. However, even in the absence of new directives, Community law in this area will continue to evolve through the case law of the ECJ. In its first case, *Mangold*, the Court followed the line of earlier sex discrimination cases, such as *Bilka-Kaufhaus*,<sup>26</sup> in requiring that any difference in treatment serve a legitimate aim and be appropriate and necessary, but also seemed to open the door to a broad general principle of equality in EC law. It is unclear what the impact of this development will be in the long run. New cases will continue to come before the Court, with a number of preliminary references already pending. In this respect the experiences of both the Netherlands and the UK are likely to be relevant – not only are non-discrimination issues heavily litigated in both jurisdictions, opening the door to references to the ECJ,<sup>27</sup> but the developed case-law in both countries may provide examples (good and bad) of how key provisions of the Directives are to be interpreted.

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<sup>26</sup> Case 170/84 *Bilka-Kaufhaus v. Weber von Hartz* ECR [1986] 1607. This case concerned the possibility for justifying indirect discrimination on the grounds of gender. As noted, the Employment Equality Directive provides for greater possibilities for justifying discrimination on the grounds of age (including direct discrimination).

<sup>27</sup> The Dutch Equal Treatment Commission, however, cannot refer cases to the Court of Justice: see, further, Jenny Goldschmidt in this issue.