Maastricht University

# Enhancing the effects of EC law on national labour markets: the Mangold case

**Citation for published version (APA):**

Muir, E. (2006). Enhancing the effects of EC law on national labour markets: the Mangold case. *European Law Review*, *31*(6), 879-892.

**Document status and date:**
Published: 01/01/2006

**Document license:**
Unspecified

**Please check the document version of this publication:**

• A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.

Link to publication

**General rights**
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

**Take down policy**
If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Download date: 26 Jan. 2022


European Legal Studies
Etudes Européennes Juridiques

**RESEARCH PAPERS IN LAW**

4/2006

Elise Muir

# Enhancing the effects of EC law on national labour markets, the Mangold case

© *Elise Muir, 2006*

European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | B-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurop.be | www.coleurop.be

**Enhancing the effects of EC law on national labour markets, the Mangold case**

Elise Muir*

*"This manuscript is a working paper for an article now published in the European Law Review (Vol. 31, No. 6, December 2006, p. 879) – not to be quoted – comments are more than welcome (emuir@coleurop.be)"*

## Introduction

The *Mangold*[1] case is the first to bring before the ECJ the provisions of Council Directive 2000/78/CE, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation[2] (hereafter ' The Directive'). The Court is called upon to enquire on the very nature of its Article 6, devoted to the justification of differences of treatment on grounds of age and motivated by the new Member States' concern for "*supporting older workers, in order to increase their participation in the labour force*"[3]. The case for litigation therefore constitutes the first interface between the Community judiciary, the Community legislature, the Member States and EU citizens on questions raised by modern employment policies as expressed in the European Employment Strategy (hereafter 'The EES'). It is in this context that the Court, gathered in a Grand Chamber, grants Directive 2000/78 and the new general principle of non-discrimination on grounds of age an unprecedented effect.[4] Indeed, the prohibition of discrimination on grounds of age derived from EC law is applied between two private parties suspected of having manufactured the litigation and this, even before the end of the implementation period of the Directive on age discrimination. The *Mangold* case therefore raises two burning questions for the Community legal order. It first questions the law on the effect of directives and general principles of Community law in the legal order of the Member States. It secondly, brings under the scrutiny of the EC judiciary, in the framework of Article 234 EC, new tools of employment policy in the Member States. Before analysing both aspects of the impact of the case, we ought briefly to recall its facts and the ruling of the Court.

---

* Academic assistant in the Law Department of the College of Europe, Bruges and PhD student at Queen Mary University, London. I am very grateful to D. Hanf, V. Hatzopoulos, C. Kilpatrick and T. Tridimas for useful comments on previous drafts and in particular to Claire Kilpatrick for very helpful discussions on this case on her various visits to Bruges. The usual disclaimer of course applies. This article is an extended version of a short case note in (2006) 2 Revue de Droit de l'Union Européenne forthcoming.

[1] C-144/04, Werner Mangold v Rüdiger Helm, judgment of the Court (Grand Chamber) 22 November 2005, nyr.

[2] [2000] O.J. L 303/16.

[3] Recital 8, Preamble, Directive 2000/78.

[4] The case has accordingly been promptly noticed as can be seen from the Editorial, "Out with the old…" (2006) 31 E.L.Rev. 1.

**Factual and legal background**

The litigation arose between Mr. Mangold and his employer, Mr. Helm, regarding the possibility to conclude fixed-term employment contracts under flexible conditions with aged workers. Mr Mangold concluded a contract of employment with Mr Helm on 26 June 2003 that was to take effect between 1 July 2003 and 28 February 2004. At the time of signing the contract, Mr Mangold was 56 years old, the contract was therefore of limited duration by direct and exclusive reference[5] to Paragraph 14(3) of the German law on part-time working and fixed-term contracts, the 'TzBfG'[6] that reads as follows: *"A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58."* The same provision adds *"[u]ntil 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58"* (hereafter 'transitory regime'). Mr Mangold subsequently claimed the incompatibility of Paragraph 14(3) of the TzBfG with, on the one hand, the Framework Agreement on fixed-term contracts concluded between the European social partners ('the Framework Agreement') and put into effect by Directive 1999/70[7] and, on the other hand, Directive 2000/78. Both instruments were submitted to a question of interpretation to the ECJ in the given case.

A first point relates to the compatibility of Paragraph 14(3) of the TzBfG with the Framework Agreement annexed to Directive 1999/70.[8] The TzBfG indeed constitutes the implementation measure in German law of the Framework Agreement. Clause 8(3) of the latter states that "*[i]mplementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement*." The question that therefore arises relates to the compatibility with this non-regression clause of the reduction, resulting from the TzBfG, of the age above which a fixed-term contract of employment may be concluded without restrictions. Prior to the adoption of the TzBfG, the age limit was indeed 60 years. This was brought down to 58 by the initial version the TzBfG, before the transitory regime based on the age limit of 52 and applicable to Mr Mangold was introduced.[9]

A second series of questions relates to the substance and effects of Directive 2000/78 which lays down a general framework for combating, among others, discrimination on grounds of

[5] Art. 5(2) and 5(3) of the contract of employment.

[6] Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen.

[7] Framework Agreement concluded by ETUC, UNICE and CEEP on 18 March 1999 and put into effect by Council Directive 1999/70/EC of 28 June 1999, [1999] O.J. L 175/43.

[8] A second subquestion, related to Clause 5(1) of the Framework Agreement, is immediately set aside by the ECJ observing that it is irrelevant to the litigation.

[9] It is only in a subsequent amendment of the TzBfG, by the First Law for the provision of modern services on the labour market of 23 December 2002, that the age limit of 58 years was temporarily replaced by a limit of 52 years. In the given case, the referring court seeks an interpretation of Clause 8(3) of the Framework Agreement in order to assess the validity of Paragraph 14(3) of theTzBfG in its original version. The Arbeitsgericht München considers that should Paragraph 14(3) of theTzBfG in its original version not comply with Community law, its 2002 amendment, applicable in the dispute, would be invalid.

age as regards employment and occupation.[10] Article 6(1) of the Directive, devoted to the justification of differences of treatment on grounds of age, states that: "*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, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*." It then lists a few examples of justified differences of treatment such as setting special conditions of access to employment and vocational training, employment and occupation of older workers in order to promote their vocational integration.[11] The *Arbeitsgericht München* asks whether Article 6(1) of the Directive must be interpreted as precluding a provision such as Paragraph 14(3) of the TzBfG that authorises, under very flexible conditions, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. If, indeed, such a measure is held to be discriminatory, the national jurisdiction further asks whether it should "*refuse to apply the provision of domestic law which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds*"[12]. The reason behind such a question is twofold. First, at the time of the facts, the Federal Republic of Germany benefited from an exceptional additional implementation period, provided for by the Directive itself to take into account particular conditions in certain Member States. [13] These extra three years starting as from 2 December 2003 resulted in the precise nature of the obligation derived from the Directive being unclear. Second, it is commonly understood that Community directives cannot have horizontal direct effect.

**The judgement of the Court**

The Federal Republic of Germany first challenges the admissibility of the reference for a preliminary ruling by arguing that the very nature of the dispute is "*fictitious or contrived*"[14]. Indeed, prior to the litigation under scrutiny, Mr Helm had publicly argued for the unlawfulness of Paragraph 14(3) of the TzBfG in identical circumstances. The Court meets this point by stressing that "*it hardly seems arguable that the interpretation of Community law sought by the national court does actually respond to an objective need inherent in the outcome of a case pending before it*"[15] since the contract was performed and its application does require the interpretation of Community law. Moreover, the agreement of the parties as to the correct

[10] Art. 1, Directive 2000/78.
[11] Art. 6(1), second Paragraph, Subparagraphs (a) (b) and (c), Directive 2000/78.
[12] At [31].
[13] Such a procedure was provided for in Art. 18, second Paragraph, Directive 2000/78.
[14] At [32].
[15] At [38].

interpretation of Paragraph 14(3) of the TzBfG does not affect the reality of the dispute.[16] The order for reference is therefore admissible.

The Court first scrutinizes the initial version of Paragraph 14(3) of theTzBfG with the non-regression requirement contained in Clause 8(3) of the Framework Agreement. It recalls that the non-regression clause only applies in the "*sphere covered by that agreement*"[17]. It is clear[18] nevertheless that the "*the successive reductions of the age above which the conclusion of a fixed-term contract is permissible without restrictions are justified, not by the need to put the Framework Agreement into effect but by the need to encourage the employment of older persons in Germany*."[19] It follows that lowering down the age above which fixed-term contracts of employment may be concluded without restrictions in the TzBfG is not contrary to Clause 8(3) of the Framework Agreement.

The Court therefore focuses on the questions related on the one hand to the substance of Article 6(1) of Directive 2000/78, and on the other hand to its effect in national law. By allowing employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, Paragraph 14(3) of the TzBfG clearly constitutes a direct discrimination on ground of age contravening the prohibition set out in Article 1 of the Directive. Article 6(1) of this Directive nonetheless allows for differences of treatment on grounds of age when objectively and reasonably justified, within the context of national law, by a legitimate aim. According to the Court, Paragraph 14(3) of the TzBfG, unquestionably pursues such an aim, since it seeks to promote the vocational integration of unemployed older workers to take into account their particular difficulties in finding work.[20] Moreover, the Court recalls that for the purpose of employment and social policy choices, Member States enjoy broad discretion.[21] The national measure under scrutiny however is not appropriate and necessary. The wording of Paragraph 14(3) of the TzBfG leads to the lawfulness of any fixed-term contract of employment and indefinite renewal of such contracts with workers above 52 irrespective of their prior status as employed or unemployed and its length. It follows that Paragraph 14(3) of the TzBfG goes beyond what is necessary for the promotion of the vocational integration of unemployed older workers and cannot be justified on the basis of Article 6(1) of the Directive.

This conclusion, explains the Court, is not called into question by the fact that the employment contract was concluded before the end of the transposition period of the Directive, for two reasons.

---

[16] At [38].
[17] At [50].
[18] A.G. Tizzano in Case C-144/04, Werner Mangold v Rüdiger Helm, Opinion of 30 June 2005, [75]-[77].
[19] At [53].
[20] At [59].
[21] At [63].

First of all, even before the end of the implementation period and according to the *Inter-Environnement Wallonie* case-law, national authorities must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that Directive irrespective of whether this national measure is concerned with its implementation or not.[22] The fact that the national provision at stake expires only a few days after the end of the implementation is not in itself decisive. On the one hand, Member States granted an exceptional extension of the implementation period have a duty to progressively approximate their legislation with the objectives of the Directive.[23] On the other hand, a significant proportion of workers will have reached the age of 58 by the end of the transitory regime and will therefore be liable to definite exclusion from stable employment.[24]

Second and "*above all*"[25], stresses the Court, *"…[…]in accordance with Article 1 [of Directive 2000/78], the sole purpose of the Directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation'"[26].* The source of the principle, as can be seen from the Preamble of the Directive[27], lies in various international instruments and the constitutional traditions common to the Member States.[28] Non-discrimination on grounds of age therefore constitutes a general principle of Community Law[29] that should be applied to measures falling within the scope of Community Law irrespective of the implementation period of the Directive. [30]

As an instrument of implementation of the Framework Agreement, Paragraph 14(3) of the TzBfG falls within the scope of EC law and has been found to be discriminatory within the meaning of Article 6(1) of Directive 2000/78. It is the responsibility of national courts, by application of the *Simmenthal* doctrine[31], to ensure the full effectiveness of the general principle of non-discrimination on grounds of age. This implies the national jurisdiction's duty to set aside the national provision.[32]

**Assessment**

As can be seen from the above account of the facts and reasoning of the Court, the ruling in *Mangold* in somewhat surprising, if not puzzling. Answering an order for reference raised in a

[22] At [67]-[68].
[23] At [72].
[24] At [73].
[25] At [74].
[26] At [74].
[27] Recitals 3 and 4, Preamble, Directive 2000/78.
[28] At [74].
[29] At [75].
[30] At [76].
[31] Case C-106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] E.C.R. 629.
[32] At [78].

litigation that can be suspected of having been manufactured, the Court explores unprecedented mechanisms to give full effect to a general principle of law encompassed in a new framework directive therefore asserting its human rights jurisdiction over modern national employment policies.

***Enhancing the effects of EC law in national law?***

At first, one may be surprised to see a litigation between private parties initiated before the end of the implementation period of a directive, being solved on the basis of a right initially contained in this directive. The Court makes a manipulative use of the case-law related to the legal effects of directives (a) by relying upon the general principle of Community law fleshed out in the Directive. This novel solution allows the Court to rule that conflicting national provisions ought to be set aside (b).

(a) The manipulative use of the law related to the legal effects of directives

If it is established that an adequately transposed directive takes effect through the medium of national implementing measures[33], the very nature of directive as set out in Article 249 Paragraph 3 EC raises two practical questions illustrated by the litigation between Mr Mangold and Mr Helm.

(i) The question of the effects of directives before the end of the implementation period goes unanswered

The existence of Member States duties before the end of the transposition period was laid down in the *Inter-Environnement Wallonie* case[34] where the Court stated that "*the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article [249] of the Treaty and by the directive itself*"[35] from the date of its notification onwards[36]. The precise nature of the duties incumbent upon the Member State from the publication of a directive until the expiry of the implementation period was unclear and the Court admitted that *"[s]ince the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period"*[37]. It asserted however that *"[a]lthough the Member States are not obliged to adopt those measures before the end of the period*

[33] Case 8/81, Ursula Becker v Finanzamt Münster-Innenstadt [1982] E.C.R. 53, [19].
[34] Case C-129/96, Inter-Environnement Wallonie ASBL v Région Wallonne [1997] E.C.R. I-7411.
[35] ibid., [40].
[36] ibid., [41].
[37] ibid., [43].

*prescribed for transposition, it follows from the second paragraph of Article [10] in conjunction with the third paragraph of Article [249] of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed."*[38]

The exact scope of this statement remains, ten years after the ruling, most unclear on three accounts, which are highly relevant for our analysis of the *Mangold* dispute.

The first element of uncertainty relates to the difficulty of identifying "*measures liable seriously to compromise the result prescribed"* by the directive. This task was left to the national court in *Inter-Environnement Wallonie*[39] but subsequent case-law established that the national measures to be scrutinised included not only implementation measures of the directive at stake but also all other measures adopted after the publication of the directive.[40] No guidelines however existed prior to *Mangold* on the assessment of how *seriously* a national measure had to be liable to compromise the results prescribed by the directive in order for it to be contrary to EC law. Implicitly tackling this issue in the present ruling, the Court rejects the argument that the national provision under scrutiny will expire a few weeks after the end of the implementation period of the Directive.[41] It rather focuses on the one hand, on the specific duty of the Federal Republic of Germany during the additional period for implementation, namely to progressively take concrete measures and to report to the Commission.[42] On the second hand, the Court analyses the practical effect that the national provision at stake would have on a significant proportion of the workers who would have reached the age of 58 by the end of the transitory regime. This class of workers would indeed be in danger of becoming definitively excluded from the safeguard of stable employment resulting from the use of fixed-term contracts. It therefore implicitly follows that the national provision at stake seriously compromises the result prescribed by the Directive. The practical consequences to be derived from this observation are nevertheless most unclear as we shall now see.

A second question indeed raised by the *Inter-Environnement Wallonie* statement relates to the precise legal nature of the duty incumbent upon the Member State. If the Member States are to refrain from taking any measures liable to seriously compromise the result prescribed by the Directive during its implementation period, what should the legal and practical consequence of a breach of this duty be? It has been argued that the national authorities would have a duty of consistent interpretation of national provisions even before the end of the implementation period. [43] This option leaves the problem of an express incompatibility between a positive act adopted at national level and Community law unsolved. Setting aside

[38] ibid., [45].
[39] ibid., [46].
[40] Case C-14/02, ATRAL SA and Etat Belge [2003] E.C.R. I-4431, [58]-[59].
[41] At [70].
[42] At [71]-[72].

the national provision at stake would contravene the Court's point in *Ratti* that "*it is only at the end of the prescribed period that the directive […] will be able to have [direct effect].*"[44] One could question the possibility of claiming damages against the State but this would raise the question of the relationship between the requirements of a measure liable seriously to compromise the result prescribed by the directive and the existence of a serious breach of Community law. At last, it seems unlikely that an enforcement action could be initiated before the expiry of the implementation period. The case at hand circumvents these issues by referring to the general principle of non-discrimination on grounds of age as formulated in Directive 2000/78. The question of the practical impact of *Inter-Environnement Wallonie* is therefore left unanswered.[45]

Thirdly, if the nature of the negative duty imposed upon the Member States in *Inter-Environnement Wallonie* is most controversial, one would have expected the Court, *a fortiori*, to tackle with great caution the question of the effects of Directives upon individuals before the expiry of the implementation period. Indeed, even if some of the above mechanisms were identified as being operational before the end of the implementation period, the Court would have to clarify the extent to which it could result in imposing obligations on private parties. This point, far from being specific to the period preceding the expiry of the deadline for implementation shall now be discussed further.

(ii) Disregarding the law on the horizontal effect of directives

Leaving aside the case-law recognising the possibility for directives to have direct effect in litigation between an individual and the State[46], an informed analysis of the *Mangold* ruling requires a short overview of the case-law on the effect of directives between private parties. In *Faccini Dori*[47], the Court was faced with the question of "*whether, in the absence of measures transposing the directive within the prescribed time-limit, consumers may derive from the directive itself a right of cancellation against traders with whom they have concluded contracts and enforce that right before a national court*"[48]. The Court distinguished this situation from the possibility for an individual to rely on the provisions of a directive against the State and pointed out that "*The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is*

[43] See for instance A.G. Jacobs in Case C-156/91, Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg., Opinion of 25 June 1992 , [18]-[27] and in Case C-212/91, Angelopharm GmbH v Freie Hansestadt Hamburg, Opinion of 16 June 1993, [70]-[76].

[44] Case 148/78, Ratti [1979] E.C.R. 1629, [43].

[45] See, along similar lines, Lenaerts and Corthaut, « Of birds and hedges : the role of primacy in onvoking norms of EU law » (2006) 31 E.L.Rev. 287, 293.

[46] Directives may give rise to rights in favour of individuals against the State see e.g. Case 41/74, Van Duyn v the Home Office [1974] E.C.R. 1337. But the State may not avail itself of the provisions of a Directive that has not (correctly) been transposed, see e.g. Joined Cases C-387/02, C-391/02 and C-403/02, Berlusconi et al. [2005] E.C.R. I-3565.

[47] Case C-91/92, Faccini Dori v Recreb [1994] E.C.R. I-3325.

[48] ibid., [19].

*empowered to adopt regulations."*[49] It therefore followed from the distinction between directives and regulations that "*in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court."*[50] This constitutes authority for the well known assertion that directives do not have horizontal direct effect.[51]

In practice, however, the dividing line between the absence of horizontal direct effect of directives and the possibility that a directive may have an incidental effect upon the situations of individuals has pushed the Court to sharpen its case-law.[52] As the Court itself puts it, directives that "*define the substantive scope of the legal rule on the basis of which the national court must decide the case before it*"[53] must be distinguished from directive that "*[create] neither rights nor obligations for individuals*"[54]. The latter type of directives, merely concerned with public law duties of the Member States could have incidental effect on the situation of individuals.[55]

A first line of case-law involves disputes between an individual and the State the outcome of which may have an impact on third parties to the dispute.[56] A second and more controversial line of cases is particularly interesting for a closer analysis of the facts in *Mangold*. It covers disputes between private parties, as arose in *CIA*[57] and *Unilever*[58], where the provisions of Directive 83/189[59] are incidentally relied upon, in order to render a provision of national law inapplicable. In both cases, the ECJ ruled that the national jurisdiction was to disapply the national provision in breach of the procedural requirements of Article 8 (notification of a new national measure) and Article 9 (postponement of the adoption of new national measures) of

[49] ibid., [24].

[50] ibid., [25].

[51] Note that it ought to be read in conjunction with an extensive interpretation of the notion of State, allowing the recognition of direct effect in a broad range of relationships between individuals and the State (e.g. Case C-188/89, Foster v British Gas [1990] E.C.R. I-3313), and with national authorities' far reaching duty of conform interpretation of national law at the light of Community law (e.g. Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al. [2004] E.C.R. I-8835). On the importance of looking at these various mechanisms together see Lenaerts and Corthaut, supra fn.45.

[52] See e.g. Tridimas, « Black White and Shades of Grey: Horizontality of Directives Revisited" (2002) 21 Yearbook of European Law 327, p. 327 and Editorial, « Horizontal direct effect – A law of diminishing coherence ? » (2006) 43 Common Market Law Review 1, 2.

[53] Case C-443/98, Unilever Italia SpA v Central Food SpA [2000] E.C.R. I-7535, [51].

[54] ibid., [51].

[55] See e.g. the distinction between directives "that specifically require Member States to modify the nexus of rights and duties arising under private law relationships" and directives that "organize relations either between Member States and the Community or between Member States and individuals" in Editorial, Common Market Law Review, supra fn.52, 2.

[56] In litigation of that kind, the directive is relied upon for the annulment of an administrative act. The annulment of such an act, resulting from the vertical direct effect of the directive is likely to affect third parties incidentally concerned with that act. See in particular A.G. Ruiz-Jarabo Colomer in Joined Cases C-397/01 to C-403/01, Pfeiffer, Opinion of 24 April 2004, [41]. Examples can be found in the case-law on environmental assessments, see e.g. Case C-435/97, World Wildlife Fund and Others v Autonome Provinz Bozen [1999] E.C.R. I-5613.

[57] Case C-194/94, CIA Security International v Signalson SA [1996] E.C.R. I-2201, [32]-[55].

[58] Case C-443/98, Unilever Italia, supra fn. 53, [31]-[52]. For a severe criticism of this case see Tridimas, « Black White and Shades of Grey […] », supra fn.52, 345.

[59] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] O.J. L 109/8.

the Technical Standards Directive**.**[60] The national authorities' failure to comply with the procedural requirements of Directive 83/189 therefore led to the impossibility for a competitor in *CIA* and for the buyer in *Unilever* to rely on a provision of national law to escape other national law duties. If these rulings imply that a directive has legal consequences on the situations of individuals, the underlying rationale is that the directive imposes requirements of a public law nature on national authorities. From a theoretical point of view, this cannot be equated to applying the substantive provisions of a directive as it was attempted and failed in *Faccini Dori*.[61]

It is in the light of this complex case-law that the dispute between Mr Mangold and Mr Helm shall be analysed. One could be tempted, as the Commission suggested, to draw a parallel with the *CIA* and *Unilever* cases. Mr Mangold is indeed seeking to rely on Directive 2000/78 for the purpose of obtaining the inapplicability of Paragraph 14(3) of the TzBfG and benefiting instead of a general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds. By applying coherently the previous case-law and assuming that its underlying logic is the theoretical distinction between directives concerned with individual's substantive rights and directives involving public law duties, such an analysis should be rejected.[62] The claim of Mr Mangold is directly based on the substance of a directive granting specific rights to individuals, in contrast to the situations in *CIA* and *Unilever* where national law was challenged incidentally and on procedural grounds on the basis of the Technical Standards Directive. This view is in line with the *Pfeiffer*[63] case in which the effect sought was similar to the one under discussion in *Mangold* and where the Court reiterated that the provisions of a directive conferring rights or imposing obligations on individuals cannot in itself apply between private parties.[64]

In the light of previous case-law on the horizontal effect of directives the *Mangold* case should therefore have led the Court to recall its case-law on the lack of horizontal effect of directives. The Court however neither relies upon, nor distinguishes, nor expressly overrules this case-law. Instead, it merely disregards the horizontal nature of the dispute and focuses on the fact that the contract was concluded before the end of the implementation period. In that respect, the Court opts for a novel approach and circumvents the difficulties raised by the *Inter-Environnement Wallonie* case-law described supra by referring, "*above all*"[65], to the general principle of non-discrimination as formulated in the Directive.

---

[60] Case C-194/94, CIA, supra fn.57, [55], and Case C-443/98, Unilever Italia, supra fn. 53, [52].

[61] In support of this view, see Editorial, Common Market Law Review, supra fn.52, 3, and Tridimas, « Black White and Shades of Grey […] », supra fn.52, 340. For further discussion see in particular Lenaerts and Corthaut, supra fn.45, 305.

[62] See A.G. Tizzano, supra fn.18, [107] and footnote 34. Please note that a very valuable discussion on direct effect and primacy, suggesting a new theoretical framework for the analysis of the case-law discussed above can be read in the present review, Lenaerts and Corthaut, supra fn.45.

[63] Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al., supra fn.51.

[64] Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al., supra fn.51, [109]. See case note by Prechal (2005) 42 Common Market Law Review 1445.

[65] At [74].

(b) The unprecedented effect of a new general principle of Community law

According to the Court, Framework Directive 2000/78 constituted a mere 'formalisation' of the general principle of non-discrimination on grounds of age. The solution adopted by the Court is therefore not only surprising in that it does not fit with the previous case-law on the legal effects of directives but the approach suggested based on the general principle of Community law is also puzzling.

(i) Uncertainties as regards the sources of the general principle of non-discrimination on grounds of age

The ruling in *Mangold* makes it clear that Directive 2000/78 merely lays down a general framework for the principle of equal treatment in employment and occupation. Reliance on the general principle of non-discrimination on grounds of age allows the Court to circumvent the difficulties raised by the law on the effect of directive. Two difficulties arise from this reasoning.

Taking on board that general principles of Community law may derive from the creative and progressive approach of the Court rather than from a systematic analysis of the laws in each Member State[66], the recognition of a general principle of non-discrimination on grounds of age remains surprising due to the modernity of the concept and its controversial nature. Unquestionably, the adoption of Directive 2000/78 itself is the expression of the unanimous willingness of the Member States to combat age discrimination.[67] This assertion nevertheless requires a caveat. The intention of the authors of the Amsterdam Treaty not to create rights of general application is reflected in the precise wording of Article 13 EC, in particular when read in comparison with Article 12 EC. Moreover, if despite the wording of Article 13 EC, the Court is willing to upgrade the legal status of the right of non-discrimination contained therein, account could have been taken of the provisions of Article 18 Paragraph 2 of the Directive. Such provisions allowed for a three year extention of the transposition deadline for Member States meeting difficulties as regards specifically the implementation of the prohibition of discrimination on grounds of age and disability. It should be mentioned that this is precisely the derogation from which the Federal Republic of Germany benefited at the time of the facts.[68] The reasoning in the *Mangold* ruling, rendered before the expiry of such a time extension, is in that respect remarkably poor.[69] The third Recital of the Preamble of the

[66] A.G. Lagrange in Case 14/61, Hoogovens v High Authority, Opinion of 4 June 1962, E.C.R. [1962] 277, 283-284.

[67] For a discussion of the implicit reference to Article II-81 of the Treaty establishing a Constitution for Europe, see Schmidt, "The Principle of Non-discrimination in Respect of Age: Dimensions of the EC's Mangold Judgement" (2006) Vol.7 N°5 German Law Journal 505, 519.

[68] On specific difficulties in Germany see Schmidt, supra fn.67, 510.

[69] Along similar lines see Editorial, E.L.Rev. supra fn.4, 2.

Directive, devoted to sex equality, is irrelevant to support the recognition of a principle of non-discrimination on grounds of age. As for the fourth Recital, it refers to a series of international instruments adopted between the end of the 1940s and the 1960s none of which explicitly mentions non-discrimination on grounds of age. Finally, the assertion according to which such a principle of non-discrimination on grounds of age would derive from the constitutional traditions common to the Member States is not supported by evidence.

The relationship entertained between the principle of non-discrimination on grounds of age and the wider principle of equal treatment in the field of employment and occupation[70] raises a second series of questions. The impact the *Mangold* case may indeed have on future litigation could be seen as extremely broad if it could be assumed that all the grounds of discrimination covered in Directive 2000/78, including in particular sexual orientation, are now constitutive of a general principles of Community law. The ruling in *Mangold* echoes the *obiter dictum* of the Court in *Grant*[71] whereby the Court, after stating that "*Community law as it stands at present does not cover discrimination based on sexual orientation*"[72], pointed at the new insertion of Article 13 EC to empower the Community legislator to intervene in that area.[73] The mere enactment of Directive 2000/78 would thereby have met the ECJ's call and the wording of the *Mangold* case suggests that the Court is ready to modify its approach to non-discrimination on grounds of sexual orientation. The question of how far beyond the scope of Directive 2000/78 such a reasoning of the Court could be taken is also open. The present ruling not only refers to the general principle of equal treatment in the field of employment and occupation but it also mentions "*the general principle of equal treatment, in particular in respect of age*"[74]. Shall the ruling therefore be restricted to directives establishing a "*general framework*" as stated in the title of Directive 2000/78 or could this extend to directives laying down "*a framework*" as indicated in Article 1 of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[75]? If one bears in mind that non-discrimination on grounds of race and ethnic origin are far less controversial rights than age or sexual orientation are[76], it is likely that they could be upgraded to general principles of Community law in future rulings. Also, as the Editorialist of the Common Market Law Review puts it, if this logic was to be accepted, "*[Chapter] IV of the*

[70] The Court disregards the suggestion of A.G. Tizzano (supra fn.18, [83] and [84]) to found the principle of non-discrimination on grounds of age on the general principle of equal treatment and instead focuses on the principle of equal treatment in the field of employment and occupation.

[71] Case C-249/96, Grant v South West Trains Ltd [1998] E.C.R. I-621.

[72] ibid., [47]. The Court thereby refused to extend the principle of non-discrimination on grounds of sex so as to include non-discrimination on grounds of sexual orientation.

[73] ibid., [48]. In a subsequent case, the Court sought to elude the question and also referred to the role of the legislator, Joined Case C-122/99 P and C-125/99 P, D and Kingdom of Sweden v Council of the European Union [2001] E.C.R. I-4319, [37]-[38]. For a more critical view of the relationship between Mangold and these cases see Editorial, E.L.Rev. supra fn.4, 2.

[74] At [ 76].

[75] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L 180/22.

[76] Waddington and Bell, "More equal than others: distinguishing european union equality directives" (2001) 38 Common Market Law Review 587, 588 and 610.

*Charter of Fundamental Rights, grouping a wide range of social aspirations under the heading "Solidarity", would provide a fertile source of such speculative claims*"[77].

Both the very legitimacy of asserting the existence of a general principle of non-discrimination on grounds of age and the relationship between the general principle of equal treatment and the principle of non-discrimination on grounds of age may therefore be questioned. But the practical effect given to this new general principle of Community law is possibly even more far reaching.

(ii) The unprecedented legal effects of a general principle of Community law

As phrased by Advocate General Gulman, the question of "*whether the Community law principles regarding the protection of fundamental rights may in some cases be relied on as creating obligations in proceedings between individuals and not just in proceedings between individuals and the authorities which are the primary addresses of fundamental rights*" is a question "*which is in fact of fundamental importance and of some difficulty*"[78]. Indeed, as Tridimas puts it "*Issues pertaining to the application of fundamental rights may arise in litigation between individuals. This is not to say, however, that fundamental rights are horizontally applicable. It can be said that a fundamental right produces horizontal effect only if it is accepted that it can be breached by the conduct of a private party*"[79]. This nevertheless is precisely what the Court implies without an ounce of an explanation in the *Mangold* case.[80]

Mr Mangold seeks to rely on EC law in order to assert his community right not to be discriminated against on grounds of age against his employer. Even though it implies setting aside a provision of national law to the benefit of another provision of national law, such a mechanism amounts to granting horizontal direct effect to a substantive Community right. The same conclusion applies whether the Community right at stake derives from an unimplemented directive before the end of its transposition period or from a general principle of EC law. If the *Mangold* case sits uneasily with the case-law on the horizontal direct effect of directives, it also is novel from the point of view of the law on the general principles of Community law. The Court nevertheless ignores the issue and the Advocate General, who explicitly asserts that the general principle of equality can be relied upon in a private litigation, does not provide any authority for this statement.[81] The ruling therefore raises the question of

[77] Editorial, Common Market Law Review, supra fn.52, 8.

[78] A.G. Gulmann in Case C-2/92, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock, Opinion of 20 April 1993, [39] and in Case C-60/92, Otto BV v Postbank NV, Opinion of 15 June 1993, E.C.R. 1993 I-5693, [ 22].

[79] Tridimas, The General Principles of EC Law (1st Edition, Oxford University Press, 1999), 31.

[80] Out of the three cases referred to by the ECJ in its reasoning, the Caballero case (Case C-442/00, Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa) [2002] E.C.R. I-11915) does indeed involve general principles of EC law as grounds of review of the act of a Member State but this appeared to be in a vertical litigation. As regards the two other cases referred to by the Court (Case C-347/96, Solred SA v Administración General del Estado [1998] E.C.R. I-937 and Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] E.C.R. 629), they do not relate to general principles of Community law. Note, in the same direction, Editorial, Common Market Law Review supra fn.52, 8.

[81] A.G. Tizzano, supra fn.18, [84] and [101]. The cases referred to at [83] relate to vertical relationships and the case referred to at [101] to support the view that the general principles of Community law can be relied upon by an individual against the State is irrelevant.

the implications to draw for future litigation between private parties relying on a general principle of Community Law. This is particularly relevant regarding employment relationships and the future of the distinction drawn between private and public employers as regards the application of EC social directives as initiated in *Marshall*[82]. The potential impact of the ruling in *Mangold* however goes beyond the scope of social law.

An interesting statement in that respect was rendered in the *Piau* case.[83] The Court of First instance appears to question, in an *obiter dictum*, the compatibility of the rule-making power claimed by the FIFA in the light of the principles common to the Member States. The Court indeed inquires into whether a private organisation aimed at regulating the promotion of football but exercising regulatory powers beyond this scope would comply with the civil and economic liberties as guaranteed by Community law.[84] Leaving aside the factual background of this case and fully acknowledging the limits of drawing a parallel between these two cases on their substance, it is surprising to observe that in both *Mangold* and *Piau* the Court blatantly disregards the fact that they imply the creation of duties on private entities. In *Piau*, the CFI seems to even suggest the application of the general principles against a private entity in the absence of any national legislation. It may be recalled that the Court has also been referring to the general principles of Community law in vertical litigations in areas where its own competence was most unclear. This can be seen from the *Akrich*[85] case for instance. One could be tempted to analyse this case-law as the Court's expression of its constitutional role in the EC via the protection of individuals against the State even in situations where Community law does not apply but also protecting individuals against stronger private actors such as employers or the FIFA. Even if these cases were the expression of such a noble mission, a lawyer's mind would expect the Court to justify the legitimacy of this pre-emption of judicial competences. In *Mangold*, the Court could be seen to seek to justify its bold reasoning by stressing the importance of ensuring the respect for the principle of non-discrimination on grounds of age "*in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned*."[86] This paragraph is however most obscure in that it juxtaposes procedural rights with material rights.

The solution adopted by the Court in *Mangold* is therefore surprising from the point of view of both the case-law on directives and on the general principles of Community law. In an attempt to clarify this ruling's impact, a few points should be stressed. First, the Court heralded that the principle of non-discrimination on grounds of age, despite being subject to

[82] Case 152/84, M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] E.C.R. 723, [49].
[83] Case T-193/02, Laurent Piau v Commission [2005] E.C.R. II-209. The author is grateful to P. Ibañez Colomo for bringing this to our attention and for the very valuable discussion that followed and inspired the following remark.
[84] ibid., [76]-[78].
[85] Case C-109/01, Secretary of State for the Home Department v Hacene Akrich [2003] E.C.R. I-9607, [54] and [58].
[86] At [76].

many discussions and to great care by the legislator, constitutes a general principle of Community law. Such a principle is a component of the general principle of equal treatment. The combination of both statements allows to expect a fruitful upcoming case-law on the basis of the 2000 Directives adopted on the basis of Article 13 EC. As regards the impact of this ruling on horizontal relationships however, we wish to submit that the case could be restrictively interpreted. Indeed, as a result of the complete ignorance of the horizontal nature of the dispute, the argument could be put forward that this particular aspect of the case is left for the national court to take into account. *Mangold* would therefore constitute a ruling on the interpretation of EC law *in abstracto,* detached from the factual background of the case. The law on the legal effects of directives and principles of Community law would therefore remain unaffected. The reason for seeking such a restrictive interpretation of the case does not only derive from the wish to reconcile it with previous case-law on the effects of EC law in national law, but also from the material scope of the ruling. As we shall now see, reliance on the general principle of non-discrimination on grounds of age has indeed allowed the ECJ to comfort its jurisdiction over national employment policies in a most undue manner.

*ECJ comforting its jurisdiction over national employment policies*

The ruling in *Mangold* provides the Court with an opportunity to consider Directive 2000/78 for the first time and in particular its provisions on non-discrimination on grounds of age. Faced with a directly discriminatory national measure, the Court inquires into the possibility of justifying the discrimination (a) before analysing the proportionality of the measure (b).

(a) The unquestionable legitimacy of support to older workers' participation in the labour force

The provision of national law at stake in *Mangold* is aimed at the vocational integration of unemployed aged workers. The Court was therefore called upon to scrutinize modern employment policy concerns derived from the ageing of the European workforce in the light of the non-discrimination principle. Before analysing the novelty of the legitimate aim recognised by the Court, we ought to focus on the structure of the Court's analysis of the justification relating to the directly discriminatory measure.

(i) An objective justification for direct discrimination

It should be briefly mentioned that the theoretical scheme of analysis of the principle of equal treatment allows for direct discrimination to be derogated from by way of express derogations. Indirect discrimination by contrast, can be justified by objective reasons

unrelated to the prohibited ground of discrimination. [87] The latter analysis is an integral part of the scrutiny of the discriminatory nature of the measure.[88] The practical impact of this distinction is that while direct discrimination is in principle unlawful and can only be derogated from in expressly circumscribed circumstances, indirect discrimination may more easily be justified.

By contrast with this common scheme of analysis, the text of Directive 2000/78 merely stresses that "*differences in treatment in connection with age may be justified*"[89] and that "*Member States may provide that differences of treatment on grounds of age shall not constitute discrimination*"[90]. Indeed, such differences of treatment can be "*objectively and reasonably justified by a legitimate aim*"[91] for which the list is open ended. If this is the case, and if the national measure is appropriate and necessary, then both the Preamble of Directive 2000/78[92] and its Article 6(1) indicate that the difference of treatment shall not constitute discrimination. The wording of Directive 2000/78 therefore suggests that any type of discrimination on grounds of age can be objectively justified. This is confirmed by the given ruling. Mr Mangold is indeed unquestionably victim of direct discrimination[93] and the Court, following the structure of the Directive, accepts that the measure may be justified by a legitimate public-interest objective.

This peculiar mechanism could be understood as resulting from a compromise between the Member States' modern concern to tackle age discrimination on the one hand and the remaining importance of age related distinctions in social and employment policies. Direct discrimination to favour older workers can be seen as a form of positive discrimination. In this context, the provisions of Directive 2000/78 related to the possibility to justify direct discrimination through objective reasons, could be better understood. It remains to be seen however how this can fit with the EC law on non-discrimination that has never until now tackled positive discrimination in such a way.

The great care that Member States have taken in both the drafting of Article 13 EC and the provisions of the Directive specifically related to age discrimination indicate their willingness to have an important margin of discretion recognised when dealing with age discrimination. A particular dimension is given to this atypical mechanism by the *Mangold* ruling. By elevating the principle of non-discrimination on grounds of age to a component of the general principle

[87] For examples on sex discrimination see e.g. Case C-167/97, Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez [1999] E.C.R. I-623, [67]; Case 171/88, Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG. [1989] E.C.R. 2743, [12]; Case C-77/02, Erika Steinicke and Bundesanstalt für Arbeit [2003] E.C.R. I-9027, [57].

[88] See e.g. A.G. Jacobs in Case C-79/99, Julia Schnorbus v Land Hessen, Opinion of 6 July 2000, [34]-[35] and Editorial, E.L.Rev. supra fn.4, 2.

[89] Recital 25, Preamble, Directive 2000/78.

[90] Art. 6(1), Directive 2000/78.

[91] Art. 6(1), Directive 2000/78. The wording in Recital 25, Preamble, Directive 2000/78 is similar.

[92] Recital 25, Preamble, Directive 2000/78.

[93] At [57], see also A.G. Tizzano, supra fn.18, [88].

of equal treatment in the field of employment and occupation, the Court triggers the concern that, as Arnull puts it, "*whatever Council legislation may say, direct discrimination on any of the grounds mentioned in Art. 13 EC may be objectively justified*"[94]. The same question is raised to an even greater extent as regards the impact of the *Mangold* ruling on the general principle of equal treatment and, for instance, discrimination on grounds of nationality. One could argue that the Court distinguishes between the substance of the principle of non-discrimination on grounds of age, which as we have just seen is particularly flexible, and the effects of the prohibition of non-discrimination that are treated in two different stages of the reasoning of the Court. Reconciling the two is however admittedly difficult.

(ii) A new legitimate employment policy objective

As follows from the open wording of Article 6(1) of the Directive, the Court in *Mangold* is keen on accepting a new legitimate employment policy objectives. The novelty of such an objective can be seen by comparison with earlier case-law. Prior to *Mangold*, the Court had been faced with several cases involving age discrimination tackled indirectly via the prohibition of discrimination on grounds of sex. A good example for our analysis is *Steinicke*[95] where the national provision at stake sought to promote part-time work for civil servants above 55 years old. The *Bundesanstalt für Arbeit* argued that the "*scheme is intended to […] make a contribution both to employment policy and to freeing posts in the employment market*. *The objective pursued by the system of part-time work for older employees is to encourage full-time workers to be willing to accept reduced working hours*."[96] Because the scheme under scrutiny excluded part-time workers from the benefit, it indirectly discriminated against female workers and therefore fell within the scope of Articles 2(1) and 5(1) of Directive 76/207.[97] The Court however accepted, as on many occasions before[98], that "*encouragement of recruitment constitutes a legitimate aim of social policy*"[99] and reminds us that "*the Member States have a broad margin of discretion in exercising that power*"[100] . This case is useful for our analysis in two respects.

First, it illustrates the traditional position of national employment policies concerned with unblocking the labour market. In *Mangold* by contrast, the employment policy goal pursued is to make it more attractive for employers to hire older workers. The Court is very keen[101] to

[94] Editorial, E.L.Rev. supra fn.4, 2.

[95] Case C-77/02, Steinicke, supra fn.87. See also Case C-187/00, Helga Kutz-Bauer and Freie und Hansestadt Hamburg [2003] E.C.R. I-2741.

[96] ibid., [36].

[97] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] O.J. L 39/40, ibid, [57].

[98] See e.g. Case C-187/00, Helga Kutz-Bauer, supra fn.95, [56].

[99] Case C-77/02, Steinicke, supra fn.87, [62].

[100] ibid, [61].

[101] At [60].

accept such a change in national employment policy objectives and asserts that the promotion of the vocational integration of unemployed older workers constitutes, "*as a rule*", a legitimate objective.[102] One ought in that respect to recall the substance of Recitals 8 and 25 of Directive 2000/78. The Community legislature refers to the consensus on new directions for national employment policies as results from the EES by recalling the substance of the Employment Guidelines for 2000. The approach suggested by the EES includes a special concern for older workers, in other words, "*the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force*"[103] and the awareness that "*[t]he prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce*"[104]. The ruling in *Mangold* therefore crystallizes the encounter between EC policy making and legal mechanisms, thereby comforting Hatzopoulos suggestion that there exist a form of dialogue between Lisbon and Luxemburg.[105]

Second, in *Steinicke* as in *Mangold*[106], the Court was happy to allow Member States a broad margin of discretion in exercising their employment policy powers. Such a *prima facie* self-restraint is justified by the current delineation of competences between Member States and the EC as regards social and employment policy. Title VIII of the ECT, devoted to "*Employment*", provides that the Member States and the Community shall "*work towards developing a coordinated strategy for employment*"[107]. As Advocate General Geelhoed puts it, "*it is clear that competence in establishing employment […] policy rests primarily with Member States, while the Community plays a coordinating and complementary role. »*[108] It could have been concluded from this, combined with the flexible wording of Article 13 EC and the Directive itself, that the Court would indeed allow the Member States an important leeway in exercising employment policy choices. As can be seen from the Court's analysis of the proportionality of Paragraph 14(3) of the TzBfG, this has however not been the case.

(b) Counterbalancing modern employment policy choices with Human rights

After having asserted the unquestionable legitimacy of the promotion of the employment of older workers and having pointed to the broad margin of discretion of the Member States in

[102] See in particular [59]-[61]. It can be observed that A.G. Tizzano (supra fn.18, [89] and [90]) does not even discuss the legitimacy of the objective pursued.

[103] Recital 8, Preamble, Directive 2000/78.

[104] Recital 25, Preamble, Directive 2000/78.

[105] See in particular Hatzopoulos, "A (more) social Europe: a political crossroad or a legal one-way? Dialogues between Lisbon and Luxembourg" (2005) 42 Common Market Law Review 1599.

[106] At [63].

[107] Art. 125 EC.

[108] A.G. Geelhoed in Case C-406/04, Gérald De Cuyper v Office national de l'emploi, Opinion of 2 February 2006, [72]. See also, along the same lines, A.G. Geelhoed in the second case on Directive 2000/78 still pending Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA, Opinion of 16 March 2006, [52] et seq.

their employment policy choices, the Court operates a fairly strict scrutiny of the proportionality of the measure.

(i) Human rights v. national employment policy

In *Mangold*, the Court strikes down the national measure at the stage of the analysis of the measure's proportionality. [109] In *Mangold,* the Court concentrates on the necessity of the measure. It first inquires into the automatic nature of the provision that applies to "*all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment*"[110]. It then focuses on the impact the measure may have on each of them who can "*be offered fixed-term contracts of employment which may be renewed an indefinite number of times*"[111], therefore threatening that "*a substantial part of [the members of this group of workers'] working life, of being excluded from the benefit of stable employment*"[112].

Such a supervision of national policy choices seeks to ensure on the one hand, that the national measures are economically suitable for the aim pursued as can be seen from the Court's insistence, in particular, that "*other consideration linked to the structure of the labour market*"[113] are be taken into account.[114] On the other hand, the Court pushes its human rights jurisdiction further. First of all, non-discrimination on grounds of age, as stated by the Court later on in the ruling, constitutes a general principle of Community law. But because of the very nature of the objective of the national employment policy that, *per se*, requires a difference of treatment on grounds of age, the Court brings into the proportionality test an external element: the notion of stable relationship. The Court is eager to accept that stable employment constitutes a major element of the protection of workers that weighs in favour of the unlawfulness of the national provision. Such a reasoning is not without echoing the case-law in which the Court of Justice, besides weighing the two interests in presence, imports a third interest such as a fundamental right in the balancing exercise.[115] The precise legal nature of the notion of stable employment in the given case is however not defined. Such uncertainty results from the difficulty of assessing the proportionality of a directly discriminatory measure at the light of an inherently discriminatory justification.

The Court therefore is unquestionably seeking to strike the correct balance between the protection of individuals' rights and Member States' employment policy choices. Several arguments could be made in support of this view. Direct discrimination *per se* calls for a strict

[109] At [63].
[110] At [64].
[111] At [64].
[112] At [64].
[113] At [65].
[114] The Court in Steinicke (Case C-77/02, Steinicke, supra fn.87, [65]) controls the economic suitability of the measure.
[115] See e.g. Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others E.C.R. [1991] I-2925, [43].

scrutiny of the Court. Also, as we have pointed out by referring to the *Steinicke* case, age discrimination may also be constitutive of indirect sex discrimination. The risk of inconsistencies in case-law in the event of "*multiple discrimination*"[116], could have justified the application of a strong proportionality test. Finally, it shall be mentioned, that in the current state of economic integration, employment constitutes the main *variable d'ajustement economique* since Member States have very strict criteria to fulfil in other areas of their economies, in particular regarding the Growth and Stability Pact[117]. The human rights concern of the Court would in that sense prevent national employment policies, coordinated in the EES, to be used as an economic instrument irrespective of individual's rights. The legitimacy of the Court's intervention in this context, together with the economic impact of the Court's ruling are however questionable.

(ii) The ECJ and national employment policies

In the field of employment policy, competence lies primarily with the Member States. Moreover, as specified by Article 13(1) EC, measures to tackle discrimination are to be taken "*[w]ithout prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it*". The degree of scrutiny of the Court should therefore be analysed in the light of the weak Community competence in this area.[118] If it cannot be denied that Directive 2000/78 precisely establishes a general framework for equal treatment in employment and occupation, the wording of Article 13 EC, the Preamble of the Directive and the provisions related to age discrimination point to the Member States' concern that they be granted a broad margin of discretion. One could therefore be surprised to see the Court counterbalancing national employment policy choices with the concern that an individual enjoy a stable employment relationship. It is in particular in circumventing the extension of the implementation period for the directive, with recourse to the general principle, that the Court puts an undue regulatory and inevitable economic constraint upon the national legislator. The risk for the Court to engage in such a direction is to contribute to an overregulation of the labour market in a period of time in which the Member States have agreed to give it more flexibility within the framework of the EES. This observation shall further be read in the light of the horizontal nature of the litigation between Mr. Mangold and Mr. Helm.

What is indeed unprecedented is that the *Mangold* ruling suggests that the ECJ will accept to review national employment policy measures relied upon in litigation between private parties, therefore possibly creating obligations for private employers. In other words, the Court does not only, in substance, state that a provision of national law justified by a legitimate

[116] Sheik, « A New Framework on Equal Treatment of Persons in EC Law ? » (2002) 8 European Law Journal 290, 311.

[117] Trubek and Trubek in particular point out that the EES emerged out of the "constraint" created by monetary integration and the Growth and Stability pact (Trubek and Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination" (2002) 11/3 European Law Journal 345). On the link between the EURO and the EES, see Mortelmans, « The Common Market, the Internal Market and the Single Market, what's in a market?" (1998) 35 Common Market Law Review 101.

[118] Along the same lines, A.G. Geelhoed in Case C-13/05, supra fn.108, [55].

employment policy objective is disproportionate to its aim in that a substantial category of older workers will be deprived from a stable employment relationship. It also seems to imply that this will result in the corresponding provision in a contract of employment being devoid of its effects. If this is so, Mr Helm, the employer of Mr Mangold, is left with the duty not to discriminate on grounds of age and to ensure that older employees are not deprived of a stable employment relationship in a disproportionate manner. The economic weight the principle of non-discrimination is likely to have on private employers ought not to be disregarded. [119] This is likely to have contrary effect to what Member States have been trying to achieve within the EES and the legitimacy of the Court's intrusion based on grounds of discrimination which have just freshly been enacted and are still causing difficulties within some Member States is in that respect highly questionable.

**Conclusion**

Both from a legal and an economic perspective, one could accordingly fear that Article 13 EC and the secondary legislation adopted therein constitute, «*à l'instar du défi d'Archimède, un point d'appui universel à partir duquel les principes de non-discrimination définis à l'article 13 CE peuvent être utilisés pour corriger, sans l'intervention des pères du traité ou du législateur communautaire, les arbitrages faits par les États membres dans l'exercice des compétences qui leur restent – encore –* »[120]. An argument could therefore be made in favour of a restrictive interpretation of certain aspects of the *Mangold* case. In that respect, it shall be stressed that is likely that both Directive 2000/78 and Directive 2000/43 will trigger a fascinating body of case-law on the general principles. The modalities of their application to modern employment and social policy choices, will however have to be clarified by the Community judiciary. Regarding the horizontal affect of such principles, as submitted earlier the Court having blatantly disregarded the horizontal nature of the dispute, the ruling could possibly be presumed to have been given in abstracto.

As illustrated in another pending case, *De Cuyper*[121], Article 13 EC is far from being the only meeting point of national employment policies and the ECJ's concern for individual's rights. Other instruments of labour market regulation such as unemployment benefits should be seen in the evolving context of the relationship between Community law and national policy making as regards labour market.[122] We can only hope that the Court will strike the right balance between legal certainty, respect for national policy choices and the protection of individuals.

[119] See in particular A.G. Geelhoed in Case C-13/05, supra fn.108, [50] and [51].
[120] A.G. Geelhoed in Case C-13/05, supra fn.108, [54] (at the time of writing, the text is not available in English).
[121] A.G. Geelhoed in Case C-406/04, supra fn.108, in particular at [60], see also [61]-[63].
[122] A.G. Geelhoed in Case C-406/04, supra fn.108, [64].

College of Europe
Collège d'Europe
Brugge
Natolin

European Legal Studies
Etudes Européennes Juridiques

## RESEARCH PAPERS IN LAW

1/2003, Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”.

2/2003, Dominik Hanf, “Der Prozess der europäischen Integration in Belgien. Voraussetzung und Rahmen der Föderalisiserung eines ehemaligen Einheitsstaats”.

3/2003, Dominik Hanf, “Talking with the “pouvoir constituant” in times of constitutional reform: The European Court of Justice on Private Applicants’ Access to Justice”.

4/2003, Horst Dippel, “Conventions in Comparative Constitutional Law”.

5/2003, Ludwig Krämer, “Access to Environmental Information in an Open European Society - Directive 2003/4”.

6/2003, Ludwig Krämer, “Uberlegungen zu Ressourceneffizienz und Recycling”.

7/2003, Ludwig Krämer, “The Genesis of EC Environmental Principles”.

8/2003, Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”.

1/2004, Dominik Hanf et Pablo Dengler, “Accords d’association”.

2/2004, David Mamane, “Reform der EU-Wettbewerbsregeln für Technologietransfer-Verträge: Einfahrt in den sicheren Hafen?”.

3/2004, Donald Slater and Denis Waelbroeck, “Meeting Competition : Why it is not an Abuse under Article 82”.

4/2004, Jacques Bourgeois and Tristan Baumé, “Decentralisation of EC Competition Law Enforcement and General Principles of Community Law”.

5/2004, Rostane Mehdi, “Brèves observations sur la consécration constitutionnelle d’un droit de retrait volontaire”.

1/2005, Jacques Pelkmans, “Subsidiarity between Law and Economics”.

2/2005, Koen Lenaerts, “The Future Organisation of the European Courts”.

3/2005, John A.E. Vervaele, “The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration”.

4/2005, Christine Reh and Bruno Scholl, “The Convention on the Future of Europe: Extended Working Group or Constitutional Assembly?”

5/2005, John A.E. Vervaele, “European Criminal Law and General Principles of Union Law”.

6/2005, Dieter Mahncke, “From Structure to Substance: Has the Constitutional Treaty improved the Chances for a Common Foreign and Security Policy?”.

1/2006, Dominik Hanf, “Le développement de la citoyenneté de l’Union européenne”.

2/2006, Vassilis Hatzopoulos, Thien Uyen Do, “The Case Law of the ECJ concerning the Free Provision of Services : 2000 – 2005”.

3/2006, Dominik Hanf, “Réformes institutionnelles sans révision du traité?”, (document de discussion).

4/2006, Elise Muir, “Enhancing the effects of EC law on national labour markets, the Mangold case”.

European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | B-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurop.be | www.coleurop.be