

# MATERIALS ON THE LAW OF THE EUROPEAN UNION

## Spring 2016: PART 3

### Direct Effect and General Principles of EU Law

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We have seen that equal pay was an aspect of the policy of what is now the EU from the beginning, and the Marshall case (excerpted in the second materials packet) involved an equal treatment directive which went beyond pay to require equal treatment of men and women with respect to conditions of employment other than pay.

The Amsterdam Treaty contained a new provision which was the legal basis for measures to prevent all forms of discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The EU has since adopted measures to prohibit discrimination on the basis of race or ethnicity,<sup>2</sup> which do not apply just in the employment context but also to “social protection, including social security and healthcare.. social advantages.. education.. [and] access to and supply of goods and services which are available to the public, including housing.”<sup>3</sup> **Art. 19 of the TFEU** provides:

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in

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<sup>2</sup> Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22 (Jul. 19, 2000).

<sup>3</sup> *Id.* at Art. 3.

accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

In 2008 the Commission published a **Communication on Non-discrimination and Equal Opportunities: a Renewed Commitment**<sup>4</sup> which announced a proposal for a new directive<sup>5</sup> (the proposed directive has not been adopted as of early 2016) and stated:

Better legislative protection against discrimination must be accompanied by an active strategy to promote non-discrimination and equal opportunities. So this Communication also proposes actions to give new impetus to the dialogue on non-discrimination policy and to make more effective use of the instruments available, both in general and with particular emphasis on promoting the social inclusion of Roma, given the particular discrimination problems they face... The fight against discrimination cannot be won by legislation alone. First and foremost it depends on changing attitudes and behaviour. But there can be no doubt that an effective and properly-enforced legal framework outlawing discrimination and ensuring that its victims can have effective recourse is an essential precursor for delivering real change. The Commission is committed to ensuring that the existing legal framework is respected, whilst proposing that new legislation is needed to extend the scope of legal protection to all forms of discrimination in all areas of life.

.Three Directives have already been adopted to give effect to Article 13 TEC, which allows for action to outlaw and combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. These Directives prohibit discrimination on grounds of age, sexual orientation, disability and religion or belief in employment, occupation and vocational training, whilst protection from discrimination based on race and gender extends beyond the employment field to include social protection and access to goods and services. The Commission is actively engaged in ensuring the proper implementation of the Directives. The overall picture is positive. National law transposing the Directives has had a tangible impact on combating discrimination. Several Member States have already gone further than the requirements of EU law in terms of providing protection from discrimination. In 2006 and 2008 the Commission reported on the implementation of the Directives on discrimination on the grounds of racial and ethnic origin and discrimination in employment and occupation. Where the Commission is not satisfied that Member States have properly respected their obligations, it has launched infringement proceedings. About half of the Member States are concerned. The problems mainly relate to failure to cover all the persons and areas covered by the Directives, definitions of discrimination that differ from the Directives and inconsistencies in provisions to

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<sup>4</sup> Com (2008) 420 (Jul. 2, 2008).

<sup>5</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 (Jul. 2, 2008). The directive has not yet been adopted but has been the subject of a number of discussions in the Council and has been considered by the Parliament.

help victims of discrimination. The Commission is also currently checking whether Member States have met their obligations to transpose the 2004 Directive on sex discrimination in access to goods and services properly. It will report in 2010 on implementation and, as stipulated in the Directive, may propose modifications where appropriate.

But properly transposing European rules into national law is only part of the story. Member States also need to ensure that their systems for redress for victims and their awareness-raising activities are effective on the ground. Individuals need to know their rights and be able to use them.

The national equality bodies set up under the Directives to promote equal treatment and combat discrimination on grounds of racial or ethnic origin or sex play an important role in assisting victims of discrimination by providing information and support in pursuing their complaints. They can give guidance to service providers and other interested parties on how to meet their obligations, and encourage mediation and alternative dispute resolution. As a result, complaints can often be resolved without recourse to the courts. Through the Progress programme, the Commission supports the development of cooperation between, and capacity-building of, equality bodies via the Equinet network.

The Commission also organises regular exchanges of information with the equality bodies on recent legal developments and common problems in dealing with sex discrimination. On this basis, the Commission is examining the effectiveness of national penalties and time limits to bring actions before national courts. These are two fundamental issues for discouraging discriminatory behaviour and giving victims effective legal remedies. The Commission is also working with these bodies to review the effectiveness of equal pay legislation in tackling the persistent gender pay gap....

Despite these achievements, the fact remains that the European legal framework for tackling discrimination is not yet complete. In particular, whilst some Member States have taken action prohibiting discrimination on grounds of age, sexual orientation, disability and religion or belief outside the area of employment, there is no uniform minimum level of protection within the European Union for people who have suffered such discrimination.

Yet discrimination on these grounds is clearly just as unacceptable outside the employment sphere as it is within it. When it comes to protection against discrimination, there can be no hierarchy. That is why the Commission announced in its 2008 legislative and work programme that it would propose new initiatives to complete the legal framework, building on the results of an extensive public consultation process. This commitment also responded to the Council's calls to the Commission to examine any gaps that may exist in the current Community anti-discrimination legislative framework, and the European Parliament's repeated requests for the framework to be extended.

The proposal for a Directive, which accompanies this Communication, opens the way to completing the European legal framework on anti-discrimination. The Directive will ensure that in all 27 Member States all forms of discrimination, including harassment, on the grounds of age, sexual orientation, disability and religion or belief are prohibited and victims have effective redress. Once adopted, the Directive will complete the process of giving effect to Article 13 TEC on all grounds and will bring to an end any perception of a hierarchy of protection.

This ambitious objective implies a response which is wide-ranging in terms of scope but realistic and reflecting the specific characteristics of the areas concerned. National traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal

choices in areas which fall within national competence.

The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The draft Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing churches and other religious organisations and their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.

The various grounds of discrimination differ substantively, and each demands a tailored response. This is not a question of creating a hierarchy between the various grounds, but of delivering the most appropriate form of protection for each of them.

As concerns age, there are situations where treating someone differently simply because of their age can be justified in the general public interest. Examples include minimum age requirements for access to education or to certain goods and services, preferential tariffs for certain age groups using public transport or visiting museums. Furthermore, where insurers and banks use age as an actuarial factor to assess the risk profile of customers, this does not necessarily amount to discrimination, though this factor should only be used where relevant and where based on objective evidence. Similar considerations apply in relation to disability. The Commission intends to initiate a dialogue with financial service providers, together with other relevant stakeholders, in order to exchange and encourage best practice.

Disability also requires a specific and tailored response. Many Member States already have legislation providing for protection of people with disabilities, but there are significant differences concerning the type of protection ensured and the fields covered. Moreover, the adoption of the United Nations Convention on the Rights of Persons with Disabilities, which has been jointly signed by the European Community and its Member States, calls for common standards of implementation in national law of the rights that it provides.

Real equality for persons with disabilities cannot be delivered simply through prohibiting discrimination. Instead, it depends on positive actions, including responding to the needs of persons with disabilities. Lack of accessibility is being increasingly recognised as inadmissible in European societies. Empowering people with disabilities to actively contribute has real economic and social benefits. As was the case for the 2000 Directive in the area of employment, measures to accommodate their needs should be reasonable – proportionate to the needs of the customer or user and in terms of costs for the body or business concerned. Member States will continue to be able to provide education for persons with disabilities in either mainstream or specialised facilities.

The future Directive will be applied in very diverse situations across the European Union. It is therefore appropriate to leave a margin of flexibility to the Member States. For example, rules which seem neutral but which could in practice have a disadvantageous impact upon a group might be permissible if they are reasonable and pursue a justifiable aim. In monitoring the application of the Directive, the Commission will pay particular attention to the use of this possibility.

The draft Directive applies to the provision of all goods and services. It would be disproportionate to submit individuals acting purely privately to all the obligations of the draft

Directive. The proposal therefore draws on practice in several Member States and includes provisions limiting its application to the commercial provision of goods and services. Private individuals are covered only in so far as they are performing their commercial activity. In terms of key concepts and mechanisms, the proposed Directive adopts the same successful model used in the existing Directives. The Directive therefore reflects the current legislation as concerns the definitions of direct and indirect discrimination, harassment and instructions to discriminate. Provisions on the role of equality bodies and the obligation for Member States to provide for proper redress against discrimination before the national courts are the same as those in the current legislation. These concepts and mechanisms are therefore already familiar to public and private organisations in the Member States, which should make the new instrument easier to transpose and apply. At the same time, by complementing the existing Directives, the proposed approach avoids reopening discussion and creating uncertainty as concerns the existing *acquis*. The Commission believes that this proposal offers a balanced and realistic way forward to complete the European anti-discrimination framework and calls on the Council and the European Parliament to take forward discussions as a matter of priority. ... Advancing non-discrimination and equal opportunities for all grounds relies both on a sound legislative basis and on a range of policy tools. These include awareness-raising, mainstreaming, data collection and positive action. The Council Resolution on the follow-up to the 2007 European Year underlined the importance of taking full account of and further developing these policy tools...

#### Stronger policy tools

##### Non-discrimination mainstreaming

Mainstreaming principles should apply across all grounds covered by Article 13 EC if the inequality and discrimination suffered by all groups are to be reduced... Implementation by the Community and the Member States of the UN Convention on the Rights of Persons with Disabilities will provide the basis for closer cooperation in this area. Second, the Roadmap for equality between women and men for 2006-10 provides the framework for action in the gender equality field. Special attention will be given to mainstreaming the gender perspective in the activities proposed.

The Commission will build on these achievements by promoting the systematic incorporation of non-discrimination and equal opportunity concerns on all Article 13 grounds into all policies, in particular within existing coordination mechanisms for employment, social inclusion, education and training. For its part, the Commission will step up screening of impacts regarding non-discrimination and equal opportunity issues of new Commission proposals, and will encourage NGOs with experience of particular non-discrimination strands to participate in consultations.

It urges Member States to utilise the various mainstreaming tools, good practice and methodologies already available at Community and national level. Equal opportunities, non-discrimination considerations and accessibility requirements will be covered in the planned guide on socially responsible public procurement in order to raise awareness in the Member States of how to promote non-discrimination and equal opportunities through procurement policy and practice.

The Commission will also continue to promote the values of non-discrimination and equal opportunities in other policies, such as the rights of the child<sup>[13]</sup> and enlargement, and more generally in the EU's external relations, including at multilateral level. Special attention will be

paid to the rights of persons belonging to minorities in non-member countries.

#### Measuring discrimination and evaluating progress

Accurate data is essential for assessing the scale and nature of discrimination suffered and for designing, adapting, monitoring and evaluating policies. There is considerable demand for data on all grounds of discrimination. Available data vary considerably by ground and by Member State, which makes comparability of data difficult if not impossible.

Legislation on privacy and data protection lay down criteria for collecting and processing data. Broadly speaking, the European public are willing to provide personal information anonymously in censuses with a view to combating discrimination. The Commission is exploring the possibilities of: (i) collecting statistics regularly on the scale and impact of discrimination in conjunction with the Member States' statistical authorities under the Community Statistical Programme, in particular on grounds of racial and ethnic origin, religion/belief and sexual orientation, where there is still a lack of information, and (ii) setting up an EU-survey module on discrimination. It is also working closely with Equinet to develop a system for gathering information on complaints handled by national equality bodies.

#### Positive action

Identical treatment may result in formal equality, but cannot suffice to bring about equality in practice. EU non-discrimination legislation does not prevent any Member State from maintaining or adopting specific measures to prevent, or compensate for, disadvantages linked to discrimination on grounds where there is provision for protection.

There is a rapidly growing appreciation of the role positive action can play to redress the lack of substantive equality in societies. Some Member States have introduced provisions making it a duty for public authorities to promote equality as a core objective of all their activities. The Commission will use the permanent dialogue with Member States to promote the full utilisation of the possibilities for positive action, in particular in access to education, employment, housing and health care.

#### Awareness-raising and training activities

Information on existing legislation is a precondition for real use to be made of it by potential victims and for awareness of duties among employers, service-providers and administrations. But as noted earlier, awareness of non-discrimination legislation remains low. If further progress is to be achieved, the biggest changes — and those hardest to achieve — involve fighting stereotypes and prejudice in all its forms. The EU information campaign 'For Diversity — Against Discrimination' will be pursued in close cooperation with national working groups bringing together representatives of civil society, government officials, social partners and other stakeholders. The Commission will also provide further support for training activities on existing legislation and targeting key stakeholders, including equality bodies, judges, lawyers, NGOs and social partners.

#### Promoting the benefits of diversity at the workplace

Recognising that legislation is more effective when it goes hand in hand with progressive and innovative strategies implemented by employers to manage an increasingly diverse workforce, the Commission and Member States support the development of diversity management, in both larger companies and SMEs.

The Council has called on the Member States and the Commission to promote workforce diversity further and to foster the development of suitable business tools, including voluntary charters. In response, with the support of business and employers' organisations, the Commission will encourage voluntary EU-wide initiatives. It also promotes cooperation between business, business schools and universities on possibilities for closer cooperation in research and training on diversity-related topics. Furthermore, it will promote diversity and improved diversity management in public administrations at EU and national level.

#### Developing the dialogue on non-discrimination and equal opportunities

In 2007 the European Year of Equal Opportunities for All opened new avenues for promoting non-discrimination and equal opportunities by involving all actors in cross-ground dialogue at EU and national level. Member States and civil society have acknowledged the value of putting this dialogue on a more permanent footing. Such exchanges will be based on the annual equality summits, which bring together stakeholders at the highest level to take stock and give impetus and direction.

The Commission has set up a non-discrimination governmental expert group to examine the impact of national and EU-level non-discrimination measures, validate good practice through peer learning and develop benchmarks to evaluate the effectiveness of non-discrimination policies. For example, the Commission intends to work with this group to follow up the findings of the comparative study on homophobia and discrimination on grounds of sexual orientation in the EU carried out by the European Agency for Fundamental Rights. The group will meet regularly with civil society, the social partners and Equinet. The Community could use the Progress programme to support the identification of innovative practice through this process. The Commission will report to the equality summits on the results of this work.

The Commission intends to use these new governance mechanisms to address the issue of multiple discrimination building on established practice in some Member States providing for a single legal procedure for victims of such discrimination to submit complaints and treating evidence that discrimination has occurred on more than one ground as an aggravating factor. The Commission will raise awareness of multiple discrimination through financing activities and providing funding for smaller networks of NGOs representing intersectional groups.

#### Applying better tools to advancing the social inclusion of the Roma

While boosting the fight against discrimination through both legislative and policy tools will benefit all potential stakeholder groups, it remains important to address particular concerns of specific groups. The situation of the Roma is of particular concern at the present time characterised by persisting individual and institutional discrimination and far-reaching social exclusion. The marginalisation of millions of people is unacceptable above all from the perspective of equality and effective enjoyment of human rights. It is indefensible too from the perspective of social cohesion. Last but not least, the widespread unemployment and poverty of such a large group of people is a waste in economic terms. Addressing this urgent problem is a joint responsibility of the European Union and Member States.

The Commission has repeatedly condemned all manifestations of anti-Gypsyism as a specific form of racism that is incompatible with the EU's principles. The application of EU discrimination legislation in the Member States is the fundamental starting point for Roma inclusion. The Commission will remain vigilant in this area and will step up its work with national equality bodies to improve their capacity to tackle cases of discrimination against Roma. The

Commission will continue to support capacity-building among Roma civil society and to promote their involvement at all levels of policy development and implementation.

The situation of Roma has been acknowledged by the European Council, which called on the Commission in December 2007 ' to examine existing policies and instruments and to report to the Council on progress achieved. ' The accompanying Staff Working Paper responds to that request. It demonstrates that there is a powerful framework of legislative, financial and policy coordination tools available and that these are increasingly used, but that more can be done to make them work more effectively.

The impact on the ground of these tools depends however on the commitment of Member States and the capacity of all actors involved to use them in full. The June 2008 European Council asked the Council to treat this as a matter of urgency. The Commission will use all the means at its disposal to support this process looking forward to a clear commitment from the European Council at the end of the French Presidency.

In order to support and promote a joint commitment by the Member States, the EU institutions and civil society, the Commission will organise an EU Roma Summit of all stakeholders in September 2008 in the context of the European Year of Inter-Cultural Dialogue; the conclusions of the Summit will be submitted to the French Presidency for further consideration in the Council of Ministers ahead of the December 2008 European Council. In addition, building on the extensive research already accomplished, the Commission will undertake a comprehensive study of existing policies and institutional mechanisms and their links with programmes and projects targeting Roma people with the aim of identifying successful transferable practices to make better use of Community and national instruments...

The Commission is strongly committed to fighting all forms of discrimination under Article 13 EC and will continue to monitor the transposition of the existing Directives carefully. In order to complete the EU legal framework, it is presenting a proposal for a directive prohibiting discrimination on grounds of age, disability, sexual orientation, religion or belief outside the employment sphere. The Commission calls on the Council and the Parliament to take forward discussions on the proposal as a matter of priority.

Successful legal protection of individual rights must go hand in hand with the active promotion of non-discrimination and equal opportunities. The Commission is committed to achieving further progress at EU and national level in key areas, such as awareness-raising, non-discrimination mainstreaming, positive action and data collection. More robust governance of non-discrimination policy should facilitate the exchange of good practice, peer learning and benchmarking between the Member States and encourage the development of new approaches for example to address multiple discrimination.

The Commission, in cooperation with civil society and the social partners, will monitor the implementation of the initiatives set out in this Communication. It will evaluate progress and the impact of specific activities.

In 2000 the EU adopted a Directive establishing a general framework for equal treatment in employment and occupation.<sup>6</sup> Article 1 of this Directive states:

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<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ No. L 303/16 (Dec. 2, 2000) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>. The directive

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

In 2005, in **Mangold v Helm**, Case C-144/04, Mr Mangold, a 56 year old lawyer, sued his employer arguing that a provision of German law which allowed employers to terminate the employment of workers over 52 more easily than the employment of younger workers, contravened the Equal Treatment Framework Directive. At the time the period for implementation of the Directive by the Member States had not expired.

As you read the decision, notice that in paragraph 67 the Court points out that the Member States' freedom to act is limited during the period when they are expected to be implementing a directive. But then the Court goes further.

55 ... the national court seeks in essence to ascertain whether Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision of domestic law... which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. If so, the national court asks what conclusions it must draw from that interpretation.

56 In this regard, it is to be noted that, in accordance with Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in that article, which include age, as regards employment and occupation.

57 Paragraph 14(3) of the TzBfG, however, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference of treatment on the grounds directly of age.

58 Specifically with regard to differences of treatment on grounds of age, Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment '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'. According to subparagraph (a) of the second paragraph of Article 6(1), those differences may include inter alia 'the setting of special conditions on access to employment and vocational training, employment and occupation ... for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection' and, under subparagraphs (b) and (c), the fixing of conditions of age in certain special circumstances.

59 As is clear from the documents sent to the Court by the national court, the purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work.

60 The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, as

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was implemented in the UK by the The Employment Equality (Age) Regulations 2006 at <http://www.opsi.gov.uk/si/si2006/20061031.htm> .

indeed the Commission itself has admitted.

61 An objective of that kind must as a rule, therefore, be regarded as justifying, 'objectively and reasonably', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age laid down by Member States.

62 It still remains to be established whether, according to the actual wording of that provision, the means used to achieve that legitimate objective are 'appropriate and necessary'.

63 In this respect the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.

64 However, as the national court has pointed out, application of national legislation such as that at issue in the main proceedings leads to a situation in which 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, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.

65 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 unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued ... Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78.

66 The fact that, when the contract was concluded, the period prescribed for the transposition into domestic law of Directive 2000/78 had not yet expired cannot call that finding into question.

67 First, the Court has already held that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (Inter-Environnement Wallonie, paragraph 45).

68 In this connection it is immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive...

69 In the case in the main proceedings the lowering... of the age above which it is permissible to conclude fixed-term contracts from 58 to 52 took place in December 2002 and that measure was to apply until 31 December 2006.

70 The mere fact that, in the circumstances of the case, that provision is to expire on 31 December 2006, just a few weeks after the date by which the Member State must have transposed the directive, is not in itself decisive.

71 On the one hand, it is apparent from the very wording of the second subparagraph of Article 18 of Directive 2000/78 that where a Member State, like the Federal Republic of Germany in this case, chooses to have recourse to an additional period of three years from 2 December

2003 in order to transpose the directive, that Member State 'shall report annually to the Commission on the steps it is taking to tackle age ... discrimination and on the progress it is making towards implementation'.

72 That provision implies, therefore, that the Member State, which thus exceptionally enjoys an extended period for transposition, is progressively to take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. Now, that obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation of the directive, to adopt measures incompatible with the objectives pursued by that act.

73 On the other hand, as the Advocate General has observed ... on 31 December 2006 a significant proportion of the workers covered by the legislation at issue in the main proceedings, including Mr Mangold, will already have reached the age of 58 and will therefore still fall within the specific rules laid down by Paragraph 14(3) of the TzBfG, with the result that that class of persons becomes definitively liable to be excluded from the safeguard of stable employment by the use of a fixed-term contract of employment, regardless of the fact that the age condition fixed at 52 will cease to apply at the end of 2006.

74 In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, 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', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paragraphs 51 and 64 above), and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle ...

76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the 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.

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect ... Simmenthal ... ).

78 Having regard to all the foregoing... Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has

reached the age of 52.

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired....

The Mangold decision is one of the decisions of the Court of Justice which has been used as an example of the Court's over-reaching.<sup>7</sup> In 2008, Roman Herzog and Lüder Gerken wrote<sup>8</sup>:

Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ),<sup>9</sup> whose justifications for depriving member states of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered a great deal of the trust it used to enjoy.... to justify its judgement [in the Mangold case], the ECJ resorted to a somewhat adventurous construction. The ECJ believed it had found a ban on age discrimination within the "constitutional traditions common to the Member States" and "various international treaties". So it was not actually the non-discrimination directive (as yet to be enforced) which caused the German reform provision to breach EU law, but a "general principle of community law". However, this "general principle of community law" was a fabrication. In only two of the then 25 member states - namely Finland and Portugal - is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature.

Fourthly, in its judgement the ECJ ordered the German reform provision to remain "not applied" with immediate effect. In fact, it was declared null and void. This also constitutes a highly questionable paradigm shift. The EC Treaty stipulates that member states are not directly bound by EU directives. This means that it is not the EU directives but the national transposition laws that must first create rights and duties for citizens.

The ECJ used to respect this, too: If the national law of a member state was not compatible with an EU directive, the ECJ confined itself to pointing out the inconsistency. Although the member state concerned then had to revise its law, the former version (incompatible with EU law) remained in effect until that was done. Hence, citizens could rely on the binding effect of their national laws. This has now changed: As a consequence of the ECJ judgement, all temporary employment contracts concluded during the German labour market reform were converted into regular employment contracts overnight - resulting in the subsequent material

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<sup>7</sup> See, e.g., Valentina Pop, Former German president bashes EU court (Sept. 10, 2008) at <http://euobserver.com/9/26712> .

<sup>8</sup> See <http://euobserver.com/9/26714> .

<sup>9</sup> The Court of Justice was called the ECJ before the Lisbon Treaty came into effect.

damage incurred by the affected companies.

One comment on the case states that:

The interesting detail of *Mangold* is that the Court constantly hints at the effects of fundamental constitutional principles of Community law. These effects are not actually spelled out, as the decision always refers back to the directive. It remains to be seen whether the Court is prepared to develop this particular aspect of the judgment further.<sup>10</sup>

**Advocate General Tizzano**<sup>11</sup> had taken a slightly different view from that of the Court in the *Mangold* Case, suggesting that the requirement for the Member States to interpret domestic law in accordance with EU law (indirect effect) should be the way to deal with the issues in the case. The Advocate General's opinion takes seriously the idea that directives are not supposed to produce horizontal direct effect.

83. It may .. be recalled that, even before the adoption of Directive 2000/78 ... the Court had recognised the existence of a general principle of equality which is binding on Member States 'when they implement Community rules' and which can therefore be used by the Court to review national rules which 'fall within the scope of Community law'. That principle requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified' by the pursuit of a legitimate aim and provided that it 'is appropriate and necessary in order to achieve' that aim.

84. As a comparison between them shows, both requirements – the specific requirement of the directive and the general requirement just described – are essentially identical, so that the analysis of the compatibility of a rule such as the German one could be carried out in the light of either requirement with similar results. The better option is perhaps to use the principle of

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<sup>10</sup> Dagmar Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35(3) *Industrial Law Journal* 329, 338 (2006)

<sup>11</sup> Here is his bio from the Court's web site: "Born 1940; Professor of European Union Law at La Sapienza University, Rome; Professor at the Istituto Universitario Orientale, Naples (1969-79), Federico II University, Naples (1979-1992), the University of Catania (1969-77) and the University of Mogadishu (1967-72); Member of the Bar at the Italian Court of Cassation; Legal Adviser to the Permanent Representation of the Italian Republic to the European Communities (1984-92); member of the Italian delegation at the negotiations for the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, for the Single European Act and for the Treaty on European Union; author of numerous publications, including commentaries on the European Treaties and collections of European Union legal texts; founder and director since 1996 of the journal 'Il Diritto dell'Unione Europea'; member of the managing or editorial board of a number of legal journals; rapporteur at numerous international congresses; conferences and courses at various international institutions, including The Hague Academy of International Law (1987); member of the independent group of experts appointed to examine the finances of the Commission of the European Communities (1999); Advocate General at the Court of Justice from 7 October 2000 to 3 May 2006; Judge at the Court of Justice since 4 May 2006."

equality – which was also raised, albeit indirectly, by the national court – since, being a general principle of Community law imposing an obligation that is precise and unconditional, it is effective against all parties and, unlike the directive, could therefore be relied upon directly by Mr Mangold against Mr Helm and could be applied by the Arbeitsgericht in the main proceedings.....

99. Before concluding, it remains to identify the legal consequences which the national court must draw from the Court's decision in circumstances, such as those in the main proceedings, in which an interpretation is sought of a directive in the context of a dispute between private parties.

100. It remains, that is, to answer the third question, by which the national court asks what the effect would be on the main proceedings of a declaration that a national rule such as that in issue was incompatible and, specifically, whether following such a declaration the national court could disapply that rule.

101. On close consideration, that question would be disposed of if the Court - following my suggestion - were to decide to declare incompatible a law, such as the law in issue, using as its yardstick of interpretation the general principle of equality, the clear, precise and unconditional content of which is binding on all legal persons and can therefore be relied upon by private parties both against the State and against other private parties ... There is no doubt that in that eventuality the national court would have to disapply a national rule held contrary to that principle which is regarded as having direct effect.

102. The question regains all its significance, however, if the Court decides - as I have suggested as an alternative - to declare incompatibility in the light of the rule against discrimination laid down in Article 6 of Directive 2000/78. In that eventuality, the answer to the question would be complicated still further by the fact that at the material time the deadline for transposition of the directive had not yet passed ... .

103. In that regard, the Arbeitsgericht and, in substance, the Commission too argue that if Directives 1999/70 and 2000/78 were to preclude a provision ...which allows workers over the age of 52 to be employed on fixed-term contracts with no restrictions, that provision would have to be disapplied and the general rule under Paragraph 14(1) of the TzBfG, which allows such contracts to be entered into only if objectively justified, applied in its place.

104. According to the Arbeitsgericht and the Commission, the contentious national provision would also have to be disapplied in the event it were found incompatible with Directive 2000/78 alone, albeit the deadline for transposition had not yet passed. In that case, if I understand them correctly, such a consequence would be the natural sanction for the breach of the obligation on Member States to refrain, prior to that deadline, from adopting measures - such as, in their opinion, the measure in issue - liable seriously to compromise the result prescribed by the directive.

105. It is true - the Commission goes on - that, being addressed to Member States, Community directives, including those whose transposition deadline has not yet passed, cannot give rise to 'horizontal' direct effect, in other words as against a private party, such as Mr Helm, being sued by another private party. However, in the present case, the application of the directives concerned would not give rise to such an effect: if Paragraph 14(3) of the TzBfG were to be set aside, it is another provision of national law, Paragraph 14(1) of the TzBfG, which would fall to be applied and not, of itself, any provision of the directives concerned.

106. Let me say at once that, in my opinion, that view cannot be upheld. It ignores the fact that in those circumstances the disapplication of the national rule in question would in reality

constitute a direct effect of the Community act and it would therefore in fact be the Community act that prevented the party concerned from relying on the rights conferred on him by his own national law.

107. In the present case, for instance, the contrary view would mean Mr Helm being prevented by a directive from relying in the Arbeitsgericht on his right under national law to hire workers over the age of 52 on fixed-term contracts with no restrictions...

108. That would clearly be at odds with the settled case-law of the Court according to which a directive, being formally addressed to Member States, 'cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual'.

109. But that is not all. The above principle applies, as has been confirmed time and again, in cases where the deadline for transposition of the directive relied upon had already passed and the obligation on Member States was therefore in that respect unconditional. It must obviously apply with even greater force when the deadline has not yet elapsed.

110. Nor is that conclusion contradicted, in my view, by the case-law cited by the Arbeitsgericht and by the Commission, in which the Court held that Member States had an obligation to refrain, in advance of the deadline for transposition, from adopting measures liable seriously to compromise achievement of the result prescribed by a directive. On the contrary, just recently the Court explained that the existence of that obligation did not give individuals the right (which is in fact expressly excluded) to rely on the directive 'before national courts to have a pre-existing national rule incompatible with the Directive disapplied'. That statement obviously appears even more justified where, as here, the dispute in the main proceedings is between two private parties.

111. In my opinion, therefore, in the main proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, if it is held incompatible with Directive 1999/70 or - according to my proposal - with Directive 2000/78.

112. That said, however, I must add that - again according to settled case-law - this conclusion does not absolve the referring court of the duty to construe its own law in a manner consistent with the directives.

113. In cases where a directive cannot produce direct effect in the main proceedings, the Court has long held that the national court must none the less 'do whatever lies within its jurisdiction', 'having regard to the whole body of rules of national law', using all 'interpretative methods recognised by national law', in order to 'achieve the result sought by the directive'. National courts, just like other Member State authorities, are subject to the obligation arising under the third paragraph of Article [288] according to which directives have binding effect, and, more generally, under [Art 4 TEU] which requires Member State authorities 'to take all appropriate measures, whether general or particular' necessary to ensure compliance with Community law.

114. This duty to construe national provisions in conformity with Community law clearly applies in the case of Directive 1999/70, the deadline for transposition of which had already passed by the time Mr Mangold entered into Mr Helm's employ, which directive, however, is of no great relevance in my analysis, since it is my view that the questions relating to it must be either ruled inadmissible ... or answered in the negative ...

115. But, on proper consideration, the duty in question also applies in the case of directives, such as Directive 2000/78 (which is of greater relevance in my analysis ...), which had already entered into force at the material time but the deadline for transposition of which had as of then not yet expired.

116. Why this is so I will now consider.

117. It must first be recalled that the duty of consistent interpretation is one of the 'structural' effects of Community law which, together with the more 'invasive' device of direct effect, enables national law to be brought into line with the substance and aims of Community law. Because it is structural in nature, the duty applies with respect to all sources of Community law, whether constituted by primary or secondary legislation, and whether embodied in acts whose legal effects are binding or not. Even in the case of recommendations, the Court has held, 'national courts are bound to take [them] into consideration in order to decide disputes submitted to them'.

118. It is clear then that the same duty must be held to apply also in the case of directives for which the deadline for transposition has not yet elapsed, since these are one of the sources of Community law and produce effects not only as from that deadline but from the date of their entry into force, that is ... on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

119. This is also borne out, moreover, by the case-law cited ... , which holds that '[a]lthough the Member States are not obliged to adopt [the] measures [to implement a directive] before the end of the period prescribed for transposition' ... 'during that period they must refrain from taking any measures liable seriously to compromise the result prescribed'.

120. There can be no doubt but that this negative duty, like the positive duty to take all measures necessary to achieve the result sought by the directive, is borne by all Member State authorities, including, within their sphere of responsibility, the national courts. It therefore follows that, in advance of the deadline for transposition, the national courts too must do everything possible, in the exercise of their powers, to avoid the result prescribed by the directive being jeopardised. In other words, they must also endeavour to favour the interpretation of national law which is most in keeping with the letter and spirit of the directive.

121. Coming now to the case at hand and drawing the conclusions from the above analysis, I take the view that in the proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, for being incompatible with the prohibition of age-based discrimination laid down by Article 6 of Directive 2000/78. However, even though the deadline for the transposition of that directive has not yet expired, the Arbeitsgericht is bound to take into consideration all rules of national law, including those having constitutional status, which contain the same prohibition, in order to arrive, if possible, at a result consistent with what the directive prescribes.

122. For all the reasons set out above, I therefore take the view that a national court hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive. However... the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired.

In January 2010 the Court of Justice considered the application of the same Directive in **Seda Küçükdeveci v Swedex GmbH & Co. KG**.<sup>12</sup> Note in particular

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<sup>12</sup> Case Case C-555/07, Jan 19, 2010. The Judges were: Vassilios Skouris, President, José Narciso da Cunha Rodrigues, Koen Lenaerts, Jean-Claude Bonichot, Rosario Silva de Lapuerta, Pernilla

paragraph 27 of the judgment.

1. This reference for a preliminary ruling concerns the interpretation of the principle of non-discrimination on grounds of age and of Council Directive 2000/78/EC ... establishing a general framework for equal treatment in employment and occupation..
2. The reference was made in the course of proceedings between Ms Küçükdeveci and her former employer Swedex GmbH & Co. KG ('Swedex') concerning the calculation of the notice period applicable to her dismissal.
3. ... Recitals 1, 4 and 25 in the preamble to the directive read as follows:
  - (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and as they result from the constitutional traditions common to the Member States, as general principles of Community law....
  - (4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.... The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.
4. According to Article 1 of Directive 2000/78, its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
5. Article 2 of the directive states: 1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
  2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; ...
6. Article 3(1) of the directive provides: 1. Within the limits of the areas of competence

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Lindh (Rapporteur) and Camelia Toader, Presidents of Chambers, Christiaan Willem Anton Timmermans, Allan Rosas, Pranas K. uris, Thomas von Danwitz, Alexander Arabadjiev and Jean-Jacques Kasel. The Advocate General was Yves Bot. You can find the decision at <http://www.bailii.org/eu/cases/EUECJ/2010/C55507.html> .

conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:... (c) employment and working conditions, including dismissals and pay; ...

7. Article 6(1) of the directive provides: Notwithstanding Article 2(2), 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.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

8. In accordance with the first paragraph of Article 18 of the directive, it was to be transposed into the legal systems of the Member States by 2 December 2003 at the latest. The second paragraph of Article 18 provided, however, that: In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith ...

9. The Federal Republic of Germany made use of that option, so that the provisions of the directive relating to discrimination on grounds of age and disability were to be transposed in that Member State by 2 December 2006 at the latest.

#### National legislation

The General Law on equal treatment

10. Paragraphs 1, 2 and 10 of the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897), which transposed Directive 2000/78, provide:

Paragraph 1 Object of the law: The object of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.

Paragraph 2 Scope... (4) For dismissals, the provisions on general and specific protection against dismissal apply exclusively. ...

Paragraph 10 Permissible different treatment on grounds of age: Paragraph 8 notwithstanding, different treatment on grounds of age is also permissible if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following: ... 1. the setting of special conditions on access to employment and vocational training, employment and occupation, including conditions of remuneration and termination of employment relationships, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection, ...

Legislation on the notice period for dismissal

11. Paragraph 622 of the German Civil Code (Bürgerliches Gesetzbuch, 'the BGB') provides:  
(1) Notice may be given to terminate the employment relationship of an employee with a notice period of four weeks to the 15th or to the end of a calendar month.  
(2) For termination by the employer, the notice period, if the employment relationship in the business or undertaking

1. has lasted for two years, is one month to the end of a calendar month,
2. has lasted five years, is two months to the end of a calendar month,
3. has lasted eight years, is three months to the end of a calendar month,
4. has lasted ten years, is four months to the end of a calendar month,
5. has lasted 12 years, is five months to the end of a calendar month,
6. has lasted 15 years, is six months to the end of a calendar month,
7. has lasted 20 years, is seven months to the end of a calendar month.

In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account.

The main proceedings and the order for reference

12. Ms Küçükdeveci was born on 12 February 1978. She was employed from 4 June 1996, in other words from the age of 18, by Swedex.

13. Swedex dismissed her by letter of 19 December 2006 with effect, taking account of the statutory notice period, from 31 January 2007. The employer calculated the notice period as if the employee had three years' length of service, although she had been in his employment for 10 years.

14. Ms Küçükdeveci contested her dismissal before the Arbeitsgericht Mönchengladbach (Labour Court, Mönchengladbach). She argued before that court that her period of notice should have been four months from 31 December 2006, that is, to 30 April 2007, pursuant to point 4 of the first indent of Paragraph 622(2) of the BGB. That period corresponded to 10 years' service. The dispute in the main proceedings is thus between two individuals, Ms Küçükdeveci on the one hand and Swedex on the other.

15. According to Ms Küçükdeveci, in so far as it provides that periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period, the second indent of Paragraph 622(2) of the BGB is a measure which discriminates on grounds of age, contrary to European Union law, and must be disapplied.

16. The Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf), hearing the case on appeal, found that the period for transposing Directive 2000/78 had expired by the date of the dismissal. That court also considered that Paragraph 622 of the BGB contains a difference of treatment directly linked to age, and, while it is not convinced that it is unconstitutional, it regards its compatibility with European Union law as doubtful. It is not sure in this respect whether the possible existence of direct discrimination on grounds of age must be assessed by reference to primary European Union law, as the judgment in ... Mangold ... appears to suggest, or by reference to Directive 2000/78. Noting that the national provision at issue is clear and could not be interpreted, if that were necessary, in a manner compatible with the directive, the court is also uncertain whether, to be able to disapply that provision in a dispute between private individuals, it must first, in order to ensure the protection of the legitimate expectations of persons subject to the law, make a reference to the Court for a preliminary ruling so that the Court can confirm that the provision is incompatible with European Union law.

17. In those circumstances, the Landesarbeitsgericht Düsseldorf decided to stay the

proceedings and refer ... questions to the Court for a preliminary ruling...

The questions referred for a preliminary ruling

Question 1

18. By its first question the referring court asks essentially whether national legislation such as that at issue in the main proceedings, under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constitutes a difference of treatment on grounds of age prohibited by European Union law, in particular primary law or Directive 2000/78. It is unsure, in particular, whether such legislation is justified on the ground that only a basic notice period is to be observed in the case of dismissal of younger workers, first, in order to enable employers to manage their personnel flexibly, which would not be possible with longer notice periods, and, second, because it is reasonable to require greater personal and occupational mobility from younger workers than from older ones.

19. To answer that question, it must first be ascertained, as the referring court suggests, whether the question should be examined by reference to primary European Union law or to Directive 2000/78.

20. In the first place, that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 ... and the Court has held that that directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age (see Mangold, paragraph 74).

21. In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, Mangold, paragraph 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, Case 43/75 Defrenne ... paragraph 54).

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

23. For the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.

24. ... the allegedly discriminatory conduct adopted in the present case on the basis of the national legislation at issue occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78, which, for the Federal Republic of Germany, ended on 2 December 2006.

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

26. A national provision such as the second indent of Paragraph 622(2) of the BGB, in that it provides that, in calculating the notice period, periods of employment completed before the employee reaches the age of 25 are not taken into account, affects the conditions of dismissal of employees. Such a provision must therefore be regarded as laying down rules on the conditions of dismissal.

27. It follows that it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the

examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.

28. In the second place, as regards the question whether the legislation at issue in the main proceedings contains a difference of treatment on grounds of age, it should be recalled that under Article 2(1) of Directive 2000/78, for the purposes of that directive, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 ...

29. In the present case, the second indent of Paragraph 622(2) of the BGB affords less favourable treatment to employees who entered the employer's service before the age of 25. That national provision thus introduces a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking.

30. Thus in the case of two employees each with 20 years' seniority in service, the one who joined the undertaking at the age of 18 will be entitled to a notice period of 5 months, whereas the period will be 7 months for the one who joined at the age of 25. Moreover, as the Advocate General observes in point 36 of his Opinion, the national legislation at issue in the main proceedings disadvantages younger workers generally compared to older ones, in that the former as the situation of Ms Küçükdeveci shows may, despite several years' seniority in service in the undertaking, be excluded from benefiting from the progressive extension of notice periods in the case of dismissal according to the length of the employment relationship, which older workers of comparable seniority will, by contrast, be able to benefit from.

31. It follows that the national legislation at issue contains a difference of treatment on grounds of age.

32. In the third place, it must be examined whether that difference of treatment is liable to constitute discrimination prohibited by the principle of non-discrimination on grounds of age given expression by Directive 2000/78.

33. The first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

34. According to the information provided by the referring court and the statements made at the hearing by the German Government, Paragraph 622 of the BGB originates in a law of 1926. That that law set the threshold at 25 was the outcome of a compromise between, first, the government of the time, which wanted a uniform extension by three months of the notice period for the dismissal of workers aged over 40, second, the supporters of a progressive extension of that period for all workers, and, third, the supporters of a progressive extension of the notice period without taking the period of employment into account, the purpose of the rule being to give employers partial relief from lengthy periods of notice for workers aged under 25.

35. The referring court states that the second indent of Paragraph 622(2) of the BGB reflects the legislature's assessment that young workers generally react more easily and more rapidly to the loss of their jobs and greater flexibility can be demanded of them. A shorter notice period for younger workers also facilitates their recruitment by increasing the flexibility of personnel management.

36. Objectives of the kind mentioned by the German Government and the referring court clearly belong to employment and labour market policy within the meaning of Article 6(1) of Directive 2000/78.

37. It remains to be ascertained, in accordance with the wording of that provision, whether the means of achieving such a legitimate aim are 'appropriate and necessary'.

38. The Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy (see Mangold, paragraph 63 ...).

39. The referring court indicates that the aim of the national legislation at issue in the main proceedings is to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility.

40. However, the legislation is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal.

41. As regards the aim pursued by the legislature at the time of adoption of the national legislation at issue in the main proceedings, adduced by the German Government, of strengthening the protection of workers according to their length of service in the undertaking, it is clear that, under that legislation, the extension of the notice period for dismissal according to the employee's seniority in service is delayed for all employees who joined the undertaking before the age of 25, even if the person concerned has a long length of service in the undertaking at the time of dismissal. The legislation cannot therefore be regarded as appropriate for achieving that aim.

42. It should be added that, as the referring court points out, the national legislation at issue in the main proceedings affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training.

43. It follows from all the above considerations that the answer to Question 1 is that European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

#### Question 2

44. By its second question the referring court asks whether, where it is hearing proceedings between individuals, in order to disapply a national provision which it considers to be contrary to European Union law, it must first, to ensure protection of the legitimate expectations of persons subject to the law, make a reference to the Court under Article 267 TFEU, so that the Court can confirm that the legislation is incompatible with European Union law.

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

46. In this respect, where proceedings between individuals are concerned, the Court has

consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, *inter alia*, Case 152/84 Marshall ... paragraph 48 ...

47. However, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (see, *inter alia*, to that effect, Case 14/83 von Colson and Kamann ... paragraph 26; Case C-106/89 Marleasing ... paragraph 8; Faccini Dori, paragraph 26; C-129/96 Inter-Environnement Wallonie ... paragraph 40; Pfeiffer and Others, paragraph 110...

48. It follows that, in applying national law, the national court called on to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 288 TFEU (see, to that effect, von Colson and Kamann, paragraph 26; Marleasing, paragraph 8; Faccini Dori, paragraph 26; and Pfeiffer and Others, paragraph 113). The requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European Union law when it determines the dispute before it (see, to that effect, Pfeiffer and Others, paragraph 114).

49. According to the national court, however, because of its clarity and precision, the second indent of Paragraph 622(2) of the BGB is not open to an interpretation in conformity with Directive 2000/78.

50. It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, Mangold, paragraphs 74 to 76).

51. In those circumstances it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, Mangold, paragraph 77).

52. As regards, second, the obligation of the national court, hearing proceedings between individuals, to make a reference to the Court for a preliminary ruling on the interpretation of European Union law before it can disapply a national provision which it considers to be contrary to that law, it is apparent from the order for reference that this aspect of the question has been raised because, under national law, the referring court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the Bundesverfassungsgericht (Federal Constitutional Court).

53. The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.

54. The possibility thus given to the national court by the second paragraph of Article 267 TFEU

of asking the Court for a preliminary ruling before disapplying the national provision that is contrary to European Union law cannot, however, be transformed into an obligation because national law does not allow that court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court. By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied (see, to that effect, Mangold, paragraph 77).

55. It follows that the national court, hearing proceedings between individuals, is not obliged but is entitled to make a reference to the Court for a preliminary ruling on the interpretation of the principle of non-discrimination on grounds of age, as given expression by Directive 2000/78, before disapplying a provision of national law which it considers to be contrary to that principle. The optional nature of such a reference is not affected by the conditions of national law under which a court may disapply a national provision which it considers to be contrary to the constitution.

56. In the light of the foregoing, the answer to Question 2 is that it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle....

Here is how **Advocate General Bot**<sup>13</sup> suggested the court should think about the case:

1. This reference for a preliminary ruling asks the Court, once again, to set out the legal rules applying to, and the scope of, the prohibition of age discrimination in Community law. It gives the Court an opportunity to clarify the scope to be given to the Mangold judgment ...
2. More precisely, the present case will lead the Court to clarify the legal rules governing the general principle of non-discrimination on grounds of age and the function which that principle fulfils in a situation in which the time-limit for the transposition of Council Directive 2000/78/EC ... establishing a general framework for equal treatment in employment and occupation has expired. In particular, the Court will have to determine the role and the powers of national courts faced with national rules containing age discrimination when the facts which gave rise to the dispute in the main proceedings occurred after the expiry of the time-limit for the transposition of Directive 2000/78 and the proceedings involve two private parties.

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<sup>13</sup> Here is his bio from the Court's website: "Born 1947; Graduate of the Faculty of Law, Rouen; Doctor of Laws (University of Paris II, Panthéon-Assas); Lecturer at the Faculty of Law, Le Mans; Deputy Public Prosecutor, then Senior Deputy Public Prosecutor, at the Public Prosecutor's Office, Le Mans (1974-82); Public Prosecutor at the Regional Court, Dieppe (1982-84); Deputy Public Prosecutor at the Regional Court, Strasbourg (1984-86); Public Prosecutor at the Regional Court, Bastia (1986-88); Advocate General at the Court of Appeal, Caen (1988-91); Public Prosecutor at the Regional Court, Le Mans (1991-93); Special Adviser to the Minister for Justice (1993-95); Public Prosecutor at the Regional Court, Nanterre (1995-2002); Public Prosecutor at the Regional Court, Paris (2002-04); Principal State Prosecutor at the Court of Appeal, Paris (2004-06); Advocate General at the Court of Justice since 7 October 2006."

3. The reference was made in the course of proceedings between Ms Küçükdeveci and her former employer, Swedex GmbH & Co. KG ('Swedex'), concerning the calculation of the period of notice applicable to her dismissal.
4. In this Opinion, I will first explain why Directive 2000/78 is the reference in the light of which the existence or otherwise of age discrimination must be determined.
5. I will then explain why, in my view, that directive must be interpreted as precluding national legislation under which periods of employment completed by a worker before he reaches the age of 25 are not taken into account in calculating the length of the period of employment, which in turn determines the length of the period of notice which the employer must give in case of dismissal.
6. Finally, I will set out why I consider that, in a situation in which the court making the reference cannot interpret its national law in a manner which is consistent with Directive 2000/78, the national court is entitled, by virtue of the principle of the primacy of Community law and in the light of the principle of non-discrimination on grounds of age, to disapply national law which is contrary to the directive, even in the case of proceedings between two private parties.....
15. Ms Küçükdeveci was born on 12 February 1978. She was employed by Swedex from 4 June 1996, that is to say, since she was 18 years old.
16. Swedex dismissed her by letter of 19 December 2006, with effect, having regard to the legal period of notice, from 31 January 2007.
17. By an action lodged on 9 January 2007, Ms Küçükdeveci challenged her dismissal before the Arbeitsgericht Mönchengladbach (Labour Court, Mönchengladbach) (Germany). In support of her action, she claimed *inter alia* that the dismissal took effect only from 30 April 2007, because point 4 of the first sentence of Paragraph 622(2) of the BGB extends the notice period in the case of a person who has been employed in the undertaking for 10 years to four months expiring at the end of a calendar month.
18. In her view, the last sentence of Paragraph 622(2) of the BGB, in so far as it provides that periods of employment before the age of 25 are not to be taken into account in calculating the period of notice, constitutes age discrimination contrary to Community law. Consequently, that provision of national law must be disapplied.
19. Since the Arbeitsgericht Mönchengladbach granted Ms Küçükdeveci's application, Swedex decided to appeal that decision to the Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf) (Germany).
20. In its order for reference, the latter court points out that even if the arrangements for employment protection might indirectly influence employers' recruitment policy, it has not been established that, in practice, the age threshold of 25 pursues and achieves any employment policy and labour market objectives.
21. According to the national court, linking the extension of the notice period to a minimum age is based essentially on the German legislature's views on social and family policy, and on the assumption that older employees are more seriously affected by unemployment because of their family and economic obligations and because of decreasing employment flexibility and mobility. The last sentence of Paragraph 622(2) of the BGB reflects the legislature's assessment that younger employees usually react more easily and more quickly to losing their job, and that, because of their age, they can reasonably be expected to have greater flexibility and mobility. In accordance with the objective of protecting older workers who have been employed for a longer period, Paragraph 622(2) of the BGB unquestionably provides that periods of employment completed before the age of 25 are not to be taken into account and it is

only from that age that workers progressively enjoy longer periods of notice on the basis of the duration of their employment with the undertaking.

22. The national court is not convinced that the last sentence of Paragraph 622(2) of the BGB is unconstitutional. On the other hand, it has doubts as to the conformity of that provision with Community law.

23. More precisely, with regard to the Court's reasoning in *Mangold* and 'consideration[s] linked to the structure of the labour market in question or the personal situation of the person concerned' which were put forward in that case, the national court is doubtful whether the unequal treatment could be objectively justified under the general principles of Community law or in the light of Article 6(1) of Directive 2000/78.

24. It also considers that it follows from the case-law of the Court that the directive in question cannot have direct effect in the dispute in the main proceedings. It also points out, on the basis of two recent judgments of the Court which repeated and clarified the obligation on national courts to interpret national law in conformity with Community law, that the requirement remains that the national provision must be capable of interpretation. In application of the criteria that, when interpreting legislative provisions, it is necessary to consider not only their wording, but also the legislative framework in which they occur and the objectives which, according to the apparent intention of the legislature, are pursued by the rules of which they form part, the national court considers that the last sentence of Paragraph 622(2) of the BGB, the wording of which is unambiguous, is not capable of interpretation.

25. It therefore wonders what consequences a national court must draw from the possible incompatibility of that provision with the general principle of Community law prohibiting age discrimination.

26. The national court emphasises that the German Constitution requires the national courts to apply the statutory provisions in force. It doubts that *Mangold* is to be interpreted as conferring power on national courts, when applying primary Community law, to set aside conflicting provisions of national law. That could result in diverging judicial decisions between courts in the Member States, which could decide to apply or not apply national statutory provisions according to whether or not they regarded them as conflicting with primary Community law. Those considerations lead the national court to ask the Court whether, in *Mangold*, it intended to exclude the possibility that national courts could be obliged by national law to make a reference for a preliminary ruling before deciding that a national legislative provision is to be disapplied because it infringes primary Community law. Finally, the requirement to disapply national legislation contrary to Community law laid down in *Mangold* raises the question of protection of the legitimate expectations of those who are subject to the law as regards the application of laws which are in force, all the more so when the question of their compatibility with the general principles of Community law arises.

27. In those circumstances, the *Landesarbeitsgericht Düsseldorf* referred the following questions to the Court for a preliminary ruling:

'(1) (a) Does a national provision under which the periods of notice to be observed by employers are extended incrementally as the length of employment increases, but the employee's periods of employment before the age of 25 are disregarded, infringe the Community law prohibition of discrimination on grounds of age, in particular primary Community law or Directive 2000/78 ...?

(b) Can the fact that employers are required to observe only a basic period of notice when terminating the employment of younger employees be justified on the grounds that employers

are recognised as having an operational interest in flexibility as regards staffing – an interest which would be adversely affected by longer periods of notice – and that younger employees are not recognised as having the protection available to older employees (by means of longer notice periods) with respect to their employment status or arrangements, for example because, having regard to their age and/or their lesser social, family and private obligations, they are assumed to have greater occupational and personal flexibility and mobility?

(2) If Question 1(a) is answered in the affirmative and Question 1(b) is answered in the negative:

In legal proceedings between private individuals, must a court of a Member State disapply a statutory provision which is explicitly contrary to Community law, or is the legitimate expectation of persons subject to the law – that national laws which are in force will be applied – to be taken into account so that a provision becomes inapplicable only after the Court of Justice has ruled on the disputed provision or a substantially similar provision?’

### III – Analysis

#### A – Question 1(a) and (b)

28. The first question seeks essentially to know whether Community law is to be interpreted as precluding national legislation under which periods of employment completed before the age of 25 are not taken into account in calculating the notice period in case of dismissal. Before answering that question, it is necessary to clarify, as the national court asks the Court to do, which Community rule is to be referred to in the present case, the principle of non-discrimination on grounds of age, which the Court has held to be a general principle of Community law, or Directive 2000/78.

1. Which is the relevant Community rule?

29. I consider that, in a situation such as that in the main proceedings, Directive 2000/78 is the rule which should be referred to for the purpose of establishing the existence or otherwise of age discrimination prohibited by Community law.

30. It should be recalled first that it is clear both from its title and preamble and from its content and purpose that Directive 2000/78 is designed to lay down a general framework in order to guarantee equal treatment in employment and occupation to all persons, by offering them effective protection against discrimination on any of the grounds covered by Article 1, which include age.

31. I would point out that the acts giving rise to the dispute in the main proceedings took place after the expiry of the time-limit available to the Federal Republic of Germany for transposing the directive, that is to say, after 2 December 2006.

32. Moreover, there is no doubt in my mind that the national rules at issue fall within the scope of the directive.....

33. My analysis with a view to determining whether the last sentence of Paragraph 622(2) of the BGB is contrary to the prohibition of age discrimination laid down in Community law will therefore be based principally on the provisions of Directive 2000/78 which define what is to be regarded as a difference of treatment based on age contrary to Community law. The directive thus constitutes the detailed framework which will make it possible to determine the existence or otherwise of age discrimination in connection with employment or occupation.

34. Consequently, I see no reason to give an autonomous scope to the general principle of non-discrimination on grounds of age by confining myself to interpreting that principle, since the

major disadvantage of that approach would be to deprive Directive 2000/78 of all useful effect. That does not mean, however, that the general principle of Community law prohibiting age discrimination has no role to play in my analysis of the present reference for a preliminary ruling. Inasmuch as it is indissociably linked to Directive 2000/78, the principal purpose of which is to facilitate the implementation of it, that general principle, as I will explain in the context of the answer to the second question, must be taken into consideration when determining whether, and under what conditions, Directive 2000/78 may be relied on in proceedings between private parties....

2. Does Directive 2000/78 preclude the last sentence of Paragraph 622(2) of the BGB?

36. I note, first of all, that, in so far as the last sentence of Paragraph 622(2) of the BGB excludes periods of employment completed by workers before the age of 25 from the calculation of the duration of the employment, which in turn determines the period of notice applicable in the case of dismissal, it introduces a difference of treatment based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78. The last sentence of Paragraph 622(2) of the BGB directly imposes less favourable treatment on dismissed workers who commenced their employment relationship with their employers before the age of 25 compared to dismissed workers who commenced such a relationship after that age. Moreover, that measure disadvantages young workers compared to older workers, since the former could possibly be excluded, as Ms Küçükdeveci's situation shows, from the protection of the progressive increase of the periods of notice of dismissal according to the time spent in the undertaking.

37. However, it is clear from the first subparagraph of Article 6(1) of Directive 2000/78 that such differences of treatment on grounds of age will not constitute discrimination prohibited by Article 2 of the directive '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'. Those legitimate objectives, which are social policy objectives, can therefore justify differences of treatment on grounds of age, of which the second subparagraph of Article 6(1) of Directive 2000/78 provides several examples.

38. The representative of the Federal Republic of Germany set out at the hearing the general context in which the threshold of 25 years was laid down. It appears that the German legislature set up, in 1926, a system of progressive increases in the period of notice of dismissal on the basis of the length of the employment relationship. The purpose of introducing a threshold of 25 years from which periods of employment are taken into account was to discharge employers partially from that gradual extension of the periods of notice. It appears to be a provision which facilitated the political compromise leading to the adoption of the principal measure, namely the extension in question. In addition, the purpose of that provision seems to be to give employers greater flexibility when they wish to dismiss young workers, that flexibility in regard to young workers compensating, in a certain sense, for the burden placed on employers by the progressive increase in the periods of notice on the basis of the length of the employment relationship. In other words, the German legislature tried to strike a balance between the strengthening of protection for workers on the basis of the time spent in the undertaking and the employers' interest in flexible personnel management.

39. In addition, the explanations provided by the national court make clear the context in which Paragraph 622(2) of the BGB was adopted. In general, that paragraph is intended to strengthen

the protection of older workers against unemployment. The German legislature started from the proposition that unemployment affects older workers more seriously than young workers, since the former have family and economic obligations which the latter generally do not have, and have less employment flexibility. At the time that the contested provision was adopted, that is to say, at the beginning of the 20th century, it appears that workers, particularly male workers, normally founded a family around the age of 30. Since they generally did not have family responsibilities before that age, young workers were sufficiently protected by the application of the basic period of notice. Moreover, young workers react more easily and rapidly to the loss of their job.

40. It has also been argued that the threshold of 25 years could be viewed as pursuing a legitimate employment policy and labour market objective inasmuch as its effect is to reduce the higher level of unemployment among young workers by creating conditions facilitating recruitment of that age group. In other words, the fact of having to comply only with the basic period of notice would encourage employers to take on more young workers.

41. In view of those explanations, can it be considered that the last sentence of Paragraph 622(2) of the BGB, which provides for periods of employment completed before the age of 25 not to be taken into account, seeks to achieve a legitimate objective within the meaning of Article 6(1) of Directive 2000/78, that is to say, a social policy objective?

42. In my view, a distinction must be drawn between the progressive extension of the period of notice of dismissal on the basis of the time spent in the undertaking and the fixing of a minimum age of 25 in order to enjoy the benefit of that extension.

43. The purpose of the extended period of notice is clearly to protect workers whose capacity to adapt, and the possibility of their being retrained, was regarded by the German legislature as reduced when they have been employed for a long time in an undertaking. If an employer decides to dismiss a worker who has been in his undertaking for a long time, an extended period of notice certainly facilitates the movement of that worker to a new employment situation, in particular, the search for a new job. That strengthened protection of dismissed workers on the basis of the time they have spent in the undertaking can, to my mind, be regarded as seeking to achieve an employment policy and labour market objective within the meaning of Article 6(1) of Directive 2000/78.

44. On the other hand, it is more difficult to identify a legitimate objective within the meaning of that provision in regard to periods of employment completed before the age of 25 not being taken into account.

45. First of all, the claim that such a measure has a positive effect on the recruitment of young workers seems theoretical, to say the very least. On the other hand, it is certain that short periods of notice will necessarily have a negative impact on young workers' search for new employment. In my view, fixing a threshold of 25 years for the implementation of the extended notice system does not favour the vocational integration of young workers within the meaning of point (a) of the second subparagraph of Article 6(1) of Directive 2000/78.

46. The principal objective of that measure, as it appears from its general context, is to enable employers to manage with greater flexibility that part of their staff constituted by young workers, since the German legislature considered that young workers have less need than older workers of protection in case of dismissal. The problem is therefore to determine whether the employers' interest in being able to manage a category of their employees with greater flexibility may be regarded as part of the social policy objectives referred to in Article 6(1) of Directive 2000/78 such as those related to employment and labour market policy.

47. In its judgment in *Age Concern England*, the Court stated that, by their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers. I conclude that the Court does not exclude the possibility that a national measure relating to employment policy and the labour market could result in the provision of 'a certain degree of flexibility for employers'. It seems to me, however, that it is difficult to accept that that flexibility granted to employers could constitute a legitimate objective in itself. The Court made clear that 'legitimate' objectives within the meaning of Article 6(1) of Directive 2000/78 are of a 'public interest nature'. That public interest nature seems absent in the measure providing that periods of employment completed before the age of 25 are not to be taken into account, which amounts ultimately to excluding a category of workers, namely the youngest, from the dismissal protection system.

48. In addition, I doubt the relevance of one of the propositions on which the last sentence of Paragraph 622(2) of the BGB is based, namely that young workers react more easily and quickly than other workers to the loss of their job. The substantial proportion of youth unemployment in our societies undermines that proposition, which may have been true in 1926 but no longer holds good today.

49. For those reasons, I consider that the measure providing that periods of employment completed before the age of 25 are not to be taken into account does not pursue a legitimate objective within the meaning of Article 6(1) of Directive 2000/78.

50. In any event, even if the Court should consider that that measure pursues a legitimate social policy objective, such as those connected with employment policy or the labour market, I consider that such a measure goes beyond what is appropriate and necessary to achieve those objectives.

51. The Member States undoubtedly enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of the measures capable of achieving it. However, the Court has also held that mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from the prohibition of age discrimination and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim. Thus, even supposing that the last sentence of Paragraph 622(2) of the BGB seeks to achieve the objective of facilitating the recruitment of young workers and, therefore, vocational integration of that category of worker, no tangible factor supports that claim or demonstrates that the measure is apt to achieve such an objective. In my view, therefore, the appropriate and necessary nature of that measure has not been demonstrated.

52. Moreover, application of the last sentence of Paragraph 622(2) of the BGB leads to a situation in which all workers who initiate an employment relationship before the age of 25 and who are dismissed, as was Ms Küçükdeveci, shortly after reaching that age are excluded, in a general way, regardless of their personal and family situation or their level of training, from an important part of the protection afforded to workers in case of dismissal. In addition, that general exclusion, decided in 1926, has been maintained without it being demonstrated, in my view, that such an age threshold is still appropriate for the contemporary economic and social situation of that category of worker.

53. That is why I propose that the Court should hold that Article 6(1) of Directive 2000/78 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides generally that periods of employment completed before the age of 25 are not to be taken into account in calculating notice periods in case of dismissal.

#### B – Question 2

54. By its second question, the national court seeks essentially to know what consequences it should draw from the incompatibility of the last sentence of Paragraph 622(2) of the BGB with Directive 2000/78. In particular, is it required to disapply that national provision when deciding a case between private parties? In addition, is that court required to make a reference to the Court for a preliminary ruling before it can disapply a national provision which is contrary to Community law?

55. I do not think that the latter question calls for a lengthy discussion. It has been clear since the Simmenthal judgment... that national courts, as the courts of general jurisdiction in Community law, must apply Community law in its entirety and protect rights which the latter confers on individuals by setting aside any provision of national law which conflicts with Community law. That duty imposed on national courts to set aside national provisions which impede the full effectiveness of Community rules is in no way subject to making a prior reference to the Court for a preliminary ruling, since such a requirement would, in most cases, transform the possibility of making a reference available to national courts under the second paragraph of Article [267] into a general obligation to refer.

56. On the other hand, the first part of the national court's question is more delicate and there is no obvious answer to it in the Court's case-law.

57. However, the question whether a directive, badly transposed or not transposed by a Member State, may be relied on in proceedings between private parties has received a clear answer from the Court on several occasions. The Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. It follows that, in the Court's view, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. The Court thus refused to take a step which would have had the consequence of assimilating directives to regulations by recognising a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. That position respects the particular nature of a directive which, by definition, does not give rise directly to obligations on the part of the Member States to which it is addressed and can impose obligations on individuals only through the medium of national transposition measures.

58. The Court compensated for that firm refusal to accept a horizontal direct effect of directives by pointing to alternative solutions capable of giving satisfaction to an individual who considers himself wronged by the fact that a directive has not been transposed or has been transposed incorrectly.

59. The first palliative for the lack of horizontal direct effect of directives is the obligation on national courts to interpret national law, as far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. The principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with

a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.

60. In *Pfeiffer and Others*, the Court set out the procedure to be followed by the national courts in regard to a dispute between private parties, thereby reducing a little bit further the boundary between the right to rely on an interpretation in conformity with Community law and the right to rely on a directive in order to have national law which is not in conformity with Community law disapplied. The Court stated that if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law, or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

61. It is agreed, however, that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.

62. The second palliative for the lack of horizontal direct effect of directives may be brought into play precisely in cases where the result required by a directive cannot be achieved by interpretation. Community law requires the Member States to make good damage caused to individuals through failure to transpose the directive, provided that three conditions are fulfilled. First, the purpose of the directive in question must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State's obligation and the damage suffered.

63. Finally, the third palliative consists in disconnecting the horizontal direct effect of directives from the right to plead them to exclude contrary national law in proceedings between private parties. That solution holds that, although directives cannot be substituted for a lack of national law or defective national law in order to impose obligations directly on private individuals, they can at least be relied on to exclude national law contrary to the directive, and only national law cleansed of the provisions contrary to the directive is applied by the national court in resolving a dispute between private parties.

64. That disconnection of the 'substitution' direct effect of directives from the right to plead them in exclusion has, however, never been accepted by the Court in a general and explicit way. At the moment, therefore, the scope of this third palliative remains very limited.

65. In sum, the current line of case-law concerning the effect of directives in proceedings between private parties is as follows. The Court continues to oppose recognition of a horizontal direct effect of directives and seems to consider that the two principal palliatives represented by the obligation to interpret national legislation in conformity with Community law and the liability of the Member States for infringements of Community law are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States.

66. The answer to be given to the court making the reference could, in the classic manner, therefore be to refer to the case-law I have just set out and state that the national court is required to use all the tools at its disposal to interpret its national law in accordance with the objective which Directive 2000/78 seeks to achieve and, if it is unable to find such an interpretation, to call upon *Ms Küçükdeveci* to bring a civil liability action against the Federal

Republic of Germany on the basis of the incomplete transposition of the directive.

67. That, however, is not the road that I will suggest that the Court take, for the following reasons.

68. First, as the Landesarbeitsgericht Düsseldorf rightly pointed out, the obligation to interpret national law in conformity with Community law applies in so far as the national law in question is capable of being interpreted. That court considers, however, that that is not so in regard to the last sentence of Paragraph 622(2) of the BGB. The Court has therefore been asked a question by a court which informs it that the wording of the provision in question is unambiguous and that, even doing all in its power to achieve the objective pursued by Directive 2000/78, it cannot interpret the national provision in conformity with the objective of the directive. Under those circumstances, I believe that it would not be satisfactory to ask the national court to perform a task which it considers itself unable to perform successfully in the present state of its national law.

69. Secondly, the principal disadvantage of an answer which directed Ms Küçükdeveci towards a civil liability action against the Federal Republic of Germany is that it would cause her to lose her case, with the financial consequences that would flow from that, even though the existence of age discrimination contrary to Directive 2000/78 is established, and require her to initiate fresh judicial proceedings. In my view, such a solution would run counter to the effective right of action which, according to Article 9 of Directive 2000/78, must be available to persons who consider themselves wronged by failure to apply the principle of equal treatment to them. In that perspective, effective action to counteract discrimination which is contrary to Community law implies that the national courts having jurisdiction can grant to persons within the disadvantaged category, immediately and without being required to call upon the victims to bring a civil liability action against the State, the same advantages as those enjoyed by persons within the favoured category. That is why I consider that the Court should not be satisfied with an answer based on the existence of a civil liability action against the State for incomplete transposition of the directive.

70. I would ask the Court to take a more ambitious approach in terms of action to counteract discrimination which is contrary to Community law, an approach which does not in any way involve a head-on confrontation with its classic case-law concerning the lack of horizontal direct effect of directives. That position, which is based largely on the specific nature of the directives intended to counteract discrimination and on the hierarchy of norms in the Community legal order, is that a directive which has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle. The Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive intended to counteract discrimination may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive.

71. That position is, in my view, the only one which can be reconciled with what the Court decided in *Mangold*. In that judgment, the Court considered that national rules which authorise, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52 cannot be justified under Article 6(1) of Directive 2000/78. The main difficulty which the Court faced was to determine the consequences which the national court had to draw from that interpretation in a situation in which the main proceedings were between private parties and the time-limit for transposition of

the directive had not yet expired on the date when the employment contract at issue was concluded.

72. Surmounting those two obstacles, the Court applied its judgment in *Simmenthal* and considered that it was the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law. The Court thus recognised that that principle could be relied on in proceedings between private parties in order to set aside discriminatory national legislation.

73. To reach that conclusion, the Court considered that the fact that, on the date on which the contract was concluded, the time-limit for transposing Directive 2000/78 had not yet expired was not of such a nature as to call into question the finding that the national legislation at issue was incompatible with Article 6(1) of Directive 2000/78. It based itself, in the first place, on the case-law flowing from the judgment in *Inter-Environnement Wallonie*, which decided that the Member States must refrain, during the period laid down for the transposition of a directive, from adopting measures liable seriously to compromise the result prescribed by that directive.

74. In the second place, the Court pointed out that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. As stated in Article 1 of the directive, its sole purpose is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from recitals 1 and 4 in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States. The Court concluded that the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.

75. The Court then applied its case-law to the effect that where national rules fall within the scope of Community law, and a reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle. The national measure at issue certainly fell within the scope of Community law as a measure intended to implement Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Consequently, the Court considered that observance of the general principle of equal treatment, in particular in respect of age, could not as such depend on the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age.

76. We are all aware that *Mangold* has been the subject of many criticisms. If we limit ourselves to the principal contribution of that judgment, namely that observance of the general principle of Community law prohibiting age discrimination cannot depend on the expiry of the period granted to Member States for transposing Directive 2000/78 and that the national court must therefore give full effect to that principle by disapplying any contrary provision of national law, including in proceedings between private parties, I consider that those criticisms need to be qualified.

77. With regard, first, to the very existence of the prohibition of age discrimination as a general principle of Community law, I am inclined to consider that the fact that the Court has emphasised such a principle corresponds to the development of that right as it flows from the

inclusion of age as a criterion of prohibited discrimination in Article 13(1) EC, on the one hand, and, on the other, the establishment of the prohibition of age discrimination as a fundamental right as a result of Article 21(1) of the Charter of Fundamental Rights of the European Union. The Court's reasoning would, of course, have been more convincing if it had been based on those factors, rather than merely on the international instruments and constitutional traditions common to the Member States, the majority of which do not recognise a specific principle prohibiting age discrimination. I think it is important, however, to emphasise that, by proclaiming that such a general principle of Community law exists, the Court is in accord with the wish expressed by the Member States and the Community institutions to counteract age discrimination effectively. From that point of view, it is not surprising that the prohibition of age discrimination, as a specific expression of the general principle of equal treatment and non-discrimination and as a fundamental right, should enjoy the eminent status of a general principle of Community law.

78. Secondly, I think that the conclusions which the Court drew in *Mangold* from the existence of such a principle are consistent with the case-law it has progressively developed in regard to the general principle of equal treatment and non-discrimination.

79. The Court has thus long considered that the general principle of equal treatment is one of the fundamental principles of Community law. That principle requires that similar situations should not be treated differently unless differentiation is objectively justified. It is one of the fundamental rights whose observance the Court ensures.

80. As a general principle of Community law, that principle performs several functions. It permits the Community judicature to fill gaps which might appear in secondary legislation. It is also an instrument of interpretation capable of clarifying the meaning and scope of provisions of Community law, and a means of reviewing the validity of Community acts.

81. Moreover, the Member States are also bound to observe the general principle of equal treatment and non-discrimination when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with the requirements flowing from the protection of fundamental rights in the Community legal order. As I pointed out earlier, the Court considers that where national rules fall within the scope of Community law, and a reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures. If it appears in the light of that interpretation that national rules are contrary to Community law, the national court will have to disapply them, in accordance with the principle of the primacy of Community law.

82. The reasoning developed by the Court in *Mangold* takes account of the various developments resulting from its case-law in order to ensure the effectiveness of the general principle of equal treatment independently of the expiry of the time-limit for transposing Directive 2000/78. In my view, that reasoning is in accordance with the hierarchy of norms in the Community legal order.

83. To illustrate the manner in which the Court has envisaged the relationship between a norm of primary Community law and a norm of secondary legislation, a comparison can usefully be made with the way in which it has approached the relationship between Article [157] ..., which lays down the principle of equal pay for male and female workers, and Directive 75/117/EEC.

84. In its judgment in *Defrenne*, the Court stated that Directive 75/117 provides further details regarding certain aspects of the material scope of Article [157] of the Treaty and also adopts

various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by that article. It considered that the directive was intended to encourage the proper implementation of Article [157] by means of a series of measures to be taken on the national level without, however, reducing the effectiveness of that article. In its judgment in Jenkins, the Court held, in the same line of reasoning, that Article 1 of that directive, which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article [157] of the Treaty, in no way alters the content or scope of that principle as defined in that article. The Court recently repeated that case-law in Cadman.

85. In the light of that case-law, I think it is perfectly logical that the Court considered in Mangold that the fact that the time-limit for the transposition of Directive 2000/78 had not expired could not undermine the effectiveness of the principle of non-discrimination on grounds of age and, in order to ensure that effectiveness, the national court had to disapply provisions of national law which were contrary to Community law. Moreover, the fact that the main proceedings were between private parties could not preclude the general principle of Community law in question from being relied on to exclude national legislation, since the Court has already on several occasions taken a more significant step by recognising that provisions of the Treaty containing specific expressions of the general principle of equal treatment and non-discrimination have horizontal direct effect.

86. The Court must now decide whether it wishes to maintain the same approach for situations which arose after the expiry of the time-limit for the transposition of Directive 2000/78. In my opinion, it should do so, because to adopt another position would depart from the logic which underlies Mangold.

87. In so far as Directive 2000/78 is intended to facilitate the specific application of the prohibition of age discrimination and, in particular, to improve judicial protection for workers who may have been wronged by a breach of that prohibition, it cannot, including – and all the more so – after the expiry of the period granted to the Member States for its transposition, affect the scope of that prohibition. It is difficult in that regard to imagine that the consequences of the primacy of Community law are weakened after the expiry of the time-limit for the transposition of Directive 2000/78. Most of all, it cannot be accepted that the protection of individuals against discrimination which is contrary to Community law is reduced after the expiry of that period even though the purpose of the rule in question is to increase their protection. To my mind, therefore, it should be possible to rely on Directive 2000/78 in proceedings between private parties in order to exclude a national provision which is contrary to Community law.

88. To adopt such an approach in the present case would not force the Court to reverse its earlier case-law concerning the absence of horizontal direct effect of directives. All that is at stake in the present case is the exclusion of a national provision contrary to Directive 2000/78, namely the last sentence of Paragraph 622(2) of the BGB, to allow the national court to apply the remaining provisions of that paragraph, namely the periods of notice calculated on the basis of the length of the employment relationship. Directive 2000/78 is not therefore to be applied to independent private conduct not subject to any particular State rule, such as the decision of an employer to take on workers over the age of 45 or under the age of 35. Only that situation would call into question the appropriateness of recognising that the directive has genuine horizontal direct effect.

89. Furthermore, if the Court wishes to maintain its general unwillingness to disconnect 'substitution' direct effect from the right to plead the exclusion of national legislation, the specific

nature of the directives intended to counteract discrimination allows it, in my view, to adopt a solution of more limited scope which, at the same time, has the merit of being consistent with the case-law it has developed in regard to the general principle of equal treatment and non-discrimination. From that point of view, it is because it implements that principle in regard to the prohibition of age discrimination that the right to plead Directive 2000/78 in proceedings between private parties is strengthened.

90. To finish, I would like to point out that, given the ever increasing intervention of Community law in relations between private persons, the Court will, in my view, be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights. Those situations will probably increase in number if the Charter of Fundamental Rights of the European Union becomes legally binding in the future, since among the fundamental rights contained in that charter are a number which are already part of the existing body of Community law in the form of directives. In that perspective, the Court must, in my view, think now about whether the designation of rights guaranteed by directives as fundamental rights does or does not strengthen the right to rely on them in proceedings between private parties. The present case offers the Court an opportunity to set out the answer which it wishes to give to that important question.

It is unclear how extensive the implications of these two cases—Mangold and Küçükdeveci—are.

Since these decisions, plaintiffs have attempted to invoke rights under the EU Charter of Fundamental Rights which are elaborated in directives. For example, Article 27 of the EU Charter of Fundamental Rights governs the right of workers to information and consultation and Directive 2002/14<sup>14</sup> establishes minimum requirements with respect to information and consultation. In **Association De Médiation Sociale v. Union Locale Des Syndicats CGT**<sup>15</sup> a local section of a Trade Union (the CGT) appointed a labour representative to AMS, an organization which was involved in social mediation and the reintegration of unemployed people into working life. AMS argued that it was not required to take measures for the representation of employees, such as the election of a staff representative under French law because it had fewer than 50 employees: “In order to determine whether those thresholds of 11 or 50 employees are met within the association, the AMS considers that it is necessary to exclude from the calculation of its staff numbers, in accordance with Article L. 1111-3 of the Labour Code, apprentices, employees with an employment-initiative contract or accompanied-employment contract and employees with a professional training contract (‘employees with assisted

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<sup>14</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002L0014>

<sup>15</sup> <http://www.bailii.org/eu/cases/EUECJ/2014/C17612.html>. This was a decision of a Grand Chamber of the Court.

contracts').<sup>16</sup> The Cour de Cassation asked the following questions of the Court of Justice: "(1) May the fundamental right of workers to information and consultation, recognised by Article 27 of the [Charter], and as specified in the provisions of Directive [2002/14], be invoked in a dispute between private individuals in order to assess the compliance [with European Union law] of a national measure implementing the directive? (2) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with [assisted] contracts?"

Here is how the Court of Justice dealt with these questions:

24... it must first be observed that the Court has already held that, since Directive 2002/14 has defined, in Article 2(d) thereof, the group of persons to be taken into account at the time of the calculation of the staff numbers of the undertaking, Member States cannot exclude from that calculation a specific category of persons initially included in that group (see ...Confédération générale du travail ...paragraph 34).

25 National legislation such as that at issue in the main proceedings, which excludes from the calculation of the staff numbers of an undertaking a specific category of employees, has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that directive. Consequently, it is liable to render those rights meaningless and thus make that directive ineffective...

26 Admittedly, it is settled case-law that the encouragement of recruitment, which is highlighted by the French Government in the case in the main proceedings, constitutes a legitimate aim of social policy and that the Member States have, in choosing the measures capable of achieving the aims of their social policy, a broad margin of discretion...

27 However, the margin of discretion which the Member States enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of European Union law or of a provision of that law...

28 An interpretation of Directive 2002/14 according to which Article 3(1) thereof allows the Member States to exclude from the calculation of the staff numbers of the undertaking a specific category of workers on grounds such as those put forward by the French Government in the case in the main proceedings is incompatible with Article 11 of that directive, which requires Member States to take all necessary steps enabling them to guarantee the results imposed by Directive 2002/14, in that it implies that the States would be allowed to evade that obligation to reach a clear and precise result imposed by European Union law ...

29 Having regard to the foregoing considerations, it must therefore be concluded that Article 3(1) of Directive 2002/14 must be interpreted as precluding a national provision, such as Article L. 1111-3 of the Labour Code, under which workers with assisted contracts are excluded from the calculation of staff numbers in the undertaking when determining the legal thresholds for setting up bodies representing staff.

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<sup>16</sup> Paragraph 16.

30 Secondly, it is necessary to examine whether Directive 2002/14, in particular Article 3(1) thereof, meets the conditions to have direct effect and, if so, whether the defendants in the main proceedings may rely on it against the AMS.

31 In this connection, it should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see ... Pfeiffer... paragraph 103 and the case-law cited).

32 In the present case, Article 3(1) of Directive 2002/14 provides that it is for the Member States to determine the method for calculating the thresholds of employees.

33 Although Article 3(1) of Directive 2002/14 grants the Member States a certain degree of discretion when adopting the measures necessary to implement that directive, that does not alter the precise and unconditional nature of the obligation in that article to take account of all employees.

34 The Court has already held, as pointed out in paragraph 24 above, that, since Directive 2002/14 has defined the group of persons to be taken into account at the time of that calculation, Member States cannot exclude from that calculation a specific category of persons initially included in that group. Thus, although that directive does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, it does nevertheless require that they be taken into account...

35 Having regard to that case-law concerning Article 3(1) of Directive 2002/14 ... it follows that that provision fulfils all of the conditions necessary for it to have direct effect.

36 However, it must be recalled that, according to settled case-law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties...

37 In this connection ... the AMS is an association governed by private law, even if it has a social objective. It follows from this that, because of the legal nature of the AMS, the defendants in the main proceedings cannot rely on the provisions of Directive 2002/14, as such, against that association...

38 None the less, the Court has held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive...

39 Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*...

40 In the case in the main proceedings, it is apparent from the order for reference that the Cour de cassation is faced with such a limitation, so that Article L. 1111-3 of the Labour Code cannot be interpreted in conformity with Directive 2002/14.

41 Accordingly, it is necessary to ascertain, thirdly, whether the situation in the case in the main

proceedings is similar to that in the case which gave rise to *Kükükdeveci*, so that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, can be invoked in a dispute between individuals in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive.

42 In respect of Article 27 of the Charter, as such, it should be recalled that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law...

43 Thus, since the national legislation at issue in the main proceedings was adopted to implement Directive 2002/14, Article 27 of the Charter is applicable to the case in the main proceedings.

44 It must also be observed that Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.

45 It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.

46 It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.

47 In this connection, the facts of the case may be distinguished from those which gave rise to *Kükükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.

48 Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

49 That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.

50 However, a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in ... *Francovich*...in order to obtain, if appropriate, compensation for the loss sustained (see *Dominguez*, paragraph 43).

51 It follows from the foregoing that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

In this case, **Advocate General Cruz Villalón** had taken a different view of how the Court should proceed.

28. Before proposing an answer to the question concerning the horizontal effect of fundamental

rights, I think it is appropriate to address what I consider to be an error. That error is the argument that the Charter contains a provision on the effectiveness or, more properly, the lack of effectiveness of fundamental rights in relations between individuals. According to that argument the provision in question is the first sentence of Article 51(1), according to which '[t]he provisions of this Charter are addressed to the institutions ... of the Union ... and to the Member States ...'.

29. On the basis of that wording, the argument which I reject draws a contrary, or should it be preferred *inclusio unius est exclusio alterius*, inference that, since the provisions of that Charter are addressed to the institutions of the Union and to the Member States, they are not addressed to individuals.

30. I consider that that inference is clearly hasty. Suffice to say that traditionally the, largely constitutional, provisions which contain declarations of rights have not expressly referred to the addressees or duty bearers of the rights, which were spontaneously understood to be the public authorities. Moreover, it is still clearly only in a minority of cases that individuals are expressly defined as possible addressees of rights. That is tantamount to saying that, in most cases, the issue of the relevance of fundamental rights in private law relationships had to be dealt with by way of interpretation, without the aid of an express constitutional provision and generally on a case-by-case basis.

31. In my view, and without there being any need to undertake an exhaustive interpretation of Article 51(1) of the Charter, it is quite clear that the issue which that provision essentially sought to address was the extent to which the fundamental rights enshrined in the Charter are binding, first, on the institutions of the Union and, secondly, on the Member States. In my opinion there is nothing in the wording of the article or, unless I am mistaken, in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals.

32. Finally, I consider that the above reasoning is not invalidated by the second sentence of Article 51(1) of the Charter, where it declares that '[t]hey', that is the Union and the Member States, 'shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'. It is clear that the purpose of that sentence is not, even collaterally, to preclude the relevance of the fundamental rights of the Charter to private law relations. The purpose of that sentence is to introduce, first, the *summa divisio* between 'rights' and 'principles' and, secondly, a caveat regarding any change in the allocation of competencies to the Union, as established in the Treaties, as a result of the entry into force of the Charter.

33. If, as I believe, that is the case, it would mean that, in that regard, an interpreter of the Charter is faced with the same, often uncertain, prospect that an interpreter of the Constitutions of the Member States generally faces.

34. Coming now to the crux of the matter, and in view of certain opinions which are expressed in this regard, it might seem that the idea of horizontal effect was a concept unknown to European Union law, which had to be addressed for the first time as a result of the incorporation of the Charter into European Union primary law. However, the idea that the fundamental freedoms of movement or particular principles such as non-discrimination on grounds of sex are relevant in private legal relations is an old and well-established one. That being so, the idea that the fundamental rights of the Charter other than the fundamental freedoms or the principle of equality could have a system which is separate and, so to speak, of

lower status in the Charter as a whole seems highly problematic.

35. In short, and as the referring court rightly points out, since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.

36. The problem of what is often called 'Drittwirkung', to use the successful German expression, is not so much the idea itself, or the concept or representation of it in our constitutional culture, which it would be difficult to challenge. The problem is the proper understanding of its effectiveness in concrete terms, a problem which is growing at a time when that effectiveness is, almost by necessity, protean, in the sense that it adopts very varied forms. Therefore, the difficulty lies in understanding that the obligation of individuals to respect the rights and freedoms of others is usually imposed, immediately and directly, by the public authorities themselves. From that perspective, the idea that individuals are subject to fundamental rights frequently leads to the public authorities' 'duty to protect' the rights. That is, moreover, the approach which has also been endorsed by the European Court of Human Rights and which at this stage enjoys unchallenged authority.

37. For practical purposes, the effectiveness of fundamental rights between individuals becomes relevant when the legal system provides for a specific guarantee of fundamental rights, often a judicial one. In such cases, the inherent nature of fundamental rights is imposed or superimposed on private-law relations by the State body with the most authority to give rulings on fundamental rights. From that perspective, the concept of horizontal effect results in a notable increase in the involvement of judicial interpreters of fundamental rights in the framework of relations governed by private law. The most specific instrument through which that mechanism becomes effective is that of ad hoc procedures for the individual protection of fundamental rights, where they exist.

38. Finally, the horizontal effect of fundamental rights operates very differently for each right or, more simply, for the various groups of rights. There are rights which, by their very structure, are not addressed to individuals, just as there are rights whose relevance in relationships governed by private law it would be inconceivable to deny. It is neither necessary nor even permissible on this occasion to consider that matter further. It is sufficient to focus on the right at issue, the right of workers to information and consultation within the undertaking, referred to in Article 27 of the Charter.

39. The right recognised in that article is an excellent example of the second group of rights to which I have just referred, that is to say the rights which it would be more than imprudent to deny were relevant in relations governed by private law. As has been stated and in terms which there will be ample opportunity to consider, that article declares that '[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices'.

40. The heading of the article in question is 'Workers' right to information and consultation within the undertaking', the last detail meaning that it must be accepted that 'the undertaking' is in some way involved in the effectiveness of that right. It is true that the public authorities (the European Union and the Member States) will be the first to be called upon to 'guarantee' workers the enjoyment of that right, through adopting and implementing the relevant provisions. However, in complying with the provisions of the public authority, undertakings themselves, and for such purposes the same is true whether they are public or private, must also ensure, on a day-to-day basis, that workers are guaranteed information and consultation at the appropriate

levels.

41. The foregoing leads me to the intermediate conclusion, and one which is subject to what is stated below, that Article 27 may be relied on in a dispute between individuals. In other words, that possibility cannot be denied on the basis of the argument that the Charter, as a consequence of the provisions of Article 51(1), has no relevance in relations governed by private law.

42. The issue which must be addressed next is that the Charter contains both 'rights' and 'principles', within the meaning of its general provisions. In the event that the right to information and consultation is a 'principle', Article 52(5) of the Charter contains very specific provisions, as I have already stated, with regard to the limited possibilities of relying on a 'principle' before a court. The task before the Court in this situation is to ascertain the possible status as a 'principle' of Article 27 of the Charter.

2. The right to information and consultation as a 'principle' within the meaning of the general provisions of the Charter

43. The innovations introduced by the Charter in the 2007 version include, in particular, the prominent distinction between 'rights' and 'principles' introduced in Article 51(1) and set out in the heading of Article 52, the effects of that distinction being given specific expression, in so far as 'principles' are concerned, in Article 52(5). However, it is striking that the Charter does not assign the fundamental rights to either of the two groups, as is usual in comparative law. The Explanations confine themselves to proposing a few examples of each but unfortunately those examples do not include the right at issue. For the purposes of the present case, and as I have already pointed out, that becomes a problem, though certainly not one which is insurmountable.

44. First, it is necessary only to point out that, within the structure of the Charter, the general category chosen for the title of the Charter itself, 'fundamental rights', must relate to all its contents. In other words, none of the content of the Charter, in terms of its substantive provisions, should be excluded from the category of 'fundamental rights'. That having been established, it is necessary, and this may seem less obvious, to point out that the fact that specific substantive content of the Charter is described as a 'right' elsewhere in the Charter does not in itself prevent it from potentially belonging to the category of 'principles' within the meaning of Article 52(5).

45. Both in the actual Charter and in the constitutional traditions of the Member States, it is common to regard as 'rights' or 'social rights' that substantive content relating to social policy which, because it cannot create legal situations directly enforceable by individuals, operates only following action or implementation by the public authorities. They are (social) 'rights' by virtue of their subject-matter, or even their identity, and 'principles' by virtue of their operation.

46. The authors of the Charter, with more or less justification, sought to make matters clearer by using the verb 'respect' in relation to the effectiveness of rights and the verb 'observe' in relation to that of principles. That does not seem clear to me. However, I consider that the requirement in the second sentence of Article 51(1) 'to promote the application' of the 'principles' is more meaningful. That requirement is important and at the same time expressive of the essence of 'principles'. In what follows, I shall seek briefly to explain the significance of the presence of such provisions in the Member States' declarations of rights and, now, in the Charter, with a few references to the origin of such provisions, before proposing that the right at issue be understood as a 'principle'.

a) The origin of the distinction between 'rights' and 'principles', and its sources of inspiration compared

47. The Convention entrusted with drafting the first version of the Charter was already aware of the benefits of drawing a distinction between 'rights' and 'principles'. Those categories would serve not only to facilitate a broad consensus within the first Convention, but also to facilitate the practical implementation of the provisions of the Charter. The authors of the Charter relied on the experience of some Member States, where a similar distinction had allowed full justiciability of 'rights' and a reduced, or in some cases no, justiciability of 'principles'.

48. Since 1937, Article 45 of the Irish Constitution has contained an exhaustive list of 'directive principles of social policy', the contents of which are not cognisable by the courts, since the legislature is the only power responsible for ensuring compliance with them. Several decades later, the Spanish Constitution of 1978 developed that approach so far as to recognise, in Article 53(3) thereof, that 'principles' could, in any event, 'inform' judicial practice. Moreover, other Member States would also adopt that approach, in recognising the existence of categories similar to but different from 'rights', mainly addressed to the legislature, but capable of playing an interpretative role before the courts and indeed in a form of review of the validity of acts of the legislature in those States which allow judicial review of legislation. That has been, inter alia, the function of the 'objectives of constitutional value' developed in the case-law of the French Constitutional Council, the 'constitutional objectives' of the Austrian Constitution and the equivalent category set out in the Bonn Basic Law. Another example is the Polish Constitution, Article 81 of which also limits the scope of particular economic and social rights, although the case-law of the Tribunal Konstytucyjny (Polish Constitutional Court) has opened up the possibility for a limited review of the constitutionality of legislation in the light of those rights.

49. In summary, the Member States which draw a distinction similar to that provided for in Article 52(5) of the Charter have established a category complementary to that of 'rights', a category incapable of giving rise to individual rights which can be directly relied on before the courts, but which is endowed with normative force at the constitutional level allowing the review of acts, primarily those of a legislative nature. That idea also reflects the concern within the Convention entrusted with drafting the Charter and within the Convention on the Future of Europe. Several Member States feared that the recognition of particular economic and social rights would result in the judicialisation of public policy, particularly in areas of significant budgetary importance. In fact, what would ultimately be called 'principles' were described in the initial drafts as 'social principles'. Although that adjective would later be removed, it is clear that the main concern of the authors of the Charter concerned rights to social benefits and social and employment rights.

b) The concept of 'principle' within the meaning of the Charter

50. The wording of the Charter shows that 'principles' contain obligations upon the public authorities, thus contrasting with 'rights', whose purpose is the protection of directly defined individual legal situations, though the specific expression of 'principles' at lower levels of the legal order is also possible. Public authorities must respect the individual legal situation guaranteed by 'rights', but in the case of a 'principle' the obligation is much more general: its wording determines not an individual legal situation, but general matters and ones which govern the actions of all public authorities. In other words, the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable

reality, while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of the Charter establishing the 'principle'.

51. The fact that 'principles' are characterised by the concept of obligation can also be seen in the explanations relating to Article 52 of the Charter, the interpretative value of which is confirmed by the Treaty on European Union itself in the third subparagraph of Article 6(1). The explanations offer several examples of 'principles', which seem to be laid down as obligations addressed to 'the Union', broadly understood as including all the Institutions and also the Member States when they implement European Union law. Accordingly, Article 25, expressly referred to in the explanations, states that the European Union 'recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'. The same recognition and respect must, according to Article 26, be given with regard to the right of persons with disabilities 'to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. Once again, the obligation on the European Union is set out in Article 37 of the Charter, which requires it to integrate and ensure '[a] high level of environmental protection and the improvement of the quality of the environment ... in accordance with the principle of sustainable development'.

52. What of Article 27 of the Charter? The first thing which should be noted is that the incorporation into the Charter of the right of workers to information and consultation within the undertaking as the first article of the title 'Solidarity' is anything but chance. That social right is, as stated in the explanations, the reflection of Article 21 of the European Social Charter and points 17 and 18 of the Community Charter of the Fundamental Social Rights of Workers. Moreover, it is a right found in the secondary legislation prior to the entry into force of the Charter, not only in the aforementioned Directive 2002/14, but also in other acts of European Union labour law, such as Directive 98/59/EC (28) and Directive 94/45/EC. (29)

53. That said, and given all the difficulties involved in filling out the meaning of the Charter, where it has, so to speak, discontinued its task, I would give more weight to the arguments which allocate the substantive content of Article 27 of the Charter to the category of 'principle', rather than to arguments allocating it to the category of 'right'. Primarily, there is a structural reason which confirms that it is an obligation upon the public authorities in the sense set out in point 50 of this Opinion.

54. Indeed, quite apart from the actual proclamation of the right and the resulting duty to guarantee it, the scope of the right directly guaranteed by the provision is extremely weak: '... in the cases and under the conditions provided for by Union law and national laws and practices'. This is confirmed by the fact that the article does not define any individual legal situations, leaving the European Union and national legislatures to give specific expression to the content and objectives determined by the 'principle.' It is true that it 'guarantees' 'information and consultation' to its beneficiaries, that is workers. However, it specifies neither the kind of information nor the consultation arrangements, and nor does it specify at what levels and through which representatives they are to be effected. The content is so indeterminate that it can be interpreted only as an obligation to act, requiring the public authorities to take the necessary measures to guarantee a right. Accordingly, the article does not determine any individual legal situations, but requires the public authorities to determine the objective content (information and consultation of workers) and certain outcomes (effectiveness of the

information, representation on the basis of the levels and notice in sufficient time).

55. There is also a systematic argument. The group of rights included under the title 'Solidarity' incorporates mainly rights regarded as social rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of 'principles'. Although that position in the system of the Charter can never be anything but a presumption, in the case of Article 27 this is a feature additional to the ones listed above.

56. The foregoing is sufficient to support my proposal, as an intermediate conclusion, that the right of workers to information and consultation within the undertaking, as guaranteed in Article 27 of the Charter, should be understood as a 'principle' for the purposes of Articles 51(1) and 52(5).

3. 'Principles' under Article 52(5) of the Charter: the possibility of relying on 'implementing acts' before the courts.

57. The logical result of the above would be that a 'principle' such as that in Article 27 of the Charter, which guarantees information and consultation to workers in the undertaking, is subject, as regards its arrangements, to the provisions of Article 52(5) of the Charter, with the consequences which this entails in terms of whether it may be relied on before the courts. However, Article 52(5) is remarkably complex, and a separate analysis of each of its sentences is required. Therefore, I shall begin by pointing out that the first sentence of Article 52(5) addresses what may be regarded as the operating conditions of the 'principles', and that the second sentence determines the scope of their justiciability.

58. The first sentence proposes that 'principles' be endowed with content, a task it performs when declaring that the 'provisions of this Charter which contain principles "may be implemented" by legislative and executive acts' taken by the European Union or by Member States when they are implementing European Union law. I shall describe that aspect of the article as the 'specific expression' dimension of the principle, which takes place when the 'principle' is organised through legislation.

59. The second sentence contains the elements aimed at ensuring that the 'principles' are effective before the courts, although, as the article points out, the effects are limited to 'the interpretation of such acts and ... the ruling on their legality'. I shall call that second aspect the 'invokability' dimension of the 'principle', the development of which takes place during the lifetime of the 'principle' before the courts.

a) The 'implementing acts' giving specific expression to the 'principle' (the first sentence of Article 52(5) of the Charter)

60. The European Union and the Member States are under an obligation to 'promote' the 'principles' set out in the Charter (Article 51(1)), and for that purpose are to adopt those 'implementing' measures which are necessary to ensure that such promotion is effective. In spite of the use of the word 'may', it is clear that this is not an absolute discretionary power, but a possibility subject, as has just been noted, to a clear obligation in Article 51(1) of the Charter, requiring the European Union and the Member States to 'promote' the 'principles'. It is clear that such promotion will be possible only through the 'implementing' acts to which Article 52 subsequently refers.

61. Similarly, a close examination of the wording of the first sentence of Article 52(5) of the Charter confirms that the article refers to legislative measures to implement the 'principles', with

the consequences which are detailed below.

62. In fact, the first sentence of Article 52(5) states that the 'principles' of the Charter may 'be implemented' by acts of the European Union and of the Member States. Those implementing acts must be understood as acts necessary to give specific legislative expression to a 'principle' and having no other purpose than that of providing it with sufficient substance for it to attain substantive independence and, ultimately, become a judicially cognisable right. The wording cannot be understood in any other way, since the obligation is addressed not only to the executive, but also to the legislature. Therefore, where the article refers to 'implementation' it is referring primarily to a specifically legislative implementation.

63. Taking this a step further, I consider that it is possible to identify, from among the legislative implementing acts referred to in the first sentence of Article 52(5) of the Charter, particular provisions which can be said to give specific substantive and direct expression to the content of the 'principle'. That differentiation is essential, since, otherwise, in areas as extensive as social policy, the environment or consumer protection, the 'implementation' of a 'principle' would consist of nothing less than an entire branch of the legal system, such as the whole of social law, environmental law and consumer law. That result would render nugatory and disruptive the function which the Charter confers on 'principles' as a criterion for interpreting and reviewing the validity of acts, since it would be impossible to carry out that function.

64. By thus distinguishing between acts giving specific substantive and direct expression to the content of a 'principle' and other acts, whether legislative acts or their individual implementing acts, it is therefore possible to safeguard the effectiveness of both the 'principles' contained in the Charter and the objective pursued by Article 52(5), which is purely to guarantee protection, albeit conditional, for those articles of the Charter requiring legislative implementation.

65. Article 3(1) of Directive 2002/14 actually provides a good example of what I have described as acts giving specific substantive and direct expression to a 'principle'. That article, as its heading states, addresses the 'scope' of the rights defined in Directive 2002/14. In turn, the title of Directive 2002/14 is also relevant for the present purposes, since it states that it has the objective of 'establishing a general framework for informing and consulting employees in the European Community', which coincides exactly with that of Article 27 of the Charter.

66. In that context, Article 3(1) of Directive 2002/14 provides the content of the 'principle' with substantive and direct expression: the personal scope of the right to information and consultation. Needless to say, establishing of the status of the holder of a right is an essential precondition for its exercise, from which it is possible to identify the special protection provided for by the Charter. It is in this regard that Article 3(1) of Directive 2002/14 may be referred to as an example of the substantive and direct expression of Article 27 of the Charter and, therefore, is capable of forming part of the content of Article 27 which may be relied on before the courts, as I shall now explain.

b) The 'invokability' dimension of the 'principle' (the second sentence of Article 52(5) of the Charter)

67. The second sentence of the oft-cited Article 52(5) of the Charter declares that 'principles' 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. That provision contains two aspects which must now be highlighted, one implicit and one explicit, the first raising no particular difficulties of interpretation, unlike the second.

68. Regarding the first, it is evident from a reading of Article 52(5) of the Charter that its wording very implicitly but unequivocally excludes the possibility of directly relying on a

'principle' so as to exercise an individual right based upon that principle. (31) Accordingly, the Charter confines the justiciability of 'principles' to their, one might say, refined state as rules and acts, and does so using a criterion which incorporates the literal wording of the 'principle' in the Charter and the acts giving substantive and direct expression to that principle.

69. The explicit aspect, and the more delicate as regards its interpretation, concerns the 'acts' to which the article refers. Indeed, if the reference to 'such acts' applied exclusively to implementing legislative acts giving substance to the principle, there would be a 'vicious circle': those implementing legislative acts would be reviewed in the light of a principle whose content, as stated in Article 27 of the Charter, is precisely that which is determined by those implementing legislative acts.

70. It is therefore necessary to consider that the scope of the acts whose interpretation and review is allowed by the second sentence of Article 52(5) differs from and is broader than that of the legislative acts giving specific expression to a principle. Specifically, all those implementing acts which go beyond the substantive and direct expression of the 'principle' will be the acts which may be relied on before the courts together with the other implementing acts. Otherwise, both Article 27 and its judicial guarantee in the second sentence of Article 52(5) of the Charter would be rendered ineffective.

71. Therefore, and in the light of a combined reading of the first and second sentences of Article 52(5) of the Charter, I consider that the characteristic function of the acts which I have called a specific substantive and direct expression of the 'principle' is that of being incorporated into the criterion for assessing the validity of other acts implementing that 'principle' for the purpose of that sentence. Moreover, it will be in the light of that criterion, comprising the wording of the 'principle' and the acts giving specific substantive and direct expression to it, that it will be necessary to assess the validity of the other implementing acts.

72. Thus, one example of an act likely to be subject to a review of its legality under the second sentence of Article 52(5) of the Charter is the act forming the subject-matter of the second question of the Cour de cassation: Article L.1111-3-4 of the French Labour Code, a provision which forms part of the system for calculating the staff numbers in undertakings for the purposes of worker representation. That representation is a channel for the right of workers to information and consultation, and is therefore an important element in the formulation and practical implementation of the 'principle' in Article 27 of the Charter. The rule excluding a specific category of workers from the system for calculating staff numbers is a rule which clearly has the potential to infringe the content of the 'principle', including, of course, the content defined in acts giving specific substantive and direct expression to the 'principle'.

c) The fact that the act giving specific substantive and direct expression to the 'principle' is in the nature of a directive

73. In the case referred by the Cour de cassation to the Court, the specific expression of the right of workers to information and consultation is contained in a directive. Given the nature of the present case as a dispute between individuals, that fact raises the question of whether the abovementioned nature of the rule giving specific expression to the principle, in particular the limited possibilities of its having horizontal effect, may create an entirely insurmountable obstacle to all that I have so far been proposing. I shall attempt to show that I do not think that that is the case.

74. Although the abovementioned article of the Charter requires the cooperation of the European Union legislature, this does not mean that such cooperation entails unlimited

delegation in favour of the legislature, in particular where such delegation may lead to undermining the meaning of the second sentence of Article 52(5) of the Charter. That would be the result if, by choosing to legislate by means of a directive, the legislature were able to deprive individuals, in disputes inter privatos, of the judicial review of validity which the Charter guarantees them.

75. However, it is inescapable that that conclusion must be justified by the settled case-law of the Court of Justice, according to which directives can in no way be relied on, except for the purposes of interpretation, in disputes between individuals. I do not think that this is impossible, and nor do I consider that the consequences of my proposal will create legal uncertainty, as the Federal Republic of Germany has stated with regard to this issue in its written observations.

76. The provision or provisions of a directive which are, hypothetically, capable of giving specific substantive and direct expression to the content of a 'principle' are, in fact, not numerous, but rather the opposite. I think, in that regard, that it is possible to provide a very strict interpretation of such provisions, so that the outcome will be entirely acceptable for the system governing the legislative category to which such provisions belong, that is to say directives. In other words, the specific substantive and direct expression of a provision of the Charter is a function that should be seen as ad hoc and in any case individually identifiable. In any event, quantitatively the provisions of a directive which perform that function will be very limited, so that the settled case-law on that delicate matter should be able to remain intact with respect to almost all of the provisions of present and future directives.

77. Finally, I consider that my proposal on that delicate point is consistent with the development of the case-law of the Court of Justice, which has allowed, also in a very specific way, objective review of national acts in the light of directives in disputes inter privatos. Without the need for me to elaborate further on this point, the solution I propose here, far from being a turning point in the Court's case-law, is, on the contrary, in keeping with an approach which began in *CIA Security*, *Mangold* and *Kücükdeveci*, to cite only the most significant judgments.

78. One last important detail: the solution proposed here should not result in a situation of legal uncertainty. Rather the reverse is true, what could cause a situation of uncertainty is the possibility that the legislature might unilaterally alter the effectiveness of the general provisions of the Charter. The process for giving specific expression to the content of the 'principles' forms part of a first cycle of consolidation of the Charter, something which quite naturally occurs during the first years of the existence of a declaration of rights in a constitutional legal order. Over time that content will be consolidated and will delimit the justiciability of the 'principles' of the Charter, indicating both to the public authorities and to citizens the type of review which courts can carry out, and within what limits. That result can only help to strengthen legal certainty in the implementation of an instrument central to the European Union legal order such as the Charter, and, in particular, the implementation of the 'principles' set out in Article 52(5) thereof.

79. That said, it is undeniable that in the case of a dispute between individuals, even if the court restricts itself to invalidating or refraining from applying an unlawful act, one party will always have an obligation imposed upon it which it did not initially expect to bear. Nevertheless, and as argued by the CGT representative at the hearing, an individual who suffers damage as a result of the unforeseen assumption of an obligation, an obligation which arises subsequently on account of the unlawful conduct of a Member State, is still able to claim from that Member State, where appropriate, compensation for the damage caused as a result of that unlawful conduct. It is true that actions to establish the liability of Member State for an infringement of

European Union law were originally designed to protect persons who rely on a right before the national courts. However, in a case such as the present case, where the European Union rule is a 'principle' of the Charter whose content has been infringed by an act whose lawfulness is at issue in a dispute between individuals, it is reasonable that the burden of an action for damages should fall on the person who has benefited from the unlawful conduct, and not on the holder of the right arising from the specific expression of the content of the 'principle'.

80. Therefore, and in conclusion, I consider, on the basis of the second sentence of Article 52(5) of the Charter, that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, may be relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation.

#### B – The second question

81. By its second question, and placed in the context of implementation of the previously described system of justiciability, the Cour de cassation asks the Court directly about the compatibility of a scheme such as that provided for in Article L.1111-3 of the French Labour Code with European Union law, in this case Article 27 of the Charter, as given specific expression Article 3(1) of Directive 2002/14. Under that provision, workers with 'employment-initiative contracts', 'accompanied-employment contracts' and 'professional training contracts' are excluded from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff.

82. Although the question refers in general to three categories of excluded contracts, it is clear from the case-file that the applicant, the AMS, has concluded approximately 120 to 170 'accompanied-employment contracts' and that there is no record that any 'employment-initiative contracts' or 'professional training contracts' have been concluded. Accordingly, and unless the Court finds otherwise, the answer which must be provided should relate exclusively to the compliance with Directive 2002/14 of the exclusion of 'accompanied-employment contracts', provided for in Article L.1111-3-4.

83. Only the French Republic, the CGT and the Commission have stated a position on that issue. According to the French Republic, the special nature of the excluded contracts, including 'accompanied-employment contracts', justifies a restriction on the scope of Article 27 of the Charter, given specific expression by Directive 2002/14. It claims that, since they are contracts aimed at integration into the labour market, rather than contracts binding on a worker within the context of an ordinary employment relationship, the objectives of Article 27 of the Charter and Directive 2002/14 are not undermined as a result of that exclusion. The French Republic relies on Article 52(1) of the Charter, under which exercise of the rights and freedoms may be subject to limitations, provided they comply with the principle of proportionality.

84. For its part, the CGT focuses its arguments on the judgment of the Court of Justice in *Confédération générale du travail and Others (CGT)*. That decision enabled the Court to rule for the first time on Directive 2002/14, in a case from the French Republic in which a question was raised concerning the exclusion of a category of workers until they had reached a specific age. According to the CGT, the fact that the Court declared that that exclusion was contrary to Directive 2002/14 confirms that in the present case, where once again a category of workers is excluded, there has been an infringement of that directive. The Commission concurs with the CGT's arguments and also proposes that the Court of Justice interpret Directive 2002/14 as meaning that it precludes national legislation such as that at issue in the present case.

85. Indeed, and as the CGT and the Commission rightly point out, the judgment in CGT provides clarification when answering the second question referred. In that case the CGT brought proceedings before the French Council of State in connection with national legislation which delayed the inclusion of a category of workers in the calculation of staff numbers in an undertaking until they had reached a specific age. The Court followed the recommendation of Advocate General Mengozzi and rejected the argument that a delay in the calculation based on age was anything other than an exclusion from the calculation. The French legislation did not wholly exclude a group of workers, but did so until they had reached a specific age. Nevertheless, and giving its ruling before the entry into force of the Charter, the Court held that that delay was equivalent to an exclusion, since it contributed to rendering the rights guaranteed by Directive 2002/14 'meaningless' and therefore made 'the [d]irective ineffective'.

86. It is true that the second subparagraph of Article 3(1) of Directive 2002/14 provides that the Member States are to determine the method for calculating the thresholds of employees employed. However, the Court held that exclusion of a category of workers was not simply a calculation, but a unilateral reinterpretation of the concept of 'employee'. Accordingly, the Court held that 'although that directive does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, it does nevertheless require that they be taken into account.'

87. Accordingly, Article 27 of the Charter, given specific substantive and direct expression by the second subparagraph of Article 3(1) of Directive 2002/14, must be interpreted, in the light of CGT, so as to allow the States to establish methods for calculating the number of workers for the purposes of staff numbers, but under no circumstances does this entail the possibility of excluding an employee from that calculation. Moreover, that is the case, as it was in CGT, even where the exclusion is only temporary.

88. The Court has consistently held that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. Moreover, as is also well known, that principle of interpreting national law in conformity with European Union law has certain limits. Accordingly, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.

89. Nevertheless, whether there exists the possibility of providing an interpretation in conformity with European Union law is to be assessed exclusively by the national court, since it requires an interpretation of domestic law to its full extent, for which the Court clearly lacks jurisdiction.

90. In this case, however, the Cour de cassation, in asking the Court of Justice to rule on whether it is possible to rely on Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, actually does so on the understanding that, should an interpretation such as that proposed in point 87 of this Opinion be upheld, it would not be possible to provide an interpretation in conformity with European Union law. The Cour de cassation well understands that aspect, since it is not the first time that the Cour de cassation has been faced with this issue and referred a question to the Court in relation to it. In addition, it would make no sense to refer a question on whether it is possible to rely on the abovementioned European Union rules in a context such as the one before the Court, if the Cour de cassation had determined that it was possible to provide an interpretation in conformity with European Union

law.

91. The same conclusion was also reached by the Government of the French Republic, both in its written and oral observations. When asked expressly about that aspect at the hearing, the Agent for the French Government recognised that it was impossible to provide an interpretation of French law capable of ensuring compliance with European Union law, as I propose that it be interpreted in point 87 of this Opinion, even taking into account the rules of labour law allowing, in exceptional cases, statutory provisions to be derogated from by means of collective agreement.

92. According to the French Government, for it to be possible to provide a combined interpretation of Article L.1111-3-4 of the French Labour Code and Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, it would be necessary to rely on an 'exception to the exception', which does not exist in the present case. When asked at the hearing about the possibility that Article L. 2251-1 of the French Labour Code might contain such an 'exception to the exception', the Agent stated that provision in question refers only to measures agreed by collective agreement, a situation which is of no relevance in the present case.

93. In addition to the foregoing, it should also be recalled that when a national court (which is also the highest interpreter of domestic law) and the Government of that Member State concur in stating that their national legal system does not allow an interpretation consistent with European Union law, the Court, in the interests of the principle of sincere cooperation, is obliged to accept that assessment and to answer the specific question which has been raised before it. Otherwise, both the spirit of cooperation between courts which governs the preliminary ruling mechanism of Article 267 TFEU and the effectiveness of that procedure would be called into question.

94. In the light of the foregoing, and in view of the impossibility of providing an interpretation of national law which is consistent with the provisions of Article 27 of the Charter, given specific expression by Article 3(1) of Directive 2002/14, it remains only to assess whether the exclusions contained in Article L.1111-3 of the French Labour Code and, in particular, that relating to 'accompanied-employment contracts' are contrary to the provisions of the second subparagraph of Article 3(1) of Directive 2002/14.

95. In that regard, and to recapitulate the conclusion reached by the Court of Justice in CGT, if a temporary exclusion such as that at issue in that case infringes the directive, a fortiori the same conclusion must be reached in the case of a total and unlimited exclusion. Furthermore, the fact that an 'accompanied-employment contract' serves the purpose of integration into the labour market in no way invalidates that conclusion, since at no time was it disputed that an employee with that contract has the status of 'worker' for the purposes of Article 27 of the Charter, as given specific expression in Directive 2002/14.

96. Moreover, as regards the French Republic's argument concerning the special nature of 'accompanied-employment contracts' and their justification in the public interest, the Court responded to a similar argument in CGT, holding that a justification for an exemption is incompatible with Article 11(1) of Directive 2002/14, which requires Member States to take all necessary steps enabling them to guarantee the results imposed by that directive at all times. It would be difficult to give a different response in the present case, in which, moreover, the total exclusion without time-limit of a category of workers is at issue.

97. Accordingly, in response to the second question referred, and in view of the impossibility of providing an interpretation of domestic law which is consistent with European Union law, I

propose that the Court of Justice interpret Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14, as meaning that it precludes national legislation which excludes a specific category of workers, namely those with 'excluded contracts', from the calculation of staff numbers for the purposes of that provision.

Is it possible to tell whether a provision of the Charter of Fundamental Rights produces horizontal direct effects or not? Note that in the AMS case the Advocate General suggested a different approach from that of the Court.

The English Court of Appeal considered this question with respect to Article 47 of the Charter in **Benkharbouche v Embassy of the Republic of Sudan**.<sup>17</sup> The case is treated as a case involving horizontal direct effect because Sudan is not subject to the obligations specified in the Charter as a Member State of the EU, even though it is a state. The question of EU law was whether a dismissed employee seeking to enforce rights which derived from EU law should be able to rely on the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights such that the employer should be precluded from relying on immunity it would otherwise possess under an English Statute.<sup>18</sup>

3. Ms. Benkharbouche, a Moroccan national, was employed as a cook at the Sudanese embassy in London. She was dismissed and brought claims against the embassy for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. The embassy claimed immunity under section 1 [State Immunity Act 1978]...

69. The next task is to examine EU law. The appellants' argument here is based on Article 47 EU Charter, which was incorporated into English law following the Lisbon Treaty. The changes took effect in domestic law on 1 December 2009 by virtue of amendments to the European Communities Act 1972 made by the European Union (Amendment) Act 2008.

70. Article 47 EU Charter provides:

"Article 47. Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article..."

71. It is common ground that, in so far as relevant to the present case, the content of Article 47 is identical to that of Article 6 ECHR. It follows from our conclusions on Article 6 ECHR that the appellants have accordingly succeeded in showing that Article 47 is violated.

72. EU law has potentially important consequences in this case. The judge held that as a result of the violation of Article 47 EU Charter, the court was bound to disapply sections 4(2)(b) and 16(1)(a) SIA. Ms. Benkharbouche and Ms. Janah could then bring their EU law claims, and

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<sup>17</sup> [2015] EWCA Civ 33 (05 February 2015). Paragraphs 69 to 85 were "substantially written by Arden L.J." Lady Justice Arden was the third woman to be appointed as a Judge of the English Court of Appeal. Before she became a Judge she practised as a barrister and specialized in corporate law.

<sup>18</sup> The Court of Appeal also concluded that the English Statute provided more immunity to states than international law required.

those statutory provisions would not then bar their claims. By contrast, the declaration of incompatibility which we propose to make under section 4 HRA does not affect the operation or validity of the SIA. The declaration acts primarily as a signal to Parliament that it needs to consider amending that legislation.

73. The appellants cannot of course claim a remedy under the EU Charter unless they can also show that they are entitled to rely on a violation of it to seek a remedy in proceedings before a national court. For this there must be claims which fall "within the scope of" EU law. As to this, Article 51 EU Charter confirms that the EU Charter is addressed to the EU institutions and like bodies and that it does not extend the field of application of the EU Treaties. Article 52(5) of the EU Charter states that the EU Charter only applies to these entities when they are implementing Union law, in the exercise of their respective powers. The EU Charter does not, therefore, apply to claims based on national law.

74. In fact, it is common ground that both claimants have claims that fall within the scope of EU law. As the judge explained, Ms. Benkharbouche's claims under the Working Time Regulations and Ms. Janah's claims under the Working Time Regulations and for racial discrimination and harassment are derived from EU measures. They have other claims which they accept are not within EU law, such as claims for unfair dismissal. The question of what falls within the scope of EU law is controversial in some contexts but no one has taken issue with the point that in part Ms. Benkharbouche's claims and Ms. Janah's claims are within the scope of EU law.

75. The outstanding issues are:

(1) whether Article 47 has "horizontal" direct effect, meaning that the appellants can rely on it even though Libya is not a Member State or one of the EU institutions referred to in Article 51 EU Charter;

(2) if so, whether this court should decline to disapply sections 4(1)(b) and 16(1)(a) SIA on the grounds that it is not clear what rule applies in place of these provisions as a matter of international law.

#### A. Horizontal Direct Effect

76. In our judgment, for the reasons given below, an EU Charter right can be relied on "horizontally" in certain circumstances.

77. The CJEU gave general principles of EU law horizontal direct effect before the EU Charter came into effect. In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle.

78. It is therefore perhaps not surprising to find that the CJEU has applied *Mangold* to the equivalent Charter provision after the Lisbon Treaty came into effect. Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age

discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination. The CJEU also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically Article 6, Treaty on the Functioning of the EU) provided that the EU Charter had the same status as the Treaties. This was significant because, as Lord Kerr pointed out in *Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 at [26]:

"[I]n its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, the *Promusicae* case [2008] All ER (EC) 809, paras 61–70." 79. A question which remained after *Kücükdeveci* was whether the CJEU's statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to Mangold general principles. The CJEU to an extent addressed this question in *Case C-176/12 Association de Mediation Sociale (AMS)* [2014] ECR I-000 ("*AMS*") which was decided after *Langstaff J.* gave his judgment. In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished *Kücükdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect. 80. The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in *Kücükdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so. The Explanations prepared under the authority of the Praesidium of the Convention which drafted the EU Charter, which Article 52(7) EU Charter requires the court to take into account when interpreting the EU Charter, state that the CJEU has "enshrined" the right to an effective remedy "as a general principle of Union law". The Explanations cite *Case 222/84 Johnston* [1986] ECR 1651; *Case 222/86 Heylens* [1987] ECR 4097 and *Case C-97/91 Borelli* [1992] ECR I-6313. In *Borelli*, for instance, the CJEU held:

"14. As the Court observed in particular in *Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in *Case 222/86 UNECTEF v Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

81. We therefore conclude that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect. It remains, of course, subject to the exceptions to be found in the jurisprudence of the Strasbourg court (subject to any contrary provision in EU law). Our conclusion accords with the analysis of the case law made by Mr. Eicke, which Mr. Landau adopted and on which Mr. Otty relied.

In paragraph 79 of the judgment the Court states that in the AMS case:

The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished *Kücükdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.