

CORRESPONDENCE, from C. Tobler

Putting *Mangold* in perspective: in response to *Editorial comments*, Horizontal direct effect – A law of diminishing coherence?¹

1. Introductory remarks

In its hotly debated decision in the *Mangold* case, handed down by the Court's Grand Chamber on 22 November 2005,² the Court of Justice found that national law such as that at issue – according to which the conclusion of a fixed-term employment contract did not require objective justification if the worker had reached the age of 52 (formerly 58) by the time the fixed-term employment relationship began – amounted to direct discrimination on grounds of age as prohibited by the Employment Framework Directive,³ and that this finding could not be called into question by the fact that the period for the implementation of the Directive had not yet expired. Since then, different views have been offered on the meaning and the consequences of the *Mangold* decision, in particular in Germany (*Mangold* was a German case).⁴ Most commentators are not sure how to interpret the decision, but many think

1. 43 CML Rev. (2006), 1.

2. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981.

3. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

4. See e.g. Gas, "Gastkommentar: Die unmittelbare Anwendbarkeit von Richtlinien zu Lasten Privater im Urteil „Mangold“", (2005) *EuZW*, 737; Herrmann, "Die negative unmittelbare Wirkung von Richtlinien in horizontalen Rechtsverhältnissen. Erwiderung auf T. Gas, Gastkommentar Heft 24/2005, S. 737", (2006) *EuZW*, 69–70; Körner, "Europäisches Verbot der Altersdiskriminierung in Beschäftigung und Beruf", (2005) *Neue Zeitschrift für Arbeitsrecht* (NZA), 1395–1398; Thüsing, "Europarechtlicher Gleichbehandlungsgrundsatz als Bindung des Arbeitgebers?", (2005) *Zeitschrift für Wirtschaftsrecht – ZIP*, 2149–2151; Arnauß, "Das Verbot der Altersdiskriminierung als unmittelbar geltendes Recht", (2006) *BB*, 325–327; Bauer and Arnold, "Auf „Junk“ folgt „Mangold“ – Europarecht verdrängt deutsches Arbeitsrecht", (2006) *NJW*, 6–12; Koenigs, "Unbegrenzte Prüfungsbefugnis des EuGH?", (2006) *Der Betrieb*, 49–50; Mayr, "Das Verbot der Altersdiskriminierung als allgemeiner Grundsatz des Gemeinschaftsrechts", (2006) *European Law Reporter*, 2–6; Reich, "Gemeinschaftswidrigkeit der sachgrundlosen Befristungsmöglichkeit bei Arbeitnehmern ab 52 Jahren", (2006) *EuZW*, 17–22; Schmidt, "The Mangold Case before the European Court of Justice", (2006) *German Law Journal*, vol. 7, www.germanlawjournal.com/article.php?id=728; Strybny, "Verstoß des § 14 Abs. 3 TzBfG gegen das gemeinschaftsrechtliche Diskriminierungsverbot", (2005) *BB*, 2753–2754. Even before the judgment, there were comments on the A.G.'s Opinion; see Jobst-Hubertus, "Ein Stück aus dem Tollhaus: Altersbefristung und der EuGH", (2005) *NZA*, 800–803; Waas, "Europarecht-

that through *Mangold* the Court recognized, albeit only implicitly, the horizontal direct effect of provisions of a directive in a situation where the implementation period for the directive at issue was still running. This was also the view of the editors of the Common Market Law Review, who called the *Mangold* decision “yet another twist in the Court’s convoluted case law about the direct effect of Directives”.⁵

I would submit that it is possible not only to read the decision in a *some-what* different manner, as suggested by Jans⁶ in response to the Common Market Law Review’s editorial, but in fact in an *entirely* different manner. I base this view on two special features of the Community legislation involved that will not easily be present in other cases. First, when holding that the finding of direct age discrimination could not be called into question by the fact that the period for the implementation of the Employment Framework Directive had not yet expired, the Court pointed to Article 18(2) of the Employment Framework Directive, which concerns the implementation period. Second the Court made much of the nature of the Directive as a “Framework” Directive.

2. The period for the implementation of the Employment Framework Directive

According to Article 18(1), the Employment Framework Directive had to be implemented by 2 December 2003 at the latest. However, “in order to take account of particular conditions and if necessary”, the Member States could have an additional three years in relation to age and disability discrimination. This is why the implementation period in relation to age discrimination was still running in Germany at the time when the facts of the *Mangold* case occurred. It may be interesting to note that the Commission’s proposals for

liche Schranken für die Befristung von Arbeitsverträgen mit älteren Arbeitnehmern”, (2005) EuZW, 583–587.

5. Editorial comments, cited *supra* note 1. Editorial comments in English were also published elsewhere, e.g. “Out with the old ...”, (2006) EL Rev., 1–2. For further comments in English see e.g. Gijzen, *Selected Issues in Equal Treatment Law: A multilayered comparison of European, English and Dutch law*, Ph. D. thesis Maastricht University (2006), pp. 441 et seq.; Waddington, “Recent developments and the non-discrimination Directives: *Mangold* and more”, (2006) MJ, 365–373, at 369.

6. Jans, “De doorwerking in de nationale rechtsorde van het verbod van leeftijdsdiscriminatie als algemeen beginsel van gemeenschapsrecht”, Chapt. 8 in Herweijer, Vonk and Zondag (Eds), *Sociale zekerheid voor het oog van de meester. Opstellen voor prof. mr. F.M. Noordam* (Deventer, Kluwer, 2006), pp. 115–129; also published as “The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of Community Law”, (2007) LIEI, 53–66. On Jans’ argument, see further note 11 *infra*.

the Directive (both the original⁷ and the amended proposal)⁸ did not provide for such a possibility of extension, which was inserted into the draft text by the Council of Ministers. When doing so, the Council did not simply state the possibility of extension but explicitly added the obligation of the Member States who avail themselves of this possibility to “report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation”. It should be noted that this is a concrete and specific obligation that goes much further than a mere standstill obligation, in that the Member States are obliged to take positive steps to tackle age and disability discrimination.

It is against this background that the Court in *Mangold* analysed the changes in the German law at issue (i.e. the lowering of the age limit in relation to fixed-term employment for which there was no need for explanation from 58 years to 52 years) in the light of the Directive. In other words: in order to find out whether Germany had respected its obligation under Article 18(2), the Court had to examine whether the amendment to the German law that was at issue in *Mangold* amounted to age discrimination within the meaning of the Directive. In this context, the Court – logically – had to resort to the Directive’s substantive provisions, including in particular Article 6(1), concerning justification of differences of treatment on grounds of age. The Court found that Germany had indeed acted contrary to its obligations under Article 18(2) of the Employment Framework Directive. Rather than taking positive steps in order to tackle age discrimination, the German legislation in fact introduced new discrimination.

On this first level, therefore, *Mangold* simply concerns the failure of Germany to fulfil its specific and positive “pre-implementation duties” under Article 18(2) of the Directive. It seems clear to me that this is not a case of direct effect in a traditional sense, since such “traditional” cases concern provisions of directives that have to be implemented by the Member States. Article 18(2) is, precisely and only, meant to have effect during the extended implementation period. In my opinion, there is no reason why in such a case an individual should not be allowed to rely on the primacy of EC law in the face of conflicting national law. Further and for the same reason, *Mangold*

7. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM(2000)334 fin., O.J. 2000, C 337 E/204.

8. Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM(2001)321 fin., O.J. 2001, C 270 E/9.

should also not be seen as similar to *CIA Securitel*⁹ and *Unilever Italia*,¹⁰ as suggested by Jans.¹¹ The situation addressed in these cases relates to the effect of provisions of the directive that need to be implemented. Again, that is not at issue in *Mangold*. Finally, *Mangold* should also not be seen as a case elaborating the *Inter-Environnement Wallonie* principle.¹² Indeed, the positive obligation under Article 18(2) of the Directive to take steps to tackle age and disability discrimination is both more specific and more far-reaching than the negative obligation under the *Inter-Environnement Wallonie* case law, which is to refrain from all actions that are liable seriously to compromise the aims of the Directive.

3. The nature of the Employment Framework Directive as a “Framework” Directive

As a second element in its reasoning, the Court of Justice points to the fact that the Directive at issue is a “Framework” Directive. According to the Court, this means that the Directive only regulates issues such as remedies, the burden of proof, protection against victimization, social dialogue, affirmative action and other specific measures, but not the prohibitions of discrimination on grounds of age as such. This prohibition, the Court explains, flows from international instruments and the constitutional traditions common to the Member States (as mentioned in the Directive’s preamble) and thus constitutes a general principle of EC law. Accordingly, reliance on the prohibition is not conditional on the expiry of the Directive’s implementation period.¹³

With this approach, the Court chose to disregard the Commission’s intention when it proposed the text of the Employment Framework Directive. The Commission¹⁴ intended the term “Framework Directive” to be understood

9. Case C-194/4, *CIA Security v. Signalson and Securitel*, [1996] ECR I-2201.

10. Case C-443/98, *Unilever Italia v. Central Food*, [2000] ECR I-7535.

11. According to Jans, *Mangold* does not concern the issue of direct effect in the proper sense of the concept, but rather the “invocabilité d’exclusion”, that is, the right of an individual to rely on EC law in order to contest the legality of national public law that is in conflict with the principle and that governs a relationship under private law, Jans op. cit. *supra* note 6, at 124.

12. Case C-129/96, *Inter-Environnement Wallonie v. Région Wallone*, [1997] ECR I-7411.

13. This approach is criticized by A.G. Mazák in Case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, pending. He described the Court’s approach in *Mangold* as “ascribing direct effect to the corresponding general principle of law” and went on to say that “In adopting that approach the Court set foot on a very slippery slope not only with regard to the question whether such a general principle of law on the non-discrimination on grounds of age exists, but also with regard to the way it applied that principle”, see paras. 132–133 of the Opinion.

14. See the Commission’s Explanatory Memorandum on the first proposal for the amending Directive, *supra* note 7, point 3.2.

within the meaning of the Protocol on Subsidiarity and Proportionality.¹⁵ According to the Protocol, “[t]he form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures”. In this context the term “Framework Directive” refers to the qualitative degree of regulation on the Community level, rather than to the quantitative degree of regulation, as held by the Court. In my opinion, it would have been more convincing if the Court had based its reasoning on the special nature of age discrimination, along the lines of an argument made by Advocate General Tizzano.¹⁶ This argument relates to the fact that, differently from other types of discrimination, the meaning of the general principle of equal treatment on grounds of age and the meaning of the prohibition of age discrimination in the Directive are identical, at least if the former is understood literally (i.e. as referring to same treatment).¹⁷ Understood in this way, the general principle of equal treatment (i.e. the principle as unrelated to a discrimination ground) requires the same treatment of comparable situations, unless there is objective justification for different treatment. This also applies in the context of general principles of equal treatment that focus on a specific discrimination ground,¹⁸ such as in the context of age. As for the Employment Framework Directive, it uses the same approach for age discrimination (but

15. Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam, O.J. 1997, C 340, point 6.

16. *Mangold*, *supra* note 2, para 84 in the AG’s Opinion – though the A.G. makes his argument in the context of the general principle of equality, rather than of equal treatment on grounds of age. In my opinion, the latter is more convincing since the former raises difficult questions of comparability.

17. The general equality principle is defined as requiring 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” (Joined Cases 117/76 & 16/77, *Albert Ruckdeschel and Hansa-Lagerhaus Ströh v. Hautzollamt Maburg-St. Annen*, [1977] ECR 1753, para. 7). However, the Court does not always distinguish between the general principle of equality and the general principle of equal treatment, and its definitions are not always consistent. E.g. the Court has described the general principle of equality and non-discrimination as requiring that “comparable situations should not be treated differently unless such difference in treatment is objectively justified”, without referring to the second part of the above formula (e.g. Case C-520/03, *José Vicente Olaso Valero v. Fondo de Garantía Salarial (Fogasa)*, [2004] ECR I-12065, para 34). On other occasions, the Court defined the general principle of equal treatment as requiring that “comparable situations must not be treated differently and different situations must not be treated in the same manner unless such treatment is objectively justified” (e.g. Joined Cases C-182 & 217/03, *Belgium and Forum 187 ASBL v. Commission*, [2006] ECR I-5479, para 170).

18. E.g. the Court long ago acknowledged the existence of a general principle prohibiting sex discrimination, which at that time simply meant a prohibition of unequal treatment; Case 149/77, *Defrenne v. SABENA*, [1978] ECR 1365 (*Defrenne III*).

only age discrimination!) in that any age discrimination, and thus even *direct* age discrimination, can be justified based on objective justifications (Art. 6(1) of the Directive).¹⁹ In other words, when it comes to the basic prohibition of discrimination on grounds of age (Art. 6(1) Employment Framework Directive), the Directive does not add anything to the general principle but in that regard has only a declarative function. In such a situation, there is no reason why an individual should not be able to rely on the general principle instead. In contrast, in the other contexts mentioned earlier (e.g. positive action, burden of proof) the directive is instrumental.

4. The practical consequences of Mangold: Much ado about nothing?

However, whatever the merit of the above arguments regarding the special nature of age discrimination, the fact remains that the Court did not choose to base its reasoning on the Commission's intent regarding the proposition of a "Framework Directive". Even so, it would seem that the finding in *Mangold* is of very limited practical consequence because the Court's finding appears to be based on a *combination* of the two factors mentioned above. If this is correct, then it means in my opinion that the finding can be relevant only when (i) there is a positive duty of the Member States under a provision like Article 18(2) Employment Framework Directive, AND (ii) the legislative EC measure at issue in the context of a particular type of discrimination is a Framework Directive within the meaning given to this term by the Court in *Mangold*.

In the present state of EC law and to my knowledge, the second point concerns only the Employment Framework Directive, and thereby discrimination on grounds of sexual orientation, disability, age and religion or belief. The first point concerns age discrimination and disability discrimination only, since only in relation to these does the Directive provide for the possibility of

19. In the field of social law, only few Directives reflect this approach, namely the Part-Time Work Directive (Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, O.J. 1998, L 14/9), the Fixed-Term Work Directive (Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999, L 175/43) and, in the field of sex equality law, the Goods and Services Directive (Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37). In the Employment Framework Directive, direct discrimination on one of the other grounds mentioned can be justified only based on Art. 2(5) (public security, public order, health, rights and freedoms of others) and based on Art. 4 (occupational requirements). In my opinion, Art. 7 on positive action is not construed as a derogation. This is indicated by the reference in Art. 7 to "full equality in practice" and by the lack of the words "notwithstanding Article 2(2)", that can be found in Arts. 4 and 6.

an extended implementation period. In other words, the combination of the two points means that that the Court's findings in *Mangold* can be relevant only in the context of age and disability discrimination. Further, it should be remembered that the second point can arise only in relation to Member States that have actually made use of the possibility to extend the implementation period. That, again, narrows down the range of potential situations in which *Mangold* might apply. Finally, given that the extended implementation period has meanwhile expired, no new cases can arise that would be covered by *Mangold*. In my opinion, all of this shows that the *Mangold* judgment is far from being capable of having the far-reaching consequences that some commentators ascribe to it. Indeed, the impression might be that of much ado about nothing. However, one never knows when the Court might find the reasoning used in *Mangold*, especially that on the general principle, useful in other contexts.

Some clarification on the implications of the *Mangold* decision may be expected from a case now pending at the Court of Justice, namely *Bartsch*,²⁰ where the national court's first question is as follows: "Does the primary legislation of the European Communities contain a prohibition of discrimination on grounds of age the protection by which must be guaranteed by the Member States even if the possibly discriminatory treatment is not connected to Community law?"

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20. Case C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, pending.

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