CASE COMMENTARY

MANGOLD v HELM (CASE C-144/04) GRAND CHAMBER, EUROPEAN COURT OF JUSTICE 22 NOVEMBER 2006

Yet Another Way Round Horizontal Direct Effect…

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THE FACTS

In June 2003 Werner Mangold, who was 56 years old, concluded a fixed-term contract of employment with Rüdiger Helm. The contract provided that its duration was based on para 14(3) of the TzBfG (German Law on Part-Time and Fixed-Term Employment) which was intended to facilitate the fixed-term employment of older workers (those over the age of 52). A few weeks into his employment, Mangold brought proceedings against Helm before the Arbeitsgericht München (Munich Labour Court) claiming that the clause fixing the duration of his employment was void in that para 14(3) of the TzBfG, on which it was based, was incompatible with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and education.

Council Directive 1999/70, concerning the framework agreement on fixed-term work, requires Member States to introduce measures to prevent abuse through successive use of fixed-term contracts (clause 5) and provides that its implementation should not constitute valid grounds for reducing the general level of protection afforded to workers (clause 8(3)). Council Directive 2000/78, establishes a general framework for equal treatment in employment and occupation, prohibits direct and indirect discrimination on the grounds of, inter alia, age (art 2). However, it also provides that:

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

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> employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary" (art 6(1)).

Germany had exercised an option of an extended implementation period and therefore has to implement this Directive by 2 December 2006.

The TzBfG, which was introduced in 2000 to implement Directive 1999/70, required the objective justification of fixed-term contracts. It was however amended in 2002 to allow the use of fixed-term contracts without such justification in the case of workers over the age of 52 (previously 56), to encourage the employment of older workers. This provision will expire on 31 December 2006, a few weeks after the date by which Germany must have transposed Directive 2000/78. The Arbeitsgericht München sought a preliminary ruling from the European Court of Justice as to the compatibility of the domestic legislation as applied to workers over the age of 52 with clauses 5 and 8(3) of the Framework Agreement (Council Directive 1999/70) and art 6(1) of Council Directive 2000/78.

EUROPEAN COURT OF JUSTICE

The ECJ held:

1. Clause 5 of the Framework Agreement (Council Directive 1999/70) was irrelevant to the outcome of the dispute of the national court in that the dispute concerned a single contract as opposed to "the use of successive fixed-term employment contracts." [41] – [43]

2. Clause 8(3) of the Framework Agreement (Council Directive 1999/70) did not prohibit domestic legislation lowering the age above which fixed-term contracts of employment may be concluded without objective justification, in that the latter was passed irrespective of the implementation of that Agreement and for reasons connected with the separate need to encourage employment. [52] – [54]

3. The purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in art 1, which include age, as regards employment and occupation. Para. 14(3) of the TzBfG, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference in treatment on the grounds directly of age. However, the purpose of that legislation was plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable

difficulties in finding work. An objective of that kind must as a rule be regarded as justifying, "objectively and reasonably", a difference of treatment on grounds of age as permitted by art 6(1) of Directive 2000/78. [56] – [57], [59], [61]

4. Art 6(1) requires the means used to achieve that legitimate objective to be "appropriate and necessary". Member States enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. However, in so far as the domestic legislation at issue takes the age of the worker 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 pursed. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as possible, the requirements of the principle of equal treatment with those of the aim pursued. Such national legislation cannot, therefore, be justified under art 6(1) of Directive 2000/78. [62-63], [65]

5. During the period prescribed for the transposition into domestic law 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. 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. The mere fact that the rule of domestic law was to expire on December 31, 2006, just a few weeks after the date by which the Member States had to have transposed the directive, was not in itself decisive. [67] – [69]

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

7. Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. The principle of non-

discrimination on grounds of age must be regarded as a general principle of Community law. 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 transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age. [74 – [76]

8. 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. [78]

COMMENTARY

If ever a judgment of the Court of Justice purporting to ensure the full effectiveness of community law would cause the disapproval of the academic opinion, then *Mangold* certainly would be that case. *Mangold* is a revolutionary judgment. It breaks new ground. It marks a path through the existing well-traversed terrain of direct effect of directives finding yet another way round what have been its well-established features: the lack of horizontal direct effect of directives and the lack of enforcement of directive-based rights prior to the expiry of the implementation period of the directive. The reasoning put forward for such new inroads is itself new: the idea that the Directive embodies a pre-existing general principle and that national law could therefore be set aside by national courts, even though the implementation period for the Directive had not expired. It is however unconvincing and its impact on this already convoluted area of European law disquieting.

The Court of Justice in this case found that the German legislation allowing fixed term employment contracts to be used in the case of employees over the age of 52 without objective justification, pursued a legitimate objective permitted by Council Directive 2000/78.[1] Although it created a difference in treatment on the grounds of age, it promoted the employment of older workers who experience greater difficulty in finding employment, a legitimate justification under the Directive. The legislation was however found to be incompatible with the Directive in that it failed the test of proportionality, which was strictly applied by the Court. The Court found that, contrary to the principle of proportionality, the national legislation went

[1] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and education, O J 2000, L303/16.

beyond what was appropriate and necessary to achieve its objective of enhancing the employability of older workers. It objected to the fact that age was the *sole* criterion for applying the fixed-term contract without restriction, which meant *all* workers above 52, whether they were unemployed or not before then, could be offered fixed-term contracts renewable until the age of retirement without restriction. Without referring to the personal circumstances of the worker concerned, the legislation would therefore apply the difference in treatment in all cases, even in cases when its objective did not really apply. In that sense it was inappropriate and unnecessary and thus disproportionate.

But the most interesting and important aspects of the Court's decision relate to the consequences of such an infringement of age discrimination Directive provisions.

Effect / Consequences of a directive during transposition period

The Court's decision obliged the national court to set aside the national law infringing the directive. The problem created by this is that at the relevant time the deadline for transposition of that directive had not yet passed. This was not the first time however that the Court had dealt with directives and their effects before their implementation time limit had expired. Very early on in its jurisprudence the Court had been asked in the case of *Ratti*[2] whether a Directive could be relied on by an individual before the time limit for its implementation had expired and it made it clear that it could not.

> "It follows that…it is only at the end of the prescribed period and in the event of the Member State's default that the directive…will be able to have the effects described in the answer to the first question. Until that date the Member State remains free in that field."[3]

Although Mangold entered the fixed-term contract in June 2003 and the implementation period of the Directive would not expire until December 2006, the Court did allow reliance on the Directive to disapply contrary national law. Mangold would therefore effectively enjoy the benefits of non-discrimination that the Directive had intended *before* the end of the prescribed period, which does not sit comfortably with the above settled case law.

The Court justifies its decision by firstly, relying on the principle that during the period prescribed for the transposition into domestic law of a directive, the Member States must refrain from taking any measures

[2] Case 148/79, *Pubblico Ministero v Ratti*, [1979] ECR 1629.
[3] *Ibid* at paragraphs [43] – [44].

"measures liable seriously to compromise" the attainment of the result prescribed by that directive, a principle first established in the case of *Inter-Environnement Wallonie.* [4] But the extent to which the national law here would *seriously* compromise the attainment of the directive's intended result, particularly considering it would lapse shortly after the Directive would come into force, is highly doubtful. Notably the Court does not even refer to its own recent explanation that the above *Wallonie* obligation does not give individuals the right to rely on the directive during the implementation period, as was the effect of its decision here. In *Rieser* it had explained that:

> "…during the period [of implementation], the Member States were required to refrain from taking any measures liable gravely to jeopardise the attainment of the result prescribed by Directive [1999/62] but that individuals could not rely on that Directive against the Member States before national courts in order to have a pre-existing national rule incompatible with the Directive disapplied."[5]

If the obligation in *Wallonie* cannot be relied on by individuals against the State to disapply national law as *Rieser seems to suggest*, it is even less likely that it can be relied against a private party as the Court purports to do in *Mangold*.[6] If directives cannot be relied on in proceedings between private parties, it is unclear how they could be relied on against an individual to disapply national law. It is therefore puzzling that the Court's decision seems to achieve that result.

The Court's line of reasoning based on the obligation set out in *Wallonie* is therefore problematic. Even if the national legislation could be found to "seriously compromise" the Directive's result, which as explained above is itself doubtful, it would be highly unlikely that the obligation to disapply it could be enforced horizontally as against an individual. Advocate General Tizzano himself does not accept this possibility.[7]

The Court, perhaps not itself convinced by the strength of the argument based on *Wallonie*, then goes on to place particular importance on the fact that Germany had an extended period of implementation coupled with an obligation to report annually to the Commission "on the steps it is taking to

[4] Case C-129/96, *Inter-Environnement Wallonie ASBL v Region Wallone*, [1997] ECR I-7411.
[5] Case C-157/02, *Rieser Internationale Transporte GmbH v Autobahnen*, O J C 71, 20.03.2004, p 4 at para [69].
[6] See below the discussion on the lack of horizontal direct effect of directives.
[7] *Mangold*, Opinion of AG Tizzano, at paras [111].

tackle age…discrimination,"[8] which it interpreted to mean Germany could not introduce measures contrary to the Directive during the period of implementation. What remains unclear from the Court's judgment is whether the deviation from traditional *Ratti* reasoning will be dependant on the existence of such undertakings by Member States expressed in the text of the Directive or will be applied more widely under a general application of the principle in *Inter-Environnement Wallonie.*

Yet another way round horizontal direct effect?

The most important and revolutionary aspect of the Court's judgment, however, relates to the fact that the disapplication of the national law at issue would effectively create obligations on individuals; employers would be prohibited from entering into unrestricted fixed-term contracts of employment with workers over the age of 52, a right clearly given by the national law which is inconsistent with the Directive. It is effectively the Directive that prevents such individuals from relying on their national law right and imposing obligations on them – something highly inconsistent with settled case law of the Court on the lack of horizontal direct effect of directives.

The Court has consistently held that directives are Community acts imposing obligations exclusively on Member States.[9] As it originally stated in *Marshall No 1*:

> "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty [now Article 249 of the EC Treaty], the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member state to which it is addressed.' It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against an individual."[10]

[8] Directive 2000/78, *above* note 1, article 18.

[9] See in particular Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority,* [1986] ECR 723, at para [48]; Case C-91/92, *Faccini Dori v Recreb,* [1994] ECR I-3325, at para [20]; and Case C-201/02, Case C-201/02, *Delena Wells v Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723, at para[56]; *Bernhard Pfeiffer and others v Deutsches Rotes Kreuz*, at para [16].

[10] *Marshall, ibid* note 8, at para [48].

By disallowing the horizontal direct effect of directives – the imposing of directive – derived obligations on individuals which can be enforced in actions by other individuals – the Court had to accept the unpalatable consequence that if the state failed to introduce implementing legislation, the courts had to continue applying incompatible national law in actions against individuals. In order to counteract the threat that this would pose to the effectiveness of community law, the Court has over the years devised ingenious judicial mechanisms to give directives some effect in horizontal scenarios.

The first way the Court found to reduce the rigour of the rule of no horizontal direct effect of directives was to expand the remit of vertical direct effect – actions on directive-derived rights by individuals against the State – by adopting the widest possible definition of an emanation of the state which would include, for example, health authorities, decentralized administrative authorities and nationalized industries.[11] It also created a limited case law "incidentally" permitting the use of unimplemented directives in horizontal scenarios in certain cases involving directives which did not directly impose legal obligations on individuals and usually involved the disapplication of technical standards.[12] Neither of these mechanisms could be of use in *Mangold*. The directive at issue did "create…rights [and] obligations for individuals" and therefore it did "define the substantive scope of the legal rule on the basis of which the national court must decide the case before it."[13]

Most relevant to *Mangold* is the third way round the lack of horizontal direct effect of directives, the concept of indirect effect: an interpretative obligation requiring national courts to read domestic law in such a way so as to conform with the provisions of directives.[14] This mechanism proves particularly useful in cases where relevant national law exists which can be subject to interpretation and when the directive itself cannot be relied on, either because it is not sufficiently precise,[15] the period of its implementation has not expired or where the proceedings are between private parties.[16] For

[11] Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, [1986] ECR 723; Case 103/88, *Fratelli Constanzo v Milano*, [1989] ECR 1839; Case C- 188/89, *Foster v British Gas plc*, [1990] ECR I-3313.

[12] Case C-194/94, *CIA Security SA v. Signalson SA and Securitel SPRL*, [1996] ECR I-2201; Case C-433/98, *Unilever v Central Food*, [2000] ECR I-7535.

[13] *Unilever*, *ibid* note 11, at para [51].

[14] Case 14/83, *Von Colson v Land Nordhein-Westfalen*, [1984] ECR 1891, at paras [26] and [28]; Case C-106/89, *Marleasing SA v La Comercial International de Alimentacion*, [1990] ECR I-4135, at para [8]; CaseC-397-403/01, *Bernhard Pfeiffer and others v Deutsches Rotes Kreuz*, at para [38].

[15] *Von Colson*, *ibid* note 13.

[16] *Marleasing*, *ibid* note 13.

that reason it could have been used in *Mangold* and in fact Advocate General Tizzano relies on this existing doctrine to reach his conclusion that the TzBfG, though contrary to Directive 2000/78, could not be disapplied but should be interpreted by the national courts in order to arrive at a result consistent with that prescribed by the Directive.[17]

The law on how to deal with unimplemented directives seemed settled: they could not be used before their period of implementation had expired,[18] they could not be relied upon in proceedings exclusively between private parties,[19] though national law should be interpreted as far as possible to give effect to their desired result.[20]

The Court of Justice, however, without the encouragement of its Advocate General, takes it upon itself to make new inroads and find yet another way round the lack of horizontal direct effect.

The new mechanism: Equal treatment as a general principle of Community law

The Court's second line of reasoning in justifying its departure from what appeared to be settled law and allowing reliance on provisions of a directive before its period of implementation had expired and in an action against a private party, is that the principle of non-discrimination on the grounds of age was not laid down by Directive 2000/78, but is a general principle of Community law.[21] Arguably what the Court may be suggesting is that although "a directive may not *of itself* impose obligations on an individual,"[22] it could do so as a result of the application of a general principle it embodies. It is therefore not the Directive that is applied horizontally but the general principle. Consequently application of this general principle cannot be conditional upon the expiry of the implementation period of the Directive.[23] The inspired recognition of non-discrimination on the grounds of age as a general principle of Community law has thus enabled the Court in one great leap to avoid both limitations it would have normally confronted in trying to apply the provisions of a directive to a case like the present. It can impose obligations found in directives on individuals in horizontal scenarios and it can do so before the implementation period has expired.

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[17] *Mangold*, Opinion of AG Tizzano, at paras [111] –[112] and [122].
[18] *Ratti*, *above* note 2.
[19] *Pfeiffer*, *above* note13, at para [109].
[20] *Ibid* at paras. [110] – [119].
[21] *Mangold*, at paras. [74] – [75].
[22] *Marshall*, *above* note 8, at para [48].
[23] *Mangold*, at para [76].

The Court's "discovery" of a general principle of non-discrimination, thus avoiding the issues of direct effect of directives, is rather unconvincing. It purports to have identified this general principle in "the third and fourth recitals in the preamble to the directive,"[24] which interestingly make no specific mention to age discrimination, "in various instruments and in the constitutional traditions common to the Member States."[25] The suggestion of an existing general principle of non-discrimination would render the introduction by the Treaty of Amsterdam of a new legal basis on such non-discrimination in art 13 EC puzzling if not redundant. The limits of the principle are also unclear; will other areas of discrimination mentioned in Directive 2000/78 on the grounds of religion, disability and sexual orientation also reap the benefits of it?

CONCLUSION

There is to date no case law of the Court of Justice suggesting that general principles of Community law can indeed create rights and obligations in proceedings between individuals. It is submitted that the Court, even in this case, is not suggesting that they do *per se*, though it does seem to indicate that the existence of a Directive embodying such a principle, in a completely unprecedented way, somehow leads to the establishment of those obligations against individuals even in horizontal relations. What is more, it does so even before the period for its implementation has expired. In its attempt to find yet another way round the lack of horizontal direct effect of directives the Court has introduced further perplexity and uncertainty in this already convoluted area of European law.

[24] *Mangold*, at para [74].
[25] *Ibid*.