Opinion of Advocate General Bot delivered on 7 July 2009

Seda Kücükdeveci v Swedex GmbH & Co. KG

Reference for a preliminary ruling: Landesarbeitsgericht Düsseldorf - Germany

Principle of non-discrimination on grounds of age - Directive 2000/78/EC - National legislation on dismissal not taking into account the period of employment completed before the employee reaches the age of 25 for calculating the notice period - Justification for the measure - National legislation contrary to the directive - Role of the national court

Case C-555/07

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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 of 22 November 2005. (2)

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 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (3) 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.

3. The reference was made in the course of proceedings between Ms Kücükdeveci 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.

I – Legal framework

A – Directive 2000/78

7. 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'.

8. Article 2 of that 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;

...'

9. Article 3(1) of the directive provides as follows:

'Within the limits of the areas of competence 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;

...'

10. Article 6(1) of Directive 2000/78 provides as follows:

'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.'

11. Pursuant to the first paragraph of Article 18 of Directive 2000/78, Member States were to transpose the directive into their legal orders by 2 December 2003 at the latest. However, the second paragraph of that article provided that:

'In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith …'

12. The Federal Republic of Germany made use of that possibility, with the result that transposition of the provisions of Directive 2000/78 concerning age and disability discrimination was to take place in that Member State no later than 2 December 2006.

B – National law

13. Paragraph 622 of the German Civil Code (Bürgerliches Gesetzbuch, 'the BGB'), entitled 'Notice periods in the case of employment relationships', provides as follows:

'(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 10 years, is four 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.' (4)

14. Paragraphs 1, 2 and 10 of the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006, (5) which transposed Directive 2000/78, state:

'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,

…'

II – The main proceedings and the questions referred to the Court

15. Ms Kücükdeveci 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 Kücükdeveci 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 Kücükdeveci'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, (6) 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, (7) 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, (8) 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. (9)

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. I would point out in that regard that, according to Article 3(1)(c) thereof, Directive 2000/78 'shall apply to all persons, as regards both the public and private sectors … in relation to … employment and working conditions, including dismissals and pay'. In so far as it is a provision governing one of the conditions under which dismissal may take place, Paragraph 622 of the BGB must be regarded as falling within the scope of that 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.

35. That being clarified, it must now be considered whether Directive 2000/78, and in particular Article 6(1) thereof, is to be interpreted as precluding national rules such as the last sentence of Paragraph 622(2) of the BGB.

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 Kücükdeveci'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, (10) 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. (11) 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. (12) 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. (13) 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 Kücükdeveci, 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 of 9 March 1978 (14) 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 234 EC 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. (15) 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. (16) 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. (17)

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. (18) 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. (19)

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. (20)

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*. (21)

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. (22)

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. (23) At the moment, therefore, the scope of this third palliative remains very limited. (24)

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 Kücükdeveci 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 Kücükdeveci 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. (25) 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. (26) 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*, (27) 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. (28)

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. (29) The Court concluded that the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. (30)

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. (31) 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. (32)

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. (33) 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. (34) That principle requires that similar situations should not be treated differently unless differentiation is objectively justified. (35) It is one of the fundamental rights whose observance the Court ensures. (36)

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, (37) and a means of reviewing the validity of Community acts. (38)

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. (39) 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. (40) 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 119 of the EEC Treaty (which became Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC)), which lays down the principle of equal pay for male and female workers, and Directive 75/117/EEC. (41)

84. In its judgment in *Defrenne*, (42) the Court stated that Directive 75/117 provides further details regarding certain aspects of the material scope of Article 119 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. (43) It considered that the directive was intended to encourage the proper implementation of Article 119 by means of a series of measures to be taken on the national level without, however, reducing the effectiveness of that article. (44) In its judgment in *Jenkins*, (45) 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 119 of the Treaty, in no way alters the content or scope of that principle as defined in that article. (46) The Court recently repeated that case-law in *Cadman*. (47)

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. (48)

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. (49)

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. (50) 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.

IV – Conclusion

91. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it:

(1) Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 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.

(2) The national court must disapply that national legislation even in proceedings between private parties.

1 – Original language: French.

2 – Case C-144/04 [2005] ECR I-9981.

3 – OJ 2000 L 303, p. 16.

4 – The last sentence also appeared, in essence, in Paragraph 2(1) of the Law on periods of notice for employees (Gesetz über die Fristen für die Kündigung von Angestellten) of 9 July 1926.

5 – BGBl. 2006 I, p. 1897.

6 – Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 119, and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 124.

7 – The national court mentions, in that regard, a judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 7 June 2005 and the judgment of the Court in Case C-360/05 *SGAE* [2006] ECR I-11519, paragraph 34.

8 – *Mangold*, paragraph 75.

9 – Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 42.

10 – Case C-388/07 *Age Concern England* [2009] ECR I-0000, paragraph 46.

11 – Paragraph 46.

12 – *Palacios de la Villa*, paragraph 68.

13 – *Age Concern England*, paragraph 51.

14 – Case 106/77 [1978] ECR 629.

15 – Case C-80/06 *Carp* [2007] ECR I-4473, paragraph 20 and the case-law cited.

16 – Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 24.

17 – See Simon, D., *La directive européenne*, Dalloz, 1997, p. 73.

18 – See, in particular, *Pfeiffer and Others*, paragraph 113 and the case-law cited, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-0000, paragraph 197.

19 – *Angelidaki and Others*, paragraph 200.

20 – *Pfeiffer and Others*, paragraph 116.

21 – *Angelidaki and Others*, paragraph 199 and the case-law cited.

22 – Ibid., paragraph 202 and the case-law cited.

23 – For a general explanation of the distinction between these two effects of Community law, see, in particular, points 24 to 90 of the Opinion of Advocate General Léger in Case C-287/98 *Linster* [2000] ECR I-6917, and Simon, D., 'Synthèse générale', *Les principes communs d'une justice des États de l'Union européenne, Actes du colloque des 4 et 5 décembre 2000*, La Documentation française, Paris, 2001, p. 331, according to which 'if the Court does not attribute direct effect to certain provisions of Community law, it is quite simply because those provisions *cannot* be applied by national courts without the latter being forced to go beyond their jurisdictional mission and substitute themselves for the national legislature, which in fact has a discretion which cannot be used by a court without transgressing the fundamental principles of the separation of powers' (p. 322). The right to plead exclusion in no way interferes with the exercise of that discretion. It is merely a means of verifying that, in such exercise, the Member State remained within the limits of that discretion.

24 – The judgments in Case C-194/94 *CIA Security International* [1996] ECR I-2201 and Case C-443/98 *Unilever* [2000] ECR I-7535 are often cited as recognising the right to plead the exclusion of directives in disputes between private parties. The Court considered that a technical rule which has not been notified in accordance with the requirements of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), which constitutes, in the Court's words, 'a substantial procedural defect', must not be applied by the national court, even in proceedings between private parties (*CIA Security International*, paragraph 48, and *Unilever*, paragraph 50). It justified that change of direction in regard to its classic case-law by the fact that 'Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals' (*Unilever*, paragraph 51).

25 – See, in particular, Case C-246/06 *Velasco Navarro* [2008] ECR I-105, paragraph 38.

26 – *Mangold*, paragraphs 77 and 78.

27 – Case C-129/96 [1997] ECR I-7411.

28 – Paragraph 45. See also *Mangold*, paragraph 67.

29 – *Mangold*, paragraph 74.

30 – Ibid., paragraph 75.

31 – OJ 1999 L 175, p. 43. See *Mangold*, paragraph 75 and the case-law cited.

32 – *Mangold*, paragraph 76.

33 – The charter was solemnly proclaimed for the first time on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and a second time on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1).

34 – Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

35 – See, in particular, Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32 and the case-law cited.

36 – *Rodríguez Caballero*, paragraph 32.

37 – See, in particular, the influence which the principle of equal treatment had on the determination of the scope of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) in the judgment in Case C-13/94 *P.* v *S.* [1996] ECR I-2143, paragraphs 18 to 20.

38 – See, in particular, Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraphs 54 to 72.

39 – *Rodríguez Caballero*, paragraph 30 and the case-law cited.

40 – Ibid., paragraph 31 and the case-law cited.

41 – Council directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

42 – Case 43/75 [1976] ECR 455.

43 – Paragraph 54.

44 – Paragraph 60.

45 – Case 96/80 [1981] ECR 911.

46 – Paragraph 22.

47 – Case C-17/05 [2006] ECR I-9583, paragraph 29.

48 – See, in particular, Case 36/74 *Walrave and Koch* [1974] ECR 1405; *Defrenne*; and Case C-218/98 *Angonese* [2000] ECR I-4139. See also, for a recent confirmation of the horizontal direct effect of the provisions of the Treaty concerning the fundamental freedoms, such as Article 43 EC, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraphs 57 to 59 and the case-law cited.

49 – The problem would then be more difficult to solve because, in addition to the major obstacle relating to the nature of the directive as a piece of secondary Community legislation, the Court would be faced with the more general question whether the prohibition of discrimination applies to all types of relationships between private persons. I note, in that regard, that the imperative nature of the prohibition of certain forms of discrimination set out in provisions of primary law has led the Court to hold that they should be applied as widely as possible, in particular in relations between private persons (see, in particular, *Defrenne*, paragraph 39, and *Angonese*, paragraphs 34 to 36). Moreover, Article 3(1) of Directive 2000/78, which provides that the directive 'shall apply to all persons, as regards both the public and private sectors', shows that the Community legislature understood the prohibition of discrimination as extending to employment relationships governed by private law. In addition, to go beyond the Community framework, see the judgment of the European Court of Human Rights of 13 July 2004, *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII, in which the European Court of Human Rights seems to accept that the prohibition of discrimination contained in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is to be applied to relations between private persons, thereby opening the way to review of the compatibility of purely private acts in the light of that article (see, on this point, Sudre, F., *Droit européen et international des droits de l'homme*, 9th edition, PUF, Paris, 2008, p. 264).

50 – See, on this subject, De Schutter, O., 'Les droits fondamentaux dans l'Union européenne: une typologie de l'acquis', *Classer les droits de l'homme*, 2004, p. 315. The author cites by way of example the workers' right to information and consultation within the undertaking (Article 27), workers' protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), the prohibition of child labour and protection of young people at work (Article 32), the right to reconcile family and professional life (Article 33), and the right of migrant workers to social security (Article 34(2)) (pp. 346 and 347).