CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Constitutional principles and horizontal effect: Kücükdeveci revisited
Authors	Schiek, Dagmar
Publication date	2010-09-01
Original Citation	Schiek, D. (2010) 'Constitutional Principles and Horizontal Effect: Kücükdeveci Revisited', European Labour Law Journal, 1 (3), pp. 368-378. doi: 10.1177/201395251000100305
Type of publication	Article (peer-reviewed)
Link to publisher's version	https://journals.sagepub.com/doi/abs/10.1177/201395251000100305 - 10.1177/201395251000100305
Rights	https://creativecommons.org/licenses/by-nc-sa/2.0/
Download date	2026-11-06 06:42:42
Item downloaded from	https://hdl.handle.net/10468/11163

UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Volume 1 | No. 3 | 2010

European Labour Law Journal

intersentia

CONTENTS

Editorial
Frank Hendrickx 303

ACADEMIC CONTRIBUTIONS

The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity
Anne Davies 307

The ILO Maritime Labour Convention 2006: An Example of Innovative Normative Consolidation in a Globalized Sector
Alexandre Charbonneau and Patrick Chaumette 332

Effective Enforcement of Occupational Health and Safety Regulation: An Economic Approach
Michael G. Faure and Laura Tilindyte 346

EUROPEAN DEVELOPMENTS

Constitutional Principles and Horizontal Effect: *Kücükdeveci* Revisited
Dagmar Schiek 368

The *Bernard*-case and Training Compensation in Professional Football
Frank Hendrickx 380

COUNTRY DEVELOPMENTS

A French Reading of Directive 2008/104 on Temporary Agency Work
Sophie Robin-Olivier 398

A Twist of the Equality Logic: The Directive on Working Conditions for Temporary Agency Workers and Dutch Law
Ferdinand B.J. Grapperhaus 406

CONSTITUTIONAL PRINCIPLES AND HORIZONTAL EFFECT: *KÜCÜKDEVECI* REVISITED

Dagmar Schiek*

Keywords: effects of non-discrimination principles; effects of directives; Court of Justice and Constitutional Courts; General Principles of EU Law

1. INTRODUCTION

While German labour lawyers were still awaiting the German Constitutional Court's final verdict on the principles established by the *Mangold* case[1], the Court of Justice of the European Union re-visited the question what exactly are the effects of Directive 2000/78 and the constitutional principle of non-discrimination on grounds of age. This case is interesting in at least two aspects, on which this case note will focus. First, the Court was provoked to decide whether directives on constitutional principles such as non-discrimination are more prone to become effective in horizontal relationships than other directives. Second, the Court was implicitly challenged to position itself in the case pending before the German Constitutional Court, following a dutiful application of the *Mangold* principles by the Federal Labour Court.

2. THE COURT'S DECISION

2.1. THE FACTS AND PROCEEDINGS BEFORE THE NATIONAL COURTS

On 4th of June 1996, Seda Kücükdeveci, then aged 18, commenced employment with Swedex GmbH & Co KG, a private medium sized company, as a semi-skilled manual worker in the shipping department of one of its branches. By letter of 19th of December 2006 she was dismissed with effect of 31st of January 2007, following the closure of

* Chair in EU law, Director of the Centre for European Law and Legal Studies (CELLS) University of Leeds.

1 ECJ C-144/04 [2005] ECR I-9981.

the shipping department. With her claim to *Mönchengladbach Labour Court*[2] she challenged this dismissal as ineffective, submitting that denying her transfer to another department to avoid dismissal constituted ethnic discrimination, and that the closing down of a department constituted a collective redundancy which the employer had failed to notify to the regional employment agency. She also submitted that her notice period should have been four months, rather than only one. Her main claim for reinstatement failed before *Regional Labour Court Düsseldorf*[3], leaving the claim relating to the notice period, on the grounds that the statutory provision applied by the employer in this horizontal case discriminated on grounds of age.

§622 BGB (German Civil Code) regulates statutory notice periods for dismissals of employees in Germany. Under paragraph 1, the minimum notice period is four weeks. Under the 1st sentence of paragraph 2 of this provision, the notice period expands progressively with increasing seniority. As far as relevant in the case, an employee gains a one month notice period after 2 years of seniority, which expands to two months after four and to four months after 10 years of seniority. According to §622 (2) 2nd sentence BGB, any seniority gained before an employee's 25th birthday is disregarded. Thus, Seda Kücükdeveci was deemed to have only achieved 3 years seniority from 1996 to 2006, leaving her with a notice period of one month rather than four.

2.2. THE QUESTIONS REFERRED AND THE MAIN RESULTS

The Regional Labour Court referred two questions to the Court.

The first question sought to ascertain whether a provision such as the one described above violates the prohibition of age discrimination, and also whether such prohibition derives from Directive 2000/78 or a general principle of EU law. The first part of the question concerned the prima facie infringement of the prohibition, while the second one addressed justification. The referring Court identified two possible justifications: the employer's interest in flexibility regarding staffing and the greater mobility of younger workers, and requested an answer on the validity of those. The second question turned to the procedural consequences of finding a violation of EU law. As this is again a horizontal case, the referring court asked whether a provision violating EU law should still be disapplied, or whether the legitimate expectation of the party to whose detriment this would work prevents such a result.

The Court of Justice held that the prohibition of age discrimination does not derive from Directive 2000/78, but rather from "various international instruments and from the constitutional traditions common to the Member States" (para 20, reference to *Mangold,* para 74), confirming that the principle of non-discrimination is a general principle of EU law (para 21). The Court added two aspects to *Mangold*: it referred

2 ArbG MGldbach 15 6 2007 – 7 Ca 84/07 – juris.

3 LAG D'Dorf 21 11 2007 12 Sa 1311/07 LAGE § 622 BGB 2002 Nr 3.

to *Defrenne II*[4] and declared explicitly that Directive 2000/78 only "gives specific expression" to the principle of non-discrimination irrespective of age. Furthermore, the Court stressed that the Charter of Fundamental Rights, which includes a prohibition of discrimination on grounds of age, is legally binding from 1st December 2009 (para 22). The Court then considered any limitations and qualifications of the principle expressed by Directive 2000/78/EC (para 24–42), before finding that the national provision contravenes EU law (para 43 and 1st para of the ruling). In its answer to the second question, the Court derived an EU law obligation to disapply any statutory provision violating the prohibition of age discrimination, such as §622 (2) 2nd sentence BGB. The Court also affirmed that a national court is under no obligation to refer a case to the national constitutional court or the Court of Justice if it wishes to disapply a statutory provision contravening EU law.

On 17th of February 2010, the Düsseldorf regional labour court closed the case.[5] Instead of applying §622 (2) 2nd sentence BGB, it relied on §622 (2) 1st sentence BGB in its conclusion that Seda Kücükdeveci had accrued 10 years seniority between June 1996 and December 2006. From the first sentence of the same statutory provision the regional labour court derived that the relevant statutory notice period was four months. Accordingly, her dismissal only became effective on 30th of April instead of 31st of January 2007. As the claimant had lost her main claim for reinstatement, she was ordered to bear 2/3rds of the costs of the proceedings.

3. EFFECTS OF DIRECTIVE 2000/78 IN HORIZONTAL CASES

3.1. PROHIBITION OF AGE DISCRIMINATION AS CONSTITUTIONAL PRINCIPLE

The establishment of equal treatment irrespective of age as a general principle of EU law was one of the more daring developments in *Mangold* case. For other non-discrimination principles, such as the prohibition of sex discrimination, racist discrimination or discrimination on grounds of disability, the Court could have relied on specific UN conventions, to which all or most Member States are signatories (CERD, CEDAW and CEPWD). It could also have pointed to Article 14 ECHR in relation to sex and race, as well as to the constitutions of most Member States. By contrast, age discrimination is not subject of any international Treaty. Considering "constitutional traditions common to the Member States" (ECJ *Mangold* para 74, *Kücükdeveci* para 22), only the Finnish and the Portuguese constitution contain such a principle.[6] Accordingly, the Court's judgment in *Mangold* was heavily criticised for

4 Case 43/75 [1976] ECR 455, para 54, referred to in para 21 of the Kücükdeveci case.

5 LAG D'Dorf 12 Sa 1311/07 (2010) Arbeit und Recht 172.

6 AG Kokott Opinion in AKZO C-550/07 P para 96 with footnote 78.

deriving a principle of non-discrimination on grounds of age from such common traditions.[7] M. Schmidt had submitted that the Heads of States and Governments, by signing of the Constitutional Treaty had established the international treaty in favour of the general principle on which the Court relied in Mangold. After all, the Constitutional Treaty incorporated the Charter of Fundamental Rights whose anti-discrimination clause (Article 21) includes age as a non-discrimination ground.[8]

With the coming into force of the Treaty of Lisbon, there is now even less reason for scepticism regarding a general EU constitutional principle of non-discrimination irrespective of age. With that Treaty, the Charter of Fundamental Rights has become a legally binding element of EU Law (Article 6 TEU). While the prohibition of age discrimination only applies directly between acts of the EU and its Member States (Article 51 Charter), the principle of non-discrimination irrespective of age is now indisputably part of EU law as a general principle. A thorough comparative analysis of Member States' constitutional traditions is no longer necessary to establish this.

The precise positioning of a prohibition of age discrimination among other non-discrimination grounds is a matter worthy of a wider discussion[9], which goes beyond the limited scope of a case note. In further considering the effects of Directive 2000/78 in a horizontal case, such as the dispute between Kücükdeveci and Swedex, we can rely on the fact that the prohibition of discrimination on grounds of age is a general principle of EU law, in other words a constitutional principle.

3.2. EFFECTS OF DIRECTIVES EXPRESSING A CONSTITUTIONAL PRINCIPLE OF EU LAW

The *Kücükdeveci* case is relevant well beyond the field of non-discrimination law in that it concerns effects of directives more generally. It is in this field that the Court clarifies and possibly qualifies its decision in *Mangold*.

The *Mangold* ruling had been criticised as "sibylline"[10], because its findings on effects of the newly found constitutional principle on non-discrimination on grounds of age appeared as imprecise as the prophecies of the ancient Greek oracle. This lack of clarity has led to widely diverging readings of the case.

On the one hand, the Court based its decision in *Mangold* on established principles. These included the principle that a Member State must not introduce new legislation counteracting the aims of a directive during its implementation period[11] and the prohibition to apply a rule contravening EU law, flowing from the principle of primacy

7 See only AG Mazak, opinion on the case *Palacios de la Villa* C-411/05 [2007] ECR I-8531, paras 79–100.

8 M. Schmidt 'The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment' 7 [2005] *German Law Journal* 505, at 520.

9 See Fredman & Spencer (eds) *Age as an Equality Issue*, 2003, for example.

10 M. Schmidt, as above, at 521.

11 C-129/96 *Inter-Environment Wallonie* [1997] ECR I-7411.

of EU law. Regarding the latter principle, the ECJ only referred to vertical cases in its *Mangold* judgment.[12] However, it had also applied the same principle in horizontal cases before Mangold.[13] Accordingly, the view has been defended that the Court was able to rely on cases where it had not taken recourse to any constitutional principle, and that it had only introduced the constitutional principle of non-discrimination irrespective of age as an additional argument.[14]

On the other hand, Mangold was read as (and criticised for) introducing new principles, and thus enabling directives and even constitutional principles in isolation to have direct effects in horizontal cases. The criticism has some merit as regards the *Inter-Environment Wallonie* principle, under which national legislation introduced during the implementation period of a directive and counteracting the aims of that directive must not be applied. This principle had not been extended to horizontal cases before, and in so far *Mangold* was a novelty.[15] However, with the expiry of the non-discrimination directives' implementation dates this aspect of *Mangold* is no longer relevant for Directive 2000/78.

As regards effects of directives, the *Mangold* case was read to acknowledge the exclusionary effect of directives in horizontal cases, without acknowledging direct horizontal effects of directives. Academics from different Member States had defended the underlying distinction between exclusionary and substitutive effects of directives[16], but the Court had not taken recourse to it so far. According to this doctrine, supremacy of EU law requires in principle acknowledging the legally binding character of directives. This can exclude the application of national law contradicting a directive. Such exclusionary effects of directives are not problematic in horizontal cases, because only substitutive effects would imply direct effects of directives in such cases. Purely exclusionary effects occur when the non-application of a national provision contradicting the directive does not lead to a void in national law, because another – pre-existing – rule of national law can then be applied to the case. This would avoid direct application of the directive. The facts of *Kücükdeveci* offer a good example for such a constellation: the national court applied §622 para 2 1st sentence BGB rather than Directive 2000/78. Substitutive effect occurs if, for example, a directive has not been implemented into national law at all. If claimants in horizontal cases could rely on the legally binding effects of the directive in these cases,

12 E.g. 106/77 *Simmenthal* [1978] ECR 629.

13 C-473/00 *Cofidis* [2002] ECR I-10875, para 38.

14 Schiek, 2006 Industrial Law Journal 329, 335–338.

15 Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?' 9 *CYELS* [2006–07], 81, at 105–6.

16 Ch. Herrmann, 'Die negative unmittelbare Wirkung von Richtlinien in horizontalen Rechtsverhältnissen' (2006) *Europäische Zeitschrift für Wirtschaftsrecht* 69–70, Prechal, 'Joined cases C-397/01 to C-403/01 Bernhard Pfeiffer et al' 42 *CMLRev* (2005) 1445; 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.

the directive would become horizontally directly effective. Accordingly, substitutive effect of directives cannot be accepted in horizontal cases. The Court's *Mangold* judgment did not specifically answer the question whether the distinction between exclusionary and substantive effect should be endorsed.[17] But it could be explained as using this distinction.[18] Other authors interpreted *Mangold* as introducing an entirely new principle of granting direct horizontal effect to directives in connection with general principles of EU law.[19]

In *Kücükdeveci,* the Court seems to have clarified some of this confusion, being more specific and at the same time more cautious. The starting point is that the constitutional principle of equal treatment irrespective of age is expressed in Directive 2000/78 – which also means that it only is applied within the limits specified by that Directive (see paras 33–43). The referring national court did not see any scope for interpreting the national law in line with this principle as expressed by the directive. Thus, in this horizontal case, the Court of Justice was pressed for a statement on the effects of directives embodying constitutional principles, or even on the effects of those constitutional principles in isolation.

The Court did not, in my view[20], acknowledge any autonomous effect of the constitutional principle of non-discrimination on grounds of age itself. When the Court used the Directive to bring the case within the scope of application of EU law, it also stressed that the Directive expressed the principle of non-discrimination irrespective of age (para 27), and when it used the Directive to establish the limits of the principle and possible justifications, the Court referred to the expression of the general principle through the Directive (para 32). Accordingly, the effects were ultimately derived from the "principle (…) as given expression in Directive 2000/78" (para 51, 53). This is a rather cautious approach. The Court did not acknowledge autonomous effect of a clause in the Charter between private parties, which would possibly contradict Article 51 of the Charter itself. Neither did it endorse direct effect of a general principle of EU law. As already stated in Defrenne III[21], a general principle of EU law cannot become effective in horizontal cases before specifying EU legislation has been adopted.

This leaves effects of directives imbued with constitutional principles in horizontal cases. The ECJ first reaffirmed that a directive cannot "itself impose obligations on an individual and cannot therefore be relied on as such against an individual" (para 46 with numerous references). This was then said not to exclude all horizontal effects of directives (paras 48–49). The Court then considers non-discrimination on grounds

17 M. Schmidt as above, 521, Masson & Micheau ' The Werner Mangold Case: An Example of Legal Militancy' 13 *European Public Law* [2007] 587, at 591–593.

18 Schiek, as above, with further references.

19 Craig, 'The Legal Effects of Directives Policy, Rules and Exceptions' 34 *European Law Review* [2009] 349, at 372, Dashwood, above, 104–105.

20 Differing from C Rayer, in this journal (ELLJ 2010[1] 264–268).

21 Case 149/77 [1978] ECR 1365 para 27.

of age as a general principle of EU law as expressed in Directive 2000/78. Because this directive has been adopted in order to express the general principle, it acquires a heightened degree of effectiveness. This leads the Court to conclude that the national court must not apply national legislation contravening the constitutional principle as expressed in the Directive (para 51).

While the Court's reasoning is regrettably short, it does follow the opinion of AG Bot. Thus, it can be assumed that the Court relied on those arguments when coming to its conclusion. AG Bot first recounted the established doctrine that provisions of directives cannot be relied upon directly in horizontal cases, because this would contradict Article 288 (2) TFEU (ex Article 249 (2) EC), which requires for directives to be implemented by Member States (paras 56–58). He proceeded to name the "palliatives" used by the Court in order to maintain the legally binding effect of directives: an obligation to interpret national law in line with directives and the doctrine of state liability in cases of insufficient transposition of provisions aiming to grant individual rights (paras 59–63). He then stressed that the doctrine of allowing directives to be relied on in order to exclude contravening national provisions even in horizontal cases is not, as yet, well established in the Court's case law, and disputed in doctrine (paras 63–66). In order for the Court not to contradict its former case law he then recommended to accept such effects of directives only in limited circumstances, namely where a directive expresses an overriding constitutional principle which is an element of the EU legal order (paras 74–90). The AG proposed to only strengthen the "right to plead Directive 2000/78 in proceedings between private parties" (para 89), and at the same time to restrict this to exclusionary effects, not allowing substitutive effects in horizontal cases. The Court followed this advice.

Accordingly, the *Kücükdeveci* case confirmed some of the readings which were given to the Mangold case, and dispersed others. The Court held that directives giving expression to the constitutional principle of non-discrimination on grounds of age would prevent national courts from applying contravening national legislation in horizontal cases. Because the *Kücükdeveci* case only concerned exclusionary effects of directives, the Court still has the opportunity to clarify whether this new doctrine is confined to such cases, or if directives expressing a general principle of EU law may further have substitutive effects in horizontal cases.

The legal position of claimants in horizontal discrimination cases has improved They will be able to dispel the application of discriminatory national legislation, if there is a non-discriminatory fall-back clause in national law which can be applied to their case. This will clearly be of relevance beyond age-discrimination. In the pending case Alvarez (C-104/09), the Court will have the opportunity to clarify whether to apply the same doctrine in the field of sex discrimination.[22]

[22] Opinion by AG Kokott of 6 May 2010, para 55.

4. ON THE DIVISION OF LABOUR BETWEEN NATIONAL COURTS AND THE COURT OF JUSTICE

All of this will have immediate repercussions on the relation between German labour courts, the German Constitutional Court (BVerfG) and the Court of Justice. Thus, the decision also adds a further blotch of paint to the increasingly complex picture of the cooperative relationship between national (constitutional) courts and the Court of Justice.

The Regional Labour Court's 2nd question was asked in the context of the Honeywell proceedings that were pending before the German Constitutional Court.[23] These proceedings result from the Federal Labour Court's faithful application of the Mangold doctrine to another, more typical case of age discrimination in relation to fixed term contract. Honeywell Bremsbeläge had employed an older manual worker on a succession of fixed term contracts, the last of which relied on the rule that there is no need to justify a fixed term employment contract if the employee is older than 52 (§14 (2) TzBfG – Act on part time and fixed term employment). The Federal Labour Court held – dutifully following *Mangold* – that this provision must no longer be applied, and that older workers were too protected by the general rule of §14 (10 TzBfG) which requires an objective justification for any fixed-term employment contract.[24] Consequently, the worker's contract was held to be unlimited and subject to full statutory employment protection. The employer challenged this ruling before the German Constitutional Court, mainly relying on its constitutional rights to conduct its business (Articles 2, 12 and 14 Grundgesetz – GG [German Constitution]). Such complaints fall within the jurisdiction of the Constitutional Court's 2nd Senate, which is generally seen as more conservative than its 1st Senate. The 2nd Senate recently delivered the judgment on the Treaty of Lisbon[25], reaffirming the Constitutional Court's competence to review actions of any of the EU institutions for remaining within the EU's competences (paras 239–241). Prompted by voluminous reasoning[26], the 2nd senate was expected to rule on the question whether the Court of Justice acted "ultra vires" when delivering its *Mangold* judgment. It should be noted that the claim before the German Constitutional Court was based on reading *Mangold* as relying on horizontal effects of a general principle of law (Craig, above under 3) and thus as creating horizontal effects of directives (Gerken et al, above). If, however, the Court in *Mangold* relied on established case law and merely added some exclusionary effects of directives (Schiek above under 3), the complaint was less likely to succeed. The

23 Case number 2 BvR 2661/06. The German Constitutional Court has published reasons for its decision of 6th July on 26th of August. It is available (only in German) from www.bundesverfassungsgericht.de.

24 BAG 7 AZR 500/04 (2006) *Neue Zeitschrift für Arbeitsrecht* 118.

25 BVerfG 2 BvE 2/08 BVerfGE 123,126, available in English from www.bundesverfassungsgericht.de.

26 Gerken, Rieble, Roth, Stein, Streinz *Mangold als ausbrechender Rechtsakt*, Munich 2009, see also Herzog & Gerken *Stop the European Court of Justice* CEPS 2008, available from www.ceup.eu.

majority of 6 judges who supported the Constitutional Court's decision relied on the fact that the ECJ's Mangold judgment added a further aspect to the effects of directives (paragraphs 77-78), while the deviant opinion of one judge stresses that this result could only be achieved when relying on a general principle of non-discrimination in a horizontal case, which would have been ultra vires (paragraphs 108-111).

Despite such high stakes, labour law academics have accepted the *Mangold* line of argument for any case of age discrimination. This has had consequences for the appreciation of the rule that employees starting their working life younger than 25 will not fully profit from gradual expansion of statutory notice periods in accordance with seniority (§622 (2) 2nd sentence BGB). By 2007, the majority of academics had convened on the opinion that this provisions should no longer be applied.[27] Regional labour courts had started to disapply the provision without bothering to refer any question to the Court.[28] The Constitutional Court's 1st Senate's chamber[29] had even rejected as inadmissible a labour court's reference under the German constitution's equality clause (Article 3 GG), because most likely §622 para 2 2nd sentence BGB was inapplicable under EU law.[30]

Against this tide, the Düsseldorf Regional Labour Court in *Kücükdeveci* considered itself not competent to decide on the applicability of §622 para 2 2nd sentence BGB without a reference to the Court of Justice. It also considered itself under an obligation to refer to the Court in order to escape the obligation to refer to the German Constitutional Court. The reference to the Constitutional Court is the precondition for any German court to disapply any piece of legislation. This is the background for its second question to the Court, seeking clarification whether a national court must refer a case to the national constitutional court before referring to the Court of Justice.

The Court's answer to the second question in *Kücükdeveci* seems regrettably short in relation to all this. Without expansive deliberation, the Court it rejected the idea of a national court, whose decisions can be appealed against, being under any obligation to refer (paras 51–54). It was only adamant on the national's Court obligation to disapply a provision contravening EU Law, irrespective of it seeking clarification of the relevant EU law by a reference. Further, the Court clarified that the existence of a national constitutional court is of no relevance to the position under EU law.

This answer can, nevertheless, be read as an implicit justification of the Federal Labour Court's activities in the Honeywell case. Considering the pending case

27 E.g. Löwisch 'Kündigen unter dem AGG' (2006) *Betriebsberater*, 2189, Kamanabrou 'Europarechtskonformer Schutz vor Benachteiligungen bei Kündigungen' (2007) *Recht der Arbeit* 199, 206, v 'Medem Europarechtswidrigkeit des § 622 Absatz 2 BGB?' (2009) *Neue Zeitschrift für Arbeitsrecht* 1072.

28 E.g. LAG Berlin-Brandenburg 7-Sa 61/07 (2008) *NZA-RR* 17.

29 Chambers of 3 judges decide on the admissibility of claims and references, while the full senate convenes for the substantive decision.

30 BVerfG 1 BvL 4/08 EzA § 622 BGB 2002 Nr 6.

before the Constitutional Court, this could even be read as pre-empted critique of its suggested outcome. As has been said, there is an expectation that the Constitutional Court will hold that the Court of Justice acted ultra vires with its *Mangold* decision. This will in turn lead to the assumption that any German case concerning the "Mangold principle" will have to be referred to the Constitutional Court. Against this perspective, the Court of Justice has already declared that any national court must remain competent to disapply EU law even if the national constitution provides for a declaration of unconstitutionality by a Constitutional Court. However, there are also ways of interpreting this decision as conciliatory (see below sub 5).

Within German academia, strategies to minimize the practical impact of *Kücükdeveci* are being developed. Wackerbarth and Kreβel[31] submit, that "disapplying" the discriminatory statutory clause regarding notice periods (§622 (2) 2nd sentence BGB) will not allow national courts the course of action taken by the Düsseldorf Regional Labour Court. In its final decision in February 2010, this Court ruled on the basis of the non-discriminatory part of the national legislation (§622 (2) 1st sentence BGB) that the claimant was entitled to a four month notice period. These authors consider that the Düsseldorf court should have referred the case to the German Constitutional Court, asking which consequences "disapplying" of the discriminatory statutory clause should have. They hope that the German Constitutional Court would have stalled the case pending before the Düsseldorf Court, until the legislator would have had amended §622 BGB. Alas, this is not in line with the Court of Justice's former case law in sex equality cases. Court has routinely held that a violation of the equal pay principle must be corrected by granting the benefit withheld.[32] Of course, this was never meant to exclude future re-regulation of the issue in question, by, for example taking away the advantage for all workers (ECJ *Smith* paras 20–22). There is some reason to assume that the effects of the constitutional principle of equal treatment irrespective of age would not be radically different from the effects of the equal pay principle under EU law. Accordingly one would assume that the Court Justice would hold that granting the benefit withheld is the default position until a non-discriminatory re-regulation of the matter has been achieved (a matter not clarified in *Kücükdeveci*). If any labour court follows Wackernagel's and Kreßel's advice, it would be obliged to refer the matter once again to the Court of Justice.

The relation between national constitutional courts and the Court of Justice has never been quite resolved. Increasing relevance of constitutional principles in the Court of Justice's case law after the Treaty of Lisbon will also lead to an increase in potential conflicts between national constitutional courts and the Court of Justice. The *Kücükdeveci* case can be read as an attempt of the Court of Justice's to reassert its own priority in this relation. At the same time, it also offers a reconciliatory approach

31 'Das Verwerfungsmonopol des BVerfG – Überlegungen nach der Kücükdeveci Entscheidung des EuGH' (2010) *Europäische Zeitschrift für Wirtschaftsrecht* 252.

32 E.g. ECJ C-200/91 *Smith* [1994] ECR I-4397 para 15.

to the German Constitutional Court when deciding about the remaining conflict post *Mangold* in Germany.

5. CONCLUSION

Following *Mangold*, the Court missed a number of opportunities for stating more clearly the relation of the non-discrimination directives to the EU's human rights body. Even fundamental cases such as *Feryn*,[33] *Coleman*[34] or *Age Concern England*[35] had been resolved without any reference to the fundamental rights quality of the non-discrimination principles, partly relying on a literal interpretation of the directives. Only in *Bartsch*,[36] the Court confirmed that there is a general principle of non-discrimination irrespective of age, while finding that the case was outside the Treaty's scope of application. The Court has now found a way for expanding exclusionary effects of directives in horizontal cases specifically for the field of non-discrimination law. This affirmation was delivered in relation to age discrimination – a form of discrimination which everyone expects to experience sooner or later. It remains to be seen whether the Court demonstrate a similar resolve in relation to grounds such as alleged racial or ethnic origin, sex or disability. These parameters remain powerful in stratifying European societies, because discriminatory disadvantage related to these is not suffered by all, but only by some. Strengthening their effectiveness is bound to be more controversial then strengthening the effectiveness of a prohibition of age discrimination.

At the same time, the Court has found a way to avoid another head-on conflict not only with its own case law, but also with the German Constitutional Court. By giving up any intention of acknowledging horizontal effects of directives generally, the Court has also reduced the danger of its case law on directives being categorised as ultra vires generally. Instead of relying on the general principle of non-discrimination on grounds of age in isolation, the Court applies the doctrine of directives being capable of having exclusionary effects even in horizontal cases only to such provisions of directives which give expression to a fundamental principle of EU law, such as human rights. In this way, the Court restricts the scope of application of exclusionary effects considerably. Finally, the Court also circumvents the contested issue whether prohibiting age discrimination really qualifies as a tradition common to the Member States. Instead, it relies on the Charter of Fundamental Rights for the EU in establishing the general principle of law it is relying upon. This distinguishes *Mangold* and *Kücükdeveci*. Thus, even if a national (constitutional) court would consider the ECJ's Mangold judgment as ultra vires, this would not necessarily apply to *Kücükdeveci*.

33 ECJ C-54/07 [2008] ECR I-5187.

34 ECJ C-303/06 [2008] ECR I-5603.

35 C-388/07 [2009] ECR I-1569.

36 ECJ C-427/06 [2008] ECR I-7245.

Both these fundamental issues will ensure that the *Kücükdeveci* case will occupy generations of scholars of EU law, hopefully becoming another milestone towards a coherent framework for equal treatment of persons – now derived from fundamental rights as established by the Charter, which have only partly been expressed in a fragmented body of secondary EU law.