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Some Reflections on the General Principles of the EU and on Solidarity in the Aftermath of Mangold and Küçükdeveci

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1. INTRODUCTION

On 19 January 2010, the European Court of Justice (ECJ) handed down a preliminary ruling1 in response to a reference lodged by the German Landesarbeitsgericht (Labour Tribunal) of Düsseldorf.

The Labour Tribunal considered that, in order to resolve the main proceedings, it needed the ECJ to answer two questions2 involving the interpretation of both the principle of non-discrimination on grounds of age and of Directive 2000/78 (hereinafter the Directive).3

The ECJ held that the principle of non-discrimination on grounds of age, as expressed in the Directive, must be implemented by national judges, who are required – if it be the case – to set aside conflicting national law, even in disputes between private parties.

The ruling was received with enthusiasm by many observers,4 who hailed it as a display of a renewed ECJ’s integration-driven inspiration. Moreover, it contributed to

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1 See the reference for a preliminary ruling from the Landesarbeitsgericht of Düsseldorf (Germany), lodged on 13 Dec. 2007. The first question focuses on the merits of the German measure challenged (whether the exception to the principle of equal treatment enshrined therein is compatible with EU law). In the second one, instead, the Labour Court asked whether “[i]n legal proceedings between private individuals, ... a national court [must] disapply a statutory provision which is clearly incompatible with Community law, or ... a national law is disapplied only after the Court of Justice has ruled on the provision at issue or on a substantially similar provision”.


normalize the uneasy consequences of the infamous Mangold decision and allegedly paved the way for the unconditional acknowledgment of the Directive’s horizontal direct effect.

The present article, after describing the background of the case and relevant case law, investigates the foundations of the general principles’ horizontal effect, before providing some reflections on the role of solidarity in the post-Lisbon European Union (EU), in light of the rationale of both Mangold and Küçükdeveci.

2. FACTUAL BACKGROUND AND LEGAL FRAMEWORK

In 2006, Ms Küçükdeveci was dismissed with one-month notice by her employer, for whom she had been employed for more than ten years, since the age of 18.

She challenged the legality of her dismissal before the Labour Court, alleging a violation of EU law. In her view, the rule of the German Civil Code (BGB) pursuant to which the employer could provide her with a shorter notice, only because she had started working before being 25, was discriminatory and bereft of a reasonable justification. Accordingly, the local court should have disregarded it and ruled for the dismissal’s illegality.

The principle of non-discrimination on grounds of age (a specification of the general principle of equal treatment) has been deemed by the ECJ to qualify as a general principle of the Union (see below) and was codified in the Directive, which lays down a general framework for combating discrimination in the area of employment. The EU prohibition of discrimination, therefore, stems at once from a primary and a secondary source of EU law.

The principle stipulates that no measure shall unjustifiably discriminate between persons in the same conditions solely on grounds of age. The Directive replicates this faithfully, specifying that it applies also to all persons in the private sectors, even in relation to employment and working conditions, including dismissals and pay.
3. The Mangold Precedent

A few words on Mangold, a preliminary ruling dating late 2006, are necessary to provide some context to Kucukdeveci. In the main proceedings, Mr Mangold had argued (incidentally, with his employee’s consent) that the German statutory provision allowing the unrestricted conclusion of fixed-term employment contracts with older employees (aged over 52) was incompatible with the Directive, insofar as it constituted an unjustifiable discrimination on grounds of age. Indeed, this constituted an exception to the general rule, whereby employers were normally subject to a duty to state the reasons why they had opted for a fixed-term employment contract.

The legal setting of the Mangold case differs from Kucukdeveci in at least one aspect. Namely, at the time of the controversy, the period for the Directive’s transposition had not yet expired. Accordingly, the claim of EC incompatibility was even narrower than in Kucukdeveci: the challenged provision was alleged to violate an instrument that had not entered into force and, therefore, had very limited legal effects.

The ECJ negotiated around this difficulty ruling that the principle of non-discrimination on grounds of age must... be regarded as a general principle of Community law. Since the challenged measure was taken to implement a directive – the ECJ argued – it fell under the sphere of EC competences, even before the end of the transposition period. The state of the Directive, it followed, was irrelevant.

After the bold statement regarding the existence of the general principle, the ECJ reasoned as follows: since EC (primary) law provides for legal protection against discrimination, national judges are called to ensure this protection irrespective of any interfering national provision.

This ruling was controversial especially insofar as it relied on the existence of the general principle of non-discrimination on the grounds of age without providing a convincing reasoning on how the ECJ had ‘found’ it. Since the ECJ appeared to ‘fabricate’

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10 See Case C-144/04, Mangold v. Rüdiger Helm (Mangold) [2005] ECR I-9981, where the ECJ answered the preliminary questions raised by the Labour Tribunal of München.
12 Mangold, para. 78.
13 Ibid., paras 28 and 67.
14 As rightly argued by Advocate General Mazák in the Opinion of 15 Feb. 2007 in Case C-411/05, Félix Palacios de la Villa v. Consol Servicios S/A (Palacios), para. 80.
15 Mangold, para. 74.
17 Mangold, para. 76: ‘observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age’. In holding the general principle as the applicable provision in this case, the ECJ followed the suggestion of the Advocate General Tizzano, see paras 84 and 101 of the Opinion.
18 At para. 74, the ECJ refers to the Preamble of the Directive: ‘the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States’. In particular, the cursory reference to the common constitutional traditions was misplaced, according to many commentators, because in fact only the Finnish and Portuguese constitutions actually spell out that principle.
this principle, and no other binding EC norm could be used to set aside the German provision, the decision sprouted discontent,\(^{20}\) and a certain belief that the severe \textit{Lissabon-Urteil} judgment\(^{21}\) represented a first retaliatory response of the \textit{Bundesverfassungsgericht} (BvG) to the ECJ, to which the decision on the same \textit{Mangold case}\(^{22}\) – that was pending before the BvG\(^{23}\) – has recently followed, yet without the disruptive effects that many feared.

4. \textbf{FROM MANGOlD TO KUÇÜKDEVECI}

After \textit{Mangold}, the Court was repeatedly called to pronounce upon the principle of non-discrimination. As it has been noticed, the Advocate Generals systematically tried to distinguish these cases from \textit{Mangold}, so as to avoid the relevance of its reasoning.\(^{24}\) In any event, the Court has not deemed necessary to elucidate the extent of the principle, and in the \textit{Palacios} case, it applied the Directive directly (it was a vertical dispute, and the period for transposition had expired).

The enflamed debate on the \textit{Mangold} precedent, apparently, confused the perception of the applicable law in the \textit{Kuçükdeveci} case. The referring court, in its first question, was not sure whether the EU standard of review was \textit{primary Community law} or \textit{the [the] Directive}. This doubt is reflected also in the first part of the second question, whose inconclusive formulation betrays the real concern of the German judge: should directives be acknowledged horizontal direct effect and entitle domestic courts to set aside contrary legislation?\(^{25}\)

In addition, the Advocate General took this concern very seriously and drafted a lengthy opinion advocating a change in the ECJ’s case law, virtually supporting the

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\(^{22}\) See C.F. Sabel & O. Gerstenberg, ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Co-ordinate Constitutional Order’, \textit{European Law Journal} 5 (2010): 511–530, 547, ‘it is conceivable that the BVG, especially in the light of the Lisbon, . . . could take the occasion of its pending review of the Mangold to articulate a Solange III doctrine, according to which it reserves the right to intervene not only when the ECJ ignores altogether consideration of fundamental rights, but also when the ECJ imposes its own interpretation of such rights in complete disregard of legitimate national diversity in their interpretation’.

\(^{23}\) \textit{Bundesverfassungsgericht}, 2 BvR 2661/06, \texttt{www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106.html} (only in German). In this judgment, the BvG has ruled that the Mangold decision did not amount to an \textit{ultra vires} act by the ECJ. However, the German judges were careful in avoiding to pronounce on the correctness of the ECJ’s legal reasoning in that decision.

possibility that certain directives might have direct effects or at least trigger disapplication in private disputes.25

Since in the Kıcıkdeveci case (as opposed to Mangold) the period of transposition of the Directive had expired,26 the matter of workplace discriminations has since then fallen squarely under EU competence.

This aspect might have invited some into relying upon a simplified reading. Since in Kıcıkdeveci the Directive has certainly deeper effects than it had in Mangold, the ECJ’s ruling27 has inspired the widely held impression that the Directive in the meanwhile has ‘ripened’, so as to achieve direct effects and legitimize disapplication. Even the Advocate General indulged in this a fortiori reasoning to introduce his proposal.28

Even a cursory glance to the decision will reveal the weakness of this impression. Indeed, the ECJ was careful in reaffirming that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.29 Moreover, the ECJ excluded that a consistent interpretation of the BGB could solve the contrast with EU law30 and stated that the Directive merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation.31

25 See paras 87–90 of the Kıcıkdeveci opinion. Advocate Bot refers to the distinction between a ‘substitution’ direct effect that makes an EU norm directly applicable and an ‘exclusion’ effect that merely renders the conflicting national provision inapplicable. It is on the basis of this distinction that he renews the ECJ that the national provision should be set aside even without having to overrule the established principles regarding the effectiveness of the directives in disputes between individuals. On this distinction, see s. 8 infra.

26 Indeed, Germany had passed in due course (14 Aug. 2006) the General Law on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, BGBl. 2006 I, 1897), whose para. 10 faithfully replicates the rule of Art. 6(1)(a) of the Directive, allowing for reasonable departures from the general rule of Art. 3 thereof, including those promoting the protection of older workers in termination procedures. As Sciarabba acutely notes (supra, 6), the Labour Tribunal could have simply deemed Art. 622(2) BGB to be implicitly superseded by the statute implementing the Directive (lex posterior), since the wording of Art. 6(1)(a) of the Directive and of para. 10 of the German Act are virtually identical. Accordingly, the Tribunal could have simply disposed of the controversy applying the domestic law. Indeed, it would be difficult to claim that such a verbatim replication of the provision might constitute an instance of incomplete or inappropriate implementation, requiring the interpreter to look at the potential direct effect of the Directive. See ibid. for a deeper analysis on this paradox.

27 That national courts must ensure that ‘the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation’, see Kıcıkdeveci, para. 51.

30 Ibid., para. 49. See also para. 20. Note that the French version of this passage is less clear, as it reads ‘la directive 2000/78 ne fait que concilier, sans le conseiller, le principe’.

29 Kıcıkdeveci, para. 46. For a clear formulation of this doctrine and an overview of the case law, see Case C-80/06, Carp [2007] ECR I 4473, para. 20.

31 Ibid., para. 50.
5. **Mangold II: Direct Effects Reload**

The ECJ’s answer to the first part of the second question is, therefore, a mere rehearsal of *Mangold*: since a general principle of non-discrimination on grounds of age exists – regardless of the Directive – national courts must ensure its protection, disapplying national conflicting provisions.

This ruling of the ECJ neither adds to nor diminishes *Mangold*. Direct horizontal effects are acknowledged as part of the general principle of equal treatment (see below), not the Directive. The only residual clarification must address the continuous use by the ECJ of the formula of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, in which the Directive seems to play, at least, some role in tandem with the principle.

This coupling is only a hermeneutic short cut. Generally, the content of principles has to be ‘found’ by the ECJ, and typically the appropriate methodology to follow is a matter of debate. In *Küçükdeveci*, however, this task was facilitated by the existence of the Directive, *à la Defrenne*. Indeed, the Directive’s purpose is precisely to give specific expression to the general principle and to put it into effect in the Member States. In other words, although it was not applicable in the dispute, the Directive inescapably nails down the content of the principle of non-discrimination on grounds of age, which, in turn, is applicable in itself.

Prospectively, it has been noticed that this principle directive combination might become, in the future, a sort of ‘complex normative figure’, capable of being invoked in particular when its first component (the principle) is listed in the Charter.

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32 On the discussion on whether not even the general principle was recognized a ‘real horizontal direct effect’, but only an ‘invocabilité d’exclusion’, and on the possible reasons behind this possibility, see s. 8 infra.

33 Sciarabba, *supra*, 9–10, holds a different view, purporting that the reference to the directive is either redundant (in case the principle is applicable directly) or insufficient (if, on the contrary, the principle cannot be applied in and of itself).


35 *Küçükdeveci*, para. 21, mentioning, by analogy, the precedent in Case 43/75, *Defrenne* [1976] ECR 455, para. 54: ‘This directive provides further details regarding certain aspects of the material scope [of the principle of equal pay].’

36 Article 1 of the Directive, as reported in para. 4.

37 Likewise, in the field of public international law, it is commonly held that ‘rules contained in a treaty will also be binding as a matter of customary law if the treaty is codificatory of customs’, Bing Bing Jia, ‘The Relations between Treaties and Custom’, *Chinese Journal of International Law* 9 (2010): 81–109, 92. See also E. Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, *Revue des Courts* 159 (1978): 1, 14–22. On the role of international principles in international law, this view corresponds to the normative reading of general principles, which acknowledges their axiomatic and binding force (see, for instance, the discussion in T. Meron, ‘International Law in the Age of Human Rights – General Course of Public International Law’, *Revue des Courts* 301 (2004): 404–408). Costa, G. Schwarzenberger, advocating for a descriptive theory of general principles, which rejects their value as rules, see *The Inductive Approach to International Law* (London: Steven & Sons, 1965), 50–51: ‘Whenever legal rules are deducted from first principles, the magician’s hat trick is applied’.

38 See Sciarabba, *supra*, 5. The correctness of this remark, however, should not misguide: in the Court’s view, the principle deserves direct horizontal application in itself, regardless of the directive’s support (whose function, in fact, is rather to flag the regulated matter as falling within the EU’s competence, see infra).
The reference to the Charter of Fundamental Rights (Charter), although somewhat out of focus, has also a strong hermeneutic function. The ruling just notices – in passing – that the principle of non-discrimination of grounds of age is enshrined in the Charter (Article 21, first paragraph), and that under Article 6(1) of the Treaty on the European Union (TEU), the Charter is as binding as are the Treaties.39

This apodictic statement proves maybe too much, suggesting some sort of retroactivity (the new TEU entered into force in December 2009, almost two years after the Labour Tribunal lodged the preliminary question). However, it also proves too little in that it does not clarify the Charter’s importance in supporting the existence of the general principle.40 Among the few undisputed effects of the (formerly) non-binding Charter, indeed, one is that it represents a privileged instrument for identifying fundamental rights41 and certainly for identifying a fundamental right as a general principle of Community law.42 Arguably, the Charter can be used to supplement principles of law already recognized in binding legal norms and contribute to their broader interpretation.43 Accordingly, the ECJ could have clarified that Article 21(1) of the Charter had been useful in supplementing and specifying the general principle or equal treatment, pointing to the principle of non-discrimination on the grounds of age.44

Like the Directive, the Charter is a legal instrument that is not directly applicable in the main proceedings. However, they both contribute in shaping the content of the general principle, producing the optical illusion that they are applied instead.

6. Simmenthal II: Supremacy Reload

The ECJ’s answer to the second part of the second question was straightforward. The judge had drawn a comparison between the domestic procedure of constitutional review and the

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39 Küçükdeveci, para. 22.
40 An aspect in relation to which the Court ought to have provided a more detailed reasoning, in light of his very controversial nature. See, for example, the opinion of Advocate General Sharpston in Case C-427/06, Banach v. Bosch und Siemens Hausgeräte (BSH) Altersfursorge GmbH [2009] 1 CMLR 5, para. 65: ‘the general principle of equality operates in certain circumstances so as to prohibit discrimination based on age, but that there was not, ab initio, a separate, detailed principle of Community law that always prohibited discrimination on grounds of age’.
41 Under this perspective, the conservative content of the Charter accounts for higher reliability: if a right is listed therein, it is likely to be undisputedly acknowledged by all Member States. As Groussot, supra, 107, noted, the Charter is deemed to be a ‘show case of existing rights’. See also, for instance, Advocate General Léger’s opinion in the Case C-353/99, Council of the European Union v. Heidi Hautala (Hautala) [2001] ECR I-9565, para. 80: ‘aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection’.
42 See Groussot, supra, 113. See also the statement of the Court, in Case C-540/03, Parliament v. Council [2006] ECR I-05769, para. 38: ‘the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and of the European Court of Human Rights’.
44 Similarly, M.P. Maduro suggests that the Charter may help the ECJ to tighten its judicial review of measures affecting fundamental rights with respect to certain categories of parameters (such as those determined by age); see ‘The Double Constitutional Life of the Charter’, in Economic and Social Rights under the EU Charter of Fundamental Rights – a Legal Perspective, eds T.K. Hervey & J. Kenner (Oxford: Hart Publishing, 2003), 269–300, 280.
preliminary reference machinery. In Germany – the Labour Tribunal contended – ordinary judges are not allowed to autonomously disapply a national provision on grounds of unconstitutionality but have to wait for the BvG to strike it down; the only way for judges not to apply what they regard as an unconstitutional statute is to lodge a constitutionality question. Similarly, the Labour Court wondered, national courts should have to wait for the ECJ to pronounce on the EU incompatibility of a national provision, before being entitled to disapply the latter.

As the Advocate General had argued, there should be no room for similar doubts, at least after Simmenthal. The ECJ simply noted that the right (or obligation) to raise a preliminary reference and the obligation to set aside EU-incompatible domestic norms are not codependent; therefore, courts must disapply without being preliminarily compelled to make or prevented from making a reference to the ECJ. It then invalidated the parallel with the German procedure, charitably avoiding – unlike Advocate Bot – to include an explicit reference to Simmenthal.

Although the answer was predictable, it was not without importance. Indeed, the ECJ took the chance to specify the unfettered supremacy enjoyed (even) by EU general principles over domestic legal systems, regardless of the potential ‘lateral’ support of other sources of primary or secondary law (if the Charter was not binding, then the Directive could not apply).

7. The Horizontal Effect of General Principles

Early comments saw in this ruling the capitulation of the ECJ with respect to the recognition of horizontal direct effects to (certain) directives. This may partly be due to the fact that expectations in this respect were very high, also because the doctrine that has so far prevented the ECJ from making this move is of judicial origin and could therefore be overruled with relatively lesser effort.

Arguably, the focus of this ruling is rather on the general principle of non-discrimination on grounds of age. For the sake of ease, we assume that the Mangold reasoning is sufficient in justifying its existence, and we dwell upon the issue of its effects.

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45 See the Küçükdeveci opinion, para. 55: ‘I do not think that the latter question calls for a lengthy discussion. It has been clear since the Simmenthal judgment [that the answer is in the negative].’
46 Küçükdeveci, para. 53.
47 In fact, the ECJ referred only to Mangold (which, in turn, quoted Simmenthal), showing a clear willingness to legitimize, and foster the settlement of, its controversial reasoning.
49 We note that Advocate General Léger has proposed a third way to identify a general principle of the EC (beside the analysis of common constitutional traditions of the Member States and the study of international instruments), in his opinion in the Hautala case. In particular, he noted that to identify a general principle ‘[i]t may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States’ (para. 69). Following this method even the controversial general principle of non-discrimination on grounds of age may prove easier to establish.
Although the scholarship has not sufficiently pondered this question (at least, it has done it infinitely less than with respect to directives), it might well be that, in fact, general principles should not have horizontal direct effects either. This contribution intends to explore this issue, encouraged by the recent remark by AG Kokott. At first glance, it seems like the issue is relatively novel, primarily because general principles typically emerge in a context where the guarantees of the individual vis-à-vis the public powers are at stake. In other words, they have been historically formulated so as to bestow on private parties rights rather than enforceable obligations. In addition, general principles typically serve an auxiliary scope: they point at the interpretation of a certain norm, among all the possible ones, that ought to be preferred.

In the absence of indications in the Treaties, the historical origin and purpose of the general principles suggest a negative answer to the question of whether they have horizontal effects. It is even possible to point at cases in which the ECJ has denied the application of certain general principles in controversies between private parties but that would not necessarily imply that no general principle can ever have horizontal effects.

In fact, with the blurring of the public/private divide and the rise of fundamental human rights as general principles (along with the long-established procedural ones), failure to protect individuals from the violation of certain principles on the part of other private parties might frustrate the overall effectiveness of the system of rights protection set up by the EU.

This has been recognized to some extent with respect to Treaty provisions. Suffice it here to recall a passage of Angonese:

the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75, Defrenne v. Sabena [1976] ECR 455, par. 31). Such considerations must, a fortiori, be applicable to Article 48 of the Treaty [on Article 48].

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50 In the following, we will discuss the reasoning of Mangold and Küçükdeveci at once since, as shown supra, in the latter case the ECJ merely applied the holding of the former.

51 ‘Il serait certes tentant de procéder à une récapitulation et à un examen approfondis du fondement doctrinal de l’effet direct horizontal, controverse, de principes généraux du droit ou de droits fondamentaux entre particuliers; see the opinion of the AG in Case C-499/08, Ole Andersen, filed on 6 May 2010, para. 23.

52 This would imply, with respect to the relationship between domestic law and the general principles of the EU, a machinery similar to the obligation of consistent interpretation. See AG Kokott’s comment on the use of general principles in Mangold and Küçükdeveci, in ‘The Basic Law at 60 — From 1949 to 2009: The Basic Law and Supranational Integration’, German Law Journal 11 (2010): 99–111. Kokott remarks that EU general principles play a hermeneutic role within domestic systems and highlights how their direct application might have momentous consequences: ‘In any case, the application of fundamental rights between private citizens is a delicate topic because it gives great power to Constitutional Courts — in this case, also to the ECJ — and strengthens their influence on the ordinary law, which, in general, is the domain of the ordinary courts’.

53 After all, general principles are an interpretative by-product of Art. 220 TEC, now transplanted in Art. 19 of the new TEU.

54 See Tridimas, supra, 47.

55 See, for instance, Case C-60/92, Otto v. Postbank NV [1993] ECR I-5683, para. 16: ‘[w]here, as in the main proceedings, a procedure is involved which concerns exclusively private relations between individuals and cannot lead directly or indirectly to the imposition of a penalty by a public authority, Community law does not require a party to be granted the right not to give answers which might entail admission of the existence of an infringement of the competition rules. That guarantee is essentially intended to protect an individual against measures of investigation ordered by public authorities to obtain his admission of the existence of conduct laying him open to administrative or criminal penalties’.
discrimination on grounds of nationality], which... is designed to ensure that there is no discrimination on the labour market.\footnote{Case C-281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA (Angonese) [2000] ECR I-4139, paras 34–35.}

This rationale could apply, with certain necessary changes, to certain general principles and with particular force to those deriving from that of equal treatment, regardless of their specification in the Treaties. This would be the case with the principle of non-discrimination on grounds of age ‘discovered’ in Mangold,\footnote{Note that in his Ku¨cu¨kdeveci opinion Advocate Bot, although supporting the horizontal effect of the general principle in and of itself, has not being able to provide other precedents than those where principles or fundamental rights that the ECJ were applied in horizontal relationship were in fact enshrined in Treaty provisions. See para. 85, mentioning the Defrenne, Angonese, and the more recent Case C-438/05, International Transport Workers’ Federation v Finnish Seamen’s Union [2007] ECR I-10779.} where the ECJ did what it had not been able or willing to do in Bostock, a case in which it contemplated the direct application of various general principles (protection of property, equal treatment, unjust enrichment) in a controversy between individuals but ended up excluding it.\footnote{See also Case C-2/92, The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock [1994] ECR I-955, paras 18–27. See, in particular, para. 26: ‘legal relations between lessees and lessors, in particular on the expiry of a lease, are, as Community law now stands, still governed by the law of the Member State in question. Any consequences of unjust enrichment of the lessor on the expiry of a lease are therefore not a matter for Community law’.}

Arguably, the judicial creation of a new set of unwritten obligations on private subjects hardly reconciles itself with the values of legal certainty and results in a scenario where individuals are held liable for the failure of their States to comply with the duty to implement EU law in keeping with the general principles of law.\footnote{It is undisputed that States, when they act as agents of the EU, are constrained by those obligations limiting the actions of EU bodies, including that of compliance with the general principles. See the Commentary to the Charter prepared by the Praesidium of the Convention as regards the prohibition of discrimination set forth in Art. 21: ‘it... addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law’ (Explanations Relating to the Charter of Fundamental Rights, Document 2007/C 303/02).}

8. INCIDENTAL HORIZONTAL EFFECTS

In sum, much of the debate regarding the horizontal effect of the directives replicates with respect to (uncodified) general principles, with an ironic twist, since legal certainty and protection of legitimate expectations are, in and of themselves, general principles of the EU.\footnote{Moreover, the EU constitutional attitude with respect to private law in the Member States is complex: harmonization has to be reconciled with respect for national diversity and constitutional traditions, which is in itself a principle of EU public law. See E.U. Petersmann, ‘Constitutional Justice and the Perennial Task of “Constitutionalizing” Law and Society through Participatory Justice’, EUI Working Paper 2010/3, <http://cadmus.eui.eu/epub/bitstream/1814/13590/1/LAW_2010_03.pdf>}

Short of taking a definitive position on the horizontal effectiveness of both directives and general principles, we intend to provide a brief description of the middle way represented by the doctrine of incidental horizontal effects, which was developed mainly with respect to directives.\footnote{For an accurate overview of this theory, see P.V. Figueroa Regueiro, ‘Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case Law of “Horizontal” Directives’.}
According to this doctrine, the directives cannot dispose of a claim between individuals and substitute the applicable EU-implementing domestic law, but they can exclude its application, serving as a touchstone\(^{62}\) of EU consistency.\(^{63}\) There were cases in which the ECJ seemingly adopted this rationale in a limited manner as in the Unilever case\(^{64}\) or more robustly (although apodictically) as in the Bermúdez\(^{65}\) and Bellone\(^{66}\) cases. Advocate Saggio borrowed from the scholarship an effective conceptualization of the problem:

> Si le juge national (…) ne peut se substituer à hiérarchie de transposition, rien ne lui interdit en revanche d’écarter l’application d’une règle nationale incompatible avec une norme qui lui est hiérarchiquement supérieure en vertu du principe de primauté.\(^{67}\)

Note that the ECJ ruled that the directives’ compulsory effects may be applied by national courts also when they were not raised by the parties.\(^{68}\) It follows that individuals’ protection through EU remedies is a matter of public law, trumping procedural niceties: in other words, a matter of supremacy. The classic concept of direct effects fails to account for this tension, and Advocate Léger already ten years ago campaigned for its abandonment, in favour of a notion encompassing exclusionary effects.\(^{69}\)

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\(^{63}\) In the words of P. Craig & G. de Bürra, EU Law (Oxford: OUP, 2008), 271: ‘a directive can preclude reliance on a provision of national law that is inconsistent with the provisions of the directive even in an action between private parties. This is premised on the primacy of Community law and entails a distinction between a directive having an “exclusionary” impact, which in effect connotes the idea that the directive “knocks out” or “excludes” inconsistent national law; and a directive having a “substitution” effect, which connotes the idea that the directive will in itself mandate certain novel EC legal consequences within the national legal order’. The distinction between involuntarité d’exclusion and involuntarité de substitution is discussed at some length in Prechal, supra, 235, 267–268. The use of principles to review the legality of EU-implementing national provisions in vertical disputes has been repeatedly confirmed; see, for instance, Joined Cases C-286/94, C-340/95, C-401/95, and C-47/96, Gauche Molenheide BVBA et al. v. Belgische Staat [1997] ECR I-7281, where the ECJ ruled that national measures implementing EC acts can be reviewed on grounds of proportionality or, if they adversely affect the right of judicial review, can accordingly be set aside by the domestic courts.

\(^{64}\) For an extensive overview of the relevant case law, see Figueroa Reguero, supra. In Case C-443/98, Unilever Italia SpA v. Centrul Food SpA (Unilever) [2000] ECR I-7535, para. 51, the ECJ laid down a principle for relying on a Directive in proceedings between individuals, although it cared not to extend this reasoning unconditionally to every case of non-transposition à la Fascini Dori: ‘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’.


\(^{67}\) Opinion to Joined Cases C-240 to 244/98, Oceano Cangro Editorial SA v. Roxio Muriano Quintana (Oceano) [2000] ECR I-4941, para. 30, n. 17. Quotation taken from D. Simon, La directive consipière (Paris, 1997). Our translation: ‘even if the national judge cannot substitute herself for the authority in charge of transposition, nothing prevents her from setting aside the application of a national rule, if it is incompatible with a norm that is superior by virtue of the supremacy principle’.


\(^{69}\) Case C-287/98, Grand Duchy of Luxembourg v. Berthe Lister [2000] ECR I-6917, paras 81–82 of the AG’s opinion: ‘there is no need for prior consideration of the direct effect of the provisions relied on, at least in the sense in which the term “direct effect” is understood. It must thus be possible to exercise rights contained in a directive that has not been transposed, irrespective of the terms in which they are couched, where they are invoked for the purposes of reviewing the legality of rules of domestic law’. See M. Claes, The National Courts’ Mandate in the European Constitution (Oxford: Hart Publishing, 2006), 113.
This evolution might have inspired the ECJ in Mangold and Kuçükdeveci: courts should have simply used the general principle – the ECJ said – to set aside national discriminatory provisions, which would have otherwise governed the issue. The dispute, then, would have been resolved applying the default rules of national law.

9. A COMMENT ON KUÇUKDEVECI

As anticipated, we have not dealt with the ECJ’s particular reasoning on the compatibility between EU law and the BGB’s exception. It is based on a circumstantial analysis of that exception’s rationale and of the policy underpinning it; the outcome could have been different and still leave our analysis intact. In fact, in a preliminary ruling handed down the week before Kuçükdeveci, the ECJ had found another German measure providing for age-related restrictions to be perfectly compatible with the principle of Article 3(1) of the Directive. The ECJ has shown reasonableness when it had to review state policies.

The added systemic value of the ruling was rather in how it dealt with the effects of the general principle in the domestic framework, strengthening the Mangold doctrine and building upon the original sin that lied therein (the controversial principle reconstruction that was carried out at variance with the traditional methods). The impact of this doctrine is apparent and AGs already wonder which specification of the non-discrimination principle will be next to being acknowledged direct effect.

We have repeatedly argued that this ruling’s innovative element is not much about the directives as it is about EU general principles. Moreover, the Simmenthal-like answer given to the referring judge and the substitution effect acknowledged to the general principle suggest that this ruling is also more about supremacy than about direct effect.

A conclusive word of realism and caution is needed, departing from the technical tenor of the reflections offered above. From December 2009, States are obliged to ensure

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71 In the Kuçükdeveci main proceedings, for instance, the disapplication of the Art. 622(2) exception would have allowed the application of Art. 622(1) BGB.

72 Namely German law prohibited persons older than 30 to apply for an intermediate position in the professional fire services, with the purpose of granting – on average – a lengthier and more efficient service. See the judgment of 12 Jan. 2010 in Case C-229/08, Colin Wolf v. Stadt Frankfurt am Main, nyp, para. 46.

73 Moreover, as noticed by Wiesbrock, supra, 546, the Court tends to frame its review on a proportionality assessment (as it was the case in Kuçükdeveci) rather than on the abstract propriety of the objective pursued by the national measure challenged.

74 See Advocate Saggio’s opinion in Oceàno, supra, para. 17: ‘Certes, l’analyse proposée suppose un découplage entre effet direct et primordial, mais cette dissociation paraît précisément constituer l’un des axes dominants de l’évolution récente de la jurisprudence de la Cour de justice comme des juridictions nationales’. Our translation: ‘Granted, this analysis implies a distinction between direct effect and supremacy, but this division seems to represent precisely one of the dominant features of the recent development in the case-law of the ECJ as well as of national jurisdictions.’
the protection of Charter’s rights when implementing EU law. Why should individuals not engage State liability for failure to do so under the Francovich test? However, even more directly, individuals could rely on the Defrenne reasoning, since the Treaty-like condition of the Charter allows them to do that. Then, the careful distinction between the principles’ substitution and exclusionary effect would lose relevance.

In retrospect, Küçükdeveci is as little about a ‘new’ power of the directives as was Defrenne. In fact, they are both about a primary source (respectively, a general principle, a Treaty provision). This has turned into reality after the entry into effect of the Lisbon Treaty – limitedly to those general principles that are enlisted in the Charter – and the prophetic remark of the Charter preamble (‘[e]njoyment of these rights entails responsibilities’) has started to prove true.

10. A LESSON OF SOLIDARITY?

The first lesson of Mangold and Küçükdeveci is that the prohibition of unjustifiable discrimination applies also to private employers, regardless of the content of domestic law. In prospect, this assumption means that all unjustified discriminatory measures will be gradually struck down, as well as those whose justification will not pass EU scrutiny.

Due to space constraints, this essay deliberately fails to dwell upon the merits of the case, that is, the actual instance of discrimination challenged before the national judges and, eventually, the ECJ. The Court has deemed that the distinction drawn by the German legislator, depending on the age at which the employment was started, was not reasonable, using a good deal of common sense.

Although perhaps it is too early to assess the effects of the Mangold/Küçükdeveci doctrine (general principles have direct horizontal effects), it is appropriate to consider the new phenomenon of individuals being responsible for discharging general non-discrimination EU obligations of which other individuals are the beneficiaries.

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77 See Joined Cases C-6 and C-9/90, Francovich and Others [1991] ECR I-5357, para. 37. See also para. 4 of Case C-91/92, Facini Dori v. Recovi [1994] ECR I-3325. In such a post-Lisbon scenario, the like of Ms Küçükdeveci and Mr Mangold would be entitled, even if German court refused to set aside German law in favour of the general principle, to claim compensation, because by not bringing Art. 622(2) BGB or Art. 14(3) TzBfG into EU compliance, Germany has violated its mandate to act as an agent of the Union, and such violation would entail an impairment of their rights. Nonetheless, as noted by Advocate Bot in the Küçükdeveci opinion, this indirect protection would be inappropriate, at least because it would imply that in the main proceedings these individuals would lose their case (para. 69).


79 Even admitting that the objective pursued were worthy (namely the limitation of younger employees’ legal protection to the benefit of older ones, who are less likely to react promptly and effectively to a sudden loss of their job), the application of the provision could yield unreasonable results. Indeed, since its application was regardless of the age at the moment of dismissal, the provision might well be comparatively more detrimental to old employees, only based on their early start, vis-à-vis their colleagues of the same age.
First, the imposition of such duties is not generalized, as it concerns only the general principles (possibly codified in the directives) and, even more directly, the obligations listed in the Charter,\textsuperscript{80} in light of its legal force, likened to the Treaties.

Second, the distinction between vertical and horizontal disputes is far from being abandoned; quite to the contrary, its relevance is unpredictably expanded. Indeed, both the general principles and the Charter are effective limitedly to the sphere of competences of the EU. Accordingly, their horizontal effects will spread in a haphazard fashion, in concurrence with the extension of the matters governed by EU law, and this will often lead to a double standard of treatment\textsuperscript{81} that is difficult to justify.\textsuperscript{82}

These two rulings clarified that, when a general principle applies and the national provisions are not in compliance therewith, the private defendant will not be able to benefit from his State’s default, as it is the case when a directive is invoked. That presumption of innocence (of dualist derivation), implicitly founded on the assumption that subjects complying with national law cannot be blamed for violating EU law, does not simply operate.

Intuitively, it is like new shared obligations were established, jointly and severally, on the States and on ‘damaging’ individuals. Both are liable in full for compensating the beneficiaries of the EU rights, in case of violation. This may happen either directly, when national judges disapply the national norm and cause the defeat of the ‘damaging’ private party, or indirectly, when the beneficiary of the EU right, after having lost in a controversy resolved in accordance to the national norm, asks for compensation to the State, for its failure to duly implement EU law.

Truly, the party who is liable and who, as advocated by the ECJ in Mangold and Küçükdeveci, loses in court due to the State’s default appears to be overly mistreated, insomuch as his reliance on national law did not remove from him the liability for the damage that occurred (think of Swedex, the company where Ms Küçükdeveci was employed: according to the ECJ, they should have borne the consequences of a negative judgment in the labour proceedings, even if they had done nothing but applying Article 622(2) BGB).

\textsuperscript{80} Better, the obligations necessary to the implementation of the Charter’s rights. For instance, the negative obligation corresponding to the right not to be discriminated on certain grounds.

\textsuperscript{81} Moreover, as Scarabbà duly notes (\textit{supra}, 15), the scope of EU competence will often be confirmed by the existence of a directive, as in Mangold and Küçükdeveci. In other words, when the ordinary judge will disapply a national provision, he will indeed do so to give priority to a general principle (substantive norm) but almost exclusively when there is a directive that certifies the supremacy of EU law on a particular subject matter (procedural criterion).

\textsuperscript{82} This double standard would be less acceptable than the one developed by the ECJ in relation to the effects of directives (bestowing on the individual’s different claims and rights depending on whether he is opposed in a controversy against the State or other individuals). See Case 148/78, Ratti [1979] ECR 1629, para. 22: ‘a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entail’. In other words, the State cannot escape an obligation of EU law by invoking its own negligence; therefore, directives can have direct vertical effect. Conversely, individual parties, not being responsible for such negligence, cannot be subject to the obligations deriving from a non-implemented directive (or a directive implemented incorrectly): directives cannot have a horizontal direct effect.
This scenario might give rise to various incentives: private parties, to the extent possible, are prompted to be aware of EU law, knowing that mere compliance with domestic law may fall short of providing him with a winning case in court. States, on the other hand, are called to act with increased diligence in implementing EU law, not to run the risk of exposing their citizens to a set of obligations – vis-à-vis any other EU citizen – which they plausibly ignored.

It is still to ascertain whether national judges will accept to embark on the ungrateful task of punishing their citizens to teach a lesson to their State (by disapplying the national norm that they deem to be at variance with the Charter, or the general principles) or, more likely, will resort to a preliminary opinion by the ECJ (see above the second question raised by the Landesarbeitsgericht in Küçükdeveci, reflecting this reluctance, or ‘reasonable sensitivity’83), even in the attempt of avoiding the dispersed review of national provisions from leading to conflicting case laws to the detriment of legal certainty.

In sum, the ECJ has brought to new life the legal source of the general principles and foretold its disruptive effect (i.e., not merely hermeneutic anymore). It also clarified that the entire Charter, all the more so, is a standard of review of national measures implementing EU law. By normalizing the horizontal application of these sources,84 the ECJ shifts on the individual’s part of the burden connected to some EU obligations that were until now firmly binding on the States, such as those relating to the protection of fundamental rights that are not traceable to the four market freedoms.

Moreover, it is necessary to evaluate the implications of Küçükdeveci: if the general principle of non-discrimination has a wider scope than the measures codifying it (the Directive), it follows that it can be invoked in a series of disputes that, despite concerning EU-regulated matters, fall outside the scope of the Directive.85

On the other hand, the rights listed in the Charter (and/or qualifying as general principle of the EU system86) are not necessarily linked to the operation of the Common Market, nor are they bestowed only on workers: every individual benefits from Charter rights (with the exception of those rights that are expressly recognized only to EU citizens), and rights elevated to the status of general principles are typically unconnected to the needs of the free market, since they originate from the common constitutional traditions.

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83 See Sciarabba, supra, 16.
85 See Wiesbrock, supra, 548.
86 As for the procedure to identify such principles, especially those of civil law, see Case C-101/08, Audiolux SA e.a. v. Groupe Bruxelles Lambert SA (GBL), nyp, para. 63, and Case C-174/08, NCC Construction Danmark A/S v. Skatteministeriet, nyp, para. 42 (general principles must emerge from common constitutional traditions, not from ordinary legislation).
With its case law on European citizenship and the rights connected thereto, the ECJ had already opened a phase of transition, first expanding the subjective and objective reach of the market freedoms and then extending them onto non-economic actors. The status of European citizen, rather than bestowing new rights, has served as the legal untouchable basis for the protection of fundamental freedoms within the EU. This thickening of the rights of the citizens *uti cives* (as citizens) rather than *uti mercatores* (as business subjects) had so far concerned the matters of welfare assistance and the trans-state provision of public services. In other words, the ECJ had already gradually accepted that a State might be called to bear at least some social burden to the benefit of citizens coming from another Member State: this is already a minimal but effective formulation of solidarity.

In *Kuckdöveci*, instead, private parties are called to give their contribution. Unquestionably, they are not requested to make financial disbursements or the like, yet the prohibition for the employer to perform discriminatory actions can result in new and consequential obligations for him: the rights of the individual are not anymore only a concern of the Union and of national public administrations but also of the citizens of the EU.

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89 Symmetrically, the ‘damaged’ individual can have his rights and claims multiply, once reliance on the general principles spares him from the boundaries of the directives’ direct effect; see Wiesbrock, *supra*, 548.

90 See Case 26/62, *Van Gend en Loos* [1963] ECR 1, para. B: ‘it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the economic and social Committee’. This reference to the cooperation on the part of the citizens, mediated by the bodies of the Community, was then little more than symbolic but is now extended to a more direct model of cooperation. The *Kuckdöveci* judgment, in other words, might undermine the egoistic model that has developed within the European Community, whereby ‘[t]he individual has rights; society, public authorities have duties and responsibility’. See Weiler, *supra*. 

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