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# The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC

Justice

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# The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC

European Network of Legal Experts in the non-discrimination field

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**European Commission**  
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# Executive Summary

1. Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin in the spheres of employment and occupation, social protection, social advantages, education and access to and supply of goods and services, while Directive 2000/78/EC prohibits discrimination on the grounds of age, disability, religion or belief and sexual orientation in the sphere of employment and occupation.
2. States were required to implement Directive 2000/43/EC by 19 July 2003 and Directive 2000/78/EC by 2 December 2003, with the exception of the provisions of Directive 2000/78/EC relating to age and disability which states were obliged to implement by 2 December 2006 at the latest. Since then, an ever-growing number of cases have been referred to the Court of Justice of the European Union (the 'CJEU') from national courts via the preliminary reference procedure, whereby national courts can refer questions of EU law to the Court before resolving disputes which involve issues relating to the interpretation of European Union law or to the validity of European Union secondary law. In response, the Court has delivered a series of important judgments which have clarified how many of the key provisions of the Directives should be interpreted and applied. This report analyses the evolution and impact of this case-law, up to 30<sup>th</sup> August 2012.
3. The Court's case-law has established that the 2000 Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. This principle is derived from the well-established human right to equality and non-discrimination that exists in international human rights law and the constitutional traditions of European Union member states. It is also set out in Article 21 of the EU Charter of Fundamental Rights, which since December 2009 has the same legal status as the EU treaties. This is the lens through which the CJEU interprets the specific provisions of both Directives, which have been given a purposive interpretation in line with this approach.
4. This interpretative approach was set out initially in the Court's very first judgment that concerned the 2000 Directives, *Mangold v Helm*. In this case, the Court ruled that Directive 2000/78/EC should be read as setting out a 'general framework' of rules which gave specific expression to a general principle of equal treatment. In its subsequent cases of *Bartsch* and *Kücükdeveci*, the Court clarified and reaffirmed the approach it had adopted in *Mangold*. In *Kücükdeveci*, the Court confirmed that the principle of equal treatment should be the 'basis' for interpreting the provisions of the 2000 Directives, along with the fundamental right to non-discrimination set out in Article 21 of the Charter of Fundamental Rights. It reiterated this important point in its subsequent judgments in the cases of *Runevič-Vardyn* and *Hennings*.
5. Furthermore, the Court has made it clear that the Directives should not be read in a narrow or excessively formalistic manner. In the case of *Coleman*, the Court expressly rejected arguments that the provisions of Directive 2000/78/EC should be read as setting minimum standards. Instead, it interpreted the Directive as intended to provide effective and substantive protection against discrimination. The Court adopted a similar approach in the cases of *Firma Feryn* and *Meister*, while in the cases of *Petersen* and *Prigge* it concluded that exceptions to the principle of equal treatment set out in the 2000 Directives must be given a strict and narrow interpretation.
6. It also appears as if the provisions of the Directives also need to be interpreted with reference to the values of human dignity and personal autonomy. As Maduro AG stated in his opinion in the *Coleman* case, these are the values which animate the enabling provisions of Article 13 TEC (now Article 19 TFEU) which provide the legal basis for the 2000 Directives. Furthermore, the full range of rights protected by the EU Charter of Fundamental Rights must be taken into account in interpreting the Directives, as the Court confirmed in *Fuchs* and *Hennings*.

where it took into account the right to engage in work set out in Article 15(1) of the Charter and the right to engage in collective bargaining set out in Article 28 respectively.

7. The other secondary objectives set out in the Recitals of the Directives are also relevant: in the case of *Fuchs*, the Court took account of the aim to promote diversity in the workforce as set out in Recital 25 of Directive 2000/78/EC. In addition, the case-law of the Court in the field of gender equality will also be a very significant point of reference: the *Mangold* and *Kücükdeveci* judgments have confirmed that the 2000 Directives and EU gender equality law share a common goal, namely to give expression to the general principle of equal treatment.
8. The case-law of the CJEU has clarified many of these issues relating to the scope of the 2000 Directives. In its judgments, it has consistently given the Directives an expansive and purposive interpretation, as illustrated in particular by its decisions in the important cases of *Palacios de la Villa*, *Maruko* and *Römer*. In *Palacios de la Villa*, the Court held that national rules governing retirement ages came within the scope of Directive 2000/78/EC as they affected the employment relationship between employers and workers. In *Maruko* and *Römer*, the Court concluded that national rules denying same-sex life partners benefits which were paid to spouses came within the scope of Directive 2000/78/EC: states retained full competency to determine marital status, but had to exercise this competency in a manner that was compatible with their obligation not to discriminate.
9. However, in *Runevič-Vardyn*, the Court held that the scope of Directive 2000/43/EC did not extend to cover the performance of public functions which could not be construed as involving the provision of a service. This is a significant limitation, which may generate problems in the future as defining what does or does not constitute a 'service' can be difficult. In *Chacón Navas*, the Court has also confirmed that the scope of the 2000 Directives only extends to cover the grounds set out in Article 13 TEU (now Article 19 TFEU): the Directives give effect to the principle of equal treatment within these parameters, but not beyond. This meant that 'sickness' does not constitute a regulated ground of discrimination in EU law.
10. The Court's case-law has clarified how many of the operative provisions of both the 2000 Directives should be interpreted and applied. In so doing, it has consistently interpreted the text of the Directives as intended to give expression to the principle of equal treatment, in line with its general interpretative approach outlined above.
11. The prohibition on direct discrimination contained in the 2000 Directives has been interpreted in a similar manner as the equivalent provisions of the gender equality directives. Thus, in *Maruko* and *Römer*, the Court concluded that, if states had established a same-sex life partnership scheme, then a refusal to pay benefits to life partners that would be available to spouses would constitute direct discrimination on the grounds of sexual orientation, if life partners and spouses were in a comparable situation for the purposes of the benefit in question. Its reasoning in these cases followed its approach in pregnancy discrimination cases such as *Dekker*.
12. In *Firma Feryn*, the Court gave effect to the prohibition on direct discrimination in a manner that ensured it gave effective protection against race discrimination, by concluding that public statements by an employer that he would not hire persons of a particular ethnic origin were directly discriminatory. It adopted a similar approach in *Coleman*, where it held that it would constitute direct discrimination if an employee was subject to less favourable treatment based on their association with another person, in this case their disabled child. This important judgment has established that 'discrimination by association' comes within the scope of the 2000 Directives.
13. Few preliminary references so far have concerned the indirect discrimination provisions of the 2000 Directives. However, the Court has made clear that it will again adopt a similar approach in applying these provisions as it does in applying the prohibition on indirect discrimination set out in the gender equality directives. In the case of *Tyrolean Airways*, it also clarified that a difference of treatment must clearly differentiate between different



categories of person on the basis of a non-discrimination ground before a claim for indirect discrimination could arise.

14. The Court has not yet had the opportunity to develop a substantial jurisprudence on the question of what will constitute harassment under the 2000 Directives, or to clarify their provisions which regulate issues such as positive action, victimisation, or social dialogue. Furthermore, its case-load has been dominated by age discrimination cases: it has received few references that relate to the other grounds, and none of as 30 August 2012 that raise issues concerning religious discrimination.
15. However, the flow of age discrimination references has ensured that the Court's case-law in this field has developed quickly. In its case-law, the CJEU has made it clear that age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of the Directive. Furthermore, the Court concluded in *Prigge* and *Fuchs* that the use of age distinctions can only be objectively justified under Article 6(1) if they are intended to give effect to social policy objectives: budgetary considerations or cost reduction cannot by themselves qualify as a legitimate aim.
16. In its judgment in *Age Concern*, the Court also emphasised that 'Article 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification'. In the cases of *Wolf* and *Prigge*, the Court also concluded that age limits which are justified on the basis that they are necessary to ensure effective performance of a job or to protect the public must be shown to be clearly appropriate and necessary, in line with the 'genuine occupational requirement' provisions of Article 4(1) of Directive 2000/78/EC.
17. The case-law of the Court has thus ensured that strong protection now exists in EU law against age discrimination in employment and occupation. However, the Court has also taken account of the specific nature of the age ground. It has given member states and employers some room for manoeuvre in cases such as *Palacios de la Villa*, *Age Concern*, *Rosenblatt*, *Georgiev*, *Fuchs* and *Hörnfeldt*, especially when it comes to measures regulating retirement age and other elements of employment policy which are designed to ensure 'inter-generational equity' in the labour market.
18. The Court's case-law has also provided some useful clarification as to what member states must do to comply with their obligations under Article 15 of 2000/43/EC and Article 17 of Directive 2000/78/EC, which require that sanctions against discrimination must be 'effective, proportionate and dissuasive'. In *Bulicke*, the Court accepted that member states can determine what procedural rules apply in discrimination cases, as long as they complied with the 'principle of equivalence', the 'principle of effectiveness' and the 'principle of non-regression'. In *Coleman*, *Firma Feryn* and *Meister*, the Court also provided clarification as to what type of evidence could establish a presumption of discrimination and thus shift the burden of proof as required by both the 2000 Directives.
19. The CJEU's case-law on the 2000 Directives has already brought about significant changes in national law across Europe. The manner in which the Court has interpreted the Directives has also begun to influence how national legislatures, courts and equality bodies approach issues relating to equality and non-discrimination. This is illustrated by a number of case studies, which show how the Court's jurisprudence is influencing the approach of national authorities.
20. However, it appears that different aspects of the Court's case-law are impacting on national legal systems in different ways. This is illustrated by two detailed case-studies of how the jurisprudence of the Court has influenced legal developments in the UK and Germany. In Germany, the Court's jurisprudence has generated academic and political controversy, encouraged national courts to refer an unusually high volume of age

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discrimination cases to the CJEU and resulted in substantial revisions being made to legislation and collective agreements. In the UK its impact has been more incremental, and national courts have not felt it necessary to make many references to Luxembourg.

21. Nevertheless, both these case studies also make it clear that the UK and German courts are closely following and applying the jurisprudence of the CJEU. Both the German and the UK courts now regularly take account of the Court's judgments in resolving discrimination claims. Furthermore, the Court's decisions have resulted in legislative reform and encouraged the expansion of judicial protection against discrimination in both states.
22. In general, the case-law of the Court has had a considerable impact across Europe. So far, this impact has mainly been felt in those areas where the Court's case-law is most developed, specifically the areas of age discrimination and sexual orientation discrimination linked to partnership benefits. As more cases are referred to the Court and its case-law expands in scope, it is likely that the influence of its jurisprudence will continue to grow.
23. The pattern of references it has received has meant that the Court's jurisprudence is more developed in some areas than in others. In particular, the high volume of references concerning age discrimination has allowed the Court to develop a substantial case-law in this area. However, the number of age-related references has far outnumbered those received for all the other grounds put together. This means that the Court's case-law in respect of the other grounds is less developed than it is for age.
24. Age discrimination is a new and complex area of law, which may along with specific national factors explain why so many age cases have reached the CJEU. However, it is perhaps surprising how few cases have been referred to the Court in respect of the other grounds covered by the 2000 Directives. This may reflect the fact that many national legal systems are still assimilating the provisions of the Directives. It may also be attributable to reluctance on the part of national courts to refer issues to the CJEU, which might be based on a variety of different factors.
25. It remains to be seen whether these trends will change over time. However, evidence exists that national courts across the EU are deciding an ever-growing number of discrimination cases. Many of these cases involve issues related to reasonable accommodation, positive action, harassment, multiple discrimination and other complex aspects of discrimination law and policy. As a result, it is likely that the CJEU will be called upon in the near future to address a wider range of cases than has been the case so far.
26. It is difficult to predict when if ever any of these issues will become the subject of further references to the Court. However, it is likely that future cases will be adjudicated in line with the general interpretative approach that the Court was already set out in detail in its case-law on the 2000 Directives.
27. In conclusion, the Court has delivered a series of important judgments which have clarified how many of the key provisions of the Directives should be interpreted and applied. In particular, the Court has made clear that the Directives are to be interpreted as giving expression to a fundamental principle of EU law. This approach runs through all the Court's case-law thus far that concerns the provisions of the 2000 Directives, and is likely to shape how its jurisprudence develops in the future.

# Introduction

Article 13 TEC (numbering before the Lisbon revision of the Treaties, now Article 19 TFEU) was inserted into the EC Treaty by the Treaty of Amsterdam in 1999.<sup>1</sup> It gave the institutions of the European Union (EU) competency to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. This enabling power was used as a legal basis for the subsequent adoption of Directives 2000/43/EC<sup>2</sup> and 2000/78/EC.<sup>3</sup> The provisions of these Directives greatly expanded the scope of EU discrimination law. Previously, only sex discrimination in employment and occupation had been prohibited under what was then the European Community’s social law (as a result of the Lisbon revision, the former European Community was replaced and succeeded by the European Union). However, Directive 2000/43/EC prohibited discrimination on the grounds of racial or ethnic origin not alone in employment and occupation but in the areas of social protection, social advantages, education and access to and supply of goods and services, while Directive 2000/78/EC extended this prohibition to cover discrimination on the grounds of age, disability, religion or belief and sexual orientation in the sphere of employment and occupation.

Member States were required to transpose the provisions of Directive 2000/43/EC by 19 July 2003 and Directive 2000/78/EC by 2 December 2003,<sup>4</sup> but could take advantage of an additional period of three years to implement the age and disability provisions of Directive 2000/78/EC, which expired on 2 December 2006. Since then, the Court of Justice of the European Union (CJEU - formerly known as the European Court of Justice) has handed down an ever-increasing number of judgments that relate to their provisions. This case-law has clarified the scope of the 2000 Directives and established how many of their key provisions should be interpreted and applied. This report aims to provide a comprehensive overview of the evolution of the case-law of the CJEU on the 2000 Directives. In particular, it will analyse how the Court has interpreted and applied the provisions of both Directives and examine the impact of its jurisprudence.

The methodology used in this report is qualitative. It aims to describe and analyse how the CJEU has interpreted the provisions of the 2000 Directives, focusing in particular on the reasoning that the Court has used to justify its decisions. The report will also examine how the interpretative approach adopted by the CJEU has been applied by national courts, with a view to assessing the impact of the Court’s case-law and the extent to which national courts have been willing to follow its reasoning when interpreting national anti-discrimination legislation in light of the 2000 Directives. The materials used in this analysis include judgments of the Court, opinions of Advocate-Generals, academic commentary and decisions of national courts.

The report begins by identifying what the Court considers to be the primary purpose and objectives of the 2000 Directives and how their provisions relate to the general principles of EU law and the individual rights set out in

<sup>1</sup> For the background to Article 13 and the Directives, see M. Bell and L. Waddington, ‘The 1996 Intergovernmental Conference and the Prospects of a Non-discrimination Treaty Article’ (1996) 25(4) *Industrial Law Journal* 320-36; M. Bell, ‘The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?’ (1999) 6(1) *Maastricht Journal of European Law* 5-23, S. McInerney, ‘Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin: A Comment’ (2000) 25(3) *European Law Review* 317-323; P. Skidmore, ‘EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?’ (2001) 30(1) *Industrial Law Journal* 126-132; D. Schiek, *Differenzierte Gerechtigkeit* (Baden-Baden: Nomos, 2000); E. Ellis and P. Watson, *EU Anti-Discrimination Law*, 2nd ed. (Oxford: Oxford University Press, 2012).

<sup>2</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>4</sup> Following accession of new Member States by 1 May 2004 for EU-10 and by 1 January 2007 for Romania and Bulgaria.

the text of the Charter of Fundamental Rights, which since December 2009 has the same legal status as the EU Treaties. It then examines how the Court has interpreted and applied the specific provisions of the 2000 Directives in light of these background factors, focusing in particular on judgments of the Court that concern the following key 'structural' issues: i) the scope of the Directives, and ii) the application of their general provisions (such as the prohibition on direct discrimination) across the different discrimination grounds. The impact of the Court's case-law is then examined through case studies of how national legislatures and courts have responded to the interpretation given by the Court to the age discrimination provisions of Directive 2000/78/EC. Finally, the report concludes with an analysis of the provisions of the 2000 Directives which have yet to be the subject of a reference to the Court and assesses how the jurisprudence of the CJEU may develop in the years to come. The analysis presented here covers the Court's case-law in respect of the 2000 Directives as it stands as of the 30<sup>th</sup> August 2012.

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## Part I

# The General Interpretative Approach Adopted by the CJEU in Interpreting the 2000 Directives

The 2000 Directives lay down a detailed framework of legal norms which set out how states should prohibit discrimination in the areas that come within their scope of application. In accordance with the principles of 'direct effect' and the 'supremacy of EU law', states are obliged to ensure that their national law conforms to the requirements of the Directives, while national courts are required to 'set aside' national legislation which is not compatible with their provisions.<sup>5</sup>

Many of the key provisions of the 2000 Directives are similar to equivalent provisions carried over from EU gender equality law and reflect the established definition given by the CJEU in its case-law to concepts such as indirect discrimination. However, the 2000 Directives also contain some unique provisions which have no equivalent in the realm of gender equality.<sup>6</sup> Furthermore, the text of the Directives does not define their scope of application in detail, or specify how their general provisions (such as the prohibition on indirect discrimination or the rules governing positive action) should be applied across the various non-discrimination grounds.

As a result, an ever-growing number of cases relating to the provisions of the 2000 Directives have been referred to the CJEU from national courts via the preliminary reference procedure set out in Article 267 TFEU (ex Article 234 TEC), which permits (and in certain circumstances requires) national courts to seek guidance from the CJEU on how to interpret provisions of EU law which are relevant to resolving legal disputes which they have been asked to adjudicate. In response, the Court's judgments have clarified how the provisions of the 2000 Directives should be implemented in national law, just as previous judgments of the Court such as *Defrenne v Sabena (No. 2)*<sup>7</sup> clarified the provisions of EU gender equality law.

In line with how it interprets other EU legal instruments, the Court has adopted a purposive approach to the 2000 Directives while also showing fidelity to their written provisions. This means that the Court interprets the text of the Directives in light of their underlying purpose and objectives, while also paying close attention to their text.<sup>8</sup> In particular, the Court has established that the 2000 Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. This principle protects individuals against discrimination within the scope of EU law: it is derived from the well-established human right to equality and non-discrimination that exists in international human rights law and the constitutional traditions of European Union member states.<sup>9</sup> The Court has also established that the provisions of the 2000 Directives are to be interpreted as giving concrete protection to the non-discrimination right set out in Article 21 of the EU Charter of Fundamental Rights.

In other words, the Court has made clear that the primary purpose and objective of the Directives is to give effect to the fundamental right of individuals not be subject to discrimination, as given expression through the principle of equal treatment and the provisions of the EU Charter. This is the lens through which the CJEU interprets the specific provisions of both Directives, as the Court has made clear in a series of important cases such as *Mangold*, *Bartsch* and *Küçükdeveci*. These judgments have helped to shape the general interpretative approach that the Court

<sup>5</sup> See P. Craig and G. de Búrca, *EU Law: Text Cases and Materials* (5<sup>th</sup> ed.) (Oxford: OUP, 2011), 180-217; 256-301.

<sup>6</sup> For example, Article 5 of Directive 2000/78/EC requires employers to make reasonable accommodation for the needs of disabled persons, while Article 6(1) makes it possible for a difference of treatment directly based on age to be objectively justified in certain circumstances. No equivalent provisions exist in EU gender equality law.

<sup>7</sup> Case C-43/75, *Defrenne v Sabena (No. 2)* [1976] ECR 455.

<sup>8</sup> See in general J. Bengoetxea, *Legal Reasoning of the European Court of Justice* (Oxford: OUP, 1993).

<sup>9</sup> See for example Article 14 of the European Convention on Human Rights; Article 26 of the UN International Covenant on Civil and Political Rights; Article 2(2) of the UN International Covenant on Economic, Social and Cultural Rights; Articles 2 and 5 of the UN International Convention on the Elimination of All Forms of Racial Discrimination; Articles 2 and 3 of the UN International Convention on the Elimination of All Forms of Discrimination Against Women; Article 1 of the Constitution of France (1958); Article 3 of the Basic Law for the Federal Republic of Germany (1949); Article 3 of the Constitution of Italy (1948).



has adopted in respect of the 2000 Directives, whereby their provisions are given an expansive and purposive interpretation in line with the objective they are designed to achieve.

## 1.1 Mangold v Helm

This interpretative approach was set out initially in the Court's very first judgment that concerned the 2000 Directives, the case of *Mangold*.<sup>10</sup> This reference from the Arbeitsgericht München concerned an age-related exception to the general provisions of the German Labour Code which restrict the use of fixed-term employment contracts. This exception had been introduced by legislative amendment of the Code in 2002 and gave employers greater freedom to conclude fixed-term contracts with workers over the age of 58 (and with workers over the age of 52 until December 2006).<sup>11</sup> The complainant challenged this law on the basis that it reduced the employment protection available to older workers and therefore constituted unjustified age discrimination contrary to the provisions of Article 6(1) of Directive 2000/78/EC. However, the prescribed time limit within which Germany was obliged to implement the age discrimination provisions of the Directive had not yet expired at the time when the specific employment contract that formed the subject matter of this case had been concluded. (However, the prescribed time limit within which Germany was obliged to implement the age discrimination provisions of the Directive had not yet expired at the time when the specific employment contract that formed the subject matter of this case had been concluded (the contract was concluded on 26 June 2003, but Germany had taken advantage of the additional period for implementing this Directive, which did not expire until 2 December 2006). National courts are usually not required to set aside national laws which are incompatible with the provisions of a Directive until the end of this period. In its reference, the national court therefore asked the CJEU whether it was obliged to 'set aside' the relevant provisions of the Labour Code by declining to apply them to the facts of this case, even though the relevant implementation period had not yet expired.

In its judgment, the Court agreed that the less favourable treatment afforded to older workers by the 2002 legislation constituted a difference of treatment on the grounds of age. It went on to find that this difference of treatment could not be objectively justified according to the test set out in Article 6(1) of the Directive, rejecting the German government's argument that the special discriminatory measures were justified by the goal of ensuring greater employment of older workers.

The Court also concluded that the 2002 legislation could be set aside even if the relevant provisions of the Directive itself were not yet legally binding on Germany, as it was incompatible with the objective of eliminating age discrimination in employment that the Directive sought to achieve. In reaching this conclusion, the Court relied in part upon the '*Inter-Environnement* doctrine', whereby member states must, during the period set aside for national implementation of a directive, 'refrain from taking any measures liable seriously to compromise the result prescribed'.<sup>12</sup>

However, the most important part of the *Mangold* decision can be found in the final paragraphs of the judgment, where the Court concluded that the 2002 legislation also had to be set aside because it conflicted with a general principle of EU law, namely the principle of equal treatment. The Court had previously recognised the existence

<sup>10</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

<sup>11</sup> The key provision of domestic law at issue was para. 14(3), fourth sentence, taken together with para. 14(3), first sentence, of the *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen* (BGBI. 2000, p. 1966, 'the TzBfG').

<sup>12</sup> Case C-129/96, *Inter-Environnement* [1997] ECR I-7411.

of a general principle of equal treatment between men and women.<sup>13</sup> In *Mangold* the Court extended the scope of this principle to include all the non-discrimination grounds set out in the 2000 Directives: the ‘principle of non-discrimination on grounds of age’ was held to be an ‘aspect’ of this more general principle. Furthermore, the Court asserted that this general principle of equal treatment was not ‘laid down’ by the 2000 Directives. Their provisions set out a ‘general framework’ of rules which gave specific expression to this general principle, but it was a separate, free-standing and ‘active principle’ of the Community legal order in its own right, whose ‘source’ was to be found in the non-discrimination provisions of international human rights law and the constitutional traditions common to the Member States.<sup>14</sup> This meant that national laws had to comply with this fundamental norm of EU law, even though the implementation period within which Germany had to give effect to the age provisions of Directive 2000/78/EC had not yet expired.

As a result, the Court concluded that it was still the ‘responsibility of national courts to guarantee the full effectiveness of the general principle of non-discrimination’ by setting aside national laws that were incompatible with this fundamental norm of the European legal order.<sup>15</sup> In other words, the national legislation which restricted the employment rights of older workers had to be set aside by the German courts on the basis that it was incompatible with the general principle of equal treatment, even though the time period within which the age discrimination provisions of Directive 2000/78/EC had to be transposed in national law had not yet expired.

## 1.2 The Mangold Controversy

The *Mangold* judgment generated controversy. Some critics argued that the Court had erred in requiring the German courts to set aside national legislation on the basis that it conflicted with the general principle of equal treatment. In their view, this principle lacked clear content and was insufficiently precise to serve as a basis for setting aside national laws, especially in the context of a ‘horizontal’ legal dispute between private parties such as that at issue in *Mangold*.<sup>16</sup> Mazák AG in his opinions in the *Palacios de la Villa* and *Age Concern* cases<sup>17</sup> expressed strong concerns about what he considered to be the uncertain nature of the general principle of equal treatment as set out in the *Mangold* judgment.

Other commentators claimed that there was no clear legal basis in the EU treaties for the existence of a general principle of equal treatment that encompassed all the grounds covered by the 2000 Directives, and that the Court’s

<sup>13</sup> See Case C-149/77, *Defrenne v Sabena* (No. 3) [1978] ECR 1365, [26]-[27]; Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143, [19]. See also the essays collected in A. Dashwood and S. O’Leary (eds.), *The Principle of Equal Treatment in EC Law* (London: Sweet & Maxwell, 1997).

<sup>14</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981, [74].

<sup>15</sup> For a comprehensive analysis of *Mangold*, see D. Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ (2006) 35(3) *Industrial Law Journal* 329-341.

<sup>16</sup> See the discussion in F. Kuitenbrouwer, ‘Onbescheiden Rechters’, *NRC Handelsblad*, 7 February 2006, summarised in J. Jans, ‘The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law’ (2007) 34(1) *Legal Issues of Economic Integration* 53–66, 58-60. See also D. Martin, ‘L’arrêt *Mangold* – Vers une hiérarchie inversée du droit à l’égalité en droit communautaire?’ *Journal des tribunaux du travail*, 2006, 109-116; O. Leclerc, ‘Le contrat de travail des seniors à l’épreuve du droit communautaire’, *Recueil Dalloz*, 2006, 557-561; A. Masson and C. Micheau, ‘The Werner *Mangold* Case: An Example of Legal Militancy’ (2007) *European Public Law* 587-593.

<sup>17</sup> Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007, [86]; Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569, Opinion of Mazák AG, delivered on 23 September 2008.

judgment in *Mangold* had thus exceeded the limits of its authority.<sup>18</sup> The Court was accused of being too quick to ‘constitutionalise’ the sphere of discrimination and of limiting the freedom of action of both the Community legislator and member states. Riesenhuber argued that the Court in *Mangold* ‘trespasses on – and threatens to occupy – foreign territory.’<sup>19</sup> In Germany, an unsuccessful attempt even was made in the *Honeywell* case to convince the German Constitutional Court that the CJEU’s judgment in *Mangold* was *ultra vires* and should be disregarded by national courts.<sup>20</sup>

Critics also argued that the Court had been wrong to include age within the scope of this general principle, on the basis that the vast majority of EU member states had not prohibited age discrimination before the coming into force of Directive 2000/78/EC. The argument was also made that it was premature for the Court to treat age as broadly equivalent to the other non-discrimination grounds, on the basis that age discrimination was a new and uncertain area of law.<sup>21</sup>

However, in its subsequent judgments in the cases of *Bartsch*<sup>22</sup> and *Kücükdeveci*,<sup>23</sup> the Court strongly reaffirmed the approach it adopted in *Mangold*. Together, these three judgments have clarified the relationship that exists between the 2000 Directives, the general principle of equal treatment and the provisions of the EU Charter of Fundamental Rights. Furthermore, the development of the Court’s reasoning across all three judgments has answered many of the concerns raised by critics of the original *Mangold* decision.

### 1.3 Mangold Affirmed – The Bartsch and Küçükdeveci Judgments

*Bartsch* concerned an application by Mrs Bartsch for a survivor’s pension following the death of her husband. According to the rules of the employer’s pension fund, no survivor’s pension would be paid out if the surviving spouse was more than 15 years younger than the deceased former employee, a provision which was compatible with the relevant domestic law. Mrs Bartsch was 21 years younger than her husband and therefore was refused payment. She challenged this on the basis that it constituted age discrimination, and the German courts referred the matter to the CJEU. Significantly, Mrs Bartsch’s husband had died before the transposition period of the Directive had expired in 2006. Therefore, the age discrimination provisions of the Directive were not directly applicable to this situation, as was the case in *Mangold*. As a result, the key issue that the CJEU had to address was whether the discriminatory law in question was incompatible with the general principle of equal treatment as recognised by the Court in *Mangold*, and if so whether the national courts were obliged to set it aside.

In her opinion in this case, Sharpston AG argued that the age discrimination provisions of Directive 2000/78/EC constituted ‘detailed legislative intervention’ which was intended to give expression to a new and more developed

<sup>18</sup> The former President of the German Republic and President of the German Constitutional Court, Roman Herzog, argued that it was a ‘fabrication’ on the part of the Court to treat age discrimination as contained within the general principle of equal treatment, on the basis that age discrimination was not treated as linked to the equality principle in the vast majority of the constitutional traditions of the member states, or in any international human rights treaty. See R. Herzog and L. Gerken, ‘Stoppt den Europäischen Gerichtshof’, *Frankfurter Allgemeine Zeitung*, 8 September 2008; (in English translation) ‘Stop the European Court of Justice’, *EU Observer*, 10<sup>th</sup> September 2008. See also L. Gerken et al., *Mangold als ausbrechender Rechtsakt* (München: Sellier, 2009).

<sup>19</sup> K. Riesenhuber, ‘Case Note’ (2007) *European Review of Contract Law* 62, 68.

<sup>20</sup> Bundesverfassungsgericht [2010], BVerfGE 126, 286. An English translation of this judgment is available at [www.bundesverfassungsgericht.de/entscheidungen/rs20100706\\_2bvr266106en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html) (last accessed 14 July 2012).

<sup>21</sup> See the opinion of Sharpston AG in Case C-227/04, *Lindorfer* [2007] ECR I-06767, [55]. See also the earlier opinion of Jacobs AG in the same case, delivered on 27 October 2005, [84]-[91].

<sup>22</sup> Case C-427/06, *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] ECR I-7245.

<sup>23</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG*, [2010] ECR I-365.

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understanding of the general principle of equal treatment.<sup>24</sup> In other words, she argued that the principle of equal treatment was an expansive concept, whose content was capable of evolving in response to changing social and moral attitudes. In her view, the CJEU in *Mangold* had thus been correct to treat the principle of non-discrimination on the grounds of age as an aspect of this general principle of equal treatment, as an emerging consensus now exists that age discrimination should be unlawful.

Sharpston AG then proceeded to argue that national legislation enacted to implement or give effect to EU law, or to take advantage of a derogation permitted under EU law, should be required in line with the *Mangold* judgment to comply with this general principle of equal treatment even when the detailed provisions set out in the Directive were not yet in force. She justified this on the basis that such laws could be said to come within the substantive scope of EU law and therefore could be required to conform to its fundamental norms, including the general principle of equal treatment. In her view, the national legislation at issue in *Mangold* was an example of a law that came within the substantive scope of EU law, as it had been initially enacted to implement the provisions of Directive 1999/70/EC concerning the framework agreement on fixed-term work.<sup>25</sup> However, national laws which at the date of enactment remained outside the scope of EU law could not be required to comply with the general principle, as was the case with the laws governing survivors' pensions at issue in *Bartsch*.

In its judgment, the CJEU agreed with this line of analysis. It concluded that the allegedly discriminatory treatment in question in this case had 'no link with Community law', in contrast with the legislation at issue in *Mangold*, which was linked to the implementation of Directive 1999/70/EC. Therefore, in *Bartsch*, the Court confirmed the correctness of its approach in *Mangold*, while also clarifying that the obligation on national courts to set aside domestic laws that conflict with the general principle of equal treatment was confined to matters that came within the scope of EU law at the relevant date in question.<sup>26</sup>

The CJEU subsequently developed its reasoning further in the important case of *Kücükdeveci*.<sup>27</sup> This reference from the Higher Labour Court of Düsseldorf concerned the second sentence of Paragraph 622 (2) of the German Civil Code (the *Bürgerliches Gesetzbuch*, the BGB), which provided that periods of work under the age of 25 would not be taken into account in calculating minimum notice periods for termination of employment, which were normally based on length of service. In this specific case, the claimant, Ms Kücükdeveci, had worked for her employers for ten years since she was 18 years of age, but when she was dismissed, the employer calculated the notice period as if she had three years' length of employment. Ms Kücükdeveci had been dismissed on the 19<sup>th</sup> December 2006, by which time the time limit within which Germany had to implement the age discrimination provisions of Directive 2000/78/EC had expired (unlike the situation in *Mangold* and *Bartsch*). Therefore, the referring court wished to know whether this cut-off point of 25 years was incompatible with the general principle of equal treatment and/or the age discrimination provisions of Directive 2000/78/EC.

Six member states intervened in this case to argue that the Court's approach in *Mangold* was mistaken and that the principle of equal treatment should not be applied in this type of age discrimination claim which involved a 'horizontal' employment contract between two private persons, namely Ms Kücükdeveci and her employer. In contrast, the Commission intervened in support of *Mangold*. Bot AG in his opinion also supported the position the Court had adopted in the earlier case. In his view, the 'primary purpose' of Directive 2000/78/EC was to give effect to

<sup>24</sup> At paragraph 58 of her Opinion in *Bartsch*, Sharpston AG commented that '[I]t is precisely because the general principle of equality has now been recognised also to include equality of treatment irrespective of age that an enabling legislative provision such as Article 13 TEC becomes necessary and is duly used as the basis' for legislation in the form of the Directive.

<sup>25</sup> OJ 1999 L175/43.

<sup>26</sup> The Court had previously indicated in its judgment in Case C-13/05, *Chacón Navas* [2006] ECR I-6467, that the general principle of equal treatment was only binding on member states 'where the national situation at issue in the main proceedings falls within the scope of Community law': see [56].

<sup>27</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

the general principle of equal treatment: the provisions of the Directive should therefore take effect and be applied in every situation which came within the scope of EU law.<sup>28</sup>

In its judgment, the CJEU decisively affirmed the correctness of the *Mangold* doctrine as re-interpreted and clarified in *Bartsch*. The Court reiterated its finding in *Mangold* that national courts were obliged to disapply national legislation which was incompatible with the general principle of equal treatment. It made clear that national courts could do this on their own initiative, independently of any use they chose to make of the reference procedure. It also confirmed that this obligation to set aside conflicting national laws applied in the context of horizontal relationships between private parties, but only in situations which came within the scope of EU law in line with its judgment in *Bartsch*.<sup>29</sup>

Applying this approach to the specific facts of this case, the Court ruled that the employment relationship between Ms Küçükdeveci and her employer came within the scope of EU law, and specifically within the scope of Directive 2000/78/EC. As a result, the Court concluded that the national courts were obliged to disapply the provisions of the German Civil Code governing notice periods insofar as they were incompatible with the requirements of the Directive. The Court then concluded that the exclusion of periods of work undertaken by employees under the age of 25 from the calculation of notice periods constituted a difference of treatment on the grounds of age. The Court considered that this measure had been introduced to further a legitimate aim, namely to encourage the hiring of younger workers by making it easier for employers to dismiss them if necessary. However, the age limit of 25 could be applied to all employees, regardless of their age or the length of time they had already worked at the time of their dismissal. The Court considered that this went beyond what was necessary to achieve the legitimate aim in question. As a result, the relevant provisions of Paragraph 622 (2) of the German Civil Code were held to be incompatible with the Directive and had to be set aside by the German courts in adjudicating Ms Küçükdeveci's claim for wrongful dismissal.

The *Küçükdeveci* judgment thus confirmed that national laws which relate to employment and occupation must either be capable of being applied in conformity with the general principle of equal treatment and the requirements of the 2000 Directives, or else be set aside by national courts.<sup>30</sup> This obligation applies even in situations where a 'horizontal' dispute between two private parties is at issue.<sup>31</sup>

## 1.4 The Relationship between the 2000 Directives, the General Principle of Equal Treatment and the EU Charter of Fundamental Rights

*Küçükdeveci* is also significant for what the Court had to say about the status of Directive 2000/78/EC. The Court confirmed that the specific provisions of this Directive should be read as giving expression to the principle of equal treatment: in the words of Bot AG, an 'indissociable link' exists between the provisions of the Directive and the

<sup>28</sup> Bot AG also suggested that the age discrimination provisions of 2000/78/EC should be given 'horizontal direct effect', i.e. that they should be interpreted as allowing Ms Küçükdeveci to rely directly on their provisions in bringing a legal action against her employer. However, in its subsequent judgment, the Court did not adopt this approach. On this point, see now Case C-282/10, *Dominguez v Centre Informatique du Centre Ouest Atlantique, Préfet de la région Centre*, Judgment of the Court (Grand Chamber) 24 January 2012.

<sup>29</sup> *Küçükdeveci*, [23].

<sup>30</sup> Applying the logic of *Küçükdeveci*, it appears as if national laws which do not come within the scope of the Directive but nevertheless come within the scope of other elements of EU law may also be set aside if they are incompatible with the general principle of equal treatment: this aspect of the judgment remains to be developed in future case-law.

<sup>31</sup> See F. Fontanelli, 'Some Reflections on the Choices of the European Court of Justice in the *Küçükdeveci* Preliminary Ruling' (2010) 2(2) *Perspectives on Federalism* 15-23, available at [http://www.on-federalism.eu/attachments/072\\_download.pdf](http://www.on-federalism.eu/attachments/072_download.pdf) (last accessed 10 July 2012).

principle of equal treatment. Furthermore, the Court took the view that this general principle should be the 'basis' for any examination of the effect of the Directive's provisions.<sup>32</sup>

In other words, the Court has concluded in line with its approach in *Mangold* that the specific provisions of Directive 2000/78/EC had to be interpreted and applied with reference to the general principle of equal treatment, which in turn is derived from and gives effect to the right to equality and non-discrimination that is embedded in international human rights law and the constitutional traditions of the member states.<sup>33</sup> In the subsequent case of *Runevič-Vardyn*,<sup>34</sup> the Court confirmed that the same logic applied in respect of the provisions of Directive 2000/43/EC.

This interpretative approach has a firm basis in the text of both Directives. The recitals to both the 2000 Directives make clear they are intended to further the commitment of the EU to the 'values of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.<sup>35</sup> More specifically, the recitals to both Directives acknowledge that the right to equality before the law and protection against discrimination constitutes a 'universal right' which is protected by all the major UN human rights treaties and by the ECHR.<sup>36</sup> The recitals also make clear that the operative parts of both Directives are designed to extend existing protection against discrimination and to ensure greater respect for 'fundamental rights', while Directive 2000/43/EC is expressly stated to 'implement the principle of equal treatment' between persons irrespective of racial or ethnic origin.

The Court in *Kücükdeveci* also took the additional step of linking the approach it had adopted in *Mangold* to the provisions of Article 21 of the EU Charter of Fundamental Rights, which provides that discrimination on the grounds of age along with other 'suspect' grounds should be prohibited.<sup>37</sup> This is an important point: now that the Charter has the same legal status as the EU treaties themselves, Article 21 provides a clear textual basis for the Court's finding that the general principle of equal treatment extends to cover age along with the other non-discrimination grounds.

Subsequent judgments have confirmed that the doctrine set out in *Mangold* as clarified in *Bartsch* and *Kücükdeveci* represents good law. For example, in the case of *Hennigs*,<sup>38</sup> the Court stated that it had 'recognised the existence of a prohibition of discrimination on grounds of age which must be regarded as a general principle of European Union law and was given specific expression by Directive 2000/78/EC in the field of employment and occupation': however, it also expressly noted that 'the prohibition of all discrimination inter alia on grounds of age appears in Article 21 of the Charter...'.<sup>39</sup> In the case of *Runevič-Vardyn*, the Court confirmed that the provisions of Directive 2000/43/EC should also be read with reference to the provisions of Article 21.<sup>40</sup>

<sup>32</sup> *Kücükdeveci*, [27].

<sup>33</sup> *Kücükdeveci*, [21].

<sup>34</sup> Case C-391/09, *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija*, Judgment of the Court (Second Chamber) 12 May 2011, [43].

<sup>35</sup> Article 2 TEU describes these as the 'foundational values' of the European Union.

<sup>36</sup> Recital 4 to Directive 2000/78/EC also makes reference to Convention No. 111 of the International Labour Organisation (ILO), which prohibits discrimination in employment and occupation.

<sup>37</sup> Bot AG placed considerable emphasis on the provisions of Article 21 of the Charter in his opinion in *Kücükdeveci*: see [76].

<sup>38</sup> Case C-297/10, *Hennigs v Eisenbahn-Bundesamt/ Land Berlin v Mai*, Judgment of the Court (Second Chamber) 8 September 2011.

<sup>39</sup> *Hennings*, [47]. See also Case C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011, [38].

<sup>40</sup> Case C-391/09, *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija*, Judgment of the Court (Second Chamber) 12 May 2011, [43].

## 1.5 The Principles Applied by the CJEU in Interpreting the Provisions of the 2000 Directives

The case-law of the Court has thus established that the primary purpose and objective of the 2000 Directives is to give effect to the principle of equal treatment and to ensure that individuals are protected against discrimination in line with Article 21 of the Charter. Furthermore, the Court has made it clear that the Directives should not be read in a narrow or excessively formalistic manner. In the case of *Coleman*,<sup>41</sup> the Court expressly rejected arguments put forward by the UK, Italy and the Netherlands that the provisions of Directive 2000/78/EC should be given a narrow interpretation. It chose instead to emphasise that the Directive had to be interpreted by reference to its goal to combat discrimination and promote equality of opportunity.<sup>42</sup>

Any other approach would be difficult to reconcile with the importance of the general principle of equal treatment within the European legal order and the provisions of the Charter. It would also be incompatible with some of the other objectives that the Directives are designed to achieve. As the Court emphasised its judgment in the *Coleman* case, the recitals to both Directives make it clear that extending protection against discrimination advances other important Community objectives, by promoting equal opportunity for all in employment and occupation, contributing ‘strongly to the full participation of citizens in economic, cultural and social life’ and fostering the necessary conditions for a ‘socially inclusive labour market’.<sup>43</sup>

The CJEU has therefore determined that the Directives should not be read as simply setting minimum standards. Instead, their provisions should be interpreted in a way that ensures they provide effective and substantive protection against discrimination, as the Court has made clear in the cases of *Firma Feryn*,<sup>44</sup> *Coleman*<sup>45</sup> and *Meister*,<sup>46</sup> as discussed further below in Part 5. The Court has also expressly stated that the scope of the Directives cannot be defined restrictively.<sup>47</sup> Furthermore, their provisions must be read together in a holistic and purposive manner, taking into account that they are designed to give expression to a fundamental norm of the EU legal order and to enhance respect for the basic right to equality and non-discrimination. In line with this approach, exceptions to the principle of equal treatment must be strictly and narrowly interpreted, as the Court made clear in the cases of *Petersen* and *Prigge*.<sup>48</sup>

As is the case throughout the substantive scope of EU law, the full range of rights protected by the Charter also need to be taken into account in interpreting the Directives. In *Fuchs*, the Court said that the prohibition of discrimination on grounds of age set out in Directive 2000/78/EC ‘must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter’,<sup>49</sup> while in *Hennigs* the Court also took into account the right to

<sup>41</sup> Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603, [47]-[48].

<sup>42</sup> See also Case C-391/09, *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija*, Judgment of the Court (Second Chamber) 12 May 2011, [43].

<sup>43</sup> Recital 8 of Directive 2000/43/EC; Recitals 6-9 of Directive 2000/78/EC.

<sup>44</sup> Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

<sup>45</sup> Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603.

<sup>46</sup> Case C-415/10, *Meister v Speech Design Carrier Systems GmbH*, Judgment of the Court (Second Chamber) 19 April 2012.

<sup>47</sup> Case C-391/09, *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija*, Judgment of the Court (Second Chamber) 12 May 2011, [43]. See also Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

<sup>48</sup> Case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47, [60]; Case C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011, [56], [72]. See also (in the context of gender equality) Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v Conseil des ministres* [2011] 2 CMLR 38.

<sup>49</sup> Joined Cases C-159/10 and 160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011, [62]. See also Case C-141/11, *Hörnfeldt v Posten Meddelande AB*, Judgment of the Court (Second Chamber) 5 July 2012, [37].



engage in collective bargaining set out in Article 28 of the Charter.<sup>50</sup> The other secondary objectives set out in the Recitals of the Directives are also relevant: for example, again in the case of *Fuchs*, the Court took account of the aim to promote diversity in the workforce as set out in Recital 25 of Directive 2000/78/EC and the objective of enhancing the ‘potential and quality of life’ of workers as set out in Recitals 8, 9 and 11 of the same Directive.<sup>51</sup>

In addition, the case-law of the Court in the field of gender equality will also be a significant point of reference, as the *Mangold* and *Kücükdeveci* judgments have confirmed that the 2000 Directives and EU gender equality law share a common goal, namely to give expression to the general principle of treatment. In *Mangold*, *Petersen* and *Prigge*, the CJEU interpreted the provisions of Directive 2000/78/EC by reference to the interpretation it had given to analogous provisions of the EU sex discrimination directives.<sup>52</sup> In its judgments in the cases of *Maruko* and *Römer*, the Court similarly referred to its case-law on sex discrimination in concluding that benefits paid under an occupational pension scheme constituted ‘pay’ and therefore came within the scope of Directive 2000/78/EC.<sup>53</sup>

It also appears as if the provisions of the Directives also need to be interpreted with reference to the values of human dignity and personal autonomy. These are the values which underpin the general principle of equal treatment and the provisions of the Charter. As Maduro AG stated in his opinion in the *Coleman* case, they are also the values which appear to animate the enabling provisions of Article 13 TEC (now Article 19 TFEU).<sup>54</sup> The case-law of the European Court of Human Rights on issues related to equality and non-discrimination will also be relevant, as may the jurisprudence of the European Committee on Social Rights, the UN human rights expert bodies and other authoritative legal bodies.<sup>55</sup>

In general, the *Mangold*, *Bartsch* and *Kücükdeveci* judgments have established that the 2000 Directives are to read as giving expression to the general principle of equal treatment. In turn, this requires the Directives to be applied in a purposive manner, to ensure they provide effective and substantive protection against discrimination across all the grounds covered by the 2000 Directives. This general interpretative approach is now embedded in the Court’s case-law, and has been applied in determining the scope of the Directives and how their substantive provisions should be applied across the different non-discrimination grounds.

<sup>50</sup> *Hennigs*, [52].

<sup>51</sup> *Fuchs*, [63].

<sup>52</sup> *Petersen*, [60]; *Prigge*, [56].

<sup>53</sup> Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-175; Case C-147/80, *Römer v Freie und Hansestadt Hamburg*, Judgment of the Court (Grand Chamber) 10 May 2011.

<sup>54</sup> *Coleman*, [7]-[8].

<sup>55</sup> See O. de Schutter, *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU Non-discrimination Directives – An Update* (Brussels: European Commission/MPG, 2011).

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## Part II

# The CJEU's Case-Law on the Scope of the 2000 Directives

Article 3 of Directive 2000/43/EC sets out its scope, which covers employment and occupation (and associated activities such as vocational training and membership of work-related organization/s), 'social protection, including social security and healthcare', 'social advantages', education and access to and supply of goods and services 'which are available to the public, including housing'. The scope of Directive 2000/78/EC is more limited, being confined to employment, occupation and associated activities. Article 3(2) of both Directives provide that they not cover differences of treatment based on nationality or the legal status of third-country nationals, while Article 3(3) of 2000/78/EC provides that its scope does not extend to 'payments of any kind made by a state scheme, including social security or social protection schemes'. Article 3(4) of the same Directive allows states to exempt their armed forces from the Directive's provisions in respect of age and disability.

As noted above, some of these provisions governing the scope of the Directives are not precisely defined. The case-law of the CJEU in the analogous field of gender equality provides detailed guidance as to what types of relationship come within the field of employment and occupation, and the Court in line with its general interpretative approach to the 2000 Directives has carried this case-law across and applied it across all of the 'new' non-discrimination grounds.<sup>56</sup> However, the scope of Directive 2000/43/EC, and in particular the question of how to define concepts such as 'disability', 'social advantages' and 'social protection', has given rise to new problems of interpretation. Also, the wording of some of the recitals to the 2000 Directives has generated some uncertainty as to their scope of application. For example, Recital 14 of Directive 2000/78/EC provides that 'this Directive shall be without prejudice to national provisions laying down retirement ages': in the case of *Palacios de la Villa*, the CJEU was asked whether this meant that national laws which permitted employers to set a compulsory retirement age for their employees did not come within the scope of the Directive's provisions. Similarly, Recital 22 to the same Directive states that its provisions are 'without prejudice to national laws on marital status and the benefits dependent thereon': in the case of *Maruko*, the CJEU was asked whether this meant that national laws regulating the payment of benefits arising under occupational pension schemes to spouses and other life partners came within its scope. (See Parts 2.1 and 2.2 for further discussion of these issues.)

The case-law of the Court has clarified many of these issues relating to the scope of the 2000 Directives. In its judgments, it has consistently given the Directives an expansive and purposive interpretation, as illustrated in particular by its decisions in the important cases of *Palacios de la Villa*,<sup>57</sup> *Maruko*<sup>58</sup> and *Römer*.<sup>59</sup> The Court has similarly confirmed that the aim of the 2000 Directives is to promote respect for the principle of equal treatment, and that this objective should be an important point of reference in determining their scope of application. However, the Court has also held that the scope of the 2000 Directives only extends to cover the grounds set out in Article 13 TEU (now Article 19 TFEU): the Directives give effect to the principle of equal treatment within these parameters, but not beyond.

## 2.1 Palacios de la Villa and National Retirement Ages

The *Palacios de la Villa* case concerned a reference by a Spanish court concerning the provisions of a national collective agreement, which established that employees in workplaces covered by the agreement would cease to be employed when they had reached 'normal retirement age', subject to the condition that they had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. Legislation had been introduced in 2005 which had permitted the inclusion of such compulsory retirement age provisions in collective agreements. This legislation had been enacted after an extensive discussion between the

<sup>56</sup> See e.g. *Maruko*, [46]-[48]; *Petersen*, [60]; *Prigge*, [56].

<sup>57</sup> Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007, [86].

<sup>58</sup> Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-175.

<sup>59</sup> Case C-147/80, *Römer v Freie und Hansestadt Hamburg*, Judgment of the Court (Grand Chamber) 10 May 2011.

Spanish government and the social partners about the potential impact of the abolition of retirement ages on the operation of the Spanish labour market. The Spanish court referred this issue to the Court, asking whether the age discrimination provisions of Directive 2000/78/EC should be interpreted as precluding national law such as the legislation at issue in this case.

Mazák AG suggested that the Court should adopt a ‘restrained’ approach in determining the scope of Directive 2000/78/EC in this context. In particular, Mazák AG suggested that the age discrimination provisions of the Directive should be interpreted as not applying to national rules governing retirement ages, on the basis that such laws involved a complex balancing of different factors and Recital 14 to the Directive stated that its provisions were ‘without prejudice’ to national retirement ages.<sup>60</sup> He argued that ‘it would... be very problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member States...’<sup>61</sup>

However, the Court did not follow this approach in its judgment. Instead, it decided that the Directive was applicable in this situation, on the basis that the legislation in question affected the employment relationship between employers and workers and therefore established rules relating to employment. In reaching this decision, the Court emphasised that the Directive intended to provide effective protection against discrimination. It also clarified that Recital 14 ‘merely states that the directive does not affect the competence of the Member States to determine retirement age’ (apparently meaning for the purposes of social security law), which thus did not preclude the application of the Directive to national laws governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.<sup>62</sup>

This meant that the Spanish legislation at issue in this case was deemed to come within the scope of the Directive. The Court went on to find that the legislation was not incompatible with the age discrimination provisions of the Directive, on the basis that it had been introduced to give effect to a legitimate aim and the means used to achieve that aim had been proportionate and necessary. (See below for more discussion of this important element of the Court’s judgment.) However, the Court nevertheless implicitly rejected the argument made by Mazák AG that the uncertain status of age discrimination justified giving a narrow interpretation to the scope of the Directive in this context.

Subsequently, a similar approach was applied in the retirement ages cases of *Age Concern*<sup>63</sup> and *Rosenblatt*,<sup>64</sup> while in the case of *Wolf*, the CJEU held that national legislation setting a maximum recruitment age for firemen came within the scope of Directive 2000/78/EC, on the basis that it established rules relating to employment.<sup>65</sup> Legislation governing the employment of dentists was held to come within the scope of the Directive in *Petersen*, as was national legislation governing the employment conditions of staff working in public university in *Hütter*<sup>66</sup> and *Georgiev*.<sup>67</sup> In *Prigge*, the Court also confirmed that the provisions of the Directive applied to collective agreements

<sup>60</sup> *Palacios de la Villa*, Opinion of Mazák AG, [61]-[65].

<sup>61</sup> *Ibid*, [63]-[65].

<sup>62</sup> *Palacios de la Villa*, [44].

<sup>63</sup> Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)* [2009] ECR I-1569. In its judgment in this case, the Court appeared to leave open the possibility that national legislation which imposed a ‘mandatory scheme of automatic retirement’ as distinct from enabling employers to terminate the employment relationship at a particular age might fall outside the scope of the Directive: see [27]. However, it is difficult to see how such a ‘mandatory scheme’ could be interpreted as not coming within the scope of employment and occupation.

<sup>64</sup> Case C-45/09, *Rosenblatt v Oellerking Gebäudereinigungsges mbH*, Judgment of the Court (Grand Chamber) 12 October 2010. [2011] 1 CMLR 32.

<sup>65</sup> Case C-229/08, *Wolf v Stadt Frankfurt am Main*, Judgment of the Court (Grand Chamber) 12<sup>th</sup> January 2010, [27].

<sup>66</sup> Case C-88/08, *Hütter v Technische Universität Graz* [2009] ECR I-5325.

<sup>67</sup> Joined Cases C-250/09 and C-268/09, *Georgiev v Technicheski universitet – Sofia, filial Plovdiv* [2010] ECR I-11869.

concluded between the social partners.<sup>68</sup> The Court has thus clearly indicated that it will give a relatively expansive interpretation to the scope of the 2000 Directives, in line with its overall interpretative approach in this context.

## 2.2 Maruko, Römer and Benefits Linked to Employment

The Court took a similar approach in the important case of *Maruko*.<sup>69</sup> This case concerned the entitlement of Mr Maruko to a widower's pension, which was part of the survivor's benefits provided by the compulsory occupational pension scheme of which his deceased registered same-sex life partner had been a member. The collective agreement governing the pension scheme provided that this benefit could only be paid out to married spouses of the deceased, not to life partners. Mr Maruko alleged that this constituted discrimination on the basis of sexual orientation contrary to the provisions of Directive 2000/78/EC, on the basis that same-sex partners could become registered life partners but were not allowed to marry and thus were not entitled to receive this benefit.

The collective agreement which governed the occupational pension scheme was regulated by statute. The referring court therefore asked *inter alia* whether the benefit at issue in this case should be treated as a payment made by a 'state scheme', which in the light of Article 3(3) of the Directive would exclude it from the scope of the Directive, or whether instead it should be construed as a form of 'pay', which would mean it related to employment and therefore came within the scope of Directive 2000/78/EC. The Court was therefore called upon to determine the important issue of whether a benefit paid under an occupational pension scheme which was regulated by statute came within the scope of Directive 2000/78/EC. In so doing, it also had to take into account Recital 22 to the Directive, which provided that its provisions were 'without prejudice to national laws on marital status and the benefits dependent thereon'.

In its judgment, the Court concluded that statutory social security schemes which provided benefits that could not be treated as equivalent to 'pay' were clearly excluded from the scope of the Directive. However, drawing once again on its case-law on gender equality, the Court held that benefits paid under an occupational pension scheme were part of the consideration that employees received from their employer in return for their service, and therefore were equivalent to 'pay'. The fact that the benefit in this case was paid to a surviving spouse and not to the employee themselves did not change the situation, as the benefit accrued by reason of the employment contract that existed between the employer and the employee.

In general, the Court concluded that benefits closely linked to the existence of a specific employment relationship would usually come within the scope of the Directive, in particular if the benefit was paid to particular categories of workers, was directly related to the period of service concerned and its amount was calculated by reference to the final salary at issue. In this case, the fact that the collective agreement that regulated the pension scheme was regulated by a statute which made membership in the scheme compulsory did not change the situation: the benefits provided by the pension scheme were designed to supplement the social security benefits provided directly by the state, funded exclusively by the employer and the employees as a group, and paid out on the basis of length of service.

Finally, the Court read Recital 22 in a similar manner as it had read Recital 14 in *Palacios de la Villa*: states retained full competency to determine marital status, but had to exercise this competency in a manner that was compatible with their obligation not to discriminate.<sup>70</sup> As such, the Court concluded that the survivor's benefit in question

<sup>68</sup> Case C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011, [48].

<sup>69</sup> Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-175.

<sup>70</sup> Directive 2000/78/EC contains no substantive provision exempting national rules governing marital status from its general non-discrimination requirements.

came within the scope of Directive 2000/778/EC. It went on to hold that the prohibition of direct discrimination on the grounds of sexual orientation set out in the Directive precluded national laws from subjecting life partners to less favourable treatment by preventing them from obtaining a benefit that was available to spouses, if surviving life partners were in a comparable situation as spouses as regards the purpose and function of the benefit at issue.

In *Maruko*, the Court thus applied its general interpretative approach again, and drew on its existing gender equality jurisprudence to give an expansive reading of the scope of Directive 2000/78/EC. It applied similar logic in the subsequent case of *Römer*.<sup>71</sup> This was another reference from a German court. It concerned a claim by Mr Römer that he had been subject to direct discrimination on the grounds of sexual orientation on the basis that, as someone in a life partnership, he had received a lower supplementary pension benefit from his employer (the City of Hamburg) than a married person would have done. The Hamburg Labour Court referred the issue to the CJEU, asking *inter alia* whether supplementary pension benefits paid by a state scheme to former employees fell within the scope of the Directive. The Court followed its approach in *Maruko* and held that such benefits did fall within its scope, again on the basis that they constituted a form of pay.

The Court has been thus consistent in how it has applied its general interpretative approach in determining the scope of the 2000 Directives. Its case-law on gender equality serves as a major point of reference. So too is the Court's reading of the Directives as directed towards ensuring effective protection against discrimination. This has encouraged the Court to avoid giving an overly narrow interpretation to the scope of the Directives.

### 2.3 Runevič-Vardyn and the Limits to the Scope of Directive 2000/43/EC

However, this does not mean that no limits exist to the scope of the 2000 Directives. In *Runevič-Vardyn*, the CJEU held that the scope of Directive 2000/43/EC did not extend to cover the performance by public authorities of all their public functions, notwithstanding the wide scope of application of the Directive and the manner in which its provisions apply to 'social advantages' and the provision of 'services'.

This case concerned a refusal by the municipal authorities of Vilnius to amend the surnames and forenames of the two applicants in this case as they appeared on certificates of civil status issued to them so as to reflect the official Polish spelling of their names. (The first applicant was a Lithuanian national but belonged to the Polish ethnic minority in that state: the second, her husband, was a Polish national.) The Lithuanian court asked the CJEU *inter alia* whether national rules which required names written on certificates of civil status to be spelt using only the characters of the official national language (Lithuanian) were prohibited by Directive 2000/43/EC on the ground that they indirectly discriminated against persons of Polish ethnicity.

In its judgment, the Court explicitly confirmed that the scope of Directive 2000/43/EC should not be given a narrow or restrictive interpretation:

43...in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, the scope of that directive cannot be defined restrictively.<sup>72</sup>

<sup>71</sup> Case C-147/80, *Römer v Freie und Hansestadt Hamburg*, Judgment of the Court (Grand Chamber) 10 May 2011.

<sup>72</sup> Case C-391/09, *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija*, Judgment of the Court (Second Chamber) 12 May 2011, [43].

However, the Court then went on to conclude that national rules governing how names were written on official documents did not come within the scope of the Directive. In arriving at this conclusion, the Court agreed with Jääskinen AG's analysis that the field of application of Directive 2000/43/EC was exhaustively set out in Article 3 of the Directive, and that the national rules in question could not be said to come within any of the areas specified there. In particular, in the eyes of both Jääskinen AG and the Court, the application of the national rules in question could not be said to come within the concept of a 'service'.<sup>73</sup>

The Court also noted that in adopting the text of Directive 2000/43/EC the Council had rejected an amendment proposed by the European Parliament which would have extended the scope of the Directive to cover 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions'.<sup>74</sup> This amendment would have covered the situation at issue in this case. However, its rejection by the Council was cited by the Court as grounds for concluding that the scope of the Directive did not extend to cover the performance of public functions which could not be construed as involving the provision of a service.

This judgment is important, in that it highlights the existence of a significant limitation on the scope of Directive 2000/43/EC. The exercise of public bodies of their public functions will not be subject to its provisions, unless they can be classified as involving the supply of services to the public in line with the provisions of Article 3(1) of the Directive.

This limit on the scope of the Directive is likely to pose problems for the CJEU in the future. It can be difficult to draw a clear distinction between service provision and the performance of public functions. A similar distinction between public functions and service provision used to exist in British law before it was removed by national legislation in 2000: this generated a highly complex case-law, which was widely criticised as being artificial, incoherent and unconvincing.<sup>75</sup>

Particular difficulties are likely to arise in the context of housing. Article 3(1)(h) explicitly states that the provision of housing to the public comes within the scope of the Directive. However, public bodies exercise many functions which relate to housing, and it is not clear which of these functions will come within the scope of the Directive. This was illustrated by the controversy that surrounded measures taken by the French government in 2010 to evict Roma living in unauthorised settlements and to ensure their return to Romania.<sup>76</sup> It is possible to construct an argument that this state action was related to 'access to and supply of' housing, taking into account the Court's statement in *Runevič-Vardyn* that the scope of Directive 2000/43/EC cannot be given a narrow interpretation). However, it is not clear whether the Court will view such measures as coming within the scope of the Directive, and it remains to be seen how the Court will further develop its case-law in this area.

<sup>73</sup> In his Opinion in *Runevič-Vardyn*, Jääskinen AG argued that the issuing of certificates of civil status in accordance with national law could not be considered to be a 'service' when compared to the examples of service provision which had been referred to in the travaux préparatoires of the Directive. In response to the argument made by the applicants that the mismatch between how their names were written in Polish spelling and how they appeared on official documentation caused them difficulties when it came to accessing goods and services, he took the view that any discrimination that had taken place in this regard was not causally linked to the issuing of the certificates of civil status as such. See [54]-[64].

<sup>74</sup> *Runevič-Vardyn*, [44]-[46].

<sup>75</sup> For example, the provision of advice on tax liability to individuals by state revenue bodies was classified as a form of service provision, while the assessment and collection of the actual taxes was not: see *Savjani v Revenue Commissioners* [1981] QB 458. For criticism of the distinction between service provision and the performance of public functions, see Baroness Hale, 'The Quest for Equal Treatment' (2005) *Public Law* 571-585, 575; A. McColgan, *Discrimination Law* (2<sup>nd</sup> ed.) (Oxford: Hart, 2005) 271-280.

<sup>76</sup> See BBC News, 'EU Warns France of Action Over Roma', 29 September 2010, at <http://www.bbc.co.uk/news/world-europe-11437361> (last accessed 1 July 2012).



## 2.4 Chacón Navas and the Limits to the Scope of Directive 2000/78/EC

The limits to the scope of Directive 2000/78/EC were analysed by the Court in its judgment in the *Chacón Navas* case.<sup>77</sup> This case concerned the dismissal of Ms Chacón Navas by her employer after she had been absent from work for a period of eight months due to illness. The employer acknowledged that the dismissal was unlawful and offered her compensation. Ms Chacón Navas nevertheless applied to be reinstated to her post, on the basis that the dismissal should be declared to be void under Spanish law as she had been discriminated against on the grounds that she had been ill. Spanish law did not treat sickness as a ground of discrimination. However, the Spanish court asked the CJEU i) whether workers who were dismissed because of sickness came within the scope of protection against disability discrimination set out under Directive 2000/78/EC, and ii) in the alternative, if sickness did not fall within the protective framework laid down in respect of disability, whether it could be treated as a ground of discrimination coming within the scope of the Directive in its own right. In making the reference, the Spanish court noted that a causal relationship often existed between sickness and disability, and suggested that individuals could only be effectively protected against disability discrimination if they were also protected against discrimination on the basis of illness.

In its judgment, the Court noted that the concept of 'disability' was not defined in the text of the Directive. It then stated in line with its case-law in other contexts that the provisions of the Directive had to be given an autonomous and uniform interpretation:

40. It follows from the need for uniform application of [Union] law...that a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question...

Applying this approach to the concept of disability, the Court held it must be understood as referring to a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.<sup>78</sup> However, following the approach of Geelhoed AG in his opinion in this case, the Court went on to note the absence of any reference to sickness in the text of the Directive and the emphasis placed in the Recitals and the operative provisions of the Directive on accommodating the needs of persons with disabilities at the workplace. It therefore concluded that the Directive was intended to cover situations in which it was probable that participation in working life would be hindered over a 'long period of time', not to protect employees from the moment they developed any type of sickness.<sup>79</sup>

The Court consequently held that the prohibition on disability discrimination set out in Articles 2(1) and 3(1)(c) of Directive 2000/78/EC should be read as precluding dismissal on grounds of disability which was not justified on the basis that the worker was not competent, capable and available to perform the 'essential functions' of his or her post, taking into account the requirement imposed on employers under Article 5 of the Directive to provide reasonable accommodation for employees with a disability. However, this protection did not extend to cover dismissal based on sickness which did not take the form of a 'physical, mental or psychological impairment' that hindered an individual's participation in professional life for a period of a sustained duration.

The Court also held that the scope of Directive 2000/78/EC could not be extended to cover sickness as a separate and distinct ground of discrimination. It concluded that Article 13 TEC (now Article 19 TFEU) did not confer competency on the (then) Community legislator (now the Union legislator) to legislate in respect of this discrimination ground,

<sup>77</sup> Case C-13/05, *Chacón Navas v Euresit Colectividades SA* [2006] ECR I-6467.

<sup>78</sup> *Ibid.*, [43].

<sup>79</sup> [45]-[46].

while the existence of the general principle of equal treatment could not by itself justify an extension of the scope of the Directive to cover sickness, even on the basis of an analogy with the disability ground.<sup>80</sup>

This judgment is significant for how it has clarified the scope of the prohibition on disability discrimination set out in the Directive: it extends to cover persons with ‘impairments’ which hinder their ability to participate in the workplace for a period of extended duration, but will not cover short-term illness. National law must protect individuals who come within this ‘autonomous and uniform’ definition of disability against discrimination on this ground, and must also require employers to make reasonable accommodation for their needs in the workplace. If national legislation adopts a narrower definition of disability, then it will not be in conformity with the Directive.

However, the definition set out by the Court in *Chacón Navas* has been criticised for adopting a ‘medical’ model of disability by focusing exclusively on the nature and extent of an individual’s impairment. Critics have suggested that the Court should instead have embraced the ‘social model’ of disability, which views disability as arising from the interaction of individual impairments with other barriers, such as the physical layout of workplaces or the negative attitudes of employers.<sup>81</sup> Expert opinion increasingly favours this mode of defining disability, as it reflects the reality of how social attitudes serve to ‘construct’ many of the obstacles faced by persons with disabilities in their daily lives.<sup>82</sup> It also is less restrictive than the medical model, which often fails to provide protection for persons with relatively minor impairments who nevertheless suffer discrimination as a result of social prejudices or a failure to make minor adjustments. Article 1 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which is the first UN human rights treaty ‘concluded’ by the EU, provides that ‘[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’. It remains to be seen whether in future cases the Court applies the definition of disability it adopted in *Chacón Navas* with reference to this provision of the CRPD.<sup>83</sup>

It also remains to be seen which long-term illnesses which impair the ability of individuals to participate in working life will come within the scope of the definition of disability set out in *Chacón Navas*. The Court made clear that an illness of limited duration did not come within the scope of protection set out in the Directive. However, the judgment left open the possibility that a long-term illness such as cancer or epilepsy may come within the scope of the Directive.<sup>84</sup> Future case-law may also provide further clarification as to what constitutes a long-term impairment.

The *Chacón Navas* judgment is also significant for how the CJEU made it clear that the provisions of the 2000 Directives cannot be extended to cover additional non-discrimination grounds which are not expressly included in their scope. It rejected the suggestion by the Spanish court that sickness could be seen as an analogous ground, and emphasised that Article 13 TEC only conferred competency upon the Community legislator to prohibit discrimination on the grounds specifically set out in its text. This places an important limit on the scope of the 2000 Directives. Their provisions cannot be stretched to cover other forms of discrimination.

<sup>80</sup> [56].

<sup>81</sup> See L. Waddington, ‘Case C-13/05, *Chacón Navas v. Eures Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006’ (2007) 44(2) *Common Market Law Review* 487-499.

<sup>82</sup> L. Waddington & A. Lawson, *Disability and Non-discrimination Law in the European Union*, Thematic Report of the European Network of Legal Experts in the Non-Discrimination Field (Brussels: European Commission/MPG, 2009), pp. 16-17.

<sup>83</sup> For further analysis, see L. Waddington, ‘The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences’ (2011) 18(4) *Maastricht Journal of European and Comparative Law*, 431-453.

<sup>84</sup> See L. Waddington and A. Lawson, *Disability and Non-discrimination Law in the European Union*, Thematic Report of the European Network of Legal Experts in the Non-Discrimination Field (Brussels: European Commission/MPG, 2009), at pp. 16-17.

This was confirmed in the Court's judgment in *Agafitei*.<sup>85</sup> This reference concerned a decision by the Romanian Constitutional Court which had placed limits on the remedies which courts could award in response to a finding that a group of judges had been subject to discrimination on the basis of socio-professional status by being paid less than prosecutors who performed work of equal value and status. This type of discrimination had been prohibited by the same legislative decree which transposed the provisions of Directives 2000/43/EC and 2000/78/EC into domestic law. As a result, another Romanian court asked the CJEU whether the judgment of the Constitutional Court was compatible with Article 15 of Directive 2000/43/EC and Article 17 of Directive 2000/78/EC, which require national authorities to provide effective remedies against discrimination. The CJEU concluded that the reference was inadmissible, on the basis that discrimination on socio-professional grounds fell outside the scope of both Directives. As in *Chacón Navas*, the Court took the view that the scope of the Directives was confined to the grounds listed in Article 1 of both Directives, and that neither Article 13 TEU or the new Article 19 TFEU provided a legal basis to combat discrimination based on socio-professional status.<sup>86</sup>

Similarly, in the case of *Kamberaj*, the CJEU confirmed that the scope of Directive 2000/43/EC did not cover discrimination based on nationality.<sup>87</sup> This case involved a claim by an Albanian national that a decision by an Italian local authority to refuse him housing benefit on the basis that its budget for granting such benefit to third-country nationals was exhausted was contrary to the provisions of this Directive. However, the Court confirmed that the Directive did not cover differences of treatment based on nationality or arising from the legal status of third-country nationals.<sup>88</sup>

The general principle of equal treatment may have a wider reach than the scope of the 2000 Directives. In addition, Article 21 of the Charter provides that discrimination based on the grounds of social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth shall be prohibited, in addition to the grounds covered by the 2000 Directives. As a result, national legislation enacted to implement or give effect to European Union law, or to take advantage of a permitted derogation, which discriminates on these 'additional' grounds may be vulnerable to being struck down on the basis that it is incompatible with the principle of equal treatment or the requirements of Article 21. However, the provisions of these Directives will not apply to discrimination based on these 'additional' grounds, which fall outside of their scope.

<sup>85</sup> Case C-310/10, *Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafitei*, Judgment of the Court (Fourth Chamber) 7 July 2011.

<sup>86</sup> *Ibid.* [34]-[35].

<sup>87</sup> Case C-571/10, *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)*, Judgment of the Court (Grand Chamber) 24 April 2012.

<sup>88</sup> [47]-[50].

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## Part III

# The Case-Law of the CJEU in Respect of the Operative Provisions of the 2000 Directives

The operative provisions of the 2000 Directives have a number of common provisions which apply across all the discrimination grounds which come within their scope. Direct discrimination, indirect discrimination and harassment are prohibited across all the different grounds. The provisions of both Directives which define what constitutes a genuine occupational requirement and govern positive action, burden of proof, remedies, the prohibition of victimisation and other areas of activity are also similar.<sup>89</sup>

Specific provisions also apply in respect of particular grounds. For example, Article 6(1) of Directive 2000/78/EC provides that less favourable treatment on the grounds of age can be objectively justified, which is not the case for the other grounds, while Article 5 requires employers to provide reasonable accommodation for persons with disabilities and Article 4(2) makes specific provision for organisations with an 'ethos based on religion or belief'.

The Court's case-law has clarified how many of these provisions should be interpreted and applied. In so doing, it has consistently applied the general interpretative approach outlined above. In particular, the Court has interpreted the text of the Directives as intended to give expression to the principle of equal treatment. Derogations from this principle have been read narrowly, and the Court has repeatedly emphasised that the purpose of the 2000 Directives is to provide effective protection against discrimination within the scope of their application.

However, at the time of writing, the CJEU has not been called upon to clarify how many of these provisions of the 2000 Directives should be interpreted and applied. Furthermore, the Court as of 30 August 2012 has issued no judgments and received no preliminary references that are linked to the ground of religion or belief, and has only issued two judgments in respect of the sexual orientation ground, two to the disability ground, and four to the grounds of racial or ethnic origin (of which two, *Runevič-Vardyn and Kamberaj*, related to the scope of the Directives rather than concerning the race ground directly, while a third, *Meister*, concerned the burden of proof provisions of the 2000 Directives and also invoked the grounds of age and sex - see below). In contrast, the Court has issued nineteen judgments that relate to the age ground, including the significant *Mangold*, *Bartsch* and *Kücükdeveci* cases already discussed above. In other words, the age ground has dominated the Court's jurisprudence thus far.<sup>90</sup> These trends are further analysed in Part 5 of this paper. For now, it should be noted that the Court's jurisprudence in respect of the operative provisions of the 2000 Directives is more developed in some areas than in others, on account of the pattern of references it has received from national courts.

### 3.1 Direct Discrimination

Article 2(2)(a) of both Directives define direct discrimination as occurring 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation' on any of the on-discrimination grounds. The equivalent provisions of the Equal Treatment Directive (originally Council Directive 76/207/EEC, now contained in the recast Directive 2006/54/EC) have been extensively interpreted and applied by the CJEU in its gender equality case-law.<sup>91</sup> The prohibition on direct discrimination contained in the 2000 Directives has been interpreted in a similar manner. As a result, where persons are subject to less favourable treatment for reasons which are directly linked to any of the non-discrimination grounds, this will violate the requirements of the 2000 Directives. A hostile intention to discriminate is not required. Furthermore, direct discrimination will be prohibited unless a specific exception set out in the text of the Directives applies to the situation: unlike the case with indirect discrimination, less favourable treatment cannot be shown to be objectively justified, except in the case of age where the special provisions of Article 6(1) of Directive 2000/78/EC apply (see below), or where the difference of

<sup>89</sup> For a general comparative overview of the provisions of the 2000 Directives, see M. Bell and L. Waddington, 'More Equal than Others: Distinguishing European Union Equality Directives?' (2001) 38(3) *Common Market Law Review* 587-611.

<sup>90</sup> D. Schiek, 'Age Discrimination before the Court of Justice – Conceptual and Theoretical issues' (2011) 48(3) *Common Market Law Review* 777-799.

<sup>91</sup> See in general P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 5<sup>th</sup> ed. (Oxford: OUP, 2011), pp. 895-908.

treatment in question can be justified on the basis that it is necessary to give effect to a genuine and determining occupational requirement, in line with the provisions of Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC.

In the case of *Maruko*, the CJEU provided valuable clarification as to what will constitute direct discrimination.<sup>92</sup> As previously discussed, this case concerned the surviving member of a registered same-sex life partnership, who had been denied a survivor's benefit that would have been available to the surviving member of a married couple. Under the German law in force at the time, same-sex couples were not permitted to get married, but could enter into a registered life partnership which granted them a status broadly equivalent to marriage. Both *Maruko* and the Commission argued that the refusal to grant the survivor's benefit in question to surviving life partners constituted indirect discrimination on the grounds of sexual orientation, as did Ruiz-Jarabo Colomar AG in his opinion in this case. However, the Court took a different view. It concluded that as same-sex couples could not get married but instead could form life partnerships of equivalent status, any difference in treatment at issue in this case was directly linked to their sexual orientation. Therefore, if surviving life partners were in a comparable situation as spouses as regards the purpose and function of the benefit at issue, then the refusal to pay the benefit would constitute direct discrimination on the grounds of sexual orientation.

The Court here in its judgment in *Maruko* thus took a similar approach as it had in the famous case of *Dekker*, where it concluded that discrimination on the basis of pregnancy constituted direct discrimination on the grounds of sex.<sup>93</sup> If the status in question (being pregnant, or being a life partner) is directly linked to a protected ground (being female, or being homosexual), then less favourable treatment based on that status will constitute direct discrimination.<sup>94</sup>

The Court applied this approach again in *Römer*.<sup>95</sup> Here the Court concluded that, if a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than would have been granted to a married pensioner, this would constitute direct discrimination on the grounds of sexual orientation if i) marriage was reserved to persons of a different gender and existed alongside a life partnership scheme which was reserved for persons of the same gender, and ii) a life partner is in a legal and factual situation comparable to that of a married person as regards the benefit at issue, taking into account the respective rights and obligations of married couples and life partners as well as the purpose of the benefit and the conditions under which it was granted.

In other words, the Court ruled in *Römer* that if national law treats registered same-sex partners as being in a similar legal relationship as married couples, then it will constitute direct discrimination if they are denied access to benefits available to spouses if they are in a comparable position as regards the purpose of the benefit and the circumstances in which it is made available. In such a situation, the difference in treatment will be based directly on sexual orientation, and therefore it cannot be justified by arguments relating to the desire of states to recognise the special status of marriage or any other consideration. As a result, states that have introduced a same-sex partnership scheme that is equivalent to marriage will have to treat homosexual partners on an equal basis as married couples when it comes to accessing most occupational benefits.

<sup>92</sup> Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-175.

<sup>93</sup> Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941.

<sup>94</sup> See C. Tobler and K. Waaldijk, 'Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*: Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported' (2009) 46(3) *Common Market Law Review* 723-746, 735 et seq.

<sup>95</sup> Case C-147/80, *Römer v Freie und Hansestadt Hamburg*, Judgment of the Court (Grand Chamber) 10 May 2011.

In the important case of *Firma Feryn*, the Court provided further clarification of the scope of the prohibition on direct discrimination set out in the 2000 Directives.<sup>96</sup> In this case, a Belgian employer had publicly stated that he would not hire employees of Moroccan ethnic origin while engaged in a recruitment drive. The Brussels Labour Court asked the Court to determine *inter alia* whether the employer's statement constituted direct discrimination even in the absence of an identifiable complainant who had personally been subject to discrimination. The Court took the view that the objective of combating discrimination and thereby 'fostering conditions for a socially inclusive labour market' that the Directive was designed to achieve 'would be hard to achieve if the scope of Directive 2000/78/EC was limited to cases where clearly identifiable victims had applied for a particular job. As a result, the Court concluded that public statements such those at issue in this case constituted direct discrimination under the Directive, on the basis that they were 'clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market', which qualified as a form of less favourable treatment.<sup>97</sup>

This judgment is important for how it establishes that direct discrimination can exist even if there is no specifically identifiable individual victim as such. It also serves as an excellent example of the Court adopting a purposive interpretation of the provisions of the 2000 Directives. As Maduro AG suggested in his opinion in this case, the effectiveness of the prohibition on discrimination would be seriously undermined if an employer could use public statements to discourage job applicants from particular ethnic groups without facing any legal sanction.<sup>98</sup> As a result, the Court gave effect to the prohibition on direct discrimination in a manner that ensured it gave effective protection against race discrimination, in line with the general interpretative approach that it has adopted in this context.

A similar approach was adopted in the case of *Coleman*.<sup>99</sup> Here, a UK employment tribunal asked the Court whether the prohibition of direct discrimination on the grounds of disability set out in Directive 2000/78/EC applied to a situation where an employee was treated less favourably than her colleagues because she was taking time off to look after her son, who was disabled (Ms Coleman was not herself disabled). In a wide-ranging opinion, Maduro AG argued that the provisions of the Directive had to be interpreted in light of the goals they were designed to achieve, namely to 'protect, in field of employment and occupation, people belonging to suspect classifications and to ensure that their dignity and autonomy is not compromised either by obvious and immediate or subtle and less obvious discrimination'.<sup>100</sup> To ensure comprehensive and effective protection against discrimination based on the disability ground, he therefore suggested that the prohibition on direct discrimination set out in the Directive had to be interpreted as applying to all situations where disability was used as a reason to treat a person less favorably, including the situation at issue in this case. In its judgment, the Court adopted a similar approach:

51. Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

The Court therefore concluded that the prohibition of direct discrimination laid down by Article 2(2)(a) of the Directive is capable of extending to cover a situation where an employee is subject to less favourable treatment based on their association with another person. Again, the principle of effective interpretation was central to this judgment, which helps to ensure that the 2000 Directives can address the multifaceted and complex ways in which

<sup>96</sup> Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

<sup>97</sup> *Ibid.* [25].

<sup>98</sup> [15]-[17].

<sup>99</sup> Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603.

<sup>100</sup> *Ibid.* [15].



discrimination is expressed. It remains to be seen how this concept of discrimination by association will be applied in other contexts.

In general, the Court has had the opportunity to develop a substantial case-law in respect of the provisions of the 2000 Directives which concern direct discrimination. The *Maruko*, *Römer*, *Firma Feryn* and *Coleman* decisions are all of particular significance, and have clarified the scope of the prohibition on direct discrimination set out in Article 2(2)(a) of both Directives. Many other references have reached the Court which relate to direct discrimination on the grounds of age. These cases are dealt with separately below, as they give rise to issues relating to objective justification which are not relevant to the other grounds covered by the 2000 Directives.

## 3.2 Indirect Discrimination

Virtually identical definitions of indirect discrimination are set out in Article 2(2)(b) of both Directives. Their provisions establish in essence that indirect discrimination will be taken to exist when ‘an apparently neutral provision, criterion or practice’ would put persons having a protected characteristic (i.e. being of a particular ethnic group, sexual orientation, age etc.) at a particular disadvantage compared to other persons unless the provision, criterion or practice is ‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.<sup>101</sup>

This wording is based on the case-law of the CJEU on indirect discrimination in the context of gender equality.<sup>102</sup> Perhaps because this case-law is well-known, very few preliminary references to the CJEU have raised issues as to how the provisions of the 2000 Directives that concern indirect discrimination should be interpreted and applied. As a result, the Court has only discussed these provisions in a few cases.

In the case of *Tyrolean Airways*,<sup>103</sup> the collective agreement which governed the grading and remuneration of employees of Tyrolean Airways did not take account of skills and knowledge which some employees had gained while serving with another airline. An Austrian court asked the CJEU whether this collective agreement indirectly discriminated against older workers by only taking account of the skills and experience they had acquired while working with one airline and not the other, even though the knowledge acquired was ‘substantively identical’ in both cases.

However, the CJEU ruled that the difference in treatment at issue was not ‘directly or indirectly based on age or an event linked to age’. The Court considered that the experience not taken into account by the terms of the collective agreement was ‘neither inextricably... nor indirectly linked to the age of employees’, even though a consequence of this omission might be that some staff members advanced a grade at a later age than others.<sup>104</sup> As a result, no issue of indirect discrimination arose.

This judgment is notable for its insistence that a difference of treatment must affect a particular group defined by their age or some other protected characteristic, or otherwise clearly differentiate between different categories of persons on the basis of a non-discrimination ground, before a claim for indirect discrimination could arise. It remains to be seen how this requirement will be applied in future indirect discrimination cases. For now, the

<sup>101</sup> For a comprehensive analysis of the concept of indirect discrimination, see C. Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2008).

<sup>102</sup> See e.g. Case C-170/84, *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

<sup>103</sup> Case C-132/11, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, Judgment of the Court (Second Chamber) 7 June 2012.

<sup>104</sup> *Ibid.* [29].

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judgment in *Tyrolean Airways* serves as a warning that a difference of treatment must be shown to affect specific categories of persons defined by reference to one of the non-discrimination grounds set out in the 2000 Directives.

Indirect discrimination also arose as an issue in the cases of *Maruko* and *Römer*. As previously noted, the CJEU held in these cases that, if national law treats registered same-sex partners as being in a legal relationship that is equivalent to marriage, then it will constitute direct discrimination if they are denied access to benefits available to opposite-sex spouses, on the basis that the difference in treatment in question would be directly based on sexual orientation. However, in his opinion in *Römer*, Jääskinen AG suggested that a failure by a state to make spousal benefits available to same-sex couples in long-term relationships might also constitute indirect discrimination, even in a situation where no life partnership scheme equivalent to marriage had been established in that country.<sup>105</sup> In his view, making benefits conditional on married status will inevitably disadvantage same-sex couples when compared to opposite-sex couples, as same-sex couples have no way of satisfying this condition. He went on to suggest that it might be difficult to show that restricting access to benefits to married couples was objectively justified. However, the Court in *Römer* left this issue open for determination in a future case.

### 3.3 Harassment

Article 1 taken together with Articles 2(1) and 2(3) of both Directives prohibits ‘unwanted conduct’ related to a non-discrimination ground takes place ‘with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. In contrast to other elements of the 2000 Directives, no equivalent provisions existed in EU gender equality law at the time of their adoption.<sup>106</sup> However, perhaps surprisingly, almost no references to the CJEU so far have raised issues relating to harassment.

In *Coleman*, the Court was asked whether the prohibition of harassment covers a situation where an employee is the victim of unwanted conduct amounting to harassment which is related to the disability of her child for whom she is the primary care provider. In line with its findings in respect of direct discrimination on the basis of association (discussed above), the Court concluded that the prohibition of harassment should cover this type of situation. What was particularly significant about the Court’s reasoning was the manner in which it emphasised that harassment has to be treated as a form of discrimination in line with the provisions of Article 2(1) of the Directive.<sup>107</sup> In other words, the harassment provisions of the 2000 Directives must be interpreted and applied in line with the general interpretative approach applied to their other provisions.

What remains unclear from the brief discussion in *Coleman* is how the specific elements of the definition of harassment set out in Article 2(3) of both Directives should be interpreted. Uncertainty also remains to the meaning of the provision in Article 2(3) that ‘the concept of harassment may be defined in accordance with the national laws and practice of the Member States’. The Court mentioned this provision in passing in *Coleman*, but provided no further guidance.

<sup>105</sup> [106]-[111].

<sup>106</sup> See now Article 4(3) of the ‘Goods and Services’ Directive 2004/113/EC and Article 2(2)(a) of the ‘Recast Equal Treatment Directive’ 2006/54/EC: see also R. Holtmaat, ‘Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification’ (2011) *European Gender Equality Law Review* 2011-2, pp. 4-13.

<sup>107</sup> *Coleman*, [58].

### 3.4 Reasonable Accommodation

The provisions of Article 5 of Directive 2000/78/EC which require employers to provide reasonable accommodation for persons with disabilities were briefly analysed in *Chacón Navas*.<sup>108</sup> In its judgment in this case, the CJEU interpreted this provision as requiring employers to take ‘appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden.’<sup>109</sup> Applying Article 5 read together with the prohibition on disability discrimination set out in Article 2 of the Directive and the text of Recital 17 to the Directive, the Court concluded that the dismissal of an employee on the grounds of disability was precluded if the employee was ‘competent, capable and available to perform the essential functions of the post concerned’ after reasonable accommodation was made.<sup>110</sup>

In other words, an employee can only be dismissed if he or she is unable to perform the ‘essential’ functions of the post in question *after* the employer has made reasonable accommodation for their specific needs. Dismissal on the grounds of disability which is based on the employee being unable to perform non-essential functions, or on the basis of a comparison between the employee and another employee who does not require reasonable accommodation, is prohibited. This is a valuable clarification of the requirement to provide reasonable accommodation. It is likely to be fleshed out in future cases, as national courts across the EU begin to engage with the requirements of Article 5.

### 3.5 Age Discrimination and the Provisions of Directive 2000/78/EC

Age discrimination in employment and occupation is prohibited by the provisions of Directive 2000/78/EC, whose general provisions apply to age as they do to the other grounds that come within its scope. However, Article 6(1) provides 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’.

In other words, a rule or a policy which subjects employees to less favourable treatment on the grounds of age will not constitute discrimination if it a) is designed to achieve a ‘legitimate aim’, and b) is ‘appropriate and ‘necessary’ to achieve that particular aim. This is the ‘objective justification’ test which is exceptionally applied in the context of age. (See the discussion on direct discrimination above in Part 3.1.)

Article 6(1) proceeds to give a number of examples of such justified differences in treatment, which include the ‘setting of special conditions on access to employment and vocational training’ in order to promote the vocational integration of particular age categories of workers or to ‘ensure their protection’; the ‘fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment’; and ‘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’.<sup>111</sup>

<sup>108</sup> For analysis of the concept of reasonable accommodation, see L. Waddington & A. Lawson, *Disability and Non-discrimination Law in the European Union*, Thematic Report of the European Network of Legal Experts in the Non-Discrimination Field (Brussels: European Commission/MPG, 2009).

<sup>109</sup> *Chacón Navas*, [50].

<sup>110</sup> *Chacón Navas*, [51].

<sup>111</sup> Article 6(2) also provides that states may exempt age-limits that govern admission to occupational social security schemes or entitlement to the benefits they provide from the prohibition on age discrimination.

The provisions of Article 6(1) have been the subject of multiple references to the Court. Some of these references have raised issues relating to the scope of Directive 2000/78/EC and its relationship to the general principle of equal treatment, as discussed above in Parts 3 and 4. However, the questions referred by national courts to the CJEU have primarily focused on how the objective justification test set out in Article 6(1) should be interpreted and applied in situations where an employee has been subject to less favourable treatment on the grounds of age.

In response, the Court has acknowledged that age constitutes a specific form of discrimination: differences of treatment on grounds of age may be justified in a wider range of circumstances than is the case for the other non-discrimination grounds. The Court has also given member states a wide margin of discretion in determining what constitutes a legitimate objective of public policy, while private employers also enjoy some flexibility in this regard. Member states are not required to draw up a specific list of age-based differences in treatment which may be justified by a legitimate aim, while policy objectives can be pursued which are not explicitly mentioned in the text of Article 6(1).<sup>112</sup> Furthermore, national legislatures and private employers have also been given a degree of leeway in choosing how to design employment and vocational training policies, especially when it comes to setting retirement ages.

However, none of this means that age does not constitute a ‘suspect’ ground. The Court has stated that Article 6(1) constitutes a very specific derogation from the general principle of equal treatment.<sup>113</sup> As such, this exception is to be read narrowly, in line with the general interpretative approach that the Court has applied in interpreting the provisions of the 2000 Directives. Furthermore, as the Court made clear in *Fuchs*, the right to work was protected by Article 15(1) of the EU Charter, and the provisions of Article 6(1) had to be read subject to this fundamental entitlement.<sup>114</sup> As a result, the objective justification test set out in Article 6(1) has to be applied in a rigorous and demanding manner. Age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of the ‘appropriate and necessary’ leg of the test.<sup>115</sup>

Even the wide leeway given to states to determine public policy goals is not unlimited. The Court made it clear in its judgment in the case of *Age Concern* that public policy objectives should be designed to advance the public interest rather than simply reducing costs for employers or enhancing their competitiveness, although it is open for a national rule to provide a ‘certain degree of flexibility for employers’ in pursuit of a legitimate public interest.<sup>116</sup> In *Prigge*, the Court concluded that public safety could not qualify as a legitimate aim under Article 6(1), whose scope only extended to cover social policy objectives ‘such as those related to employment policy, the labour market or vocational training.’<sup>117</sup> In *Fuchs*, the Court also ruled that ‘while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1).’<sup>118</sup> Both of these are significant limitations, as it limits the range of public policy or economic cost objectives that can justify the use of age as a differentiating factor.

<sup>112</sup> Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569, [43].

<sup>113</sup> *Age Concern*, [60]-[67].

<sup>114</sup> Joined Cases C-159/10 and 160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011, [62]. See also Case C-141/11, *Hörnfeldt v Posten Meddelande AB*, Judgment of the Court (Second Chamber) 5 July 2012, [37].

<sup>115</sup> The wording of the objective justification test set out in Article 6(1) differs from that set out in respect of indirect discrimination in Article 2(2)(b) of the same Directive, in that the wording of Article 6(1) requires that a difference in treatment be ‘objectively and reasonably justified’ [the author’s italics]. However, in *Age Concern*, the Court made it clear that this difference in wording was not significant: Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569, [53]-[67].

<sup>116</sup> *Age Concern*, [46].

<sup>117</sup> Case C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011, [81].

<sup>118</sup> *Fuchs*, [74].

Furthermore, the Court in its judgment in *Age Concern* has emphasised that ‘Article 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification’: while member states enjoy broad discretion in ‘choosing the means capable of achieving their social policy objectives’, ‘that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age.’<sup>119</sup> Furthermore, in the same judgment, the Court stated 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 a derogation from that principle 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...<sup>120</sup>

In *Fuchs*, the Court made clear that arguments in support of the use of age distinctions had to be supported by ‘evidence of probative value.’<sup>121</sup>

The case-law of the Court has thus given a clear interpretation to the provisions of Article 6(1) and ensured that strong protection now exists in EU law against age discrimination in employment and occupation. In this area as elsewhere, the Court has given a purposive interpretation to the provisions of the 2000 Directives and read derogations from the principle of equal treatment in a narrow and restrictive manner. However, the Court has also taken account of the specific nature of the age ground, and the manner in which the use of age-based distinctions may be appropriate and necessary to achieve a legitimate aim. In so doing, it has tried to strike a delicate balance between enforcing the prohibition on age discrimination and ensuring that member states and employers enjoy some room for manoeuvre in this context.

However, this remains a complex area of law. Age-based distinctions are commonly used across Europe to differentiate between different categories of employee.<sup>122</sup> Often these distinctions are based on generalisations, stereotyping and prejudice. However, at times, their use may be based on rational considerations.<sup>123</sup> National legislatures, governments and courts are often unsure as to how to apply the requirements set out in Article 6(1) of the Directive.

This uncertainty is amplified by the fact that age is a ‘new’ ground of discrimination: few European legal systems have a history of prohibiting age discrimination. Also, the status, meaning and interpretation of age discrimination law appears to be contested in certain states. In particular, as illustrated by the comparative case-study that follows in Part 4 of this report, the CJEU’s case-law on age discrimination seems to have had a more ‘destabilising’ effect on national law and policy in Germany than in the UK and other states, for a variety of reasons.

As a result, despite having set out the broad contours of how Article 6(1) is to be interpreted and applied, the CJEU continues to receive a steady flow of preliminary references from national courts on the topic of age discrimination: a high volume of age discrimination cases have come from Germany in particular. This means that the Court has developed a detailed jurisprudence on the interpretation and application of Article 6(1), where it has taken the

<sup>119</sup> *Age Concern*, [67].

<sup>120</sup> *Ibid.* [51]. The Court here cross-referred to its case-law on the application of the objective justification test in the context of equal pay, citing in particular ‘by way of analogy’ its judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, [75] – [76].

<sup>121</sup> *Fuchs*, [76]-[83].

<sup>122</sup> See D. O’Dempsey and A. Beale, *Age and Employment*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2011).

<sup>123</sup> See C. O’Cinneide, *Age Discrimination and European Law*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2005).

general approach described above and applied it to a variety of national laws and practice. This case-law has had a considerable impact, and requires detailed scrutiny.<sup>124</sup>

### 3.6 Age Discrimination and the Question of Objective Justification

As discussed above in Part 1, the first reference concerning the 2000 Directives that reached the Court was the age discrimination case of *Mangold*, which concerned German legislation which had limited the employment rights of older workers by giving employers greater freedom to conclude fixed-term contracts with workers over the age of 52. This judgment established that the prohibition on age discrimination set out in Directive 2000/78/EC was an aspect of the general principle of equal treatment, and therefore the objective justification test set out in Article 6(2) should be applied with rigour on the basis it constituted a derogation from the principle of non-discrimination.<sup>125</sup> It also set out how the objective justification test should be applied by national courts, and the Court has subsequently applied this template in the flow of age discrimination cases that have followed *Mangold*.

When considering whether the German legislation at issue satisfied the first leg of the objective justification test, i.e. whether it was directed towards achieving a legitimate aim, the Court in *Mangold* considered that the purpose of the legislation was ‘plainly to promote the vocational integration of unemployed older workers’ by giving employers an incentive to hire them in preference to younger workers who enjoyed greater employment rights. It took the view that ‘the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt’ and therefore concluded that objectives of this kind would ‘as a rule’ constitute a legitimate aim under Article 6(1). The Court thus granted the national legislature a considerable margin of discretion when it came to setting public policy objectives.<sup>126</sup>

Turning then to the question of whether the legislation was ‘appropriate and necessary’ and therefore satisfied the second leg of the objective justification test, the Court stated that member states ‘unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy’. However, the Court went on to note that the legislation limited the employment rights of all workers who were older than 52, irrespective of their previous employment history. It concluded that the manner in which age had been used as the ‘only criterion’ for defining the disadvantaged group of workers, ‘regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned’, went beyond what was objectively necessary to attain the objective of promoting the vocational integration of older workers.<sup>127</sup> The Court thus held that states enjoy broad discretion in setting national employment policy, but the use of age as a criterion has to be clearly shown to be proportionate and necessary to achieve the policy objectives at issue.

As discussed above in Part I, the *Mangold* judgment was controversial for a number of reasons, including the way in which the CJEU viewed the prohibition on age discrimination as constituting a specific aspect of the more general principle of equal treatment. The manner in which the Court applied the objective justification test set out in Article 6(1) also generated some criticism. In the case of *Lindorfer*, Jacobs AG in an opinion written before delivery of the *Mangold* judgment had suggested that age could not be treated as equivalent to gender or

<sup>124</sup> For a comprehensive analysis, see D. Schiek, ‘Age Discrimination before the Court of Justice – Conceptual and Theoretical issues’ (2011) 48(3) *Common Market Law Review* 777-799.

<sup>125</sup> This aspect of the judgment has been discussed in detail above in Part 1.

<sup>126</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981, [59]-[61].

<sup>127</sup> *Ibid.* [63]-[65].

other forms of discrimination and implied that the Court should tread cautiously in this field.<sup>128</sup> In the wake of the *Mangold* judgment, Mazák AG in his opinions in *Palacios de la Villa* and *Age Concern* argued that age was not a 'suspect ground, at least when compared to race or sex', and suggested that the Court should recognise that 'age-based differentiations, age-limits and age-related measures are...widespread', 'simple to administer' and 'clear and transparent'.<sup>129</sup> However, in subsequent cases, the Court has remained faithful to the approach it adopted in *Mangold*, and thus to the general interpretative approach it has adopted in applying all of the provisions of the 2000 Directives.<sup>130</sup>

As a result, the use of age-based distinctions which are inconsistent with or not rationally linked to the policy objectives they are supposed to advance, or which are disproportionate in the sense of being over-inclusive or under-inclusive, will be incompatible with the requirements of Article 6(1). This is illustrated by the judgment of the Court in *Kücükdeveci*, where as discussed above the Court concluded that the exclusion of periods of work undertaken by employees under the age of 25 from the calculation of notice periods furthered the legitimate aim of encouraging employers to hire younger workers but was disproportionate as it applied to all employees, regardless of their age or experience.<sup>131</sup>

A similar approach was adopted in the case of *Hütter v Technische Universität Graz*, which raised the question of the compatibility with the Directive of Austrian legislation which provided that periods of work under the age of 18 were excluded when calculating an employee's grading for salary purposes.<sup>132</sup> In this case, the applicant, Mr *Hütter*, completed a period of apprenticeship as a laboratory technician together with a female colleague. However, when they were both subsequently employed as full-time employees, the fact that his colleague was older than him and therefore had been over 18 years of age for a longer period of her apprenticeship meant that she was recruited at a higher grade than him. The Austrian Government asserted that the law in question was designed to achieve two legitimate aims, namely encouraging those under 18 to stay in secondary education while simultaneously promoting the integration of young people who have pursued vocational training into the labour market.

In its judgment, the Court considered that both these objectives could constitute legitimate aims of public policy in their own right, and reiterated that states enjoyed wide discretion in deciding which measures to adopt in pursuit of their chosen employment and social policy goals. However, the Court questioned whether the law could be said to rationally advance either of these two legitimate aims: the age limit applied irrespective of whether students had staying in secondary education or undergone vocational training, while it also could 'lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages'.<sup>133</sup> Therefore, the age limit 'did not single out a group of persons defined by their youth in order to give them special conditions of recruitment intended to promote their integration into the labour market', and therefore could not be said to advance the aim of integrating particular

<sup>128</sup> Case C-227/04 P *Lindorfer v Council*, [2007] ECR I-6767, Opinion of Jacobs AG, delivered on 27 October 2005, [84]-[91]. Subsequently, the Grand Chamber of the Court re-opened the proceedings in the wake of *Mangold*, and obtained a second opinion by Sharpston AG: see Opinion of Sharpston AG, delivered on 30 November 2006. This opinion echoed the views of Jacobs AG on age discrimination, to some extent. However, the Grand Chamber ultimately resolved the case without dealing with the allegation of age discrimination in any detail.

<sup>129</sup> Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007; Case C-388/07, *Age Concern England* [2009] ECR I-0000, Opinion of Mazák AG, delivered on 23 September 2008, [74]-[76].

<sup>130</sup> See for instance Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365; see also on this point C. O'Conneide, 'Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age' (2009-10) 2 *Revue des Affaires Européennes* 253-276.

<sup>131</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>132</sup> Case C-88/08, *Hütter v Technische Universität Graz* [2009] ECR I-5325.

<sup>133</sup> *Hütter*, [39].



groups of younger workers into the labour market. As such, the national law could not be said to be objectively justified under Article 6(1).

In *Andersen*,<sup>134</sup> the CJEU developed its case-law further by drawing a distinction between requirements set out in Article 6(1) that an age distinction had to be both ‘appropriate’ and ‘necessary’. This reference concerned Danish legislation which provided that workers employed in the same undertaking for at least 12 years were entitled to a severance allowance unless, on termination of the employment relationship, they had reached the age at which they were entitled to receive a pension. This legislation was challenged by the applicant, who was dismissed by his employer at the age of 63 but wished to remain in the job market rather than retiring and collecting his pension. The Court accepted the Danish government’s argument that this age-linked restriction was intended to achieve the legitimate aim of ensuring that employers did not pay double compensation to dismissed employees (in the form of the severance allowance and the pension). It also accepted that the primary objective of the measure was to provide extra income protection for long-serving workers who were made unemployed but who still intended to participate in the labour market: as most employees who were entitled to an old-age pension usually left the labour market after their contracts were terminated, the Court therefore concluded that the legislation was not ‘manifestly inappropriate’ in light of this objective. However, the legislation did not allow older workers who wished to remain in the labour market to temporarily waive their pension entitlement in favour of obtaining a severance allowance, as Mr Andersen wished to do in this case. This meant that an entire category of employees defined by their age were denied the opportunity of benefiting from the extra income protection provided by the allowance. In the Court’s view, this was ‘unnecessary’ and therefore the legislation was incompatible with the requirements of Article 6(1).

The Court thus followed the approach proposed by Kokott AG in her opinion in this case and distinguished between the requirement that age distinctions be ‘appropriate’, in the sense of being rationally linked to the achievement of the relevant legitimate aims, and the requirement that they be ‘necessary’, i.e. that they are suitably tailored and do not impose a disproportionate penalty on the disadvantaged age group. The Danish legislation at issue in *Andersen* was appropriate, but not necessary.

The CJEU again differentiated between ‘appropriate’ and ‘necessary’ measures in the case of *Prigge*,<sup>135</sup> which concerned the provisions of a collective agreement which required Lufthansa pilots to retire at the age of 60. This age limit had been agreed by the social partners to ensure the safety of airline passengers. However, as noted above, the Court concluded that this could not qualify as a legitimate aim under Article 6(1), on the basis that it was a public policy objective which did not relate to employment policy, the labour market or vocational training. The Court went on to reject the argument that the age limit could be justified as coming within the provisions of Article 2(5) of Directive 2000/78/EC, which provides that its provisions are ‘without prejudice to measures laid down by national law which, in a democratic society, are necessary’ for *inter alia* the protection of public health. It accepted that the age limit as set out in the collective agreement came within the scope of Article 2(5) and was an ‘appropriate’ measure to give effect to the aim of preserving public safety. However, national and international legislation set an upper age limit of 65 for pilots, and no evidence has been presented to justify why a lower age limit has been set in the collective agreement. The Court therefore concluded that the measure was not ‘necessary’.<sup>136</sup>

In the case of *Petersen*,<sup>137</sup> the Court again concluded that age limits which were not applied consistently across a profession could not be justified as being ‘necessary’ under the provisions of Article 2(5). This reference from the German labour courts concerned an age limit of 68, after which dentists providing public care under the German

<sup>134</sup> Case C-499/08, *Ingeniørforeningen i Danmark (acting on behalf of Ole Andersen) v Region Syddanmark*, Judgment of the Court (Grand Chamber) 12 October 2010.

<sup>135</sup> C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011.

<sup>136</sup> The Court also made it clear that the provisions of Article 2(5) as a derogation to the principle of equal treatment had to be interpreted narrowly, again in line with its overall interpretative approach: see *Prigge*, [56].

<sup>137</sup> Case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

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health insurance system lost their authorisation to continue this work. The German Government attempted to justify the age limit on two separate grounds. Firstly, it argued the time limit was justified under the provisions of Article 2(5) in order to protect the health of patients obtaining dental care under the national statutory health insurance scheme, as 'general experience' indicated that dentists suffered a decline in performance after the relevant date. Secondly, the Government also argued that the measure was justified under the provisions of Article 6(1) as necessary to give effect to the legitimate employment policy objective of sharing out employment opportunities across the different generations: the age limit served to open up new places on the public care panel for younger dentists.

In its judgment, the CJEU took the view that the protection of public health could constitute a legitimate aim for the purposes of Article 2(5). However, the age limit did not apply to dentists in private practice. As a result, the Court held that it was inconsistent to argue that an age limit was necessary to protect patients against possible decline in the skills of dentists but not to apply this protection to patients receiving care from private practitioners. It therefore concluded that the age limit was not 'necessary' and therefore was not objectively justified under the provisions of Article 2(5).

However, the Court went on to say that the age limit could in principle be objectively justified under the provisions of Article 6(1) on the basis of the second alleged legitimate aim, i.e. on the grounds that it was necessary to maintain an equitable balance between older and younger dentists, and to keep open paths of career progression within the public health panels. The necessity for such an age limit would depend on the circumstances of the specific labour market in question and whether there was an excess of dentists wishing to occupy places on the public panel, which the Court considered should be determined by the national courts.

*Petersen* is thus interesting for a number of reasons. The rigour of the objective justification test is demonstrated by the Court's refusal to accept that the age limit could be justified under Article 2(5) as necessary to protect the health of patients. However, the Court was also prepared to accept that age limits may be justified if they advance 'inter-generational solidarity'.

Similar arguments also prevailed in *Georgiev*,<sup>138</sup> where the Court held that restrictions laid down by national legislation on the employment of university lecturer after the age of 65 could be objectively justified under Article 6(1). In this case, a professor had his employment contract terminated at 65: he then worked for two more years on the basis of fixed-term contracts, but was obliged to retire at 68 in accordance with the relevant provisions of the Bulgarian Labour Code. The Court considered that these age limits were capable of opening up employment and promotion opportunities for younger academics: it also took the view that these age limits could help to ensure that a mix of generations would exist among academic staff which could enhance the quality of teaching and research.<sup>139</sup> As in *Petersen*, the Court was thus willing to grant states a reasonably wide margin of discretion when age limits are justified on the basis they promote inter-generational fairness. However, in *Georgiev*, the Court nevertheless made it clear that the national courts were still required to assess whether the age limits were necessary in the light of current labour market conditions and were applied consistently across the different categories of academic staff.<sup>140</sup>

In the case of *Fuchs*,<sup>141</sup> the CJEU adopted a similar analysis. The legislation at issue in this case provided that state prosecutors should retire at 65, subject to a possibility of continuing to work until 68 if it was in the interests of the state: the applicants in this case had worked until they were 65, when they had their application to continue working rejected by their employer. The Court considered once again that such an age limit could be justified on

<sup>138</sup> Joined Cases C-250/09 and C-268/09, *Georgiev v Technicheski universitet – Sofia, filial Plovdiv* [2010] ECR I-11869.

<sup>139</sup> *Ibid.*[46].

<sup>140</sup> [67]-[68].

<sup>141</sup> Joined Cases C-159/10 and 160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011.

the basis that it established a ‘favourable age structure’ that opened up posts for younger employees.<sup>142</sup> In general, it concluded that the age limit struck a fair balance between the right to work of older employees (as protected by Article 15 of the EU Charter) and the aim of establishing a balanced age structure, taking into account the salaries and pension entitlements of older staff and the inherent flexibility built into the legislation. The Court also considered that the fact that some prosecutors could continue to work until 68, and that the retirement age for civil servants employed by other Länder and the federal government was being gradually raised to 67, did not make the legislation incoherent.

In general, the Court has given states a relatively wide margin of discretion when it comes to setting retirement ages. The case of *Palacios de la Villa*, as discussed above in Part 2.1, concerned the provisions of a national collective agreement which established that employees in workplaces covered by the agreement would cease to be employed at the fixed retirement age of 65, subject to a condition that the employees affected had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. Legislation in 2005 had permitted the inclusion of such compulsory retirement age provisions in collective agreements, after a process of extensive debate as to the potential impact of the abolition of retirement ages on the operation of the Spanish labour market.<sup>143</sup> The Court took the view that considered that the retirement age provisions in question could be regarded as objectively justified under Article 6(1) of the Directive, on the basis that they were objectively and reasonably justified by a legitimate aim relating to employment policy and the effective functioning of the Spanish labour market. In particular, the Court highlighted that the measure in question ‘was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations’.<sup>144</sup> The Court also went on to note that the measure took into account both the age of employees and also their pension entitlements, as well as allowing collective agreements to modify the operation of the retirement age scheme. Therefore, it concluded that the national legislation in question could be regarded as coming within the ‘broad discretion’ accorded to member states in setting and implementing employment policy.

Subsequently, the Court adopted a similar analysis in *Age Concern*.<sup>145</sup> This case involved a challenge brought by a civil society organisation against the provisions of the UK Employment Equality (Age Discrimination) Regulations 2006 that had transposed the age provisions of Directive 2000/78/EC into UK law. These Regulations permitted employers to terminate the employment contracts of employees who are older than 65: employees who wished to continue to work after this ‘mandatory retirement age’ can request to stay on, and if they continue to work are protected against unfair dismissal, but employers needed only to ‘consider’ this request. The applicants claimed that these provisions were not compatible with the Directive.

This case differed from *Palacios* in three important respects. Firstly, the UK Government cited the workforce management needs of employers to justify the retirement age provisions: however, this is not specifically listed as a legitimate aim in the list of examples of legitimate aims set out in the text of Article 6(1) (see above), unlike ‘employment policy’, the aim cited by the Spanish Government in *Palacios*. Secondly, unlike the case in *Palacios*, age was the sole criterion taken into account in the application of the UK retirement age provisions: employees could be dismissed at 65 if an employer wished to make use of the mandatory retirement age provisions, even if they had not made enough contributions to qualify for a full pension under the relevant social security legislation. Finally, the UK retirement age provisions had not been agreed through a process of consultation with the social partners.

<sup>142</sup> The Court also made clear that the limited number of individuals affected did not prevent the measure from being justified on the basis it pursued a legitimate goal of public policy: [51].

<sup>143</sup> *Fuchs*, [61]-[63].

<sup>144</sup> [53].

<sup>145</sup> Case C-388/07, *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

Nevertheless, the Court considered that the UK legislation could in principle be considered to be objectively justified, and reiterated that Member States enjoyed a broad discretion in the area of national employment policy.

In *Rosenblatt*, the CJEU confirmed that national legislation which permitted employers to terminate employment contracts at the age of 65 was compatible with the provisions of Article 6(1). In this case, the applicant, Ms Rosenblatt, had worked as a cleaner for 39 years at a barracks in Hamburg: when she reached 65, she was her employment contract was terminated, leaving her only in receipt of a statutory old-age pension of EUR 253.19 per month. However, the Court held that the relevant provisions of the German legislation in question struck a defensible balance between the needs of older workers and the interest of employers in workforce planning and distributing employment opportunities between different generations. It reiterated that states enjoyed a wide discretion in this area of employment policy, and emphasised that the age limits in question could be adjusted by the social partners through collective agreements. The national court highlighted that the automatic termination of her employment relationship would cause substantial financial hardship to Ms Rosenblatt: however, in response, the CJEU noted that the legislation in question did not require employees to leave the labour market or denied them protection against age discrimination.<sup>146</sup>

Subsequently, in the recent case of *Hörnfeldt*,<sup>147</sup> the Court similarly held that Swedish legislation which permitted employment contracts to be terminated at 67 was not incompatible with the requirements of Article 6(1). Again, the Court emphasised that the legislation struck an appropriate balance between the interests of employees and employers and did not force individuals to withdraw from the labour market.

Some criticism has been directed against the Court's case-law on retirement ages, on the basis that it gives states an excessive degree of discretion. The Court has certainly applied the objective justification in a less exacting manner in this context than it has in others. In so doing, it has consistently emphasised that states have a legitimate interest in ensuring that an appropriate balance is struck between the interests of older and younger workers. This concern with inter-generational equity is certainly consistent with the Court's general interpretative approach, with its emphasis on protecting the rights of all workers. However, concern has been expressed that the Court's approach allows states considerable leeway when it comes to fixing retirement ages.<sup>148</sup>

The Court has also given states and employers a relatively wide margin of discretion when it comes to adjusting existing practices to reflect the new emphasis on age equality. In *Hennings*,<sup>149</sup> the CJEU concluded that a collective agreement, which replaced a system of pay which discriminated on the basis of age with a new non-discriminatory system while making provision for a transitional period when certain age-based pay inequalities were maintained in place, was compatible with the requirements of Article 6(1). The Court ruled that this temporary transition period was an appropriate and necessary measure which was intended to achieve the legitimate aim of protected established salary entitlements. However, in the same case, the Court concluded that provisions of collective agreements which provided that the basic 'pay step' of employees within each salary group was to be determined by reference to their age on appointment were not objectively justifiable. In general, the judgment of the Court in *Hennings* appears to strike a good balance: it permits employers some flexibility when it comes to adjusting their pay practices, while also making it clear that 'built-in' age-based inequalities will usually not survive challenge under the age discrimination provisions of Directive 2000/78/EC.

<sup>146</sup> *Age Concern*, [71]-[77].

<sup>147</sup> Case C-141/11, *Hörnfeldt v Posten Meddelande AB*, Judgment of the Court (Second Chamber) 5 July 2012.

<sup>148</sup> For analysis, see D. O'Dempsey and A. Beale, *Age and Employment*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2011), at 13-14.

<sup>149</sup> Case C-297/10, *Hennings v Eisenbahn-Bundesamt/ Land Berlin v Mai*, Judgment of the Court (Second Chamber) 8 September 2011.

### 3.7 Age Distinctions as Genuine Occupational Requirements

The question of when age limits may be justified on the basis that they constitute ‘genuine occupational requirements’ in line with the provisions of Article 4(1) of Directive 2000/78/EC arose in the case of *Wolf*.<sup>150</sup> This reference concerned a regulation which prevented individuals over the age of 30 applying to the fire service. The German Government suggested that this measure was justified in line with the requirements of Article 4(1), on the basis that it was necessary to achieve the legitimate aim of ensuring the effective functioning of the fire service. The Government argued that evidence showed that few fire service employees over the age of 45 years of age would have sufficient physical capacity to fight fires and rescue persons in danger, and that the age limit ensured that individuals recruited to the fire service could perform these tasks for a sustained period of time before they were assigned to less physically demanding duties.

The Court accepted that an age limit in these circumstances could be objectively justified under Article 4(1) of the Directive, referring in particular to Recital 18 to the Directive which provides that its provisions do not require emergency services to recruit or retain persons who cannot carry out the range of functions that they may be called upon to perform in their job. In the view of the Court, high physical capability was a genuine and determining occupational requirement for the posts in question, and the imposition of a maximum age limit served as an adequate and effective ‘proxy’ for the required level of physical fitness.<sup>151</sup>

However, in *Prigge*, the Court was not prepared to accept that a requirement in a collective agreement for Lufthansa pilots to retire at the age of 60 could be justified by reference to Article 4(1), on the basis that national and international legislation imposed a compulsory retirement age of 65 and no evidence had been presented to show that the lower age-limit was necessary when it came to ensuring the safety of Lufthansa passengers in particular. In reaching this conclusion, the Court emphasised that Article 4(1) had to be interpreted narrowly, on the basis that it represented a derogation from the principle of equal treatment. (The Court adopted a similar approach in respect of the provisions of Article 2(5) of Directive 2000/78/EC, as discussed previously.) This is a significant point: the use of age as a proxy for physical capacity needs to be scrutinised with care.<sup>152</sup>

In general, the *Prigge* decision makes it clear that the Court will adopt a restrictive approach to the interpretation and application of the genuine occupational requirement provisions of Article 4(1), in line with its general interpretative approach in this context and its previous case-law on gender equality.<sup>153</sup> It remains to be seen how this approach will be applied in the context of other non-discrimination grounds, and in particular when it comes to the ‘religious ethos’ exception set out in Article 4(2).

<sup>150</sup> Case C-229/08, *Wolf v Stadt Frankfurt am Main*, Judgment of the Court (Grand Chamber) 12 January 2010.

<sup>151</sup> This judgment contrasts with a decision of an UK employment tribunal in the case of *Baker v National Air Traffic Services*, ET 2203501/2007, which considered that an upper age limit of 36 in recruitment of air traffic controllers could not be considered to be objectively justified, on the basis that the employer had failed to show that the age limit was necessary to achieve similar legitimate aims as those cited in the *Wolf* case. However, in the *Baker* case, there was no evidence that the performance of air traffic controllers generally declined with age, unlike the case with the fire fighters in *Wolf*.

<sup>152</sup> There is a need for great caution in assuming that performance declines with age: medical evidence demonstrates that this is not necessarily the case: see J. Grimley-Evans, ‘Age Discrimination: Implications of the Ageing Process’, in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003), 11-20.

<sup>153</sup> See Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case C-273/97, *Sirdar v The Army Board* [1999] ECR I-7403.

### 3.8 Remedies and Enforcement

Both the 2000 Directives contain a set of common provisions which are concerned with ensuring that their provisions are enforced by national authorities and that individuals are able to obtain effective remedies against discrimination. Article 7 of Directive 2000/43/EC and Article 9 of Directive 2000/78/EC require that judicial and/or administrative procedures are available to all persons who consider themselves to have been discriminated against, while Article 6(2) of Directive 2000/43/EC and Article 8(2) of Directive 2000/78/EC provide that implementation of the Directives should not constitute grounds for a reduction in the level of protection offered against discrimination in national law (the 'principle of non-regression'). Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC make provision for a shift in the burden of proof when a claimant establishes the existence of facts which are capable of giving rise to a presumption that discrimination has taken place. Furthermore, Article 15 of 2000/43/EC and Article 17 of Directive 2000/78/EC states to ensure that sanctions against discrimination are 'effective, proportionate and dissuasive', while Article 14 of 2000/43/EC and Article 16 of 2000/78/EC provide that states must abolish all national laws which are contrary to the principle of equal treatment and ensure that contractual provisions or terms of collective agreements contrary to the principle are also abolished.<sup>154</sup>

The CJEU has been called upon to clarify certain aspects of these provisions. In so doing, the Court has made it clear that remedies and sanctions against discrimination must reflect the fundamental importance of the principle of equal treatment. They must also be applied in an effective manner so as to provide substantive protection for individuals against discrimination.

For example, in the case of *Coleman*, the Court made it clear that the 'effective application of the principle of equal treatment' requires that the burden of proof is shifted in cases involving discrimination on the basis of association, in line with the provisions of Article 10(1) of the Directive. Once a claimant had established facts which could give rise to an inference that she had been discriminated against on the basis of her association with a disabled person, the burden shifted to the respondent to prove that no discrimination had taken place. In this respect, the Court indicated that a respondent could discharge this burden by demonstrating that the 'employee's treatment was justified by objective factors unrelated to any discrimination on grounds of disability'.<sup>155</sup>

In *Firma Feryn*,<sup>156</sup> the Court held that statements 'by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy', leading to a shift of the burden of proof.<sup>157</sup> An employer could attempt to discharge this burden by adducing evidence that he had not committed an actual act of discrimination in such a situation, by for example 'showing that the actual recruitment practice of the undertaking does not correspond' to the discriminatory statements made. It was for the national court to determine whether this evidence would be sufficient to prove that no discrimination had taken place.

In *Firma Feryn*, the Court also emphasised that member states were required to 'introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective'. While the Directive gave states a degree of choice as to how to give effect to this obligation, national law must prohibit the type of discriminatory statement at issue in this case and make provision for suitable sanctions to apply which are 'effective, proportionate and dissuasive'. In the circumstances, this could include 'a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost

<sup>154</sup> For a general analysis of these provisions, see C. Tobler, *Remedies and Sanctions in EU Non-discrimination Law*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2005).

<sup>155</sup> *Coleman*, [55].

<sup>156</sup> Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

<sup>157</sup> [31].

of which is to be borne by the defendant'. It could also 'take the form of a prohibitory injunction...ordering the employer to cease the discriminatory practice, and, where appropriate, a fine', or involve the 'award of damages to the body bringing the proceedings'.<sup>158</sup>

*Coleman* and *Firma Feryn* thus confirm that the burden of proof must shift in every case where a claimant establishes facts from which it can be presumed that discrimination has taken place. Furthermore, while states enjoy some discretion as to how they implement the Directives within their national legal systems, effective remedies must be available which are sufficiently proportionate and dissuasive so as to combat the specific form of discrimination at issue.

In *Bulicke*,<sup>159</sup> the 41-year old claimant had applied for a post which stated that the employer was looking for candidates between 18 and 35 years of age. Her application was rejected, and she subsequently brought an action seeking compensation for the alleged age discrimination to which she had been exposed. However, her case was dismissed on the basis that she failed to submit it within the very short time-limit of two months during which claims under the 2000 Directives had to be submitted under German law (in the absence of alternative provisions set out in a binding collective agreement).<sup>160</sup> On appeal, the Hamburg Regional Labour Court asked the CJEU whether this time-limit infringed the requirements of EU law by failing to provide effective legal protection against discrimination, especially given that longer time-limits applied in respect of sex discrimination and wrongful dismissal claims. The Hamburg Court also asked whether the introduction of a shorter time-limit for claims under the 2000 Directives that applied in respect of sex discrimination cases constituted a violation of the principle of non-regression set out in Article 8(2) of Directive 2000/78/EC.

In its judgment, the Court drew upon its previous case-law, and concluded that it was for the domestic legal system of each member state to set out the procedural rules which apply to discrimination claims, as long as 'such rules are not less favourable than governing similar domestic actions (principle of equivalence)' and that 'they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness)'.<sup>161</sup> The 'principle of equivalence' required that 'national rules be applied without distinction, whether the infringement alleged is of European Union law or national law, where the purpose and cause of action are similar'. However, this principle does not require Member States to 'extend their most favourable rules to all actions' that come within the field of employment law. It was for national courts to determine whether domestic procedures comply with the requirements of this principle of equivalence, taking account of the specific nature of the procedural rule under challenge and its contextual role within national law.<sup>162</sup> With regard to the 'principle of effectiveness', the Court held that 'whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole'.<sup>163</sup> Furthermore, 'account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'. 'Reasonable' time periods are in principle compatible with this principle.<sup>164</sup>

Applying the two principles to the facts at issue in *Bulicke*, the Court concluded that a time-limit of two months was not necessarily incompatible with the requirements of Directive 2000/78/EC, especially as the time-period ran from the moment a claimant acquired knowledge of the alleged discrimination. The Court also concluded that

<sup>158</sup> [36]-[40].

<sup>159</sup> Case C-246/09, *Bulicke v Deutsche Büro Service GmbH*, Judgment of the Court (Second Chamber) 8 July 2010.

<sup>160</sup> Ms Bulicke had learnt by telephone that she had failed to obtain the job on 19 November 2007, and had submitted her claim on the 29 January 2008. In the interim, the company had published another advertisement looking for younger workers.

<sup>161</sup> [25].

<sup>162</sup> [26]-[29].

<sup>163</sup> [35]-[36].

<sup>164</sup> [36].



the principle of non-regression had not been violated. Any reduction in protection had firstly to be connected to the implementation of the Directive, and secondly relate to the 'general level of protection' afforded against discrimination that came within its scope. As sex discrimination did not come within the scope of Directive 2000/78/EC, the introduction of the two-month time limit did not represent a reduction in protection against the forms of discrimination prohibited by the Directive.<sup>165</sup>

*Bulicke* is an important case because it establishes that member states can determine what procedural rules apply in discrimination cases as long as they comply with the 'principle of equivalence', the 'principle of effectiveness' and the 'principle of non-regression'. The *Bulicke* judgment provides useful clarification of what adherence to these principles require. However, some concern must exist about how the Court applied the 'principle of effectiveness' in this case. Victims of discrimination are often members of vulnerable and marginalised groups, who often have inadequate access to legal advice. A two month time-limit gives them very little time to bring forward a claim. The argument could be made that the Court should have taken more account of this reality in applying the principle of effectiveness in *Bulicke*. Such an approach would have been consistent with the purposive interpretative approach it has adopted to the 2000 Directives.

In *Meister*,<sup>166</sup> the CJEU provided more guidance on the obligation of states to provide effective remedies for victims of discrimination and to make provision for a shift in the burden of proof. In this case, the claimant, a Russian national, had applied for an advertised position. She satisfied all the requirements of the post, but her application was unsuccessful and the job was subsequently re-advertised. She brought a claim for damages, alleging that she had been subject to discrimination on the grounds of sex, age and ethnic origin. She also sought access to information from the employer about the selection procedure for the post, including whether the employer had hired another person and the nature of their qualifications. The German Federal Labour Court asked the CJEU whether the provisions of Directive 2000/78/EC and the equivalent provisions of the recast Equal Treatment Directive 2006/54/EC gave an alleged victim of discrimination a right to receive the information sought, and if this information was not conforming whether it gave rise to a presumption that discrimination exists.

In its judgment, the Court again applied its existing gender equality case-law on the shift of burden of proof, in particular its recent decision in *Kelly*.<sup>167</sup> In line with this jurisprudence, it concluded that alleged victims of discrimination did not have a right to receive the information sought: however, it also ruled that a refusal by the defendant to make such information available 'may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination', which would result in a shift of the burden of proof.<sup>168</sup>

Furthermore, the Court indicated that the fact that the employer did not dispute that the claimant satisfied the requirements for the post, along with the fact that she was not invited to an interview despite her expertise and the decision to re-advertise the post, could also be taken into account in establishing the existence of a presumption of discrimination.<sup>169</sup> The Court also explicitly confirmed that a presumption of indirect discrimination could be established to exist on the basis of statistical evidence.<sup>170</sup> The judgment in *Meister* thus provides valuable clarification of the type of evidence that can establish a presumption of discrimination and thus give rise to a shift in the burden of proof: it is likely to become a significant point of reference for domestic courts applying the burden of proof provisions of the 2000 Directives for some time to come.

<sup>165</sup> [43]-[47].

<sup>166</sup> Case C-415/10, *Meister v Speech Design Carrier Systems GmbH*, Judgment of the Court (Second Chamber) 19 April 2012.

<sup>167</sup> Case C-104/10, *Kelly v National University of Ireland (University College Dublin)*, Judgment of the Court (Second Chamber) of 21 July 2011.

<sup>168</sup> *Meister*, [46]-[47].

<sup>169</sup> [45].

<sup>170</sup> [43].

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# Part IV

## The Impact of the CJEU's Jurisprudence on National Law

The CJEU has therefore consistently interpreted the 2000 Directives as intended to give effective protection to the principle of equal treatment. In the cases that have been referred to it, the Court's judgments have provided clear guidance to national courts as to how key provisions of the Directives should be interpreted and applied.

Many of these cases have concerned important and complex issues of national law, such as the legislation governing default retirement age that was at issue in the cases of *Palacios de la Villa*, *Age Concern*, *Rosenbladt* and *Hörnfeldt*, or the rules limiting the entitlement of same-sex partners to pension benefits which formed the subject of the *Maruko* and *Römer* judgments. The Court's judgments in these particular cases have thus been very significant. For example, the Court's judgment in *Firma Feryn* generated a change in Belgian law and resulted in a finding by the Belgian courts that the employer in that case had directly discriminated.<sup>171</sup>

However, the impact of the Court's case-law has also extended beyond its judgments in these specific cases. The manner in which it has interpreted the Directives has also begun to influence how national courts have applied domestic anti-discrimination law, especially in cases which are analogous to those already decided by the CJEU. For example, in the Irish case of *McCarthy v Health Services Executive*, the Irish High Court took account of the CJEU's judgment in the *Palacios* reference in upholding a legislative provision which required medical professionals to retire at 65.<sup>172</sup> The Danish High Court similarly took account of the *Prigge* judgment in concluding that a collective agreement which made provision for the dismissal of pilots at the age of 60 constituted discrimination on the basis of age.<sup>173</sup>

The Court's jurisprudence is also influencing the evolution of national law and policy, even if national authorities do not always explicitly refer to the Court's case-law when introducing reforms to existing practice. For example, after the Court's judgment in *Mangold*, the Belgian Minister for Labour took steps to inform the social partners of the need to remove references to age in the provisions of collective agreements which determined how salaries were fixed.<sup>174</sup> The Court's case-law is also influencing how national equality bodies go about their work of investigating discrimination complaints and promoting equality of opportunity. This can be illustrated by reference to a case study example, namely recent decisions of the Cypriot Equality Body.

### **Case Study: The Impact of the Case-law of the CJEU on the Conclusions Adopted by the Cypriot Equality Body**

The Cypriot Equality Body received two complaints, one in relation to the non-recognition of homosexual marriages and one regarding the non-recognition of registered partnerships between homosexuals by the Cypriot government. These two complaints followed two other complaints in 2008 where the complainants applied to the Equality Body because their foreign partners had been denied rights which would have been granted had they been a heterosexual couple. The report of the Equality Body recognised that this issue fell within the competency of the legislative branch of government. However, it took close account of the ECJ ruling in the case of *Maruko*, and recommended the introduction of a framework which would grant recognition to same-sex partners and regulate their legal position: A.K.P. 142/2009, 16/2010, dated 31/03/2010. Similarly, the Equality Body subsequently made extensive reference to the Court's age

<sup>171</sup> By way of remedy, the Belgian Labour Court in this case ordered the cessation of the discriminatory practice and the publication of this judicial order in several newspapers.

<sup>172</sup> Unreported, 19 March 2010.

<sup>173</sup> Western High Court decision of April 12, 2012, B-1065-08. The Norwegian Supreme Court also has taken account of *Prigge* in resolving a similar case concerning the retirement age of helicopter pilots: see the Supreme Court Judgment of 14 February 2012, HR-2012-325-A.

<sup>174</sup> See E. Bribosia and I. Rorive, European Network of Legal Experts in the Non-discrimination Field, *Country Report on Belgium 2009*, at 126 – available at [http://www.non-discrimination.net/content/media/2009-BE-Country%20Report%20LN\\_final.pdf](http://www.non-discrimination.net/content/media/2009-BE-Country%20Report%20LN_final.pdf) (last accessed 20 August 2012).

discrimination jurisprudence and in particular to the judgments in *Mangold* and *Palacios* in concluding that preferential treatment given to older students by the national Open University could not be objectively justified and therefore constituted unlawful age discrimination: see Decision A.K.I. 74/2009, 22.11.2010. It also made reference to the age discrimination case-law of the Court in concluding that it was discriminatory to require traffic wardens to retire at 60: see Decision A.K.I. 76/2009, 11.03.2010.

The case-law of the CJEU in respect of the 2000 Directives is thus having an impact on national law and practice across the EU. However, it appears that different aspects of the Court's case-law are impacting on national legal systems in different ways. This is demonstrated by the pattern of references that have reached the Court. The Court's case-law on age discrimination has generated multiple references from a variety of member states, and in particular from Germany. This indicates that specific elements of the Court's case-law, and in particular its judgments in the area of age discrimination case-law, may be generating more 'turbulence' in some national legal systems than others.

To understand why the Court's case-law may have this variable impact, it is useful to compare how the jurisprudence of the Court has influenced legal developments in two specific member states, the UK and Germany. These two countries make for a useful comparative study on the basis that they are large member states with relatively stable economic, political and legal structures. Furthermore, the courts of both countries have in the past engaged actively with the CJEU in the development of EU gender equality law, with the jurisprudence of the Court in this field playing a key role in the evolution of national sex discrimination law in both states.<sup>175</sup> As a result, comparing how the Court's case-law in respect of the 2000 Directives has influenced the legal systems of both these states will help to illustrate how the Court's case-law can impact on different states in different ways.

#### **Case-Study: The Impact of the Case-law of the CJEU on UK Law**

Prior to implementation of the 2000 Directives, the UK had comprehensive legislation in place which prohibited discrimination on the grounds of sex, race and disability. To comply with the requirements of the Directives, it therefore had to extend protection to the age, religion or belief and sexual orientation grounds: it also had to extend several provisions of its existing legislation in the fields of disability and race and ethnic origin. While discrimination on the grounds covered by the 2000 Directives is widely acknowledged to constitute a serious social problem in the UK, this extension of protection against discrimination did not generate much controversy in either the political or legal spheres. This may have been attributable in part to cultural familiarity with the comprehensive anti-discrimination legislation that exists in other common law jurisdictions such as Canada, the US and Australia. Furthermore, the presumption existed among many legal experts and government officials that the CJEU would interpret the provisions of the 2000 Directives in a similar manner as it had interpreted the provisions of the gender equality directive: this is reflected for example in the consultation document produced by the UK government on how to implement the age discrimination provisions of Directive 2000/78/EC: Department of Trade and Industry (UK), *Equality and Diversity: Age Matters* (London: DTI, 2003).

As a result, the various forms of primary and secondary legislation which transposed the 2000 Directives into national law were formulated on the basis that a similar approach should apply across all the discrimination grounds and that exceptions to the principle of non-discrimination had to be narrowly formulated. However, legal experts expressed criticisms that the Directives had not been fully transposed into UK law.

<sup>175</sup> Claire Kilpatrick has described Germany and the UK as 'the active preliminary reference couple' in the judicial dialogue between national courts and Luxembourg that contributed to the emergence of EU gender equality law: see C. Kilpatrick, 'Gender Equality: A Fundamental Dialogue', in S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice* (Oxford: Hart, 2001), 77-94.

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Furthermore, there exists a tradition of legal activism in the anti-discrimination field, often supported by trade unions and civil society. As a result, the provisions of the 2000 Directives have generated a substantial case-law. For example, in 2009-10, over 20,000 claims relating to the discrimination grounds covered by the 2000 Directives were commenced in UK employment tribunals: see A. McColgan, *Country Report on UK 2010* (Brussels: European Network of Legal Experts in the Non-discrimination Field), at 143.

This domestic case-law has generated few references to the CJEU. However, despite this, the Court's case-law has had a significant impact in the UK. The Court's judgments are regularly cited by judges and lawyers, and the UK courts make detailed reference to the Luxembourg case-law in interpreting domestic law. For example, the UK Supreme Court followed the CJEU's age discrimination case-law closely in deciding the leading British age discrimination case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16.

Furthermore, the CJEU's evolving case-law has played an important role in encouraging legislative reform. After the Court ruled in *Coleman* that 'associative discrimination' came within the scope of the prohibition on direct discrimination set out in Directive 2000/78/EC, sections 13 and 26 of the Equality Act 2010 give effect to *Coleman* across all the protected grounds by regulating discrimination 'because of' and harassment 'related to' a protected characteristic. The Court's judgment in *Age Concern* established that the default retirement age of 65 set out in the UK Employment Equality (Age) Regulations 2006 was in principle compatible with the provisions of Directive 2000/78/EC. When the case returned to the domestic courts, the High Court ruled that the establishment of a default retirement age of 65 was lawful, but expressed serious doubts about whether the selection of 65 as the 'trigger' age was proportionate: *R (Age Concern) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 1017 (QB). The UK has since abolished this default retirement age through the provisions of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.

Several factors may explain the patterns demonstrated by this case study. Academic commentary has suggested that UK courts are sensitive to the costs and delays caused by referrals to Luxembourg, and often take the view that they are able to apply EU law accurately by themselves.<sup>176</sup> Furthermore, the general interpretative approach applied by the CJEU in *Mangold* and subsequent cases has been broadly similar to the approach that has been applied by the UK courts in interpreting both the Directives and the provisions of domestic legislation in leading domestic cases such as *R (Amicus and others) v Secretary of State for Trade and Industry*<sup>177</sup> and *Seldon v Clarkson Wright and Jakes*.<sup>178</sup>

As a result, UK courts have not considered it necessary to refer many cases to Luxembourg: in their view, the CJEU's case-law on the 2000 Directives read together with its gender equality jurisprudence provides clear guidance as to what EU law requires in most circumstances. It remains to be seen how the evolving jurisprudence of the CJEU will generate change in UK law in the future: for now, it is clear that the Court's case-law has had a significant impact on UK law, even though only two references have been made by UK courts to Luxembourg.

### **Case-Study: The Impact of the Case-law of the CJEU on German Law**

Several constitutional provisions in the German Basic Law (*Grundgesetz*) such as Article 1(1) and Article 3, protect human equality as an aspect of the fundamental guarantee of human dignity, which constitutes the supreme value of the German legal order. This right of non-discrimination can take effect in both public and

<sup>176</sup> T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40(1) *Common Market Law Review* 9-50, 38.

<sup>177</sup> [2004] EWHC 860 (Admin).

<sup>178</sup> [2012] UKSC 16.

private law through the horizontal effect of constitutional provisions, and the principle of equal treatment of employees is well established in case-law. Since 2006, there now also exists specialised anti-discrimination legislation in the form of the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*), which *inter alia* transposes the provisions of the 2000 Directives into national law.

However, despite this strong foundation for domestic non-discrimination law, German courts have made multiple references to the CJEU. These have mainly concerned the age discrimination provisions of Directive 2000/78/EC, where German references have made up the bulk of the Court's case-law. The two sexual orientation cases referred to the Court, *Maruko* and *Römer*, have also come from Germany. German courts have always been a regular source of references to the CJEU. However, it is striking that they have provided the majority of the total number of cases referred to the Court in respect of the 2000 Directives at the time of writing.

Both the lower and higher courts in the German judicial hierarchy have engaged in a sustained 'dialogue' with the CJEU through the reference procedure: in cases such as *Küçükdeveci*, *Rosenblatt* and *Fuchs*, the national courts have submitted detailed sets of questions to the CJEU, seeking clarification and further development of the principles initially laid down in *Mangold* and *Palacios*. This has enabled the CJEU to clarify the provisions of Directive 2000/78/EC that relate to age discrimination, while also ensuring that the German courts obtain clear guidance in a disputed area of law.

This pattern, which contrasts interestingly with the UK experience, may reflect the fact that age discrimination is a new and relatively complex area of law. It may also be caused in part by factors which are specific to the German legal context. The enactment of the AGG generated considerable controversy, as did the *Mangold* decision of the CJEU as discussed above.<sup>179</sup> This controversy may have contributed to the readiness of German courts to refer cases to the CJEU: as the authoritative interpreter of EU legislation, the Court is best placed to resolve contested questions of European Union law.

Deborah Mabbett has also noted that many of the collective agreements that play an important role in regulating Germany's labour market have historically made some use of age distinctions to determine eligibility for benefits, retirement or pay increments. As a result, she suggests that the prohibition on age discrimination set out in Directive 2000/78/EC may require greater adjustments to be made to existing social regulation in Germany than is the case in states such as the UK which have a less collectivist labour market structure.<sup>180</sup> This may partially explain the volume of references that German courts have made to the CJEU. In cases such as *Rosenblatt*, *Prigge* and *Hennings*, the national courts have sought clear guidance from the CJEU before applying the legislative prohibition on age discrimination to collective agreements negotiated between the social partners, perhaps mindful of the need to balance respect for collective bargaining rights with enforcing anti-discrimination law.

Specific factors therefore exist in Germany that may explain why national courts have referred so many age discrimination cases to the CJEU. The comparison with the UK suggests that the controversy that has surrounded anti-discrimination law in Germany, combined with the specific nature of the German labour market, may explain

<sup>179</sup> For an overview of this debate in English and references to the key academic literature on this subject, see M. Mahlmann, *Country Report on Germany 2010* (Brussels: European Network of Legal Experts in the Non-discrimination Field), at 8-9 – available at [http://www.non-discrimination.net/content/media/2010-DE-Country%20Report%20LN\\_FINAL\\_0.pdf](http://www.non-discrimination.net/content/media/2010-DE-Country%20Report%20LN_FINAL_0.pdf) (last accessed 20 August 2012).

<sup>180</sup> D. Mabbett, 'EU Age Discrimination Law in Germany and the UK: Legal Irritant and Reform Lever', unpublished paper, available in draft form at <http://www.jhubc.it/ecpr-porto/virtualpaperroom/043.pdf> (last accessed 30 August 2012); see also D. Mabbett, 'Age Discrimination in Law and Policy: How the Equal Treatment Directive affects National Welfare States', in M. Ross and Y. Borgmann-Prebil (eds.) *Promoting Solidarity in the European Union* (Oxford: Oxford University Press, 2010), 198-215.



the high reference rate. The comparison also makes clear that the case-law of the CJEU can affect national legal systems in different ways.

However, in both the UK and Germany, it is also clear that national courts closely follow and apply the jurisprudence of the CJEU. The Court's case-law has become the major reference point for determining how the provisions of the 2000 Directives should be applied. It has also played an important role in transforming national law. Both the German and the UK courts now regularly take account of the Court's judgments in resolving discrimination claims.<sup>181</sup> Furthermore, the Court's decisions have resulted in legislative reform and expanded legal protection against discrimination in both Germany and the UK.

In general, the case-law of the Court has had a considerable impact across Europe. So far, this impact has mainly been felt in those areas where the Court's case-law is most developed, specifically the areas of age discrimination and sexual orientation discrimination linked to partnership benefits. As more cases are referred to the Court and its case-law expands in scope, it is likely that the influence of its jurisprudence will continue to grow.

<sup>181</sup> See e.g. BVerfGE, 2 BvR 1397/09, 19 June 2012.

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# Part V

## Trends and Future Directions

The case-law of the CJEU has thus set out the general interpretative approach that the Court will apply when reading and giving effect to the provisions of the 2000 Directives. It has clarified the scope of these Directives and provided guidance as to how some of their key provisions should be interpreted. These judgments have already had a considerable impact on national law across Europe. However, the pattern of references it has received has meant that the Court's jurisprudence is more developed in some areas than in others.

In particular, the high volume of references concerning age discrimination has allowed the Court to develop a substantial case-law on the interpretation and application of the objective justification test set out in Article 6(1) of Directive 2000/78/EC. However, as previously noted, the Court has yet to receive any references which relate to discrimination on the grounds of religion or belief, and the number of age-related references has far outnumbered those received for all the other grounds put together.

This means that the Court's case-law in respect of the other grounds is less developed than it is for age. It also means that the Court has not yet had the opportunity to provide guidance on the interpretation of some of the provisions of the 2000 Directives which relate to one particular ground. For example, no reference so far has reached the Court in relation to the provisions of Article 4(2) of Directive 2000/78/EC which concern organisations that have a 'religious ethos'. Furthermore, as noted above, the Court has only handed down one judgment so far (*Chacón Navas*) that discussed the 'reasonable accommodation' requirements set out in Article 5 of Directive 2000/78/EC.

The Court has also had limited opportunity so far to develop a substantial jurisprudence in respect of the indirect discrimination and harassment provisions of the 2000 Directives: as discussed in Part 3, only the *Tyrolean Airlines* and *Coleman* cases respectively have required the Court to analyse these provisions in detail. Furthermore, there are important provisions of both Directives which have not yet featured in any reference. For example, Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC provide that states may make use of positive action, which has been the subject of a series of important judgments by the Court in the context of gender equality.<sup>182</sup> However, as yet, the Court has not been asked to interpret these provisions. The same is true of the provisions of both Directives also require member states to prohibit the victimisation of individuals who have complained about discrimination, disseminate information about the requirements of the Directives, and engage in dialogue with social partners and non-governmental organisations with a view to promoting respect for the principle of equal treatment.<sup>183</sup>

This pattern of references is not altogether surprising. Age discrimination is a new area of law: very few EU states had introduced any form of legal regulation on this subject before 2000.<sup>184</sup> It also gives rise to complex issues, as discussed above, and the experience of states such as Ireland that prohibited age discrimination before 2000 indicates that it tends to be the subject of a high proportion of discrimination claims in general.<sup>185</sup> Furthermore, as the comparative case study in Part 4 demonstrated, specific national factors may also be in play which might explain in particular why German courts have referred so many age cases to the Court.

However, it is perhaps surprising how few cases have been referred to the Court in respect of the other grounds covered by the 2000 Directives. This may reflect the fact that many national legal systems are still assimilating the provisions of the Directives and do not have a tradition of legal activism in this field. National courts may also feel confident that the existing case-law of the Court (including its gender equality jurisprudence) provides them with adequate guidance as to how to apply the provisions of the 2000 Directives in most situations: as mentioned above, the UK courts appear to take this view.

<sup>182</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051; Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363; Case C-158/97 *Badeck* [2000] ECR I-1875; Case C 407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539.

<sup>183</sup> Articles 9-12 of Directive 2000/43/EC and Articles 11-14 of Directive 2000/78/EC.

<sup>184</sup> C. O'Conneide, *Age Discrimination and European Law*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2005).

<sup>185</sup> *Ibid.*, pp. 16-17.

Other factors may also be in play. Courts in many European countries have recently been required to decide a number of controversial and high profile religious discrimination cases. Many of these cases have involved issues related to the wearing of religious symbols in the workplace and Christian employees seeking exemptions from standard workplace practices to enable them to express their religious beliefs. However, as yet, none of these cases have been referred to the CJEU, even though they appear to come within the scope of Directive 2000/78/EC. This type of case often involves a complex blend of legal issues related to national constitutional law, ECHR rights and the requirements of EU law. Perhaps as a result, some national courts may be reluctant to refer such cases to Luxembourg.

Interestingly, several such cases originating in the UK have recently been appealed to the European Court of Human Rights, whose jurisprudence in this area is likely to exert a considerable influence both on national courts and the CJEU.<sup>186</sup> One case in particular, *Ladele*, serves as a useful case study to illustrate the complexity of the issues that arise in religious discrimination cases and the overlapping legal frameworks that can apply to their facts.

### **Case Study: Religious Discrimination - *Ladele v London Borough of Islington* [2009] EWCA Civ 1357**

Ms Ladele was a registrar employed by a local authority to conduct civil marriages refused to officiate at civil partnerships between same-sex partners, on the basis that this was incompatible with her Christian religious beliefs. She was subject to disciplinary procedures as a result. Ms Ladele then alleged that she had been subject to direct discrimination, indirect discrimination and harassment on the grounds of her religious belief. At first instance, an Employment Tribunal upheld her claim on all three grounds, finding in particular that the failure to accommodate Ms Ladele's beliefs meant that she had been to less favourable treatment as a result of her religious beliefs.

However, on appeal, the Employment Appeals Tribunal (EAT) held that there was no direct discrimination as Ms Ladele had not been discriminated against or subjected to harassment on the basis of her religious beliefs: she had been disciplined solely on the basis that she had failed to perform work duties. It also concluded that there was no indirect discrimination, on the basis that the requirement in question that all registrars perform civil partnerships, while adversely affecting persons who shared Ms Ladele's religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect. The EAT also held that her rights under Article 9 and 14 of the European Convention on Human Rights had not been violated. The Court of Appeal upheld this decision. Neither court felt it necessary to refer the matter to the CJEU. Ms Ladele has now brought a case to the European Court on Human Rights alleging a violation of her Article 9 and 14 rights under the Convention – Application No. 51671/10.

It remains to be seen whether these current trends will change over time. National courts across the EU are deciding an ever-growing number of discrimination cases. Many of these cases involve issues related to reasonable accommodation, positive action, harassment, multiple discrimination and other complex aspects of discrimination law and policy.<sup>187</sup> As a result, it is likely that the CJEU will be called upon in the near future to address a wider range of cases than has been the case so far.

<sup>186</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Eweida v British Airways plc* [2010] EWCA Civ 80; *McFarlane v Relate Avon Ltd* [2010] IRLR 196.

<sup>187</sup> See e.g. in Sweden, Labour Court case 2010/91 of 15 December 2010 which involved issues of multiple discrimination related to age and gender, analysed at <http://www.non-discrimination.net/content/media/SE-20-Flash%20report%20age%20case.pdf>; in France, Rouen Administrative Court, Judgment no 0500526-3 of 24 June 2008, which concerned reasonable accommodation in public service appointments, analysed at <http://www.non-discrimination.net/content/media/LR-8-FR-1.pdf>; in the Czech Republic, the judgment of the Czech Constitutional Court No. II. ÚS 2943/08, dated 27.1.2009, relating to harassment, analysed at <http://www.non-discrimination.net/content/media/CZ-15-TEMPLATE%20FLASH%20REPORT%20Czech%20constitutional%20court%20on%20racial%20harassment.pdf>.

For example, a case has already been referred by the German courts to the CJEU which gives rise to some interesting issues involving multiple discrimination.<sup>188</sup> This is the case of *Odar v Baxter Deutschland*, which concerns national measures which provide that workers close to retirement age may be excluded or receive lower compensation from a benefit scheme designed to alleviate the consequences of redundancy.<sup>189</sup> These measures have been challenged on the basis that they discriminate on the basis of age and/or disability, on the basis that it reduces the compensation that must be paid to severely disabled workers who can retire at an earlier age than other workers (they become entitled to receive a state pension at 60 instead of the usual retirement age of 65, which means that their ‘retirement age’ for the purposes of this benefit scheme is lower than that of non-disabled workers). The alleged discrimination in question here is linked both to the age of the workers and their disabled status: it therefore raises the interesting question of how such claims should be treated under the framework set out by the 2000 Directives.

Sharpston AG in her Opinion issued on 12 July 2012 suggested that the national measures in question did not directly discriminate on the grounds of age but did indirectly discriminate on the grounds of disability, on the basis that the legitimate aims of this benefit scheme could be achieved by less discriminatory means which paid due regard to their particular circumstances when allocating the limited funds payable as compensation upon redundancy.<sup>190</sup> In reaching this conclusion, Sharpston AG focused on how the scheme had a negative impact on disabled workers coming within a particular age band. In other words, her analysis took account of how disadvantage was generated in this case by a combination of factors linked to age and disability. It will be interesting to see whether the Court will adopt a similar approach in its judgment in this case: its decision may provide important guidance on how multiple discrimination claims should be handled by national courts.

The Danish courts have also referred two cases to the Court which raise important issues that relate to the disability discrimination provisions of Directive 2000/78/EC.<sup>191</sup> The CJEU has been asked to provide further clarification of the definition of disability and the approach to reasonable accommodation set out in its earlier judgment in *Chacón Navas*. In particular, the Court has been asked whether a reduction of working hours can qualify as reasonable accommodation under Article 5 of the Directive, and whether the provisions of the Directive preclude the application of a provision of Danish law under which an employer is entitled to dismiss an employee with a shortened notice period if the employee has received salary during periods of illness for a total of 120 days during a period of 12 consecutive months. This reference thus returns to some of the issues left open by the judgment of the Court in *Chacón Navas* as discussed previously in Part 2. As a result, this case looks likely to add new depth to the Court’s case-law on disability discrimination. The same can be said for the enforcement action being brought by the Commission against Italy in respect of its alleged failure to place all employers under an obligation to make reasonable accommodation for persons with disabilities.<sup>192</sup>

The CJEU has also been asked to clarify its case-law in respect of sexual orientation discrimination and differences of treatment based on marital status in a reference from the French Cour de Cassation in the case of *Hay v Crédit*

<sup>188</sup> The facts of *Meister* as discussed above in Part 3.8 involved a claim of multiple or overlapping forms of discrimination: however, the legal issues the CJEU were asked to resolve did not concern this aspect of the case: see Case C-415/10, *Meister v Speech Design Carrier Systems GmbH*, Judgment of the Court (Second Chamber) 19 April 2012.

<sup>189</sup> Case C-152/11, *Odar v Baxter Deutschland GmbH*, lodged on 28 March 2011.

<sup>190</sup> Sharpston AG noted in a footnote to her opinion in *Odar* (fn. 50) that the Court in Case C-86/10 *Balaban v Zelter GmbH*, lodged on 12 February 2010, had been asked whether national legislation that allowed the selection of workers for collective dismissal on the grounds of age was justified under Article 6(1) of the Directive. However, the reference had been withdrawn by the referring national court after a hearing but before judgment was delivered by the CJEU: see OJ 2011 C 252, p. 27.

<sup>191</sup> Case C-335/11, *HK Denmark on behalf of Jette Ring v Dansk Almennyttigt Boligselskab*, lodged on 1 July 2011; Case C-337/11, *HK Denmark on behalf of Lone Skouboe Werge v Pro Display A/S*, lodged on 1 July 2011.

<sup>192</sup> Case C-312/11, *European Commission v Italy*, action brought on 20 June 2011.

*agricole mutuel de Charente-Maritime et des Deux-Sèvres*.<sup>193</sup> In this case, the Court has been asked whether the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the provisions of a collective agreement, which excludes same-sex partners who enter into a civil solidarity pact from obtaining advantages in pay and working conditions which are reserved for married persons. This reference will present the Court with an opportunity to further develop the approach it has set out in the *Maruko* and *Römer* judgments.

The very interesting case of *Belov*, which was been referred to the Court of Justice by the Bulgarian Equality Body, the Commission for Protection against Discrimination (KZD), on 25 July 2011, will also give the CJEU the opportunity to clarify some very important aspects of Directive 2000/43/EC.<sup>194</sup> This is the first case relating to the treatment of the Roma to be referred to the Court. It concerns an allegation that the attachment of electricity meters to electricity poles at a height of 7 meters in Roma districts of the Bulgarian city of Montana, while electricity meters are installed at a maximum height of 1.70 meters in other parts of the city in order to allow consumers to check their meter readings, constitutes discrimination on the grounds of ethnic origin. The CJEU has been asked to determine whether the installation of these meters constitutes a form of service provision which comes within the scope of Directive 2000/43/EC, and whether it is necessary for an act of direct or indirect discrimination to infringe a right or interest explicitly recognised in law or whether discriminatory behaviour which subjects individuals to a disadvantage is sufficient. The Court has also been asked to provide guidance on aspects of indirect discrimination and the circumstances in which the burden of proof will shift. Furthermore, the Court must also determine whether the KZD is entitled to make a preliminary reference, which involves an assessment of whether it can be considered to be a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. This reference therefore raises important questions relating to the scope and interpretation of Directive 2000/43/EC and the status of national equality bodies which perform an adjudicatory role when it comes to settling discrimination claims.

The Court will also be called upon to develop its case-law on the burden of proof, and in particular on when a presumption of discrimination on the grounds of sexual orientation can be said to arise, in a reference from the Romanian courts which concerns homophobic statements made by the principal director of a leading football club (*Steaua Bucharest*).<sup>195</sup> A number of references from German courts have also asked the Court to clarify whether a public scheme granting assistance to public servants in case of illness comes within the scope of Directive 2000/78/EC in a series of German references: in his opinion in the joined case of *Dittrich*, Cruz Villalón AG has suggested that it does, if the state 'in its capacity as a public employer, is the principal source of finance for that assistance'.<sup>196</sup> The Court has also been asked to develop its age discrimination case-law in a series of other references, which are currently pending before the Court: this includes the action brought by the Commission against Hungary in respect of national legislation setting a new retirement age of 62 for judges, prosecutors and notaries public.<sup>197</sup>

New cases are therefore reaching the Court which will help to expand its existing jurisprudence. However, it remains to be seen how the pattern of references to the Court develops over the next few years. Some areas of anti-discrimination law appear to give rise to particularly complex legal questions. For example, the provisions

<sup>193</sup> Case C-267/12, *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, lodged on 30 May 2012.

<sup>194</sup> Case C-394/11, *Valeri Hariev Belov*, lodged on 25 July 2011.

<sup>195</sup> Case C-81/12, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, lodged on 14 February 2012.

<sup>196</sup> Joined Cases C-124/11, *Bundesrepublik Deutschland v Dittrich*, lodged on 9 March 2011; C-125/11, *Bundesrepublik Deutschland v Klinke*, lodged on 9 March 2011; C-143/11, *Müller v Bundesrepublik Deutschland*, lodged on 24 March 2011: Opinion of Cruz Villalón AG, delivered on 28 June 2012.

<sup>197</sup> Case C-286/12, *European Commission v Hungary*, action brought on 7 June 2012. See also Case C-266/11, *Dansk Funktionærforbund, Serviceforbundet, acting on behalf of Frank Frandsen v Cimber Air A/S*, lodged on 27 May 2011; Case C-476/11, *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*, lodged on 19 September 2011; Case C-546/11, *Dansk Jurist- og Økonomforbund (DJØF - Danish Union of jurists and economists) acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, lodged on 26 October 2011.

of Article 4(2) which permit organisations with a ‘religious ethos’ to treat workers differently depending upon their beliefs have the potential to give rise to difficult borderline cases, while the question of when employers may be obliged to accommodate the religious beliefs of their employees has already been the subject of a series of controversial cases at national level (as previously discussed). The reasonable accommodation provisions of Article 5 of Directive 2000/78/EC also give rise to difficult legal issues, as does the question of how to apply the common indirect discrimination, positive action and harassment provisions of both Directives across the different discrimination grounds. Uncertainty also surrounds the scope of Directive 2000/43/EC, in particular when it comes to the distinction that the Court has drawn in *Runevič-Vardyn* between the performance of public functions and the provision of services by a public authority. However, it is difficult to predict when if ever any of these issues will become the subject of further references to the Court: so far, no clear correlation can be established between the legal complexity of an issue and the extent to which it features in references made to the CJEU by national courts. It will also be interesting to see what type of cases the Commission refers to the CJEU in the future. So far, the Commission has only referred a few cases to the Court.<sup>198</sup>

What is clear is that future cases will in all likelihood be adjudicated in line with the general interpretative approach that the Court was already set out in comprehensive detail in its case-law on the 2000 Directives. The provisions of both Directives will be read as specific expression to the general principle of equal treatment and the human right of all individuals to freedom from discrimination as set out in Article 21 of the EU Charter of Fundamental Rights. Its provisions will be given a purposive interpretation in line with this objective, and exceptions to the principle of equal treatment will be read strictly and narrowly. It also appears if the provisions of the Directive will be read in accordance with the principles of respect for human dignity and autonomy and the other fundamental rights set out in the EU Charter. The Court has made clear that this template will be applied whenever it is called upon to interpret the 2000 Directives.

As a result, while uncertainty exists as to how the case-law of the Court will develop over the next few years, its future direction of travel appears to be clear. The Directives are designed to protect a fundamental right, as is made clear by the text of their recitals and operative provisions. From its judgment in the *Mangold* case on, the CJEU has interpreted the Directives by reference to this objective. A similar approach is likely to be applied in future references that will reach the Court in relation to the provisions of the 2000 Directives.

<sup>198</sup> Case C-312/11, *European Commission v Italy*, action brought on 20 June 2011; Case C-286/12 *European Commission v Hungary*, action brought on 7 June 2012.



## Conclusion

Since the 2000 Directives came into force, an ever-growing number of cases have been referred to the CJEU from national courts via the preliminary reference procedure. In response, the Court has delivered a series of important judgments which have clarified how many of the key provisions of the Directives should be interpreted and applied.

The Court's case-law has established that the 2000 Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment, which also finds expression in Article 21 of the EU Charter of Fundamental Rights. This is the lens through which the CJEU interprets the specific provisions of both Directives, which have been given a purposive interpretation in line with this approach.

The case-law of the CJEU has clarified many of these issues relating to the scope of the 2000 Directives. It has also helped to establish how many of the operative provisions of both Directives should be interpreted and applied. This case-law has had a considerable impact across Europe, albeit mainly in those areas where the Court's case-law is most developed such as age discrimination. As more cases are referred to the Court and its case-law expands in scope, it is likely that the influence of its jurisprudence will continue to grow.

It remains to be seen how the case-law of the CJEU in this area will evolve in the future. However, the Court has made clear that the Directives are to be interpreted as giving expression to a fundamental principle of EU law. This approach runs through all the Court's case-law thus far that concerns the provisions of the 2000 Directives, and is likely to shape how its jurisprudence develops in the future.

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