DEVELOPMENTS

The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* Judgment

By Marlene Schmidt[*]

A. Introduction

On 22 November 2005,[1] the European Court of Justice (ECJ) delivered a judgement in a preliminary ruling procedure from the *Arbeitsgericht München* (Labour Court Munich), answering questions concerning the interpretation of Clauses 2, 5 and 8 of the Framework Agreement on fixed-term contracts, put into effect by Council Directive 1999/70/EC of 28 June 1999,[2] and as regards the construction of Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[3] Essentially, the *Arbeitsgericht* wanted to know whether a statutory provision exempting employees of 52 years of age and older from limitations to the conclusion of fixed-term contracts was compatible with Community law.

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[1] Case C-144/04, Werner Mangold v. Rüdiger Helm, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3695 (2005), [hereinafter "Mangold"].

[2] Council Directive 99/70, Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, 1999 O.J. (L 145) 43; corrected 1999 O.J. (L 244) 64; *see* Anne Röthel, *Europäische Rechtsetzung im sozialen Dialog, Zur Richtlinie 1999/70/EG über befristete Arbeitsverhältnisse*, 17 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 65 (2000); MARLENE SCHMIDT, DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT, paras. 384-398 (2001).

[3] Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16; *see* Dagmar Schiek, *Gleichbehandlungsrichtlinien der EU - Umsetzung im deutschen Arbeitsrecht*, 21 NZA 873 (2004); Alexius Leuchten, *Der Einfluss der EG-Richtlinien zur Gleichbehandlung auf das deutsche Arbeitsrecht*, 19 NZA 1254 (2002).

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The ECJ's answers to these questions have garnered a lot of attention.[4] This is, however, only partly due to the fact that the Court, once again, held that Community law should be interpreted as precluding a provision of German labour law.[5] The ECJ's decision in *Mangold* is particularly controversial because the period prescribed for the implementation of Directive 2000/78/EC into domestic law had expired neither when the fixed-term employment contract was concluded nor when the decision was handed down. Indeed, it has not yet expired. Nevertheless the ECJ found that the national provision, conflicting with Article 6 of Directive 2000/78/EC and the general principle of non-discrimination in respect of age, must be set aside. The case raises not only questions as regards the compatibility of German labour law with the European principle of non-discrimination in respect of age but also fundamental (constitutional) matters of European law.

B. The German Legal Context

I. The German Law of Fixed-term Contracts

Since 1 January 2001 fixed-term contracts have been regulated under sections 14-18 *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge* (TzBfG - Act on Part-Time Work and Fixed-Term Contracts),[6] implementing Directive 97/81/EC on Part-Time

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[4] Tonio Gas, *Die unmittelbare Anwendbarkeit von Richtlinien zu Lasten Privater im Urteil "Mangold"*, 16 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 737 (2005); Christoph Herrmann, *Die negative unmittelbare Wirkung von Richtlinien in horizontalen Rechtsverhältnissen*, 17 EuZW 69; Derk Strybny, *Verstoß des § 14 Abs 3 TzBfG gegen das gemeinschaftsrechtliche Diskriminierungsverbot*, 60 BETRIEBSBERATER [BB] 2753 (2005); Norbert Reich, *Zur Frage der Gemeinschaftsrechtswidrigkeit der sachgrundlosen Befristungsmöglichkeit bei Arbeitnehmern ab 52 Jahren*, 17 EuZW 21 (2006); Marita Körner, *Europäisches Verbot der Altersdiskriminierung in Beschäftigung und Beruf*, 22 NZA 1395 (2005); Jubst-Hubertus Bauer & Christian Arnold, *Auf* Junk *folgt* Mangold *– Europarecht verdrängt deutsches Arbeitsrecht*, 59 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 6 (2006); Folkmar Koenigs, *Unbegrenzte Prüfungsbefugnis des EuGH?*, 58 DER BETRIEB [DB] 49 (2006); Hermann Reichold, *Der Fall Mangold: Entdeckung eines europäischen Gleichbehandlungsprinzips?*, 5 ZEITSCHRIFT FÜR EUROPÄISCHES ARBEITS- UND SOZIALREHT [ZESAR] 55 (2006); Gregor Thüsing, *Europarechtlicher Gleichbehandlungsgrundsatz als Bindung des Arbeitgebers*, 26 ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT UND INSOLVENZPRAXIS [ZIP] 2149 (2005); Georg Annuß, *Das Verbot der Altersdiskriminierung als unmittelbar geltendes Recht*, 61 BB 325 (2006); Bernd Waas, *Europarechtliche Schranken für die Befristung von Arbeitsverträgen mit älteren Arbeitnehmern? - § 14 III TzBfG aus der Sicht des Generalanwalts*, 16 EuZW 583 (2005) (commenting the opinion of Advocate General Tizzano, delivered 30 June 2005); Jobst-Hubertus Bauer, *Ein Stück aus dem Tollhaus: Altersbefristung und der EuGH*, 22 NZA 800 (2005) (commenting the opinion of Advocate General Tizzano, delivered 30 June 2005).

[5] As regards the "dialogue" between German labour and the ECJ, see the different contributions in: LABOUR LAW IN THE COURTS, NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE (Silvana Sciarra ed., 2001).

[6] 2000 BGBl. I at 1966. *See* Marlene Schmidt, *News of Atypical Work in Germany - Recent developments as to fixed-term contracts, temporary and part-time work*, 3 GERMAN LAW JOURNAL [GLJ] (No. 7, 2002).

Work[7] and Directive 1999/70/EC on Fixed-Term Contracts. Since a fixed-term contract ends automatically when the agreed upon time elapses, the problems and costs incidental to dismissal protection can be avoided by way of fixed-term contracts.[8] Soon after first protective measures of dismissal protection had been enacted in 1920,[9] German labour courts developed the rule that a fixed-term contract is lawful only if there is a reasonable, objective justification for the fixed term.[10]

In 2001, the legislator codified this case law in sec. 14 para. 1 TzBfG, stipulating that a fixed-term employment contract may be entered into if there are objective grounds for doing so. Objective grounds exist in particular where:

1) The operational manpower requirements are only temporary;
2) The limitation as to time follows a period of training or study in order to facilitate the employee's finding subsequent employment;
3) One employee replaces another;
4) The peculiar nature of the work justifies the time limitation;
5) The limitation as to time is a probationary period;
6) Reasons relating to the employee personally justify the limitation;
7) The employee is paid out of budgetary funds provided for fixed-term

[7] Council Directive 97/81, Concerning the Framework Agreement on Part-time Work Concluded Between UNICE, CEEP and the ETUC, 1998 O.J. (L 14) 9; amended by Council Directive 98/23, 1998 O.J. (L 131) 10.

[8] As to the rules of dismissal protection in Germany, *see* MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY, 3rd ed. (2000), paras. 218-260.

[9] Betriebsrätegesetz [BRG - Works Councils' Act], 4 Feb. 1920, RBGl. at 147 (contained first provisions of general dismissal protection).

[10] Fundamentally, see *Reicharbeitsgericht* [RAG - Reich Labour Court], RAGE 1, 361 (363); confirmed RAGE 7, 93 (96). These decisions, however, dealt with consecutive fixed-term contracts. Contrary to today, the RAG, moreover, required the employer's intention to circumvent dismissal protection. Fundamentally, see *GS Bundesarbeitsgericht* (BAG – Federal Labour Court), dec. of 12. Oct. 1960, AP no. 16 § 620 BGB Befristeter Arbeitsvertrag; more recently, BAG, dec. of 21 Feb. 2001, AP no. 226 § 620 BGB Befristeter Arbeitsvertrag; BAG, dec. of 22 March 2000, AP no. 222 § 620 BGB Befristeter Arbeitsvertrag.

employment and if he or she is employed on that basis; or

8) The limitation as to time is fixed by common agreement before a court (no. 8).

There are, however, three exceptions to the rule that a fixed-term employment contract may only be concluded if there are objective grounds for doing so. Two of them existed previously under the *Beschäftigungsförderungsgesetz* 1985 (BeschFG 1985 - Act on the Improvement of Employment Opportunities),[11] which preceded the TzBfG.

The first exception is elucidated in sec. 14 para. 2 TzBfG. It provides that the term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years. Within that maximum period, a fixed-term contract may be renewed at most three times. The conclusion of a fixed-term employment contract within the meaning of sec. 14 para. 2 TzBfG shall not be authorised if that contract is immediately preceded by an employment relationship of fixed or indefinite duration with the same employer. Also, a collective agreement may fix the number of renewals or the maximum duration of the fixed-term in derogation from the first sentence sec. 14 para. 2 TzBfG.

The second exception, effective as of 1 January 2004 as sec. 14 para. 2a TzBfG,[12] allows the conclusion and repeated renewal of a fixed-term contract without any objective reason for a period of up to four years after an enterprise has been established.

The third exception refers to older workers. According to sec. 14 para. 3 TzBfG, the conclusion of a fixed-term contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship commences. A fixed-term shall not be permitted where there is a close relationship with a previous employment contract of indefinite duration that had been concluded with the same employer. Such a close connection shall be presumed to exist where the interval between two employment contracts is less than six months. Section 14 para. 3 TzBfG was amended by the First Law for the Provision of Modern Services on the Labour Market of 23 December 2002.[13] The

[11] 1985 BGBl. I at 710.

[12] 2003 BGBl. I at 3002.

[13] Erstes Gesetz über moderne Dienstleistungen auf dem Arbeitsmarkt [First Law on the Modern Services in the Labor Market], 2002 BGBl. I at 14607.

new version of that provision, which took effect on 1 January 2003, is henceforth worded as follows:

> A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58. It shall not be permissible to set a fixed term where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between the two employment contracts is less than six months. Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58.

Whether Article 6 of Directive 2000/78/EC must be interpreted as precluding such a provision of domestic law was the central question to be addressed by the ECJ.[14]

II. The Implementation of the Principle of Non-discrimination in Respect of Age into German Law

Although the period to implement Directive 2000/78/EC into national law expired years ago (on 2 December 2003), neither this Directive nor Directive 2000/43/EC[15] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which was to be implemented by 19 July 2005, have been transposed into German law.[16] This delay is due to a paralysis resulting from the

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[14] The facts of the case also raised questions as regards the admissibility of the reference for a preliminary ruling on the grounds that the dispute between the parties involved was fictitious or contrived. Prior to the conclusion of the employment contract between Mr. Mangold and Mr. Helm, the latter had publicly argued a case identical to Mr. Mangold's, to the effect that sec. 14 para. 3 TzBfG was unlawful. The ECJ nevertheless regarded the order of reference as admissible. *See* Mangold, *supra* note 1, at paras. 32-39. For criticism, *see* Reichold, 5 ZESAR 55 (2006); Bauer, 22 NZA 800 (2005); Strybny, 60 BB 2753 (2005).

[15] Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Race or Ethnic Origin, 2000 O.J. (L 180) 22. In the event of action taken by the Commission under Article 226 EC against Germany, the ECJ stated - not very surprisingly - that Germany has violated its obligation to implement Directive 2000/43/EC. Case C-329/04, Commission of the European Communities v. Federal Republic of Germany, European Court of Justice (ECJ), 16 EuZW 444 (2005).

[16] Case C-43/05, Commission of the European Communities v. Federal Republic of Germany, 17 EuZW 216 (2006) (holding that Germany had violated its obligations deriving from Directive 2000/78/EC by

fact that, on the one hand, there is fundamental disagreement whether or not transposition into domestic law should be restricted to the minimum required by Community law. And, on the other hand, anti-discrimination laws, Directives 2000/43/EC and 2000/78/EC in particular, are strongly opposed by parts of academia and German society.[17] Since the implementation of the ban of age discrimination will presumably result in fundamental changes of domestic labour law,[18] Germany has used the option provided in Article 18 (2) of Directive 2000/78/EC to get another three-year-period to implement the directive provisions on age discrimination. As a consequence, Germany is not obliged to implement them before 2 December 2006.

C. The ECJ's *Mangold* Judgment

I. The Facts

On 26 June 2003, Mr. Mangold, then 56 years old, entered into an employment contract with Mr. Helm, who practices as a lawyer. The contract took effect on 1 July 2003. Article 5 of the contract provided that:

> 1. The employment relationship shall start on 1 July 2003 and last until 28 February 2004.
> 2. The duration of the contract shall be based on the statutory provision which is

not implementing the principle of non-discrimination in respect of religion and belief, disability and sexual orientation into domestic law).

[17] *See* Franz-Jürgen Säcker, "*Vernunft statt Freiheit!*" - *Die Tugendrepublik der neuen Jakobiner, Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, 35 ZRP 286 (2002); Klaus Adomeit, *Diskriminierung - Inflation eines Begriffs*, 55 NJW 1622 (2002).

[18] As to the consequences of the ban of age discrimination for German labour law, *see* Marlene Schmidt, *The Need for Modernising German Labour Law Arising From The Ban of Age Discrimination*, *in* MODERNISATION OF LABOUR LAW AND INDUSTRIAL RELATIONS, LIBER AMICORUM FOR MARCO BIAGI 353-367 (Roger Blanpain & Manfred Weiss eds., 2003); Marlene Schmidt & Daniela Senne, *Das gemeinschaftsrechtliche Verbot der Altersdiskriminierung und seine Bedeutung für das deutsche Arbeitsrecht*, 55 RdA 80-89 (2002); Herbert Wiedemann & Gregor Thüsing, *Der Schutz älterer Arbeitnehmer und die Umsetzung der Richtlinie 2000/78/EG*, 22 NZA 1234-1242 (2002); MANFRED LÖWISCH & GEORG CASPERS & DANIELA NEUMANN, BESCHÄFTIGUNG UND DEMOGRAPHISCHER WANDEL, BESCHÄFTIGUNG ÄLTERER ARBEITNEHMERINNEN UND ARBEITNEHMER ALS GEGENSTAND VON ARBEITS- UND SOZIALRECHT (2003); Wolfgang Zöllner, *Altersgrenzen beim Arbeitsverhältnis jetzt und nach Einführung eines Verbots der Altersdiskriminierung*, *in* GEDÄCHTNISSCHRIFT FÜR WOLFGANG BLOMEYER 517-533 (Rüdiger Krause et. al eds., 2003); Eva Kocher, *Das europäische Recht zur Altersdiskriminierung – Konsequenzen für das deutsche Arbeitsrecht*, 14 ARBEIT 305 (2005); fundamentally DANIELA SENNE, AUSWIRKUNGEN DES EUROPÄISCHEN VERBOTS DER ALTERSDISKRIMINIERUNG AUF DAS DEUTSCHE ARBEITSRECHT (2006).

> intended to make it easier to enter into fixed-term contracts of employment with older workers (the provisions of the fourth sentence, in conjunction with those of the fourth sentence, of section 14 para. 3 TzBfG ...), since the employee is more than 52 years old.
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> 3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.

According to Mr. Mangold, Article 5 of the contract, inasmuch as it limits the term of his contract, is, although such a limitation is in keeping with sec. 14 para. 3 TzBfG, incompatible with Directive 1999/70/EC and Directive 2000/78/EC.

II. Directive 1999/70/EC on Fixed-Term Contracts

Two questions arise as regards the compatibility of sec. 14 para. 3 TzBfG with Directive 1999/70/EC.

1. Clause 5 Framework Agreement - Restriction of Fixed-term Contracts

First, it is doubtful whether sec. 14 para. 3 TzBfG is compatible with Clause 5 of the Framework Agreement on fixed-term contracts, implemented by Directive 1999/70/EC.[19] To prevent abuse arising from the use of successive fixed-term employment contracts, this clause stipulates that at least one of the following restrictions must apply to fixed-term contracts: either (a) objective reasons justifying the renewal of such contracts or relationships; or (b) the maximum total

[19] See Council Directive 96/34, On the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and ETUC, 1996 O.J. (L 145) 4; amended by Council Directive 97/75, 1997 O.J. (L 10) 4 and Council Directive 97/81, On the Framework Agreement on Part-time Work, *supra* note 7. The content of Council Directive 1999/70 (*supra* note 2), has not been developed in the usual law-making procedure between Commission, Parliament, and Council, but, in accordance with the procedure provided for in Articles 138 ss. EC, by the social partners on European level. As regards the latter procedure, *see* Gabriele Britz & Marlene Schmidt, *The Institutionalised Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law*, 6 ELJ 45 (2000) (with further proofs).

duration of successive fixed-term employment contracts; or (c) the number of renewals of such contracts. However, according to sec. 14 para. 3 TzBfG, no such restriction applies to fixed-term contracts with employees fifty-two years of age or older. There is neither a maximum total duration nor a maximum number of renewals of successive fixed-term employment contracts provided. Nevertheless, many scholars consider sec. 14 para. 3 TzBfG compatible with Directive 1999/70/EC, arguing that the difficulties this age group encounters on the labour market constitute an objective reason justifying the non-limited renewal of such contracts.[20] However, Clause 5 only limits the use of successive fixed-term employment contracts. Since the employment contract between Mr. Mangold and Mr. Helm was the first and only contract concluded between the parties, the ECJ refused to interpret Clause 5.[21]

2. Clause 8 para. 3 Framework Agreement - Non-regression Clause

Clause 8 para. 3 of the Framework Agreement provides that the implementation of the agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement. Such non-regression clauses began to be included in the Community's social affairs directives at the end of the 1980s,[22] so as to provide, albeit by different forms of words, that the implementation of a particular directive should not constitute a "justification," "ground" or "reason" for providing less favourable treatment than that already available in the various Member States.[23] In the case of Mr. Mangold, the question arose whether lowering the age threshold in section 14 para. 3 TzBfG from 58 to 52 years in 2002 violated Clause 8 para. 3 of the Framework Agreement.

The ECJ answered that question in the negative. The Court found that the term "implementation," used without any further precision in Clause 8 para. 3 of the Framework Agreement, did not refer only to the original adoption of Directive 1999/70 and especially of the Annex thereto containing the Framework Agreement,

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[20] *See* Waas, 16 EuZW 583 (2005), fns. 13 and 14; doubtfully (and rightly so), *see* Christof Kerwer, *Finger weg von der befristeten Einstellung älterer Arbeitnehmer?* 19 NZA 1316, 1317 (2002).

[21] Mangold, *supra* note 1, at paras. 41-43.

[22] A clause of this kind is also to be found in the Community Charter of the Fundamental Social Rights of Workers, the final recital of which states that "the solemn proclamation of fundamental social rights at European Community level may not, when implemented, provide grounds for any retrogression compared with the situation currently existing in each Member State". *See* Advocate General Tizzano, Opinion of 30 June 2005, Case C-144/04, Werner Mangold v. Rüdiger Helm, para. 54. [hereinafter "AG Opinion – *Mangold*"].

[23] *Id*.

but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained. This includes those, which, after adoption in the strict sense, add to or amend domestic rules previously adopted. As a consequence, Clause 8 para. 3 of the Framework Agreement was also applicable to the Law of 2002, lowering the age limit from 58 to 52 years.

According to the ECJ's view, however, Clause 8 para. 3 does not prohibit as such any reduction of the protection which workers are guaranteed in the sphere of fixed-term contracts by the Framework Agreement. The decisive question is, therefore, whether the reduction of protection is connected to the implementation of that agreement. The German legislature did not justify the amendment of section 14 para. 3 TzBfG by the Law of 2002 by the need to put into effect the Framework Agreement but by the need to encourage the employment of older persons in Germany. In those circumstances, the Court found that section 14 para. 3 TzBfG was not contrary to Clause 8 para. 3 of the Framework Agreement.[24]

By referring to the justification given for a particular piece of legislation, the ECJ has obviously followed the well-founded line of argumentation suggested by Advocate General Tizzano,[25] who resisted interpreting Clause 8 para. 3 Framework Agreement as a standstill clause that absolutely prohibits any lowering of the level of protection that exists under national law at the time of implementation of the directive. Instead, Advocate General Tizzano's suggested construing Clause 8 para. 3 as a transparency clause. So viewed, the clause guards against abuses by prohibiting Member States from taking advantage of the transposition of the directive to implement, in a sensitive area such as social policy, a reduction in the protection already provided under their own law, while blaming it on non-existent Community law obligations rather than on an autonomous home-grown agenda.

II. Directive 2000/78/EC

Directive 2000/78/EC prohibits discrimination on the basis of age, *inter alia* (religion, belief, sexual orientation, disability).[26] According to Article 1, "the purpose of ... Directive [2000/78/EC] is to lay down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation, with a view to putting into

[24] Mangold, *supra* note 1, at paras. 44-54.

[25] AG Opinion – *Mangold*, *supra* note 22, at paras. 60-79; *see* Waas, 16 EuZW 583, 584 (2005).

[26] As regards age discrimination in terms of Directive 2000/78 (supra note 3), see European Commission, Age discrimination and European Law (2005) (with further proofs).

effect in the Member States the principle of equal treatment." The Directive prohibits any discrimination, whether direct or indirect. Article 2 of Directive 2000/78/EC (titled "Concept of discrimination") states in subparagraphs 1 and 2 (a):

> For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1, while, for the purposes of paragraph 1, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of these grounds referred to in Article 1.

In terms of Article 3, within the limits of the areas of competence conferred on the Community, Directive 2000/78/EC applies to all persons, as regards both the public and private sectors, including public bodies, in relation to, *inter alia,* conditions for access to employment, to self-employment or to occupation. It includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion, as well as employment and working conditions, including dismissals and pay.

Contrary to discrimination on grounds other than age, not only indirect but also direct age discrimination may be justified. As Article 6 of Directive 2000/78/EC provides:

> Notwithstanding Article 2 (2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:
> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older

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> workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

1. The Principle of Non-discrimination in Respect of Age

As to the interpretation of Articles 2 and 6 of Directive 2000/78/EC, the ECJ started by emphasising, correctly, that the purpose of section 14 para. 3 TzBfG was to promote the vocational integration of unemployed older workers, insofar as they encounter considerable difficulties in finding work. According to the Court's view, the legitimacy of such a public-interest objective could not reasonably be doubted. An objective of that kind must, as a rule, be regarded as justifying, "objectively and reasonably," a difference of treatment on grounds of age laid down by Member States. These findings can only be emphasised. The integration of unemployed older workers surely is a legitimate aim in terms of Article 6 (1), explicitly naming "legitimate employment policy" as an example.

However, the fact that a domestic provision differentiating between older and younger employees is motivated by a legitimate aim does not mean that such a (direct) discrimination is justified. As it follows from Article 6 (1), the means of achieving that aim shall furthermore be appropriate and necessary. Notwithstanding the fact that in this respect the 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, the Court did not refrain from applying the test of proportionality itself. It found that the application of section 14 para. 3 TzBfG leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. Thus, the Court reasoned, a significant number of workers, determined solely on the basis of age, is in danger, during a substantial part of their working lives, of being excluded from the benefit of stable

employment which, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.

According to the ECJ's view, insofar as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. The court reached this conclusion because it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued. As a consequence, the Court stated: "Such national legislation cannot, therefore, be justified under Article 6 (1) of Directive 2000/78."

2. Effects of the Principle of Non-discrimination in Respect of Age Prior to the Expiration of the Implementation Period

The findings of the ECJ as regards the interpretation of Article 6 of Directive 2000/78/EC are, however, highly problematic. For, as already indicated earlier, the period of transposition has not yet expired: In accordance with Article 18 (1) of the Directive, the Member States were to adopt the laws, regulations and administrative provisions necessary to comply by 2 December 2003 at the latest. However, Article 18 (2) grants an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that case the Member States are to inform the Commission forthwith. Any Member State that chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council. The Federal Republic of Germany has made use of the option provided for in Article 18 (2) and has requested an additional period to implement the ban of age discrimination. As a consequence, the implementation period will not expire until 2 December 2006.

However, the Court found that the fact that the transposition period had not expired could not call its findings into question. According to the ECJ's established case law, during the period prescribed for implementation of a directive the Member States must refrain from taking any measures that are likely to seriously to compromise the attainment of the result prescribed by that directive. In this connection it is immaterial whether or not the rule of domestic law in question,

adopted after the directive entered into force, is concerned with the transposition of the directive.

The Court did not find decisive the fact that, in the circumstances of the case at stake, section 14 para. 3 sentence 2 TzBfG, lowering the age threshold from 58 to 52 years, is to expire on 31 December 2006, just a few weeks after the date by which Germany must have transposed the directive. Rather, it concluded from the very wording of the second subparagraph of Article 18 of Directive 2000/78 that a Member State that enjoys the exceptional, extended period for transformation, is progressively to take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. That obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation of the directive, to adopt measures incompatible with the objectives pursued by that act.[27]

Remarkably, the Court did not stop its reasoning at this point but continued to argue that the non-expiry of the transposition period did not call its findings into question, primarily due to "the general principle of non-discrimination." Taking recourse to Article 1 of Directive 2000/78/EC, the ECJ argued that the purpose of the directive is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation." From the wording of this provision as well as from the third and fourth recitals in the preamble to the directive, the Court drew important conclusions. It opined:

> Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. The source of the actual principle underlying the prohibition of those forms of discrimination are rather being found in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member

[27] Mangold, *supra* note 1, at paras. 66-72.

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> States for the transposition of a directive. In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.[28]

D. Dimensions

As already indicated, the ECJ's decision in *Mangold* has several important dimensions.

I. Dimension One: The General Principle of Non-discrimination in Respect of Age

The first dimension refers to the statement that, under Community (constitutional) law, there is a general (fundamental) principle of non-discrimination in respect of age. This finding is not at all surprising but in line with the ECJ's findings as regards gender discrimination.[29] The ECJ already has acknowledged that the general principle of non-discrimination in respect of gender as established in Directive 76/207/EEC[30] belongs to the fundamental rights of Community law. It is, however, applicable on the national level only inasmuch as it has found expression in specific Community law, as *e.g.* Directive 76/207/EEC, or national law concerning the non-discrimination of gender.[31] Even before the ECJ's decision in *Mangold*, it safely could be assumed that the principles of non-discrimination on

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[28] Case C-129/95, Inter-Environment Wallonie, 1997 E.C.R. I-7411, para. 45; Case C-106/77, Simmenthal, 1978 E.C.R. 629, para. 21; Case C-347/96, Solred, 1998 E.C.R. I-937, para. 30.

[29] This fact is overlooked by: Reich, 17 EuZW 21 (2006); Reichold, 5 ZESAR 55, 57 (2006).

[30] Council Directive 76/207, On the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40 (EEC).

[31] Case C-149/77, Defrenne III, 1978 E.C.R. 1365, paras. 26-29; Cases 75/82 and 117/82, Razzouk and Beydoun, 1984 E.C.R. 1509, paras. 6-7; Case C-158/91, Levy, 1993 E.C.R. I-4287, para. 16; Case C-13/94, P/S, 1996 E.C.R. I-2143, para. 19; Case C-50/96, Schröder, 2000 E.C.R. I-743, para. 56. *See* Christopher Docksey, *The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law*, 20 INDUSTRIAL LAW JOURNAL [ILJ] 258, 260 (1991); MARLENE SCHMIDT, DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT III. para. 41 (2001),

various grounds as established in Directives 2000/43/EC and 2000/78/EC constitute fundamental rights under Community law. This assumption is confirmed by the fact that all of these principles are explicitly granted in Article II-81 para. 1 of the Treaty establishing a Constitution for Europe.[32]

In its decision in *Mangold*, the ECJ did not transfer its established case law concerning the principle of non-discrimination with respect to gender, but argued that a general principle of non-discrimination in respect of age could be found in various international instruments and in the constitutional traditions common to the Member States.[33] This is correct – but only upon more careful analysis.[34] At first blush one might be tempted to make the following argument. Of course, Article 6 EU-Treaty obliges the European Union to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. But, explicit bans of age discrimination can only be found in the Finnish constitution.[35] International instruments explicitly prohibiting discrimination in respect of age do not exist. A principle of non-discrimination in respect of age discrimination only can be derived from the general principle of non-discrimination without objective reasons as established in Article 14 of the European Convention on Human Rights, in the ILO Discrimination (Employment and Occupation) Convention No. 111,[36] the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[37] The suspicion arises that the Court, although not explicitly mentioning it, took the adoption of Article II-81 of the Treaty establishing a Constitution for Europe as evidence that the principle of non-discrimination in respect of age represents a constitutional tradition common in the Member States.[38] Since the Treaty establishing a European Constitiution will not be ratified in the foreseeable future, due to a halt of the ratification process caused by the referenda in France and The Netherlands, the question arises: is it

[32] 2004 O.J. (C 310) 1.

[33] Mangold, *supra* note 1, at para. 74.

[34] Very critically, *see* Thüsing, 26 ZIP 2149, 2150 (2005).

[35] EC-COMMISSION, REPORT ON MEMBER STATES' LEGAL PROVISIONS TO COMBAT DISCRIMINATION 61, 64 (2000).

[36] LÖWISCH, CASPERS & NEUMANN, BESCHÄFTIGUNG UND DEMOGRAPHISCHER WANDEL 20 (2003).

[37] Körner, 22 NZA 1391, 1397 (2005).

[38] *See* Manfred Zuleeg, *Zum Verhältnis nationaler und europäischer Grundrechte*, 27 EuGRZ 511, 514 (2000); Meinhard Hilf, 53 NJW Beilage 5, 6 (2000); MARLENE SCHMIDT, DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT III. para. 86 (2001).

legitimate to call on a fundamental right established in the Treaty to substantiate a "constitutional tradition common in the Member States" in terms of Article 6 EU? This question has to be answered in the affirmative. The Treaty establishing a Constitution for Europe was adopted by the Intergovernmental Conference, *i.e.* by the Heads of State and Government at the Brussels European Council on 17 and 18 June 2004 and was signed in Rome on 29 October 2004. As a consequence, even if it is so far not a document of surpanational, *i.e.* Community (constitutional) law, it nonetheless has to be regarded as an ordinary treaty of international law.

II. Dimension Two: Horizontal Direct Effect

However, if the Court had simply transferred its above-mentioned case law as regards the principle of non-discrimination in respect of gender, another problem would have arisen. The principle of non-discrimination in respect of gender is applicable on the national level only inasmuch as it has found expression either in specific Community law or in national law. The principle of non-discrimination in respect of age has found expression in Directive 2000/78/EC. Up to the present, however, Directive 2000/78/EC has not been implemented into German labour law. According to the ECJ's established case law, Directive provisions are not directly applicable between private parties. As a consequence, the principle of non-discrimination in respect of age would not have been applicable on the national level. To solve these problems, Advocate General Tizzano suggested that the ECJ base its decision on the recognised general principle of equality. He emphasised that the general principle of equality, being a general principle of Community law imposing an obligation that is precise and unconditional, was effective against all parties and, unlike the Directive, could therefore be relied upon directly by Mr. Mangold against Mr. Helm and could be applied by the *Arbeitsgericht München* in the main proceedings.[39]

Whether or not general principles of European law have direct horizontal effect at the national level is disputed.[40] However, it remains an open question whether the ECJ followed this argumentation. The Court does not even mention the problem of horizontal direct effect but takes recourse to Directive 2000/78/EC and to the general principle of non-discrimination at the same time, in fact applying them both

[39] Mangold, *supra* note 1, at paras. 83-84. For a critique, *see* Bauer, 22 NZA 800, 802 (2005).

[40] Affirming, *see* Körner, 22 NZA 1395, 1397 (2005); Gas, 16 EuZW 737 (2005). Negating, *see* Thüsing, 26 ZIP 2149 (2005) (showing that the general principle of non-discrimination in the past has been used as a yardstick to measure Community secondary law or national law implementing Community law).

directly in a case between private parties.[41] The decision raises more questions than it answers.[42] Particularly the question arises whether the Court would have applied the principle of non-discrimination in respect of age directly if the age discrimination had not resulted from a statutory but rather from a contractual provision.[43]

Therefore, whether or not the Court in *Mangold* has finally given up its established case law rejecting direct horizontal effect of directives[44] remains to be seen.[45] Since the ECJ defended this case law only a few weeks before *Mangold*,[46] the assumption arises that horizontal direct effect of Directive provisions may be limited to those constituting fundamental rights. In view of the clear wording of Article 13 EC, it does not seem very plausible that the Court might understand this provision, not (only) as a competence norm to adopt legal measures to do away with age discrimination, but as a guarantee of the principle of non-discrimination in respect of age.[47] Perhaps the ECJ had the idea that principles of non-discrimination on various grounds, equally protected in the European Constitution, should have the same effects. And, according to the ECJ's established case law, the principles of non-discrimination in respect of gender and nationality as established in Articles 141 and 39 EC are directly applicable between private parties - although, according to their wording, the Treaty obligation to grant non-discrimination is directed to Member States only. All these thoughts, however, are mere speculation, illustrating the sibylline character of the reasoning.

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[41] *See* Annuß, 61 BB 325 (2006) (The statement, that one cannot conclude anything for a direct horizontal effect of Directive 2000/78/EC is, hence, misleading.).

[42] For a critique, *see* Thüsing, 26 ZIP 2149 (2005); Strybny, 60 BB 2753, 2754-5 (2005); Körner, 22 NZA 1395, 1397 (2005); Gas, 16 EuZW 737 (2005); Bauer & Arnold, 59 NJW 6, 10 (2006).

[43] *See* Thüsing, 26 ZIP 2149, 2150 (2005). Whether domestic law incompatible with directive provisions has to be set aside even if the directive provisions contain rights and obligations between private parties (so-called negative horizontal direct effect), is highly disputed within the ECJ. *See* Herrmann, 17 EuZW 69 (2006) (with further proofs).

[44] *See* Reich, 17 EuZW 21 (2006); Kerwer, 19 NZA 1316, 1318 (2002).

[45] Rightfully skeptical, Thüsing, 26 ZIP 2149, 2150 (2005).

[46] Case C-397/01-403/01, 2004 E.C.R. I-0000 (not yet reported).

[47] Reichold, 5 ZESAR 55, 57 (2006).

III. Dimension Three: Implications for German Labour Law

The last, but not the least important, dimension of the ECJ's decision in *Mangold* refers to its implications for German labour law.

1. Fixed-term Employment Contracts with Older Employees

If section 14 para. 3 sentence 4 TzBfG excluding employees older than 52 from the rule that the conclusion of a fixed-term contract must be justified by an objective reason justifying the fixed-term has to be set aside, then fixed-term employment contracts entered into with employees of that age are to be regarded as employment contracts concluded for an unlimited duration, unless one of the other exceptions in terms of sec. 14 TzBfG applies. As a consequence, the fixed-term contract is still valid only if there is either an objective reason justifying the fixed-term (para. 1), if an employment contract concluded for a maximum period of two years was the very first one between the parties involved (para. 2), or the employment contract concluded for a maximum period of four years was concluded with a newly established enterprise (para. 2a).[48] In all other cases, only the fixed-term is void but the employment contract as such continues to exist.[49]

Since the aim to provide for employment opportunities for employees older than 50 was found legitimate by the ECJ, the parties forming the present coalition government have agreed that very soon sec. 14 para. 3 TzBfG shall be replaced by a provision[50] avoiding the mistake of disproportionality. This will be achieved by not determining the employee's age but his or her unemployment for a certain minimum period. Suggestions vary between 6 and 12 months, as the decisive requirement; at the same time limited to a maximum of four years.[51]

[48] *See* Thüsing, 26 ZIP 2149, 2150 (2005).

[49] *See Bundesarbeitsgericht* (BAG – Federal Labour Court) of 26 April 2006, 7 AZR 500/04, press release no. 27/06.

[50] Coalition agreement, paras. 1177 seq.

[51] *See* Thüsing, 26 ZIP 2149, 2159 (2005); Reichold, 5 ZESAR 55, 57 (2006); Strybny, 60 BB 2753, 2754 (2005).

2. Other Fields of Age Discrimination

Section 14 para. 3 TzBfG is not the only statutory provision differentiating between employees in accordance with their age. Other interesting examples can be found in the *Altersteilzeitgesetz* (ATG - Act on Old Age Part-Time Work) and the *Kündigungsschutzgesetz* (KSchG – Act on Dismissal Protection). Furthermore, many collective agreements, works agreements and employment contracts refer to a certain age as required for certain rights and benefits.[52] Many of these laws and contracts are insufficiently justified under European law.[53] This is particularly true of pay structures providing higher pay for certain age groups and the right to old age part-time work. It remains to be seen whether, in view of the *Mangold* decision, employees can invoke any of those rights and benefits presently withheld due to their age.[54]

3. Protection of Legitimate Trust in German Statutory Law?

Whether or not employers who have entered into employment contracts on the basis of section 14 section TzBfG prior to the ECJ's decision in *Mangold*, due to "legitimate trust in German statutory law," may be exempted from that provision's invalidation is another question vividly discussed among German labour law scholars.[55] The ECJ has not mentioned that topic - most probably, because none of the parties involved had raised it. However, it seems doubtful that a second reference to the ECJ, in order to receive protection of legitimate trust, will have good chances of success. In the very few cases in which the ECJ has limited the effects of its rulings to the future, the financial value of the claims excluded was enormous. While it is conceivable that a comparable limitation is made in a case dealing with claims to equal treatment in respect of old age part-time work under the AtG or as to collective agreements granting higher wages to persons of a higher age, a corresponding decision with respect to sec. 14 para. 3 TzBfG does not seem particularly plausible.

[52] See only the examples discussed in the literature mentioned in fn. 16.

[53] *See also* Annuß, 61 BB 326 (2005).

[54] For a critique, *see* Thüsing, 26 ZIP 2149, 2150 (2005).

[55] Positively, *see* Thüsing, 26 ZIP 2149, 2151 (2005); Strybny, 60 BB 1753, 2754 (2005).

Particularly due to the fact that, already during the legislative process leading to the adoption of the TzBfG many experts had informed the legislator of their doubt concerning the compatibility of sec. 14 para. 3 TzBfG with EC law,[56] it might be worthwhile to sue the Federal Republic of Germany for damages and to insist that the ECJ is asked for his point of view.

[56] *See* Kerwer, 19 NZA 1316 (2005).

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