MANGOLD, EGENBERGER, AND SMITH V MEADE: DIRECT EFFECT’S NEW, HAPPY WORLD OF HARIBO

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Article 288 TFEU

... 
A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

...
Starting point:
No ‘horizontal direct effect’ of Directives


According to Article [288 TFEU] the binding nature of a Directive, which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in relation to ‘each Member State to which it is addressed’. It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a Directive as against the state he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with [EU] law.
Mangold (2005), paras 74–76

Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole 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’, the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

The principle of non-discrimination on grounds of age must thus be regarded as a general principle of [EU] 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 States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.
Mangold confirmed & extended

Ajos v Rasmussen (2016)

[23] [A]s Directive 2000/78 does not itself lay down the general principle prohibiting discrimination on grounds of age but simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle. The EU legislature intended by the adoption of the directive to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment and, in particular, to specify various possible exceptions to that principle, circumscribing those exceptions by the use of a clearer definition of their scope.

[36] [T]he principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle.

[42] [T]he fact that it is possible for private persons with an individual right deriving from EU law ... to claim compensation where their rights are infringed by a breach of EU law attributable to a Member State cannot alter the obligation the national court is under to uphold the interpretation of national law that is consistent with Directive 2000/78 or, if such an interpretation is not possible, to disapply the national provision ..., or justify that court giving precedence, in the dispute before it, to the protection of the legitimate expectations of a private person who has complied with national law.
Proportionality in *Mangold* and *Küçükdeveçi*

**Mangold, para 64**

When 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, it must be considered to go *beyond what is appropriate and necessary* in order to attain the objective pursued.

**Küçükdeveçi, para 41**

As regards the aim pursued by the legislature at the time of adoption of the national legislation at issue in the main proceedings, adduced by the German Government, of strengthening the protection of workers according to their length of service in the undertaking, it is clear that, under that legislation, the *extension of the notice period* for dismissal according to the employee’s seniority in service is *delayed for all employees who joined the undertaking before the age of 25*, even if the person concerned has a *long length of service in the undertaking at the time of dismissal*. The legislation cannot therefore be regarded as *appropriate* for achieving that aim.
The Court’s deduction in *Küçükdeveçi*

The **Directive’s prohibition** of discrimination based on age is **motivated by the general principle** of the prohibition of discrimination based on age. **General principles** apply regardless of deadlines. (The prohibition contained in) the **Directive**, therefore, **applies** even **before the deadline** for implementation has passed.

This is an example of the four-terms-fallacy (**quaternio terminorum**): ‘motivated by …’ is **not the same middle term** as ‘general principles’. If we used ‘motivated by …’ in both premises, we would easily see that the conclusion is wrong: the Court has held, before as after *Mangold*, that individuals can derive rights from Directives only when the deadline has expired.

Besides, which Directive (or indeed any act of secondary EU law) is not motivated by some general principle?
The Court’s reasoning in *Mangold*

Among two **rules of the same rank**, the **specific** one **takes precedence** in its application over the general one: *lex specialis derogat legi generali*.

The **lower-ranking norm** is only **valid if** it is **compatible with the higher-ranking norm**, and invalid only if incompatible: *lex superior derogat legi inferiori*.

The **time limit** granted the MSs for implementing the Directive does not contravene the general principle: the time limit **puts a cap on the hiatus that is inherent** in the Directive because it requires implementation as a separate and subsequent step. The time limit thus promotes the general principle.

Both rules mean that the **general principle** underlying a Directive **cannot leapfrog the Directive itself**.
Proportionality: the Better as the Enemy of the Good Enough

The Court holds the age thresholds in Mangold and Kücükdeveci disproportionate because in order to combat unequal treatment without objective justification (i.e. discrimination), the Member States have not provided for enough unequal treatment on all sorts of grounds.

Once such unequal treatment is introduced, the same objection can be raised again (concepts are necessarily abstract), until there is no rule left that applies to any two individuals, i.e. no-one is treated like anybody else.

The proper question should have been whether the level of generalisation chosen by the Member State makes the measure obviously incapable of achieving its aim, because the rules create more inequality than there was before.
Case C-414/16 Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV

[76] The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see AMS ⇒ Küçükdeveçi).

[77] As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (see Defrenne, Angonese, Ferlini, Viking).
Para 76 of Egenberger

- **Article 51(1) ChFREU**: “The provisions of this Charter are addressed ... to the Member States only when they are **implementing** Union law.”

- **Åkerberg Fransson**: the Charter applies where national legislation “falls within the scope of European Union law”, so that “situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter” – BUT ...

- **Case C-421/98 Commission v Spain (Architects)**: “[s]o far as application of Article [52 TFEU] ... is concerned, it should be borne in mind that that provision is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of free movement to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article”.

Para 76 of *Egenberger* ctd.

- **Case 121/85 *Conegate***: “in principle it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. ... Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles ... ”

- **Case C-333/13 *Dano***: secondary EU law did not set out the conditions under which entitlement to a type of benefit arose ⇒ “when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.” ⇔ the Charter is inapplicable.
The Court’s references in *Egenberger*, para 77

- *(Re *Küçukdeveçi*, see above.)*
- **Viking**: “in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.”
- **Angonese**: Employment conditions in private savings banks were governed by a collective agreement between employers and employees. Cascading delegation: the banks concerned were authorised to determine, inter alia, the selection criteria for recruitment decisions.
- **Ferlini**: CHL (respondent hospital) set up by statute, and financed by the Luxembourg state and by the city of Luxembourg.
[18] For the purposes of the implementation of [Article 157 TFEU] a distinction must be drawn within the whole area of application of Article [157] between, first, **direct and overt discrimination** which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, **indirect and disguised discrimination** which can only be identified by reference to more explicit implementing provisions of [an EU] or national character.

[21] Among the **forms of direct discrimination** which may be **identified** solely by reference to the criteria laid down by Article [157] must be included in particular those which have their **origin in legislative provisions or in collective labour agreements** and which may be detected on the basis of a purely legal analysis of the situation.

[22] This applies **even more** in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether **public or private**.
Defrenne ctd.

[38] [It] is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.

[39] In fact, since Article [157] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

[40] The reply to the first question must therefore be that the principle of equal pay contained in Article [157] may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.
[42] A directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (Marshall). ... 

[43] Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (Pfeiffer).

[44] The Court has expressly held that a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive (OSA).

[46] As regards Dansk Industri (C-441/14, EU:C:2016:278), ... it is the general principle prohibiting discrimination on grounds of age, and not the directive that gave concrete expression to that general principle ... which confers on private persons a right which they may rely on as such and which, even in disputes between private persons, ...
Case C-351/12 OSA (reference in S&M para 44)

[43] Even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (AMS).

[46] A collecting society would still not be able to rely on [the copyright Directive] in order to set aside national legislation contrary to that provision if it were to be regarded as an emanation of the State.

[47] If that were the case, the situation, in circumstance such as those in the main proceedings, would not be that of an individual invoking the direct effect of a provision of a directive against a Member State, but rather the reverse. It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (Dominguez).

[48] In view of the foregoing, the answer to the second question is that [the Directive] must be interpreted as meaning that it cannot be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision.
Smith v Meade ctd.

[52] CIA dealt with a particular situation, namely the adoption of national technical regulations that did not comply with procedural obligations concerning notification and delayed adoption, set out in [Dir. 2015/1535].

[53] ... Those national technical regulations were inapplicable in a dispute between individuals on the ground that non-compliance with the obligations stemming from [the Directive] constituted a ‘substantial procedural defect’ ... [The] directive ... created neither rights nor obligations for individuals, did not determine the substantive content of the legal rule on the basis of which the national court had to decide the case before it, meaning that the case-law to the effect that a directive that has not been transposed may not be relied on by one individual against another was not relevant in such a situation.

[54] [The motor insurance Directive, by contrast,] defines the substantive content of a rule of law and falls, consequently, within the scope of the case-law to the effect that a directive that has not been transposed or has been incorrectly transposed may not be relied on by one individual against another.
Conclusion

• The *Mangold* case law has left the “mediation” by Directives behind.
• None of the Court’s arguments are entirely convincing.
• The proposition in *Egenberger* that the Charter applies without further as between individuals remains an as yet unfounded assertion.
• It would have been surprising had the Court managed to provide in 174 words a convincing justification for deciding a question that has for decades been contentious in some Member States’ constitutional law.
• The figure of 174 includes the 5 references (almost half the text), whose probative value must be severely discounted.
• *OSA* is at best ambiguous.
• The Court’s attempt in *Smith v Meade* at reordering this area rests on an equivocation.