

THE NOVEL APPROACH OF THE CJEU ON THE HORIZONTAL DIRECT EFFECT OF THE EU PRINCIPLE OF NON-DISCRIMINATION: (UNBRIDLED) EXPANSIONISM OF EU LAW?

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ABSTRACT

The application of the EU principle of non-discrimination in private disputes is a sensitive issue. Recent case-law of the CJEU (cases Mangold and Küçükdeveci) conveys a novel approach that disturbs the pattern of the previous case law. The result of the novel approach is the possibility of horizontal direct effect in a much broader range of situations than before. It for instance leads to the de facto horizontal direct effect of anti-discrimination directives. The approach seems to go beyond the mere circumvention of the lack of horizontal direct effect of anti-discrimination directives. It seems that the horizontal direct effect of the principle applies in all cases falling within the scope of EU law. This raises an important question: when should private legal relationships be considered as falling within the scope of EU law? This question is a challenge for future case law. A prudent approach is recommended.

Keywords: general principles of law; horizontal direct effect; non-discrimination; scope of EU law; third party effect

§1. INTRODUCTION

This contribution focuses on the horizontal direct effect of the EU principle of non-discrimination as enshrined in Article 21 of the Charter of Fundamental Rights. According

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to this provision, discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation (Article 21 (1)) or nationality (Article 21 (2)) is prohibited. The application of this principle in private disputes is a sensitive issue. It raises essential questions regarding the division of competences between the Union and Member States, the internal EU separation of powers between the CJEU and EU legislator (institutional balance) and the public-private divide. Until very recently, only two prohibitions against discrimination could be invoked in private disputes, namely discrimination based on sex and nationality. In addition, they could only be invoked in a limited number of situations. The recent cases *Mangold*¹ and *Kücükdeveci*² show that currently, other prohibitions against discrimination can also apply directly in horizontal cases, including the prohibition against discrimination based on age, sexual orientation or disability. Moreover these recent cases take a novel approach to the horizontal direct effect of the principle of non-discrimination.³ This results in the possibility of horizontal direct effect in a much broader range of situations than before. This contribution will explain why the *Mangold/Kücükdeveci* approach must be considered novel and overreaching, and explores the potential consequences. Suggestions will be made to keep this expansionist approach in check.

§2. GENERAL REMARKS

A. DEFINITION OF HORIZONTAL DIRECT EFFECT

There is no univocal meaning of the concept of horizontal direct effect. In this contribution the concept will be used to refer to the effect of EU law in national proceedings between private parties (horizontal disputes). This effect will be considered as 'direct' if EU law applies as an autonomous ground for review before a national court.⁴ The use of EU law as an autonomous ground for review can be contrasted with the use of EU law as tool of interpretation of national legislation (indirect effect). The definition of direct effect includes two kinds of review on the basis of the EU principle of non-discrimination. The first concerns direct review of the private legal relationships as such (*horizontal*

¹ Case C-144/04 *Mangold* [2005] ECR I-09981.

² Case C-555/07 *Kücükdeveci*, Judgment of 19 January 2010, not yet reported.

³ This approach is highly controversial, as evidenced by the great amount of criticism from the media, several Advocates General and the Member States. For further references see De Mol, 'Case note *Kücükdeveci*: *Mangold* Revisited – Horizontal Direct Effect of a General Principle of EU Law', 6 *European Constitutional Law Review* 2 (2010), p. 293–294.

⁴ On this definition of direct effect see also De Witte, 'Direct effect, supremacy, and the nature of the legal order', in P. Graig and G. de Búrca, *The Evolution of EC Law* (Oxford University Press, Oxford 2003), p. 178–213; S. Prechal, *Directives in EC Law* (2nd ed., Oxford University Press, Oxford 2005), p. 226–270.

substitution effect).⁵ One example could be a contractual clause reviewed for its consistency with an EU norm. The effect of this kind of review is that EU law becomes a substitute for national (private) law by directly creating obligations, regulating private legal relationships, or by modifying or extinguishing such obligations.⁶ The second involves the review of national public acts (for example private law legislative acts) that regulate private legal relationships (*horizontal exclusion effect*). One example would be a case in which the validity of a contractual clause depends on compliance of national private law with the EU principle of non-discrimination. The effect of non-compliance with EU law is the setting aside (exclusion) of national law provisions. Some EU lawyers argue that horizontal exclusion effect of EU law should not be considered as direct effect, but as an expression of the principle of primacy. Advocates of this position pursue an ambitious unitary perception of the relation between EU law and national law.⁷ The definition used in this contribution is more moderate and seems more commonly accepted.⁸ In addition, private lawyers tend to qualify horizontal substitution effect as ‘direct horizontal effect’ and horizontal exclusion effect as ‘indirect horizontal effect’.⁹ The reason for these differing qualifications is not that there is another view on the relationship between EU law and national law, but rather another focus. Instead of measuring the effect of EU law on the proceedings before the national court, these private lawyers measure the effect of EU law on the private legal relationship itself. In the case of a horizontal substitution effect the EU norm interferes directly with the private legal relationship. In the case of a horizontal exclusion effect the interference of EU law with the private legal relationship is indirect, namely through national (private) law. In order to avoid Babel-like confusion it is useful to be aware of these different approaches.

B. THE QUESTION OF THIRD PARTY EFFECT IN CONSTITUTIONAL LAW

The horizontal direct effect of the principle of non-discrimination poses classic constitutional questions regarding the divide between public and private law. The

⁵ The term ‘private legal relationship’ is used in a broad sense. It covers (i) legal acts in the context of contractual private legal relationships and (ii) factual conduct in the context of non-contractual private legal relationships.

⁶ See Hartkamp, ‘The General Principles of EU Law and Private Law’, 75 *RechtsZ* 2 (2011), p. 241–259, at 249.

⁷ See e.g. Lenaerts and Corthout, ‘Of birds and hedges: the role of primacy in invoking norms of EU law’, 31 *European Law Review* 3 (2006), p. 287–315.

⁸ See for a useful overview between the two visions on the concept of horizontal direct effect: Muir, ‘Of Ages in – and Edges of – EU Law’, 48 *CMLR* 1 (2011), p. 42–47. See also Lenaerts and Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’, 47 *CMLR* 6 (2010), p. 1640–1644.

⁹ See for example Hartkamp, ‘The effect of the EC Treaty in private law. On direct and indirect horizontal effect of primary community law’, 18 *European Review of Private Law* 3 (2010), p. 527–549, section 2.

principle of non-discrimination is a fundamental right that belongs to the public sphere. Its application in the private sphere is not widely accepted and is controversial. The debate is classified under several titles: the horizontal effect of fundamental rights, the constitutionalisation of private law, the third-party effect of human rights and the *Drittwirkung* of fundamental rights. The horizontal direct effect of the principle of non-discrimination cannot be discussed and analyzed, without fully acknowledging this debate.

The debate on the third-party effect of fundamental rights is concerned with the question of whether fundamental rights apply in the private sector,¹⁰ and if so, in what way. Two positions can be distinguished in this debate: fundamental rights are either considered exogenous (alien) or endogenous (integrated) to the system of private law.¹¹ The focus of the proponents of the exogenous role of fundamental rights is on the basic distinction between the public and private sphere. The essence of this distinction is that private persons do not need to pursue public interests: they are autonomous and can make their own choices (no matter how reprehensible). Application of fundamental rights to the private sector is considered undesirable, because it would mean imposing the (one and only) common moral standard to individuals whose behaviour in principle rests on free choice.¹² In contrast, advocates of an endogenous position consider fundamental rights as the expression of values that underlie the entire legal order (public and private law).¹³ In their view these rights are so elementary that they ought to be applicable as a matter of principle in both public and private sectors. From this perspective, their application to private legal relationships is inherent to the character of fundamental rights.¹⁴

There are several ways in which fundamental rights can affect private law. A distinction can be made between the use of fundamental rights in the private sphere by the legislature and by the judiciary. The first way is less controversial because it confirms the view that fundamental rights do not automatically apply to private law and that specific action by the legislator is needed. Additionally, fundamental rights legislation is specific, in the

¹⁰ Usually this refers to the field of contracts, tort and property. Family law is often left out, because that is characterised by a high level of public policy considerations. Smits, 'Private Law and Fundamental Rights: a Sceptical View', in T. Barkhuysen and S.D. Lindenberg, *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers, Leiden 2006), p. 11.

¹¹ Voermans, 'Applicability of Fundamental Rights in Private law: what is the Legislature to do? An Intermezzo from a Constitutional Point of View', in Barkhuysen and Lindenberg, *Constitutionalisation of Private Law*, p. 34.

¹² Sommeregger, 'The horizontalization of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere via Legislation', in A. Sajó and R. Uitz, *The constitution in private relations: expanding constitutionalism* (Eleven International Publishing, Utrecht 2005), p. 48.

¹³ Nieuwenhuis, 'Fundamental Rights Talk. An Enrichment of Legal Discourse in Private Law?', in Barkhuysen and Lindenberg, *Constitutionalisation of Private Law*, p. 5; Lindenberg, 'The Constitutionalisation of Private Law in the Netherlands', in Barkhuysen and Lindenberg, *Constitutionalisation of Private Law*, p. 100.

¹⁴ Sommeregger, in Sajó and Uitz, *The constitution in private relations: expanding constitutionalism*, p. 49.

sense that it is tailored to the specific circumstances of the private actors. The recourse to fundamental rights by the judiciary is more sensitive, because it concerns court-made horizontal effects of general constitutional or unwritten fundamental rights. Two kinds of court-made third-party effect can be distinguished: indirect and direct third-party effect.¹⁵ Indirect third-party effect means that the fundamental right is used as a tool of interpretation of open-ended private law provisions. Direct third-party effect means that the fundamental right applies directly to private legal relationships. Direct third-party effect is more precarious than indirect third-party effect. In fact direct horizontal effect is only acceptable for those who assume that fundamental rights are endogenous to private law.

Third-party effect, even direct court-made third party effect, is more likely to be considered as acceptable in cases with persons that are in a dependent position, mainly in the field of employment. Third-party effect (and therefore interference in private autonomy) is then justified by the inequality between the two individuals that resembles the subordinated position of the individual towards the state (the so called ‘weaker party’ argument).¹⁶

Today, it is commonly accepted that fundamental rights can affect private relations. However, issues regarding how this is done, and to what extent, are still a matter of debate.¹⁷ The positive constitutional laws of the Member States show different approaches to these sensitive issues.¹⁸

§3. STANDARD CASES REGARDING THE OLD GROUNDS: SEX AND NATIONALITY

A. GENERAL FEATURES

To return to the case law on horizontal direct effect of the principle of non-discrimination in the pre – *Mangold* era will highlight the novelties of the *Mangold/Kücükdeveci* approach. This case law reveals two main characteristics. Only written expressions of the principle were granted horizontal direct effect. As a result this case law only concerns

¹⁵ This is a basic distinction. There are varying kinds and degrees of direct and indirect effect. See Oliver and Fedtke, ‘Comparative Analysis’, in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere – A Comparative Study* (Routledge-Cavendish, London 2007), p. 470.

¹⁶ Avbelj, ‘Is there *Drittwirkung* in EU Law’, in Sajó and Uitz, *The constitution in private relations: expanding constitutionalism*, p. 154.

¹⁷ R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford 2002), p. 354–355.

¹⁸ For a useful comparison of the constitutional law of a number of EU Member States (Denmark, UK, France, Germany, Greece, Ireland, Italy and Spain), see Oliver and Fedtke, in Oliver and Fedtke, *Human Rights and the Private Sphere – A Comparative Study*. See also De Witte, ‘The crumbling public/private divide: horizontality in European anti-discrimination law’, 13 *Citizenship Studies* 5 (2009), p. 515–524.

the ‘old’ grounds of discrimination: nationality and sex. Furthermore, the horizontal direct effect was not derived from the principle of non-discrimination itself, but from additional factors. This is by the various degrees of horizontal direct effect of expressions of the principle of non-discrimination that appear in previous case law. In fact three degrees of horizontal direct effect can be distinguished. The first degree is ‘full (or unconditional) horizontal direct effect’. Full horizontal direct effect means that a non-discrimination clause can be invoked against all types of discrimination falling within its scope of application, regardless of whether the discrimination at issue appears in a vertical or a horizontal setting. As a result private parties are bound by the principle of non-discrimination in the same situations as public parties. The second degree is ‘limited horizontal direct effect’. This means that a non-discrimination clause only applies directly in private disputes under certain circumstances or conditions. As a result private parties are not bound by the principle of non-discrimination in the same way as public parties.¹⁹ The third degree is ‘no horizontal direct effect’. Certain expressions of the principle of non-discrimination do not merit any kind of horizontal direct effect.

B. FULL OR UNCONDITIONAL HORIZONTAL DIRECT EFFECT: *DEFRENNE II AND ANGONESE*

The first case in which full (unconditional) horizontal effect was recognized was *Defrenne II*.²⁰ The case involved an action brought by a female employee against a private employer concerning discrimination in terms of pay, compared with male colleagues. The employee relied on ex-Article 119 EC (now Article 157 TFEU). With regard to the application in the private sphere of that provision the CJEU considered – without any further explanation – as follows:

In fact, since Article 119 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.²¹

The same approach can be found in the *Angonese* decision with respect to the principle of non-discrimination based on nationality surrounding employment, remuneration and other employment related conditions.²² Mr Angonese brought a cause of action against a private bank concerning a requirement imposed by the bank for admission

¹⁹ See also Prechal and De Vries, ‘Seamless web of judicial protection in the internal market?’, 34 *European Law Review* 1 (2009), p. 5–24.

²⁰ Case 43/75 *Defrenne II* [1976] ECR 455.

²¹ Para. 39. Mandatory means that the provision is not subject to private autonomy. See Lenaerts and Gutiérrez-Fons, 47 *Common Market Law Review* 6 (2010), p. 1648, footnote 104.

²² Case C-218/98 *Angonese* [2002] ECR I-04139.

to a recruitment competition. The CJEU held that this requirement amounted to discrimination in the sense of ex-Article 48 EC (now Article 45 TFEU).²³ Considering the fact that the case involved a private dispute, the Court declared unequivocally that ‘the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well’.²⁴

As a result, in their respective fields, Articles 157 and 45 (2) TFEU fully (unconditionally) apply directly in private relations.²⁵ The main foundation of this full horizontal direct effect has been explained in *Angonese* where the CJEU considered that the purpose of both ex-Article 119 EC (now Article 157 TFEU) and 48 EC (now 45 (2) TFEU) is ‘to ensure that there is no discrimination on the labour market’.²⁶ Hence, the CJEU seems to have deduced the horizontal direct effect from the (presumed) intention of the Treaty makers.²⁷ This is far-reaching, because the Treaty makers did not intend those provisions to be directly effective prohibitions against discrimination. However, in the light of the doctrine of third-party effects, the approach taken by the CJEU is not particularly groundbreaking. First, it does not take the position that the principle of non-discrimination is by principle applicable to private disputes. On the contrary, the horizontal direct effect is the result of interpretation of a Treaty provision and thus deduced from the (presumed) intention of the Treaty makers. Secondly, it only concerns the field of employment law. In this field of private law, the application of fundamental rights is more accepted than in others.²⁸

C. LIMITED HORIZONTAL DIRECT EFFECT: *WALRAVE AND KOCH* AND *FERLINI*

The approach of the CJEU towards the general prohibition against discrimination based on nationality (Article 18 TFEU) has been more cautious. So far only a *limited*

²³ Ibid., para. 39–40.

²⁴ Para. 36. Case confirmed in Case C-94/07 *Raccanelli* [2008] ECR I-05939, para. 44–48.

²⁵ See also S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, (European Monographs 48, Kluwer Law International, The Hague 2005), p. 27–28. But see Prechal and de Vries, 34 *European Law Review* 1 (2009), p. 15. They point to the facts of the *Angonese* and *Raccanelli* cases that contained a certain degree of dominance. They argue that possibly this could have had a certain weight in the Court’s decision.

²⁶ Para. 35.

²⁷ But see Prechal and de Vries, 34 *European Law Review* 1 (2009), p. 17. They point to a possible ‘fundamental right twist’ in the part of para. 35 of *Angonese* considering that Article 48 constitutes a specific application of the general prohibition of discrimination contained in Article 6 of the EC Treaty. They argue that ‘on this basis it could be concluded that it is, in particular, the fundamental rights character of the prohibition of discrimination on the grounds of nationality that creates the obligation for private individuals, and, ultimately give rise to the full horizontal direct effect.’

²⁸ It must be noted that also the CJEU considers workers as ‘the weaker party to the employment contract’ (e.g. Joined Cases C-397/01-C-403/01 *Pfeiffer* [2004] ECR I-08835, para. 100; Case C-429/09 *Fuss*, Judgement of 25 November 2010, not yet reported, para. 33). However the CJEU did not use this argument with regard to the recognition of horizontal direct effect of Articles 157 and 45 TFEU.

horizontal direct effect has been accepted, meaning that horizontal direct effect only exists in *certain* situations falling under the scope of application of Article 18 TFEU. The two leading cases are *Walrave and Koch* and *Ferlini*.²⁹ *Walrave and Koch* concerned an action directed against private sporting federations by two Dutch pacesetters in cycle races. The pacemakers argued that the rules of the sporting federation were incompatible with ex-Articles 7, 48 and 59 EC (now Articles 18, 45 and 56 TFEU). One of the questions was whether those provisions could be used directly against private parties. The CJEU held that:

Articles 7, 48, 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality.

Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.³⁰

The main consideration that related to Article 7 EC was that³¹:

The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.³²

In *Ferlini*, Mr Ferlini took proceedings against a hospital concerning discriminatory fees for the care given during his wife's confinement and stay in the maternity unit. These fees were settled unilaterally, by a group of healthcare providers (EHL). The CJEU held that ex-Article 6 EC (now Article 18 TFEU) could apply directly, as it:

also applies in cases where a group or organisation (...) exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty (...).³³

It follows from both cases that the horizontal direct effect is founded on the effectiveness of exercising the right of free movement of persons.³⁴ The idea is that, in certain circumstances, the denial of such effect could undermine the effectiveness of free

²⁹ Case 36/74 *Walrave and Koch* [1974] ECR 01405 and Case C-411/98 *Ferlini* [2000] ECR I-08081.

³⁰ Para. 16 and 17.

³¹ Other reasons for horizontal direct effect are given in para. 19 and 20, but they seem to relate to Articles 48 and 59 EC.

³² Para. 18.

³³ Para. 50.

³⁴ See also Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, p. 27.

movement. The horizontal direct effect seems to be confined to situations in which the discriminating party has the power to influence the exercise of free movement rights. The kind of horizontal direct effect of Article 18 TFEU is thus limited.

Even though the horizontal direct effect of Article 18 TFEU is relatively limited, it must be noted that in absolute terms its effects exceed that of Articles 45 and 157 TFEU. This is because the horizontal direct effect of the latter provisions is confined to (parts of) the field of employment law, while the horizontal direct effect of Article 18 TFEU can go beyond that field. For example it can apply in the area of fees for medical and hospital care (*Ferlini*). The horizontality of all three provisions all concern private law relations in which one party is weaker than the other party. In this context, the approach additionally shows that the horizontal direct effect of the principle of non-discrimination is not presumed but derived from the effectiveness of the free movement of persons.

D. NO HORIZONTAL DIRECT EFFECT: *MARSHALL*

Expressions of the principle of non-discrimination in directives were not adorned with horizontal direct effect. This follows from *Marshall*.³⁵ Ms Marshall was dismissed on the grounds of having attained the qualifying age for state pension. That age was lower for women than for men. Ms Marshall argued that her dismissal was incompatible with Directive 76/207/EEC.³⁶ The CJEU considered that the non-discrimination clause contained therein should be considered to be unconditional and sufficiently precise to be relied upon by an individual against the state.³⁷ However, the CJEU rejected horizontal direct effect (both exclusion effect and substitution effect):

according to Article 189 of the EEC treaty the binding nature of a directive (...) 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. [emphasis added]³⁸

It follows that it was the source of law in which the principle of non-discrimination was expressed (a Directive) which prevented the principle from having horizontal direct effect. As a consequence, on the basis of the previous case law, the principle of non-discrimination based only on sex had horizontal direct effect with regard to the pay of employees (as expressed in the Treaty), but not with regard to the other fields in which that principle is expressed (because it is only expressed in directives).

³⁵ Case 152/84 *Marshall* [1986] ECR I-00723.

³⁶ Directive 76/207/EEC of 9 February 1976 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] OJ L 39/ 40.

³⁷ Case 152/84 *Marshall*, para. 52.

³⁸ Para. 48.

§4. RECENT CASE LAW REGARDING A NEW CAUSE OF ACTION: AGE DISCRIMINATION

A. THE *MANGOLD* AND *KÜCÜKDEVECİ* CASES

Mangold and *Kücükdeveci* introduce a novel approach to the horizontality of the principle of non-discrimination. The cases concern age discrimination. The *Mangold* case involved a dispute between an employee and private employer regarding a fixed-term contract. The duration of the contract was based on German employment law which provided for a difference in the treatment of employees over the age of 52 and those under the age of 52. It was easier to terminate fixed-term contracts of employment for the former. One question was whether Article 6(1) of Directive 2000/78³⁹ must be interpreted as precluding a provision of domestic law such as that at issue. The CJEU evaluated the national law on the basis of the Directive and answered the question in the affirmative. The implications from that conclusion are as follows:

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

As a result, the prohibition of discrimination based on age had horizontal direct effect even though the period for transposition of Directive 2000/78 had not yet expired and the case involved a horizontal dispute. The horizontal direct effect is explained as follows:

(...) Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. (...) The principle of non-discrimination on grounds of age must (...) 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 States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age (...).⁴⁰

The CJEU's reasoning is vague. Even the most basic element of the approach is not clear: what is the source of the horizontal direct effect? Is it Directive 2000/78 or the general principle?

In *Kücükdeveci* the CJEU sought to clarify the *Mangold* approach. *Kücükdeveci* concerned a German dispute between an employee and a private employer regarding the period of notice for dismissal. This period had been calculated on the basis of the length

³⁹ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴⁰ Para. 74–77.

of service of the employee. However, in accordance with German law no account was taken of periods of employment prior to the completion of the employee's 25th year. First of all the CJEU established that the basis of examination was 'the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78'.⁴¹ It ruled that 'the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC (...) must be interpreted as precluding national legislation, such as that at issue in the main proceedings'. The CJEU confirmed the case law prohibiting the horizontal direct effect of directives, but did not consider this as an obstacle to oblige the national judge to set aside the relevant national legislation:

Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (...). In those circumstances it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, (...) the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.⁴²

Küçükdeveci shows that it is the general principle of non-discrimination based on age that produces the horizontal direct effect.⁴³ The foundation of the horizontal direct effect is barely explained. The CJEU deduces the horizontal direct effect from 'the need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78'.⁴⁴

B. NOVEL APPROACH TO THE HORIZONTALITY OF THE NON-DISCRIMINATION PRINCIPLE

The approach in *Mangold* and *Küçükdeveci* is novel from several perspectives. The first novelty is that the cases do not concern horizontal direct effect of a written expression of the principle of non-discrimination, but a court-made general principle of law. In addition to Treaty provisions and regulations, the general principle of non-discrimination turns out to be capable of having horizontal direct effect. This is not at all self-evident. General principles are normally a means to protect private individuals *vis-à-vis* public authorities and are abstract in the sense that they point in a certain direction rather than giving concrete rules of law. These features could be a reason for denying horizontal direct

⁴¹ Para. 27.

⁴² Para. 50–51.

⁴³ See also Muir, 48 *CLMR* 1 (2011), p. 56.

⁴⁴ Para. 53.

effect to general principles.⁴⁵ It is striking that the CJEU does not explain why a general principle in and of itself is capable of having horizontal effect.

A second novel aspect is the fact that the horizontal effect is derived from the ‘need to ensure the full effectiveness of the principle of non-discrimination on the grounds of age’. It is difficult to grasp the exact meaning of this rationale, though it reveals the assumption of the CJEU that the application in the private sphere is included in the principle itself. It can only be in that scenario that the need to ensure full effectiveness of the principle of non-discrimination would logically imply horizontal direct effect. The same assumption can be drawn from the fact that, in contrast to the standard cases discussed in §3, no reference is made to additional factors, such as the intention of the EU Treaty makers, the legislature, or to the promotion of the right to free movement. The reference to the need to ensure the full effectiveness of the principle raises the question of whether the CJEU has adopted an approach where the principle of non-discrimination (or even all fundamental rights) applies as a matter of principle in both public and private relations.⁴⁶

The effectiveness-rationale, which is derived from the principle itself, also suggests that full (unconditional) horizontal direct effect has been given.⁴⁷ It does not seem to allow horizontal direct effect to apply only in certain situations or under certain conditions. Indeed, the CJEU did not make any reservation regarding the specific circumstances of the case.⁴⁸ It is especially striking that the CJEU did not confine its approach to the scope of application of Directive 2000/78 (field of employment law). On the contrary, in *Küçükdeveci*, the CJEU refers explicitly to the entire scope of EU law:

The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision *falling within the scope of European Union law* which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision (...). [emphasis added]⁴⁹

The concept of full or unconditional horizontal effect is not novel as such. As discussed, Articles 45 and 157 TFEU also have full horizontal direct effect and apply directly to private relations throughout their entire field of application. However, these provisions

⁴⁵ Compare Case 152/84 *Marshall*, para. 48; Case C-91/92 *Faccini Dori* [1994] ECR I-03325, para. 22; Case C-201/02 *Wells* [2004] ECR I-0723, para. 56. See also Lenaerts and Gutiérrez-Fons, 47 *CLMR* 6 (2010), p. 1640–1644. See also Craig, ‘The ECJ and ultra vires action: A conceptual analysis’, 48 *CMLR* 2 (2011), p. 420–422.

⁴⁶ Endogenous position, see §2.B.

⁴⁷ Full horizontal direct effect in the meaning described in §3.A., namely that the principle of non-discrimination based on age can be invoked against all discrimination falling within its scope of application. This is such regardless of whether the discrimination at issue appears in a vertical or a horizontal setting.

⁴⁸ Compare e.g. with Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 61.

⁴⁹ Case C-555/07 *Küçükdeveci*, para. 53. See also para. 23 and Case C-144/04 *Mangold*, para. 75.

have specific fields of application (employment conditions and pay respectively). The general principle of non-discrimination based on age applies across the entire scope of EU law. The novelty of *Mangold* and *Kücükdeveci* is thus that it concerns full (unconditional) horizontal direct effect of a general clause.

C. TWO QUALIFICATIONS

This novel approach appears to disturb the pattern of the previous case law. Differences as to the source of the non-discrimination clause (Treaty or Directive) and the nature of the clause (specific or general) no longer seem to lead to different degrees of horizontal direct effect. Perhaps two qualifications should be made to the conclusions drawn above. The first qualification relates to the fact that *Mangold* and *Kücükdeveci* both concern horizontal exclusion effect. The second relates to uncertainties about the precise object of the horizontal direct effect.

Mangold and *Kücükdeveci* both concern exclusion effect. The review on the grounds of the principle did not concern the contractual clause or the period of notice for dismissal, but the underlying German national private legislation. So, the principle did not directly regulate the private legal relationship (substitution effect). Instead, the private legal relationship was affected indirectly, because the application of the principle led to the setting aside of certain parts of applicable national private law (exclusion effect).⁵⁰ Hence, there is no certainty as to whether the general principle of non-discrimination based on age produces horizontal substitution effect. However, the acceptance of this kind of horizontal direct effect can be expected, because denial would result in severing the two types of horizontal direct effect. So far, the CJEU has never divided the concept of horizontal direct effect. Expressions of the principle of non-discrimination either have horizontal direct effect in both forms or lack horizontal direct effect. Solutions that fall in between have not been accepted. Furthermore, because the application of the principle of non-discrimination in private situations is derived from the scope of the principle itself it would make sense to also grant horizontal substitution effect. The *Bartsch* case may be an example of a gateway to granting horizontal substitution effect. This case concerned the review of guidelines of a private pension fund. The question for the CJEU was whether the application of the prohibition of discrimination on the grounds of age is mandatory where the allegedly discriminatory treatment contains no link with Community law. The CJEU ruled that:

The application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. (...)

⁵⁰ See §2.A.

Although the CJEU did not explicitly deal with the question of horizontal substitution effect, it did not reject the possibility as such.⁵¹ Significant in this case is the use of the word ‘mandatory’ which has also been used in *Defrenne II*. Therefore, it does not seem likely that the CJEU will as a matter of principle reject horizontal substitution effect.⁵² Presumably, the crucial question will not be whether the general principle of discrimination based on age will apply to private situations, but in what private situation this will be the case. This question will be further discussed in §5.C. and D.

The second qualification to the above conclusion is that case *Kücükdeveci* leaves room for the interpretation that the object of the horizontal direct effect is not the general principle of non-discrimination as such, but ‘the general principle of non-discrimination, as expressed in Directive 2000/78’. This has been suggested by Muir, who considers it doubtful that the principle of non-discrimination based on age would have horizontal direct effect in cases that fall outside the material scope of Directive 2000/78. Muir’s interpretation would clearly be a good way to mitigate the potential adverse effects of the *Mangold/Kücükdeveci* approach.⁵³ The main advantage is that the horizontal direct effect would be limited to areas in which the EU legislature intended to render the principle of non-discrimination applicable on a specific ground. This reading would make the *Mangold/Kücükdeveci* less controversial from the point of view of legal certainty and institutional balance. It is not certain, however, whether Muir’s reading will turn out to be correct. The CJEU seems to have deliberately opted for an approach that is dogmatically different from existing approaches. More specifically, this approach seems to go beyond the mere circumvention of the lack of horizontal direct effect of Directive 2000/78. As is apparent from the rulings in cases *Mangold* and *Kücükdeveci*, the CJEU did not seem to have limited the approach to the scope of application of Directive 2000/78 (field of employment law). On the contrary, in *Kücükdeveci*, the CJEU referred explicitly to the entire scope of EU law.⁵⁴ Moreover, *Mangold* clarifies that Directive 2000/78 is not the only directive that can render applicable the general principle of non-discrimination based on age. The principle applied because the national measure at issue qualified as a measure of implementation of another directive, Directive 1999/70.⁵⁵ The case happened to concern matters governed by Directive 2000/78, though this did not seem to have been an additional condition for rendering applicable the principle of non-discrimination based on age. It is therefore likely that the *Mangold/Kücükdeveci* approach must be understood as granting horizontal direct effect to the general principle of non-discrimination based

⁵¹ See Hartkamp, 75 *RabelsZ* 2 (2011), p. 250.

⁵² See also Case C-45/09 *Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, Judgement of 12 October 2010, not yet reported, para. 52 and 53.

⁵³ See §4.

⁵⁴ Para. 23 and 53. See §4.C.

⁵⁵ Para. 75.

on age as such. The assessment of the consequences will therefore be undertaken on a reading of the case.⁵⁶

§5. EFFECTS OF THE NOVEL APPROACH ON THE HORIZONTALITY OF THE PROHIBITION OF DISCRIMINATION ON THE ARTICLE 19 TFEU-GROUNDS: SEX, AGE, RELIGION OR BELIEF, DISABILITY, SEXUAL ORIENTATION AND RACIAL OR ETHNIC ORIGIN

While the *Mangold/Kücükdeveci* approach only concerned age it is likely that the CJEU will adopt a similar approach to the other grounds mentioned in Article 19 TFEU.

A. DE FACTO HORIZONTAL EXCLUSION EFFECT OF ANTI-DISCRIMINATION DIRECTIVES

The first and most striking consequence of the novel approach, specifically of the *Kücükdeveci* case, is the *de facto* horizontal exclusion effect of anti-discrimination directives.⁵⁷ This effect results from the combination of two elements. The first is the way in which the case is brought within the scope of EU law. The national legislation at issue did not qualify as an implementing measure or as an EU derogation. Yet, the CJEU considered the case as falling within the scope of EU law, because ‘the national legislation at issue in the main proceedings (...) concerns a matter governed by [that] directive [2000/78], in this case the conditions of dismissal’.⁵⁸ Apparently the mere fact that the subject matter of the national legislation at issue fell under the material scope of Directive 2000/78 sufficed to render the general principle of non-discrimination based on age applicable. Consequently, this general principle would seem to apply to all national legislation that falls under the material scope of application of Directive 2000/78.⁵⁹

The second element is the application of the general principle of non-discrimination based on the grounds of age. It is the ‘general principle of non-discrimination on grounds of age as expressed in Directive 2000/78’ that serves as *de facto* standard for review.⁶⁰ The

⁵⁶ If indeed the *Mangold/Kücükdeveci* horizontal direct effect would turn out to be limited to ‘the general principle of non-discrimination as expressed in EU anti-discrimination instruments’ (as proposed by Muir) then only the effects described in §5.A. and 5.C. will remain relevant.

⁵⁷ Compare Craig, ‘The legal effect of Directives: policy, rules and exceptions’, 34 *European Law Review* 3 (2009), p. 372–375.

⁵⁸ Para. 25.

⁵⁹ See also Editorial comments, ‘The scope of application of the general principles of Union law: An ever expanding Union’, 47 *CMLR* 6 (2010), p. 1593.

⁶⁰ Case C-555/07 *Kücükdeveci*, para. 27, 28, 33 and 43.

combined result of the two elements is *de facto* horizontal exclusion effect of the principle of non-discrimination based on age, contained in Directive 2000/78.

By analogy, the same approach would probably apply for other prohibitions of discrimination based on the grounds contained in Directive 2000/78. As a result, the general principle of non-discrimination based on religion or belief, disability, sexual orientation and age would seem to have exclusion effect in the private employment sector (employed and self-employed).

This approach would seem to extend to other anti-discrimination directives expressing the general principle of non-discrimination, such as Directive 2000/43.⁶¹ Consequently, the principle of non-discrimination based on racial or ethnic origin would have exclusion effect not only in the private employment sector (employed and self-employed), but also outside that sector, in areas such as 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.⁶²

Similarly, one would expect directives expressing the general principle of non-discrimination based on sex to have *de facto* horizontal exclusion effect. This implies a major change for the horizontality of the principle of non-discrimination based on sex. The horizontal direct effect of the principle of non-discrimination based on sex can now be invoked not only as regards pay, but also to other employment conditions.⁶³ Furthermore, other private legal relations will be affected. For example, self-employed persons⁶⁴ can rely directly on the principle in private disputes.⁶⁵ In addition, the prohibition of sex discrimination can apply directly in private legal relations in the field of access to and supply of goods and services⁶⁶, including access to premises the public are permitted to enter, all types of housing (including rent and hotel accommodations),

⁶¹ 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 L 180/22.

⁶² *Ibid.*, Article 3.

⁶³ Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23.

⁶⁴ This is novel, because Article 157 TFEU only applies to employment relationships. Self-employed persons under national law only fall under this provision in cases of 'disguised' employment relationships. Case C-256/01 *Allonby* [2004] ECR I-00873, para. 68–71.

⁶⁵ Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, [1986] OJ L 359/56. This directive shall be repealed with effect from 5 August 2012. On that date the period for transposition of Directive 2010/41/EU will have expired; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L 180/1.

⁶⁶ Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37.

services such as banking, insurance and other financial services, transport and the services of any profession or trade.⁶⁷

The result of the *de facto* horizontal exclusion effect of anti-discrimination directives is far-reaching. The distinction between directives and regulations has become less relevant in private disputes,⁶⁸ and the horizontal exclusion effect extends to private relations that are not marked by inequality between the contractual parties.

B. HORIZONTAL EXCLUSION EFFECT OUTSIDE THE SCOPE OF APPLICATION OF ANTI-DISCRIMINATION DIRECTIVES

The section above shows the effect of the novel approach on the horizontal exclusion effect of anti-discrimination directives. However the effect extends further. It is likely that private relations falling outside the material scope of these directives can also be affected. This results from the comprehensive nature of general principles combined with the full horizontal direct effect of the *Mangold* and *Kücükdeveci* cases.⁶⁹ A crucial feature is that general principles of law apply throughout the entire legal system. Consequently, their application is not confined to specific fields of law. It is therefore likely that the prohibitions of discrimination based on Article 19 TFEU grounds have exclusion effect in all horizontal cases falling within the scope of EU law. In order to understand what that means, it is necessary to assess when horizontal cases fall within the scope of EU law.

Generally speaking, a case falls within the scope of EU law if the case contains an element that can be linked with EU law. In other words: the general principle of EU law can only be used in conjunction with a specific provision of EU law. The central question here is to identify what elements in private disputes can establish such a link with EU law. This question is a challenge for future case law to clarify. For the time being there is some guidance in the *Mangold*, *Kücükdeveci* and *Bartsch* cases that can serve as a first step to explore possible answers to these questions.

For the subject of review horizontal exclusion, cases are similar to vertical cases as they all concern the review of national public acts. However the procedural setting is different. *Mangold* and *Kücükdeveci* show that this difference does not lead to another approach about the manner in which cases can be brought within the scope of EU law. The same mechanisms apply as in vertical cases. It is the link between the national legislation at hand and EU law that renders the general principle applicable – it is not necessary that the private legal relationship as such can be linked to EU law.

⁶⁷ See the commentary of the Commission on Article 1 of the Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM (2003) 657 final, p. 13.

⁶⁸ See also Thüsing and Horler, 'Case note on *Kücükdeveci*', 47 *CMLR* 4 (2010), p. 1170.

⁶⁹ *Supra* §4.B.

Based on the reasoning in the existing case law, there are three different reasons to deem that a national public act falls within the scope of EU law:⁷⁰

- (i) It is an implementing measure (agency situation)⁷¹;
- (ii) It qualifies as permitted derogation under EU law⁷²; or
- (iii) It falls otherwise within the scope of EU law.⁷³

The application of the first and second categories to horizontal disputes means that the involvement of any national measure implementing any other EU instrument or any measure qualifying as EU derogation can trigger the application of the general principle of non-discrimination. This is regardless of whether EU anti-discrimination law covers the private legal relations concerned. As a result horizontal exclusion effect might arise in various fields of private law such as consumer law, company law, housing, access to good and services.⁷⁴

The last category has not yet been crystallized. However there is a tendency towards a broad interpretation of this category.⁷⁵ It must be noted that this category is a possible ‘Pandora’s box’ that should be handled with care. Whereas the application of categories (i) and (ii) can be explained by virtue of the need that measures deriving⁷⁶ from EU law must comply with EU general principles, there is no such justification with regard to the last category.

The *Küçükdeveci* case is an example of the use of this category. The German legislation at issue did not qualify as a measure of implementation or as a derogation of free movement provisions. Yet it came within the scope of EU law, because of the sole circumstance that its subject matter was governed by Directive 2000/78. This is a far-reaching method of bringing a case within the scope of EU law.⁷⁷ In the context of the *Küçükdeveci* case this method might be justified in so far as it seeks to avoid the question of whether a national measure qualifies as an implementation measure *stricto sensu*.⁷⁸ The underlying logic

⁷⁰ T. Tridimas, *The General Principles of EU Law* (2nd ed., Oxford EC Law Library Series, Oxford 2007), p. 36–42.

⁷¹ See e.g. Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-07411, para. 88.

⁷² See e.g. Case C-260/89 *ERT* [1991] ECR I-02925, para 43 and Case C-368/95 *Familiapress* [1997] I-03689, para. 24.

⁷³ See e.g. Case C-286/94 *Garage Molenheide* [1997] ECR I-07281, para. 48.

⁷⁴ The *Mangold* case is an example of the application of category (i). The German law at issue qualified as a measure of implementation (para. 74).

⁷⁵ Tridimas, *The General Principles of EU Law*, p. 39. See also Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch* [2008] ECR I-7245, para. 70.

⁷⁶ In the sense of that they are authorized or obliged to take by EU law. See Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, 39 *CMLR* 5 (2002), p. 945–994, at 959.

⁷⁷ See also Editorial comments, ‘The scope of application of the general principles of Union law: An ever expanding Union’, 47 *CMLR* 6 (2010), p. 1589–1596 and Thüsing and Horler, 47 *CMLR* 4 (2010), p. 1169.

⁷⁸ See also Editorial comments, 47 *CMLR* (2010), p. 1593. In footnote 26 it is stated that: ‘it might well be that the court [...] still conceived of the situation in *Küçükdeveci* as being one of ‘implementation’, [...]

seems to be that Member States are not only obliged to introduce the principle of non-discrimination based on age in the fields covered by Directive 2000/78, but that they also must ensure that all public acts in those fields comply with the principle (implementation in the broad sense).

Although the method of bringing national legislation within the scope of EU law solely by virtue of its subject matter seems justified in the *Küçükdeveci* case, extensive use of this method presents risks of unjustified extensions of the scope of EU law. For example, this ‘subject-matter-overlap’-method could mean that the scope of application of other EU instruments (instruments that do not express the principle of discrimination) can serve to render the principle of non-discrimination applicable. Or, this method could mean that the material scope of one anti-discrimination provision can be used to trigger the principle of non-discrimination on other grounds (that are not expressed in that instrument). Take for example a case involving national legislation that discriminates on the grounds of age in the area of housing. Housing is not a matter governed by Directive 2000/78, but it does concern a matter governed by Directive 2000/43 (which only relates to discrimination based on racial or ethnic origin). In such a case, the principle of non-discrimination based on age should not apply as long as the national legislation at issue does not qualify as a measure of implementation (*stricto sensu*) or derogation on free movement provisions.⁷⁹

Whatever the exact development of the third category will be, the general principle of non-discrimination based on the grounds mentioned in Article 19 TFEU may have horizontal exclusion effect outside the scope of non-discrimination directives, particularly in cases in which measures of implementation of EU law or EU derogation are being challenged. This evokes the next question: how should the principle be defined outside the fields in which it is expressed? In this scenario anti-discrimination directives cannot serve as *de facto* standards of review. Therefore, the principle of non-discrimination

on the basis that the Member State’s obligation to transpose includes also a duty to ‘tidy up’ pre-existing legislation [...].’

⁷⁹ Support for this limitation of the ‘subject-matter-overlap’-method can be found in Case C-20/10 *Vino*, Order of the President of the Sixth Chamber of the Court of 11 November 2010, not yet reported, especially para. 53, 56, 57, 63 and 64. See also C-427/06 *Bartsch* [2008] ECR I-7245. This case concerned pension rights. These rights fall under EU law, because they must be considered as pay in the sense of Article 157 TFEU (Case C-262/88 *Barber* [1990] ECR I-1889, para. 20). Yet the general principle of discrimination based on age did not apply. So, apparently it is not possible to use the material scope of a certain expression of the principle of non-discrimination on a specific ground (i.e. sex) to trigger the application of the principle of non-discrimination on another ground (i.e. age). Compare Prechal et al., ‘The Principle of Attributed Powers and the ‘Scope of EU Law’, in L. Besselink et al., *The Eclipse of the Legality Principle in the European Union*, p. 213–247, at 218.

should only apply in its ‘bare, unvarnished’⁸⁰ form. Under this unpolished version of the principle, only manifest discriminations on suspect grounds should be prohibited.⁸¹

C. *DE FACTO* HORIZONTAL SUBSTITUTION EFFECT OF ANTI-DISCRIMINATION DIRECTIVES?

As noted earlier the *Mangold/Kücükdeveci* approach may also mean that the general principle of non-discrimination can have horizontal substitution effect, because it is not likely that these two versions of horizontal direct effect will be treated separately. However, this does not necessarily mean that the anti-discrimination directives besides *de facto* exclusion effect also have *de facto* substitution effect. In the context of applying general principles of law there is a fundamental difference between horizontal exclusion effect cases and horizontal substitution effect cases. In horizontal exclusion effect cases general principles apply to national public measures, whereas in horizontal substitution effect cases they apply to private legal relationships. Consequently, in the latter case, to be able to apply a general principle of law, the private legal relationship itself must fall within the scope of EU law. This raises an important question: when should private legal relationships be considered as falling within the scope of EU law?

The case law on general principles of law does not give much guidance.⁸² A quite prudent approach with regard to this issue would be appropriate. The approach to be followed needs to do justice to the comprehensive nature of general principles, as well as preventing further interference with the allocation of powers and the principle of legal certainty. Only private legal relationships that have a genuine, profound and direct link with EU law must be considered as falling within the scope of EU law. When would such link exist?

Arguably, the mere fact that a private legal relationship concerns a matter governed by an anti-discrimination directive should not suffice to establish such link. This method was used in the *Kücükdeveci*-case to bring national discriminatory legislation within the scope of the principle of non-discrimination. The underlying logic is probably a broad understanding of the obligation of the Member States to implement Directive 2000/78. In the case of private action, however this rationale would not apply, as private individuals are not obliged to implement or comply with directives. This should perhaps

⁸⁰ Expression borrowed from Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch*, para. 49.

⁸¹ Compare Timmermans, ‘De grondbeginselen’, in P.J.G. Kapteyn et al., *Het recht van de Europese Unie en van de Europese Gemeenschappen* (6th ed., Kluwer, Deventer 2003), p. 137.

⁸² The technique of bringing situations under the scope of EU law is tailored to acts of public law. Moreover the existing case law on the horizontal direct effect of principles of non-discrimination (Articles 18, 45 and 157 TFEU) is not very helpful. The (full) horizontal direct effect of cases *Mangold/Kücükdeveci* seems to bear more of a resemblance to that of Articles 45 and 157 TFEU. However, these provisions have specific scopes of application. Like general principles, Article 18 TFEU has a general scope of application, but so far this provision only had limited horizontal direct effect.

be a reason not to use the ‘subject matter-overlap’ method of the *Küçükdeveci* case in horizontal substitution effect cases. In fact, there seems to be no solid ground for doing so. Nevertheless, if the CJEU would use that method, the anti-discrimination aforementioned directives may have *de facto* horizontal substitution effect.⁸³ Consequently, the general principle of non-discrimination can apply directly against all private acts that concern matters which fall within the material scope of those directives. This would, for instance, mean that a unilateral termination by the principal of an agency agreement due to the agent’s pregnancy could be challenged directly on the grounds of the EU principle of non-discrimination based on sex.⁸⁴ This principle could also be directly invoked against a private bank refusing mortgages to female applicants on the grounds of pregnancy.⁸⁵ Another possibility would be to directly challenge public discriminatory statements of an employer under EU law.⁸⁶

The impact of the recognition of *de facto* horizontal substitution effect to anti-discrimination directives would be even more far-reaching than the *de facto* horizontal exclusion effect of *Küçükdeveci*. Besides the fact that the lack of horizontal direct effect of directives is egregiously circumvented, it would bring private legal relationships that do not have a genuine, profound and direct EU link within the scope of EU law. The application of the ‘subject matter-overlap’-method of the *Küçükdeveci* case in a purely private setting might even mean that non-binding instruments of EU law could bring cases within the scope of EU law.⁸⁷ A final result would be the limitation of private autonomy in relations between private parties of equal standing.

D. HORIZONTAL SUBSTITUTION EFFECT OUTSIDE THE SCOPES OF APPLICATION OF ANTI-DISCRIMINATION DIRECTIVES

The conclusion of the above sections is that the general principle of non-discrimination should not apply to private acts solely by reason of the circumstance that they concern a matter that is governed by an anti-discrimination Directive. This does not mean that this principle could never apply to private legal relationships. It seems fair that whereas private parties are involved in EU implementation their action must comply with EU

⁸³ The *Bartsch* case could be an indication that this method does apply. As this case concerns the review of guidelines of a private pension fund it can be described as a ‘substitution effect’ case. It seems that if the death of Mr Bartsch would have occurred after the expiration of the period for transposition, the private legal relationship could have been brought within the scope of EU law solely by virtue of Directive 2000/78.

⁸⁴ See the recent Case C-232/09 *Danosa*, Judgement of 11 November 2010, not yet reported, para. 70–71.

⁸⁵ Example taken from COM (2003) 657 final, footnote 67.

⁸⁶ E.g. public statements of an employer that he will not recruit employees of a certain ethnic or racial origin. Such a statement constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43. Case C-54/07 *Feryn* [2008] ECR I-05187, para. 28.

⁸⁷ In a purely private setting (i.e. in absence of a public act ‘vehicle’) directives must be considered as non-binding.

principles of law (category (i), *supra*). One example of private action that qualifies as an implementing measure is Article 18 of Directive 2000/78, which allows the Member States to entrust the social partners with the implementation of collective agreement provisions of the Directive. The same is true for the use of EU derogations.⁸⁸ Whereas private parties invoke EU derogations (category (ii), *supra*), it is logical that these EU derogations cannot permit measures that are incompatible with EU general principles of law. Current CJEU case law applied the EU general principle of proportionality to this kind of private action.⁸⁹ Consequently, if horizontal substitution effect is allowed, the principle of non-discrimination can arise in purely private relations falling outside the scope of application of anti-discrimination Directives.

§6. OTHER EFFECTS OF THE NOVEL APPROACH

The *Mangold/Kücükdeveci* cases concern an Article 19 TFEU ground for discrimination, with an approach that might also affect the other explicit grounds mentioned in Article 21 of the Charter.

Firstly, the principle of non-discrimination based on nationality is also a general principle of law⁹⁰ and it has the status of a fundamental right (Article 21(2) of the Charter). It must therefore be taken into account that the *Mangold/Kücükdeveci* approach will influence the horizontal direct effect of this principle. If so, this could be relevant for the application of Article 18 TFEU. As explained in §3, the existing horizontal direct effect of this provision is founded on the free movement of persons and therefore limited to situations that influence that free movement. The *Mangold/Kücükdeveci* approach conveys a different rationale of the horizontal direct effect of the principle of non-discrimination. This is a rationale that has been derived from the principle itself and results in full horizontal direct effect. Application of this rationale to the principle of non-discrimination based on nationality would imply abandonment of the *Walrave and Koch* rationale⁹¹ and thus result in full horizontal direct effect of Article 18 TFEU.⁹²

⁸⁸ That private action can also qualify as a derogation from an EU obligation results from the fact that private parties are bound by free movement provisions and thus also can invoke EU derogations. See Cases C-438/05 *Viking Line* and C-341/05 *Laval* [2007] ECR I-11767.

⁸⁹ E.g. Cases C-438/05 *Viking Line*, para. 84. But see Eeckhout, 39 *CMLR* 5 (2002), p. 963 arguing that the principle of proportionality has wider significance and impact than the other general principles.

⁹⁰ Case C-115/08 *ČEZ* [2009] ECR I-10265, para. 91.

⁹¹ According to which horizontal direct effect is confined to situations in which the discriminating party has the power to influence the excises of free movement rights. See §3.C.

⁹² A first example could be (the exclusion effect) case *ČEZ*. This case is special because the principle of non-discrimination has been used outside the context of the free movement provisions. In addition, according to para. 41 the principle of non-discrimination based on nationality was not only invoked against the Land Oberösterreich, but also against other private property owners. Yet with regard to the question regarding the consequences of non-compliance with EU law the CJEU held that: '138 (...) the national court must fully apply Community law and protect the rights conferred thereby on

Consequently, in this context it also has to be established under what circumstances horizontal cases (in which the *Walrave and Koch* and *Ferlini* element of power to influence free movements rights is lacking) fall within the scope of Article 18 TFEU. For instance, would it be enough that the discriminatory conduct concerns an EU citizen of another Member State?⁹³

Secondly, Article 21 of the Charter also mentions language, political or any other opinion, membership of a national minority, property and birth as additional types of discrimination to those mentioned in Article 19 TFEU. It also seems likely that these types of discrimination must be qualified as general principles of law.⁹⁴ They are not expressed in secondary legislation. However it is likely that they can apply directly in private cases concerning public or private acts that qualify as measures of implementation or as derogation from an EU obligation.

Finally, according to the general principle of equality similar situations must be treated in the same way, and different situations must not be, unless such treatment is objectively justified. Under this principle potentially any treatment (equal treatment or disparate treatment) can be prohibited. This depends on the facts of the case.⁹⁵ In *Mangold* the CJEU referred to the *Caballero* case which concerned (vertical) direct effect of the general equality principle.⁹⁶ It would be of serious concern if the CJEU were to consider granting horizontal direct effect to this principle. This principle is even more open-ended than the principle of non-discrimination on specific grounds. This makes it difficult for a private individual to assess his or her legal position under this principle.⁹⁷ Additionally, the dividing line between legislature and judiciary as regards the definition of the principle and its implementation is thin. Answering the question of whether the situations at issue are similar or different involves the risk of making political choices that are not supported by legislative intent.⁹⁸ In vertical situations this can already be awkward, but the effect will even be worse in a horizontal setting. As mentioned in §2.B., the principle of private autonomy implies the right of free choice. Whereas it might be

individuals, if necessary disapplying any provision if its application would, in the circumstances of the case, lead to a result contrary to Community law (...)' For further comments see de Mol, 'C-115/08, Land Oberösterreich/ČEZ', *Tijdschrift voor Europees en economisch recht* SEW (2010), p. 124–129.

⁹³ In a vertical setting this would be enough to trigger the applicability of Article 18 TFEU. See Prechal et al., in Besselink, *The Eclipse of the Legality Principle in the European Union*, p. 226.

⁹⁴ Compare Case C-555/07 *Kücükdeveci*, para. 22 and Lenaerts and Gutiérrez-Fons, 47 *CMLR* 6 (2010), p. 1655–1656. They qualify Article 21 (1) of the Charter as the internal source of inspiration supporting the findings of the CJEU in *Mangold*. They also consider that: '(...) the Charter provides a sound legal basis for the establishment of general principles of EU law. (...) Express reliance on the Charter, as grounds for establishing a general principle of EU law cannot awaken national sensitivities.'

⁹⁵ See also for the difference between the general principle of non-discrimination and a specific prohibition of a particular type of discrimination Opinion of Advocate General Mázak in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 79–97.

⁹⁶ Case C-144/04 *Mangold*, para. 75.

⁹⁷ Case C-226/08 *Stadt Papenburg*, Judgement of 14 January 2010, not yet reported, para. 45.

⁹⁸ See for a recent example of such political choice case C-149/10 *Chatzi*, Judgement of 16 September 2010, not yet reported, para. 68.

tenable to argue that this free choice can be ruled out by certain specific grounds of disparate treatment that are commonly deemed unacceptable, this does not necessarily hold for the general principle of equal treatment. This principle potentially rules out all treatment and therefore does not seem to leave room for any (irrational) personal preferences.⁹⁹

§7. CONCLUSION: (UNBRIDLED) EXPANSIONISM OF EU LAW?

As appears from the previous discussion, the *Mangold/Kücükdeveci* cases convey a novel approach with an enormous impact. Did the CJEU overreach by expanding the application of the principle of non-discrimination? If so, should such expansionism be checked or permitted to continue unbridled?

This contribution concludes that the CJEU's approach clearly thwarts the intention of the EU legislature in several ways. Firstly, by the EU prohibition against discrimination based on age horizontal direct effect. Even though the EU legislature intended that the prohibition against discrimination based on age would apply in the private sector, this was meant to happen through national law and not directly through EU law.¹⁰⁰ Secondly, by rendering the principle applicable before expiration of the period of transposition of Directive 2000/78.¹⁰¹ This means the legislator's choice with regard to the scope *ratione temporis* of the principle has been ruled out. Thirdly, the approach may mean that the principle of non-discrimination based on age can apply in private relations outside the field of employment. Hence, the legislator's intention as expressed in Directive 2000/78 with respect to the scope *ratione materiae* of the principle would also be thwarted.

Although the setting aside of choices of the legislature is awkward,¹⁰² it does not automatically mean that the CJEU exceeds its competences. Indeed, setting aside the choices of the legislature can be a legitimate consequence of the application of primary law (for example of Article 21 of the Charter or of the general principle of non-discrimination). As Advocate General Bot has correctly pointed out: 'a directive which has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle'.¹⁰³ This same logic could explain the setting aside of the choices of the legislature with regard to the scope *ratione*

⁹⁹ See also Safjan and Miklaszewicz, 'Horizontal effect of the General Principles of EU law in the Sphere of Private Law', 18 *European Review of Private Law* 3 (2010), p. 484–485.

¹⁰⁰ This follows from the fact that the Treaty makers provided deliberately that Article 19 TFEU (before Article 13 TEC) would not be a direct effective prohibition of discrimination, but only a base to take appropriate action and from the choice of the EU legislature to take action by virtue of a directive (while according to Article 19 TFEU it could have chosen to use a regulation).

¹⁰¹ Case C-144/04 *Mangold*, para. 76.

¹⁰² Compare the Opinion of Advocate General Trstenjak Case C-101/08 *Audiolux* [2009] ECR I-09823, para. 107.

¹⁰³ Case C-555/07 *Kücükdeveci*, para. 70.

temporis and *ratione materiae*. If one recognizes the existence of a general principle it makes sense that the legislature cannot limit its general field of application, nor can its application be limited in time.¹⁰⁴ The same is true for the horizontal direct effect. If this effect follows from primary law, secondary law cannot limit it. So the crucial question is whether this effect does follow from primary law.

As Lenaerts and Gutiérrez-Fons argued in a recent article, it is up to the CJEU to decide whether a general principle produces horizontal direct effect or not.¹⁰⁵ If the CJEU has the competence to recognize the existence of general principles, it may also recognize their third-party effect. However, this does not mean that the CJEU can invent horizontal direct effect. The legitimacy of horizontal direct effect can only come from carefully argued rationale.¹⁰⁶ Unfortunately, the *Mangold* and *Küçükdeveci* cases are inadequate in their reasoning. While the rulings do refer to the need to ensure the effectiveness of the general principle of non-discrimination based on age, they do not explain what is meant by effectiveness nor do they support their position by further elaboration of their underlying rationale. Recourse to effectiveness assumes that the application in the private sphere is included in the scope of the general principle, but what is the ground for this assumption? The rulings fail to answer that crucial question.

It is difficult to find an appropriate source of inspiration for the assumption of the CJEU. The first logical source of inspiration would be the various international instruments and the constitutional traditions common to the Member States. General principles are very often derived from these sources.¹⁰⁷ So, with regard to the recognition of their third-party effect, recourse to those same sources would be logical or even imperative.¹⁰⁸ The divergent constitutional traditions of the Member States call for restraint rather than for action.¹⁰⁹ A second (internal) source of inspiration could be the

¹⁰⁴ Although it remains controversial that in *Mangold* the national legislation at issue has been reviewed on the grounds of Directive 2000/78. Before the date of expiration one would have expected a relatively 'soft' examination on ground of the general principle in its 'bare, unvarnished' form (see §5.B.) in combination with applying the limits set in the *Inter-Environnement Wallonie*-condition according to which Member States must refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by that directive. Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para. 45.

¹⁰⁵ See Lenaerts and Gutiérrez-Fons, 47 *CLMR* 6 (2010), p. 1647.

¹⁰⁶ See also Herdegen, 'The Origins and Development of the General Principles of Community Law', in U. Bertiz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer Law International, The Hague 1999), p. 3, at 1. See also Craig, 48 *CMLR* 2 (2011), p. 421.

¹⁰⁷ E.g. the general principle of non-discrimination based on age, Case C-144/04 *Mangold*, para. 74.

¹⁰⁸ See Lenaerts and Gutiérrez-Fons, 47 *CMLR* 6 (2010), p. 1633. They note that 'neither Article 6(3) TFEU nor Article 340 TFEU can be interpreted without looking at the laws and case law of the Member States. Those Treaty provisions impose on the ECJ an express obligation to examine, and to draw on, the various approaches adopted at national level'.

¹⁰⁹ See §2.B. But see the Opinion of Advocate General Trstenjak in Case C-80/06 *Carp* [2007] ECR I-4473, para. 69–70 and the Opinion of Advocate General Bot in Case C-555/07 *Küçükdeveci*, end of footnote 49.

Charter.¹¹⁰ However, the Charter is only declared to be binding upon the Union public authorities and Member States.¹¹¹ Moreover, Article 21 of the Charter does not contain any reference to application in the private sphere. On the contrary, this provision does not seem to apply to private individuals. This can be concluded from the explanations relating to Article 21¹¹²:

(...) Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law.

The extension of the general principle of non-discrimination to the private sphere lacks both sufficient reasoning and a convincing source of inspiration and must therefore be viewed as an expansion of EU law by the CJEU. Should this expansion also be qualified as unbridled? There are two mitigating factors that render an affirmative answer to that question premature.¹¹³ Firstly, from a general perspective one could argue that the result of the *Mangold* and *Kücükdeveci* cases is roughly in line with the intention of the EU legislature to introduce the principle of non-discrimination on certain grounds in specific private sectors.¹¹⁴ Secondly, the use of Directive 2000/78 as ‘the normative yardstick’ could be considered as respectful of other choices of the legislator.¹¹⁵ However, as has been shown, the large potential of the approach could lead to results in which these mitigating factors will be absent. In particular, this is because the *Mangold/Kücükdeveci* approach might lead to the application of the principle of non-discrimination in private relations beyond the scope of non-discrimination directives or specific Treaty anti-discrimination clauses. In those situations one cannot argue that the application in the

¹¹⁰ See Lenaerts and Gutiérrez-Fons, 47 *CLMR* 6 (2010), p. 1655.

¹¹¹ Article 51 entitled ‘Field of application’ does not mention private individuals.

¹¹² Explanations of the Charter, *Official Journal* C 303 of 14 December 2007. For the status of the Explanations of the Charter see Article 6 (1) TEU: ‘The rights, freedoms and principles in the Charter shall be interpreted (...) with due regard to the explanations referred to in the Charter, that set out the sources of those provisions’. See also Article 51 (7) Charter. Case C-279/09 *DEB*, Judgement of 22 December 2010, not yet reported, para. 32.

¹¹³ Compare Prechal, ‘Competence Creep and General Principles of Law’, 3 *Review of European Administrative Law* 1 (2010), p. 19. She considers that: ‘in the two cases the application of the principle of non-discrimination is certainly not unbridled (...) we have witnessed ‘controlled fireworks’, with some very minor collateral damage’.

¹¹⁴ Due to the fact that Directive 2000/78 and the other anti-discrimination directives mentioned in this contribution are meant to be implemented in the private sectors (e.g. Article 3 of Directive 2000/78/EC, [2002] L 303/16).

¹¹⁵ Compare Prechal, 3 *Review of European Administrative Law* 1 (2010), p. 17–18 and Lenaerts and Gutiérrez-Fons, 47 *CLMR* 6 (2010), p. 1649. Lenaerts and Gutiérrez-Fons consider: ‘Insofar as the normative yardstick (...) remains the relevant directive (...) the powers of the EU legislature are safeguarded’. Instead this can also be explained negatively as ‘(...) judicial law making by way of a pick and choose from Directive 2000/78.’ De Mol, 6 *European Constitutional Law Review* 2 (2010), p. 305.

private sphere is (more or less) intended by the EU legislature. Neither will it be possible to show respect to the EU legislature by using secondary law as ‘the normative yardstick’. In addition, an extensive reading of *Kücükdeveci* could lead to direct effect of the general principle of non-discrimination in private disputes that lack a genuine link with EU law.¹¹⁶

Future case law on those aspects will determine whether the approach will be characterized as unbridled – that is to say without any checks or limits. This could be avoided by the setting of firm and transparent boundaries. In this contribution two different proposals have been discussed. Firstly, the CJEU could limit the horizontal direct effect to expressions of the general principle of non-discrimination in secondary law (as proposed by Muir).¹¹⁷ Alternatively, the CJEU could adopt a prudent approach with regard to the circumstances under which horizontal disputes come within the scope of EU law.¹¹⁸ A distinction could be made between private disputes that involve measures that qualify as measures of implementation or as EU derogations on the one hand, and private disputes that do not involve such measures on the other. In the first scenario, application of EU general principles seems fairly acceptable. In the second scenario it would be best to reject the applicability of general principles of EU law to purely private legal relationships. As a result, *de facto* substitution effect of non-discrimination directives should be denied. Consequently, the *Kücükdeveci* approach (e.g. bringing measures under the scope of EU law solely by virtue of their subject matter) should be reserved for horizontal cases in which general principles apply to national legislation (horizontal exclusion effect cases). Moreover, in the context of horizontal exclusion effect cases, the use of this approach should not mean that the mere overlap of the subject matter of national legislation and that of a provision of EU law suffices to trigger the general principle of non-discrimination. In addition, restraint is advisable in the substantive application of the principle of non-discrimination outside the scope of non-discrimination directives.¹¹⁹ In these scenarios it is not possible to fall back on a normative yardstick of the legislature. When the CJEU does review matters outside of the scope of non-discrimination directives, it should do so with restraint, prohibiting only those actions that constitute manifest violations.¹²⁰ If not, the application of the general principle of non-discrimination could be problematic with a view to the principles of conferral of powers, of legal certainty and of institutional balance.

¹¹⁶ Depending on how easily the ‘subject-matter-overlap’ method will apply. See §5.B. and 5.C.

¹¹⁷ See §4.C.

¹¹⁸ See §5.C.

¹¹⁹ This will occur especially in cases in which measures of implementation of EU law or EU derogation are being challenged. If the Muir reading is followed this situation will not occur.

¹²⁰ See §5.B.