

**QUESTION:**

In the Küçükdeveci Case (Case C-555/07, Jan 19, 2010, Materials Packet 3) Advocate General Bot wrote:

65. In sum, the current line of case-law concerning the effect of directives in proceedings between private parties is as follows. The Court continues to oppose recognition of a horizontal direct effect of directives and seems to consider that the two principal palliatives represented by the obligation to interpret national legislation in conformity with Community law and the liability of the Member States for infringements of Community law are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States.

66. The answer to be given to the court making the reference could, in the classic manner, therefore be to refer to the case-law I have just set out and state that the national court is required to use all the tools at its disposal to interpret its national law in accordance with the objective which Directive 2000/78 seeks to achieve and, if it is unable to find such an interpretation, to call upon Ms Küçükdeveci to bring a civil liability action against the Federal Republic of Germany on the basis of the incomplete transposition of the directive.

Explain these two paragraphs of the Advocate General's opinion, and how the Court of Justice's judgment in the case differs from this "current line of case law". In your paper please also explain, with reasons, how you think the Court of Justice should have decided the case.

**COMMENTS:**

**THE SUBSTANCE**

As we discussed in class, the Court of Justice adopted an approach different from that described in this passage from the Advocate General's opinion (although one very similar to the approach the Advocate General advocated after the passage quoted in the question) and stated, in paragraph 27:

"it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings."

The decision in *Kücükdeveci* built on the Court's earlier decision in the *Mangold* case which recognized a general principle of EU law against age discrimination. As the course materials point out, this decision has been criticized as an example of the Court of Justice's over-reaching.

In the *Mangold* case the Court used the general principle as a means of limiting the Member State's freedom to adopt legislation inconsistent with the general principle. In *Kücükdeveci* the Court seems to go further. The Court applies the *Mangold* principle to a long standing rule of German law and makes it clear that the general principle is binding not just on the Member States but also on non-state entities. The explicit reference to the general principle "as given expression in" the Directive seems to give horizontal direct effects to some directives, which seems to be a change in the Court's approach (at the very least the Court makes clear what was not so clear in *Mangold*).

On the one hand, the directive provides more detailed guidance to aid in compliance than the general principle would on its own (and presumably the general principle is limited where the directive allows the Member States to exercise discretion). On the other hand the Court has in the past been quite firm about the idea that directives don't give rise to horizontal direct effects, subject to the possibility that a national court could interpret national law to be consistent with the directive in some circumstances.

By combining the two (general principle and Directive) as the Advocate General suggested the Court is able to avoid the problems which would arise from a reliance on either on its own. Emphasizing an obligation on non state entities to comply with the general principle would raise the question of what the general principle required (a legal certainty problem)<sup>1</sup> whereas emphasizing the Directive conflicts with the Court's traditional insistence that Directives don't produce horizontal direct effects. But there's a question whether the Court is really able to avoid these problems through combination. It's quite a clever strategy, but to the extent that it really undermines the no horizontal direct effect for directives principle it seems to lack legitimacy. The palliatives, of course, also undermined this principle, although the damages actions really focus on the Member State and the interpretation obligation is limited by the principle of legal certainty (and is in practice not always very useful as this case illustrates).

The earlier cases on the effect of directives seem to allow private parties to benefit from a sort of presumption that the Member States have acted appropriately, so they are not

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<sup>1</sup> Note that the Advocate General writes in para 61 of his opinion: "It is agreed, however, that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*." Why do these limitations not apply in the context of disapplication or substitution of a national law ?

generally required to second guess the State's decisions with respect to the implementation of directives. This decision removes that presumption with respect to the general principle of age discrimination, thus putting the burden of verifying the compliance of national law with EU law in this area on non-state entities.

Plus, for the future it is not clear what other general principles of law will apply in this way.

The Court's reliance on the post-Lisbon Treaty effect of the Charter of Fundamental Rights is surprising, given that at the time of the events giving rise to the litigation the Charter was not legally binding.

Some answers suggested that the Court's decision interferes too much with the Member State's freedoms to decide on employment law etc. The Member States have given up that freedom in signing on to the Treaties. Directives once adopted are binding on the Member States and unless there is some basis for asserting a directive is invalid (goes beyond the powers the Treaty gives to the EU, for example) the Member States are obliged to implement the directive. So whereas as a policy matter we may think some Directives restrict the member States' freedoms in ways that are undesirable (a policy conclusion) the idea that this decision restricts the Member States' freedoms with respect to the result specified in the directive too much is doctrinally pretty unsound. And where the Member States have discretion this presumably wouldn't be removed by the effect of the general principle as given effect in the Directive.

But whether this decision imposes obligations on non-state entities in an inappropriate way is a different question. We know, for example (now - not when you wrote the papers) that not all treaty provisions produce horizontal direct effects - see for example the free movement of goods provisions. Horizontal direct effect is not the default rule for Treaty provisions, which makes this decision seem even more dramatic.

The Court does not say whether the general principle as given expression in the directive imposes an obligation on non-state actors to ensure equal treatment in all circumstances, merely that national rules which are inconsistent with the general principle plus directive must be disapplied. So, if a Member State had failed to implement the directive, and had no rules which were inconsistent with the directive, but employers tended to discriminate on the basis of age, could a person affected by the discrimination sue the employer after this case? Arguably the supremacy rationale for the case could require disapplication of inconsistent state law while not imposing obligations of compliance on non-state actors (i.e. not full horizontal direct effect for the directive)..

## **OTHER COMMENTS (THE FORM)**

Good legal writing is very different from good writing in other contexts. Good legal writing is not exciting. Sentences should be short and clear. Do not use long words where a shorter word would work. The aim is to communicate as clearly as possible what you have to say.

The question asks for your views on the right doctrinal answer to the problem. This could involve thinking about the appropriate role of a court/ this court, but I don't think it makes sense to spend much of the limited space on more general policy issues. Try to focus your answers on what the question asks and emphasize material that is directly relevant to the question.

This question of what is relevant is I think linked to the space question. There is quite a bit to say about the narrower doctrinal issues raised directly by the question. So it probably isn't the best plan to spend a lot of the available space on an introductory paragraph or on description of the historical development of the direct effect doctrine, or on whether EU law limits the Member States' freedoms too much (although that is an interesting question). On the other hand brief references to some of those cases in the context of the main argument was, I think, a good idea.