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The role of general principles and the EU Charter of Fundamental Rights in the case law of the European Court of Justice in relation to age discrimination

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I. Introduction

The Mangold judgement[1] was the first case on age discrimination in the case law of the Court of Justice in 2005. The Court ruled in this case that 'the principle of anti-discrimination on grounds of age is a general principle of EU law'[2]. Non-discrimination on grounds of age is one of the most dynamic fields of application under Directive 2000/78/EC ever since then. [3] To date, the Court of Justice has taken 20 decisions[4] in this matter and an additional 13 cases are[5] in progress. Almost half of the judgements, nine out of 15 cases, which had already been

[1] C-144/04 *Mangold* ECR [2005] I-9981, para 77.
[2] Ibid., para 75.
[3] OJ [2000] C 303/16.
[4] C-144/04 *Mangold* ECR [2005], I-9981; C-411/05 *Palacios de la Villa* ECR [2007] I-*08531; C-427/06 Bartsch* ECR [2008] I-07245; C-388/07 *Age Concern' England* ECR [2009] I-01569); C-88/08 *Hütter* ECR [2009] I-05325; C-341/08 *Petersen* ECR [2010] I-00047; C-555/07 *Kücükdeveci* ECR [2010] I-00365; C-229/08 *Wolf* ECR [2010] I-00001; C-499/08 *Andersen* ECR [2010] I-09343; C-45/09 *Rosenbladt* [2010] I-09391; C-250/09 and 268/09 *Georgiev* ECR [2010] I-11869; C-286/12 *European Commission v Hungary* [2012] ECR not yet reported; C-159/10 and C-160/10 *Fuchs and Köhler* ECR [2011] I-06919; C-297/10 and 298/10 *Hennings* ECR [2011] I-07965; C-447/09 *Prigge* ECR [2011] I-08003; C-132/11 *Tyrolean Airways* ECR [2012] not yet reported; C-141/11 *Hörnfeldt* ECR [2012] not yet reported; C-152/11 *Odar* ECR [2012] not yet reported ; C-476/11 *Kristensen* ECR [2012] not reported; C-546/11 *Toftgaard* ECR [2013] not yet reported.
[5] C-429/12. *Pohl* is about a measure ignoring or only partially taking into account, time spent in service before the age of 18 years; The Court received a number of questions from the Federal Republic of Germany which concern the compatibility with Union law age criteria used in the wage structure of provincial judges C-20/13 *Unland* , and provincial civil servants . 501/12 *Specht* ; C-502/12 *Schombera* ; C-503/12 *Wieland* ; C-504/12 *Schönefeld* ; C-505/12 *Wilke* ; 506/12 *Schini* ; C-540/12 *Schmell*, C-541/12 *Schuster* ; other pending cases: C-416/13 *Vital Pérez* concerns a provision in the conditions of application to jobs at local police department which requires that the applicant must be at the most 30 years old, C-417/13 *Starjakob* ; C-266/11 *Frandsen*'s is about a clause in a collective agreement which stipulated the ipso iure retirement of pilots at the age of 60.

decided, were taken by the Grand Chamber.[6] On the basis of the general legislative framework and the case law of the Court of Justice one can see gradually the normative framework of non-discrimination on grounds of age in Union law. The Court uses several means of interpretation to confirm the normativity of age discrimination in Union law and in the law of the Member States. One of these is that the Court elevated the prohibition of discrimination on grounds of age to the status of primary law. In addition, the Court increasingly refers to the Charter of Fundamental Rights[7] (hereinafter referred to as well as the Charter) in its legal reasoning. The aim of this study is to investigate the role of general principles and the Charter of Fundamental Rights in the case law of the Court of Justice regarding age discrimination.

II. The legal framework of age discrimination in the EU

Directive 2000/78/EC lays down the general legal framework of non-discrimination on grounds of age in the EU. The Directive was adopted pursuant to Article 19 TFEU. The Treaty of Amsterdam placed Article 19 TFEU into the Treaty, and for a long time it was the first provision of primary law, which specifically did quantify the prohibition of discrimination on grounds of age. Article 19 (1) TFEU is, however, only a delegating provision, under which the Council after obtaining the consent of the European Parliament, and acting unanimously may adopt the appropriate measures in order to give effect to equal treatment.

As we shall see in the following section, the European Court of Justice upraised the principle of anti-discrimination on grounds of age to the status of general principles, that is, to the status of primary law. Article 21 (1) of the EU Charter of Fundamental Rights, which became binding on the 1 of December 2009, prohibits also discrimination on grounds of age. The Charter of Fundamental Rights had not been part of binding Union law for a long time.[8] The Treaty of Lisbon has, however, changed this situation. According to Article 6 (1) of the Lisbon Treaty, the Charter shall have the same legal value as the Treaties, that is, it became part of primary law of the EU. Unlike the defunct Constitutional Treaty, the text of the Charter itself, was not included into the Treaty, but the European Parliament, Commission

[6] The Court shall assign a matter to the Grand Chamber if the difficulty or importance of the case or other special circumstances require it or a Member State or an institution participating in the procedure request it. Article 60 (1) of the Rules of Procedure of the Court of Justice OJ [2012] L 265/1.

[7] The Charter of Fundamental Rights of the European Union OJ [2012] C 326/391 consolidated version.

[8] Union institutions, that is, the European Parliament, the Commission and the Council solemnly proclaimed it on 7 December 2000.

and the Council solemnly proclaimed it again in December 2007 and its text was published in the Official Journal of the European Union.[9] Following Article 51 (1) of the Charter, the Charter is applicable to Member State's action only when they are implementing Union law' ('bei der Durchführung des Rechts der Union'). The European Court of Justice ruled in Akerberg Fransson[10] that the term 'implementation' must be broadly interpreted, therefore the Charter is applicable not only when Member States are implementing for instance an EU directive, but also when they are acting within the scope of EU law. This is the case, for example, when a national rule is not specifically an implementation measure of an EU directive, but it regulates issues that fall under the scope of a directive. Following the Court's case-law, the scope of the Charter is essentially the same as general principles.

On the basis of Directive 2000/78/EC the general legal framework of age discrimination can be characterised as follows. In EU law the scope of the prohibition discrimination on grounds of age is applicable in principle to all workers, i.e. to the young and the older workers.[11] The scope of the Directive is so broad, that it virtually covers any employment rule, which concern access to the profession, wages and the termination of employment relationship.[12] Except for the provisions of retirement[13], and state social security systems or social protection schemes[14], to which the Directive is not applicable. In addition, Member States may provide that the provisions of the Directive do not apply to the armed forces.[15] The provisions of the Directive, however, shall also apply both to the public and private sector[16], as well as it is not only open, direct forms of discrimination on grounds of age that shall be prohibited, but also indirect discrimination[17]. It is another question that so far the Court of Justice have dealt mainly with direct discrimination. [18]

[9] OJ C 2007, 303/1.

[10] C-617/10 *Akerberg Fransson* ECR [2013] not yet published, para. 21. As the Court of Justice has put it, it can not occur, that EU law is applicable to the case, but the Charter not. Consequently, the applicability of Union law includes the applicability of fundamental rights set out in the Charter. Daniel Sarmiento (2013): Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in the EU. *Common Market Law Review,* 2013. No. 50, p. 1267-1304.

[11] For a short comparison of United States' and Union law see Daniela Gross (2010): *Die Rechtfertigung einer Altersdiskriminierung auf der Grundlage der Richtlinie 2000/78/EG*. Freiburg, Nomos, pp. 32-35.

[12] Article 3 (1).

[13] See recital 14 of the directive.

[14] Article 3 (3).

[15] Article 3 (4).

[16] Article 3 (1).

[17] Article 2.

[18] So far there has been only one case in which the concept of indirect discrimination on grounds of age was raised. C-132/11 *Tyrolean Airways* ECR [2012] *not yet published.*

Nevertheless, age discrimination can be justified more widely under the Directive. This is in particular true with regard to direct discrimination on grounds of age. According to Article 2 (5), the Directive does not apply to measures laid down by national law which in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the for the protection of the rights and freedoms of others. Following Article 4 (1) Member States may adopt rules, in which age is a genuine and determining occupational requirement, which is required by the nature of the activity.

Beyond these general clauses which apply to other forms of discrimination as well, Article 6 of the Directive lays down a further ground for justification specifically applicable to age discrimination. According to Article 6 (1) Member States may justify age discrimination on the basis of employment policy, social policy objectives, provided that they are proportionate. According to Article 6 (2) Member States may lawfully use age criterion in occupational social security systems for admission or entitlement to retirement or invalidity benefits. Both exceptions may apply regarding direct discrimination. Common feature of the latter two exception clauses is that they can only be successfully invoked if the legitimate objectives and measures adopted for their implementation are in proportion with each other.

Having regard to the above, Directive 2000/78/EC only lays down the general legal framework of age discrimination. It really depends on the case law of the European Court of Justice exactly what level of protection Union law provides against age discrimination. The ECJ lives with a number of means of interpretation in its case law on age discrimination, which gradually strengthen the normativity of non-discrimination based on age in Union law and thereby under the legal system of the Member States. For example the Court of Justice clearly separated from each other the different exception clauses. In the *Prigge* case[19] the Court of Justice stated that a rules requiring the *ipso iure* termination of employment of pilots at the age of 60 may theoretically be justified subject to aviation safety. However, aviation safety shall be regarded as a measure adopted in order to protect public security, therefore, it shall be admissible only under article 2 (5), as employment policy, social policy objectives can be invoked only under article 6 (1) of the Directive. It is in itself important under which article a measure can be justified. As Article 2 (5) allows an exception from equal treatment it shall be construed strictly, whereas under Article 6 (1) Member States have a wider margin of discretion.

[19] C-447/09 *Prigge ECR* [2011] I-08003.

The intensity of the proportionality test also defines in itself the level of protection in Union law with regard to age discrimination. On the one hand, the Court has widely recognized the legitimate employment policy objectives of Member States under Article 6 (1) of the Directive, therefore the real filter provides the proportionality test. The proportionality test usually involves two things: the review of the appropriateness and the necessity of the national measure. Whereas the appropriateness test requires an abstract review of whether the measure is suitable to achieve the aim, the necessity test can be applied in two ways. A less strict application of the necessity test means that the measure is in conflict with EU law only in case of an apparent, manifest error. Under a more stringent application of the test, the Court analyses whether there is an alternative measure available less adversely affecting the interests concerned. [20] For the first sight the intensity of the proportionality test vary from case to case in age discrimination cases. There are one type of measures, in relation to which the Court of Justice applies a less stringent proportionality test, and these are the so-called mandatory retirement clauses. Mandatory retirement means, when the employment relationship terminates by operation of law (*ipso jure*) at a certain age, usually at the age of retirement. In the event such measures are applicable in general, that is, not to certain occupational groups[21] such as doctors[22], airline pilots[23], teachers[24], then the Court leaves wider room of manoeuvre for the Member States.[25] The reason for this is that, as we shall see in the next section mandatory retirement is a sensitive political issue, therefore in order to maintain the dialogue with national courts the Court lives more leeway for Member States action.

It also strengthens the normativity of anti-discrimination on grounds of age in Union law that the Court of Justice elevated the prohibition of age discrimination to the level of general principles of EU law. Since the Mangold case the argument appears from time to time in the

[20] See further: Hős Nikolett (2010): Az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlata, különös tekintettel az arányosság teszt alkalmazására. *Európai Tükör,* 2010/3. pp 57-76.

[21] Typically in the case of professions, where there are only a limited number of posts.

[22] C-341/08 *Petersen* ECR [2010] I-00047.

[23] C-447/09 *Prigge* ECR [2011] I-08003.

[24] C-250/09 and 268/09 *Georgiev* ECR [2010] I-11869.

[25] C-411/05 *Palacios de la Villa* ECR [2007] I-08531; C-388/07 *Age Concern' England* ECR (2009) I-01569; C-45/09 *Rosenbladt* ECR [2010] I-09391; C-141/11 Hörnfeldt ECR [2012] not yet reported. For the critiques in the literature: Ulrich Preis (2010): Schlangenlinien in der Rechtssprechung des EuGH zur Altersdiskriminierung. *Neue Zeitschrift für Arbeitsrecht,* 2010/23. p. 1327. Elaine Dewhurst (2013): Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations *Common Market Law Review* 2013/50. pp. 1333-1362.

case law that Directive 2000/78/EC aims to clarify the principle of anti-discrimination on grounds of age that is part of primary law. Further to general principles of EU law or in parallel to it, the Court many times refers to various provisions of the Charter of Fundamental Rights. Last part of this article deals with the role of the Charter of the Fundamental Rights in the interpretation of the provisions of Directive 2000/78/EC.

III. The role of general principles of Union law in the case law on age discrimination

In the Mangold case the Court of Justice developed and in the *Kücükdeveci*[26] judgement it improved a framework of interpretation, according to which Directive 2000/78/EC only specifies the prohibition of discrimination on grounds of age which derives from general principles of EU law. It follows that the national judge shall disapply any national provision that is not in conformity with Directive 2000/78/EC, even if this issue is raised in a dispute between private individuals. The general principle of anti-discrimination on grounds of age is, however, only applicable, if the case otherwise falls within the scope of Union law. This latter condition is interpreted by the Court of Justice in a rather broad sense. On the one hand, it follows from the case law that the content of the general principle and Directive 2000/78/EC is substantially identical with each other. Therefore, all laws of the Member States, or provisions of collective agreements, which regulate a matter that falls under the scope of the Directive is governed by the general principle as well. In the recent *Kristensen*[27] judgement, the ECJ interpreted so broadly the scope of EU law to include up to a clause in an employment contract, which concerns an issue falling under the scope of Directive 2000/78/EC. The reason is that there is ultimately a national implementation measure behind the contract clause, which is applicable to the relationship between the private employer and employee. Thus, a weak link to EU law is sufficient for general principles of EU law to be applicable.

The question arises why it is necessary, to refer to a general principle of EU law if the same issue is regulated by a secondary EU law measure? In addition, since the Court does not refer to the general principle of anti-discrimination on grounds of age in all judgements, it is a question of what is exactly the role of general principles in the interpretation of Directive 2000/78/EC.

[26] C-555/07 *Kücükdeveci* ECR [2010] I-00365.
[27] C-476/11 *Kristensen* ECR [2012] not yet reported.

In general, general principles of EU law are written or unwritten principles, which supplement the Treaties and provide an aid for interpretation and application of EU law.[28] Since general principles are higher legal norms, their infringement is considered, as if it was a breach of any provision of the Treaty. [29] General principles have a number of common function in Union law, for example they are important means for the Court of Justice to complete legal vacuums in Union law. We don't find a definitive catalogue of general principles in the Treaties, however, the principle of equal treatment falls therein according to the case law of the Court of Justice. The ECJ has recognized the constitutional function of the equal treatment principle in its previous case law.[30] In *Defrenne III*[31] the Court ruled, for instance, that discrimination based on sex is not only one of the principles of Union law, but also it is a fundamental right. Similarly, in *Schröder*[32] the Court of Justice stressed, although the principle of equal pay was originally included into the Treaty for economic reasons, in fact, the economic objective of Article 157 TFEU is secondary to the social aim, which constitutes the expression of a fundamental human right. Similarly, by locating the ban on age discrimination on a higher level of legal norms, the Court of Justice has confirmed the normativity of this prohibition in EU law. This frame of interpretation can be used as a point of reference in support of wider interpretation of EU law provisions.

The reference to the principle of equal treatment in *Mangold* and *Kücükdeveci* is also used for a further purpose, i.e. to strengthen the effective implementation of Directive 2000/78/EC. The main point of the case law is, that the content of the principle of equal treatment on grounds of age is the same as Directive 2000/78/EC, therefore a provision of national law (or a contract clause) which is in breach with Directive 2000/78/EC constitutes at the same time a breach of the general principle of equal treatment. It is an important principle with regard to directives in EU law, that their provisions cannot be directly invoked in a dispute between private individuals. [33] The practical application of the basic principle is not subject to such

[28] Alan Dashwood, Michael Dougan, Barry Roger, Eleanor Spaventa and Derrick Wyatt (2011): *European Union Law.* Oxford and Portland, Oregon, Hart Publishing, p. 321.; Koen Lenaerts and Piet Van Nuffel (2011): *European Union Law.* London, Sweet and Maxwell, p. 851.

[29] C-112/77 *Töpfer v. Commission ECR* [1978] I-1019 para 19.

[30] Dagmar Schiek (2006): The ECJ decision in Mangold: A further twist on the effects of directives and constitutional relevance of Community Equality Legislation. *Industrial Law Journal*, 2006/3. pp. 329-341. Mark Bell (2011): The principle of equal treatment: widening and deepening. In: Paul Craig and Gráinne de Búrca: *The Evolution of EU law.* Oxford, OUP, pp. 611-639.

[31] C-149/77 *Defrenne v Sabena* ECR [1978] I-01365 paras 26-27.

[32] C-50/96 *Deutsche Telekom AG v Mr. Schroeder* ECR [2000] I-00743. para 57.

[33] C-152/84 *Marshall* ECR (1986) I-00723., para. 48, *C-91/92 Faccini Dori ECR* [1994] I-03325. para. 20. Directives can have direct effect only through statutory national implementation measures.

restrictions, since it is part of EU primary law and its content is further clarified by a secondary law measure. Thus the principle of equal treatment may require the national judge to disapply any provision of national law which is in breach with this principle. The European Court of Justice, therefore bypassed the dispute on horizontal direct effect of directives and on the basis of the hierarchy of legal norms and the principle of the primacy of Union law further developed the effective application of directives.[34] What follows from *Mangold* and *Kücükdeveci* is not that the provisions of the directive can be invoke directly in a dispute between private individuals, but that EU law precludes the application of a provision of national law.

The adoption of this framework of interpretation did not, however, go smoothly. The following section describes the Mangold case and its impact in the case law on age discrimination.

a. The Mangold case

In *Mangold* the disputed employment law provision allowed employers to conclude fixed term contracts with their employees at the age of 52 without objective reasons, as the general rule would have required. This rule was introduced in order to promote the employment of older workers in Germany. The procedure before the national court was a dispute between two individuals Werner Mangold and Rüdiger Helm. According to Mr Mangold, this provision of national law constituted discrimination on grounds of age and therefore it was in breach with Directive 2000/78/EC. The provision in question, was an implementation measure of the framework agreement on fixed term contracts[35], but the period of implementation of Directive 2000/78/EC has not yet expired at the time of the procedure before the national court.

The Court has stated, that the provision constituted direct age discrimination and it could not be justified under Article 6 (1) of the Directive. However, the case was not yet closed with this, as the national judge wanted to know what he should do in the present case when he should apply a provision of national law that is in breach with EU law in a dispute between private individuals and especially that the period of implementation of the Directive has not yet expired. Before the expiry of the deadline for implementation national courts are not obliged to disapply provisions of national law in breach with EU law.

[34] Evelin Ellis and Philippa Watson (2012): EU Anti-Discrimination Law. Oxford, OUP, pp. 123-130.
[35] Directive 1999/70/EC to the implementation of the framework agreement on fixed-term work OJ (1999) L 175/43.

The Court referred back to its earlier case law on directives according to which Member States[36] and national courts[37] have to refrain from adopting measures which go against the objectives of directives during the implementation period. In this case, it appeared that the legislator adopted the national provision in question specifically with regard to the transitional period between the entry into force of the Directive and the expiry of the implementation period. It had to be applied, in fact, until the deadline for implementation (until 31 December 2006) expired.

With this, however, the Court did not, as yet insured the effective functioning of EU law. As a final step, it based the effect of Union law not directly on the Directive, but on the general principle of equal treatment. With a much-disputed step the European Court of Justice stated that the observance of the general principle of equal treatment, in particular in respect of age, should not be as such conditional upon the expiry date for implementation of Directive 2000/78/EC. Therefore, following the principle of primacy of EU law ruled that, the national court shall be under an obligation to disapply any provision of national law in conflict with EU law even where the period for transposition of that directive has not yet expired[38] The national provision in question fell within the scope of Union law, because it was an implementation measure of the framework agreement on fixed-term contracts.

b. The Mangold saga

It was widely criticized how the Court of Justice has derived from the general principle of equal treatment the principle of non-discrimination on grounds of age. The Court has set out in two poorly structured paragraphs of the judgement the legal basis of this interpretation. First, it emphasized the fact that the source of the general principle of equal treatment, is not directly Directive 2000/78/EC, but different, specifically in the judgement, not mentioned international agreements, as well as constitutional traditions common to the Member States.[39] Finally, as a next step, in paragraph 75 of the judgement has come to the conclusion that 'the prohibition of age discrimination is considered to be a general principle of Union law'.

It seemed, therefore, that the Court has essentially derived the general principle of anti-discrimination on grounds of age from the general principle of equal treatment. On the basis of this interpretation in the extreme case, all forms of discrimination prohibited in Article 1 of

[36] C-129/96 *Inter-Environnement Wallonie* ECR [1997] I-7411.
[37] C-212/04 *Adeneler* ECR [2006] I-6057.
[38] C-144/04 *Mangold* ECR [2005] I-9981 para 76.
[39] Ibid. para. 77.

Directive 2000/78/EC shall be recognized as a general principle of Union law as well[40] It caused further uncertainty, that the Court has not specified the source of the general legal principle. It only referred in general to various international agreements and common constitutional traditions of the Member States. It is true that, for example, Article 14 of the European Convention of Human Rights prohibits certain forms of discrimination, but age is not specified in the list. It should be noted, however, that the list in Article 14 is not exhaustive. The Court of Justice also referred to the common constitutional traditions of the Member States. However, in fact only the Finnish and the Portuguese constitutions contain direct reference to discrimination based on age. It should be noted that, generally, the Court of Justice does not follow an exhaustive comparative law methodology during the development of general principles of Union law, but rather an evaluative assessment. It means, that from more than one solution the Court selects by allegation a solution which is most appropriate for the specific case.[41] In addition, the prohibited forms of discrimination are not constant. It reflects the social, economic, political disposition of a particular age which specific forms of discrimination are considered to be unacceptable and develops together with the society. Therefore you may have an interpretation, according to which the prohibition of discrimination on grounds of age was always part of equal treatment law. However, it became unacceptable to society only now, in particular, in light also the employment policy issues affecting Europe.[42]

The European Court of Justice's decision was followed by great indignation in particular in Germany, where the Court was accused that it exceeded the limits of lawful interpretation of EU law in Mangold.[43] A constitutional law complaint was lodged before the Federal Constitutional Court[44], which had as its object whether the European Court of Justice has exceeded the limits of lawful interpretation of EU law in the *Mangold* case. If this would have been approved by the Constitutional Court the Mangold case could not have been applied in Germany.

[40] The Advocate-General Mazák in the Case C-411/05 *Palacios de la Villa* ECR [2007] I-08531, para. 79-100.
[41] According to Tridimas in the framework of this investigation the Court of Justice - for primarily pragmatic reasons - does not endeavour to find by comparison of national laws the "common denominator" acceptable to all the Member States. Takis Tridimas (2006): *The General Principles of EU Law.* Oxford, OUP. pp. 20-23.
[42] Advocate General Sharpston in Case C-427/06 *Bartsch* ECR [2008] I-07245 , para.79-85.
[43] L. Gerken, V. Rieble, G.H. Roth, T. Stein, R. Streinz (2009): „Mangold" als ausbrechender Rechtsakt, München, Sellier.
[44] 2 BVR 06, 2661 Honeywell Bremsbelag Gmbh.

The subject of the procedure before the Constitutional Court was a labour court judgement in which the court disapplied a provision of national law in conflict with EU law and established as a consequence that a clause of a contact of employment on fixed term was null. According to the constitutional complaint this constitutes an infringement of freedom of contract. Although the Constitutional Court ruled that it has the right to review judicial decisions applying union law, it stressed, that ultra vires review may only be exercised in a manner which is open towards European law, so that the supranational nature of Union law would not be put at risk. In addition, the European Court of Justice has also the right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of interpretation of Union law which can lead to different outcomes to supplant the interpretation of the Court of Justice with an interpretation of its own. Therefore an ultra vires review by the Federal Constitutional Court can only be considered if an institution of the European Union, in this case, the European Court of Justice, have exceeded the boundaries of their competences and the infringement is obvious and significant.[45] It is such a sufficiently qualified infringement of EU law where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power [46]

In the specific case, the Constitutional Court refused the complainant's request, since in his opinion the labour court's decision does not represent such a sufficiently qualified infringement of EU law. Overall, therefore, in order to maintain the cooperative relationship with the Court of Justice the Constitutional Court has taken a fairly moderate decision.

c. The Bartsch and Kücükdeveci affairs

After the *Mangold* case it was in question for a long time, what is the role of the prohibition of discrimination on grounds of age in the case law of the Court of Justice. Mainly, because the Court of Justice has taken several judgements (*Palacios de la villa*[47], *Age Concern England*[48], *Hütter*[49], *Petersen*[50]), which clearly decided on the basis of the Directive and it did not refer to the general principle of anti-discrimination on grounds of age. In spite of the fact that one of the above mentioned cases namely the *Palacios de la* Villa case concerned the

[45] Ibid. para. 57-61.
[46] Ibid. para. 64.
[47] C-411/05 *Palacios de la Villa* ECR [2007] I-08531.
[48] C-388/07 *Age Concern' England ECR* [2009] I-01569.
[49] C-88/8 *Hütter* ECR [2009] I-05325.
[50] C-341/08 *Petersen* [2010] ECR I-00047.

interpretation of the Directive between private individuals. In the *Bartsch case*[51], the Court of Justice only clarified, that the principle of non-discrimination on grounds of age should not be applied, where the matter does not fall within the scope of Union law. According to the facts of the case the employer, the Bosch-Siemens GmbH set up an occupational pension scheme. According to the guidelines of the pension scheme, if the widow of the deceased worker was 15 years younger, the widow was not entitled to retirement pension from the pension scheme. In the case at issue, the worker died on 5 may 2004, i.e. before the expiry of the deadline for implementation of Directive 2000/78/EC (December 31, 2006). The Court ruled that the case did not fall within the scope of Union law because, on the one hand, the guidelines of the occupational pension scheme could not be considered as an implementation measure of Directive 2000/78/EC, as well as at the time the deadline for implementation of the directive has not expired.[52]

Finally, almost five years after the Mangold decision was taken, has had the European Court of Justice the opportunity to clarify the issues raised in the *Mangold* case. In the *Kücükdeveci*[53] case the disputed national law has ruled out to take into account periods of service before the age of 25. According to the general rules, the length of the period of notice in case of the employers' withdrawal increased in line with the period of service spent by the employer. The substantial difference between the *Kücükdeveci* and the *Mangold* cases was that the deadline for implementation of Directive 2000/78/EC has expired at the time of the procedure before the national court. Although the disputed national provision was not an implementation measure of the directive, but it fell within its scope of application. It was a further significant change in relation to the *Mangold* case that the EU Charter of Fundamental Rights became binding.

The national court wanted to make it clear in particular, whether ultimately it has to decide the case on the basis of the general principle of anti-discrimination on grounds of age or with regard to Directive 2000/78/EC. The European Court of Justice confirmed the *Mangold* case and ruled that the Directive only specifies the general principle of anti-discrimination on grounds of age. [54] In connection with the legal source of the general principle the Court of Justice referred to international agreements and constitutional traditions common to the

[51] C-427/06 *Bartsch* [2008] ECR I-07245.
[52] *Ibid.*,para. 24 to 25.
[53] C-555/07 *Kücükdeveci* ECR [2010] I-00365.
[54] Ibid., para. 21.

Member States, and also pointed out that non-discrimination on grounds of age is also displayed in Article 21 (1) of the EU Charter of Fundamental Rights.[55]

In addition, the Court of Justice confirmed in the *Kücükdeveci* case, that it is not possible to invoke general principles of Union law, if the measure otherwise does not fall within the scope of Union law. Here the Court of Justice pointed out, that at the time of the dispute before the national court occurred the implementation deadline of Directive 2000/78/EC has been expired. On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.[56] The scope of the general principle of anti-discrimination on grounds of age and Directive 2000/78/EC is therefore, essentially the same. The Court has stated that the rule constituted direct discrimination on grounds of age, and although it followed a legitimate employment policy goal, but it was not suitable and necessary to achieve that objective.

Finally, the Court provided guidance to the national judge what it should do with the national rule in conflict with EU law. In particular, confirmed where proceedings between individuals are concerned, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. However, the Court of Justice pointed out in the *Kücükdeveci* case, if the court finds that a provision of national law is in conflict with EU law, the national court is first required to interpret national law, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive (indirect effect). If, however, this is not possible, then it is possible to refer to the general principles of EU law in order to disapply a national provision which it considers to be contrary to that principle.[57] The national rule in question was clear and precise, therefore not open to an interpretation in conformity with Directive 2000/78/EC.

The Court of Justice in the *Kücükdeveci* case, therefore, has confirmed and further developed the general interpretative framework laid down in the *Mangold* case. The Court, moreover used this framework of interpretation also in other cases. In *Runevič-Vardyn*[58] the Court extended this framework of interpretation to Directive 2000/43/EC[59] on racial and ethnic discrimination, if only it ruled that the Directive is merely an expression of the principle of

[55] Ibid. para. 22.
[56] Ibid., para. 25.
[57] Ibid, para 48-51.
[58] C-391/09 *Runevič-Vardyn* ECR [2011] I-03787, para. 43.
[59] OJ L (2000) 180/22 .

equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union. Still, however, it is a question, to what extent the interpretative framework laid down in the *Mangold* and *Kücükdeveci* cases can be extended to other directives outside of the field of equality law. Even though the Court already had an opportunity to extend it to Directive 2003/88/EC on the organization[60] of working time, it clearly refrained from doing so. [61]

IV. The role of the EU Charter of Fundamental Rights in the case law on age discrimination

The number of references to different provisions of the Charter of Fundamental Rights in the case law on age discrimination is significantly rising since the Treaty of Lisbon entered into force.[62] The Court has referred to the Charter in its legal argumentation in 6 out of the 14 decisions which were taken since the 1 of December 2009. This is particularly striking with regard to discrimination on grounds of age, where the Court of Justice specifically avoided in the *Mangold* case and also in the following cases the reference to the Charter before the entry into force of the Lisbon Treaty. Probably in order not to complicate the otherwise uncertain legal basis of the principle of anti-discrimination on grounds of age. However, with the binding legal force of the Charter the situation has changed. On the one hand, there was a binding primary law source of EU law which specifically listed age among the prohibited grounds of discrimination. Therefore, after a long silence the Court of Justice could strengthen the legal basis of the general principle of anti-discrimination on grounds of age. On the other hand, the reference to the Charter has in a number of cases inspired the interpretation of Directive 2000/78/EC.

It should be pointed out that the Court's references to rights and freedoms set out in the Charter of Fundamental do not merely confine to Article 21 in age discrimination case law, which expressly rules out discrimination on grounds of age. This is due to the fact that the

[60] OJ L (2003) 299/9 .

[61] C-282/10 *Dominguez* ECR [2012] not yet reported. Laurent Pecht (2012): Between Judicial minimalism and avoidance. The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez *Common Market Law Review* 2012/6. 1841-1880.o., Mirjam de Mol: Dominguez: The Deafening Silence. *European Constitutional Law Review,* 2012/2., p. 280-303.

[62] This finding is also generally true for the case law of the European Court of Justice (see, in particular in this regard Sara Iglesias Sánchez (2012): The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights. *Common Market Law Review,* 2012/49, pp. 1565-1612 Concerning the employment and social policy practice see Berke Gyula (2013): Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben. *Lex HR Munkajog,* 2013/11. pp. 8-14.

Charter of Fundamental Rights contains a number of other provisions, which express relevant social, economic, employment policy questions in relation with discrimination on grounds of age. Such an Article is for example Article 25, which deals with the rights of the elderly. In accordance with this provision the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Article 15 (1) is also relevant, which recognizes the right to engage in work.

Certainly, we can say that after the Charter of Fundamental Rights became binding fundamental rights-based arguments became much more visible in the case law of the Court of Justice on age discrimination. References to the Charter can be classified in two groups. In a number of cases the Court still refers to the Charter along the general principle of anti-discrimination based on age. Essentially this is the case in the cases mentioned in the last chapter *(Kücükdeveci* and *Kristensen*). In another group of cases, the Court uses the Charter as an autonomous legal source, and virtually ignores other international documents (in particular the European Convention on Human Rights and the related case-law) or constitutional traditions common to the Member States.[63] The Charter is used for a number of purposes, such as in support for a restrictive interpretation of exceptions from Directive 2000/78/EC and for narrowing the margin of discretion available for Member States under Article 6 (1) of the Directive.

As to the first group of cases, as it was pointed out in the previous chapter, the Court referred to the Charter not as a source of the general principle of anti-discrimination on grounds of age, but as an autonomous source of primary law, which prohibits discrimination based on age. In short, Directive 2000/78/EC, only specifies the general principle of non-discrimination on grounds of age. In addition, the Court points out that the prohibition of discrimination on grounds of age is also listed in Article 21 of the Charter which according to Article 6 (1) TEU has the same legal value as the Treaties since December 1, 2009. Two conclusions follow from this: on the one hand, the Court highlights the autonomous importance of the Charter of Fundamental Rights among the sources of fundamental rights, and despite the binding legal force of the Charter the importance of general principles remains relevant in the case-law of the Court of Justice. This is true in spite of the fact that for now it seems that the content of

[63] This confirms the trend in the case-law, that references to other international legal instruments, and the role of comparative analysis has significantly reduced since the Charter of Fundamental Rights became binding. Gráinne de Búrca (2013): After the EU Charter of Fundamental Rights: The Court of Justice as the Human Rights Adjudicator? New York University School of law, public law and legal theory research papers, No. 13-51., pp. 6-7.

the general principle and of Article 21 is essentially the same. Thus the reference to general principles retains the connection to the previous (pre-Lisbon) case law and offers a kind of flexibility.[64] As far as this latter aspect is concerned, the scope of the general principle is so broad that it is sufficient to establish a weak link to Union law and it can be applicable (*Kristensen*). It is questionable whether the Court could adopt such a broad interpretation also under Article 51 of the Charter. This is probably the reason why, for now the Court refrained from recognizing the prohibition on age discrimination only on the grounds of Article 21 of the Charter.

The joint reference to the general principle and to Article 21 of the Charter was used by two ends in the case law so far. In a number of cases (e.g. *Kücükdeveci*) the Court refers to the Charter in order to strengthen the effective application of EU law. Similarly, in *Kristensen*[65] the Court used the interpretative framework developed in *Mangold* and *Kücükdeveci* in order to extend the scope of the principle of anti-discrimination on grounds of age to a clause in a employment contract. In the *Kristensen* case the Court analysed an occupational pension scheme, in which the contribution paid by the employer was dependent on the age of the employee. Thus, for a person under 35 the employer paid as part of his wage 6% contribution and for an employee between 35-44 years but of the same qualifications up to an 8% contribution. On the other hand, the amount of the contribution paid by the employee was also dependent on the age of the employee, so that the younger employee had to pay a lower contribution than the older worker. According to Mrs Kristensen this system constituted direct age discrimination.

Before the examination of the merits of the case the Court had to decide whether EU law could be applied at all to the specific case, given that, it concerned a dispute between two individuals, not in relation of a collective agreement or legislative measure, but as regards a contract clause in the employment relationship between G. Kristensen and the employer. Following *Bartsch* the Court could have come to the conclusion that since the case did not concern an implementation measure of Directive 2000/78/EC it fell outside the scope of the general principle.

Nevertheless, the Court came to the conclusion that it is on the basis of the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter and given specific expression by Directive 2000/78, that the question whether European Union law precludes an

[64]Sara Iglesias Sánchez (2012) ibid, p. 1610.
[65] C-476/11 *Kristensen* [2012] ECR not yet reported

occupational pension scheme such as that at issue in the main proceedings must be examined. [66] The Court stressed that the case fell within the scope of Union law. First, because the contract clause was adopted in the context of the national implementation measure of Directive 2000/78 and after the date of expiry of the period prescribed for the Member State concerned for transposing the Directive. In addition, the situation in question concerned fell under the scope of the directive. The Directive covers public and private entities, inter alia, [...] in relation to pay. The subject of the dispute before the national court was the employer's contributions paid by the employer in respect of its employees and not the retirement benefits payable following their retirement.[67] Furthermore, the employer's commitment to pay those contributions stems solely from the contract of employment concluded between that company and its employees and is not imposed on it by law. Contributions paid by the employer for employees by the employer for the benefits offered, which were part of pay without legislation entered into the contract of employment to the employer.[68] The funding of the occupational pension scheme at issue in the main proceedings is provided both by the employer, in the amount of two thirds of the contributions, and by the employee, in the amount of the remaining third, without the State contributing to it.

The Court concluded that the age criteria used in the occupational pension scheme constituted direct age discrimination, since it affected workers under the age of 35 less favourably. The use of this age criteria could not be justified under Article 6 (2), since it does not set any age criteria for admission to retirement benefits. The Court pointed out that Article 6 (1) can be applied as regards the aims pursued under an occupational pension scheme in a contract of employment, such as that at issue in the main proceedings.[69] The age criteria served the same purposes, as if it was a state pension insurance system: to take into account the interests of older and younger workers and to cover the risks of death, disability or serious illness. These are objectives which take account of the interests of all employees, in the context of social, employment and labour market policy concerns, with a view to ensuring retirement savings of a reasonable amount when an employee retires[70]. Therefore they may be regarded as legitimate aims.

[66] Ibid., Para. 31.
[67] Ibid., para. 27.
[68] Ibid, para. 28.
[69] Article 61.
[70] Ibid., para. 62.

As regards proportionality the Court found the use of the age criteria was appropriate but it referred the analyses of necessity back to the national court. [71] In the latter respect, the Court gave the guidance that the national court must, inter alia, consider whether the detriment resulting from the difference in treatment observed is offset by the benefits of the occupational pension scheme at issue in the main proceedings.[72] Thus the contributions to the occupational pension scheme are essentially treated as a form of pay. In fact, it is a question to what extent it can be expected from a private employer to take all the complex social and political decisions which are necessary with regard to measures to be justified under Article 6 (1).

In another case, the Court used the interpretative framework laid down in *Mangold* and *Kücükdeveci* in order to justify the restrictive interpretation of Article 6 (2) of Directive 2000/78/EC. According to Article 6 (2) of the Directive, Member States may legally use age criteria for admission or determination of entitlement to retirement or invalidity benefits in relation with occupational social security schemes. In the *Toftgaard*[73] case the question was raised as to whether this exception may apply to any type of occupational social security system or only to those that cover the risks of old age and invalidity. The Court ruled, since Article 6(2) of Directive 2000/78/EC allows Member States to provide for an exception to the principle of non-discrimination on grounds of age, that provision must be interpreted restrictively, that is it only applies to occupational social security schemes that cover the risks of old age and invalidity. [74]

[71] As a result of the application to older workers of higher employer and employee pension contribution rates, the application of age-related increases in contributions makes it possible for those workers to build up reasonable retirement capital, even where their affiliation to the scheme in question is relatively recent. Those increases also make it possible for younger workers to join that scheme, since it is open to any Experian employee regardless of age, while imposing on those persons a lighter financial burden, the employee contributions deducted from younger workers being lower than those paid by older workers. In addition, the application to older workers of higher employer and employee pension contribution rates appears, generally, to be appropriate to ensuring that a larger proportion of those contributions is set aside to cover the risks of death, incapacity and serious illness, the occurrence of which is statistically more likely for older workers. Para. 64-65 points.

[72] The national court must, in particular, take account of the fact that, first, Ms Kristensen benefited from that scheme in so far as she has received the contributions paid by her employer on her behalf, and, secondly, that the lower amount of the employer contributions corresponds to the lower amount of the employee contributions, such that the percentage of basic salary that Ms Kristensen had herself to pay into her retirement savings account was lower than that payable by a worker of over 45 years of age. It is for that court to weigh up those considerations. Para. 68.

[73] C-476/11 *Kristensen* [2013] ECR not yet reported

[74] Ibid., para. 40-41.

In another group of cases, the Court used the Charter as an independent, autonomous source of interpretation. This was the case for instance in the *Fuchs* case[75], which concerned the compatibility of a German provincial rule with EU law, which provided the compulsory retirement of prosecutors on reaching the age of 65. The European Court of Justice has determined that this provision fell within the scope of the Directive and it constituted direct age discrimination. A significant part of the judgement dealt with the question of justification and proportionality of this measure. The Court ruled that the realization of a balanced age structure among young and elder civil servants is a legitimate social and employment objective which falls under Article 6 (1) of the Directive. In addition, it emphasized that the measure seemed to be appropriate in the given profession. It was because there were a limited number of posts available in the profession and access to that profession is limited by the requirement that members should have obtained a special qualification entailing the successful completion of a course of study and a traineeship. In addition, the entry of young people into the profession could be restricted owing to the fact that the civil servants concerned are appointed permanently. This, however, still was not sufficient to establish the proportionality of the measure. The Court stressed that Member States have a wide discretion in adoption of the measures for better allocation of workplaces between generations.

However, Member States may not frustrate the prohibition of discrimination on grounds of age set out in Directive 2000/78/EC. That prohibition must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union.[76] Thus, attention must be paid to the fact that such employment policy measures can have an impact on the fundamental right to engage in work of the workers. It follows, then, that national courts have to find the appropriate balance between the potentially divergent interests. Beyond the promotion of employment of young workers the interest of older workers to continued employment must be taken into account as well. Keeping older workers in the labour force promotes diversity in the workforce, moreover, it contributes to the realising of their potential and to the quality of life of the workers concerned. [77] However, attention must be paid also to the opposite, namely to those who have reached the age at which they are entitled to a retirement pension may wish to avail themselves of it and to leave work with the benefit of that pension, instead of continuing to work.[78] The authorities of the

[75] C-156/10 and C-160/10 *Fuchs and Köhler* ECR [2011] *I-06919*
[76] Ibid., para. 62.
[77] Ibid., para. 63.
[78] Ibid, para. 64.

Member States must in particular take care that the automatic retirement of workers at the age of retirement does not harm their legitimate expectations. This will be met in particular, if the persons concerned are to receive an appropriate level of pension.[79] It was apparent from the documents before the Court that prosecutors retire, as a rule, at the age of 65 on a full pension equivalent to approximately 72% of their final salary. The national measure further provided for the possibility of prosecutors working for a further three years until the age of 68 if they so requested and if it was in the interests of the service. Finally, it did not prevent prosecutors from exercising another professional activity, such as that of legal adviser, with no age limit.

In this case the Court referred to an article of the Charter although the national court did not asked to do so and it did not directly follow from the provisions of the Directive. It seems from this technique of interpretation that the Court can refer any time to the fundamental rights and freedoms set out in the Charter in order to support its main argument.[80] It must be pointed out, however, that the Court clearly avoided the reference to Article 25 of the Charter, despite the fact that the content of that article and legal arguments of the Court were virtually the same. The reference in this case, to the Charter served essentially the purpose that the Court of Justice narrowed somewhat down the margin of discretion of the Member States in the adoption of legitimate employment policy measure under Article 6 (1).

As regards the role of the Charter of Fundamental Rights those cases deserve special attention, in which the significance of collective agreements during the examination of proportionality was raised. The Court has so far dealt with this question in four cases. Following the *Palacios de la Villa*[81] and *Rosenbladt*[82] cases it seemed that the Court recognizes the advantages in the regulation with collective agreements. In both of these cases, the Court of Justice analysed clauses in sector level collective agreements, which allowed the *ipso iure* termination of employment relationships at the retirement age (65 years). [83] In both countries, in Spain and Germany this measure was introduced in order to reduce the

[79] Ibid., para. 67.
[80] The evolution of the case law of the Court of Justice of the European Union on Directive 2000/43/EC and Directive 2000/78/EC (2012) European Commission Directorate-General for Justice p. 5.
[81] C-411/05 *Palacios de la Villa* ECR [2007] I-08531.
[82] C-45/09 *Rosenbladt* ECR [2010] I-09391
[83] In the *Palacios de la Villa* case the collective agreement in the Spanish textiles sector provided for automatic termination of employment relationships, where the worker had reached the age of 65 and was entitled to old-age pension. In the *Rosenbladt* case the German collective agreement contained a clause, which stipulated the termination of employment relationships because of acquiring old-age pension at the age of 65.

unemployment rate, i.e. in order to better distribute workplaces between generations.[84] Although the Court has determined that these provisions constituted direct age discrimination, it found them proportionate. In *Rosenbladt* the Court pointed to the fact, that it is not proven that there was a direct relationship between older workers leaving the labour market and the creation of jobs for young workers. Despite this fact, the Court has found appropriate and necessary the automatic termination of employment relationships at the age of retirement in order to facilitate the employment of young workers, and to develop a balanced age structure within the enterprise. It should be noted, that the measures have not ruled out, that the worker can continue his professional activities at the pensionable age. However, they have also provided the workers a reasonable amount of pensions and ensured that the workers have received adequate financial compensation.

In both of the cases the Court attributed particular importance to the fact, that the provisions in question were adopted by collective bargaining. In the *Palacios de la* Villa case, the Court noted in general terms that regulation by collective agreements provides some flexibility. Regulation by collective agreements allows that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question. [85] In the *Rosenbladt* case, without referring to the Charter, or general principles the Court had stated that the clause on the automatic termination of employment contracts at issue in the main proceedings was the result of an agreement negotiated between employees' and employers' representatives exercising their right to bargain collectively which is recognised as a fundamental right. [86] As regards the source of this right the Court of Justice referred back to its previous case law. In the *Commission v. Germany* case[87], the Court of Justice raised the right to collective bargaining to the level of fundamental rights. Beyond the reference to Article 6 of the European Social Charter, and Article 12 of the Community Charter of Fundamental Social Rights of Workers the Court also referred to Article 28 of the Charter of Fundamental Rights.

[84] Such clauses reflect political and social consensus about better distribution of workplaces between generations in Germany. This consensus is based on the assumption that the exit of older workers from the labour market will automatically facilitate the employment of younger workers affected by long-term unemployment. On the other hand, the rights of older workers are properly protected. Most of them in fact directly after obtaining the pension want to stop working, because the pension provides sufficient compensation.

[85] C-411/05 *Palacios de la Villa*, Para. 74.

[86] C-45/09 *Rosenbladt* , para. 67.

[87] C-271/08 *Commission v. Germany* ECR [2010] I-07091.

Following this case law some national judges came to the conclusion that regulation by collective agreements can have an importance in the examination of proportionality. After such history, therefore, it seemed surprising that in *Hennings*[88] and *Prigge*[89], in which the European Court of Justice referred autonomously and directly to Article 28 of the Charter of Fundamental Rights, as the main source of the right to collective bargaining, took a rather critical position with regard to collective agreements. In both cases the Court pointed out that the fundamental nature of the right to collective bargaining does not exempt the measure from the scope of the Directive. The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests. [90] By referring to the *Viking*[91] and *Laval*[92] cases the Court recalled, where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law. [93] The provisions in question, have been adopted by the social partners under their regulatory autonomy and that they did not specifically served as an implementation measure of the Directive. Despite this they fell within the scope of the Directive, because they directly affected the workers with regard to remuneration or dismissal. It is remarkable that the Court of Justice unlike in the *Palaciois de la Villa* and *Rosenbladt* cases did not attach any importance to the fact that the provisions in question were adopted by collective bargaining.

The *Hennings* case[94] concerned the collective wage agreement of civil servants. The basic wage of civil servants was essentially defined by two factors. First, the nature of the activity carried out by a worker and second the age of the employee. After the expiry of two years the worker received the basic wage of the following age group. The problem was that the basic wage of the worker was determined solely on the basis of the nature of the activity carried out by the worker and the age of the worker at the time of entering the service. As a result, a situation could appear that for instance two architects who were adopted on the same day

[88] C-297/10 and 298/10 *Hennings and Mai* ECR [2011] I-07965.
[89] C-447/09 *Prigge* ECR [2011] I-08003.
[90] Ibid., Para. 66.
[91] C-438/05 *Viking* ECR [2007] I-10779.
[92] C-341/05 *Laval* ECR [2007] I-11767.
[93] C-447/09 *Prigge* ECR [2011] I-08003. Para. 67.
[94] C-297/10 és 298/10 *Hennings and Mai* ECR [2011] I-07965

could receive different amount of basic wage since they entered the firm at different age. This system constituted direct age discrimination according to the European Court of Justice. The age criteria was apparently used in order to reflect the seniority and professional experience of the employee. The Court of Justice has recognized, that rewarding the professional experience of the worker can be considered as a legitimate aim under article 6 (1) of Directive 2000/78/EC directive since there is a direct relationship between professional experience of the worker and longer periods of service. However, the provision of the collective agreement in question was not proportionate since it showed internal inconsistencies. It was because the provision in question did not take into account professional experience prior to entering the firm in determination of the basic wage of the employee. In this way it was possible that a newly recruited worker without actually any professional experience received the same wage as a worker at the same age who was, however, recruited to the firm earlier and therefore had several years of professional experience.

The difference was even more apparent as compared to the previous case law of the Court of Justice in the *Prigge* case[95], which concerned a provision of a collective agreement, according to which the employment relationship of Deutsche Lufthansa pilots ceased at the end of the month when they reached the age of 60 years. The social partners referred to the worker's reduced physical performance, and the promotion of air transport safety as a justification. Court found that the disputed provision constituted direct age discrimination and it could not be justified under any of the grounds of the Directive. Although aviation safety can be considered as a legitimate objective under Article 2 (5), i.e. an objective to protect the interests of public safety and public health. However, in the specific case the total prohibition of employment in the given profession was not proportionate. There was no proof that there was a direct relationship between the performance and the age of the worker. The age criterion could not be considered as an important and determining professional requirement within the meaning of Article 4 (1) of the Directive either. Article 6 (1) was not applicable in the case in question, having regard to the fact that aviation safety is not considered to be an employment policy measure.

At first sight, it is surprising that in cases in which the Court has recognized collective bargaining as a fundamental right with reference to the Charter of Fundamental Rights, it applied the proportionality test fairly strictly. However, this difference can be explained by the earlier case-law of the Court of Justice. The Court of Justice, on the one hand follows its

[95] C-447/09 *Prigge* [2011] ECR I-08003.

case law in internal market law according to which the right to collective bargaining is not of an absolute nature in EU law therefore it is shall be exercised in accordance with Union law within the scope of application of EU law.[96] This is in particular a problem in countries (e.g. in Germany), where the legislator and the courts refrain from intervening in the content of collective agreements with reference to the concept of "collective autonomy". On the other hand, the differences can be explained with the principles developed by the Court of Justice in its earlier case law on age discrimination. The *Palacios de la Villa* and *Rosenbladt* cases concerned general retirement measures, with regard to which the Court follows a more lenient case law.[97] The *Hennings* case did not fall under this case law since it did not concern a measure relating to retirement. In the *Prigge* case the social partners referred only to aviation safety as a legitimate objective, therefore Article 6 (1) was not applicable, under which the social partners could have had a broader margin of appreciation.

V. Conclusions

Since the *Mangold* case the Court has from time to time pointed out that Directive 2000/78/EC gives effect to the general principle of equal treatment which has a firm legal basis in international law and the common constitutional tradition of the Member States. The Court of Justice has raised the prohibition of discrimination on grounds of age thereby to the level of primary law. The expression of this general principle might have seemed a bold step at the time of the *Mangold* case (2005), but it reflects the latest development in EU law. In particular, in the light of the fact that the Charter of Fundamental Rights - which became binding on 1 December 2009 and which belongs to primary law according to the Lisbon Treaty - specifically identifies this form of discrimination. This framework of interpretation permeates the interpretation of the Directive, to the extent that it provides a more efficient protection against discrimination.

On the other hand, the European Court of Justice has referred to the provisions of the Charter of Fundamental Rights in the interpretation of Directive 2000/78/EC ever more often, which has intensified the fundamental rights-based argumentation in the case law of the Court of Justice. Despite the references to the Charter the Court of Justice decides the cases essentially on the basis of the provisions of Directive 2000/78/EC and it is not the fundamental rights

[96] C-438/05 *Viking* ECR [2007] I-10779, C-341/05 *Laval* ECR [2007] I-11767, also in this line C-271/08 *Commission v Germany* ECR [2010] I-07091

[97] See above on page 5 and to C-286/12 *Commission v Hungary* case see also Tamás Gyulavári and Nikolett Hős (2013): Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts. *Industrial Law Journal*, 2013/3., pp. 289-297.

based argumentation that dominates the cases. This may arise from the fact that the traditionally minimalist, formalistic and self-referencing technique of interpretation, won't be suitable for the resolution of disputes concerning fundamental rights in the long-term.[98] Having regard to the complex fundamental rights system set up by the Lisbon Treaty the number of cases this type will certainly increase in the future.

[98] De Búrca (2013) ibid. p. 15.