

EUROPEAN UNION LAW:PAPER ASSIGNMENT MEMO

QUESTION:

In the *Kücükdeveci* Case 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 *Kücükdeveci* to bring a civil liability action against the Federal Republic of Germany on the basis of the incomplete transposition of the directive.

Write a critical analysis of the Court of Justice's decision in *Kücükdeveci*. In your answer, explain how the Court of Justice's judgment in the case reflects or does not reflect the approach suggested by Advocate General Bot in the paragraphs of his opinion set out above. What are the advantages and disadvantages of the approach the Court of Justice adopted in this case?

COMMENTS:

The question asks you to address the specific question of how the Court's judgment reflects or does not reflect what the Advocate General says in these paragraphs of his opinion. It does not ask for a description of the facts of the case or for general discussion of the history of direct effect. The question is quite specific and you only have 4 pages to spend on it. There is lots to say about this so the best approach would be to spend your words carefully. Make them count!

The question is not just specific but it asks specifically about your views on the correct doctrinal answer to the problem faced by the Court. You should try to focus your answers on what the question asks and emphasize material that is directly relevant to the question.

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.

It would be good to be sure what the word palliative means in order to address this question. A palliative is something which relieves the symptoms of an illness without curing it. So the Advocate General (AG) is referring to ways in which the Court of Justice (CJ) has attempted to soften the harshness of the rule prohibiting horizontal direct effect of directives: interpretation and damages actions.

In ¶¶ 65 and 66 the AG refers to the CJ's general approach to the issue of whether directives produce horizontal direct effect, which is that they do not, and that courts should instead focus on the interpretive obligation (or indirect effects) and the possibility of a damages action. The AG does recommend a different approach to the issue on the basis that the national court stated that "even doing all in its power to achieve the objective pursued by Directive 2000/78, it cannot interpret the national provision in conformity with the objective of the directive" (¶ 68) and that claiming damages would require new judicial proceedings and this would conflict with the "effective right of action which, according to Article 9 of Directive 2000/78, must be available to persons who consider themselves wronged by failure to apply the principle of equal treatment to them" (¶ 69). The AG's opinion antedates the Court's judgment and is designed to help the Court reach its decision in the case. Acknowledging what the Court's jurisprudence has to say about the issues in the case is consistent with the AG's role. Nevertheless Advocates General do sometimes suggest that the Court's jurisprudence should change.

Thus in ¶ 70 the AG recommends the CJ "take a more ambitious approach in terms of action to counteract discrimination which is contrary to Community law, an approach which does not in any way involve a head-on confrontation with its classic case-law concerning the lack of horizontal direct effect of directives. That position, which is based largely on the specific nature of the directives intended to counteract discrimination and on the hierarchy of norms in the Community legal order, is that 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. The Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive intended to counteract discrimination may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive."

The CJ stated, in paragraph 27 of its judgment that "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."

This decision builds on the CJ's decision in *Mangold*, which, as the course materials point out, has been criticized as an example of the Court of Justice's over-reaching. In *Mangold* the CJ used the general principle to limit 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 affects not just the Member States but also non-state entities. The explicit reference to the general principle “as given expression in” the Directive seems to give something very like 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). The national court must disapply provisions of national law which conflict with the general principle plus directive (gp plus directive).

This disapplication of national law is a consequence of supremacy. It is not completely new, but the idea that directives can contribute to the need for disapplication is inconsistent with the prior emphasis on interpretation. The requirement of disapplication is different from a requirement to interpret national law as far as possible to be consistent with a directive. This is what is important about this case.

As to the gp plus directive idea, 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 (although note that the AG says in ¶ 70 that “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”). 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 AG suggested, the CJ 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 raises the question of what the general principle requires (a legal certainty problem)¹ 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 CJ 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).

¹ Note that the AG writes in ¶ 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 ?

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 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.

So although as a technical matter there is a difference between looking at a directive as a source of rights and obligations for non-state entities (which is where horizontal direct effect would take us) and treating the gp plus directive as creating an obligation on a national court to disapply a conflicting national rule, in a case such as this the employer's obligation becomes an obligation to give the longer notice period (ie to pay the employee for more weeks than the national law would require). For an employer trying to figure out what to do to comply with its obligations it seems to me that the gp plus directive does make a difference here. So as a technical doctrinal matter it may be that what is going on here is different from horizontal direct effect of the directive, from a practical perspective I am not sure that it makes much difference.

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).

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. And the Charter is binding on EU institutions and Member States rather than on non-state entities. In one sense requiring disapplication of national rules which contravene general principles operates on the Member States, but in another (practical) sense it also affects the position of non-state entities.

For the future it is not clear what other general principles of law will apply in this way. Altogether the CJ's decision does raise some issues with respect to legal certainty, which is another general principle of EU law.