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Some reflections on the choices of the European Court of Justice in the *Kücükdeveci* preliminary ruling

by

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Abstract

In Kücükdeveci judgment, the European Court of Justice declared that national judges must set aside national norms that are at variance with the general principle of non discrimination on grounds of age, by virtue of its direct applicability (even in disputes between private parties). This principle is also codified in the Charter of Fundamental Rights and in the EC Directive 2000/78, therefore it is worth analyzing these three sources in turn (general principles, Charter, directives) to understand which of them can have horizontal direct effects, and upon which conditions. In addition to that, the author focuses on the validity of an "incidental direct effects" doctrine, and on the repercussions that this decision might have on the social cohesion of the European Union.

Key-words:

General principles of the European Union, directives, European Charter of Fundamental Rights, non discrimination on grounds of age, social cohesion

1. Preliminary remarks

Some months have passed, and it is perhaps appropriate now to recall the *Kücükdeveci* judgment of the European Court of Justice (ECJ)[I] and account for its most remarkable aspects.

The ECJ was asked to pronounce on the EU-legality of a German domestic provision, under which employers who wish to dismiss an employee, can, for the purpose of calculating the length of the period of notice to be provided, disregard the years of seniority that the employee has accrued before the age of 25. In the main proceedings, an employee who had been dismissed under these terms brought his employer before the Labor Tribunal, asking the judge to declare the irregularity of his dismissal.

The measure appeared to violate the principle of non-discrimination on grounds of age, that the ECJ had already had the opportunity to specify and use in the infamous 2005 *Mangold* case.[II] The challenged provision was also at variance with the letter of the non-discrimination directive (Directive 2000/78), which mandates that, in the absence of a justification, 'there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 [including age]' (Art. 2).

Although at the time of the main proceedings the non-discrimination directive was fully operative (in fact, it had been carefully transposed by the German legislator),[III] it could not be invoked to challenge the legality of the German norm, because directives normally do not have horizontal direct effect, that is, they cannot dispose of disputes between private parties.

As a result, the ECJ compared the challenged norm with the general principle, and found them to be incompatible. Specifically, the Court acknowledged the motivation behind this *prima facie* discrimination (the necessity to provide eldest workers with a comparatively higher protection in case of dismissal), but deemed the German provision to be insufficiently effective (and disproportionate) even in light of such purpose. Accordingly, the ECJ instructed national judges to set this provision aside, even in the case of private disputes (Wiesbrock 2010).

2. General principles of the EU order.

The *Kücükdeveci* judgment is very instructive as to the horizontal effect of general principles, an aspect that – apart from the *Mangold* ruling – had virtually never been explored, either in the case-law or in the scholarship. Intuitively, general principles serve an auxiliary function: they inform the interpretation and inspire the application of specific rules. As for their direct application, the framework is more blurred, especially when principles are supposed to affect the outcome of disputes between individuals (as opposed to being used to assess the legality of the acts of public authorities).

Historically, general principles emerge to fill the physiologic *lacunae* of any legal order, and to provide citizens with some instruments of control against the exercise of public powers. Principles typically consist of procedural and substantive guidelines aimed at ensuring an appropriate threshold of fairness of the public intervention in social life. Accordingly, their role in litigation is mostly as standard of review for state action (vertical direct effect). To put it differently, when principles are enforced, they generally bestow on private parties rights, rather than enforceable obligations.

When it comes to non-discrimination, however, it may be that private parties are just as likely to adopt discriminatory conduct as are public authorities. Therefore, non-discrimination principles end up being invoked in private litigation; the issue, then, is whether it is desirable that the set of enforceable rights and obligations of individuals should depend on the content of non-codified general principles, as opposed to positive regulation.

In other words, the judicial creation of a new set of unwritten obligations of private subjects is difficult to reconcile with the values of legal certainty, and results in a scenario where individuals can be held liable for the failure of their States to comply with the duty to implement EU law in keeping with the general principles of law. In the case under consideration, for instance, Germany's failure to harmonize its domestic legislation to the non-discrimination principle would have established the employer's liability *vis-à-vis* the employee, although the former had done nothing but abiding by valid national law.

The "horizontalization" of general principles can be read in light of the similar process relating to European directives which, in turn, followed the footsteps of the private

application of Treaty norms (see Case 43/75 *Defrenne v. Sabena*,[IV] discussed below). However, the ECJ did not ratify in the case under consideration both direct applicability and horizontal effect of the general principles; as more fully described below, their relevance in private disputes is only of partial (incidental) application.

3. Incidental horizontal effect.

The ECJ did not rule that directives can have direct horizontal effect. Quite to the contrary, the Court recalled and reaffirmed its previous case-law on the point; indeed, despite the call for a change uttered by the Advocate General in his opinion, the ECJ rejected the temptation to overrule the well-established principle that 'a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual' (par. 46).

However, although the direct effect of the directive instrument has not been not reformed by the ECJ, much of the doctrinal debate developed with respect to directives can be reproduced here, not only with respect to the issue of horizontal application (see above), but also as regards the notion of incidental direct effect.

This formula has been consistently used in the literature to identify the possible use of an EU norm to obviate the application of the existing national provision, when these two instruments are incompatible. However, differently from what happens with (full) direct effect, the EU provision is not applied directly to resolve the controversy. To put it differently, its content does not affect the outcome of the dispute, which has to be decided on the basis of national law (excluding the disapplied rule).

According to this doctrine, directives cannot dispose of a claim between individuals and substitute the applicable EU-implementing domestic law, but they can exclude its application, serving as a 'touchstone' (Prechal 2005: 234) of EU-consistency. (Craig and Búrca 2008: 271) [V] There were cases in which the ECJ seemingly adopted this rationale, as limitedly as in the *Unilever* case[VI] or more robustly (although apodictically) like in the *Bernáldez*[VII] and *Bellone*[VIII] ones.

This view might have inspired the ECJ in *Mangold* and *Kücükdeveci*: German national judges should have simply used the general principle of non-discrimination on grounds of

age to set aside national discriminatory provisions. The main dispute, then, would have been resolved applying the default rules of national law (in the *Kücükdeveci* case, the German provision establishing a direct proportion between seniority and length of the notice period).

4. Directives: a Trojan horse for the application of EU law?

Despite the ECJ's concern to deny any *révirement* on directives' legal effect, these latter can nonetheless play a major role. First of all, they prove helpful in identifying the content of the general principle. The reconstruction of general principles has always represented a very delicate task for the Court, and the existence of a legal source that lays down the shared understanding of the Member States with respect to a principle can reduce any further difficulty in this respect. Hence, the systematic use, in the reasoning of the judgment, of the formula 'the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78,' in which the formula is accorded a formal role, next to the principle.

More technically, the directive is determinant insomuch as it certifies the existence of an EU competence on the matters that it regulates. Accordingly, since the subject of the directive falls under the EU sphere of action, general principles can apply thereto, including in the cases (like in *Kücükdeveci* or *Mangold*) in which the directive itself cannot apply. In other words, directives may used as a precondition for the application of the principle (Sciarabba 2010).

In *Mangold*, the challenged provision had been adopted to transpose the non-discrimination directive, therefore the attribution of the non-discrimination matter to the EU did not trigger obvious issues as to the extent of the EU competence. In *Kücükdeveci*, instead, it was more controversial whether the domestic provision could be reviewed against EU law. The connection between the German rule (regulating an aspect of dismissal procedures) and the directive is indirect, as the former is not an expression of non-discrimination policies, but merely a norm belonging to one of the fields to which non-discrimination principles should apply (Thüsing and Horler 2010).

The ECJ failed to take into account this weaker connection and applied the *Mangold* doctrine: the existence of the directive and its theoretical application to the field of dismissals is sufficient for the EU to have competence thereon; accordingly, EU general principles can represent the standard of review for the legality of the domestic norm, even if the directive has no direct effect.

In sum: EU law applies (through its general principles) even on matters that are incidentally governed by a directive, and even if this latter does not apply. In the case of directives that build upon a general principle, such as the non-discrimination directive at stake in *Mangold* and *Kücükdeveci*, the legal outcome is virtually identical to the existence of a directive's direct horizontal effect, given the similarity between the content of this latter and the principle.

5. The Charter of Fundamental Rights.

The principle of non-discrimination on grounds of age, besides being enshrined in the directive 2000/78 and having been ratified in *Mangold*, is also codified in the Charter of Fundamental Rights (Art. 21, first paragraph). The ECJ deliberately avoid emphasizing this aspect (see the laconic wording of par. 22 of the decision, in which it simply mentions that under Art. 6(1) of the Treaty on the Functioning of the European Union the Charter has the same force of the Treaties).

This reluctance is likely due to the fact that the Lisbon Treaty, carrying within the hardening of the Charter, entered into force only in December 2009, long after the facts leading to the main proceedings. The ECJ could not rule in favor of the direct application of the Charter without being accused to have provided it with some undue retroactive effect.

However, the overall design of the decision is built upon some long-reaching implications, which may bring significant consequences in the current post-Lisbon scenario. Indeed, the Charter's acquired Treaty-like nature provides private parties with the power to invoke it in private disputes on the basis of the *Defrenne* doctrine. In *Defrenne*, indeed, the Court clarified that directives may be invoked between private parties when

their content 'provides further details regarding certain aspects of the material scope' of treaty norms (par. 54).

As a result, directives detailing some of the principles listed in the Charter (many of which have the status of general principles of the EU) attain direct horizontal applicability, in the sense that they merely facilitate the direct horizontal application of the Charter, by specifying its content. The Charter's horizontal application is a profound development of the EU system, insomuch as it establishes new obligations on EU citizens (and not only on EU or national bodies) for the purpose of enforcing certain constitutional rights and principles.

6. The social impact of *Kücükdeveci*

Quite apart from the issue of the effects of directives and general principles, between the lines of the *Kücükdeveci* judgment it is possible to spot the premises of a further development. Ruling that EU citizens must bear part of the cost for the actual implementation of the Charter's rights, the ECJ finally accomplished the preamble of the Charter, which warns the beneficiaries of the rights protected therein that ('[e]njoyment of these rights entails responsibilities').

Granted, duties and obligations flowing from the EU legislation are not an innovation, but for the first time they are not designed in this judgment to serve some structural purpose of the economic Community (such as the functioning of the Common Market). Private subjects are called to contribute to the constitutional integration of the EU, and to incur costs and obligations aimed at ensuring that other citizens' non-market rights are safeguarded. This is suggestive of a new notion of solidarity, which for once is not based on an opportunistic reading of citizenship.

This shift can be better appreciated considering what had been the ECJ's approach up until now. In the past, the Court had typically preferred not to impose upon member states judicially-designed solutions which could have altered domestic welfare policies, hence the systematic use of the indirect effect doctrine, whereby the ECJ instructs ordinary judges to interpret domestic provisions as much as possible in keeping with EC directives,

yet gives them the power to choose how to resolve the dispute in practice, so as to accommodate the interests at stake (Niglia 2010).

This hands-off approach is missing in *Kücükdeveci*: the choice to elevate the stance of non-discrimination rights in litigation (through the Charter, or through recourse to general principles) makes the indirect effect stratagem useless. More importantly, it becomes clear through the judgment that non-discrimination rights deserve protection regardless of the possible good faith of the perpetrators of the abuse: the interest of redressing discrimination conduct prevails over the position of those who erroneously based their behavior on national law.

As a result, EU citizens are finally called to contribute to the constitutional building of Europe,[IX] and States are strongly pressed to act diligently in their transposition duties, since any failure to conform national legislation to EU law (be it a directive, a general principle or a provision of the Charter) may result in blameless citizens being punished in court.

[I] ECJ, Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG* (*Kücükdeveci*), nyp, of 19 January 2010.
[II] ECJ, Case C-144/05, *Mangold v Rüdiger Helm*, 2005, ECR I-998.
[III] This aspect differentiates the legal setting of *Kücükdeveci* from the *Mangold* precedent, in which one of the most controversial issues was precisely that the period for transposition had not expired yet.
[IV] ECJ, Case C-43/75, *Defrenne v. Sabena*, 1976, ECR 455.
[V] The distinction between *invocabilité d'exclusion* and *invocabilité de substitution* is discussed at some length in Prechal (2010, 235, 267-268).
[VI] ECJ, Case C-443/98, *Unilever Italia SpA v. Central Food SpA*, 2000, ECR I-7535.
[VII] ECJ, Case C-129/94, *Criminal proceedings against Rafael Ruiz Bernaldez*, 1996, ECR 1-1829.
[VIII] ECJ, Case 215/97, *Bellone v. Yokohama*, 1998, ECR-I 2191.
[IX] As opposed to the established trend according to which EU citizens are always only recipients of rights, see J.H.H. Weiler (2010), On the Distinction between Values and Virtues in the Process of European Integration, 2010, draft.

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