The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the *Mangold* Approach

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Abstract According to the Court's case-law, a prohibition of discrimination can flow not only from enacted (written) Union law but also from (unwritten) general principles. Faced with the lack, or limited reach, of written non-discrimination law, the Court recognised the existence of two layers of general principles of equality, namely a general principle of equality *tout court* (i.e. a principle that is not linked to any discrimination ground) and a number of general principles of equality linked to particular discrimination grounds. In the resulting multi-level system, the *Mangold* line of case-law in particular raises questions not only about the relevance and function of the general principles of equality in the larger system of Union law, but also about the interrelation between the different layers of equality law and the meaning of the prohibition of discrimination on the level of the general principles. The contribution traces the creation through the Court's case-law of the layered system of equality law and its practical implications.

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1 Introduction

The subject of the present chapter is the contribution of the Court of Justice to the development of the prohibition of discrimination under Union law.[1] This development began in the 1950s, when the law of the European Coal and Steel Community was the starting point for the meaning given by the Court to the legal concept of discrimination. Since then, a wealth of case-law has further refined this meaning and elaborated on the place of non-discrimination in the Union's legal order. In a broader context, non-discrimination law has also been the starting point for the development of a number of general elements of Union law, for example the duty of conform interpretation and the right to an individual substantive remedy in case of a breach of rights.[2]

It is obviously not possible in the present limited framework to provide a comprehensive analysis of all this. Instead, the focus will be on one particular aspect which both connects, and has an overarching effect on, the overall system of Union non-discrimination law: According to the Court's case-law, a prohibition of discrimination can flow not only from enacted (written) Union law but also from (unwritten) general principles. Faced with the lack, or limited reach, of written non-discrimination law, the Court recognised the existence of two additional and distinct layers of general principles of 'equality'/'equal treatment'/'non-discrimination' (the Court uses these terms interchangeably,[3] and so does this contribution). These layers consist, first, of a general principle of equality *tout court* (i.e. a principle that is not linked to any discrimination ground) and, second, of a number of general principles of equality linked to particular discrimination grounds (e.g. age, sex, sexual orientation, nationality). In the resulting multi-level system, the written prohibitions of discrimination are specific expressions of the general principles. Recent case-law further shows that Articles 20, 21 and 23 of the Charter of Fundamental Rights (hereinafter: the Charter) are part of this system.

Perhaps the most debated decisions of the Court of recent years on discrimination relate to the second layer of this system (i.e. that of the general principles of equality with a particular focus), namely the *Mangold* line of case-law.[4] It raises questions not only about the relevance and function of the general principles of equality in the larger system of Union law, but also about the interrelation between

[1] The present contribution is limited to EU law. As was noted already by Steindorff 1965, p. 59 the principle of equality (and thereby also the prohibition of discrimination) has a different face in different legal orders. More recently, Diebold 2011 has written about the high fragmentation of the non-discrimination principle in international economic law.

[2] See e.g. Tobler 2011b.

[3] According to the Court, the terms 'non-discrimination' and 'equal treatment' are 'simply two labels for a single general principle of [Union] law'; Case C-422/02 *P Europe Chemi-Con (Deutschland) GmbH v Council and Commission* [2005] ECR I-791, para 33.

[4] Case-law beginning with Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

the different layers of equality law and the meaning of the prohibition of discrimination on the level of the general principles.

The present contribution aims to put this case-law in the larger context of the Union's multi-level architecture of equality. After mapping the scene by briefly recalling the breadth and the limits of the Union's present non-discrimination law, the contribution traces the creation through the Court's early non-discrimination case-law of the layered system of equality law. Thereafter, it turns to the practical relevance of the two levels of the general principles of equality in cases of alleged discrimination and to the meaning of the prohibition of discrimination as it results from the Court's case-law. In the latter context, it will be argued that whilst this meaning generally remains rather elusive when a prohibition of discrimination flows from a general principle of equality, the Court in the *Mangold* line of case-law has found a surprising way of making it quite specific.

2 Mapping the Scene of the Union's Non-discrimination Law

Since the Lisbon revision, non-discrimination has been explicitly recognised as a fundamental value of the European Union in Article 2 TEU. On the level of primary law, the most notable provision to prohibit discrimination is undoubtedly Article 21 of the Charter, which binds the EU institutions, bodies, offices and agencies whenever they act under EU law, and the Member States when they are 'implementing Union law' (Article 51(1) of the Charter) or 'when they act in the scope of Union law' (Explanations on the Charter). Article 21(1) contains an open-ended list of prohibited discrimination grounds, referring to 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation', to which Article 21(2) adds nationality. On the level of secondary law only Article 1d(1) of the Staff Regulations is similar; it contains the same list of grounds but adds that under certain conditions non-marital partnerships shall be treated as marriages.

Other Union non-discrimination law is quite different. Firstly, some provisions prohibit discrimination without mentioning any grounds. For example, Article 40(2) TFEU in the context of agricultural law simply prohibits 'any discrimination between producers or consumers within the Union'. Similarly, Article 4(b) of the ECSC Treaty prohibited 'measures or practices discriminating among producers, among buyers or among consumers, specifically as concerns prices, delivery terms and transportation rates'. More recently, Article 4(2) (equality of EU Member States)[5] and Article 9 TEU (equality of EU citizens) have been construed in the same manner. Secondly, where written law does focus on discrimination grounds,

[5] See *avant la lettre* Case C-273/04 *Poland v Council* [2007] ECR I-8925 (old and new Member States).

these are limited in number, though their list is longer than is indicated by the mere text of the Treaties. In addition to well-known grounds such as EU nationality (Article 18(1) TFEU),[6] origin of a good (e.g. Articles 95(1) and 110(1) TFEU), sex (Article 157(1) and (2) TFEU and secondary law), racial or ethnic origin (Directive 2000/43),[7] religion or belief, disability, age and sexual orientation (Directive 2000/78),[8] there are also part-time work (clause 4 of the Framework Agreement attached to Directive 97/81),[9] fixed-term work (clause 4 of the Framework Agreement attached to Directive 1999/70),[10] registration of a vehicle and origin or destination of a transport operation (Article 7(3) of Directive 1999/62)[11] and third-country nationality (e.g. Article 11 of Directive 2003/109),[12] to mention a few random examples. By their very nature, not only the number but also the substantive meaning of these grounds is limited.[13] Thirdly, whether or not they focus on particular grounds, almost all non-discrimination provisions have a limited field of application.[14] Only the prohibition of discrimination on grounds of nationality under Article 18(1) TFEU and the specific provisions reserved by it[15] applies in all fields of Union law.

As a result, even though today the legislative development of the body of EU non-discrimination law has reached a point where it would be difficult to compile a

[6] Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585, para 52.

[7] Commission Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

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

[9] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9.

[10] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43.

[11] Directive 1999/62/EC of the European Parliament and of the Council on the charging of heavy goods vehicles for the use of certain infrastructures, OJ 1999 L 187/42.

[12] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

[13] See e.g. in Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 (disability does not include sickness); Case C-310/10 *Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v Ştefan Agafiţei and Others*, judgment of 7 July 2011, n.y.r. (alleged discrimination against judges is based on a socio-professional category which is not covered by Directives 2000/43 and 2000/78).

[14] See e.g. Joined Cases C-63/91 and C-64/91 *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer* [1992] ECR I-477 (poverty is not a risk covered by Community social insurance law that prohibits sex discrimination).

[15] According to the General Court, these even include the competition rules; Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft mbH & Co. KG and Others v Commission* [2004] ECR II-1, para 147; compare Van Gerven 1971, p. 414 et seq.

comprehensive list of all relevant provisions,[16] the protection against discrimination remains limited. This raises the question of whether gaps can be filled through the application of general principles of equality. In this context, it is useful to look back to the time when the process of building the layered system of equality law began, precisely, against the background of the lack, or limited reach, of written law in force at the time.

3 The Construction of the Multi-level Architecture of Equality

It is often assumed that the genesis of the Union's general principles of equality began with the Court's decision in *Ruckdeschel*,[17] an agricultural case. However, the first steps were taken in the different context of staff law at a time when the Staff Regulations contained no non-discrimination provision. It is worth tracing this development in some detail, since it is these early cases that laid the groundwork for the different effect of the Union's general principles with respect to actions by the Union institutions, on the one hand, and Union law applicable in the Member States, on the other.

3.1 The General Principle of Equality Tout Court

3.1.1 The Staff Case *Bernardi* (1971)

In the present writer's analysis, the first decision in which the Court recognised the existence of a general principle of equality is *Bernardi*.[18] In this case, an official of the European Parliament complained about the temporary posting of a colleague as a translator for two Parliament sessions in Strasbourg, instead of giving travel orders to him. Whilst Advocate General Roemer did not mention equality in his

[16] See e.g. the categorisations by Timmermans 1982, p. 429, and the list by Lenaerts 1991, pp. 39–41. It might be added that non-discrimination provisions are not always immediately recognisable as such. Article 63(1) TFEU is a case in point. It replaces Article 67(1) of the EEC Treaty, which prohibited both 'restrictions' on the free movement of capital and 'discriminations based on the nationality or the place of residence of the parties and the place where the capital is invested'. Whilst Article 40 of the EEA Agreement retains this wording, Article 63(1) TFEU merely mentions restrictions. However, according to the Court these two provisions are 'substantially identical'; e.g. Case C-10/10 *Commission v Austria*, judgment of 16 June 2011, n.y.r., para 42.

[17] Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753.

[18] Case 48/70 *Giorgio Bernardi v European Parliament* [1971] ECR 175.

opinion, the Court held that, unless justified in the interests of the service, the conferring of the advantages flowing from the postings in question on certain officials 'is capable of adversely affecting their immediate colleagues because it infringes the principles of equality of treatment and of objectivity which must govern the public service' (*Bernardi*, para 27).

Given that the Staff Regulations at the time contained no non-discrimination provision that could have been relied on by Mr Bernardi, the Court's reference to the 'principle of equality of treatment' must be read as recognition of the existence of a general principle that filled the gap. Later, the Court referred to its 'consistent case-law', according to which 'the general principle of equality is one of the fundamental principles of the law of the Community civil service [which] requires that comparable situations shall not be treated differently unless such differentiation is objectively justified' (*Ferrario*,[19] para 7). It is clear that this principle is the general principle of equality *tout court*, i.e. an equality principle unrelated to a particular discrimination ground. It is simply a 'principle of equal treatment of the various servants', to borrow the words of the applicant in the earlier staff case *Huber*[20] (in which the Court did not enter into the substance of the argument).

3.1.2 Outside Staff Law: *Frilli* (1972) and *Ruckdeschel* (1977)

Following *Bernardi*, the Court recognised the existence of the general principle of equality *tout court* outside the realm of staff law first in *Frilli*[21] and subsequently in *Ruckdeschel*. *Frilli* concerned the right of a retired migrant worker with a very small pension to a guaranteed income for old people under Belgian law. In addition to specific questions under Community social security law, the case also raised issues in relation to the fact that under Belgian law the benefit to a foreign worker depended on the existence of a reciprocal agreement with the Member State of which the worker was a national. The Court held that "such a condition is incompatible with the rule of equality which is one of the fundamental principles of Community law" (*Frilli*, para 19).

In *Ruckdeschel*, the issue of discrimination arose because the Community institutions, in the context of the common organisation of the market in cereals in force at the time, had abolished production refunds previously granted to a product called quellmehl while maintaining them with respect to a product in competition with quellmehl, namely maize-based starch. The Council argued that the fact that the products in question were not identical ruled out any possibility of discrimination. Advocate General Capotorti disagreed. He thought that under the terms of Article 40 of the EEC Treaty a comparison could very well be made between

[19] Joined Cases 152, 158, 162, 166, 170, 173, 175, 177, 178, 179, 182 and 186/81 *W. Ferrario and Others v Commission* [1983] ECR 2357.

[20] Case 78/63 *Rémy Huber v Commission* [1964] ECR English special edition 367.

[21] Case 1/72 *Rita Frilli v Belgian State* [1972] ECR 457.

producers of different products, provided that the products were substitutable. The Court, however, did not rely on that provision. It noted that this provision, whilst it clearly prohibited any discrimination between producers of the same product, did not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. However, according to the Court (*Ruckdeschel*, para 7): '[t]his does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.' In the case at hand, the Court found the abolition of the refund for quellmehl, while maintaining it for starch, 'incompatible with the principle of equality' (operative part of the judgment).

Lenaerts[22] observed that *Ruckdeschel* '*institue* [...] *par la voie jurisprudentielle une règle de droit supérieure non écrite d'application générale*'. Indeed, *Ruckdeschel* confirmed that a general principle of equality existed not only in the Communities' staff law, but also outside this specific realm. In this context, it should be noted that the Court's statement in the above-quoted paragraph is not limited to the legality of actions by Community institutions, but rather refers to Community law in general, i.e. also to law applicable in the Member States. In *Klensch*,[23] the Court explicitly confirmed the binding effect of the general principle of equality *tout court* on the Member States where they implement EU agricultural law.

3.2 General Principles of Equality with a Particular Focus

Perhaps more surprising than the recognition of a general principle of equality *tout court* was the recognition of general principles of equality related to specific grounds. Whilst the former had long been part of the Member States' constitutional traditions,[24] the same was not true for the latter. Again, the starting point for the Court's case-law on this matter can be found in staff law. It concerned alleged sex discrimination.

[22] Lenaerts 1991, p. 6.

[23] Joined Cases 201 and 202/85 *Marthe Klensch and others v Secrétaire d'État à l'Agriculture et à la Viticulture* [1986] ECR 3477.

[24] Unsurprisingly from that point of view, certain early academic writers saw Article 4(b) of the ECSC Treaty as an expression of this *national* principle; e.g. Börner 1965, p. 218, compare also Zuleeg 1992.

3.2.1 The General Principle of Equality with Respect to Sex

The Staff Case *Sabbatini* (1972)

The existence of a general principle of equality with respect to sex was first recognised in *Sabbatini*,[25] though somewhat implicitly. The case concerned an official of the European Parliament who complained about the refusal of her employer to grant her an expatriation allowance on the ground that, after her marriage, she was no longer the head of her household. This was based on a provision of the Staff Regulations according to which an official marrying a person who at the date of marriage did not qualify for the allowance forfeited the right to the allowance unless the official thereby became the head of household. A further provision resulted in a married *male* official being deemed the head of household. Ms Sabbatini complained about sex discrimination. Since the Staff Regulations contained no prohibition of discrimination that could have been applied to the case, she relied both on an alleged general principle of law prohibiting any discrimination on the ground of sex and on what was then Article 119 of the EEC Treaty on equal pay for men and women (now Article 157(1) and (2) TFEU).

In his opinion in the case (and in the parallel case *Chollet*),[26] Advocate General Roemer took the view that no general principle of the kind argued by Ms Sabbatini existed in the laws of the Member States. Instead, he seemed to suggest the application of Article 119 of the EEC Treaty, by analogy. According to the Advocate General, even though the contested rule did not formally distinguish between male and female officials, it nevertheless manifestly drew a distinction between the sexes since the status of head of household was determined according to sex. However, he considered this justified based on economic, sociological and psychological considerations, in particular the pre-eminence granted to the husband at the time by the family law of most Member States. The Court did not agree, holding that the Staff Regulations 'cannot [...] treat officials differently according to whether they are male or female, since termination of the status of expatriate must be dependent for both male and female officials on uniform criteria, irrespective of sex' (Sabbatini, para 12). According to the Court, the only acceptable reason for refusing the allowance was the case where the marriage brought to an end the state of expatriation itself (and thereby the very basis for the allowance).[27]

Sabbatini is the first case where the Court found indirect sex discrimination. However, the judgment is not clear about the legal basis for this finding, nor is *Airola*,[28] a subsequent staff case where the unfavourable treatment of women was

[25] Case 20/71 *Luisa Sabbatini, née Bertoni, v Parliament* [1972] ECR 345.

[26] Case 32/71 *Monique Chollet, née Bauduin, v Commission* [1972] ECR 363.

[27] At the time of the *Sabbatini* judgment, the Court did not yet interpret the concept of indirect discrimination as including the element of objective justification; Tobler 2005, p. 184 et seq.

[28] Case 21/74 *Jeanne Airola v Commission* [1975] ECR 221.

caused through reliance on the official's nationality as determined by the marriage state. Commentators[29] at the time argued that the Court must have relied on an unwritten general principle of non-discrimination or equality specifically on the ground of sex. Subsequently, the Court in *Razzouk and Beydoun*[30] (para 16) explicitly spoke about 'the principle of equal treatment of both sexes' that applies in the Community civil service, and added that this principle is not limited to the requirements under the Union's sex equality law applicable in the Member States (i.e. Article 119 of the EEC Treaty and the Directives then in force).

The special approach in *Sabbatini* and *Airola* becomes evident when compared with that in *Prais*,[31] which concerned staff recruitment competitions and disadvantageous treatment on the ground of religion. Here, no general principle was necessary in order to fill a gap, since Article 27 of the Staff Regulations provided that officials were to be selected without reference to race, creed or sex.[32] The Court held that, where a candidate informs the appointing authority that religious reasons make certain dates impossible for him or her, the decision to nevertheless hold a recruitment competition on such a date infringes Article 27 of the Staff Regulations and 'the freedom of religion as embodied in the European Convention on Human Rights and thus part of the fundamental rights recognised in Community law' (*Prais*, para 18). Given the existence of Article 27 of the Staff Regulations, the Court in its reasoning could give it the place that in *Sabbatini* and *Airola* had been taken by the general principle of equality with respect to sex. The reference to the freedom of religion then simply underlined the importance of the written provision.

Outside Staff Law: *Defrenne III* (1978)

Outside staff law, the existence of a general principle of equality with respect to sex first emerged from *Defrenne III*.[33] At issue were the different retirement ages imposed by the Belgian airline Sabena on air stewardesses and (male) air stewards and the financial consequences of the early dismissal for a stewardess. Ms Defrenne's action before the Belgian courts led to three preliminary rulings. In the third of these, the national court asked (among other things), whether, outside the scope of Article 119 of the EEC Treaty, Community law contained a general principle prohibiting discrimination based on sex as regards conditions of employment in the Member States.

[29] Streil 1975, p. 322; Massaro 1976, pp. 530–531.

[30] Joined Cases 75 and 117/82 *C. Razzouk and A. Beydoun v Commission* [1984] ECR 1509.

[31] Case 130/75 *Vivien Prais v Council* [1976] ECR 1589.

[32] Note that the general principles of equality apply fully to EU personnel not covered by the Staff Regulations; see Case C-485/08 P *Claudia Gualtieri v Commission* [2010] ECR I-3009.

[33] Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365 (*Defrenne III*). In Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455 (*Defrenne II*), para 12, the Court had already stated that "the principle of equal pay forms part of the foundations of the Community".

Again, this question has to be seen against the background of a gap. At the material time there was no written Community law on the issue at hand (dismissal) but only on remuneration.

In this situation, Ms Defrenne tried to rely on Article 119 of the EEC Treaty, arguing that it is 'only a specific statement of a general principle against discrimination which had found many expressions in the Treaty' and, therefore, must be given a wide interpretation so as to cover dismissal (*Defrenne III*, para 6). In other words, her argument was that of a general non-discrimination (equality) principle *tout court*. The Court was more specific. Though ultimately refusing Ms Defrenne's claim, it did recognise the existence of a general principle of equality with respect to sex.[34] Having stated that respect for fundamental personal human rights is one of the general principles of Community law, it added that 'there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights' (*Defrenne III*, para 27). Much later, the Court explicitly referred to the 'general principle of equality of the sexes' in the context of Community law outside staff law (*Lindorfer,*[35] para 50).

However, different from the staff cases discussed above, the confirmation of the existence of such a principle did not mean that Ms Defrenne could *rely* on it. While recognising the need to ensure sex equality in working conditions for Community officials in the context of the Staff Regulations (and referring in this context to *Sabbatini* and *Airola*), the Court pointed out that, as far as Community law to be applied in the Member States was concerned, the Community at the material time 'had not [...] assumed any responsibility for supervising and guaranteeing the observance of the principle of equality between men and women in relation to working conditions other than remuneration' (*Defrenne III*, para 30). From this, it concluded that Ms Defrenne's case, insofar as it did not concern pay, was outside the scope of Community law.

This means that already in the 1970s the juxtaposition of two types of cases—namely action by the institutions on the one hand and the application of Union law in the Member States on the other—showed the effect of a general (equality) principle depending on the addressees. First, it follows from *Sabbatini* and *Airola* that the institutions are generally bound by the Union's general principles of equality, as later explicitly confirmed in cases such as *Rinke*[36] (para 28), according to which 'compliance with the prohibition of [...] discrimination on the ground of sex is a condition governing the legality of all measures adopted by the [Union] institutions'. In contrast, *Defrenne III* shows that the Member States and individuals (e.g. employers) are bound by the Union's general principles of equality) only where there is Union law that brings the issue at hand within the scope of that law, or, in the helpful wording of Ellis, where the general principle can be 'attached' to Union law.[37]

[34] See e.g. Pernice 1979, p. 414. Compare however O'Leary 2011, p. 775.

[35] Case C-227/04 P *Maria-Luise Lindorfer v Council* [2007] ECR I-6767.

[36] Case C-25/02 *Katharina Rinke v Ärztekammer Hamburg* [2003] ECR I-8349.

3.2.2 General Principles of Equality on Other Grounds

The recognition by the Court of the existence of general principles of equality in respects other than sex followed only much later. In *Mangold* (paras 74 and 75), the Court recognised the existence of a general principle of equality with respect to age, religion or belief, disability and sexual orientation. In relation to sexual orientation, the existence of such a principle was subsequently confirmed in *Römer*[38] (paras 59 and 60). In the context of Euratom law, where there is no equivalent to Article 18(1) TFEU, the Court in *ČEZ*[39] (para 89) recognised the existence of a general principle of non-discrimination on the ground of nationality.

However, the list of such principles that might be recognised by the Court in the future is not boundless. *Audiolux*[40] is a case in point. It concerned the protection of minority shareholders in the event of other shareholders acquiring or strengthening their control of a company. In its reference for a preliminary ruling, the national court asked whether the existence of a general principle of equality with respect to minority shareholders can be deduced from specific provisions of secondary company law on equal treatment and protection of minority shareholders (these provisions did not apply to the case at hand). In other words, the question was whether these specific provisions are expressions of a 'larger' general principle. This the Court denied, observing 'that the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well-defined and certain. Therefore, in examining the provisions mentioned by the national court, the sole purpose is to ascertain whether they give any conclusive indications of the existence of such a principle. In that connection, it must be stated that only if those provisions are drafted so as to have binding effect [...], will those provisions have indicative value showing the well-defined content of the principle concerned [...]' (*Audiolux*, para 34). In the case at hand, the Court found that the relevant provisions in secondary law were too specific to allow the conclusion of the existence of a general principle of

[37] Ellis and Watson 2012, p. 344; further Rastrelli 1979, p. 140

[38] Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, judgment of 10 May 2011, n.y.r.

[39] Case C-115/08 *Land Oberösterreich v ČEZ as* [2009] ECR I-265.

[40] Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-9823.

equality with respect to minority shareholders.[41] From this, it must be concluded that not every written non-discrimination provision is an expression of a general principle. At the same time, *Audiolux* shows that where there is no general principle of equality with respect to a particular ground, the general principle of equality *tout court* remains relevant.[42]

3.3 Links Between the Layers and with the Charter

Returning to the overall picture of the Union's multi-level architecture of equality, the Court's case-law shows that the different layers of this system are linked to each other. Firstly, the written prohibitions of discrimination are specific expressions of the general principles of equality. From a logical point of view, it is clear that written provisions without a discrimination ground can only be linked to the general principle of equality *tout court*. Accordingly, the Court stated in *Royal Scholten-Honig*[43] (para 26) that what is today Article 40(2) TFEU on agricultural law 'is merely a specific enunciation of the general principle of equality'. As for those provisions that do refer to a particular discrimination ground, again from a logical perspective their first link is to the general principle of equality with respect to the relevant ground. Thus, the Court stated for example in *Kücükdeveci* (para 27) that 'the general principle of European Union law prohibiting all discrimination on grounds of age' is given expression in Directive 2000/78 in the domain of employment and occupation.

Secondly, the general principles of equality with a specific focus can be seen as specific expressions of the general principle of equality *tout court*. In that sense, it is also possible to conceive of written prohibitions of discrimination as specific expressions of this latter principle. For example, in *Österreichischer Gewerkschaftsbund*[44] (para 59), the Court called the principle of equal pay for men and women under Article

[41] E.g. Bengoetxea 2010, p. 1184. Some commentators point out that one complication lies in the fact that most of the specific provisions at issue concern the relationship between the company and its shareholders, whilst *Audiolux* concerns the relationship between different shareholders; e.g. Wilsing and Paul 2009, p. 756; Mucciarelli 2010, p. 162 et seq.

[42] Having denied the existence of a general principle of equality with regard to minority shareholders, the Court in *Audiolux* proceeded to examine whether the general principle of equality *tout court* requires equal treatment of minority shareholders by a shareholder acquiring or strengthening his control of a company. This the Court denied, stating in particular that 'the general principle of equal treatment cannot in itself either give rise to a particular obligation on the part of the dominant shareholder in favour of the other shareholders or determine the specific situation to which such an obligation relates' (para 57).

[43] Joined Cases 103 and 145/77 *Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce; Tunnel Refineries Limited v Intervention Board for Agricultural Produce* [1978] ECR 2037.

[44] Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

157(1) TFEU and Directive 2006/54 a specific expression of 'the principle of non-discrimination', without referring to sex.[45] In other cases, the Court appears to combine the three layers. In *ČEZ* (paras 89 and 91) the Court explained its finding that 'the principle of prohibition of any discrimination on grounds of nationality' is a general principle which is also applicable under the law of the Atomic Energy Community, by pointing out that what is today Article 18(1) TFEU 'is a specific expression of the general principle of equality'. Though not illogical in the perspective of the overall system, it is nevertheless submitted that it would be helpful if the Court were to distinguish more clearly between the individual layers.

Thirdly, the Court's more recent case-law has confirmed that Articles 20 (equality before the law), 21 (non-discrimination) and 23 (equality between men and women) of the Charter are part of the Union's multi-level architecture of equality. According to the Explanations on the Charter, Article 20 'corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law'. In *Chatzi*[46] (paras 63 and 64), the Court confirmed that the fundamental nature of the principle of equal treatment as one of the general principles of European Union law 'is affirmed in Article 20 of the Charter' and continued to state: '[t]his principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'. Importantly, this definition shows that in spite of its wording, Article 20 is not about 'equality before the law' understood in a traditional sense (i.e. equal application of the law to all, whatever the content of the law)[47] but indeed the broad principle as previously recognised in its case-law. In *Sayn-Wittgenstein*[48] (para 89), the Court stated that 'the principle of equal treatment' is 'also enshrined in Article 20 of the Charter of Fundamental Rights' (see also *Nagy*,[49] para 47).

In the context of Articles 21 and 23 of the Charter, the Explanations on the Charter do not mention general principles of equality. However, the Court observed in *Prigge*[50] (para 38) that 'the prohibition of all discrimination on grounds, inter alia, of age is *incorporated* in Article 21 of the Charter', and in

[45] Similarly already Case C-132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts* [1993] ECR I-5579, para 17; *Case C-218/98Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA [1999] ECR I-5723, para 16, and Case C-320/00 A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.* [2002] ECR I-7325, para 12.

[46] Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon*, judgment of 16 December 2010, n.y.r.

[47] E.g. Vierdag 1973, pp. 16–17.

[48] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, judgment of 22 December 2010, n.y.r.

[49] Case C-21/10 *Károly Nagy v Mezőgazdasági és Vidékfejlesztési Hivatal*, judgment of 21 July 2011, n.y.r.

[50] Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG*, judgment of 13 September 2011, n.y.r.

Hennigs and Mai[51] (para 46) that 'the principle of non-discrimination on grounds of age' is 'enshrined in primary law in Article 21 of the Charter'. Here, too, equality 'requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified' (*Test-Achats*,[52] para 28 read in conjunction with para 17, in the context of Articles 21 and 23 of the Charter).[53]

It may be concluded that whilst Article 20 corresponds to the general principle of equality *tout court*, Articles 21 and 23 reflect general principles of equality with respect to particular grounds (keeping in mind, however, that the Charter is addressed only to the institutions of the Union and to the Union's Member States).

4 Relevance and Meaning

4.1 Relevance of the General Principles of Equality in Practice

In the system of Union law, the general principles have constitutional status (*Audiolux*, para 63). Whether a prohibition of discrimination derived from a general principle applies in a practical case depends on the situation. Firstly, in cases where the legality or validity of a measure of secondary law or its interpretation consistent with primary law is at issue, and where there is an applicable superior non-discrimination rule in the written law other than Articles 20, 21 and 23 of the Charter, such as for example Article 40(2) TFEU, there is no room, and no need, to apply a general principle. Conversely, where there is no such law, a general principle of equality will be the benchmark for the analysis (*Ruckdeschel*, *Test-Achats*). The same is true where equality is relied on as a justification for restricting another right (e.g. *Sayn-Wittgenstein*). In such cases, the general principle of equality *tout court* will be relevant where there is no general principle of equality with particular focus (e.g. *Ruckdeschel*, *Sayn-Wittgenstein*). Otherwise, the relevant principle with a particular focus will apply (e.g. *Test-Achats*, in relation to sex). In the latter context, the particular focus has the advantage of implying that the relevant ground by itself (i.e. in the context of *Test-Achats* the mere difference in sex between female and male holders of insurance policies) cannot be relied on in order to argue non-comparability.[54]

[51] Joined Cases C-297/10 and C-298/10 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*, judgment of 8 September 2011, n.y.r.

[52] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, judgment of 1 March 2011 (Grand Chamber), n.y.r.

[53] See e.g. Tobler 2011a, p. 2051, with further references.

[54] Regarding the issue of comparability in *Test-Achats*, see section "The Elusive Concept of Comparability."

Secondly and similarly, in cases that do not concern the legality or validity of a measure of secondary law, written non-discrimination law will be relevant insofar as it covers the matter at issue. Where a gap needs to be filled and actions of the institutions are at issue, the general principles of equality recognised by the Court can apply without further ado (e.g. *Bernardi*, *Sabbatini*). In contrast, where a case concerns Union law to be applied in the Member States, the situation is more complex, since here the application of a general principle of equality requires that this principle can be attached to some other EU law. As already noted, this was not possible in *Defrenne III*, and neither was it in the more recent cases of *Chacón Navas*[55] and *Bartsch*.[56] This means that in these cases the applicants could not invoke a general principle of equality in order to argue that they were the victims of discrimination prohibited under Union law.

In other contexts, such an argument has proven to be possible. One interesting example concerns EU citizenship, where cases such as *Pusa*[57] and *Gaumain-Cerri*[58] can be read as based on the general principle of equality *tout court* (rather than on Article 18(1) TFEU), which is attached to Article 21(1) TFEU, in order to allow the Union citizens to complain about unequal treatment by their *own* Member State on the ground of having exercised free movement rights.[59] However, since the Court began to interpret Article 21(1) TFEU as implying a prohibition of restrictions,[60] this construction has no longer been necessary.[61]

More recently, the Court has found discrimination based on a general principle of equality in a series of cases involving age discrimination, among which notably *Mangold* and *Kücükdeveci*. In the former, the Court attached the general principle of equality with respect to age to the Fixed-Term Work Directive, and in the latter

[55] Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 (there is nothing in Union law to which the general principle of equality *tout court* could be attached in such a manner as to prohibit disadvantageous treatment on the ground of sickness).

[56] Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245 (there is nothing in Union law to which the general principle of equality with respect to age could be attached where a matter falling within the scope of Directive 2000/78 arises before the end of the period for the implementation of that Directive in the Member States).

[57] Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763.

[58] Joined Cases C-502/01 and C-31/02 *Silke Gaumain-Cerri v Kaufmännische Krankenkasse - Pflegekasse and Maria Barth v Landesversicherungsanstalt Rheinprovinz* [2004] ECR I-6483.

[59] Tobler 2005, p. 364 et seq.

[60] E.g. Case C-406/04 *Gérald De Cuyper v Office national de l'emploi* [2006] ECR I-6947.

[61] These days, the Court's case-law deals with discriminations on grounds of nationality by one's own Member State under the concept of restrictions; see also Mei 2009, p. 280. More generally, differences in treatment other than those on the ground of *nationality* by the *host* Member State may amount to restrictions; see e.g. the different tax treatment of dividends received by non-resident and resident pension funds under the law on the free movement of capital in Case C-493/09 *Commission v Portugal*, judgment of 6 October 2011, n.y.r., para 30. If seen in this manner, it is not necessary to examine all citizenship cases involving different treatment in the light of equality, as appears to be done by e.g. Amadeo 2011.

to Directive 2000/78.[62] However, as the present writer has argued in a different context,[63] in such cases an additional element must be taken into account when considering the relevance of the general principles of equality. Under the *Tedeschi* principle,[64] rules of primary law can apply only in the absence of more specific secondary law. Decisively, according to the Court, Directive 2000/78 does *not* constitute such a specific measure with respect to the general principles of equality relating to religion or belief, disability, age and sexual orientation. It merely provides for a 'general framework' for the implementation of the prohibitions of discrimination at issue. In other words, the prohibitions in the Directive are merely declaratory and for that reason do not fill the gap on the level of the secondary law. In *Kücükdeveci* (para 27), the Court in the context of age discrimination explicitly confirmed that, where an allegation of such discrimination concerns a matter within the scope of EU law, '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'.

In cases where there is EU law to which the general principle of equality with respect to age could be attached, this approach has allowed the Court to avoid notably the issue of the lack of horizontal effect of Directives, by instead relying on the primacy of the general principle[65] in a situation involving a legal conflict between individuals.[66] However, it remains to be seen whether the same approach can be applied in a different context. Given that the Court's reasoning with respect to the merely declaratory nature of Directive 2000/78 appears to be based on the nature of that Directive as providing no more than a 'general framework', it is doubtful that it can be transposed to many other measures of the Union's secondary law.[67] Arguably, this is confirmed by the Court's approach in *Dominguez*,[68] which avoids a *Mangold*-type construction even though the case concerned an issue (namely the right to annual leave) that appears both in EU secondary

[62] This link has been particularly heavily criticised; e.g. De Mol 2011, p. 126.

[63] Tobler 2011b, p. 98 et seq.

[64] Case 5-77 *Carlo Tedeschi v Denkavit Commerciale s.r.l.* [1977] ECR 1555, para 35.

[65] See the reference to Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 in *Mangold*, para 77.

[66] *Mangold* was the first case to do so. Earlier cases on the horizontal effect of prohibitions of discrimination concerned written law, rather than general principles of equality; e.g. Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455 (*Defrenne II*), regarding what is today Article 157(1) TFEU (equal pay for men and women workers), and Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, regarding Article 45 TFEU (free movement for workers).

[67] Other examples of this type of 'framework' Directives (though not 'general framework' Directives) might be Directive 2000/43 (see Article 1) and Directive 2004/113 (see Article 1); see again Tobler 2011b.

[68] Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, judgment of 24 January 2012, n.y.r., paras 121–134 of the Advocate General's opinion.

law)[69] and in the Charter, and even though Advocate General Trstenjak in her opinion discussed the possibility of such an approach.[70]

4.2 The Meaning of the Prohibition of Discrimination Under a General Principle of Equality

4.2.1 Basic Definitions and Operationalisation Through Written Law

The basic definitions of equality and discrimination under EU law show that the Court's understanding of these concepts is based on the so-called Aristotelian model.[71] According to settled case-law, the principle of equality or equal treatment 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified' (e.g. *Arcelor*,[72] para 23,[73] and, in the context of Article 20 of the Charter of Fundamental Rights, *Chatzi*, para 64). As for discrimination, it 'can arise only through the application of different rules to comparable situations or the application of the same rule to different situations' (e.g. *Commission v Hungary*,[74] para 50).[75]

[69] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299/9.

[70] Whilst the Court called the right to paid annual leave as stated in the Directive 'a particularly important principle of European Union social law' (*Dominguez*, para 16), it discussed neither the existence of a general principle on this issue nor its relationship with the Directive and with Article 31(2) of the Charter. In the present writer's analysis, the *Mangold* approach requires both the existence of a general principle and room for its application under the *Tedeschi* principle.

[71] E.g. More 1993, p. 53. It should be noted that the prohibition of harassment under the Union's social law is based on a different approach; see Holtmaat 2009.

[72] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008] ECR I-9895.

[73] An early indication that equality may require different (rather than same) treatment can be found in Case 15/57 *Compagnie des Hauts Fourneaux de Chasse v High Authority of the European Coal and Steel Community* [1957–1958] ECR 211, p. 230.

[74] Case C-253/09 *Commission v Hungary*, judgment of 1 December 2011, n.y.r. In the seminal Case 13/63 *Italy v Commission* [1963] *ECR* 165, the Court in this context referred to 'discrimination in substance', as opposed to discrimination in form.

[75] In the most recent generation of non-discrimination legislation, where there are legal definitions of discrimination, comparability is only mentioned in the context of direct discrimination. Seen that in the Court's case-law comparability is also relevant in the context of indirect discrimination, it has been argued that to require it also in the context of indirect discrimination is dogmatically unsound and should be abandoned; Schiek 2007, p. 468 et seq. However, there appears to be no case-law that would confirm such a change in approach.

In practice, the main problem with this approach lies in the fact that its constitutive elements, namely comparability and justification, remain undefined.[76] As in other legal systems, the prohibition of discrimination under Union law is made more concrete through written law. For example, such law may contain specific elements concerning comparability (e.g. the reference to 'equal work or work of equal value' in Article 157(1) TFEU[77] or the definition of the 'comparable permanent worker' under clause 3 of the Framework Agreement attached to Directive 1999/70). Further, it may explicitly distinguish between direct and indirect discrimination (e.g. Article 7(3) of Directive 1999/62) or even give legal definitions of these and other forms of discrimination (e.g. Article 2 of Directive 2000/78). Also, written law may limit the possibilities to justify discrimination. As a rule, justification for direct discrimination under written law is based on a closed system (i.e. direct discrimination can be justified exclusively based on the grounds listed in the law,[78] as opposed to indirect discrimination where the much broader possibility of objective justification is inherent in the modern definition of the concept). In contrast, in some contexts written law provides for the possibility of objective justification even with respect to direct discrimination. The best-known example is probably Article 6(1) of Directive 2000/78, concerning age discrimination (though the Court's case-law has specified that here objective justification is limited to social policy objectives).[79] Finally, written provisions may contain specific rules on matters of enforcement such as proof (which must be distinguished from the existence of justification),[80] remedies and sanctions.

The degree of operationalisation through written law as well as its specific content may differ depending on the area of Union law. Some prohibitions of discrimination remain close to the general principle of equality *tout court*, for example Article 40(2) TFEU, which merely specifies those who benefit from the prohibition. Most other provisions are more specific, though on the level of the TFEU even basic aspects remain based on the Court's case-law (for example the distinction between direct and indirect discrimination and the requirements of proof in this context under the Treaty rules on free movement, with the exception of Article 200(5) TFEU).[81]

[76] See e.g. Westen 1982 and Fredman 2011, p. 8 et seq.

[77] Though it should be noted that this does not exclude other elements of comparability; see e.g. Case C-218/98 *Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA* [1999] ECR I-5723 and Case C-19/02 *Viktor Hlozek v Roche Austria Gesellschaft mbH* [2004] ECR I-11491.

[78] E.g. Case C-64/08 *Ernst Engelmann*, judgment of 9 September 2010, n.y.r., para 34.

[79] *Prigge*, paras 34 and 81. Other examples where objective justification is possible for direct discrimination concern part-time work and fixed-term work under clauses 4 of the relevant Framework Agreements and direct sex discrimination under Article 4(5) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

[80] See Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187, paras 29–40 (proof), as compared to paras 21–28 (existence of discrimination).

[81] Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617.

The by far most developed legislation stems mainly from the social field (Directives 2000/43, 2000/78, 2004/113, 2006/54 and 2010/41).[82] Much of this modern law codifies case-law of the Court, though more recent case-law has yet again added interesting elements, such as the recognition of discrimination by association[83] and a notable shift of the boundary between direct and indirect discrimination.[84]

4.2.2 The Prohibition of Discrimination Under a General Principle of Equality

Different from the written law just mentioned, the definition of discrimination in the context of the general principles of equality generally revolves around comparability and objective justification. It has been observed that on this level equality is 'a loose principle that amounts to little more than a general standard of fairness and rationality'.[85]

The Elusive Concept of Comparability

Comparability in particular has proven to be an elusive concept. Where Union law prohibits not only discrimination but also restrictions, as is the case in the areas of free movement and Union citizenship, it may be possible to avoid it.[86] This is, however, not possible in the context of the general principles of equality. First, where the claim is one for equal (same) treatment, there is the need to find a comparator that is suitable for the purposes of the case at hand.[87] Second, since by

[82] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ 2010 L 180/1.

[83] Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

[84] E.g. Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados* AE [2005] ECR I-1789 and Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757 as compared to e.g. Case 15/69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola* [1969] ECR 363 and Case C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997; see Tobler and Waaldijk 2009, p. 735 et seq.

[85] E.g. Bell 2011, p. 626.

[86] See Case C-293/06 *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* [2008] ECR I-1129, para 28 of Advocate General Sharpston's opinion. The Court followed her suggestion.

[87] In the Court's case-law, cases involving discrimination through same treatment are comparatively rare; see e.g. Case C-400/02 *Gerard Merida v Bundesrepublik Deutschland* [2004] ECR I-8471 (taxation of migrant workers); Joined Cases T-437/04 and T-441/04 *Holger Standertskjöld-Nordenstam and Jean-Claude Heyraud v Commission* [2006] I-A-2-00029, II-A-2-00127 (Union civil servants) and Case C-558/07 *The Queen, on the application of S.P.C.M. SA, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc. v Secretary of State for the Environment, Food and Rural Affairs*[2009] ECR I-5783 (REACH).

definition no two situations are in all respects the same, it will always be possible to find elements that distinguish them, and it will then be necessary to make a judgment on their legal relevance.[88] That judgment is necessarily a value judgment. The Court's case-law offers little practical guidance in that regard, other than that when legislation is concerned the comparability of situations must be assessed in the light of the subject-matter and purpose of the measure in question (*Test-Achats*, para 29, based on a consistent line of case-law).[89]

The issues that may arise in this context are well illustrated by a number of recent cases decided by the Court on the basis of a general principle of equality. For example, in *Chatzi*, mother of twins claimed double parental leave, thereby implicitly claiming that her situation is comparable to that of parents who have two children consecutively. Similarly, the Commission argued that parents of twins are in a situation comparable to that of parents of children separated by a small age difference. The Court, however, interpreting the relevant provisions of Union law in the light of Article 20 of the Charter, found that there is no suitable comparator in such a case. Rather, parents of twins are in a special situation, which must be taken into account by the national legislature by making sure that parents of twins receive treatment that takes due account of their particular needs.[90]

In *Sturgeon*,[91] a case involving consumer rights in air transport, passengers complained because they were refused compensation for delayed flights, in line with the wording of the relevant Union legislation, which mentions a right to compensation only in the event of cancellations. The difference in treatment was based on the legislator's judgment that the situations of the airlines in terms of their responsibility are not comparable with respect to delays and cancellations. The Court, interpreting the relevant provisions in the light of the general principle of equality *tout court*, relied on a different comparison. It compared the situations of the air passengers in terms of the damage they suffered in the event of delays and cancellations and found them comparable.[92]

Comparability also played an essential role in *Test-Achats*, where the Court had to examine the validity of a provision of secondary non-discrimination law. This case, which concerns the treatment of men and women in insurance contracts, not only involves different layers of the Union's system of equality law, it also provides a particularly useful illustration of the complexity of the issues that may arise in the context of comparability. At issue was the validity of Article 5(2) of Directive 2004/113, which allowed the Member States, in derogation from the principle of equal treatment set up under Article 5(1) and with the exception of

[88] See Advocate General Sharpston in her opinion in *Lindorfer*, para 24.

[89] See already Advocate General Capotorti in his opinion in *Ruckdeschel*, p. 1779.

[90] Critical on the Court's approach to comparability Argalias 2010.

[91] Joined Cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH (C-402/07); Stefan Böck and Cornelia Lepuschitz v Air France SA* (C-432/07) [2009] ECR I-10923.

[92] See e.g. Lenaerts and Gutiérrez-Fons 2010, p. 1636. Critical on *Sturgeon* e.g. Mendes de Leon 2010.

costs related to pregnancy and maternity regulated under Article 5(3), to decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. Article 5(2) was the result of the legislative process (the Commission's proposal had provided for equal treatment after a transitional period).[93] It reflected the legislator's view that factual differences between men and women with respect to the levels of risk of the respective groups were relevant for the purpose at hand and, therefore, could lead to different treatment of the individuals belonging to these groups.

The Court based its examination on Articles 21 and 23 of the Charter on the one hand, and on the legal basis of Directive 2004/113 on the other. In the context of the latter, it stated that the legislator was entitled to bring about equal treatment of the sexes in the field of insurance gradually, with appropriate transitional periods. In the context of the former, it found that the legislator had acted in an inconsistent manner: whilst it started from the legal presumption of comparability as expressed in Article 5(1) (in other words, from the absence of any legally relevant differences), it then nevertheless allowed for a permanent derogation (as expressed in Article 5(2), which implies the presence of legally relevant differences). The combination of these findings led to the Court to declare Article 5(2) invalid as of 21 December 2012.[94]

Different from *Sturgeon*, the Court in *Test-Achats* did not enter into an examination of the appropriateness of relying on factual differences (i.e. differences between groups of male and female insurance policy holders based on actuarial and statistical factors). Rather, it appears to focus on the consistency of the legislator's choices, similar to the approach in *Ruckdeschel*, where it relied on the 'original' decision by the legislator on comparability, which had led to the same treatment of quellmehl and starch, and found that the later decision, namely to abolish the refund only for quellmehl, was inconsistent in the absence of proof of factors showing that quellmehl and starch were no longer in comparable situations. It remains unclear what are the consequences of *Test-Achats* for the assessment of the comparability of situations of insurance policy holders in other contexts (namely statutory pensions under Directive 79/7,[95] and occupational pensions under Directive 2006/54 and the proposed Directive on implementing the

[93] Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM(2003) 657 fin., pp. 6–9.

[94] Tobler 2011a, with further references; see also the Commission's Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09, OJ 2012 C 11/1.

[95] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation).[96]

The complexity of the issue is further illustrated by the arguments of Advocate General Van Gerven, made almost 20 years ago in the context of occupational pensions and alleged sex discrimination. According to the Advocate General, differences established on the basis of actuarial factors between men and women as *groups* cannot be legally relevant when it comes to the calculation of contributions and benefits ascribed to *individuals* (like the Commission, the Advocate General advocated an individual, rather than a group-based approach).[97] Moreover, comparability was only the second label for his argument in favour of an individual approach: his first argument was couched in terms of justification, similar to Advocates General Jacobs and Sharpston in their opinions in the staff case *Lindorfer* (para 46 et seq. and para 46, respectively). Recently, the Court confirmed in a different context that the same factual element may be relevant in the analytically different contexts of comparability and objective justification (*Rosado Santana*, para 69),[98] which is rather confusing.[99]

Objective Justification

Turning to objective justification, it would appear that it is less defined as a concept in the context of the general principles of equality than in that of indirect discrimination or restrictions. In the context of the latter two legal concepts, there must be a legitimate aim that must not be of a purely economic nature, and the measure in question must be appropriate (suitable) and necessary (requisite).[100] In the context of the former, the test appears to be more generally one of arbitrariness.[101]

In practice, the assessment of objective justification in cases involving a general principle of equality may be extremely brief, or even non-existent. For example, in

[96] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 fin.

[97] Joined opinions of Advocate General Van Gerven in Cases C-109/91 *Gerardus Cornelis ten Oever v Stichting Bedrijfspensioenfonds voor het glazenwassers- en schoonmaakbedrijk*, C-109/91 *Michael Moroni and ColloGmbH*, C-110/91 *David Neath v Hugh Steeper Ltd.* and C-200/91 *Coloroll Pension Trustees v James Richard Russel and Others* [1993] ECR I-4879, para 34 et seq. This is also the issue behind the US case-law cited by the Advocate General (and by Advocate General Kokott in her opinion in *Test-Achats*).

[98] Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía*, judgment of 8 September 2011, n.y.r.

[99] Compare Gerards 2005, pp. 71 and 347.

[100] For an illustrative application in the area of free movement for workers, see Advocate General Sharpston's opinion in Case C-542/09 *Commission v The Netherland* of 16 February 2012, n.y.r.

[101] Tridimas 2006, pp. 84 and 92 et seq.

Sturgeon the Court simply stated that no objective justification for the different treatment in question appeared to exist, without any further elaborations. In *Test-Achats*, there is no mention of justification at all. Conversely, age discrimination cases in the line of *Mangold* contain extensive elaborations on justification. The reason for this lies in a special approach of the Court to the interpretation of the general principle of equality on the ground of age (and in the same vein, to those on the grounds of religion or belief, disability and sexual orientation), which leads to a much more detailed framework of analysis.

From *Mangold* via *Kücükdeveci* to *Prigge*: Making (Some) General Principles of Equality Quite Concrete

As was already noted, the Court in the *Mangold* and *Kücükdeveci* line of cases applies the general principle with respect to age 'as given expression in Directive 2000/78'. The link thus made with the Directive led the Court to examine the existence of discrimination in the light of the provisions of the Directive. As Bell[102] puts it, the Court embodies the general principle with the detailed contents of the Directive. Obviously, the same would not have been possible with respect to the general principle of equality *tout court*, which underlines the practical importance of the second layer in the multi-level architecture of equality under Union law.

In this manner, not only do the legal definitions of direct and indirect discrimination under Article 2 of the Directive become relevant as a matter of the general principle, but so, too, do the Directive's comparatively more restrictive rules on justification. The practical consequences are well illustrated by *Prigge*, an age discrimination case concerning pilots, whose employment contracts were automatically terminated when they reached the age of 60, pursuant to a collective agreement. Having recalled the existence of the principle of non-discrimination on grounds of age which must be regarded as a general principle of EU law and which has been given specific expression in Directive 2000/78 in the domain of employment and occupation, and having further recalled its incorporation in Article 21 of the Charter, the Court examines the questions before it in the light of the provisions of the Directive on scope, the definition of direct discrimination and justification.

The Court finds that rules of a collective agreement such as that at issue in *Prigge* concern the employment conditions of workers within the meaning of Article 3(1)(c) of the Directive and are, therefore, within the scope of the Directive. Next, the Court states that a pilot who attains the age of 60 is in a comparable situation to that of a younger pilot performing the same activity for the same airline company and/or falling under the same collective agreement, and that the former is treated in a less favourable manner than the latter, directly on the ground

[102] Bell 2011, p. 628.

of his age. Turning to the issue of justification, the Court examines several grounds from the 'complex web of derogations'[103] under Directive 2000/78. It rejects justification based on Article 2(5) (according to which the Directive is 'without prejudice 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 for the protection of the rights and freedoms of others') and based on Article 4(1) (which allows for different treatment based on a characteristic related to the discrimination ground that constitutes a genuine and determining occupational requirement) for lack of necessity. It also rejects justification based on Article 6(1) (which allows for different treatment if 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives [...] if the means of achieving that aim are appropriate and necessary' and in this context mentions several examples), because justification under this provision is limited to social policy objectives.

Overall, given that the issue at hand falls within the scope of Directive 2000/78 and that there is different treatment on grounds of age for which there is no justification, it must be concluded that a rule of the type at issue in *Prigge* constitutes direct age discrimination. Even though the Court constantly refers to Directive 2000/78, it must be remembered that what is at issue is discrimination under the general principle with respect to age 'as given expression in Directive 2000/78 in the domain of employment and occupation'. The case shows that with this approach Court has found a way to make the meaning of the prohibition of discrimination under the general principle/the Charter much more specific than would otherwise be the case. This is particularly evident on the level of justification, where the analysis in cases such as *Prigge* contrasts starkly with that in other cases decided on the basis of a general principle of equality. In this context, non-discrimination is clearly more than a general standard of fairness and rationality.

However, the fact remains that the *Mangold* approach as reflected in *Prigge* is rather peculiar. In effect, it means that in a horizontal situation where Directive 2000/78 could not have been relied on had it been applicable (compare *Dominguez*), the Directive is held not to be applicable (based on the argument that the prohibition of discrimination on the ground of age flows from a general principle rather than from the Directive), but then nevertheless used in order to provide the necessary link to bring the matter at issue within the scope of Union law, in order to allow for the applicability of the general principle of equality with respect to age, whose meaning in turn is determined relying on the specific content of the (non-applicable!) Directive. Those familiar with the tales of the legendary Baron von Münchhausen may feel reminded of the story in which the baron saved himself from drowning by pulling himself up by his own hair.[104]

[103] Barnard 2001, p. 970.

[104] Baron von Münchhausen: "[...] und fiel nicht weit vom andern Ufer bis an den Hals in den Morast. Hier hätte ich ohnfehlbar umkommen müssen, wenn nicht die Stärke meines eigenen Armes mich an meinem eigenen Haarzopfe, samt dem Pferde, welches ich fest zwischen meine Kniee schloß, wieder herausgezogen hätte." I wish to thank my colleague Armin Cuyvers from Leiden University for suggesting the use of this metaphor in the present context.

5 Conclusion

From the very beginnings of European Community law, the meaning and the role of the prohibition of discrimination has been shaped by the Court's case-law. Modern Union law contains numerous provisions that prohibit discrimination in different fields and in different manners. Ultimately, all of these are part of a larger and sophisticated construct in which the statutory non-discrimination provisions are specific enunciations of general principles of equality and in which the latter find expression in the Charter of Fundamental Rights.

Following *Mangold* and *Kücükdeveci*, some writers have wondered whether 'an EU style fundamental right no to be discriminated against on grounds of age (and other grounds listed in Article 19 TFEU) [...] is but a variation of the principle of equality before the law or rather an emanation of a fundamental right to non-discrimination',[105] and whether now a distinction has to be made between a 'parent' equality principle and 'subsidiary' equality principles.[106] In the present writer's analysis, it is clear from the Court's case-law that two distinct layers of general principles of equality with different functions and, to some extent, also different meanings must be distinguished, namely the general principle of equality *tout court* and general principles of equality with a particular focus. Case-law shows that the latter are emanations of fundamental rights to non-discrimination as incorporated in Articles 21 and 23 of the Charter and that these in turn can be seen as specific expressions of the general principle of equality *tout court* enshrined in Article 20 of the Charter. In that sense, the latter indeed embodies a parent equality principle of which the general principles of equality with a particular focus are (more specific) subsidiaries.

In the present writer's opinion, the building of this layered system is one of the most fascinating aspects of the Court's case-law. At the same time, this construct raises difficult questions when it comes to its practical implications. This concerns less the main function of the general principles of equality, namely to serve as an interpretative framework and as part of the principles of judicial review,[107] than the additional function of filling gaps in the Union's non-discrimination law in cases of alleged discrimination. In this context, it was argued that the Court's much-debated *Mangold* line of case-law has a very special place in the Union's layered system of equality. Through it, the Court in the specific context of Directive 2000/78 has found a surprising way to operationalise the general principles that have found expression in that Directive and to give them a meaning that

[105] Schiek 2012, p. 234.

[106] Semmelmann 2011, p. 246.

[107] McCrudden and Kountouris 2007, p. 88.

goes considerably further than the general standard of fairness and rationality that is otherwise typical for the Union's general principles of equality. In this specific context, the general principles of equality in effect embody precise, detailed and meticulously drafted rules—which is precisely what has been said not to be possible for general principles.[108] However, there are some first indications in the Court's case-law that it might not easily be possible to apply the *Mangold* approach in other contexts.

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[108] See Toth 2000, p. 81, who has argued that "unwritten general principles are by their very nature, entirely unsuitable to afford adequate legal protection in an area like human rights which requires precise, detailed, meticulously drafted rules"; also Wilsing and Paul 2009, p. 756 (in the context of *Audiolux*), according to whom the general principles by their very nature are different from rules for the approximation of laws, precisely because they are general principles rather than rules for specific situations.

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