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THE ROLE OF LAW IN ECONOMIC MARKETS: RECENT CASES OF THE EUROPEAN COURT OF JUSTICE IN EMPLOYMENT LAW

ROLF WANK*

INTRODUCTION

If you want to compare the legal system of one of the European countries, such as Germany, with American law, it is insufficient to simply know the German law. This situation has arisen because German law is influenced by European Community (EC) law in an increasing number of subjects. EC law is formed by EC-Directives and the interpretations of the European Court of Justice (ECJ). Thus, there are two legal systems: that of the EC and that of Germany; and two levels of jurisdiction: that of the ECJ and that of the German Federal Labor Court (*Bundesarbeitsgericht*, or BAG). The relationship between the ECJ and the national courts is unique in many ways. After some introductory remarks on the ECJ, this Essay illustrates this complex relationship through a discussion of recent ECJ cases.¹

The EU is a community under law with the ECJ in Luxemburg interpreting EC law that is mandatory for all twenty-seven member states of the European Union.² In employment law this happens generally by way of “*preliminary rulings*,” referring to the interpretation of EC Directives, Art. 234 EC-Treaty.³ A national court asks the ECJ how a certain Directive is to be understood.⁴ To do so, however, the question must be relevant for a certain suit before this national court.⁵ The ECJ does not decide the outcome of the national litigation itself in such cases. Rather, in an abstract way, the ECJ provides an answer as

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1. This dual view is also represented in the notes of this article: Besides quoting the ECJ by ECR you will find the ECJ as EuGH in the German version plus BAG jurisdiction and German comments.

2. Heinz-Dietrich Steinmeyer, *Das Verhältnis des Europäischen Gemeinschaftsrechts zum deutschen Recht*, in PETER HANAU, HEINZ-DIETRICH STEINMEYER & ROLF WANK, HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS 233, 234 (2002).

3. See Rolf Wank, *Die Organe der EU*, in HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS, *supra* note 2, at 32, 89.

4. *Id.*

5. *Id.* at 91.

to how EC law referring to such a case is to be interpreted.⁶ The national court must then apply the interpretive answer of the ECJ to the case.⁷

Because the ECJ refers to one single legal system, namely that of EC law, whereas the national courts apply their respective national law, controversies emerge. Additionally, not only are there different legal systems, but the method of interpretation by the ECJ often differs from the method of legal interpretation in a member state.⁸

Before utilizing several cases to demonstrate the issues of the ECJ in employment law, general remarks regarding the problems in the relationship between the ECJ and the national courts are appropriate.

I. SURPRISING CASES

As a German maxim states: “Both on the ocean and before the court, we are alone in the hands of God.”⁹ Every lawyer is accustomed to the fact that supreme courts sometimes present unexpected rulings. Yet, the surprise cannot be very great. Whenever there is a legal problem in Germany, scholars develop at least two opinions, if not more. In most cases the federal courts follow one of the already existing opinions. Therefore, only those whose opinions the court declines to follow are surprised.

Comparatively speaking, EC jurisprudence, from a German point of view, results in such surprises more often than decisions in German national courts. This is because the results of the ECJ jurisprudence are sometimes disparate from anything that had been written or even thought of in German opinions. This indicates that ECJ jurisprudential problems differ from those in national law. In this Essay, I will focus on the problems associated with ECJ interpretation of employment law.

The following remarks are attributed to the German philosopher Lichtenberg.¹⁰ He wrote, “When a book and a head collide and a hollow sound is heard, must it always have come from the book?”¹¹ Applied here: If ECJ

6. *Id.*

7. *Id.*

8. See Rolf Wank, *Sekundärrecht*, in HANDBUCH DES EUROPÄISCHEN ARBEITS-UND SOZIALRECHTS, *supra* note 2, at 151, 173 (2002); Clemens Höpfner & Bernd Rüthers, *Grundlagen einer europäischen Methodenlehre*, 209 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 1 (2009) (F.R.G.).

9. See, e.g., HANS-JOACHIM MUSIELAK, MEIN RECHT VOR GERICHT: RECHTE UND PFLICHTEN IM ZIVILPROZESS 8 (1995) (“Vor Gericht und auf hoher See sind wir allein in Gottes Hand.”).

10. Georg Christoph Lichtenberg (1742–1799) was a philosopher and writer who is best known today for his aphorisms. See HENRY & MARY GARLAND, THE OXFORD COMPANION TO GERMAN LITERATURE 527 (3d ed. 1997).

11. GEORG CHRISTOPH LICHTENBERG, UNSER LEBEN HÄNGT SO GENAU IN DER MITTE ZWISCHEN VERGNÜGEN UND SCHMERZ: DAS LEBEN AUF DEN PUNKT GEBRACHT 51 (Robert

jurisdiction and German law collide, the reason must not always be the ECJ. As a legal scholar I follow the principle of “*audiatur et altera pars*”¹² and therefore endeavor to give justice to both sides—the ECJ and the German law. To begin with, I will consider the ECJ point of view and try to demonstrate its potential difficulties. Then I will adopt the German view and ask if there may be justified criticism of the ECJ’s jurisprudence.

II. THE COMPETENCE OF THE ECJ

To understand the difficulties of ECJ judges, try placing yourself in their situation. You must be competent in all legal subjects (civil law, administrative law, criminal law, employment law, social security law, tax law, etc.), and questions may arise regarding the law of all twenty-seven member states. The degree of difficulty faced by an ECJ judge was demonstrated in the Christel Schmidt case,¹³ where the judge had previously been a professor for public law and had to deal with a case in employment law—leading to a ruling that was attacked by all commentators.¹⁴

In practice, judges gain experience by the fact that they become a reporter for a certain subject. The fact that there is no specialization in the ECJ has its good and its bad aspects. Compared with the ECJ, judges of the Federal Labor Court in Germany only deal with employment law, and the court has ten senates, each of which handles only certain aspects of employment and labor law. The result is that the judges increasingly invent details that can hardly be understood because they have made law very complicated. On the other hand, the requirement of competency in all matters and a lack of specialization sometimes leads to a ruling that is not based on experience and is not convincing.

III. DIFFERENT LEGAL SYSTEMS

A. *No Application of National Law*

A very important difference between the rulings of the supreme courts in Germany and the rulings of the ECJ results from the fact that the German

Gernhardt ed., 2008) (“Wenn ein Buch und ein Kopf zusammenstoßen und es klingt hohl, ist das allemal im Buch?”).

12. “Let the other side also be heard.” This Augustinian maxim is a basic principle derived from Roman law. TORE JANSON, MERETHE DAMSGAARD SØRENSEN & NIGEL VINCENT, *A NATURAL HISTORY OF LATIN* 275 (2007).

13. C-392/92, Schmidt v. Spar, 1994 E.C.R. I-1311.

14. See, e.g., Jobst-Hubertus Bauer, *Christel Schmidt läßt grüßen: Neue Hürden des EuGH für Auftragsvergabe*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] n.7 (2004), available at, http://www.gleisslutz.com/media.php/Veröffentlichungen/Downloads/GleissLutz_JHBauer_2004.pdf?dl=1.

opinions stay inside the framework of German law. In contrast, the ECJ applies only European law and does not consider national law. Each is its own legal system with its own definitions. Some scholars and lawyers in member states do not realize that. For example, the ECJ has no competence in and no influence on German law.¹⁵ The arguments of German scholars or lawyers referring to German law therefore “bounce off” of the ECJ. Nonetheless, the ECJ must decide whether a ruling of the national legal system is in compliance with EC law.¹⁶ To do so, the ECJ must first understand the national law, and that means that it must also interpret it.

B. Reference to Twenty-Seven Legal Systems

A harmonization between two legal systems—e.g., EC law and German law—is difficult enough, yet the difficulties multiply because the EC is a legal community of twenty-seven member states. Each of the twenty-seven judges and the eight Advocates General of the ECJ has grown up in his or her own national legal system and therefore become accustomed to thinking in terms of his or her own national system.¹⁷ Let us imagine that there is a comparable North America and Middle American Community. Then there could be a chamber consisting of three judges. We could therefore find a United States judge together with a Canadian judge and a judge from Mexico sitting in a case that originated in the United States of America. The Canadian judge will argue from a Canadian point of view, the Mexican judge from a Mexican point of view, and only the American judge will initially understand the implications for the United States. All three judges must keep in mind that any question must be viewed in the light of the national legal system.

Now let us replace the United States judge in this chamber with a Costa Rican judge. It follows that all three judges, the one from Costa Rica, the one from Canada, and the one from Mexico, have no expertise in United States employment law, which is the basis of the case they are now deciding. The result of the ruling may very well not be in compliance with United States employment law.

Of course, the judges of the EJC are informed about the legal situation in a certain country by the court presenting the case, by commentaries from the national governments, and by a scientific service of the ECJ.¹⁸ Nevertheless, the judges in our case do not have sufficient familiarity with the respective national law. Thus, if neither the national government nor the national supreme court provides a comment, the ECJ may come to the conclusion that

15. Wank, *supra* note 3, at 91.

16. *Id.*

17. Höpfner & Rütters, *supra* note 8, at 9.

18. Ninon Colneric, *Die Rolle des EuGH bei der Fortentwicklung des Arbeitsrechts*, 2 EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EUZA] 212, 223 (2008) (F.R.G.).

the report on Japanese employment law presented to the ECJ by the labor court of first impression represents the prevailing opinion in Japan.

In addition to the aforementioned difficulties, other complications arise from the procedural framework.

IV. SPECIALTIES OF PRELIMINARY RULINGS

When rulings of the ECJ are criticized in Germany, sometimes the specialty aspects of the so-called preliminary ruling¹⁹ are not taken into account. If a German employment court proposes an issue to the ECJ, the question cannot refer directly to German employment law, and the ECJ does not answer any question directly concerning German employment law.²⁰ Instead, the proposing German court only must ask questions referring to the interpretation of EC law, and the ECJ only answers as to how EC law is to be interpreted.²¹ Therefore, the answers of the ECJ are always abstract or theoretical in nature. The proposing court, however, must rule upon the particular case before it—requesting that the case be heard because of the particular issue under EC law. And, although the court’s answer, in an abstract way, is only referring to the interpretation of EC law, it should come as no surprise that the answer of the ECJ is understood as a resolution to the German case. For example, in the *Christel Schmidt* case, a German employment court asked the ECJ if a cleaning woman (with or without a bucket and cleaning cloth) is “part of an enterprise” when interpreting a Directive on the transfer of enterprises.²² The ECJ confirmed. Its ruling was not specific to the claimant, Christel Schmidt; rather, the ECJ merely indicated that there may be situations where a single cleaning woman could be “part of an enterprise.”²³ And, from this abstract answer, the employment court could have decided alternatively that in this case, no part of an enterprise had been transferred.

I will now present some of the most recent cases the European Court of Justice has decided on employment law.

V. MASS DISMISSALS – *JUNK*

A. *Timing of the Notice of the Employer*

The EC law of mass dismissals requires two duties of the employer: (1) before a mass dismissal the employer must consult the *works council*; and (2) the employer must give notice to the *labor authority* that a mass dismissal will

19. See ROLAND BIEBER ET AL., *DIE EUROPÄISCHE UNION: EUROPARECHT UND POLITIK* 256 (8th ed., 2009); RUDOLF STREINZ, *EUROPARECHT* 220 (5th ed., 2001).

20. Wank, *supra* note 3, at 91.

21. *Id.*

22. C-392/92, *Schmidt v. Spar*, 1994 E.C.R. I-1311.

23. *Id.*

take place.²⁴ The relevant Directive²⁵ had been understood in Germany as requiring differentiation between the two proceedings.²⁶ The act of consultation with the works council must take place before the dismissal; but the notice to the labor authority can still be given until the end of the period of notice.²⁷ In Germany employees receive long periods of notice, which means that the employer also has a lengthy period of time to provide notice to the labor authority.

Differing from the German understanding, the ECJ in the *Junk* case determined that the same rules must be applied to both procedures; i.e. the employer must not only consult the works council before a dismissal, but must also give notice to the labor authority before the dismissal.²⁸ If the ECJ had proceeded in a methodically correct way, it would have dealt with both procedures separately and would have stated common relationships between the two procedures. Instead, the ECJ referenced neither the system of the corresponding rules nor the different aims as would have been required under accepted jurisprudential methodology. The opinion refers in detail to the *wording* of the Directive, but not even in this respect does the ruling meet methodological requirements. When the ruling was made there were twenty-one different official languages in the EC for twenty-five legal systems. According to the ECJ, all official languages are of equal value. Therefore, the ECJ was obligated to verify how the ruling would have been translated into the different official languages. Had the ECJ done this, it would have concluded that the finding of the ECJ cannot clearly be understood from the wording, because the translation into the different official languages leads to different results. The interpretation prevailing in Germany would have been in compliance with the wording of the EC law.

Furthermore the ECJ would have had to inquire into *the aim of both procedures*. That is, it would have been necessary to differentiate between the different aims of the two procedures. The ECJ is right in saying that the aim of the consultation with the works council rule is to avoid dismissals or to reduce their number.²⁹ But its interpretation, stating that the aim of the notice to the authority is “to look for solutions for problems created by the planned next

24. Rolf Wank, *Massenentlassungen*, in HANDBUCH DES EUROPÄISCHEN ARBEITS-UND SOZIALRECHTS, *supra* note 2, at 673, 673–78.

25. Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

26. See *Außertariflicher Angestellter in der Metallindustrie*, 26 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1107, 1109 (2004) (F.R.G.).

27. Wank, *supra* note 24, at 678.

28. C-188/03, *Junk v. Kühnel*, 2005 E.C.R. I-885, ECJ 27.1.2005 C-188/03, 2005, ECR I-885; EuGH Slg. 2005, I-885; NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2005, 1099; AP KSchG § 17 Nr. 18; NEUE ZEITSCHRIFT FÜR ARBEITSRECHT (NZA) 2005, 213; DER BETRIEB (DB) 2005, 453; BETRIEBS-BERATER (BB) 2005, 331.

29. *Junk*, § 38.

dismissals,” lacks any substance.³⁰ The important question is whether the labor authority can and shall avoid dismissals—with the result that it must take part in the process before the dismissals—or if it instead shall look for solutions for dismissals that have already taken place. This depends on whether the notice to the labor authority is intended for the protection of the individual employee or if it is aimed at the labor market policy of finding new occupations for those dismissed. The ECJ does not even touch upon this decisive question with its trivial statement about the aims of the Directive. Thus, this question—the actual question—remains unanswered.

B. Transformation of EC Law into National Law

There are two more questions of general importance for the relationship between EC jurisdiction and national law. One is how an ECJ decision can be transformed into national law, the other is retroactive effects.

1. Legislative Action

The best method of transforming ECJ law that alters national law would be the national legislature changing the statute accordingly. In reality, in many cases this does not happen at all, or only after many years. Until then, the courts must determine for themselves how to handle their national law when the ECJ, following EC law, proscribes a certain interpretation. In German law there are different methods for transforming EC law made by court interpretation.

2. Reaction by the Court

One method is that of “*richtlinienkonforme Auslegung*” and “*richtlinienkonforme Rechtsfortbildung*” (respectively: EC-compliant interpretation of the present law and creating new law in compliance with EC law).³¹ Interpreting national law by following the methods of the respective national legal theory may lead to different results for the same text. One text may lead, in a legally possible way, to one or another result. If national law has followed interpretation A and the ECJ then interprets EC law in a different

30. *Id.* § 47.

31. ULRIKE BABUSIAUX, DIE RICHTLINIENKONFORME AUSLEGUNG IM DEUTSCHEN UND FRANZÖSISCHEN ZIVILRECHT (2007); MARTIN FRANZEN, PRIVATRECHTSANGLEICHUNG DURCH DIE EUROPÄISCHE GEMEINSCHAFT 224 (1999); CLEMENS HÖPFNER, DIE SYSTEMKONFORME AUSLEGUNG 171 (2008); CHRISTOF KERWER, DAS EUROPÄISCHE GEMEINSCHAFTSRECHT UND DIE RECHTSPRECHUNG DER DEUTSCHEN ARBEITSGERICHE 273 (2003); Heinz-Dietrich Steinmeyer, *Das Verhältnis des Europäischen Gemeinschaftsrechts zum deutschen Recht*, in HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS, *supra* note 2, at 233, 248; Rolf Wank, *Auslegung und Rechtsfortbildung des Gemeinschaftsrechts*, in HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS, *supra* note 2, at 171, 188.

way—interpretation B—the national courts are obliged in the future to interpret national law according to interpretation B, as long as this is possible following the legal theory in the respective national law.³² Under certain conditions, national law may allow the courts to create new law. If this is possible, and if an interpretation B is possible in the matter at hand, the national courts must create new law like B in the future.

It must be kept in mind that the result must be one in accordance with the legal theory of the national law. One possible result under the respective national law can be replaced by another result also possible under national law. But what can the courts do when the result found by the ECJ cannot be derived from the present national law?

For this situation, the German Federal Labor Court has introduced a new idea, the “*presumption of a legislator to be in compliance with EC law.*”³³ If the legislature intended a certain interpretation, but the ECJ now has an opinion different from the national legislator, then a presumption that the German legislator would now prefer the new interpretation, as presented by the ECJ, is possible.³⁴

In the case of a mass dismissal, for example, the German legislator, contrary to the ECJ, did not intend that the employer be required to give notice to the labor authority before dismissing employees.³⁵ Following the German rules of interpretation, with reference to the aim of the German legislator, a different result was not possible for the courts. Therefore, the Federal Labor Court should have denied an “interpretation in conformity with EC law.”

In fact, the Federal Labor Court made such a ruling some years ago.³⁶ The Federal Labor Court then created the idea of presumption of EC law conformity.³⁷ On the basis of this presumption the German legislator accepts that German rules are now understood in such a way that notice to the labor authority must be given before the dismissal.³⁸

32. See C-14/83, *Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. I-1891.

33. *Kündigung bei nicht rechtzeitiger Anzeige einer Massenentlassung—Vertrauensschutz*, 23 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 971 (2006) (F.R.G.).

34. See C-397/01 to C-403/01, *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut, e.V.*, 2004 E.C.R. I-8835.

35. Wank, *supra* note 24, at 678.

36. *Außertariflicher Angestellter in der Metallindustrie*, *supra* note 26, at 1109.

37. *Kündigung bei nicht rechtzeitiger Anzeige einer Massenentlassung—Vertrauensschutz*, *supra* note 33, at 971.

38. Jobst-Hubertus Bauer et al., *Geänderte Voraussetzungen für Massenentlassungen nach der „Junk“-Entscheidung des EuGH?*, 8 DER BETRIEB [DB] 445 (2005) (F.R.G.); Boris Dzida & Klaus-Stefan Hohenstatt, *BAG schafft Klarheit bei Massenentlassungen*, 35 DER BETRIEB [DB] 1897 (2006) (F.R.G.); *Dornbusch/Wolff*, BETRIEBS-BERATER [BB] 2005, 885; Matthias Jacobs & Sebastian Naber, *Massenentlassungen – Kündigungserklärung als Zeitpunkt der “Entlassung,”* 2 SAMMLUNG ARBEITSRECHTLICHER ENTSCHEIDUNGEN [SAE] 61 (2006) (F.R.G.); *Schiek*, ARBEIT UND RECHT (AuR) 2006, 41.

This new aspect must be observed critically.³⁹ If a certain opinion of the legislator is evident, the balance of power requires the legislator, and not the courts, to change the law. Meanwhile, the Federal Civil Court (BGH) has also applied the presumption.⁴⁰

3. No Application of National Law

Another way to ensure national law complies with EC law is to *not apply national law* that is contrary to EC law. There is a great controversy in academic literature as to whether the national courts are allowed to take this approach.⁴¹ The ECJ has taken the position that EC law does not and cannot allow national courts to deviate from their own legal system; they should use all options granted to them in their national law, but cannot go beyond it.⁴²

Some commentators argue that German courts should not apply German law when it is contrary to EC law. Others advocate that the courts do so only in the cases where it is a ruling with a prohibition, the prohibition can be cancelled, and this is the only way to obey EC law.⁴³

C. Retroactive Effects

Another problem deals with the retroactive effects of EC jurisdiction and potential retroactive effects in national law. The question is: if a ruling of the Federal Labor Court differs from what has been the general opinion before, can the retroactive effect be applied to cases that have taken place prior to this change in interpretation?

As previously mentioned, the problem is not as relevant in Germany, where there are often indicators for a future change of jurisdiction before the change actually occurs. There are articles in legal papers and media coverage discussing the possibility that courts decide differently from prior opinions or instances when the Federal Labor Court announces that it may change its position. There are, of course, surprising rulings in Germany—outcomes not

39. See Bauer et al., *supra* note 38, at 445; Ferme/Lipinski, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2005, 593; Höpfner & Rütters, *supra* note 8, at 24; Jacobs & Naber, *supra* note 38, at 66.

40. BGH 26.11.2008, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2009, 427; see also Pfeiffer, NJW 2009, 412.

41. KERWER, *supra* note 31, at 103.

42. C-397/01 to C-403/01, Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, 2004 E.C.R. I-8835; see also Colneric, *supra* note 18, at 223.

43. Albrecht Bach, *Direkte Wirkungen von EG-Richtlinien*, 45 JURISTENZEITUNG (JZ) 1108, 1111 (1990); CHRISTOPH HERRMANN, RICHTLINIENUMSETZUNG DURCH DIE RECHTSPRECHUNG 78 (2003); STREINZ, *supra* note 19, at 184; Compare Rolf Wank, *Bereitschaftsdienst als Arbeitszeit*, 4 RECHT DER ARBEIT [RdA] 246, 250 (2004) (F.R.G.), with Horst Konzen, *Die Wirkung von Richtlinien in der neueren arbeitsrechtlichen Judikatur des EuGH*, in FESTSCHRIFT FÜR ROLF BIRK ZUM SIEBZIGSTEN GEBURTSTAG 439, 452 (Horst Konzen, et al., eds., 2008).

predicted by anyone before the prediction. Yet, surprising rulings happen most often in EC law, because ECJ decisions are not bound by a national legal order; therefore, the ECJ's interpretation may be wholly different from what would have been expected in national law.

With respect to Germany, the same rules that apply to jurisprudence also apply to retroactive legislation. Faith in the present jurisprudence may, in certain circumstances, result in litigation having no retroactive effect on a party; rather, that opinion can only be applied to future cases.

Contrary to this position, the ECJ believes that all of its rulings have a retroactive effect. The only exception to this, according to the ECJ, occurs when the ECJ expressly states in its ruling that there shall be no retroactive effect.⁴⁴

I do not follow this line of thinking. The ECJ only decides ECJ law. It cannot decide the consequences for national law. This is because the consequences may vary for each of the twenty-seven different member countries. If in one national law system, a special interpretation had been generally accepted for years and years, and no one ever thought of deviating from it, then it is wrong to dictate a retroactive effect.

Regardless, the Federal Labor Court has denied a retroactive effect in *Jung*.⁴⁵

Moreover, the BAG has since ruled on this issue, concluding that the consultation with the works council must begin before the dismissal, but may not have concluded before the dismissal.⁴⁶

VI. AGE DISCRIMINATION – *MANGOLD*

In *Mangold*,⁴⁷ besides the question of age discrimination, there are general questions regarding the relationship between EC law and German law, such as

44. C-309/85, *Barra v. Belgian State & City of Liège*, 1988 E.C.R. 355.

45. *Kündigung bei nicht rechtzeitiger Anzeige einer Massenentlassung—Vertrauensschutz*, *supra* note 33, at 971.

46. BAG 21.5.2008 AP BGB § 613 a Nr. 335; *see also* BAG 12.7.2007 AP KSchG 1969 § 17 Nr. 31.

47. C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-998; *see also* *Bauer*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT (NZA) 2005, 8000; *Bauer/Arnold*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2006, 6; Richard Giesen, *Massenentlassungsanzeige erst nach Abschluss von Sozialplanberatungen?*, 4 SAMMLUNG ARBEITSRECHTLICHER ENTSCHEIDUNGEN [SAE] 135, 145 (2006) (F.R.G.); Colneric, *supra* note 18, at 223; Kai Hailbronner, *Hat der EuGH eine Normverwerfungskompetenz?*, 15 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 811 (2006) (F.R.G.); Christoph Herrmann, *Die negative unmittelbare Wirkung von Richtlinien in horizontalen Rechtsverhältnissen*, 3 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 69 (2006) (F.R.G.); *Körner*, NZA 2006, 1395; *Nettesheim*, JZ 2008, 1159; *Preis*, NZA 2006, 401; Norbert Reich, *Anmerkung, in Gemeinschaftsrechtswidrigkeit der sachgrundlosen Befristungsmöglichkeit bei Arbeitnehmern ab 52 Jahren*, 17 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 17, 20 (2006) (F.R.G.); *Reichold*, JZ 2006, 549; *Riesenhuber*,

the pre-effects of EC law. In legal theory, there is the question of “the principle of application of norms of the lowest step.” I discuss these principles in turn in this section.

A. *Contracts of a Limited Period for Older Employees*

According to the “Directive on employment for a limited period,” national legal systems are not allowed to accept employment contracts for a limited period without restrictions. Although some restrictions are required, the national law is free to choose from the following: (1) provide reasons for the limited period, (2) restrict the length of the period, or (3) restrict the number of limited periods.⁴⁸ In German law, there was a statute that allowed an employment contract for a limited period for employees older than sixty-two years without a good reason for the employer or any other restriction.⁴⁹ The ECJ ruled that this German statute was not in accordance with EC law. But the court did not invalidate this option in general; rather, it struck down only that particular option because of the principle of proportionality, and it required special conditions to make such a statute in compliance with EC law.

B. *Pre-Effects of the EC Law*

What gives this ruling a special character is that, at the time of this ruling, the period for transformation of the applicable EC Directive⁵⁰ into German law had not yet been passed. Therefore, the ECJ likely had no right to decide the issue. According to the jurisprudence of the ECJ, during the period of the adaptation of a Directive and the transformation of court decisions into national law, there is a prohibition of frustration—in this period no national statute in conflict with a Directive may be passed. In *Mangold*, the ECJ claimed a pre-effect based upon the prohibition of frustration. Therefore, it was possible for the ECJ to control a German statute, even though the period for transformation had not yet been passed.

FESTSCHRIFT FÜR ADOMEIT, 2008, S. 631; Schiek, AuR 2006, 145; Streinz/Herrmann, RECHT DER ARBEIT (RdA) 2007, 145; Felipe Temming, *Freie Rechtsschöpfung oder nicht: Der Streit um die EuGH-Entscheidung Mangold spitzt sich zu*, 47 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3404 (2008) (F.R.G.); Thüsing, ZIP 2005, 2149; Raimund Waltermann, *Bemerkungen zu den Rechtssachen Mangold und Palacios de la Villa*, in FESTSCHRIFT FÜR ROLF BIRK, *supra* note 43, at 915; Rolf Wank, *Methodische Bemerkungen zu einigen neueren EuGH-Urteilen zum Arbeitsrecht*, in FESTSCHRIFT FÜR ROLF BIRK, *supra id.* at 929, 937.

48. Wank, *Einzelne Richtlinien*, HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS, *supra* note 2, at 620, 688.

49. *See generally id.* at 690–91.

50. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

C. *The Principle of Application of the Norm of the Lowest Step*

The second important general issue raised by *Mangold* is the question of which types of EC law can serve as the basis for a ruling. If a Directive concerning the relationship between employers and employees is against EC law, then the member state must change law accordingly. But that does not mean that there is a direct consequence for the employer and employee, because EC law does not directly affect individuals in these situations. It differs from the so-called *primary law*, i.e., the law arising from the EC treaty itself is distinct from EC fundamental rights and from general principles of the EC.⁵¹ Thus, if the ECJ wanted its ruling to have a direct effect on employment relationships, without transformation by the German state, then the ECJ would have to claim that its solution came from primary law and not from secondary law—meaning out of Directives. Unfortunately, in *Mangold* there was no such primary law for the intended solution. Therefore, the ECJ invented a general principle prohibiting discrimination because of age.⁵² Because this newly invented general principle was part of primary law, the ruling was directly applicable to German employment relationships.

From a methodological point of view the ruling cannot be accepted.⁵³ When primary law has correctly been transformed into secondary law, then the ECJ is only allowed to apply this secondary law and is only able to control national law through the use of secondary law. As in *Mangold*, secondary law—the Directive against discrimination of old age—already existed, therefore, the ECJ was not permitted to apply primary law. There is a principle that the norms of the lowest step must always be applied.⁵⁴ In an earlier case the ECJ respected this principle.⁵⁵ If one were to follow the method of the ECJ, it would mean, for example, that the question of which law is applicable to the sale of bread would not be decided by civil law, but by the constitution!

51. See BIEBER ET AL., *supra* note 19, at 56.

52. *Mangold*, § 4.

53. Felipe Temming, *supra* note 47, at 3404.

54. BIEBER ET AL., *supra* note 19, § 10; Rudolf Streinz & Stefan Leible, *Einleitung*, in EUROPÄISCHE DIENSTLEISTUNGSRICHTLINIE 1, 64 (Monika Schlachter & Christoph Ohler eds. 2008). The principle is comparable to the American system of avoiding decisions on constitutional grounds when statutory grounds suffice. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (laying out Court review principles on questions involving both constitutional and statutory law).

55. C-120/95, *Decker v. Caisse Madale des Employés Privés*, 1998 E.C.R I-1831; NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 17699 (1998) (F.R.G.); *Kostenerstattung für Brillenkauf in einem anderen Mitgliedstaat*, in 11 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 616 (1998) (F.R.G.) = *Arbeitsrechtliche Entscheidungen*, (51) DER BETRIEB [DB] 987 (1998) (F.R.G.).

D. *Effects of EC Law Among Individuals*

Because the ECJ claimed that the solution came from primary law, the ruling was then directly applicable to individuals. If the ECJ had decided, as would have been correct, that the solution came from Directives, the question would have centered upon the consequences for individuals.

The prevailing opinion of the ECJ, as well as of the literature on EC law, is that if national law is contrary to EC law, there are direct consequences for the member states, but not for individuals.

1. Directives only Binding Member States

There are additional questions in the details. Directives are, as the EC treaty says (art. 249), and as every Directive says, again, *only binding on the member states*. Unlike EC ordinances, Directives alone are not directly applicable; rather, they must be transformed into the law of the member states so that, in effect, only the national law is applied. From this point of view there cannot be direct application of Directives at all.

2. Directives Binding National Governments in a Claim by a Citizen

Contrary to this view, the ECJ has approved direct application if a *citizen refers to a Directive against his government*.⁵⁶ The reason is that the member state as a whole is obligated to apply the Directive. It would act against the principle of estoppel if, on the one hand, it is the EC's obligation to transform the Directive and, on the other hand, it would deny a duty to a citizen. But this direct effect in favor of citizens against the member state is limited.

When the Directive has been passed, the member state has a period of years to transform the Directive. The member state can fully use this period during which it is not yet bound by the Directive. Therefore, the citizen can only refer to the Directive once the period for transformation has passed or if the Directive has been transformed in time, but is, in its content, contrary to EC law. In addition, the Directive must be applicable itself—it must contain law with evident legal conditions and legal consequences.

If pursuant to these principles there is a claim against the state, it is irrelevant whether the state acted as the state in public law or like an individual in private law. A citizen can sue the state as an employer and refer directly to the Directive.

56. Case 9/70, *Grad v. Traunstein*, 1970 E.C.R. 825; Case 152/84, *Marshall v. Southampton Area Health Authority*, 1986 E.C.R. 737; see KERWER, *supra* note 31, at 84.

3. No Application among Individuals

Following the arguments of the ECJ, Directives are not directly applicable to individuals. Literature suggests that there is an exemption for certain cases.⁵⁷ If the violation of EC law leaves open the scope for the legislator, the courts may not interfere and create new law applicable to individuals. It is different if a rule in national law is contrary to EC law and if there is only one solution that is in conformity with EC law, namely, to invalidate the rule. In this case, the courts may simply not apply the rule as given by the national legislator, but rather apply a correct EC-conforming rule to the private parties. In *Mangold*, following this opinion, as there was an exemption concerning the possibility of an employment contract for a limited period for old employees, this rule could simply have been invalidated with the consequence that general law would have been applicable.

In two later rulings concerning age discrimination (*Palacios*⁵⁸ and *Bartsch*⁵⁹) the ECJ no longer referred to primary law.

VII. TRANSFER OF UNDERTAKING—GÜNEY GÖRRES

If one enterprise is purchased by another, or even if parts of it are purchased, then the employment relationships of the employees in the former enterprise pass by law to the buyer. This comes from the Directive on the transfer of a business enterprise⁶⁰ and has been transformed into German law in sec. 613 a, Civil Code (BGB).

There are problems in cases where a portion of an enterprise is not purchased, and the enterprise received services in the past from enterprise A and now makes a contract for the same services with enterprise B. Following the jurisprudence of the ECJ in these cases, the Directive on transfer of a business enterprise is applicable as long as an economic unit is transferred, meaning a combination of resources, including personnel and assets.

57. See generally Part VI.D.

58. See *infra* Part IX.

59. Case C-427/06, *Bartsch v. Bosch und Siemens Hausger* [2008 E.C.R.]; *Alterdiskriminierung bei Altersabstandsklauseln*, in 47 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3417 (2008); *Alterdiskriminierung—Ausschluss der Hinterbliebenenversorgung für mehr als 15 Jahre jüngere Ehegatten in betrieblicher Altersversorgungsregelung*, in 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1119 (2008) (F.R.G.); Jobst-Hubertus Bauer & Christian Arnold, *Verbot der Altersdiskriminierung*, 47 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3377 (2008) (F.R.G.); Bernd Klemm, *EuGH: Zulässige Altersabstandsklauseln bei Ruhgeldanspruch des überlebenden Ehegatten*, 63 BETRIEBS BERATER [BB] 2353 (2008) (F.R.G.); Ulrich Preis & Felipe Temming, *Alterdiskriminierung im Betriebsrentenrecht: Die Abstandsklausel ist angezählt*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1209 (2008) (F.R.G.).

60. Council Directive 2001/23, art. 3, 2001 O.J. (L 82) 16, 17 (EC).

As an example, in *Güney Görres*,⁶¹ the contract to control flight passengers had been given to enterprise A before and had now been contracted to enterprise B. Mrs. Güney-Görres sued enterprise B claiming that she was now an employee of this enterprise.⁶²

In its jurisprudence, the ECJ always claims that simply giving a new contract to another enterprise does not mean a transfer of enterprise; but, on the other hand, it has applied the Directive in cases where the contract had been cancelled with enterprise A and made with enterprise B.⁶³ The ECJ has yet to successfully distinguish the cases.⁶⁴ This was highlighted yet again in the newest case, *Ferrotron*.⁶⁵

German jurisprudence and literature have created a new criterion in an effort to distinguish these cases. The idea behind the law on the transfer of a business entity is similar to purchasing real estate together with the mortgage; if someone utilizes the resources of someone else, then he shall be obliged to take over the employees together with these resources. If the new enterprise only takes a few employees, or if there is nothing but a new contract, then the Directive on transfer of a business enterprise is not applicable. In *Güney Görres*, the new enterprise used the resources of the airport and only took over personnel. Under a correct ruling, this would not have been considered a case of a business transfer. But the ECJ does not give reasons concerning the aim of a Directive, and it did not accept the German view. It argued that a transfer of a business enterprise only takes place in cases of “using resources for oneself”⁶⁶ and therefore was not supported by the Directive. This argument is—by all respects—astonishing. All decisions that have been developed by

61. Joined Cases C-232 & 233/04, *Güney-Görres v. Securicor Aviation, Ltd.*, 2005 E.C.R. I-11237; APRL 2001/23/EG Nr. 1 AP H 8/2006, 1251; *Arbeitsvertragsrecht: Eigenwirtschaftliche Betriebsmittelnutzung kein prägendes Merkmal für Betriebsübergang*, 23 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 29 (2006) (F.R.G.); NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 889 (2006) (F.R.G.).

62. *Güney-Görres*, § 2.

63. Rolf Wank, *Methodische Bemerkungen zu einigen neuen EuGH-Urteilen zum Arbeitsrecht*, in Festschrift für Rolf Birk, *supra* note 22, at 929, 948.

64. Rolf Wank, *Der Betriebsübergang in der Rechtsprechung von EuGH und BAG—eine methodische Untersuchung*, Festschrift 50 Jahre Bundesarbeitsgericht 245 (Hartmut Oetker, Ulrich Preis, & Volker Rieble eds., 2004).

65. Case C-466/07, *Klarenberg v. Ferrotron Technologies GmbH* 2009 E.C.R.

66. BAG 2.3.2006 AP § 613 a BGB Nr. 302; Heinz Josef Willemsen & Michael Müntefering, *Outsourcing nach „Güney-Görres“*, 23 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1105 (2006) (F.R.G.); BAG 6.4.2006 AP § 613 a BGB Nr. 299; 23 NEUE JURISTISCHE WOCHENSCHRIFT [NZA] 723 (2006) (F.R.G.); BAG 13.6.2006 AP § 613 a BGB Nr. 305; *Teilbetriebsübergang—Forschungsschiff als wirtschaftliche Einheit*, 23 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1101 (2006) (F.R.G.); 23 NEUE JURISTISCHE WOCHENSCHRIFT [NZA] 2006, 1185 (F.R.G.).

the ECJ itself are, of course, not found in the Directives. It would have been correct if the ECJ had argued the matter itself.

VIII. OLD AGE LIMITATION OF EMPLOYMENT CONTRACTS—*PALACIOS*

In German law, as well as in the legal systems of a number of EC member states, there is a rule stipulating that an employment relationship automatically ceases at a specified age. In Germany the general age limit is sixty-five. This age requirement is the same as for the start of old-age pensions by the social security system. The rationale of the Federal Labor Court and of German scholars is that it is reasonable for an employee to retire at sixty-five because he begins to receive old-age pension at this same age.

The ECJ had to decide, for Spanish law, in *Palacios*,⁶⁷ whether a Spanish statute could provide such an age limit without being contrary to EC law.⁶⁸ The ECJ approved the statute.⁶⁹ The ruling is remarkable in that the ECJ no longer refers to the unacceptable arguments in *Mangold*—that all questions of discrimination can be taken from primary law. In *Palacios* the ECJ, methodologically speaking, correctly applies the Directive concerning old-age discrimination. According to this Directive, old-age discrimination in employment law is generally prohibited.⁷⁰ The Directive allows a justification for reasons of *labor market policy*.⁷¹ The labor market policy, in countries that provide such an across-the-board old-age limitation, is that older employees should leave their workplaces in order to give younger employees a chance to fill them. The EC Directive leaves the decision to member states regarding whether they are willing to accept those labor market policies. In *Palacios*, that happened: the ECJ ruled that Spanish law was in accordance with the EC Directive concerning old-age discrimination.

67. Case C-411/05, *Palacios de la Villa v. Cortefiel Servicios SA*, 2007 E.C.R. I-8531; NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1219 (2007) (F.R.G.); AP RL 2000/78/EG Nr. 8; DER BETRIEB [DB] 2427 (2007) (F.R.G.); Klaus Bertelsmann, *Altersgrenze 65, EuGH und AGG: Zwangsbeendigung von Arbeitsverhältnissen nur eingeschränkt zulässig*, ARBEITSRECHT IM BETRIEB [AiB] 689 (2007) (F.R.G.); Sudabeh Kamanabrou, *Vereinbarkeit von Pensionsgrenzen mit Europarecht*, EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EuZA] 251 (2008) (F.R.G.); Kocher, RECHT DER ARBEIT [RdA] 238 (2008) (F.R.G.); Felipe Temming, *Der Fall Palacios: Kehrtwende im Recht der Altersdiskriminierung?*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1193 (2007) (F.R.G.); Roetteken, ZEITSCHRIFT FÜR TARIFRECHT [ZTR] 350 (2008) (F.R.G.); Raymond Waltermann, *Bemerkungen zu den Rechtssachen Mangold und Palacios de la Villa*, in Festschrift für Rolf Birk, 915 (Horst Konzen et al. eds., 2008).

68. Council Directive 2000/78, art. 6, 2000 O.J. (L303) 16, 20 (EC) (in German at: AP H. 8/2008 Bl. 1318).

69. Ley 14/2005 sobre las cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubilación, enacted in B.O.E. 2005, 157.

70. Council Directive 2000/78, art. 6, 2000 O.J. (L303) 16, 20 (EC) (in German at: AP H. 8/2008 Bl. 1318).

71. *Id.* ch. 1, § 6.

From a methodological point of view, the ECJ's return to the correct application of the principle of applying the norm of the lowest step is welcome. The question, however, is whether—in reference to the justification of labor market policy—control by the ECJ was legitimate at all. If the ECJ had applied the arguments from *Mangold*, it could have controlled the rules in Spanish law if it was in accordance with the principle of proportionality.⁷²

This approach requires an examination of the legal facts. In Germany, only half of the employees work until the general age limit of sixty-five, and the remaining employees end their employment relationship before they reach the specified age limit.⁷³ Of those who reach the age of sixty-five only a very small percentage would like to continue working. The question is whether the argument of labor market policy is applicable if no more than these few employees are concerned.

On the other hand, it must be admitted that the ruling of the ECJ is in compliance with a prevailing opinion in jurisprudence and literature in the member states; if the ECJ had decided differently, this would have required significant changes in many legal systems.

In addition, much of EC antidiscrimination law comes from America. Many things in this area, especially questionable or incorrect aspects, are derived from American law. Yet, with regard to old-age discrimination, the EC does not understand that in America, old-age limitations are considered forbidden discrimination.

The BAG has since transformed the *Palacios* rule into German law.⁷⁴

IX. PROHIBITION OF DISCRIMINATION—*MARUKO*, *FERYN*, AND *COLEMAN*

A. Maruko

In *Tadao Maruko*,⁷⁵ the plaintiff of the litigation created a “Lebenspartnerschaft” (lifelong partner relationship) with another man in

72. For a more detailed description of the German concept of proportionality, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007) (describing proportionality test and objectives).

73. See generally Jennifer Roberts, Nigel Rice & Andrew M. Jones, *Early Retirement and Inequality in Britain and Germany: How Important Is Health?* (Univ. of York Health, Econometrics and Data Group, Working Paper 08/27, 2008), available at, http://www.york.ac.uk/res/herc/documents/wp/08_27.pdf.

74. BAG 18.6.2008 NZA 2008, 1302.

75. Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R.; EuGH AP Richtlinie 2000/78/EG Nr. 9; NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1649 (2008) (F.R.G.); *Gleichstellung gleichgeschlechtlicher Lebenspartnerschaften bei Hinterbliebenenversorgung*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 459 (2008) (F.R.G.); Ralf Brinktrine, *Anmerkung*, 48 JURISTENZEITUNG [JZ] (2008), at 790 (F.R.G.); Lembke, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1631 (2008) (F.R.G.); Franz Ruland,

2001. According to German law, a marriage can only be created between two persons of the opposite sex. For persons of the same sex there is a special institution called the “Lebenspartnerschaft.”⁷⁶ This institution is, in many ways, similar to marriage, but not in all respects. Therefore there are multiple situations where it is unclear whether the same rules are valid for a Lebenspartnerschaft as for married people.

In *Maruko*, the Lebenspartner was insured by a special old-age pension scheme of German theatres. When the Lebenspartner died, Mr. Maruko applied for a widower’s pension. The pension system denied payment because, according to the articles of the company, there was only a claim for married people and not for life partners. Thus, the ECJ had to decide whether the arguments of the pension system were contrary to Directive 2000/78/EC.

In similar cases, the Federal Administrative Court and the Federal Civil Court had denied such a claim. They argued that such a preference for marriage, over the Lebenspartnerschaft, is legitimate because of the special constitutional protection of marriage and because of the differing concerns regarding maintenance in marriages as compared to the Lebenspartnerschaft.⁷⁷

The ECJ ruled that, pursuant to the Directive, the payment is covered by the notion of “payment” in Art. 141, EC Treaty. In earlier cases the ECJ had often approved this view. The national court should decide whether the partner is in a comparable situation to a widow in this system. If such a comparison is possible, the denial of a payment is direct discrimination because sexual orientation is covered by Directive 2000/78/EC.⁷⁸

B. Feryn

In *Feryn*,⁷⁹ a Belgian enterprise produced garage doors that were installed in customers’ garages. The manager of Feryn gave an interview to newspapers stating that he would not employ workers of Moroccan origin. In reviewing

Sozialrecht, 49 JURISTISCHE SCHULUNG (JuS) 739 (2008) (F.R.G.); Markus Sprenger, *Aktuelle Tendenzen des EuGH im Diskriminierungsrecht—Rechtsprechung oder Rechtsfortbildung*, 63 BETRIEBSBERATER [BB] 2405, 2407 (2008) (F.R.G.).

76. The federal government defined the life partnership in the *Gesetz über die Eingetragene Lebenspartnerschaft*, 16. Februar 2001 (BGBl. I S. 266).

77. See, e.g., MASHA ANTOKOLSKAIA, HARMONISATION OF FAMILY IN EUROPE: A HISTORICAL PERSPECTIVE 419 (2006).

78. Meanwhile the BAG has ruled that registered “Lebenspartner” are equal in law to married people in this regard, *BAG: Eingetragene Lebenspartner sind bei einer betrieblichen Hinterbliebenenversorgung zukünftig wie Ehegatten zu behandeln*, 64 BETRIEBS-BERATER [BB] 954 (2009) (F.R.G.).

79. Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 2008 E.C.R. I-5187; EuGH AP RL Nr. 2000/43/EG Nr. 1; *Diskriminierung durch öffentliche Äußerung des Arbeitgebers*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2767 (2008) (F.R.G.); *EuGH: Unmittelbare Diskriminierung durch öffentliche Äußerung des Arbeitgebers*, 63 BETRIEBS-BERATER [BB] 1729 (2008) (F.R.G.).

this case, the ECJ ruled that direct discrimination can be assumed even if there is no identifiable victim. It is sufficient if the employer's intent is to refuse employment to persons from a certain protected ethnic origin. The ECJ did not even mention the problem of "customer preference," a justification that has been discussed in American and in German law. The result of this ruling is that those utterances lead to a presumption against the employer that can be used against him in a later litigation with an already existing applicant.⁸⁰

C. Coleman

In *Coleman*,⁸¹ a secretary was employed by a London attorney's office, which later dismissed her. She claimed to have been discriminated against because she was the mother of a disabled child. The ECJ ruled that direct discrimination does not require that an employee be discriminated against because of his or her own disability; rather, it is sufficient if she is discriminated against because of the disability of another person. The question remains open, however, as to how involved the relationship between the employer and the third person must be to conclude that discrimination occurred.⁸²

X. OTHER CASES—SCHULTZ-HOFF

Other cases in labor law from recent years deal with the problem of whether the state may require enterprises contracting with the state to utilize collective bargaining agreements, even though they are not a member of an

80. Frank Bayreuther, *Drittbezogene und hypothetische Diskriminierungen*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 986 (2008) (F.R.G.); Josef Franz Lindner, *Die Ausweitung des Diskriminierungsschutzes durch den EuGH* [The Extension of Protection Against Discrimination by the ECJ], 38 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2750 (2008) (F.R.G.); Josef Franz Lindner, *Staatliches „Anprangern“ des Arbeitgebers wegen Verstoßes gegen das AGG?*, RECHT DER ARBEIT [RdA] 45 (2009) (F.R.G.); Andrea Potz, *Öffentliche Äußerungen eines Unternehmers im Lichte des europäischen Gleichbehandlungsrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL- UND ARBEITSRECHT [ZESAR] 495 (2008) (F.R.G.); Markus Sprenger *Aktuelle Tendenzen des EuGH im Diskriminierungsrecht—Rechtsprechung oder Rechtsfortbildung?* [Current Trends in Discrimination Law of the ECJ—Law or Legal Training?], BETRIEBS-BERATER [BB] 2405 (2008).

81. Case C-303/06, *Coleman v. Attridge Law & Steve Law*, 2008 E.C.R. I-5063; *Gerichtshof der Europäische Gerichte*, 38 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763 (2008); *Unmittelbare Diskriminierung einer Arbeitnehmerin wegen Pflege eines behinderten Kindes*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 932 (2008) (F.R.G.).

82. Frank Bayreuther, *Drittbezogene und hypothetische Diskriminierungen*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 986, 987 (2008) (F.R.G.); Markus Sprenger, *Aktuelle Tendenzen des EuGH im Diskriminierungsrecht—Rechtsprechung oder Rechtsfortbildung?* [Current Trends in Discrimination Law of the ECJ—Law or Legal Training?], BETRIEBSBERATER [BB] 2405, 2407 (2008) (F.R.G.); Felix Welti, *Rechtsprechung mit Anmerkungen*, in ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL UND ARBEITSRECHT [ZESAR] 148 (2009) (F.R.G.).

employers' association (*Rüffert*)⁸³ and the question of how far labor disputes may infringe upon the freedom of settlement (*Laval*⁸⁴ and *Viking Line*⁸⁵). These were, however, cases concerning labor law and therefore beyond the scope of this Essay.

A recent case in employment law referred to the law of vacations according to an EC Directive on working-time, Directive 2003/38/EC. The ECJ addressed, in a preliminary ruling presented by the state labor court of Düsseldorf, the *Schultz-Hoff* case,⁸⁶ which dealt with an employee who had been sick and unable to work from September 2004 through the end of 2005. In November 2005, when he was still unable to work and the employment relationship had already ended, Mr. Schultz-Hoff demanded the monetary substitute for the vacation days that he did not take during the years 2004 and 2005.

83. Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989; *Tarifvertrags—und Betriebs—verfassungsrecht*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 537 (2008) (F.R.G.); *Europarecht/Tarifvertragsrecht*, DER BETRIEB [DB] 1045, (2008) (F.R.G.); Hans-Peter Löw, *Neue Herausforderungen an das Arbeitsrecht*, 49 BETRIEBS-BERATER [BB] 834 (2008) (F.R.G.); NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3485 (2008) (F.R.G.); Steffan Klumpp, *Dienstleistungsfreiheit versus Tariftreue* [Providing Freedom versus Collective Agreements], 48 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3473 (2008) (F.R.G.); Patrick U. Jaap, *Tariftreueklauseln nach dem „Rüffert“—Urteil des EuGH* [Collective Agreements Clauses After the “Ruffert” Ruling of the EJC], in AUFSÄTZE [ZTR] 476 (2008) (F.R.G.); Achim Seifert, *Die vergaberechtliche Treuepflicht vor dem Europäischen Gerichtshof*, EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EuZA] 526 (2008) (F.R.G.); Rudolf Streinz, *Europarecht*, 49 JURISTISCHE SCHULUNG [JuS] 823 (2008) (F.R.G.); Gregor Thüsing & Thomas Granetzny, *Noch einmal: Was folgt aus Rüffert?*, 26 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 183 (2009) (F.R.G.).

84. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, 2007 E.C.R. I-11767; AP Art. 49 EG Nr. 15; *Bautarifverträge—Mindestlöhne—Freier Dienstleistungsverkehr*, 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 159 (2008) (F.R.G.).

85. Case C-438/05, *Int'l Transp. Workers' Fed. v. Viking Line ABP*, 2007 ECR I-10779; *Kollektive Maßnahme einer gewerkschaftlichen Organisation gegen private Seeschiffahrtsunternehmen*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 124 (2008) (F.R.G.); AP Art. 43 EG Nr. 3.

86. Joined Cases C-350/06 & 520/06 *Schultz-Hoff v. Deutsche Rentenversicherung Bund* 2009 E.C.R. I-00179; NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 495 (2009) (F.R.G.); (Author) (*Name of Article*), (Vol. No.) 26 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 135 (2009) (F.R.G.); Roland Abele, *Erlöschen des Urlaubsanspruchs bei Arbeitsunfähigkeit gemeinschaftswidrig*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 147 (2009) (F.R.G.); *id.* at 152; Jobst-Hubertus Bauer & Christian Arnold, 39 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 631 (2009) (F.R.G.); Gregor Dornbusch & Lara Ahner, *Urlaubsanspruch und Urlaubsabgeltung bei fortdauernder Arbeitsunfähigkeit des Arbeitnehmers*, 26 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 180 (2009) (F.R.G.); Björn Gaulm et al., *EuGH: Urlaubsanspruch trotz Dauerkrankheit*, in 2009 BETRIEBS BERATER [BB] 497 (2009) (F.R.G.).

According to German law, an employee who cannot take his vacation time in one year can transfer it into the next year,⁸⁷ but no later than the end of March in the following year. Accordingly, in November 2005, Mr. Schultz-Hoff no longer had any claims. Under German law, if the vacation time cannot be taken on account of the employer, the employee is entitled to the monetary substitute instead. In *Schultz-Hoff*, the reason that the vacation was not taken resulted from Mr. Schultz-Hoff's illness, thus a monetary substitute was unavailable. The ECJ ruled, however, that the EC Directive allows the transfer of vacation into the next year, if it cannot be taken because of sickness.⁸⁸

In the wording of the Directive, there is no such restriction. Therefore, the ECJ ruled that Mr. Schultz-Hoff could claim his vacation for 2004 and 2005 and that the restriction concerning the time limit of the end of March in the following year was invalid. The LAG Düsseldorf⁸⁹ accordingly granted the claimant the substitute money. This ruling is one of the several rulings in EC employment law that no one in Germany can understand. Again, the argument is not convincing if given by a court that seldom cares what the text of EC law says.

If the purpose of vacation is relaxation, an employee cannot demand relaxation in November 2005 for the year 2004. If the ECJ argued based on the meaning of an EC Directive and did not merely refer to the wording, it would have come to the same result as the German courts. The ECJ also argues that there is an International Labour Organization (ILO) convention which the ECJ claims would have led to the same result. Unfortunately, the ECJ has not read this convention. It does not allow claims of vacation after 18 months, so that contrary to the ECJ there is a time limit that should be respected.⁹⁰

CONCLUSION

In addition to special subjects in employment law, there are some methodological consequences in the rulings that I have discussed herein. In general, EC Directives for which the period of transformation has not yet passed have no pre-effect; there is only a prohibition of frustration, in that a law cannot be passed which is contradictory to the Directive. Within the basis

87. *Neueste Rechtsprechung des BAG in Leitsätzen*, 38 BETRIEBS-BERATER [BB] 2088 2006 (F.R.G.).

88. See Case C-342/01 Opinion of Advocate General Mischo, 2003 E.C.R. I-2607; *Jahresurlaub einer Arbeitnehmerin außerhalb des Mutterschaftsurlaubs*, 21 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 535 (2004) (F.R.G.).

89. The "LAG Düsseldorf" is the Landesarbeitsgericht (State Labor Court) in Düsseldorf, the capital of North Rhine-Westphalia.

90. In the meantime the BAG has adopted the ruling from *Schultz-Hoff*, BAG 24.3.2009; 9 AZR 983/07.

of EC law there is also a difference between primary law and secondary law. In general, only rules of the lowest step must be applied. Thus, if a Directive exists, the ECJ is not allowed to refer to primary law.

As all Directives in employment law serve to protect employees, contrary to the opinion of the ECJ, establishing the aim of a Directive requires a more nuanced argument than merely suggesting that the aim of the Directive is to protect employees. Instead, in all cases, there must be a consideration of the interests of both the employer and of the employees. If a Directive has multiple objectives, they must be regarded separately. If German law is contrary to EC law and if the legislator does not provide the change itself, German courts may try, by way of EC law, to conform their interpretation, or they may try to create new law in conformity with the EC in order to obtain the desired new results in German law. The idea of a presumption of the legislator following EC law may help, but this new manner of interpretation may lead to the courts acting instead of the legitimate legislator.

The jurisprudence of the ECJ, claiming that a retroactive effect of its ruling generally takes place and is not limited to cases where the ECJ takes into account the national legal orders, cannot be accepted. The citizens rely on the law of their member state. The national courts should endeavor to force the ECJ to change this unacceptable ruling.

The conclusion on the three rulings with respect to age discrimination must be different. In *Maruko*, the ECJ left it to the national court to determine whether there was a comparable legal situation—a procedure that must be welcomed. In *Feryn*, the intention to be politically correct overtook the legal arguments. The *Coleman* ruling can only be accepted if there is a narrow relationship between the employer and the third person.

It would be preferable if the ECJ would not only refer to the wording of Directives but would also ask what the meaning of a Directive is. For example, the meaning of vacation is recreation, and an employee cannot get 2004's recreation in the winter of 2005. New developments in case law may help to illuminate the difficulty of reception of ECJ rulings in national law.

ANNEX: ARTICLES AND SECTIONS QUOTED

EC-TREATY:

- Art. 141
- Art. 234

DIRECTIVES:

- 98/59/EC
- 2000/78/EC, Art. 1 – 6, 18
- 2001/23/EC
- 2003/38/EC

GERMAN CIVIL CODE (BÜRGERLICHES GESETZBUCH):

- Sec. 613 a

