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Andrea Eriksson*

Developments

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Introduction

Because every kind of discrimination is antithetical to the European integration process,¹ the principle of nondiscrimination is deeply embedded in European Union law. Indeed, a large body of nondiscrimination law has been

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developed by both legislative bodies and the European Court of Justice (ECJ). Thus, law relating to equality and nondiscrimination can be found in several distinct fields under the EC Treaty: the large body of internal market,\(^2\) citizenship,\(^3\) immigration,\(^4\) and labor\(^5\) law contains numerous rules providing for the equal treatment of products, companies, and natural persons. However, in European parlance, “nondiscrimination law” refers only to the rules that “aim to combat discrimination based on personal characteristics as an autonomous objective.”\(^6\) The core of European nondiscrimination law consists of the measures taken by the European Union (EU) under articles 13 and 141 EC—and their interpretation by the ECJ. Over the years the Court has developed an “extremely extensive case law”\(^7\) on the prohibition of discrimination, with the result that it has become not only the “engine of integration”\(^8\) but also a means of protection against discrimination. Its recent decisions in the Mangold,\(^9\) Maruko,\(^10\) Feryn,\(^11\) and Coleman\(^12\) cases have contributed considerably to the advancement of European nondiscrimination law.

In Mangold, to the surprise of most observers, the ECJ held that there exists in European law (1) a general principle of nondiscrimination on the ground


\(^3\) Art. 12, 17, 18 EC.


\(^6\) Schiek, Waddington & Bell, supra note 1, at 3.

\(^7\) Bruno Mestre, Discrimination by association: protected by EU Law but limiting the scope of Mangold, 2008 European Law Reporter 301.


of age. In *Maruko*, it declared the disadvantaged treatment of same-sex life partners relative to spouses to be direct discrimination on grounds of sexual orientation, thus ruling in favor of same-sex couples for the first time (2). The public announcement of an employer that he will not employ people of a certain ethnic origin was classified, in *Feryn*, as direct discrimination on grounds of racial or ethnic origin regardless of whether a specific victim of discrimination could be identified (3). Finally, in *Coleman*, the Court held that Directive 2000/78/EC\(^{13}\) prohibits discrimination not only against people who bear a specific attribute themselves but also against those associated with someone who has a protected trait (4). Taken together, these decisions demonstrate the Court’s inclination to extend protection against discrimination by interpreting the rules of nondiscrimination law expansively, thus giving them maximal effect.

1. **Werner Mangold v. Rüdiger Helm (C-144/04), judgment of the Court (Grand Chamber) of November 22, 2005**

1.1. **The judgment**

In *Mangold*, the Court had to deal with age discrimination, which is expressly prohibited in the November 2000 Framework Directive. Mr. Mangold, at the time aged fifty-six, was employed on a fixed-term basis in 2003 by Mr. Helm, who practiced law. In their contract of employment the parties justified the fixed-term clause by reference to the German Fixed-Term Employment Act,\(^{14}\) under which such employment contracts are lawful\(^{15}\) without further justification if the employee is aged fifty-two or more. Mr. Mangold brought proceedings before the national labor court claiming that the fixed-term clause, although in conformity with national law, was incompatible with European law, in particular, with the Framework Directive. Consequently, the Munich Labor Court referred the question of how to interpret that directive to the ECJ.

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\(^{14}\) § 14 Teilzeit- und Befristungsgesetz.

\(^{15}\) Under German law, fixed-term contracts without objective justification are generally void, i.e., the contract becomes an employment contract of unlimited duration and, as such, is subject to the usual possibilities of terminating the contract and, in particular, to laws of employment protection. For details as to the German legal situation, see *Mangold*, supra note 9, ¶ 14–19.
After finding the order for reference admissible, the Court considered the compatibility of the German statute with the Framework Directive and concluded that it entailed a differential treatment on the basis of age, which was not justified under article 6(1) of the directive. Even though the legislative purpose of promoting the vocational integration of unemployed older workers was legitimate, the Court concluded that the means used to achieve that objective went beyond what was appropriate and necessary. The Court based this finding mainly on the fact that the age of the worker was the only criterion used to justify the use of a fixed-term contract; thus, the personal situation of the particular individual was not adequately acknowledged.

However, the period prescribed for the transposition of the directive into domestic law had not yet expired (at the time the contract was concluded) since Germany had availed itself of an option to defer this deadline. Therefore, because the Framework Directive could not be applied directly, the Court rejected the claim for differential treatment.

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16 Admissibility had been questioned on grounds that the dispute in the main proceedings was fictitious or contrived, because Mangold’s employer also had publicly argued that the German Fixed Term Employment Act was incompatible with EC law. However, the Court reasoned that the interpretation of Community Law was relevant for the outcome of the case pending before the national court and, therefore, that the parties’ agreement on the validity of the national law could not affect the existence of the dispute. (Mangold, supra note 9, ¶¶ 32–38) For a detailed discussion on the admissibility, cf. Opinion of Advocate General Tizzano, of June 30, 2005, [2005] E.C.R. I-9981, ¶¶ 22 et seq.; See also Antoine Masson & Claire Micheau, The Werner Mangold Case: An Example of Legal Militancy, 13 Eur. Pub. L. 589 et seq. (2007).

17 The compatibility with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] O.J. (L175/43) (Framework Agreement), which is supposed “to prevent abuse arising from the use of successive fixed-term employment contracts,” has also been questioned. However, in the Court’s opinion, the interpretation of the Framework Agreement was irrelevant to the outcome of the dispute, as no successive fixed-term employment contract had been concluded (cf. Mangold, supra note 9, ¶ 43).

18 Mangold, supra note 9, ¶ 57.

19 Article 6 (1) of Council Directive 2000/78/EC states: “Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

20 Mangold, supra note 9, at ¶ 65.

21 Mangold, supra note 9, at ¶ 59.

22 Mangold, supra note 9, at ¶ 65.

the Court pursued another line of argument. First, it decided that the retention of a discriminatory norm during the transposition period conflicted with the rule that “Member States must refrain from taking any measures seriously liable to compromise the attainment of the result prescribed by [a] directive.” Second, the Court stated that “the principle of nondiscrimination on grounds of age [is] a general principle of Community law” whose observance was not dependent on the expiry of the directive’s transposition period. Accordingly, it was irrelevant whether the implementation period of the Framework Directive had elapsed, if the national rule in question fell within the scope of Community law. Furthermore, since the German Fixed-Term Employment Act had been created, inter alia, in order to implement the European Framework Agreement on Fixed-Term Work, any part of that statute must lie within the scope of Community law. Consequently, the ECJ concluded, “it is the responsibility of the national court to guarantee full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community Law, even where the period prescribed for transposition of that directive has not yet expired.”

1.2. Prohibition of age discrimination as a general principle of Community law?

The Court’s judgment is remarkable not for the finding that the German Fixed-Term Contract Act discriminates on grounds of age but, rather, for its presumption that there exists a general principle of Community law forbidding age

24 Mangold, supra note 9, ¶ 67 with reference to Case C-129/96, Inter-Environnement Wallonie ASBL v. Région Wallonne, [1997] E.C.R. I-7411, ¶ 45 (“Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed”). Settled Case Law, recently affirmed in Case C-212/04, Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG), [2006] E.C.R. I-6057, ¶ 121.

25 Id., ¶ 75.

26 Id., ¶ 76.

27 See supra note 17.

28 Mangold, supra note 9, at ¶ 78.
discrimination. It is for this aspect, in particular, that the decision has been criticized by scholars as well as by some of the Court’s advocates general.

According to articles 6(2) and 46 lit. (d) EU, the ECJ derives general principles of Community law from international human rights treaties, especially the European Convention on Human Rights (ECHR), and from the constitutional traditions common to the member states. Consequently, the Court referred in Mangold to “various international instruments and [...] constitutional traditions common to the Member States.” These instruments and traditions, indeed, enshrine the general principle of equal treatment; however, except for a few constitutions, they do not contain express prohibitions

29 Karl Riesenhuber, Case: ECJ—Mangold. 3 EUR. REV. CONTRACT L. 69 (2007). Besides, it has been argued that the judgment is remarkable for the Court’s change of its case law concerning horizontal direct effect of directives as between private parties (see e.g. Tonio Gas, Die unmittelbare Anwendbarkeit von Richtlinien zu Lasten Privater im Urteil “Mangold,” [The Direct Effect of Directives to the Detriment of Private Individuals in the Mangold decision] 16 EUROPAISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 737 (2005): Masson & Micheau, supra note 16, at 591 et seq.). However, as the Court based its reasoning on a general principle of European Community Law, the question of the (possible) horizontal direct effect of the Framework Directive did not need to be answered by the Court (see also Rudolf Streinz & Christoph Herrmann, Der Fall Mangold—eine “kopernikansische Wende im Europarecht”? [The Mangold Case—a Copernican Turn in European law?], 2007 RECHT DER ARBEIT 167).

30 See e.g., Monika Böhm, Umfang und Grenzen eines europäischen Verbots der Altersdiskriminierung im deutschen Recht [Scope and Limits of a European Prohibition of Age Discrimination in German Law]. 2008 JURISTENZEITUNG, 324–330; and Ulrich Preis, Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht, Der Fall Mangold und die Folgen [Prohibition of Age Discrimination as a European Fundamental Right: The Mangold Case and the Consequences], 23 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 410 (2006); Riesenhuber, supra note 29, at 62–71; Streinz & Herrmann, supra note 29, at 168. Many scholars also have dealt with the question of whether the Court has altered its case law concerning horizontal direct effect: cf., e.g., Jobst-Hubertus Bauer & Christian Arnold, Auf “Junk” folgt “Mangold”—Europarecht verdrängt deutsches Arbeitsrecht [Mangold follows Junk—European Law displaces German Labor Law, 59 NEUE JURISTISCHE WOCHENSCHRIFT, 9–12 (2006); Gas, supra note 29, at 737. As the Court has based its finding on the existence of a general principle of nondiscrimination on the basis of age, it did not have to elaborate on the horizontal direct effect of directives and accordingly has not done so. Cf. Streinz & Herrmann, id. at 167–168.


32 Mangold, supra note 9, at ¶74.

33 Only in Finland (art. 6(2) Finnish Constitution) and Portugal (art. 59(1) Portuguese Constitution) was discrimination on grounds of age expressly prohibited. Neither the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), nor the European Social Charter contains an express prohibition of discrimination on grounds of age. Kerstin Odendahl, Rechte älterer und behinderter Menschen (§ 42) [Rights of the Elderly and Disabled], in HANDBUCH DER EUROPÄISCHEN GRUNDRECHTE [HANDBOOK OF EUROPEAN FUNDAMENTAL RIGHTS] 1132, ¶8 (F. Sebastian M. Heselhaus & Carsten Nowak eds., C.H. Beck 2006).
against age discrimination.\textsuperscript{34} Nor does the EC Treaty contain such a prohibition. Article 13 EC merely enables the Community to “take appropriate action to combat discrimination based on . . . age. . . .” Even if the general principle of nondiscrimination on the basis of gender,\textsuperscript{35} which has been derived from article 141 EC (former article 119 EC) and its implementing legislation, is acknowledged as an independent principle, quite apart from the general principle of equality,\textsuperscript{36} it is a significant step further to infer from the latter the existence of a general principle specifically prohibiting age discrimination.

It is true that the general principle of equality implies, potentially, a prohibition of any discrimination on specific grounds. It is also true that any specific prohibition is an expression of that general principle.\textsuperscript{37} However, neither article 13 EC nor the implementing directives necessarily reflect a preexisting prohibition of all possible forms of discrimination. Rather, it is envisaged that the Community legislature and the member states may take appropriate action in this regard if they consider it necessary.\textsuperscript{38} For the Court to devise such a general

\textsuperscript{34} Böhm, supra note 30, at 326/327; Kerstin Odendahl, Diskriminierungsverbote (§ 45) [PROHIBITIONS OF DISCRIMINATION] in Handbuch der Europäischen Grundrechte [HANDBOOK OF EUROPEAN FUNDAMENTAL RIGHTS] 1219 et seq., ¶¶ 57 et seq. (F. Sebastian M. Heselhaus & Carsten Nowak eds., C.H. Beck 2006); Riesenhuber supra note 29, at 67; Felipe Temming, Freie Rechtsschöpfung oder nicht: Der Streit um die EuGH-Entscheidung Mangold spitzt sich zu [Free Creation of Law or not: The dispute about the ECJ Decision in “Mangold” is Sharpening], 61 Neue Juristische Wochenschrift 3404 (2008), arguing that these sources are sufficient for the deduction of a general principle.

\textsuperscript{35} Case 149/77, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, [1978] E.C.R. 1365, (decided Jun 15 1978), ¶¶ 26–27 [hereinafter Defrenne]. (“The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.”). For a discussion of the question whether EC law contains a general principle of equality, \textit{cf.} Mestre, supra note 7, at 302. For an overview of the principle of nondiscrimination based on sex, \textit{cf.} Andrea Eriksson, Diversity oder Gleichstellung der Geschlechter—Leitbilder des europäischen Antidiskriminierungsrechts [Diversity or Parity of the Sexes—Examples of European Antidiscrimination Law], in Europarecht aus Frauensicht [EUROPEAN LAW FROM A WOMEN’S PERSPECTIVE] (Beate Rudolf ed., Nomos forthcoming 2009).

\textsuperscript{36} \textit{Cf.} Opinion of Advocate General Sharpston, Bartsch, supra note 31, at ¶ 59.


\textsuperscript{38} Opinion of Mr. Advocate General Mazák, Palacios, supra note 31, at ¶138.
principle without a conclusive legal basis severely restricts the legislature’s prerogative and discretion to shape the scope and the limits of European nondiscrimination law.\(^{39}\) Now that the period for implementation has elapsed and all member states are bound by the Framework Directive, there is no question that the principle of nondiscrimination on the grounds of age is a general one. However, at the time of the \textit{Mangold} decision, this was not the case. To base its finding, legally, on the existence of a general principle of prohibiting age discrimination, the Court should have shown in detail that such a principle actually existed at that time.\(^{40}\) Be that as it may, it merely made a reference to the general principle of equality, which exists, obviously, though it is not identical to the specific prohibition of age discrimination.

The Court’s position would have been strengthened if it had taken into account articles 21 and 25 of the European Charter of Fundamental Rights\(^{41}\) as proof of the member states’ general wish to prohibit age discrimination. However, the charter was not, and still is not, binding law.\(^{42}\) Moreover, merely because the Framework Directive was concluded unanimously does not, in itself, prove the existence of a general principle in that sense: by adopting the directive, the member states wished to be bound by its provisions after the implementation period has elapsed. There is no indication that they wished merely to affirm an already binding principle. Even though age discrimination sometimes is considered in international law to fall under the rubric of discrimination on grounds of “other status,”\(^{43}\) this does not raise the specific prohibition

\(^{39}\) Riesenhuber, \textit{supra} note 29, at 68.

\(^{40}\) As it had done, for example in \textit{Defremne}, \textit{supra} note 35, ¶¶ 26–28 and Case 44/79, Hauer v. Land Rheinland-Pfalz, [1979] ECR 37327, ¶¶ 17 et seq.

\(^{41}\) 2000 O.J. (C 364) 1; article 21 (Non-discrimination) “1. 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 shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited”; article 25 (The rights of the elderly) “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

\(^{42}\) Cf. Opinion of Advocate General Kokott, on Oct 14 2004, Joined Cases C-387/02, C-391/02 and C-403/02, \textit{Silvio Berlusconi and Others}, [2005] E.C.R. I-03565, footnote 83: “Although this Charter does not yet have binding legal effect comparable to that of primary law, it does at least, as a legal reference, provide information on the fundamental rights guaranteed by the Community legal order.” After the entry into force of the Treaty of Lisbon (2007 O.J. (C 306) 1), the new article 6(1)(1) EU will make the Charter binding on the member states.

of age discrimination to the level of a general principle of Community law; the international jurisprudence to that effect is “too recent and uneven.” In view of these considerations, the ECJ was rightly reproached for having exceeded its competence by contriving a general principle of Community law prohibiting the discrimination on the basis of age.

Nonetheless, the Court, once again, affirmed the existence of such a general principle in its recent decision in Bartsch, even though it denied its applicability to the instant case. It held that the general principle must be applied where there is a link with Community law. While it is true that, in several other decisions in the field of nondiscrimination law, the Court did not mention the existence of a general principle of nondiscrimination on specific grounds, this was because such a reference was not necessary. In those cases, the Court could rely directly on article 141 EC or on the respective directives themselves, as the period for transposition of the directives had expired. Certainly, in those decisions and, in particular, in Bartsch the ECJ had the chance to introduce the legal basis for a general principle of nondiscrimination on specific grounds by


45 Supra note 30.


47 Bartsch, supra note 46, at ¶ 25: “... the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law.”

48 Cases C-17/05, B. F. Cadman v Health & Safety Executive, 2006 E.C.R. I-09583 (decided Oct 3 2006) concerning art. 141 EC merely mentions the existence of the general principle of equality (¶ 28); Palacios, supra note 38; Coleman, supra note 12; Feryn, supra note 11. In Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA, [2006] E.C.R. I-06467 (decided Jul 11 2006), ¶ 56, the Court did make a reference to the general principle of nondiscrimination but decided “that the scope of Directive 2000/78 should [not] be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof.” Thus far, this decision is also in line with the case law—a general principle of nondiscrimination in relation to specific grounds has not again been recognized.

49 Frank Bayreuther, Altersdiskriminierung bei Ausschluß eines Ruhegeldanspruchs bei fünfzehn Jahre jüngeren Ehegatten [Age Discrimination in the Exclusion of a Title to a Pension to Spouses, Fifteen Years Younger], 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 698 (2008).

50 Cadman, supra note 48.

51 Palacios, supra note 38; Coleman, supra note 12; Feryn, supra note 11.
dealing with the arguments raised by the critics of Mangold and by elaborating on the origin, scope, and contents of such a principle. As this was not necessary for the judgment in the specific cases, the Court refrained from doing so.

Thus, one is left to conclude that, since Mangold, the ECJ acknowledges a general principle of nondiscrimination on grounds of age. Regardless of whether its derivation of that principle in Mangold is convincing or not, the Court’s recognition has rendered the principle valid European law, especially since the member states have tacitly accepted this jurisprudence by not even discussing the inclusion of any provision to the contrary in the EC treaty. Since Mangold, the Court has not “detached” the principle of nondiscrimination from the existing directives, suggesting that, while it remains well disposed toward European nondiscrimination law, it does not lightly exceed its competence. It seems, then, that the judgment in Mangold, while it did not herald the beginning of an “all-embracing European Anti-Discrimination law,” nonetheless introduced a general principle with regard to age discrimination that enhanced European protection against discrimination.


53 In Bartsch, supra note 46, at ¶ 24, the Court held that there was no link with Community Law. For a discussion of this part of the judgment, see Preis & Temming, supra note 52. For the other cases, cf. supra notes 50 and 51.

54 The decision of the German Constitutional Court in the (pending) Honeywell Bremsbelag case (2 BvR 2661/06) will not influence the validity of the general principle of nondiscrimination on grounds of age. Should the German Constitutional Court follow the Mangold critics and argue that the ECJ exceeded its competences and that, therefore, the decision need not be observed (cf. Temming, supra note 34, at 3404), its judgment would be contrary to European Community Law, especially to the principle of supremacy of Community Law over national (see Case 6/64, Flaminico Costa v. Enel, [1964] E.C.R. 585 (decided July 15 1964). See generally Craig, supra note 23, at 344 et seq.


2. Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (C-267/06), judgment of the Court (Grand Chamber) of April 1, 2008

2.1. The judgment

Maruko concerned discrimination on grounds of sexual orientation, which is also expressly prohibited in the Framework Directive. The case concerned a homosexual man in a registered same-sex life partnership. After the death of his life partner, Mr. Maruko’s application for a widower’s pension was rejected by his partner’s pension institution on the basis that only spouses were entitled to this benefit. Mr. Maruko challenged this decision in a domestic court, arguing that it constituted discrimination on grounds of his sexual orientation. Because the Framework Directive prohibits such discrimination in the field of employment, the court referred the matter to the ECJ for a preliminary ruling.

After explaining in detail that the widower’s pension should be classified as pay within the meaning of article 3(1)(c) of the Framework Directive, the Court dealt rather tersely with the significance of Recital 22 of the preamble to the directive, which states that the “Directive is without prejudice to national laws on marital status and the benefits dependent thereon.” The pension institution had deduced from this clause that the Framework Directive did not apply to provisions of national law relating to civil status or benefits accruing from that status, such as survivor’s benefits. However, the Court found that, although civil status and its benefits are matters falling within the competence of the member states, the latter must comply with Community law and, especially, with the principle of nondiscrimination when exercising that competence. Without addressing the general question of the significance of preamble recitals, the Court concluded that Recital 22 could not affect the application of the directive.

The next issue before the Court was whether the rejection of Mr. Maruko’s application violated the directive’s prohibition of discrimination on grounds of sexual orientation. In light of the directive’s purpose, which, according to article 1, is to combat certain forms of discrimination in the field of employment and occupation, the Court reasoned that, if the situation of a surviving life partner is comparable with that of a spouse, the denial of a survivor’s benefit to life partners constitutes a direct discrimination within the meaning of articles 1 and 2(2)(a) of the Framework Directive. The question of the comparability

57 Maruko, supra note 10, at ¶¶ 40–56.

58 Maruko, supra note 10, at ¶ 39 (reiterating the arguments of the pension institution). For an argument in the same sense, see e.g., the German Constitutional Court, BVerfG (2 BvR 855/06), (decided Sep 20 2007), 61 N EUE J URISTISCHE W OCHENSCHRIFT, 213 (2008).

59 Maruko, supra note 10, at ¶¶ 58/59.

60 Maruko, supra note 10, at ¶¶ 65 et seq.
between life partners and spouses was, as an issue of national law, referred back to the national court.\footnote{Maruko, supra note 10, at ¶ 73.}

### 2.2. Discrimination against same-sex life partners as compared with spouses—discrimination on grounds of sexual orientation?

While the classification of the widower’s pension in question as “pay,” within the meaning of the directive, merely reaffirmed previous case law,\footnote{Manfred Bruns, Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung [The Maruko Decision: in conflict between European and National Interpretations], 61 NUE JURISTISCHE WOCHENSCHRIFT 1929 (2008).} the finding that the denial of a pension to a homosexual life partner can constitute direct discrimination on grounds of sexual orientation renders Maruko remarkable and, thus, much discussed.\footnote{See, e.g., Matthias Mahlmann, Gleichstellung gleichgeschlechtlicher Lebenspartnerschaften bei Hinterbliebenenversorgung [Equality of Same-Sex Lifepartnerships Concerning Survivor’s Benefits], 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 314–319 (2008); and Andrea Potz, Gleichstellung homosexueller Paare bei der Hinterbliebenenversorgung [Equality of Homosexual Couples with Respect to Survivor’s Benefits], 61 RECHT DER WIRTSCHAFT 405–408 (2008).}

Ten years earlier, in Grant v. South West Trains,\footnote{Case C-249/96, Grant v. South-West Trains, [1998] E.C.R. I-00621, (decided Feb. 17 1998).} the Court had denied that a collective agreement refusing same-sex couples the benefits granted to heterosexual couples amounted to discrimination. However, this was before the adoption of the Framework Directive; thus, the claim for discrimination could only be based on article 141 EC concerning equal pay for men and women. The Court had held that the collective agreement was not discriminatory in the sense of article 141, since both male and female same-sex couples were denied the benefit. This cautious approach by the ECJ toward the question of sexual-orientation discrimination\footnote{Mestre, supra note 7, at 303.} can thus be explained by the legal situation at the time.\footnote{For a discussion of the judgment, see Mark Bell, Anti-Discrimination Law and the European Union 109 et seq. (Oxford Univ. Press 2002).}

Now, however, in Maruko, the Court was guided by the prohibition of discrimination on grounds of sexual orientation expressly stated in the Framework Directive. According to that text, direct discrimination occurs when one of two persons in a comparable situation is treated less favorably than the other on grounds of religion, beliefs, disability, age, or sexual orientation. In contrast, indirect discrimination arises when an apparently neutral provision places persons having a certain religion, disability, age, or sexual orientation at a particular disadvantage compared with other persons.\footnote{Article 1 and 2 of the Framework Directive.} Under the national rule...
in question, only an applicant who had been married to the deceased would be entitled to survivor’s benefits. Accordingly, Mr. Maruko’s pension, at first glance, was denied on the basis of his civil status and not on any of the grounds prohibited by the directive. However, in general and in practice, it is heterosexuals who get married and homosexuals who establish registered partnerships.\textsuperscript{68} Thus, making eligibility for a survivor’s benefit dependent on the civil status of being married is a distinction that could be defined as indirect discrimination based on sexual orientation.\textsuperscript{69}

The ECJ takes a different view, regrettably without discussing the reasons for its ruling; it simply states that where surviving spouses and surviving life partners are in comparable situations, the denial of a pension to the latter constitutes direct discrimination on grounds of sexual orientation.\textsuperscript{70} There are two likely reasons for this conclusion.

First, the Court sought to render a decision that was “true-to-life” and “down-to-earth”\textsuperscript{71} and that furthered the purpose of the directive.\textsuperscript{72} It might have made its point clearer by remarking, explicitly, that neither registered heterosexual life partners nor homosexual spouses—despite their theoretical possibility\textsuperscript{73}—occur all that often in real life. It is not a question of homosexuals being affected detrimentally in greater numbers than heterosexuals. In fact, it is only homosexuals who are surviving life partners and, thus, are denied the survivor’s pension. Differentiations on grounds of having been married or having entered into a life partnership, therefore, exclusively affect people with a specific sexual orientation and, consequently, discriminate directly on grounds of it.\textsuperscript{74}

This approach is not inconsistent with the Court’s prior case law. In \textit{Schnorbus},\textsuperscript{75} a woman had contested the possibility of “priority access” to practical legal training for those who had completed military service (or its civilian

\textsuperscript{68} Under the German Life-Partnership Law, it is possible for two homosexuals of the opposite gender to marry one another, or for two heterosexuals of the same gender to establish a registered life partnership, although neither is a loving couple (see also Mahlmann, \textit{supra} note 63, at 319). When recognizing a marriage or a life partnership, the state does not inquire as to the motivation behind it. However, the Life-Partnership Law was designed to enable homosexual couples to enter into a life partnership. Thus, in fact, it is only homosexual men and women who fall under the scope of the Law on Registered Life Partnerships, whereas it is only heterosexual people who are married.

\textsuperscript{69} For this view, see German Constitutional Court \textit{supra} note 58, at 210 and German Federal Administrative Court (BVerwG—6 C 27/06) (decided July 25 2007), \textit{61 N EUE JURISTISCHE WOCHENSCHRIFT} 247 (2008).

\textsuperscript{70} \textit{Maruko, supra} note 10, at ¶72.

\textsuperscript{71} In the same sense Mahlmann, \textit{supra} note 63, at 319.

\textsuperscript{72} \textit{Maruko, supra} note 10, at ¶65.

\textsuperscript{73} \textit{Supra} note 68.

\textsuperscript{74} Mahlmann, \textit{supra} note 63, at 319; Potz, \textit{supra} note 63, at 408.

equivalent) as direct discrimination on grounds of gender, since only men were obliged to perform this service in Germany. The Court held the national rule in question to be indirect discrimination because, besides the completion of military service, it provided for a number of other, different circumstances to be taken into account for priority access. Thus, in contrast with the situation in Maruko, in the Schnorbus decision women were also entitled, by law and in fact, to the favorable treatment.

Second, the assumption in Maruko of direct discrimination makes it impossible to justify differential treatment. The exceptions in articles 2(5), 76 4, 77 and 778 of the directive clearly do not apply; nor can any justification for direct discrimination be found elsewhere in the text.79 Indirect discrimination, by contrast, could be justified if a legitimate state aim were pursued by appropriate and necessary means.80 It has been argued that the special protection and advancement of marriage, stipulated in article 6 of the German Constitution, could be a legitimate aim that would be furthered by privileging spouses.81 By considering the differentiation between spouses and life partners as direct discrimination, the ECJ avoided dealing with that argument, which, on closer examination, is hardly persuasive. To treat registered life partners less favorably than spouses does not further marriage, since under German law homosexual couples cannot choose between marriage and registered life partnership. No homosexual person is likely to choose marriage to a person of the opposite sex over entering into a registered life partnership with a same-sex partner in order to create the entitlement to a survivor’s pension.82 However, to classify the situation as direct discrimination leaves no room for justification. Thus, the ECJ enhanced rights protection for homosexuals while avoiding direct conflict with the German judiciary. Nonetheless, the ruling would have been judicially less contestable if the Court had examined and rejected the grounds that could be raised in justifying differential treatment of spouses and gay life partners.

The crucial question of whether the situations of spouses and life partners actually are comparable, in the sense of article 2(2)(a) of the Framework

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76 “This Directive shall be 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.”

77 Concerning Occupational Requirements.

78 Concerning Positive Action.

79 Potz, supra note 63, at 408; Schiek, Waddington & Bell, supra note 1, at 273.

80 Article 2 (2) (b) (i) of the Framework Directive.

81 German Constitutional Court supra note 58, at 210; BVerwG. supra note 69; see Potz, supra note 79, at 408 (footnote 47).

Directive, is a question of national law; therefore, it was referred back to the national court. Nevertheless, albeit implicitly, the Court shows its presumption of comparability, ruling, for the first time, in favor of same-sex couples. Of course, as long as the highest German courts continue to deny this comparability, the significance of the Maruko decision may be diminished, at least in Germany. However, the ECJ clarified in Maruko that it was not marriage and life partnership, in general, but, rather, the situations of spouses and life partners with respect to the specific benefit in question, that were to be compared. Because, under German law, the duties to care for each other and to commit themselves, mutually, to a lifetime union are now identical for spouses and life partners, the German courts no longer have grounds for refusing to align the benefits granted to respective survivors. In line with the ECJ’s judgment, the referring national court in Maruko has concluded that these statuses are comparable so far as the granting of survivor’s benefits are concerned. It remains to be seen whether the higher courts will follow suit and do their part for nondiscrimination on grounds of sexual orientation.

Additionally, it is not only the assumption of direct discrimination that advances the protection of homosexuals but also the ECJ’s finding that, although matters of civil status fall within the competence of the member states, they must adhere to European law when exercising that competence within the scope of the EC Treaty. If the member states decide to introduce a special civil status for homosexual couples, they must do so in conformity

83 Maruko, supra note 10, at ¶72 read together with ¶69. See also Mark Lembke, Sind an die Ehe anknüpfende Leistungen des Arbeitgebers auch an Lebenspartner zu gewähren? [Are Employer-Provided Benefits Based on Marital Status also to be Granted to Life Partners?], 61 N EUE J URISTISCHE W OCHENSCHRIFT 1633 (2008).


86 Maruko, supra note 10, at ¶72.

87 Stüber, supra note 82, at 751.


89 Maruko, supra note 10, at ¶59.

90 As opposed to making marriage available to homosexual couples, as, for example, the Netherlands, Belgium, Sweden and Spain have done (Michael Coester, Art. 17 b EGBGB, Eingetragene Lebenspartnerschaft [Article 17 b Introductory Act to the German Civil Code, Registered Lifepartnership], in M ÜNCHENER K OMMENTAR Z UM B GB [M UNICH C OMMENTARY ON THE (G ERMAN ) C IVIL C ODE ¶ 143 (Kurt Rebmann, Roland Rixecker & Franz Jürgen Säcker eds., C.H. Beck 2006).
with the principle of nondiscrimination as contained in Directive 2000/78/EC and ensure that they are not discriminated against in the field of employment.\(^{91}\) Thus, in *Maruko*, the ECJ contributed to the protection of homosexual men or women against discrimination, in good company with other international courts and human rights bodies.\(^{92}\)

3. **Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn (C-54/07), judgment of the Court (Second Chamber) of July 10, 2008**

3.1. **The judgment**

In *Feryn*, the ECJ had to deal with racial discrimination, which is expressly prohibited in Directive 2000/43/EC\(^{93}\) (Race Directive). Mr. Feryn, the director of a Belgian company that installed safety doors, had made public statements to the effect that his business was planning to recruit fitters but it could not employ “immigrants,” as its customers were reluctant to give them access to their private residences to perform the work. Consequently, the Belgian organization designated to promote equal treatment under article 13 of the Race Directive applied to the Belgian labor court for a finding that Feryn had a discriminatory recruitment policy. Because it did not claim or show that anyone had actually applied for a job and had not been employed because of his or her ethnic origin, the Belgian Labor Court asked the ECJ for a preliminary ruling regarding the scope of direct discrimination in light of the public statements made by Feryn, the conditions of the reversal of the burden of proof for discrimination, and the kind of penalties to be imposed.

First, the Court concluded—again referring to the purpose of the directive—that direct discrimination can occur even when a specific victim cannot be identified.\(^{94}\) It held that the question of what constitutes direct discrimination must be distinguished from the question of who is entitled to bring a claim for

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\(^{91}\) Bruns, *supra* note 62, at 1929.


\(^{94}\) *Feryn*, *supra* note 11, at ¶ 25.
The public statement of an employer that he will not recruit employees of a certain national origin is likely to dissuade certain candidates from submitting their applications and, accordingly, to hinder their access to the labor market. Consequently, such a statement constitutes direct discrimination within the meaning of the Race Directive, regardless of who brings a claim. The ECJ concludes, furthermore that, under article 8(1) of the directive, a public statement of this kind can trigger a shift of the burden of proof such that it is for the employer to rebut the presumption that he has applied a directly discriminatory recruitment policy. As to the issue of which kind of sanctions may be appropriate, the decision draws on article 15 of the directive, reiterating that possible sanctions must be “effective, proportionate and dissuasive.” The Court held that when there is no identifiable victim, both a prohibitory injunction and the award of damages to the body bringing the claim may fulfill these criteria.

3.2. Direct discrimination without an identifiable victim?

The finding that a refusal to employ immigrants constitutes racial or ethnic discrimination within the meaning of the Race Directive is hardly surprising. However, that such discrimination can be inferred from an employer’s public statement, where a specific victim cannot be identified, shows the Court’s willingness to interpret European nondiscrimination law widely in order to render it fully effective.

Under article 2(2)(a) of the Race Directive, direct discrimination occurs “where one person is treated less favorably than another . . . in a comparable situation on grounds of racial or ethnic origin.” The wording of article 2, thus, seems to demand that a specific person has actually been discriminated against. The Court’s reasoning, however, is centered on the directive’s purpose, namely, to foster conditions for a socially inclusive labor market. If people of a particular race are dissuaded from even applying for employment by the public statements of an employer, their access to the labor market is hindered and the market is not socially inclusive. Consequently, even potential applicants are protected by the principle of racial nondiscrimination contained in the Race Directive; thus, even hypothetical acts of discrimination are prohibited. The European Court of Justice thus has broadened the scope of the protection against discrimination from a subjective right of a specific person to

95 Feryn, supra note 11, at ¶¶ 26/27.
96 Emphasis added.
97 Recital 8 of the Preamble to the Race Directive.
a preemptive right of society. In this sense the principle of nondiscrimination serves not only the protection of individuals but also the creation of a nondiscriminatory society.

With respect to the purpose of the directive and the result achieved, the Court’s decision is convincing. However, it did not address two important issues raised by the case.

First, the ECJ, as opposed to its advocate general, did not deal with the question of whether it matters that the discrimination took place because of Mr. Feryn’s customers’ preferences. One may conclude that the Court found it absurd to justify an instance of discrimination by referring to the discriminatory wishes of one’s customers, as this would amount to justifying racial discrimination with racism.

Second, the Court, like the advocate general, did not discuss the extent to which the employer, when publicly making discriminatory statements, can rely on his fundamental right of freedom of expression, which is protected under European law. According to settled case law, the exercise of this freedom may be restricted, provided that the restriction proportionately serves objectives of general interest. Clearly, the principles of equality and nondiscrimination are in the general interest and of special importance within Community law. Since, these prevail, when balanced with freedom of expression, a reliance on freedom of expression would not have produced a different result. Nonetheless, the Court’s decision would be less contestable had it disposed of these two issues and rebutted, at least briefly, the potential arguments. However, this omission does not diminish the importance of the Court’s finding that hypothetical discrimination lies within the scope of the directive. Clearly, this line of reasoning is applicable with respect to other grounds of discrimination; thus, public statements of unwillingness to employ women, homosexuals, or people of a certain religion would be equally liable to sanction. Thus the
protection against discrimination with respect to any of the grounds listed in article 13 EC is considerably enhanced.

4. S. Coleman v. Attridge Law and Steve Law (C-303/06), judgment of the Court (Grand Chamber) of July 1, 2008

4.1. The judgment

The issue in Coleman was discrimination on grounds of disability, which is also prohibited in the Framework Directive. Ms. Coleman had worked as a legal secretary since 2001 and given birth to a disabled child in 2002. The child required special care, which was mainly provided by Ms. Coleman. In March 2005, she accepted voluntary redundancy but proceeded to bring a claim under national law against her former employer for disability-related discrimination and harassment, alleging that the employer had treated her less favorably than employees with nondisabled children and had subjected her to treatment that created a hostile atmosphere for her.

Under the applicable U.K. law, a person discriminates against a disabled person if he treats him less favorably than he treats others for a reason related “to the disabled person’s disability.” The cause of action, therefore, is expressly limited to those subjected to discrimination because they are disabled. The Framework Directive, on the other hand, provides that direct discrimination occurs when one person is treated less favorably than another “on any of the grounds referred to in Article 1.” Similarly, harassment is deemed a form of discrimination “when unwanted conduct related to any of the grounds referred to in Article 1 takes place…” When Ms. Coleman alleged that her less favorable treatment had occurred because of her son’s disability and not her own, the domestic employment tribunal—in light of the difference in wording between the Framework Directive and the national law—turned to the ECJ for a preliminary ruling on this question of interpretation.

The main question to be answered by the ECJ, then, was whether the Framework Directive also protects nondisabled people who, in the employment context, suffer direct discrimination and/or harassment because of their connection with a disabled person. The Court could not find an express limitation in the wording of the directive as to who could claim protection. Rather, its reasoning is centered, once more, on the purpose of the directive, which is

104 Section 2 A (1) of the British Disability Discrimination Act–DDA.

105 Article 2(3) of Directive 2000/78/EC.

106 Coleman, supra note 12, at ¶27. Also Advocate General Maduro identified this single issue of law arising in the case. (Opinion of Advocate General Maduro, of Jan 31 2008, ¶ 6.)

107 Coleman, supra note 12, at ¶38.
not only to protect disabled people but also to combat all forms of discrimination “on grounds” of disability in the field of employment. The principle of equal treatment as contained in the directive, therefore, does not apply to a particular category of persons but by reference to the grounds mentioned in article 1. Consequently, employees who are not disabled but who are discriminated against because of the disability of a person connected with them fall within the personal scope of the directive. In the ECJ’s opinion, even the provisions, which are designed to accommodate the needs of disabled people, do not limit the personal scope of the directive or require its restrictive interpretation.

In the Court’s view, such a broad interpretation of the personal scope of the directive does not conflict with its own prior judgment in Chacon Navas. In that case, which concerned the question of whether HIV should be considered a disability in the sense of the directive, the ECJ had stressed that the scope of the Framework Directive could not be extended beyond the grounds listed exhaustively in article 1. However, the Court now clarifies that it did not intend for the directive’s scope, rationae personae, to be interpreted strictly with regard to those grounds. An interpretation of the Framework Directive “limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.”

4.2. “Discrimination by association” within the scope of European non-discrimination law?

Again, the primary argument of the ECJ was the desire to render the principle of nondiscrimination fully effective. For the first time, the Court recognized as a matter of European law the existence of a concept of “discrimination by association.” Such is said to occur when a person is treated detrimentally because of his or her connection with someone possessing a protected attribute. This considerably broadens the personal scope of nondiscrimination law, in

108 Articles 5 and 7(2) of the Framework Directive.

109 Coleman, supra note 12, at ¶ 39–43.


111 Coleman, supra note 12, at ¶ 46.

112 Coleman, supra note 12, at ¶ 56.

113 In English law the concept of “Discrimination by Association” is a subcategory to the doctrine of “Transferred Discrimination” comprising also other factual situations where the victim of discrimination is not actually carrying a protected characteristic himself. For a full analysis of this doctrine, see Simon Forshaw & Marcus Pilgerstorfer, Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination 19 Kin’s L. J. 265–292 (2008).

114 Forshaw & Pilgerstorfer, supra note 113, at 271; Mestre, supra note 7, at 303.
general, and the Framework Directive, in particular.\textsuperscript{115} Even though the instant judgment was delivered with respect to disability only, the underlying rationale is applicable across the range of prohibited grounds contained in the Framework Directive.\textsuperscript{116} Due to the identical formulation of the relevant directives, this clearly applies to gender\textsuperscript{117} and race\textsuperscript{118} discrimination as well.\textsuperscript{119}

However, two questions remain: first, what must be the nature of the association between the victim of discrimination and the person with the protected attribute for the protection to be extended? Although the advocate general argued that “discrimination by association”\textsuperscript{120} is prohibited by the directive, the Court reasoned, merely, that the discrimination was based on the “child’s disability.”\textsuperscript{121} However, this should not be understood as restricting the protection of the antidiscrimination directives to situations in which parents are discriminated against, since the Court’s central argument applies equally to other close relationships, such as those between spouses, life partners, or siblings. For now, it must be assessed on a case-by-case basis whether the relationship is sufficiently close.\textsuperscript{122}

Second, the Court’s judgment does not resolve the issue of whether indirect discrimination by association is also prohibited.\textsuperscript{123} With respect to indirect discrimination by association, the wording of the directives is clear; indirect discrimination, as defined in article 2(2)(b) of the Framework Directive, occurs where an apparently neutral provision would put “persons having a particular

\textsuperscript{115} Lindner, supra note 100, at 2751; Anja Lingscheid, Diskriminierung wegen einer Behinderung—auch bei “bloß” behindertem Kind [Discrimination on Grounds of Disability—also when it pertains “just” to a Disabled Child], 2008 BETRIEBSBERATER 1964.

\textsuperscript{116} Bayreuther, supra note 98, at 987; Anja Lingscheid, supra note 115; Marcus Pilgerstorfer & Simon Forshaw, Transferred Discrimination in European Law, 37 INDUST. L. J. 389 (2008); Gabriel N. Toggenburg, Discrimination by association: A notion covered by EU equality law?, 2008 EUR. L. REPORTER 87.


\textsuperscript{118} Race Directive, supra note 97.

\textsuperscript{119} Pilgerstorfer & Forshaw, supra note 116, at 389.

\textsuperscript{120} Coleman, supra note 12, at ¶ 19.

\textsuperscript{121} Coleman, supra note 12, at ¶ 48.

\textsuperscript{122} Bayreuther, supra note 98, at 987.

\textsuperscript{123} Arguing for such a wide interpretation of the concept is, for example, Lisa Waddington, Protection for Family and Friends: Addressing Discrimination by Association, 2007 EUR. ANTI-DISCRIM.L.REV. 15.
[characteristic] at a particular disadvantage. Similarly, it is “persons of a racial or ethnic origin” or “persons of one sex” who are protected in the Race Directive and the Gender Directive, respectively. As the limit of interpretation lies in the wording of a legal rule, indirect discrimination by association is not prohibited by the directives. This means, for example, that an employer would not be sanctioned if he required for the promotion of employees to area managers that their spouses or partners move with them to that area, and if he refused to promote someone because the disabled spouse needed special care and, for this reason, could not move. Even if this is unsatisfactory, in light of the purpose of the principle of nondiscrimination, it is not for the Court but for the legislative bodies of the EU to adjust the wording of the directives so as to include indirect discrimination by association.

What remains from Coleman is that the Court has incorporated direct discrimination by association into the scope of protection in order to render the directive fully effective, again arguing on the basis of the purpose of nondiscrimination law and interpreting the legal rules expansively. This serves, once again, to enhance the protection against discrimination within the European Union.

5. Conclusion

In its recent decisions, the European Court of Justice has shown its inclination to expand notions of what constitutes discrimination. Initially, nondiscrimination law was interpreted as protecting individual rights and aiming at market integration. In its case law, the Court complemented this individual market-based tendency by stressing the general sociopolitical objective of the protection against discrimination. The spirit and purpose of European nondiscrimination law, in the Court’s interpretation, involves not just the protection of the individual against unfair or detrimental treatment on the basis of

124 Emphasis added.
125 Article 2(2)(b) Race Directive (emphasis added).
126 Article 2(1)(b) Gender Employment Directive and article 2(b) Gender Goods and Services Directive (emphasis added).
127 Toggenburg, supra note 116, at 86.
128 Toggenburg, supra note 116, at 87. E.g., it was the ECJ that introduced the notion of indirect discrimination before it was expressly included in Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on gender [1998] OJ (L 14/6), (SANDRA FREIDMAN, DISCRIMINATION LAW 107 (Oxford Univ. Press 2002).
129 Mestre, supra note 7, at 303.
130 Bayreuther, supra note 98, at 990.
particular attributes but also the fight against all forms of discrimination within the member states in order to ensure the development of “tolerant societies.”

In the four decisions discussed here, the Court has enhanced, considerably, the protection against discrimination in Europe. In Mangold, the Court developed the general principle of nondiscrimination on grounds of age even though the Framework Directive was not yet applicable. In Maruko, it made the justification of a differential treatment between registered life partners and spouses virtually impossible and thus ruled in favor of homosexual couples for the first time. In Feryn, it brought hypothetical discrimination into the ambit of European nondiscrimination law, and, in Coleman, it introduced the principle of discrimination by association into European nondiscrimination law.

In all these decisions, the Court was prompted by the desire to render European nondiscrimination law fully effective and to further combating discrimination in society; sometimes, it was even inclined to exceed its competences to achieve that end. Although, after Mangold, it was criticized for having “turned into a self-righteous body destined to protect against all forms of discriminations and achieve at the judicial level what could not be achieved at the national political level,” its recent decisions show that the Court does not wish to replace the legislature but that it will interpret the law so as to ensure the full effectiveness of the law. It is the purpose of the provisions of the EC Treaty empowering the Union to combat discrimination and of the directives enacted on that basis, that drive the Court to stretch its competences and interpret the existing law expansively. The ECJ reasons pragmatically and teleologically and is likely to broaden further the scope of European nondiscrimination law in future. Whatever criticisms have been aimed at the Court for exceeding its competences, its jurisprudence in Mangold, Maruko, Feryn, and Coleman has considerably contributed to the advancement of protection against discrimination in the European Union.

111 Recital 12 to the Preamble of the Race Directive.

112 Mestre, supra note 7, at 304.

113 Art. 13, 141 EC.

114 For the same result, see Lindner, supra note 100, at 2752; and Bayreuther, supra note 98, at 990.