3. As for the objectives pursued by the directive, it is important to note that that directive seeks, *inter alia*, to protect the commercial agent in his relations with the principal. It is therefore necessary to interpret the wording of Article 17(2) in a manner which contributes to the protection of the commercial agent and which therefore takes full account of the merits of the latter in carrying out the transactions assigned to him. The concept of 'new customers', within the meaning of that provision, may not therefore be construed restrictively (§ 33).
4. In light of the foregoing, the view must be taken that it is in relation to the goods in respect of which the commercial agent was assigned by the principal to negotiate and, if applicable, to conclude the sale or purchase that it is necessary to determine whether a customer is new or existing within the meaning of Article 17(2). Thus, in a situation such as that in the main proceedings, in which the commercial agent is assigned to negotiate the sale of a portion of the principal's range of goods and not all of that range, the fact that a person already maintained business relations with the principal in respect of other goods does not exclude that person from being regarded as a new customer brought in by that commercial agent when the latter has managed, through his efforts, to initiate business relations between that person and the principal for the goods which the agent has been assigned to sell. The mere fact that, in circumstances such as those in the main proceedings, customers brought in by a commercial agent for his principal had already purchased from the principal goods comparable in nature to those in respect of which that commercial agent had negotiated the sale to those customers cannot suffice as a basis for taking the view that the latter goods already formed part of the pre-existing business relations with those customers (§ 34-37).
5. It is necessary to examine whether the sale of the goods in question required, on the part of the commercial agent, particular negotiating efforts and sales strategy, leading to the establishment of specific business relations, particularly insofar as those goods relate to a different portion of the principal's range. In that regard, the fact that the principal entrusted a commercial agent with the marketing of new goods to customers with whom the principal already maintained certain business relations may indicate that those goods relate to a different portion of the range to that which those customers had purchased up to that point and that the sale of those new goods to the latter customers would require that commercial agent to set up specific business relations, this, however, being a matter for the referring court to determine (§ 38-39).
6. The sale of goods generally takes place in a different setting depending on the brands to which they belong. In that regard, the Court has already held that a brand is often, in addition to being an indication of the origin of the goods or services, an instrument of commercial strategy used *inter alia* for advertising purposes or to acquire a reputation in order to develop consumer loyalty. Thus, circumstances such as those in the main proceedings, in which the offer of the principal's goods is divided up into different brands, each of its commercial agents being entrusted with negotiating the sale of one or more brands only, tends to suggest — this, however, being a matter for the referring court to determine — that those commercial agents are required to establish, with each customer, business relations specific to the brands assigned to them (§ 40-41).
7. As regards Marchon's argument that it is easier for commercial agents to place new goods with persons who already have business relations with the principal, that assertion, even if considered to be proven, should be fully taken into account by the national court in the course of its analysis seeking to ascertain the equitable nature of the indemnity claimed (§ 42).

Judgment

The first indent of Article 17(2)(a) of Council Directive 86/653 […] must be interpreted as meaning that customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell must be regarded as new customers within the meaning of that provision, in the case where, even though those customers already had business relations with that principal in relation to other goods, the sale, by that agent, of the first goods required the establishment of specific business relations, this being a matter for the referring court to determine.

ECJ (Grand Chamber) 19 April 2016, case C-441/14 (Ajos), age discrimination

Dansk Industri (DI), acting on behalf of Ajos A/S – v – Estate of Karsten Eigil Rasmussen, Danish case

Summary

A court applying national law that is at odds with the principle of non-discrimination on grounds of age must disapply that law, even if it is unequivocal and even where the dispute is between private parties.

Facts

Mr Rasmussen was dismissed by his employer Ajos in 2009. Having been with the company since 1984, he

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was, in principle, entitled to a severance allowance equal to three months' salary, pursuant to Article 2a(1) of the Law on salaried employees. However, since he had reached 60 years of age on the date of his departure and was entitled to an old-age pension payable by the employer under a scheme which he had joined before reaching 50 years of age, Article 2a(3) of the said law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the labour market after his departure. Said Article 2a(3) provides: "No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching 50 years of age".

In March 2012, Mr Rasmussen's union brought an action on his behalf against Ajos claiming payment of a severance allowance equal to three months' salary as provided for in Article 2a(1) of the Law on salaried employees. The union relied on the ECJ's judgment in the *Andersen* case (C-499/08, officially known as *Ingeniørforeningen i Danmark*).

National proceedings

On 14 January 2014, the *Sø- og Handelsretten* (Maritime and Commercial Court) upheld a claim brought by the legal heirs of Mr Rasmussen, since deceased, for payment of severance allowance. That court held that it was clear from the judgment in *Andersen* that Article 2a(3) of the Law on salaried employees was contrary to Directive 2000/78 and that the previous national interpretation of that provision was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.

Ajos brought an appeal against that judgment before the *Højesteret* (Supreme Court). In support of its appeal, it argued that any interpretation of Article 2a(3) of the Law on salaried employees that was consistent with the judgment in *Andersen* would be *contra legem*. It also argued that the application of a rule as clear and unambiguous as Article 2a(3) of the Law on salaried employees could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of legal certainty and the protection of legitimate expectations.

Noting that the present case entails a dispute between private persons in which it is not possible to give direct effect to Directive 2000/78 and that any interpretation of Paragraph 2a(3) of the Law on salaried employees that was consistent with EU law would conflict with national case-law, the referring court was uncertain whether the general principle of EU law prohibiting discrimination on grounds of age may be relied on by an employee against his private sector employer in order to compel the employer to pay a severance allowance provided for under Danish law, even when, under national law, the employer is not required to make any such payment. The case before the national court thus also raises the question of the extent to which an unwritten principle of EU law may preclude a private sector employer from relying on a provision of national law that is at odds with that principle. Accordingly, the court referred two questions to the ECJ.

ECJ's findings

1. The first question was whether, in proceedings between private parties, the general principle prohibiting discrimination on grounds of age is to be interpreted as precluding national legislation which deprives an employee of the right to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take retirement (§21).
2. The source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found in various international instruments and in the constitutional traditions common to the Member States (see *Mangold*, C-144/04 and *Kücükdeveci*, C-555/07). As Directive 2000/78 does not itself lay down the general principle prohibiting discrimination on grounds of age but simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle. The EU legislature intended by the adoption of the directive to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment and, in particular, to specify various possible exceptions to that principle, circumscribing those exceptions by the use of a clearer definition of their scope (§22-23).
3. The Court has previously held that, by generally excluding a whole category of workers from entitlement to the severance allowance, Paragraph 2a(3) of the Law on salaried employees affects the conditions regarding the dismissal of those workers for the purposes of Article 3(1)(c) of Directive 2000/78 (*Ingeniørforeningen i Danmark*, C-499/08). It follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age. The same applies with regard to the fundamental principle of equal treatment, the general principle prohibiting discrimination on grounds of age being merely a specific expression of that principle (§25-26).

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4. By its second question, the referring court seeks to ascertain, in essence, whether EU law is to be interpreted as permitting a national court seised of a dispute between private persons (where it is established that the relevant national legislation is at odds with the general principle prohibiting discrimination on grounds of age) to balance that principle against the principles of legal certainty and the protection of legitimate expectations and to conclude that the latter principle should take precedence over the former. In that context, the referring court is also uncertain whether, in carrying out that balancing exercise, it may or must take account of the fact that the Member States are under a duty to compensate for the harm suffered by private persons as a result of the incorrect transposition of a directive, such as Directive 2000/78 (§28).
5. Where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective. While it is true that, in relation to disputes between individuals, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, the fact nonetheless remains that the Court has also consistently held that the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive (§29-30).
6. It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*. The requirement to interpret national law in conformity with EU law entails an obligation on national courts to change its established case-law where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law (§31-34).
7. Even if a national court does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying, if need be, any provision of national legislation contrary to that principle. Moreover, the principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle. Accordingly, in the present case, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the national court must disapply that provision (§35-37).
8. A national court cannot rely on the principle of the protection of legitimate interests in order to continue to apply a rule of national law that is at odds with the general principle prohibiting discrimination on grounds of age. According to settled case-law, the interpretation which the Court gives to EU law clarifies and, where necessary, defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that, unless there are truly exceptional circumstances, which is not claimed to be the case here, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation (§38-41).
9. The fact that it is possible for private persons with an individual right deriving from EU law to claim compensation where their rights are infringed by a breach of EU law attributable to a Member State, cannot alter the obligation the national court is under to uphold the interpretation of national law that is consistent with Directive 2000/78 or, if such an interpretation is not possible, to disapply the national provision that is at odds with the general principle prohibiting discrimination on ground of age, as given concrete expression by that directive, or justify that court giving precedence, in the dispute before it, to the protection of the legitimate expectations of a private person who has complied with national law (§42).

Judgment

1. The general principle prohibiting discrimination on grounds of age, as given concrete expression by Council Directive 2000/78 […] must be interpreted

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as precluding, including in disputes between private persons, national legislation […], which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.

2. EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law, can alter that obligation.

ECJ 7 April 2016, case C-460/14 (Massar), legal insurance

Johannes E.A. Massar – v – DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV, Dutch case

Summary

A legal expenses insurance policy must cover the cost of a lawyer of choice, even in administrative proceedings (judgment almost identical to that in *Büyüktipi*, also summarised in this edition of EELC).

Facts

Mr Massar had taken out legal expenses insurance with the insurance company DAS. In January 2014, his employer applied to the UWV, an independent public body, for permission to terminate his employment contract on grounds of redundancy. Mr Massar requested DAS to cover the costs of legal assistance relating to his representation by an external lawyer. DAS informed him that the UWV procedure was not an "inquiry or procedure" within the meaning of the Dutch law transposing Directive 87/344. Article 4(1) of that directive provides:

> "Any contract of legal expenses insurance shall expressly recognise that:
> a. where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person;
> b. the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person, to serve his interests whenever a conflict of interests arises."

Accordingly, DAS informed Mr Massar that it would not bear the costs associated with representation by a lawyer, but that, if he wished, one of DAS' own lawyers could provide him with the necessary legal assistance.

Mr Massar applied to the District Court in Amsterdam for interim relief in the form of an order that DAS should transfer the case to an external lawyer appointed by him, and pay the lawyer's fees and the costs associated with that procedure. The District Court asked the Supreme Court for guidance.

The Supreme Court observed that, under the applicable provisions of Dutch law on the protection of employees against dismissal, the employer may end the employment relationship with an employee principally in two ways, namely, either by applying to the court for dissolution of the contract between the two parties, or by terminating the contract after obtaining authorisation to dismiss granted by UWV. In the latter case, the authorisation procedure is subject to legislation which is intended to fulfil the important functions of providing protection against unjustified dismissals and a public measure affording, not only the protection of weaker groups on the labour market, but also the prevention of improper recourse to social security. The Supreme Court considered that, *prima facie*, UWV proceedings can be categorised as an 'inquiry', within the meaning of Article 4(1) of Directive 87/344. However, the arguments against that meaning include, *inter alia*, the legislative history of that directive and the consequences that such a wide interpretation of 'inquiry' could have for legal expenses insurance schemes. For this reason, the Supreme Court referred questions to the ECJ, in essence asking whether Article 4(1)(a) of Directive 87/844 must be interpreted as meaning that the term 'inquiry' referred to in that provision includes a procedure at the end of which a public body authorises the employer to dismiss an employee, who is covered by legal expenses insurance.

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