Headnotes

to the order of the Second Senate of 6 July 2010

- 2 BvR 2661/06 -

1. **a) Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.**

   b) Prior to the acceptance of an ultra vires act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.
   To ensure the constitutional protection of legitimate expectations, it should be considered, in constellations of retroactive inapplicability of a law as a result of a ruling by the Court of Justice of the European Union, to grant compensation domestically for a party concerned having trusted in the statutory provision and having made plans based on this trust.

2. **Not all violations of the obligation under Union law to make a submission constitute a breach of Article 101.1 sentence 2 of the Basic Law. The Federal Constitutional Court only complains of the interpretation and application of rules on competences if, on a sensible evaluation of the concepts underlying the Basic Law, they no longer appear to be comprehensible and are manifestly untenable. This standard for what is considered arbitrary is also applied if a violation of Article 267.3 TFEU is considered to have taken place (confirmation of Decisions of the Federal Constitutional Court <Entscheidungen des Bundesverfassungsgerichts – BVerfGE> 82, 159 <194>).**

FEDERAL CONSTITUTIONAL COURT

- 2 BVR 2661/06 -

IN THE NAME OF THE PEOPLE

**In the proceedings
regarding the constitutional complaint**

of the firm H... GmbH,
legally represented by the Managing Directors,

- agents: CMS Hasche Sigle, Partnerschaft von
Rechtsanwälten und Steuerberatern,
Theodor-Heuss-Ring 19-21, 50668 Cologne-

against the judgment of the Federal Labour Court (Bundesarbeitsgericht) of 26 April 2006 - 7 AZR 500/04 -,

the Federal Constitutional Court – Second Senate - with the participation of

Justices Voßkuhle (President),
Broß,
Osterloh,
Di Fabio,
Mellinghoff,
Lübbe-Wolff,
Gerhardt, and
Landau

ruled on 6 July 2010:

The constitutional complaint is rejected as unfounded.

Grounds:

A.

I.

The complainant is an enterprise involved in automotive supplies. It employs more than 1,200 employees at its production site in Schleswig-Holstein. It concluded a fixed-term employment contract with the plaintiff of the original proceedings on 18 February 2003 for the period from 19 February 2003 to 31 March 2004 without having objective reasons for the fixed term of employment. The plaintiff was deployed as a 1

helper in the production of brake pads. All in all, the complainant concluded 56 fixed-term employment contracts with previously unemployed persons at that time in order to cover production peaks. Of these 56 new staff members, 13 employees – including the plaintiff of the original proceedings – had already reached the age of 52. According to the information provided by the complainant, the additional employees were deliberately appointed on the basis of the Law on Part-Time Working and Fixed-Term Contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge – Teilzeit- und Befristungsgesetz* – TzBfG) in order to obtain legal security vis-à-vis actions against fixed-term employment contracts. It was said that such actions against fixed-term employment contracts had been lodged against the complainant in the past and, had they been successful, would have led to disruptions in personnel planning.

A short time later, the plaintiff asserted to the complainant the inapplicability of the fixed term of his employment contract. He invoked the alleged incompatibility of the fixed term on the basis of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175 175/43), as well as Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 175 303/16). The Lübeck Labour Court rejected his action for a finding that the employment relationship had not ceased and for continued employment by judgment of 11 March 2004. It found that the plaintiff could not invoke a direct impact of the directives on relationships between private individuals. The plaintiff's appeal on points of fact and law was rejected by the Schleswig-Holstein *Land* Labour Court by judgment of 22 June 2004. In addition to indicating the inapplicability of directives to relationships under private law, the *Land* Labour Court also pointed to the insufficient certainty and definiteness of the directives in terms of their content. The plaintiff filed an appeal on points of law against this with the Federal Labour Court. The appeal on points of law was successful in substance. 2

II.

1. The original version of § 14 of the Law on Part-Time Working and Fixed-Term Contracts of 21 December 2000 (Federal Law Gazette <*Bundesgesetzblatt* – BGBl.> I p. 1966) reads as follows in excerpts: 3

(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. […] 4

(2) The term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years; […] A fixed term according to sentence 1 shall not be permissible if a fixed-term or an indefinite duration employment relationship already existed with the same employer. […] 5

(3) The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term em- 6

ployment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months.

(4) […] 7

The legislature expanded the group of individuals covered by § 14 of the Law on Part-Time Working and Fixed-Term Contracts in December 2002 (First Act for Modern Services on the Labour Market (*Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*) of 23 December 2002, Federal Law Gazette I p. 4607). For the period from 1 January 2003 to 31 December 2006, the age limit imposed on the possibility to conclude fixed-term employment contracts without objective reasons was reduced from the age of 58 to the age of 52. To this end, a fourth sentence was inserted in § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts: 8

Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58. 9

With this amendment, which constituted an element of the labour market reforms, the legislature was pursuing the goal of reducing the statistically much higher unemployment among older people by lowering the barriers for their re-entry into working life. It is said that the over-fifties are not only unemployed for longer than other age groups, but also constitute a much larger proportion of the long-term unemployed. The legislature indicated that the low level of employers' willingness to recruit them was caused primarily by a "psychological barrier to appointment" caused by the mistaken belief that older employees could no longer be made redundant should personnel be reduced later (Bundestag printed paper (*Bundestagsdrucksache* – BTDrucks) 15/25, p. 40). Since experience had shown that fixed-term employment relationships increased the willingness to recruit and that an average of roughly one-half of fixed-term employment relationships led to contracts for employment that were of an indefinite duration, it was said that § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts should be expanded accordingly. 10

The legislature considered the differences of treatment vis-à-vis older job-seekers brought about with this provision to be justified in view of the employment policy goal pursued, namely to improve older people's chances of obtaining work. This was said to also be in line with a major goal of European employment policy (Bundestag printed paper 15/25, p. 40). It was said that Germany had been explicitly called upon by Council Decision 2001/63/EC of 19 January 2001 on guidelines for Member States' employment policies (OJ L 175 22/18) to improve obstacles and negative factors for the employment of older unemployed persons. 11

2. a) Article 19.1 TFEU (formerly Article 13.1 ECT) empowers the Council to adopt provisions in the area of competence of the Union inter alia to combat discrimination based on age. The provision does not contain a directly effective prohibition of dis- 12

crimination (see Streinz, in: Streinz, EUV/EGV, 2003, Art. 13 EGV, para. 17; Epiney, in: Calliess/Ruffert, EUV/EGV, 3rd ed. 2007, Art. 13 EGV, para. 1). Article 19.1 TFEU reads as follows:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 13

By contrast, Article 21.1 of the Charter of Fundamental Rights of the European Union contains a prohibition of discrimination based on age which has direct effect. The revised version of the provision, dated 12 December 2007, reads as follows (OJ C 303/1; Federal Law Gazette 2008 II p. 1165): 14

(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. 15

(2) Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited. 16

The Charter of Fundamental Rights was not yet legally binding in the period material to the ruling. It was not placed on a legally equal footing with the Treaties until the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (Treaty of Lisbon – OJ C 306/10; Federal Law Gazette 2008 II p. 1038) (Article 6.1 sentence 1 TEU). 17

b) Directive 1999/70/EC is intended to put into effect the framework agreement on fixed-term contracts concluded between the general cross-industry organisations (Article 1 of Directive 1999/70/EC). According to the agreement, which is annexed to the directive, the principle of non-discrimination applies to fixed-term workers; abuse by means of successive fixed-term employment contracts is to be avoided (see clauses 4 and 5 of the Annex to Directive 1999/70/EC for details). The Law on Part-Time Working and Fixed-Term Contracts was adopted by the German legislature in 2000 in order to transpose this directive into German law. 18

Directive 2000/78/EC is intended inter alia to prevent discrimination based on age. Article 1 of Directive 2000/78/EC defines the purpose of the legal act such that a general framework is to be laid down for combating discrimination as regards employment and occupation, inter alia on the grounds of age, with a view to putting into effect in the Member States the principle of equal treatment. The principle of equal treatment is defined as a prohibition of certain types of direct or indirect discrimination (Article 2 of Directive 2000/78/EC). The field of application of the directive covers in particular employment and working conditions in a Member State, regardless of the 19

existence of a cross-border connection (Article 3 of Directive 2000/78/EC). Article 6.1 of the directive further provides that differences of treatment on grounds of age can be justified. The provision reads as follows:

Article 6 - Justification of differences of treatment on grounds of age 20

(1) 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, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. 21

Such differences of treatment may include, among others: 22

a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; 23

b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; 24

c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement. 25

[…] 26

The deadline for the transposition of the directive expired on 2 December 2003 (Article 18.1 of Directive 2000/78/EC). With regard to differences of treatment on grounds of age, the Member States were able to have recourse to an additional period of three years until 2 December 2006 (Article 18.2 of Directive 2000/78/EC). The European Commission was to be informed if recourse was to be had to this additional period. It was furthermore to receive reports annually on the steps being taken to tackle age discrimination and on the progress being made towards implementation of the directive. The Federal Republic of Germany had recourse to this additional period. The additional period for transposition ended on 2 December 2006. 27

3. a) The Court of Justice of the European Communities (now Court of Justice of the European Union) found in its judgment of 22 November 2005 in Case C-144/04 *Mangold* [2005] ECR I-9981 that Community law and, more particularly, Article 6.1 of Directive 2000/78/EC, were to preclude a provision of domestic law such as § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts. It is said to be the responsibility of the national court to guarantee the 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 had not yet expired. 28

The Court of Justice stated as grounds inter alia that such legislation aimed to attain the legitimate objective of the vocational integration of older workers. It was however said to go beyond what was appropriate and necessary because it took age as the only criterion, regardless of any other consideration such as the structure of the labour market in question or the personal situation of the person concerned. 29

A breach of Directive 2000/78/EC was said not to be precluded by the fact that the period prescribed for its transposition had not yet expired when the contract was concluded. Firstly, a Member State must refrain during the period prescribed for transposition from taking any measures liable to seriously compromise the attainment of the result prescribed by that directive. The Federal Republic of Germany had furthermore chosen in this case to have recourse to an additional period of three years according to Article 18.2 of Directive 2000/78/EC. This provision was said to imply by virtue of obligations to report to the Commission that the Member State should progressively take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. That obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation, to adopt measures incompatible with the objectives pursued by that act. Secondly, the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. The Court of Justice reasoned the existence of this new principle by referring to the recitals in the preamble to Directive 2000/78/EC, which refer in turn to various international instruments and to the constitutional traditions common to the Member States. 30

The present national rule is said to fall within the scope of Community law because § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts had been adopted as a measure implementing Directive 1999/70/EC and had been amended in 2002 to include § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts. 31

b) After receiving the constitutional complaint, the question as to whether the prohibition of discrimination based on age is opposed by a national provision was once more set before the Court of Justice in Case C-411/05 *Palacios de la Villa* (judgment of 16 October 2007) [2007] ECR I-8531), Case C-427/06 *Bartsch* (judgment of 23 September 2008) [2008], ECR I-7245) and Case C-555/07 *Kücükdeveci* (judgment of 19 January 2010, *Neue Juristische Wochenschrift* – NJW 2010, p. 427). In the Kücükdeveci ruling, the Court of Justice confirmed the Mangold ruling with regard to the general principle of Union law, which was said to prohibit any discrimination based on age, and referred as grounds to Article 21.1 of the Charter of Fundamental Rights. 32

III.

The Federal Labour Court found with the impugned judgment of 26 April 2006 that the employment relationship between the parties had not ended as per 31 March 2004 by virtue of a fixed-term arrangement. It reasoned this inter alia by arguing that 33

the complainant could not invoke § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts in justification of the fixed term of employment. The element-related prerequisites of this provision were reportedly met. The provision was however said not to be compatible with Community law, and therefore could not be applied by the national courts. This was said to follow from the Court of Justice's Mangold ruling.

The Senate was said to be bound by the announcement of the inapplicability of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts by the Court of Justice, which the court had dually reasoned by a breach of the goal pursued by Directive 2000/78/EC and by a breach of the prohibition of discrimination based on age, based on general principles of Community law. The ruling of the Court of Justice was said to be based on the interpretation of Community law in the framework of proceedings for a preliminary ruling according to Article 234.1 (a) ECT (now Article 267.1 (a) TFEU) and to keep within the boundaries of the competences transferred to the Court of Justice under Article 23.1 sentence 2 of the Basic Law. 34

The principle of equal treatment in employment and occupation found by the Court of Justice, which was said to preclude discrimination based on the characteristics named in Article 1 of Directive 2000/78/EC, was said to be considered as a sub-case of the general principle of equality and non-discrimination, which in turn was said to be among the Community fundamental rights. This principle, which could also be invoked by a private individual before a national court, was said to restrict the national legislature in its legislative activity insofar as its provision fell within the field of application of Community law. The Law on Part-Time Working and Fixed-Term Contracts was said to fall in the field of application of Community law since it served to transpose Directive 1999/70/EC. It may be true that the prohibition of discrimination based on age had so far been explicitly named neither in bindingly applicable international treaties, nor in a major number of constitutions of the Member States. Nonetheless, it was said to be not ruled out to derive such a prohibition from openly worded elements and by means of partial further development of the law. 35

The Court of Justice is also not said to have transgressed its competences insofar as it derived the inapplicability of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts from Directive 2000/78/EC. The grounds put forward by the Court of Justice were said to be understood such that a national law enacted during the transposition period of a directive was inapplicable if its contents ran counter to the goal of the directive and no interpretation was possible that was in conformity with Community law. The legal basis for this presumption of advance effects was said to be formed by the principle of the loyalty of the Member States to the Treaties according to Article 10.2 and Article 249.3 ECT (now Article 4.3 (3) TEU and Article 288.3 TFEU). 36

The ruling was said to be certainly absolutely clear in terms of its outcome; there was therefore no need for a renewed submission on the part of the Court of Justice on 37

the incompatibility of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts with Community law.

38 The Federal Labour Court furthermore refused to apply § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts for reasons of Community law or national protection of legitimate expectations to a fixed-term agreement concluded prior to 22 November 2005. Only the Court of Justice was said to have jurisdiction as to the time limitation of the inapplicability of a national provision in breach of primary Community law. Such a restriction was however not contained in the Mangold ruling. The Senate also did not consider itself to be obliged to afford to the Court of Justice the opportunity to subsequently grant protection of legitimate expectations by means of a submission because the prerequisites applying to such a time restriction of the impact of rulings according to the case-law of the Court of Justice were said not to be met. Even if the Senate were empowered after a pronouncement of inapplicability of the Court of Justice to grant protection of legitimate expectations according to national constitutional law, and hence to restrict its temporal impact, it was said that there was no protection of legitimate expectations in favour of the complainant. Prior to the conclusion of the fixed-term employment contract with the plaintiff, there had been no ruling on the part of the Federal Labour Court regarding the permissibility of a fixed-term arrangement based solely on age without objective reasons; moreover, it was said that this had been disputed in the legal literature on labour law.

IV.

39 The complainant is complaining of a violation of its rights under Article 2.1 and Article 12.1 in conjunction with Article 20.3 (1.) and Article 101.1 sentence 2 of the Basic Law (2.).

40 1. The complainant asserts that there has been a violation of its contractual freedom according to Article 2.1 and Article 12.1 in conjunction with Article 20.3 of the Basic Law from two different points of view. A violation is said to emerge, firstly, from the Federal Labour Court having materially based the impugned ruling concerning the inapplicability of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts on the Court of Justice's Mangold judgment. If this ruling was to be understood as the Federal Labour Court had understood and applied it in the impugned judgment, this was said to constitute a manifest transgression of competences on the part of the Court of Justice. Insofar as the Federal Labour Court based its judgment on the fact that the Court of Justice invoked a general principle of Community law, it was already said to be doubtful whether the naming and application of a prohibition of discrimination based on age was not inseparably linked in function terms to the remarks on Article 6.1 of Directive 2000/78/EC. Moreover, the Court of Justice is said not to have any competence to examine domestic labour legislation with regard to the legal relationship between private individuals. The enactment of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts was said not to be qualified as implementation of Community law. Furthermore, the Court of Justice was said to

further develop the law in a manner that was not permissible by postulating the prohibition of discrimination based on age as a directly applicable general principle of Community law. Furthermore, the case-law of the Court of Justice regarding Directive 2000/78/EC was said to lead to an advance and third-party effect of directives not covered by the Treaties.

The complainant furthermore claims there has been a violation of its contractual freedom according to Article 2.1 and Article 12.1 in conjunction with Article 20.3 of the Basic Law in the fact that the Federal Labour Court had allegedly not granted adequate constitutional protection of legitimate expectations and had rejected the appeal on points of law. Also according to Community law, the Federal Labour Court was said not to have been prevented from taking account of aspects of the protection of legitimate expectations, given that questions related to the protection of legitimate expectations had neither been identified nor decided on in the Mangold proceedings. It was said that the Court of Justice's pronouncement of inapplicability in the case of Mangold could not be understood in this respect as absolute and definitely applicable. Unlike the presumption of the Federal Labour Court, the complainant had been able to rely on § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts not being measured against Directive 2000/78/EC, which was still to be transposed. 41

2. The complainant further submits that its right to its lawful judge according to Article 101.1 sentence 2 of the Basic Law has been violated. The Federal Labour Court is said to have arbitrarily violated its obligation to make a submission according to Article 234.3 ECT (now 267.3 TFEU) because it had transgressed the latitude at its disposal in an unjustifiable manner. If one were to presume that the Federal Labour Court was bound by the Mangold ruling, the Federal Labour Court should have submitted to the Court of Justice the question of whether contractual relationships which had been concluded prior to the Mangold ruling were also covered, or whether principles of Community law or of national protection of legitimate expectations did not require a time limit. The fact that the Court of Justice only pronounces a time limit on the impact of its rulings in exceptional cases is said to relate only to the financial impact on the Member States, but not to the case constellation at hand. The lack of a time limit in the Mangold ruling itself is said to be due to the fact that there had been no reason whatever for a time limit in that case. 42

V.

The Second and the Sixth Senates of the Federal Labour Court, as well as the Second and the Sixth Senates of the Federal Social Court, have made statements. 43

B.

The constitutional complaint is admissible. 44

I.

The impugned judgment of the Federal Labour Court is a viable subject-matter of a constitutional complaint as a measure of German public authority (§ 90.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). The obligation incumbent on the Federal Constitutional Court to act as a guardian over the Basic Law exists vis-à-vis all measures of German public authority, in principle also to those which give rise to the domestic application of Community and Union law (see BVerfGE 89, 155 <171>; 123, 267 <329>), transpose (see BVerfGE 113, 273 <292>; 118, 79 <94>; BVerfG, judgment of the First Senate of 2 March 2010 - 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 -, NJW 2010, p. 833 <835>) or perform Community and Union law. Whether and to what degree the review of the constitutionality of such measures by the Federal Constitutional Court is restricted is a question of the merits of the constitutional complaint insofar as unresolved questions are to be clarified in this respect. 45

II.

The grounds of the constitutional complaint meet the requirements of § 92 and § 23.1 sentence 2 of the Federal Constitutional Court Act. According to the complainant's statements, it particularly appears to be possible that the impugned judgment of the Federal Labour Court violates the complainant's contractual freedom according to Article 2.1 and Article 12.1 in conjunction with Article 20.3 of the Basic Law because, firstly, it is based on a non-permissible further development of the law by the Court of Justice, which according to the case-law of the Federal Constitutional Court is not to be applied in Germany (see BVerfGE 89, 155 <188>; 123, 267 <353-354>), and secondly, it does not grant constitutional protection of legitimate expectations. 46

The complainant makes an adequate case for why the Court of Justice has reportedly transgressed the boundaries of interpretation of Community law with the ruling in the case of Mangold and further developed Community law in a manner which was no longer covered by the competences of the Community. In doing so, it discusses the case-law of the Federal Constitutional Court on review of competences which had been handed down by the time of the lodging of the constitutional complaint, as well as the Court of Justice's Mangold ruling, which is held to be in violation of competences, and the critical remarks made on this in the literature. The complainant was not obliged, anticipating details of the constitutional court's review of the acts of the European bodies and institutions which were still to be lent precise form by the Federal Constitutional Court, to dwell on compliance with the boundaries of the competences of such bodies and institutions. 47

C.

The constitutional complaint is unfounded. 48

I.

The complainant's contractual freedom according to Article 12.1 and Article 2.1 of the Basic Law has not been violated because the impugned judgment of the Federal Labour Court is based on a non-permissible further development of the law on the part of the Court of Justice. 49

1. a) Both the principle of freedom of action guaranteed by Article 2.1 of the Basic Law, and the guarantee of the right to freely exercise an occupation according to Article 12.1 of the Basic Law, include the right to establish, structure and time-limit employment relationships by submitting concurring declarations of intent (see in general terms for the structure of employment contracts BVerfG, order of the Second Chamber of the First Senate of 23 November 2006 - 1 BvR 1909/06 -, NJW 2007, p. 286). As a major expression of the principle of freedom of action, contractual freedom is generally protected by the fundamental right to free development of personality according to Article 2.1 of the Basic Law (see BVerfGE 72, 155 <170>; 81, 242 <254 et seq.>; 89, 214 <231 et seq.>; 103, 89 <100-101>). When it comes to freedom of action particularly in the field of professional activity, which is specifically guaranteed in Article 12.1 of the Basic Law, general freedom of action, which is subsidiary to other freedom rights, cannot however be used as a standard for review (see BVerfGE 89, 1 <13>; 117, 163 <181>). This particularly applies in the field of the law on individual employment contracts (see BVerfGE 57, 139 <158>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 4, 356 <363-364>). 50

The private law system is provided with a statutory structure. Laws provide for the exercise of contractual freedom not only for its institutional protection, but also in order to safeguard the social interests of structurally weaker market participants. For this reason, the conclusion of fixed-term employment contracts is not completely placed at the free disposal of the contracting parties, but is traditionally tied to prerequisites which are intended to protect employees. Gainful employment is as a rule the sole basis for employees' livelihood. Fixed terms cater for the needs of the profitable running of a company in terms of flexibility requirements. For the employees which it affects, however, a fixed-term employment relationship not only offers the opportunity of gainful employment, but also brings with it uncertainty concerning the continuation of the source of income. State encroachment on the principle of freedom of action, providing protection in this respect, needs to be placed on a statutory footing when it comes to structuring fixed-term employment relationships, and this footing in turn must prove itself to be constitutional. 51

The provision of non-constitutional law which is material to the constitutional complaint proceedings is § 14 of the Law on Part-Time Working and Fixed-Term Contracts in the version applicable from 1 January 2003 to 31 December 2006. It was possible according to § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts to derogate from the principle that objective reasons are required to establish fixed-term employment relationships if the employee had reached the age 52

of 52 on commencing the fixed-term employment relationship. This exceptional arrangement, however, must be set aside to the detriment of the complainant if it violates Community law (now Union law).

b) The law of the European Union can only develop effectively if it supplants contrary Member State law. The primacy of application of Union law does not lead to a situation in which contrary national law is null and void. Member States' law can, rather, continue to apply if and to the degree that it retains an objective area of provision beyond the field of application of pertinent Union law. By contrast, contrary Member States' law is in principle inapplicable in the field of application of Union law. The primacy of application follows from Union law because the Union could not exist as a legal community if the uniform effectiveness of Union law were not safeguarded in the Member States (see fundamentally ECJ Case 6/64 *Costa/ENEL* <judgment of 15 July 1964> [1964] ECR 1251 para. 12). The primacy of application also corresponds to the constitutional empowerment of Article 23.1 of the Basic Law, in accordance with which sovereign powers can be transferred to the European Union (see BVerfGE 31, 145 <174>; 123, 267 <402>). Article 23.1 of the Basic Law permits with the transfer of sovereign powers – if provided for and demanded by treaty – at the same time their direct exercise within the Member States' legal systems. It hence contains a promise of effectiveness and implementation corresponding to the primacy of application of Union law. 53

c) aa) Unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be comprehensive (see BVerfGE 73, 339 <375>; 123, 267 <398>). 54

As autonomous law, Union law remains dependent on assignment and empowerment in a Treaty. For the expansion of their powers, the Union bodies remain dependent on amendments to the Treaties which are carried out by the Member States in the framework of the respective constitutional provisions which apply to them and for which they take responsibility (see BVerfGE 75, 223 <242>; 89, 155 <187-188, 192, 199>; 123, 267 <349>; see also BVerfGE 58, 1 <37>; 68, 1 <102>; 77, 170 <231>; 104, 151 <195>; 118, 244 <260>). The applicable principle is that of conferral (Article 5.1 sentence 1 and Article 5.2 sentence 1 TEU). The Federal Constitutional Court is hence empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law) (see BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 113, 273 <296>; 123, 267 <353-354>), and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences. 55

bb) The obligation incumbent on the Federal Constitutional Court to pursue substantiated complaints of an *ultra vires* act on the part of the European bodies and institutions is to be coordinated with the task which the Treaties confer on the Court of Jus- 56

tice, namely to interpret and apply the Treaties, and in doing so to safeguard the unity and coherence of Union law (see Article 19.1 (1) sentence 2 TEU and Article 267 TFEU).

If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk. If, however, on the other hand the Member States were to completely forgo *ultra vires* review, disposal of the treaty basis would be transferred to the Union bodies alone, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or to an expansion of competences. That in the borderline cases of possible transgression of competences on the part of the Union bodies – which are infrequent, as should be expected according to the institutional and procedural precautions of Union law –the constitutional and the Union law perspective do not completely harmonise, is due to the circumstance that the Member States of the European Union also remain the masters of the Treaties subsequent to the entry into force of the Treaty of Lisbon, and that the threshold to the federal state was not crossed (see BVerfGE 123, 267 <370-371>). The tensions, which are basically unavoidable according to this construction, are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration. 57

cc) *Ultra vires* review may only be exercised in a manner which is open towards European law (see BVerfGE 123, 267 <354>). 58

(1) The Union understands itself as a legal community; it is in particular bound by the principle of conferral and by the fundamental rights, and it respects the constitutional identity of the Member States (see in detail Article 4.2 sentence 1, Article 5.1 sentence 1 and Article 5.2 sentence 1, as well as Article 6.1 sentence 1 and Article 6.3 TEU). According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the control powers which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is reserved and open towards European law. 59

This means for the *ultra vires* review at hand that the Federal Constitutional Court must comply with the rulings of the Court of Justice in principle as a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany (see BVerfGE 123, 267 <353>). 60

Ultra vires review by the Federal Constitutional Court can moreover only be consid- 61

ered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences (see BVerfGE 123, 267 <353, 400>). A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of competences is in other words sufficiently qualified (see on the wording "sufficiently qualified" as an element in Union liability law for instance ECJ Case C-472/00 P *Fresh Marine* <judgment of 10 July 2003> [2003] ECR I-7541 paras. 26-27). This means that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law (see Kokott, *Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht*, *Archiv des öffentlichen Rechts* – AöR 1994, p. 207 <220>: "*erhebliche Kompetenzüberschreitungen*" (considerable transgressions of competences) and <233>: "*drastische*" (drastic) *ultra vires* acts; Ukrow, *Richterliche Rechtsfortbildung durch den EuGH*, 1995, p. 238 in favour of a review of evident errors; Isensee, *Vorrang des Europarechts und deutsche Verfassungsvorbehalte – offener Dissens*, in: Festschrift Stern, 1997, p. 1239 <1255>: "*im Falle krasser und evidenter Kompetenzüberschreitung*" (in the case of a gross, manifest transgression of competences); Pernice, in: Dreier, GG, 2nd ed. 2006, Vol. II, Art. 23, para. 32: "*schwerwiegend, evident und generell*" (grievous, manifest and across-the-board); Oeter, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL 2007, p. 361 <377>: case-law of the Court of Justice said to be binding "*sofern sie sich nicht völlig von den vertraglichen Grundlagen ablöst"* (unless it completely departs from the basis of the Treaties); Scholz, in: Maunz/Dürig, GG, Art. 23 para. 40 <October 2009>: "offensichtlich, anhaltend und schwerwiegend"(manifest, consistent and grievous)).

(2) The mandate to uphold the law in the interpretation and application of the Treaties (Article 19.1 (1) sentence 2 TEU) does not restrict the Court of Justice to acting as a guardian over compliance with the provisions of the Treaties. The Court of Justice is also not precluded from refining the law by means of methodically bound case-law. The Federal Constitutional Court always explicitly recognised this power (see BVerfGE 75, 223 <242-243>; BVerfGE 123, 267 <351-352>). It is in particular not opposed by the principle of conferral and the structure of the association of sovereign states (*Staatenverbund*) constituted by the Union. Rather, the further development of the law – carried out within the boundaries imposed on it – can particularly also contribute in the supranational association to a delimitation of competences which does justice to the fundamental responsibility of the Member States with regard to the Treaties as against the regulatory powers of the Union legislature. 62

Primary law explicitly provides at individual junctures that the Union bodies are to 63

act on the basis of general principles common to the laws of the Member States (Article 6.3 TEU; Article 340.2 and Article 340.3 TFEU). The Court of Justice's task includes in this respect ensuring the lawfulness of the Union within the meaning of the constitutional traditions common to the Member States. The standard is both written primary and secondary law, and the unwritten general principles, as they are derived from the constitutional traditions of the Member States, with supplementary consultation of the Member States' international agreements (see Wegener, in: Calliess/ Ruffert, EUV/EGV, 3rd ed. 2007, Art. 220 EGV, para. 38; with further references on the general principles in international law Gaja, General Principles of Law, in: Wolfrum, Max Planck Encyclopaedia of Public International Law, http://www.mpepil.com, paras. 7 et seq. and 17 et seq.). The need to create fundamental right protection comparable to the Basic Law stressed inter alia by the Federal Constitutional Court (see BVerfGE 37, 271 <285>) has since the 1970s been possible only by means of further developing the law via the method of the evaluative comparative law (see fundamentally ECJ Case 11/70 *Internationale Handelsgesellschaft* <judgment of 17 December 1970> [1970] p. 1125 para. 4; ECJ Case 4/73 *Nold/Commission* <judgment of 14 May 1974> [1974] p. 491 para. 13).

Further development of the law is however not legislation with political latitude, but follows the instructions set out in statutes or international law. This is where it finds its foundations and its limits. There is particular reason for further development of the law by judges where programmes are fleshed out, gaps are closed, contradistinctions of evaluation are resolved or account is taken of the special circumstances of the individual case. Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence. 64

A major limit on further development of the law by judges at Union level is the principle of conferral (Article 5.1 sentence 1 and Article 5.2 sentence 1 TEU). It takes on its significance against the background of the highly federalised, cooperative organisational structure of the European Union, which is analogous to a state in many areas both as to the scope of its competences and in the organisational structure and the procedure, but does not have the characteristics of a federal state. The Member States have only assigned limited individual sovereign powers. General empowerments and the competence to gain further competences for themselves contradict this principle, and would undermine the Member States' constitutional law responsibility for integration (see BVerfGE 123, 267 <352-353>). This applies not only if independent expansions of competence cover areas which are counted among the constitutional identity of the Member States or depend particularly on the process of democratic discourse in the Member States (see BVerfGE 123, 267 <357-358>), al- 65

beit any transgression of competence weighs particularly heavily here.

(3) If the supranational integration principle is not to be endangered, *ultra vires* review must be exercised reservedly by the Federal Constitutional Court. Since it also has to find on a legal view of the Court of Justice in each case of an *ultra vires* complaint, the task and status of the independent suprastate case-law must be safeguarded. This means, on the one hand, respect for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them (see ECJ Opinion 1/91 *EEA Treaty* [1991] ECR I-6079 para. 51). Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens. 66

2. Measured against these standards, the Federal Labour Court has not ignored the scope of the complainant's contractual freedom according to Article 12.1 of the Basic Law. The impugned judgment proves to be constitutional insofar as it has presumed § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts to be inapplicable. 67

In view of the underlying case-law of the Court of Justice, *ultra vires* further development of the law, which should lead to the inapplicability of the legal principles in question in Germany – which may be established solely by the Federal Constitutional Court (see BVerfGE 123, 267 <354>) – is not apparent. It is irrelevant whether the outcome found in the Mangold ruling can still be gained by recognised legal interpretation methods and whether any existing shortcomings would be evident. At any rate, it does not constitute a transgression of the sovereign powers assigned to the European Union by an Approving Act (*Zustimmungsgesetz*), thus violating the principle of conferral in a manifest and structurally effective manner. 68

a) The Court of Justice reached the conclusion in the Mangold ruling that a national provision such as § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts conflicted with Community law and had to be set aside (ECJ Case C-144/04 <judgment of 22 November 2005> [2005] ECR I-9981 paras. 77-78). This statement was reasoned with two arguments whose interrelationship remains unclear (see Thüsing, *Europarechtlicher Gleichbehandlungsgrundsatz als Bindung des Arbeitgebers?*, *Zeitschrift für Wirtschaftsrecht* – ZIP 2005, p. 2149 <2150-2151>). The provision is said to contradict both Article 6 of Directive 2000/78/EC and a general principle of Community law prohibiting discrimination based on age. 69

Whilst a passage in the English and French-language versions of the Mangold ruling indicates that the Court of Justice appears to particularly take as a basis the general prohibition of discrimination (see ECJ <judgment of 22 November 2005> loc. cit., para. 74: “[z]weitens” <German-language version>, “[i]n the second place and above all” <English-language version>, “[e]n second lieu et surtout” <French-language version>), another passage might favour the opposite (ECJ <judgment of 22 November 2005> loc. cit., para. 78: “more particularly, Article 6(1) of Directive 2000/78”). This allows one to presume that, although Directive 2000/78/EC was not yet applicable for Germany, given that the transposition period had not yet expired, the Mangold ruling reviewed the German fixed-term employment arrangement by applying the standard of this directive because the directive only lent concrete form to what in any case applied by virtue of the general principle of the prohibition of discrimination based on age and independently of the directive (see Skouris, *Methoden der Grundrechtsgewinnung in der EU*, in: Merten/Papier, *Handbuch der Grundrechte in Deutschland und Europa* – HGRe, Vol. VI/1, 2010, § 157, para. 24). 70

b) A sufficiently qualified breach by the Court of Justice of the principle of conferral cannot be ascertained. Neither the opening of the field of application of Directive 2000/78/EC to cover cases which were to particularly attain the objective of the vocational integration of long-term unemployed older workers (aa), nor the advance effect of Directive 2000/78/EC, which was yet to be transposed in Germany, presumed by the Court of Justice (bb), nor the derivation of a general principle of the prohibition of discrimination based on age (cc), led to a structurally significant shift to the detriment of Member State competences. 71

aa) The Court of Justice considered the general principle of the prohibition of discrimination based on age to be applicable in the case of Mangold because the facts fundamentally fell within the field of application of Directive 2000/78/EC (ECJ <judgment of 22 November 2005> loc. cit., paras. 51, 64 and 75). This precedence was the prerequisite for a national provision such as § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts being measurable against Community law at all – and therefore also against its general principles. The complainant, by contrast, submitted that the relevant provision of the Law on Part-Time Working and Fixed-Term Contracts had served employment policy purposes which remained within the competence of the Member States. 72

Whether a specific measure of a Member State falls within the field of application of Union law is determined by the Court of Justice in each case according to the content-related scope of the measure in relation to the subject-matter and the persons involved. A directive can also open the area of application of the Treaties and lead to a situation in which the general principles of Union law affect the Member States’ law (see von Danwitz, *Rechtswirkungen von Richtlinien in der neueren Rechtsprechung des EuGH*, *Juristenzeitung* – JZ 2007, p. 697 <704>). Whether a directive opens the area of application of the Treaties is determined according to its goals (see ECJ Case C-226/97 *Lemmens* <judgment of 16 June 1998> [1998] ECR I-3711 73

paras. 25 and 35-36). By contrast, the national legislature cannot rule out the objective field of application of Union law by also pursuing with a measure goals – such as employment policy (see the restricted competences to act according to Article 145 to Article 150 TFEU) – which the Union is not empowered to provide for (see ECJ Case C-274/96 *Bickel and Franz* <judgment of 24 November 1998> [1998] ECR I-7637 para. 17; established case-law). The Court of Justice justifies this by pointing out that the Member States might otherwise cause detriment to the uniform effect of Union law through different objectives.

In the concrete case, the Court of Justice established the applicability of Community law, and hence of the general prohibition of discrimination based on age, by stating that Directive 1999/70/EC was originally to have been transposed with the Law on Part-Time Working and Fixed-Term Contracts (ECJ <judgment of 22 November 2005> loc. cit., para. 75). It is possible to object to this that only the original version of the Law on Part-Time Working and Fixed-Term Contracts in 2000 served to transpose Directive 1999/70/EC, but not the Amending Act with which sentence 4 was added into the existing § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts (see on the lack of a reference to Community law Bundestag printed paper 15/25, p. 40). A decisive consideration which cannot be completely rejected in terms of the internal logic of Union law is however the objective scope of Directive 1999/70/EC, in particular its prohibition of reducing the level of protection (Article 8.3 of Directive 1999/70/EC). It is the material argument, and not the respective objective of the national legislature. 74

bb) A further development of the law by the Court of Justice's Mangold ruling which carries weight with regard to the criterion of manifestness, violating the principle of conferral, is also not given because of the advance effect of Directive 2000/78/EC, which had not yet been transposed in Germany, that was presumed by the Court of Justice. 75

The Court of Justice presumed that a breach by a national provision such as § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts of Article 6.1 Directive 2000/78/EC was not precluded by its transposition period not yet having expired at the time of conclusion of the contract (ECJ <judgment of 22 November 2005> loc. cit., paras. 70 et seq.). The latitude of the Federal Republic of Germany for action and lending concrete form during the transposition period was however not restricted by this to such a degree that a structurally effective shift of competences had to be presumed. According to the case-law of the Court of Justice, the Member States are already obliged during the period prescribed for transposition of a directive which has come into force to refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by that directive (see ECJ Case C-129/96 *Inter-Environnement Wallonie* <judgment of 18 December 1997> [1997] ECR I-7411 para. 45; ECJ Case C-14/02 *ATRAL* <judgment of 8 May 2003> [2003] ECR I-4431 para. 58). 76

The Mangold ruling can be categorised in the previous case-law of the Court of Justice on the domestic effect of directives. Although the Court of Justice has ruled several times that a directive "cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual" (see ECJ Case C-91/92 *Faccini Dori* <judgment of 14 July 1994> [1994] ECR I-3325 paras. 19 et seq.; ECJ Joined Cases C-397-403/01 *Pfeiffer* <judgment of 5 October 2004> [2004] ECR I-8835 para. 108), the Court of Justice has recognised that domestic provisions adopted in violation of directives must be set aside in a legal dispute between private individuals (see for instance ECJ Case C-194/94 *CIA Security* <judgment of 30 April 1996> [1996] ECR I-2201; ECJ Case C-443/98 *Unilever* <judgment of 26 September 2000> [2000] ECR I-7535 paras. 49 et seq.). With the advance effect of directives that was presumed in the Mangold ruling, the Court of Justice creates a further case group for the so-called "negative" effect of directives. Like the case-law on the "negative" effect of directives, this serves all in all only to carry out existing legal obligations of the Member States, but does not create any new obligations of the Member States violating the principle of conferral. 77

cc) It is immaterial whether a general principle of the prohibition of discrimination based on age could be derived from the constitutional traditions common to the Member States and from their international agreements although only two of the 15 constitutions of the Member States at the time of the Mangold ruling contained a special prohibition of discrimination based on age (see Case C-411/05 *Palacios de la Villa* (see Opinion of Advocate General Mazák of 15 February 2007) [2007] ECR I-8531 para. 88; Hölscheidt, in: Meyer, *Kommentar zur Charta der Grundrechte der EU*, 2nd ed. 2006, Art. 21, para. 15) and also the international agreements to which the Court of Justice had referred by indicating the recitals in the preamble to Directive 2000/78/EC did not contain a specific prohibition of discrimination. A putative further development of the law on the part of the Court of Justice of the European Union, which would no longer be justifiable in terms of legal method, would only constitute an evident breach of the principle of conferral if it also had the effect of establishing competences in practice. With the disputed general principle of the prohibition of discrimination based on age derived from the constitutional traditions common to the Member States, however, neither a new field of competences was created for the Union to the detriment of the Member States, nor was an existing competence expanded with the weight of a new establishment. This would only be the case if without the issuance of a secondary legal act – seen here as having an advance effect – not only rights, but also obligations of citizens were introduced by virtue of further development of the law which would prove to constitute both encroachments on fundamental rights and a shift of competence to the detriment of Member States. Even if they guarantee the protection of fundamental rights at Union level, general principles may not expand the field of influence of Union law over and above the existing competences of the Union or indeed establish new tasks and competences (see Article 51.2 of the Charter of Fundamental Rights). 78

The case is however different here because the bodies involved in legislation based on Article 13.1 ECT (now Article 19.1 TFEU), including the Council and the German representative in the Council – and not judges in the course of the further development of the law – have made binding the principle of prohibition of discrimination based on age for legal relationships based on employment contracts, and hence have also opened up discretion for court interpretations of the law (see in this respect above aa). 79

II.

The complainant's contractual freedom according to Article 12.1 in conjunction with Article 20.3 of the Basic Law has also not been violated by the impugned judgment not having granted protection of legitimate expectations. 80

1. a) The major elements of the principle of the rule of law include legal certainty. The confidence of the citizen who is subject to the law in the reliability of the legal system is not to be disappointed by the retroactive elimination of acquired rights (see BVerfGE 45, 142 <167>; 72, 175 <196>; 88, 384 <403>; 105, 48 <57>). 81

Confidence in the continued existence of a law can be affected not only by the retroactive finding of its nullity by the Federal Constitutional Court (see BVerfGE 99, 341 <359-360>), but also by the retroactive finding of its inapplicability by the Court of Justice. The eligibility of confidence for protection in a statute which is in violation of Union law is determined in particular according to how predictable it was that the Court of Justice would classify such a provision as being in violation of Union law. It is furthermore important that an arrangement has been made while trusting in a certain legal situation, in other words that the trust was acted on (see BVerfGE 13, 261 <271>). 82

b) The possibilities for Member States' courts to grant protection of legitimate expectations are pre-defined and limited by Union law. Rulings of the Court of Justice in the preliminary ruling proceedings according to Article 267 TFEU in principle have an *ex tunc* effect. The interpretation of Union law by the Court of Justice is hence also to be applied by the Member States' courts to legal relationships which were established prior to the issuance of the preliminary ruling. The Court of Justice only exceptionally restricts the retroactive nature of its ruling in view of the considerable difficulties which its rulings may cause with legal relationships established in good faith for the past (see ECJ Case C-61/79 *Denkavit* <judgment of 27 March 1980> [1980] ECR 1205 paras. 16-17; established case-law). 83

Protection of legitimate expectations can hence not be granted by the Member States' courts imposing a time limit on the effect of a preliminary ruling by applying the national provision whose incompatibility with Union law was established to the period prior to the issuance of the preliminary ruling. The Court of Justice does not as a rule permit such an effect of the protection of legitimate expectations with a primary effect, since, with regard to the uniform validity of Union law, it presumes that only it itself 84

could place a time limit on the impact of the interpretation carried out in its rulings (see ECJ <judgment of 27 March 1980> loc. cit., para. 18; established case-law). The case-law of the Court of Justice, by contrast, does not contain any indications that the Member States' courts are prevented from granting secondary protection of legitimate expectations by compensating for the damage caused by breach of trust.

c) It is hence possible in order to ensure the constitutional protection of legitimate expectations in constellations of the retroactive inapplicability of a law as a result of a ruling by the Court of Justice to grant compensation domestically for a party concerned having trusted in the statutory provision and having made plans based on this trust. The Union's liability law also assigns to the Member State responsibility for a statute which violates Union law and hence reduces the burden on the citizen. It may remain open whether such a claim is already established in the existing state liability system. 85

2. The Federal Labour Court has not ignored the scope of protection of legitimate expectations that is to be constitutionally granted according to Article 12.1 in conjunction with Article 20.3 of the Basic Law. Because of the primacy of application of Community and Union law, the Federal Labour Court was allowed to not consider itself able to grant protection of legitimate expectations by confirming the rulings of the previous instances that had been handed down in favour of the complainant. Any claim to compensation against the Federal Republic of Germany without a violation of the primacy of application of Union law for the loss of assets which the complainant suffered by virtue of a fixed term being not imposed on the employment relationship was not the subject-matter of the proceedings before the Federal Labour Court. 86

III.

The impugned judgment does not violate the complainant's right to its lawful judge according to Article 101.1 sentence 2 of the Basic Law. 87

1. The Court of Justice is the lawful judge within the meaning of Article 101.1 sentence 2 of the Basic Law. It constitutes denial of the lawful judge if a German court does not comply with its obligation to make a submission to the Court of Justice in preliminary ruling proceedings according to Article 267.3 TFEU (see BVerfGE 73, 339 <366 et seq.>; 75, 223 <233 et seq.>; 82, 159 <192 et seq.>). According to the case-law of the Federal Constitutional Court, however, it is not the case that all violations of the obligation under Union law to make a submission immediately constitute a breach of Article 101.1 sentence 2 of the Basic Law. The Federal Constitutional Court complains of the interpretation and application of rules on competences only if, on a sensible interpretation of the concepts determining the Basic Law, they no longer appear to be comprehensible and are manifestly untenable (see BVerfGE 29, 198 <207>; 82, 159 <194>). 88

This standard for what is considered arbitrary is also applied if a violation of Article 267.3 TFEU is considered to have taken place. The Federal Constitutional Court 89

is not obliged under Union law to fully review the violation of the obligation to make a submission under Union law and to take the case-law of the Court of Justice re Article 267.3 TFEU as an orientation (see BVerfG, order of the First Chamber of the Second Senate of 6 May 2008 - 2 BvR 2419/06 -, *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report* - NVwZ-RR 2008, p. 658 <660>; a different view is held in BVerfG, order of the Third Chamber of the First Senate of 25 February 2010 - 1 BvR 230/09 -, NJW 2010, p. 1268 <1269>). Article 267.3 TFEU does not demand an additional remedy to review compliance with the obligation to make a submission (see Kokott/Henze/Sobotta, *Die Pflicht zur Vorlage an den Europäischen Gerichtshof und die Folgen ihrer Verletzung*, JZ 2006, p. 633 <635>). A court adjudicating at last instance according to Article 267.3 TFEU is by definition the last judicial body before which individuals may assert the rights conferred on them by Union law (see ECJ Case C-224/01 *Köbler* <judgment of 30 September 2003> [2003] ECR I-10239 para. 34). Thus, in the interpretation and application of Union law the non-constitutional courts retain latitude of their own in assessment and evaluation which corresponds to that which they have in handling non-constitutional provisions of the German legal system. The Federal Constitutional Court, which only acts as a guardian over adherence to the boundaries of this latitude, in turn does not become the “supreme court of review for submissions” (see BVerfG, order of the First Chamber of the Second Senate of 9 November 1987 - 2 BvR 808/82 -, NJW 1988, p. 1456 <1457>).

90 The obligation to make a submission according to Article 267.3 TFEU is dealt with in a manifestly untenable manner particularly in those cases in which a court deciding on the merits does not at all consider making a submission despite the question of Union law being – in its view – material to the ruling, although it itself has doubts as to the correct answer to the question (fundamental disregard for the obligation to make a submission). The same applies in those cases in which the court of the principal proceedings deliberately deviates in its final instance ruling from the case-law of the Court of Justice regarding questions which are material to the ruling and nonetheless does not make a submission or refrains from making a renewed submission (deliberate deviation without a willingness to make a submission). If material case-law of the Court of Justice is not yet available with regard to a question of Union law that is material to the ruling, or if existing case-law has possibly not yet exhaustively answered the question which is material to the ruling, or if a further development of the case-law of the Court of Justice not only appears as a distant possibility, Article 101.1 sentence 2 of the Basic Law is only violated if the court of the principal proceedings at final instance has unjustifiably transgressed the evaluation framework necessarily available to it in such cases (incompleteness of the case-law). This may particularly be the case if possible counterviews to the question of Union law that is material to the ruling are to be clearly preferred over the opinion put forward by the court (see BVerfGE 82, 159 <194 et seq.>). A breach of Article 101.1 sentence 2 of the Basic Law is therefore already to be negated in such cases if the court has answered the question which is material to the ruling in a manner that is at least justifiable.

2. The impugned judgment does not violate Article 101.1 sentence 2 of the Basic Law, given that the Federal Labour Court, by deciding not to make a submission to the Court of Justice, did not deny the complainant its lawful judge. 91

The Federal Labour Court could particularly not have had to bring about a preliminary ruling because of the incomplete nature of the case-law of the Court of Justice. Presuming that the Court of Justice had found § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts to be inapplicable in the Mangold ruling with the required lack of ambiguity and that the prerequisites applicable according to the case-law of the Court of Justice for a time limit to be imposed on the effect of rulings had not been met, the Federal Labour Court did not consider itself to be obliged to afford to the Court of Justice by means of a submission the opportunity to subsequently grant protection of legitimate expectations. This constitutes a justifiable outcome. The contrary view of the complainant that the Court of Justice had left open the question of the retroactive protection of legitimate expectations in the case of Mangold and the case-law of the Court of Justice on the time limit of the effect of rulings did not refer to the present case constellation, is not clearly preferable to the view of the Federal Labour Court. The Federal Labour Court was, moreover, allowed to presume that § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts had to be set aside according to the Mangold ruling. 92

IV.

This ruling was handed down with 6:2 votes with regard to the grounds and with 7:1 with votes regard to the outcome. 93

Voßkuhle	Broß	Osterloh
Di Fabio	Mellinghoff	Lübbe-Wolff
Gerhardt		Landau

Dissenting opinion
of Justice Landau
on the order of the Second Senate of 6 July 2010
- 2 BvR 2661/06 -

Counter to the view taken by the Senate majority, the constitutional complaint is well-founded. The impugned judgment violates the complainant’s fundamental rights under Article 12.1 and Article 2.1 of the Basic Law because the Federal Labour Court has set aside § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts without a constitutionally tenable reason, and hence circumvented the commitment to law and order (Article 20.3 of the Basic Law). The Federal Labour Court was constitutionally unable to invoke Union law in its interpretation by the Court of Justice of the European Communities (Court of Justice) in the case of Mangold. 94

The Senate majority places excessive requirements on the finding of an *ultra vires* 95

act on the part of the Community or Union bodies by the Federal Constitutional Court, and in this respect deviates from the Senate's judgment on the Treaty of Lisbon without any convincing reasons (I.). It wrongly denies the existence of a transgression of competence on the part of the Court of Justice in the case of Mangold (II.). The Federal Labour Court has also denied this transgression of competence and the resulting options for action (III.).

I.

96 1. With the judgment on the Treaty of Lisbon of 30 June 2009, it should be recalled that the acts of bodies of the European Union are only democratically legitimised as long as they remain within the framework of the competences which the Member States have transferred to the Union. Compliance with boundaries of competences is not solely a matter of the balancing of the powers of constitutional and Community bodies. In the system of democratic government, the claim of a norm to apply follows not from a one-sided subordination of the citizen to power, but from its connection back to the citizen himself or herself. Democratic legitimation hence requires an actual uninterrupted link to the people of a Member State. It may not merely be construed, even by ruling out verifiability. Its necessity ends not at the boundary of the national Approval Act and the prohibition of blanket powers, but continues within the community of states. Activities which are not covered by the tasks that have been transferred are not thus co-legitimated (see BVerfGE 93, 37 <68>). In this sense, the competences given to the Union by the Member States convey and limit the (objective) context of legitimation in which each body which exercises sovereign power must stand (see Häberle, *Europäische Verfassungslehre*, 6th ed. 2009, p. 307), and respect for which the principle of conferral as an expression of the state constitutional basis of all authority of the European Union also aims towards.

97 The empowerment to exercise sovereign power supranationally originates from the Member States as the masters of the Treaties (BVerfGE 123, 267 <349>); there is no subject of legitimation for the authority of the European Union which could be constituted without derivation from the sovereign power of the States at a higher level, as it were. The Treaty of Lisbon confirmed in Article 5.1 sentence 1 and Article 5.2 TEU the principle of conferral exercised in a restricted and controlled manner. Provisions concerning the exercise of competences such as Article 5.3 and Article 5.4, as well as Article 4.2 TEU, furthermore, ensure competences conferred are exercised in such a way that the competences of the Member States are not affected. Moreover, the Treaty – with a constitutional interpretation – does not contain any provisions creating the competence for the Union bodies to decide on their own competence (see BVerfGE 123, 267 <392-393>; agreeing v. Bogdandy, NJW 2010, p. 1 and 4). The linking of democratic legitimation with the exercise of sovereign power which is stressed by the Lisbon ruling of the Federal Constitutional Court would also not be sufficiently determined for this. The primacy of application which was developed by the case-law of the Court of Justice of the European Union remains an institution which is conferred under an international treaty, and hence a derived one (BVerfGE

123, 267 <400>). It changes nothing with regard to the obligation to comply with the system of competences. For sovereign power exercised in Germany, it reaches only so far as the Federal Republic has consented to it or was permitted to consent to it (BVerfGE 123, 267 <402>). In particular, the competence transferred to the Court of Justice to interpret and apply Union law is also not without its limits. The limits imposed on it by the Basic Law are ultimately subject to the jurisdiction of the Federal Constitutional Court (BVerfGE 75, 223 <235>; 123, 267 <344>).

The constitution and international treaties give rise to competences in order to establish, to the extent of the respective attribution, sovereign power that is lawful, that is, legitimated according to the rule of law and in democratic terms. The Senate was aware of this in its judgment of 30 June 2009, and this determined its lines. The attribution of competences assigns different supranational and national functions to one another. They hence wish to ensure proper cooperation, visible responsibility towards the citizen and mutual control, and as a result to prevent abuse of sovereign power. An excess of intertwinings and overlaps undermines the substance of democratic responsibility and violates the principle ensuing from the democratic rule of law that bodies – national or supranational – have to bear responsibility for their decisions. 98

2. In the case of breaches of boundaries – which blur these responsibilities – the Federal Constitutional Court has an obligation to effect *ultra vires* review (BVerfGE 123, 267 <353-354>). With the current state of development of Union law, only the supreme national courts, in particular the constitutional courts, can be considered to exercise a review of competence vis-à-vis the Union bodies, given that the Court of Justice constitutes the keystone of the system at European level and has tended to use this position in a manner that is open towards the Community (see Grimm, *Der Staat* 48 <2009>, p. 475 <494>). The executive and judicative instances of the European Union have to a large extent the possibility to assert Union law in the interpretation which they consider to be correct without the political instances having effective mechanisms at their disposal to counteract them in case they consider the consequences of the interpretation to be detrimental. The possibility to counter undermining of competences which has occurred by legislative means or by revising the Treaties is of slight practical effectiveness in view of the high hurdles existing for this in a Union with 27 Member States (see Grimm, loc. cit. <493-494>; Scharpf, *Legitimität im Europäischen Mehrebenensystem*, Leviathan 2009, p. 244 <248 et seq.>). 99

3. When exercising this competence to effect a review, the principle of openness of the Basic Law towards Europe is to be complied with as a correlate of the principle of sincere cooperation (Article 4.3 TEU) and to be made fruitful (BVerfGE 123, 267 <354>). The majority one-sidedly dissolves the tension occurring here between the principle of safeguarding democratic legitimation and the functioning of the Union (see Folz, *Demokratie und Integration*, 1999, p. 395) in favour of functionality. 100

a) In the ruling on the Treaty of Lisbon, the Senate developed a balanced model which restricts review in substantive terms to manifest breaches of boundaries to- 101

wards the Member States and places it in formal terms under the priority of legal protection at Union level (BVerfGE 123, 267 <353>). This hence covers each expanding interpretation of the Treaties which is tantamount to a non-permissible autonomous amendment of the Treaty (see Everling, *Europarecht* - EuR 2010, p. 91 <103, footnote 62>). Competence violations of a peripheral nature which are not manifest and unambiguous in their nature, and which do not call into question the substance of democratic responsibility, are not considered; the same naturally applies to transgressions of competences which are only significant within the Union and which do not impact the latitude of the Member States. “Manifest”, that is, clear and unambiguous, violations are first and foremost to be made amenable to an assessment by the Court of Justice, the possibility however existing to articulate existing reservations in terms of competences. It is shown as being particularly exemplary in the case at hand how the priority of legal protection at Union level could have been achieved and which constructive potential its exhaustion would have had (III. below). It can be adequately ensured by these means that enabling the reserve competence (BVerfGE 123, 267 <401>) of the Federal Constitutional Court to find on the inapplicability of Union law because of transgression of competences remains restricted to exceptional cases (see Wahl, *Der Staat* 48 <2009>, p. 587 <594>).

b) The Senate majority goes beyond the requirement of a manifest – that is unambiguous and evident – transgression of competences and departs from the consensus on which the Lisbon judgment was based by requiring a “sufficiently qualified” violation of competences which is not only manifest, but which also leads to a structurally significant shift in the structure of competences between Member States and a supranational organisation. Hence, the Senate majority goes beyond the goal of a structure of *ultra vires* review which is open towards European law. It ignores the major prerequisite of binding democratic legitimation on exercising sovereign power that is emphasised in the Lisbon judgment which is breached on any transgression of competences; if the exercise of sovereign power is permitted without sufficient democratic legitimation, this contradicts the core statement of the Senate’s judgment of 30 June 2009. 102

With the demand for a structurally significant shift in the structure of competences (C. I. 2. b), the Senate majority furthermore ignores the fact that specific dangers to the safeguarding of the competences, and hence the democratic legitimation in the case of the European Union, emerge less from grievous – and as such recognisable – assumptions of competences in individual cases than from gradual developments in the course of which minor transgressions of competences, which per se might be slight, accumulate to have significant consequences. The risk presumably inherent in all federal systems of “political self-enhancement” (see BVerfGE 123, 267 <351-352>) of the higher level exists to a particular degree in the case of the European Union, given that the distribution of competences here – unlike in federal states – is not objective, but takes place at a final level. The goal of establishing and maintaining the Single Market has an impact of removing boundaries (Grimm, *Der Staat* 103

48 <2009>, p. 475 <493>). Whether in the context of such developments – which can be illustrated using the ongoing expansion of the Court of Justice's case-law on the impact of provisions contained in directives, culminating in the case of Mangold (II. 1. b below) – ever permits one to make out an individual case of transgression of competences which shows the grievousness required by the Senate majority, and hence sets off the counter mechanism of *ultra vires* review, appears highly questionable – especially since, in many cases, it will only be possible to properly evaluate the suitability of an individual act to bring about structural shifts in the structure of competences in retrospect (see Scharpf, *Legitimität im Europäischen Mehrebenensystem*, Leviathan 2009, p. 244 <264>).

c) In the result, the Senate majority does not thus do justice to its responsibility for the rule-of-law-based, democratic meaning of provisions relating to competences. It hence continues to pursue a problematic tendency which is already recognisable in the previous case-law of the Federal Constitutional Court, that is of only asserting on paper the democratically founded national right to hand down a final ruling on the application of sovereign power in one's own territory and the concomitant responsibility for compliance with the competences granted to the Union, and of shying away from effectively implementing them in practice: Whilst the Federal Constitutional Court initially left it open as to whether Community law could be measured in terms of the Basic Law (BVerfGE 22, 293 <298-299>), it went on to affirm the question in the Solange I ruling with regard to a review according to fundamental rights (BVerfGE 37, 271 <280 et seq.>), and twelve years later to suspend this review competence (see BVerfGE 52, 187 <202-203> on the interim period) with regard to the fundamental rights case-law of the Court of Justice which had grown up (Solange II, BVerfGE 73, 339 <387>). The court then developed only in outline, and later more clearly, the idea of a supplementary review of compliance with the boundaries imposed on competences (see BVerfGE 75, 223 <242>; 89, 155 <188>). However, instead of making these means an effective control instrument, the court practically returned to the status quo of the Solange II ruling (see for instance the banana market decision BVerfGE 102, 147 <163>; on developments see Grimm, *Der Staat* 48 <2009>, pp. 475 <478-479>). 104

II.

With its judgment in the case of Mangold, the Court of Justice manifestly transgressed the competences granted to it to interpret Community law with the Mangold judgment and acted *ultra vires*. The question left open by the Senate majority, namely whether the Court of Justice of the European Union departed from the area of justifiable interpretation – including further developing the law – with its judgment, is manifestly to be answered in the affirmative (1.); the ruling of the Court of Justice also had a detrimental effect on the latitude remaining with the Federal Republic of Germany as a Member State according to the Treaty (2.). 105

1. It is irrelevant whether, in the case of Mangold, the Court of Justice rightly consid- 106

ered the field of application of Community law to be opened and rightly found a contradiction in terms of content between § 14 of the Law on Part-Time Working and Fixed-Term Contracts and Article 6 of Directive 2000/78/EC. At least the considerations with which the Court of Justice disregarded the fact that the transposition period had not expired no longer appear as a still justifiable interpretation and further development of Union law, but as an expanding interpretation of the Treaties which is equivalent to a non-permissible autonomous amendment of the Treaty.

a) One must presume a simple finding to which one may not blind oneself by presuming the Court of Justice's case-law tradition, which is orientated in line with the *effet utile* principle, to be a given from the outset: The Court of Justice measured German law by Article 6 of Directive 2000/78/EC although this directive was not binding on the Federal Republic of Germany at the time in question; according to the will of the Community legislature, the democratically legitimated bodies of the Federal Republic were not yet bindingly subject to the Directive at that time. Moreover, despite the differentiation set out in Article 249.2 and Article 249.3 of the EC Treaty in the shape of the Treaty of Nice (Article 288.2 and Article 288.3 TFEU), the Court of Justice attributed to the directive, which had not yet entered into force, a (negative) direct internal effect which led to the inapplicability of contrary national law. As should also have been clear to the Court of Justice, the latter finally had a detrimental impact on holders of fundamental rights who trusted in the effectiveness of national labour law. 107

b) The grounds for this result submitted by the Court of Justice are manifestly not convincing; they lead to the conclusion that the Court of Justice asserts an outcome which it desires in the sense of Community law being applicable as broadly as possible without consideration for the contrary will of the Community legislature, and hence has overstepped the boundaries of methodically justifiable further development of the law. What is more, they make it clear how different argumentation patterns of the Court of Justice which are certainly open towards the Union, but per se long-accepted in their combination, entail the risk of a gradual erosion of the Member States' competences and democratic legitimation which is difficult to halt. 108

aa) Insofar as the Court of Justice designates the prohibition of discrimination on grounds of age as a general principle of Community law and referred to this, this can be understood neither using the grounds of the judgment, nor indeed independently of it. The derivation of a specific prohibition of discrimination on grounds of age from international agreements and constitutional traditions common to the Member States is not justifiable. This has already been adequately documented in the legal literature, and not lastly by Advocate General Mazák, and has not been seriously doubted so far; although it leaves the question open in formal terms, the Senate majority ultimately cannot avoid noticing this (see on this at C. I. 2. b) cc) with the references named there; see furthermore Gerken/Rieble/Roth/Stein/Streinz, *"Mangold" als ausbrechender Rechtsakt*, 2009, pp. 19 et seq.; Körner, *Neue Zeitschrift für Arbeits- und Sozialrecht* – NZA 2005, p. 1395 <1397>; Krebber, Comparative Labor Law & Policy Journal 2006, p. 377 <390-391>; Preis, NZA 2006, p. 401 <402>; Riesenhuber, *European* 109

Review of Contract Law – ERCL 2007, pp. 62 <66-67>; Wieland, NJW 2009, p. 1841 <1843>). Against this background, it is also not reasonable to declare the prohibition of discrimination on grounds of age simply as a case of application of the general principle of equality under Union law (see ECJ Case C-117/76 <judgment of 19 October 1977> [1977] ECR 1753 paras. 7 et seq.), as the Court of Justice does fleetingly with its reference to the first recital of Directive 2000/78/EC in the case of Mangold (para. 74) and explicitly in a follow-up ruling (ECJ Case C-555/07 <judgment of 19 January 2010> juris, para. 50); the decisive evaluation that age could be a problematic differentiation criterion which requires further justification does not emerge from the general principle of equal treatment. What is more, as has been stated, it is alien to the common constitutional traditions, and particularly in the context of the labour market is anything but a matter of course, in view of the major problems existing for older unemployed persons when seeking a permanent job. Finally, the Court of Justice says nothing about the will of the Member States, which is clearly expressed by doubling the legal basis in Articles 12 and 13 ECT (now Article 18 and 19 TFEU), to restrict differentiations because of other characteristics than nationality only after (!) they have been lent concrete form under secondary law.

bb) Also the concept of an "advance effect" of the directive (see on this at C. I. 2. b) bb) may carry the outcome of the interpretation of the judgment in the case of Mangold neither per se, nor when regarded together with the alleged unwritten prohibition of discrimination on grounds of age. The outcome desired by the Court of Justice emerges in this respect only from an accumulation of various dogmatic approaches which impinge on the Member States' latitude and which, in terms of a transparent democratic distribution of competences, is ultimately no longer acceptable. 110

The recognition of the direct effect of provisions of directives by the Court of Justice was already a step of further development of the law that clearly pointed beyond the wording of the Treaty (Oppermann/Classen/Nettesheim, *Europarecht*, 4th ed. 2009, p. 184; see also Alter, Establishing the Supremacy of European Law, 2001, in particular pp. 16 et seq.), which the Federal Constitutional Court however followed (BVerfGE 75, 223), unlike some other courts (see *Entscheidungen des Bundesfinanzhofs* – BFHE 143, 383; Conseil d'Etat, decision of 22 December 1978, EuR 1979, p. 292). In this respect, the Federal Constitutional Court allowed itself to be guided by the concept of openness towards European law. It found that the case-law of the Court of Justice was able to invoke major objective arguments – namely the concept of an effective sanctioning of Member States after unsuccessful expiry of the transposition deadline – and that it linked the direct effect to prerequisites that had not necessarily been complied with, which prevented equating directives and provisions in a manner that was in violation of the Treaty (BVerfGE 75, 223 <237, 241-242, 244>). The Court of Justice did not show this reserve in the case of Mangold. It renounced the principle that the direct application of provisions from the directives is contingent on the transposition period having ended (see on this only Biervert, in: Schwarze, *EU-Kommentar*, 2nd ed. 2009, Art. 249 EGV, para. 28); what is more, in substance it per- 111

mitted an indirect impact of the directive on the relationship between private individuals (see by contrast still reserved ECJ Case C-91/92 <judgment of 14 July 1994> [1994] ECR I-3325 paras. 19 et seq.). It is no longer possible to base these far-reaching steps on the concept of sanctioning of (defaulting) Member States. The Court of Justice only provides an extremely inadequate explanation of them by indicating in blanket terms the principle that the Member States must refrain during the period prescribed for transposition of a directive from taking any measures liable to seriously compromise the attainment of the result prescribed by that directive. If the Senate majority in speaking here of merely "carry[ing] out existing legal obligations" which is said not to "create any new obligations of the Member States violating the principle of conferral", the problem is masked: Also "carrying out" existing obligations can ultimately only mean that legal obligations are amplified beyond the measure of what has been agreed.

2. The understanding of Community law developed by the Court of Justice in the case of Mangold concerns the delimitation of the competences of Community (Union) and Member States' law, which is vital to the triggering of *ultra vires* review. It deprives the Member States of latitude in the field of employment policy, which is largely reserved for the Member States (see Article 3.1 (i), Articles 125 et seq. ECT; Article 2.3, Article 5.2 and Articles 145 et seq. TFEU). Hence, the prerequisites are met for the involvement of *ultra vires* review, even if one should not overestimate the significance of the extant transgression of competences in view of the anticipated expiry of the transposition period for the directive. If, however, the Senate majority would like to deny an "effect of establishing competences in practice" by observing that the bodies which are empowered to legislate, including the Council and the German representative there, have made binding the principle of the prohibition of discrimination based on age for legal relationships based on employment contracts and "hence have also opened up discretion for court interpretations of the law", it supposes without further foundation that the legal view of the Court of Justice was covered by the will of the legislature. If there had been any need of an indication to the contrary, the adoption of § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts however shows very clearly that in particular the Federal Republic of Germany quite definitely did not wish its latitude for action to be restricted in such a manner as emerges from the judgment in the case of Mangold. On the contrary: The German representative on the Council evidently did not have in mind the court interpretation of the law restricting the latitude of the Federal Republic of Germany, and could not be expected to be able to recognise it. 112

Finally, the fact that the transgression of competences on the part of the Court of Justice should not have any consequences for the law applicable today, given that a prohibition of discrimination on grounds of age is contained in Article 21.1 of the Charter of Fundamental Rights, does not make the violation undone – above all not with regard to the case at hand on which the Federal Labour Court had to rule on the basis of the law applicable at the time of conclusion of the contract (see Federal 113

Labour Court, judgment of 27 November 2003 – 2 AZR 177/03 –, juris, para. 16; Krüger, in: *Münchener Kommentar zum BGB*, 4th ed. 2006, Art. 170 EGBGB, para. 3).

III.

Under these circumstances, the Federal Labour Court was not permitted to invoke the judgment in the case of Mangold to set aside the unambiguous order on the application of the provision contained in § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts and to grant the action against fixed-term employment contracts. Since, conversely, the court according to Article 234 ECT was not free in terms of Community law – and via Article 101.1 sentence 2 of the Basic Law also constitutionally – to rule in open deviation from the case-law of the Court of Justice, the 7th Senate should have considered or deliberated on all available possibilities to solve the immanent tensions. This was wrongly not carried out in view of the fact that the Federal Labour Court – as the Senate majority – ignored the transgression of competences by the Court of Justice. 114

It would have been a priority in this respect to consider claiming legal protection at Union level, as is also stated in the Lisbon judgment, albeit the latter was admittedly not handed down until after the ruling impugned here. The Federal Labour Court could definitely have once more submitted to the Court of Justice by means of the proceedings according to Article 234 ECT, explaining the existing reservations, the question of whether Community law did not demand § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts to be set aside. Community law did not preclude such a renewed, expanded, well-founded submission (see ECJ Case C-69/85 <order of 5 March 1986> [1986] ECR 947 para. 15). In this framework, it would also have been possible to explicitly ask the question as to a possible time limit on the effects of the judgment (see only ECJ Case C-43/75 <judgment of 8 April 1976> [1976] ECR 455; Schwarze, in: Schwarze, *EU-Kommentar*, 2nd ed. 2009, Art. 234, para. 67). The preliminary ruling proceedings would already have opened up many possibilities to resolve or at least alleviate the immanent conflict between constitutional and Community law requirements in a cooperative manner and at an early stage. 115

In the event of a complete confirmation of the Mangold ruling, the Federal Labour Court could and furthermore should have examined whether and to what degree there were possible rulings in conformity with European law which would have respected the will of the legislature expressed in § 14.3 sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts at least in terms of the outcome, for instance by the present legal dispute being ruled on whilst not applying the said provisions according to the principles of the cessation of the operational foundation. Only had it not been possible to take such paths could and should the Federal Labour Court have taken the path of review of statutes according to Article 100.1 of the Basic Law to formally find the transgression of competences by the Federal Constitutional Court. This shows, moreover, that *ultra vires* review can be exercised to a great de- 116

gree in a manner that is open towards European law and cooperative; the actual act of finding a transgression of competence and inapplicability by the Federal Constitutional Court still remains at any rate a last resort.

Landau

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