OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 15 February 2007 [1]

I — Introduction

1. By the two questions which it referred for a preliminary ruling by order of 14 November 2005, [2] the Juzgado de lo Social n° 33 de, Madrid, essentially wishes to ascertain whether the prohibition of discrimination on the grounds of age as laid down, in particular, in Article 2(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [3] precludes a national law allowing compulsory retirement clauses to be included in collective agreements. In the event of an affirmative answer, the referring court also wishes to know if it is required to disapply the national law concerned.

2. These questions have been raised in the context of a dispute between private parties, namely proceedings brought by Félix Palacios de la Villa against Cortefiel Servicios SA, José Maria Sanz Corral and Martin Tebar Less in which Mr Palacios claims that his dismissal on the ground that he had attained the compulsory retirement age laid down in a collective agreement was unlawful.

3. Questions on the interpretation of Directive 2000/78 have already been referred to the Court in the *Mangold* [4] and *Navas* [5] cases. As regards, more specifically, discrimination on grounds of age, this is the third time (after *Mangold* [6] and *Lindorfer* [7]) that the Court has been called upon to adjudicate an age discrimination claim, although it must be emphasised that the present case differs considerably from those cases in terms of the factual and legal background.

1 — Original language: English.

2 — Received at the Court Registry on 22 November 2005.

3 — OJ 2000 L 303, p. 16.

4 — Case C-144/04 [2005] ECR I-9981.

5 — Case C-13/05 [2006] ECR I-6467.

6 — Cited in footnote 4.

7 — See the Opinion of Advocate General Jacobs in Case C-227/04 P *Lindorfer* v *Council*, pending before the Court; this Case has been reopened by Order of the Court of 26 April 2006; see the second Opinion delivered in this Case on 30 November 2006 by Advocate General Sharpston.

II — Legal framework

A — *Community law*

4. Directive 2000/78 was adopted on the basis of Article 13 EC in the version prior to the Treaty of Nice, which provides:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting 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.'

5. The 1st and the 14th recitals in the preamble to Directive 2000/78 are worded as follows:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

...

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

...'

6. Article 1 of Directive 2000/78 states that the purpose of that Directive is:

'... to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual

orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

7. Paragraph 1 of Article 2, which defines the concept of discrimination, provides as follows:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

...'

8. Article 3 of Directive 2000/78, entitled 'Scope', provides in paragraphs 1 and 3:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals and pay;

...

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

...'

9. Article 6 provides for justification of differences of treatment on grounds of age:

'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.

Such differences of treatment may include, among others:

(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;

(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;

(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.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

10. Under the first paragraph of Article 18 of Directive 2000/78, transposition of the directive had to take place by 2 December 2003. Since Spain did not avail itself of the option, provided for in the second paragraph

of Article 18, of having an additional period of three years from 2 December 2003, that date also marks the end of the period allowed for implementation of the directive in Spain.

B — *Relevant national law*

11. According to the order for reference, from 1980 (starting with Law 8/80 on the Workers' Statute) until 2001, compulsory retirement was used by the Spanish legislature as a mechanism for promoting intergenerational employment.

12. After provisions of Law 8/80 providing for the setting of compulsory retirement ages in collective agreements had been ruled unconstitutional by the Constitutional Court, Law 8/80 was replaced in that respect by Royal Legislative Decree 1/1995 governing the Law on the Workers' Statute ('WS'). The WS is currently the principal national legislation in the field of industrial relations.

13. In the current version of the WS — that is to say, as amended by Law 62/03, which came into force on 1 January 2004 and which transposed Directive 2000/78 into Spanish law — Articles 4 and 17 lay down a prohibition of discrimination on grounds, inter alia, of age.

14. As regards compulsory retirement, the Tenth Additional Provision of the WS, in the version in force until July 2001, provided as follows:

'In accordance with the limits and conditions laid down in this provision, compulsory retirement may be used as an instrument in the implementation of employment policy. The maximum age-limit applicable to the capacity to work and the termination of employment contracts shall be set by the Government by reference to the resources of the social security system and the labour market, without prejudice to the right to complete qualifying periods for retirement. Retirement ages may be agreed freely by collective bargaining, without prejudice to the social security provisions in that regard.'

15. Due to a shift on the part of the legislature from perceiving compulsory retirement as an instrument favourable to employment to considering it a burden on the social security system, the Tenth Additional Provision was repealed in 2001 and

compulsory retirement abolished. This gave rise to a large number of disputes before the Courts, challenging the lawfulness of clauses in collective agreements providing for the compulsory retirement of workers. As is clear from the order for reference, the Spanish Supreme Court took the view that, following the abolition of their legal basis, the compulsory retirement clauses included in a number of collective agreements were no longer lawful.

16. However, at the instigation of social partners, employers' organisations and trade union organisations, compulsory retirement was reinstated by Law 14/2005 of 1 July 2005 on clauses in collective agreements concerning the attainment of normal retirement age ('Law 14/2005'), which came into force on 3 July 2005. The Sole Article of that Law reinstated the Tenth Additional Provision of the WS — in somewhat different wording — ('the definitive Law 14/2005 regime') and reads as follows:

'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:

(a) Such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.

(b) A worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'

17. Law 14/2005 was designed not only to govern collective agreements concluded after its entry into force on 3 July 2005, but also — by means of the 'Single Transitional Provision' — to govern agreements already in force when the law was published.

18. The Single Transitional Provision ('STP'), to which the questions referred in the present case relate, provides as follows:

'Clauses in collective agreements concluded prior to the entry into force of this Law,

which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided that the agreement stipulates that the workers concerned must have completed the minimum period of contributions and that they must have satisfied the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.'

19. As the referring court pointed out, the STP differs from the rules on compulsory retirement contained in the Sole Article of Law 14/2005 governing collective agreements concluded after the entry into force of that law in that, according to the wording of the STP, there is no express requirement for compulsory retirement to be linked to objectives consistent with employment policy, which must be set out in the collective agreements concerned.

III — Factual background, procedure and questions referred

20. According to the order for reference, Mr Palacios, born on 3 February 1940, worked for the undertaking Cortefiel Servicios SA since 17 August 1981 as organisational manager.

21. On 18 July 2005, the undertaking informed Mr Palacios by letter of his dismissal on the basis that he satisfied all the requirements laid down in Article 19 of the Collective Agreement and in the STP.

22. The relationship between the parties is governed by the Textile Trade Collective Agreement for the Community of Madrid ('TTCA'), which was concluded on 10 March 2005 and published on 26 May 2005. Article 3 of the TTCA provides that it will remain in force until 31 December 2005.

23. Article 19(3) of the TTCA provides: 'In the interests of promoting employment, it is agreed that the retirement age will be 65 years unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.'

24. If Mr Palacios had retired on 18 July 2005, the date on which he was dismissed from the undertaking, he would have been entitled to receive from the social security scheme a retirement pension amounting to 100% of his contribution base of EUR 2 347.78, without prejudice to the maximum limits laid down in law.

25. In his action in the main proceedings Mr Palacios claims that his dismissal is void for breach of fundamental rights. In addition to an allegation of harassment, which the referring court regards as unfounded, Mr Palacios argues that he was discriminated against because he had reached the age of 65 and challenges directly the letter of dismissal.

26. The referring court notes that the letter of dismissal applied Law 14/2005 and that it is that single issue, namely whether the STP is compatible with Community law, which is the subject of the questions referred to the Court of Justice.

27. In addition, the referring court points out in its legal analysis that under the STP it is lawful to dismiss a worker provided that two conditions are satisfied, namely, that he has reached retirement age and that he fulfils the other conditions required for entitlement to a State pension. In its view, if the STP is incompatible with Community law, it must not be applied, in accordance with the principle of primacy.

28. The referring court emphasises also that, in contrast to the STP, the definitive Law 14/2005 regime makes compulsory retirement conditional upon the pursuit of objectives which are consistent with employment policy. It appears from the order for reference that the referring court therefore considers the definitive Law 14/2005 regime to be compatible with Directive 2000/78, pursuant to the derogation provided for in Article 6(1) thereof in relation to differences of treatment on grounds of age.

29. Moreover, the referring court takes the view that under Law 14/2005 workers who have reached the age of 65 are treated differently depending on whether the collective agreement under which they are subject to compulsory retirement at the age of 65 was already in force when that law was enacted or has been negotiated subsequently.

30. Finally, the referring court considers Article 13 EC and Article 2(1) of Directive 2000/78 to be precise and unconditional provisions which may be applied directly to the case before it.

31. Against that background, in order to establish with greater legal certainty an applicable criterion of interpretation, the

Juzgado de lo Social has referred the following questions to the Court for a preliminary ruling:

'(1) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to draw a retirement pension under their contribution regime?

In the event that the reply to the first question is in the affirmative:

(2) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the Single Transitional Provision of Law 14/2005 cited above?'

IV — Legal analysis

A — *The first question*

Introductory remarks

32. Before embarking on the analysis it appears appropriate to determine in greater detail the issues which arise from the first question referred.

33. First of all, as the Commission has noted in its written observations, the referring court seems to allude in the order for reference, alongside the alleged discrimination on grounds of age, to a possible discrimination arising from the fact that two different provisions of national law on compulsory retirement — namely the STP

and the definitive Law 14/2005 regime — apply depending on whether the collective agreement concerned was concluded before or after Law 14/2005 entered into force.

34. However, as appears especially from the wording of the first question, which refers expressly to discrimination on grounds of age and the related Community provisions, the latter — different — type of discrimination on grounds of the date of the conclusion of the collective agreement may well be considered by the referring court as a problem arising under the principle of equality as provided for by national law. However, in my view, it is not the subject of the question referred to the Court in the present case. That view is shared, I might add, by the parties to the present proceedings, as is clear from the statements made at the hearing.

35. Secondly, it should be noted, as regards discrimination on grounds of age, that in its first question the referring court mentions, in addition to Directive 2000/78, also Article 13 EC and expresses the view that this provision may be capable of producing direct effect.

36. It should be emphasised, however, that Article 13 EC is simply an empowering provision, enabling the Council to take appropriate action to combat, inter alia, discrimination on grounds of age. As such, it cannot have direct effect; nor can it preclude the application of a national law such as the STP. [8]

37. I agree therefore with the parties that the first question referred should not be examined directly in the light of Article 13 EC. On the other hand, that does not mean that Article 13 EC is of no importance for the interpretation of Directive 2000/78 and the principle of non-discrimination on grounds of age.

38. Thirdly, it must be borne in mind that the questions in issue were referred for a preliminary ruling prior to the ruling of the Court in *Mangold*, [9] in which the Court took the far-reaching view that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. Accordingly, in order to provide the referring court with a helpful answer, the first question must also be examined with regard to that general principle.

8 — See, to that effect, Joined Cases T-219/02 and T-337/02 *Lutz Herrera* v *Commission* [2004] ECR-SC I-A-319 and II-1407, paragraph 89, and Opinion of Advocate General Sharpston delivered on 30 November 2006 in the Case *Lindorfer* v *Council*, cited in footnote 7, point 65.

9 — Cited in footnote 4.

39. In the light of the above considerations the following issues arise, in my view, from the first question referred.

40. First, it must be examined whether Directive 2000/78 is applicable *ratione materiae* to the circumstances underlying the present case. If so, the second issue to be addressed is whether a national law allowing for compulsory retirement, such as the STP, is compatible with Directive 2000/78 and, in particular, whether such a measure can be justified under that directive. Thirdly, the first question referred should be assessed in the light of the general principle of non-discrimination on grounds of age as defined by the Court in *Mangold*. The controversies triggered by that judgment, especially with regard to the existence of a general principle of that kind, call for some additional comments.

41. The issue of the possible consequences which the referring court has to draw from the answer to the first question is the subject of the second question referred.

Main submissions of the parties

42. In the present proceedings, written observations have been submitted by the Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as by the Commission and the parties to the main proceedings. With the exception of Mr Palacios, those parties were also represented at the hearing held on 21 November 2006.

43. As to the first question referred, all parties except for Mr Palacios agree essentially that that question should be answered in the negative, albeit on the basis of slightly differing arguments. The Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as Cortefiel, maintain that the principle of non-discrimination on grounds of age as laid down in Directive 2000/78 does not apply to a national law such as the STP. In that respect, those parties refer in particular to the 14th recital of the directive regarding national provisions laying down retirement ages.

44. In the alternative, those Governments submit that a national provision allowing for the setting of a compulsory retirement age is in any event justified under Article 6(1) of Directive 2000/78. The Commission maintains that Directive 2000/78 is applicable to a national provision such as the STP, but agrees that such a provision is justifiable under Article 6(1) of the directive.

Applicability of Directive 2000/78 ratione materiae?

45. In order to determine whether the scope of Directive 2000/78 is to be interpreted as extending to a national rule such as the STP, account must be taken not only of the wording but also of the purpose and general scheme of the directive. [10]

46. Under Article 1 of Directive 2000/78, the purpose of that directive is to lay down a general framework for combating discrimination on the grounds specified in that article — which include grounds of age — as regards *employment and occupation.*

47. The material scope of the directive is defined in detail in Article 3. In particular, pursuant to point (c) of Article 3(1), the directive applies in relation to 'employment and working conditions, including dismissals and pay'.

48. Whereas the Commission argues that the STP lays down a working condition for the purposes of Article 3(1)(c) of Directive 2000/78, most other parties maintain that, as a national provision providing for the setting of retirement ages, the STP falls outside the scope of that directive.

49. In that respect, the first point to note is that the referring court describes the STP as a provision laying down conditions concerning retirement, namely allowing for compulsory retirement clauses to be included in collective agreements. Such compulsory retirement is conditional upon the completion of the minimum period of contributions and fulfilment of the other requirements laid down in social security legislation for entitlement to a retirement pension under that contribution scheme.

50. On the other hand, Mr Palacios refers in this context to his 'dismissal' because of compulsory retirement as provided for by the collective agreement on the basis of the STP. By contrast, the Spanish Government challenged that terminology at the hearing, pointing out that, in reality, Mr Palacios had not been dismissed, but had simply been obliged to retire pursuant to national rules providing for compulsory retirement at the age of 65. According to that Government, the letter sent to Mr Palacios does not refer to 'dismissal'.

10 — See to that effect, inter alia, Cases C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 22, and C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15.

51. In that regard it should be emphasised, first of all, that according to the 14th recital of Directive 2000/78, of which account must be taken in interpreting the directive, [11] the directive is to be without prejudice to national provisions laying down retirement ages.

52. I must say that I find it somewhat difficult not to regard the national rule in question as a provision of the kind envisaged by that recital.

53. It is true that the STP does not itself govern the social security regime containing the requirements for entitlement to a retirement pension, but rather refers to that scheme as a condition for the setting of a compulsory retirement age. Nevertheless, I think the fact remains that the STP — in connection with a collective agreement based on it — lays down a compulsory retirement age. It entails the termination of the employment and the commencement of the pension.

54. To regard this instead as 'dismissal' is in my view rather far-fetched, although, admittedly, the Court espoused an interpretation to that effect in its case-law on that term as used in Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. [12]

55. In the line of cases I am referring to, [13] the Court distinguished access to a statutory or occupational retirement scheme, that is to say, the conditions for payment of an old-age retirement pension, from the fixing of an age limit with regard to the termination of employment. The Court found that the latter question concerns the conditions governing dismissal and therefore falls to be considered under Directive 76/207. [14]

56. That interpretation, however, was based on the premises that the word 'dismissal' as used in that directive must be given a wide meaning. [15]

11 — See to that effect, inter alia, Case C-240/02 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2004] ECR I-2461, paragraph 22; see also *Navas*, cited in footnote 5, paragraphs 45 and 49.

12 — OJ 1976 L 39, p. 40.

13 — See, in particular, Case 262/84 *Vera Mia Beets-Proper* [1986] ECR 773, and Case 152/84 *Marshall* [1986] ECR 723.

14 — See *Vera Mia Beets-Proper*, cited in footnote 13, paragraph 34, and *Marshall*, cited in footnote 13, paragraph 32.

15 — See *Vera Mia Beets-Proper*, cited in footnote 13, paragraph 36, and *Marshall*, cited in footnote 13, paragraph 34.

57. By contrast, Directive 2000/78 calls in my view for a narrow interpretation of its scope of application, in particular so far as non-discrimination on grounds of age is concerned.

58. I can align myself in that respect with Advocate General Geelhoed's view in his Opinion in *Navas*, where he pointed out that the history and wording of Article 13 EC as the legal basis of Directive 2000/78 suggest a rather restrained interpretation of that directive and that the Community legislature must have been aware of the potentially far-reaching economic and financial consequences of, in particular, the prohibition of discrimination on grounds of age. [16]

59. Indeed, a very careful approach is in general advisable when it comes to the interpretation and application of prohibitions of discrimination in Community law since, owing to the rather open and not clearly definable concept of non-discrimination, there is a danger that such rules may very generally eliminate or call into question requirements and conditions laid down in national law. [17]

60. As Advocate General Geelhoed rightly put it, prohibitions of discrimination 'can be used as a lever to correct, without the intervention of the authors of the Treaty or the Community legislature, the decisions made by the Member States in the exercise of the powers which they — still — retain'. [18]

61. So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. [19] It is therefore a much more difficult task to determine the existence of a discrimination on grounds of age than for example in the case of discrimination on grounds of sex,

16 — See Advocate General Geelhoed's Opinion in *Navas*, cited in footnote 5, points 46 to 51.

17 — See, to that effect, Opinion of Advocate General Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita and Carrefour Marinopoulos* [2006] ECR I-8135, point 41, and Opinion of Advocate General Stix-Hackl in Case C-40/05 *Kaj Lyyski* [2007] ECR I-99, point 56.

18 — Opinion in *Navas*, cited in footnote 5, point 54.

19 — See Opinion of Advocate General Jacobs in *Lindorfer*, cited in footnote 7, points 83 and 84.

where the comparators involved are more clearly defined. [20]

62. What is more, whilst the application of the prohibition of discrimination on grounds of age thus requires a complex and subtle assessment, age-related distinctions are very common in social and employment policies.

63. In particular, age-related distinctions are, naturally, inherent in retirement schemes. It should be borne in mind that national provisions laying down retirement ages automatically entail, according to the concept of discrimination as defined in Article 2 of Directive 2000/78, direct discrimination on grounds of age. Consequently, if such national provisions were to fall within the scope of Directive 2000/78, every such national rule, whether it lays down a minimum or a maximum age of retirement, would in principle have to be measured against the directive.

64. Even though Article 6 of the directive provides for specific exceptions and limitations with regard to age discrimination, it would, in my opinion, still be very problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member States.

65. I take the view that the Community legislature was aware of these problems and that it inserted the 14th recital in the preamble of Directive 2000/78 in order to make clear that it did not intend the scope of that directive to extend to rules setting retirement ages. [21]

66. Lastly, I am unconvinced by the argument of the Commission that the 14th recital may refer not to the scope of the Directive but to the grounds of justification provided for in Article 6 of the directive. A possibility of justifying national provisions under a directive is quite different from a directive

20 — For this reason alone I think the case-law of the Court concerning the application of the principle of equal pay for men and women, in which the Court has held that pensions may fall under the heading of 'pay' within the scope of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) is not without more transferable to the present case concerning discrimination on grounds of age. See as to that case-law, inter alia, Case C-50/96 *Schröder* [2000] ECR I-743 and Case C-351/00 *Niemi* [2002] ECR I-7007.

21 — As the Irish Government rightly pointed out, that recital did not appear in the proposal from the Commission (OJ 2000 C 177 E, p. 42) but was subsequently inserted into the preamble of the directive by the Council.

being 'without prejudice' to such provisions. Moreover, paragraph 2 of Article 6 of the directive refers only to the fixing of ages for occupational social security schemes: it does not refer, as the 14th recital does, to provisions laying down retirement ages in general.

67. In the light of the foregoing considerations I reach the view that a national provision providing for the setting of a compulsory retirement age, such as the STP, does not for the purposes of Directive 2000/78 relate to 'employment and working conditions, including dismissals and pay', and does not therefore fall within the scope of that Directive. Such a national provision cannot therefore be precluded by the prohibition of discrimination on grounds of age as laid down in that directive.

Justification of a rule such as the one at issue?

68. Should the Court none the less conclude that a national rule such as the STP falls within the scope of Directive 2000/78, it will be necessary to examine if that rule can be justified under Article 6 of that directive, it being understood, as mentioned above, that a rule providing for the setting of a compulsory retirement age entails direct discrimination on grounds of age within the meaning of Article 2 of that directive.

69. Quite obviously, on a proper application of the concept of discrimination, the alleged discrimination would consist in the present case in the fact that persons who reach the age of compulsory retirement, as opposed to younger persons, are not to be employed any more. It should be observed, however, that it is perhaps more usual for people to feel treated less favourably on grounds of age with regard to a minimum retirement age — as is provided for in probably most of the pension schemes of the Member States — since, in general, retirement seems to be perceived more as a social right than as an obligation.

70. In any event, Article 6(1) of Directive 2000/78 lays down, specifically with regard to differences of treatment on grounds of age, that Member States may provide that such differences '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'.

71. It appears from the order for reference — and from the submissions of the Spanish Government — that the STP allowing for the inclusion of compulsory retirement clauses in collective agreements was adopted, at the instigation of the social partners, as part of a policy promoting intergenerational employment.

72. In my view there is no doubt that this provision, read in conjunction with Article 19(3) of the Collective Agreement, serves a legitimate public-interest aim of employment and labour market policy capable of justifying a difference of treatment on grounds of age in accordance with Article 6(1) of the directive. In this context I confess that I do not agree with the assumption that the referring court seems to make, that is to say, I do not consider it necessary for the national provision in question to refer expressly to a legitimate policy ground for the purposes of Article 6(1) of Directive 2000/78 in order to be justifiable under that provision. Also, given that directives are binding only as to the result to be achieved, it should be sufficient and decisive that the national law is in actual fact and in the result justified by such a legitimate aim.

73. Turning, next, to the requirement under Article 6(1) of Directive 2000/78 that the means used to achieve the legitimate objective at issue be 'appropriate and necessary', it should be emphasised, as the Court pointed out in *Mangold*, that the Member States enjoy broad discretion in their choice of the measure capable of attaining their objectives in the field of social and employment policy. [22]

74. Indeed, as a rule, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature or the other political and societal forces involved in the definition of the social and employment policy of a particular Member State (such as the social partners in the present case). At most, only a manifestly disproportionate national measure should be censured at this level.

75. In *Mangold*, however, the Court, basing itself on the information provided by the national court, concluded that the national rule on fixed-term contracts at issue in that case had to be regarded as going beyond what is appropriate and necessary for the attainment of the objective of the vocational integration of unemployed older workers. In that context, the Court referred inter alia to the fact that a significant body of workers, determined solely on the basis of age, is in

22 — See *Mangold*, cited in footnote 4, paragraph 63.

danger during a substantial part of its members' working life, of being excluded from the benefit of stable employment. [23]

76. By contrast, in the present case there appear to be no indications to the effect that providing for a compulsory retirement as such or, in the concrete case, the fixing of a retirement age of 65 would go beyond what is appropriate and necessary for the attainment of the objectives pursued.

77. Admittedly, in view of the demographic challenges and budgetary constraints facing most Member States — which induced the Commission just recently to call for urgent action — the crucial issue in Europe seems rather to be to prolong employment and raise pensionable age. But, then again, it is for the Member States to define their policies in this context.

78. For these reasons I conclude that even if the scope of Directive 2000/78 were to be interpreted as covering a national provision such as that in issue, such a provision would not be precluded by that directive.

23 — See *Mangold*, cited in footnote 4, paragraph 64.

The prohibition of discrimination on grounds of age as a general principle of Community law, and the implications of *Mangold*, part I

79. The most salient feature of the judgment in *Mangold*, in which the Court was called upon to rule on the compatibility with Article 6(1) of Directive 2000/78 of a provision of German law providing for the conclusion of fixed-term contracts of employment for workers who have reached the age of 52, is probably the finding that 'the principle of non-discrimination on grounds of age must ... be regarded as a general principle of Community law'. [24]

80. The Court made that statement following a suggestion made by Advocate General Tizzano that the general principle of equality should be used as a yardstick for assessing the compatibility of the national rule in question, rather than the directive itself. [25] This approach apparently enabled two problems underlying that case to be overcome: first, the Court used that concept to defuse the objection that at the material time the period allowed for the transposition of

24 — See *Mangold*, cited in footnote 4, paragraph 75.

25 — See Advocate General Tizzano's Opinion in *Mangold*, cited in footnote 4, points 84 and 101.

Directive 2000/78 had not yet expired for Germany, [26] secondly, the Court was able to avoid the question whether the directive has 'horizontal direct effect'. [27]

81. The Court stated that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation; rather, the 'source of the actual principle underlying the prohibition of those forms of discrimination' is to be found, 'as is clear from the [first] and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States'. [28]

82. In this context, the Court apparently starts from the assumption that a specific prohibition on grounds of age is already inherent in or derives from the general principle of equality. [29]

26 — See paragraphs 74 and 76 of the judgment.

27 — See paragraphs 77 and 78 of the judgment.

28 — See paragraph 74 of the judgment.

29 — See especially paragraphs 74 and 76 of the judgment. See, as to a similar reading of the judgment, Opinion of Advocate General Sharpston in *Lindorfer*, cited in footnote 7, points 55 and 56.

83. The approach adopted by the Court in *Mangold* has received serious criticism from academia, the media and also from most of the parties to the present proceedings and certainly merits further comment.

84. First of all, it should be emphasised that the concept of general principles of law has been central to the development of the Community legal order.

85. By formulating general principles of Community law — pursuant to its obligation under Article 220 EC to ensure observance of the law in the interpretation and application of the Treaty — the Court has actually added flesh to the bones of Community law, which otherwise — being a legal order based on a framework treaty — would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'.

86. This source of law enabled the Court — often drawing inspiration from legal traditions common to the Member States, and

international treaties — to guarantee and add content to legal principles in such important areas as the protection of fundamental rights and administrative law. However, it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty.

87. It is nevertheless possible to reflect on the soundness and conclusiveness of the reasons on which the Court based its findings in *Mangold* concerning the existence of a general principle of non-discrimination on grounds of age.

88. In that regard it may be noted that, indeed, various international instruments and constitutional traditions common to the Member States to which the Court refers in *Mangold* enshrine the general principle of equal treatment, but not — except in a few cases, such as the Finnish constitution — the specific principle of non-discrimination on grounds of age as such.

89. On a closer analysis it is actually a bold proposition and a significant move to infer, solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on grounds of age — or any other specific type of discrimination as referred to in Article 1 of Directive 2000/78. The following general remarks on the mechanism of non-discrimination may illustrate that view.

90. According to the commonly accepted definition, as well as established case-law, the general principle of equal treatment, or of non-discrimination, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. [30]

91. It is not overly difficult to establish whether two situations are treated differently or, as the case may be, in the same way. The really crucial step in the application of the general principle of equality is rather, first, to determine whether the situations in question are comparable or, in other words, relevantly similar — which necessitates an analysis based on the criterion of relevance. That

30 — See, inter alia, the judgments in Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31.

assessment is normally not made explicit in the judgments of the Court and in fact entails a value judgment.

92. What distinguishes the general principle of non-discrimination from a specific prohibition of a particular type of discrimination is essentially that in the latter case the criterion on which differentiation may not legitimately be based is already expressly identified. Thus, it is already determined that differentiation may not be based on grounds of nationality, sex, age or any other 'batch' of discrimination referred to in the formulation of the specific prohibition concerned. By contrast, the general prohibition of discrimination leaves open the question of which grounds for differentiation are acceptable. That question has apparently been answered in different ways over time and is currently subject to ongoing developments at both national and international level.

93. One could say that the general principle of equality *potentially* implies a prohibition of discrimination *on any ground* which may be deemed unacceptable.

94. It is therefore correct to state, as the Court did with regard to prohibitions of discrimination on specific grounds, that specific prohibitions constitute particular expressions of the general principle of equality which forms part of the foundations of the Community. [31] However, to infer — as the Court did in *Mangold* — from the general principle of equality, the existence of a prohibition of discrimination on a specific ground is quite different and far from compelling.

95. In my view, moreover, neither Article 13 EC nor Directive 2000/78 necessarily reflect an already existing prohibition of all the forms of discrimination to which they refer. Rather, the underlying intention was in both cases to leave it to the Community legislature and the Member States to take appropriate action to that effect. In any event, that is what the Court, too, seems to suggest in *Grant,* in which it concluded that Community law, as it stood, did not cover discrimination based on sexual orientation. [32]

96. It should be added that if the reasoning in *Mangold* were followed to its logical conclusion, not only prohibition on grounds of age, but all specific prohibitions of the

31 — See, inter alia, Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 28.

32 — See Case C-249/96 *Grant* [1998] ECR I-621, paragraph 48.

types of discrimination referred to in Article 1 of Directive 2000/78 would have to be regarded as general principles of Community law.

97. In the light of the foregoing considerations I do not regard as particularly compelling the conclusion drawn in *Mangold* as to the existence of a general principle of non-discrimination on grounds of age.

98. In any event, even if that finding were taken as a basis for the present assessment, it is clear from *Mangold* that the Court proceeds from the assumption that the general principle of non-discrimination on grounds of age is no different in substance from the equivalent prohibition under Directive 2000/78, in particular so far as justification is concerned. [33]

99. With reference to my above observations in that regard, I can therefore conclude that even by reference to the existence of a general principle of non-discrimination on grounds of age, a national rule such as that in issue would not be precluded by Community law.

33 — See *Mangold*, cited in footnote 4, in particular paragraphs 74 and 78.

100. For all the reasons set out above, I therefore take the view that the Court should state by way of reply to the first question referred that the principle of non-discrimination on grounds of age as laid down in Article 2(1) of Directive 2000/78 does not preclude a national rule such as the STP.

B — *The second question*

Main submissions of the parties

101. By its second question, the referring court essentially seeks to ascertain whether it has to disapply the STP if that provision proves to be precluded by the prohibition of discrimination on grounds of age.

102. Since the Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as Cortefiel, submitted that the

Court should answer the first question in the negative, they made only subsidiary submissions on the question whether the national rule in issue should be set aside, although the United Kingdom Government put particular emphasis on that question.

103. All of those parties essentially agree that neither Directive 2000/78 nor a general principle of law prohibiting discrimination on grounds of age can have the effect of requiring a national court to disapply a conflicting national provision. Since the dispute in the main proceedings lies between private parties, such a finding would undermine the rule that directives cannot produce horizontal direct effect. However, there would still be an obligation to interpret the national rule in issue as far as possible in such a way as to be in conformity with Directive 2000/78 and the principle enshrined therein.

104. By contrast, the Commission maintains — as, apparently, does Mr Palacios — that in the event of an affirmative answer to the first question, the national court would be required to set aside any conflicting national provision. In that context the Commission relies again on *Mangold* and argues that if the Court found in that case that there was an obligation to set aside national law conflicting with the prohibition of discrimination on grounds of age, [34] then, *a fortiori*, the same must be true in the present case, where the period prescribed for the transposition of Directive 2000/78 has already expired.

Obligation to set aside or the implications of *Mangold,* part II

105. Obviously, the second question does not arise if the Court, following my suggestion, declares the rule in issue compatible. I will nevertheless address, wholly in the alternative, the question as to the appropriate conclusions to be drawn by the referring court for the purposes of the main proceedings in the event that the prohibition of discrimination on grounds of age, as laid down in Directive 2000/78 — or, as the case may be, in a corresponding general principle of Community law — were to be construed as precluding a provision such as the STP, bearing in mind that this issue has been raised in a dispute between private parties concerning the termination of an employment relationship.

34 — See paragraph 78 of that judgment, cited in footnote 4.

106. First of all, the cornerstones of the relevant case-law should be recalled.

107. It should be noted that, according to established case-law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly. [35]

108. The Court has attributed this effect to directives — despite the wording of Article 249 EC which, as regards directives, does not refer to the conferral of rights on individuals — with a view to the binding nature and the practical effect of the directive and, above all, on the grounds that a defaulting Member State should not be able to rely, as against individuals, on its own failure to perform the obligations which the directive entails. [36]

109. Naturally, that reasoning cannot hold true with regard to obligations incumbent upon an individual. Accordingly, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. [37]

110. Thus, where a provision of a directive satisfies the substantive requirement of being unconditional and sufficiently precise, an individual can, as a rule, avail himself of that provision as against a public authority (vertical direct effect), but not as against an individual (horizontal direct effect).

111. The Court emphasised in this context that the acceptance of the latter effect would amount to recognising 'a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is

35 — See, in particular, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25.

36 — See, inter alia, Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 12, and Case 148/78 *Ratti* [1979] ECR 1629, paragraph 22.

37 — See, inter alia, *Marshall*, cited in footnote 13, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56.

empowered to adopt regulations'.[38] The Court also pointed out that the principle of legal certainty prevents directives from creating obligations for individuals.[39]

112. However, that general rule needs to be nuanced at least in two respects. First, the Court has accepted that 'mere adverse repercussions' on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned.[40] Second, a certain line of case-law suggests that, even in a purely private dispute, an individual may, in certain circumstances, rely on a directive in order to have the conflicting national rule in issue set aside (sometimes referred to as 'incidental direct effect').[41]

113. Turning now to the circumstances of the present case, I will first discuss the question of a possible obligation to disapply the national rule in issue with regard to Directive 2000/78. I will then address the possible impact of a general principle of non-discrimination on grounds of age as applied in *Mangold*.

114. In the first place, it should be noted that in my view there is no doubt that the prohibition of discrimination on grounds of age as laid down in Directive 2000/78, particularly in Articles 1 and 6 thereof, is sufficiently precise and unconditional as to satisfy the substantive conditions for direct effect as regards the setting of a compulsory retirement age. Suffice it to say that it is clear from the case-law of the Court that the fact that provisions of a directive are subject to exceptions or, as in the present case, provide for justifications does not in itself mean that the conditions necessary for those provisions to produce direct effect are not fulfilled.[42]

115. Next, it appears from the order for reference that the referring court — which relies in that regard inter alia on the case-law of the Spanish Constitutional Court — would have to consider the collective agreement setting the compulsory retirement age to be unlawful in the absence of the express legal basis provided for it by the STP.

38 — See *Faccini Dori*, cited in footnote 37, paragraph 24.

39 — See *Wells*, cited in footnote 37, paragraph 56.

40 — See, in particular, *Wells*, cited in footnote 37, paragraph 57.

41 — See to that effect, in particular, Case C-194/94 *CIA Security* [1996] ECR I-2201 and Case C-443/98 *Unilever* [2000] ECR I-7535.

42 — See as to that Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 32 to 38, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 105.

116. The setting aside of the STP, to which the present reference for a preliminary ruling refers, as a consequence of its preclusion by the prohibition of discrimination on grounds of age, would thus result in the collective agreement being considered unlawful by the referring court.

117. In the dispute in the main proceedings, Mr Palacios challenges the act by which his employer Cortefiel informed him of the termination of his employment contract on grounds of retirement. We are thus clearly concerned with a horizontal contractual relationship, involving mutual rights and obligations relating to employment. A finding by the referring court to the effect that Mr Palacios' claim is founded and that the termination of the working relationship (being based on the STP and the collective agreement) is void, would directly concern Cortefiel in that it would impose on it an obligation to uphold the working relationship or, as the case may be, to bear other consequences such as the provision of compensation.

118. Thus, in the present context, invoking the directive would clearly impose some sort of obligation on another individual, in this case the former employer.

119. In the light of the case-law outlined above one could ask, first, if this effect could not be acceptable in that it amounts merely to 'adverse repercussions' within the meaning of the *Wells* case-law. In *Wells*, the Court admittedly treads a fine line in distinguishing a situation 'where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party' from 'mere adverse repercussions on the rights of third parties'. [43]

120. It should, however, be observed that *Wells* concerns a triangular relationship in the sense that it is aimed, first and foremost, at the *fulfilment by a Member State* of an obligation arising under a directive, the resulting impact on an individual constituting merely a collateral effect of that obligation.

121. Certainly, one could theoretically construe the present situation as representing a triangular situation in the sense that in fact the directive would be invoked against the STP and the collective agreement, that is to say, against the State, on which the obliga-

43 — See *Wells*, cited in footnote 37, paragraphs 56 and 57.

tion of proper implementation is incumbent.[44]

122. However, that approach would certainly overstretch the *Wells* rationale and could in principle be applied to almost any horizontal legal relationship since, ultimately, even private-law contractual relationships are always based on or must comply with State (contract) law. Rather, in a case such as that before the referring court, it seems appropriate to me to consider the imposition of an obligation on an individual as a direct consequence of invoking the directive, not only as a side-effect of relying on the directive as against the State.

123. The issue of horizontal direct effect has also been discussed by the parties from yet another perspective, which relates to the specific implications for the present case if the directive were to be attributed direct effect. Mr Palacios is seeking to rely on Directive 2000/78 in order to preclude the application of the STP and to benefit instead from general national law under which, as appears from the order for reference, the fixing of compulsory retirement, having lost its legal basis, would be unlawful.

124. That discussion relates to the distinction — well-known in doctrinal writings but also, to a certain extent, reflected in case-law — between the 'exclusionary' as opposed to the 'substitution' effect of invoking a directive. As the argument goes, it should be possible to rely on a directive in litigation between private parties if its only effect is that of 'knocking out' conflicting national rules in order to make way for other national rules on which the litigant can then base his claim. On that view, the directive would not itself take the place, in substantive terms, of the conflicting national rule, or, to put it in the words of the case-law in *Marshall* and *Faccini Dori*,[45] would not 'of itself impose obligations on an individual'.

125. Arguably, under that approach direct effect is not so much considered from the perspective of 'invocability' or the legal position of individuals under directives, but instead more from the perspective of the primacy of Community law and the related 'objective' obligation incumbent in general upon national courts — as on all public

44 — I might add that the concept of 'the State', as defined by the Court with regard to vertical direct effect, is broad enough to cover also the social partners — in that they carry out a public function in adopting collective agreements — as an emanation of the State. See in this respect inter alia Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 18.

45 — See above, point 109.

authorities in the Member States — to ensure that the desired result of the directive is achieved and, in particular, to refrain from applying conflicting rules of national law. [46]

126. However, what is to my mind decisive, in particular with due respect to the principle of legal certainty, is whether the legal position of an individual is affected to his detriment as a result of the invocation of a directive, regardless of whether, technically, that adverse effect was brought about by the mere exclusion of the conflicting national provision in question or in consequence of its substitution by the directive.

127. The argument that, in cases such as that before the referring court, directives may be attributed at least 'exclusionary' horizontal direct effect cannot therefore in my view be upheld. [47]

128. It is true that in some cases such as *CIA Security* and *Unilever* the Court seems to have accepted such an effect and ordered the disapplication of national rules in proceedings between individuals. [48] But I think that these cases have to be understood in the light of the specific circumstances underlying them, involving directives concerned with public law duties of a technical or procedural kind, which are not in my view comparable with a directive like that at issue.

129. Lastly, it should be noted that in *Pfeiffer and Others,* which concerned proceedings between private parties, the Court did not set aside, in accordance with the case-law in *Simmenthal,* [49] the conflicting national rule on working time, even though that was all that was required in order to achieve the desired result. Instead, it referred to the less invasive and generally applicable 'default' obligation to adopt an interpretation of the national legislation that is in conformity. [50]

130. Does that mean that, just after *Pfeiffer and Others,* the Court abandoned its previous stance on the non-horizontal direct effect of directives by ruling in *Mangold* [51] that it is the responsibility of the national

46 — See to that effect Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, paragraphs 55 to 61, and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 33.

47 — See to that effect also Advocate General Tizzano in his Opinion in *Mangold*, cited in footnote 4, point 106.

48 — *CIA Security*, cited in footnote 41, paragraphs 54 and 55, and *Unilever*, cited in footnote 41, paragraphs 49 to 52.

49 — Case 106/77 [1978] ECR 629.

50 — See *Pfeiffer and Others*, cited in footnote 42, paragraphs 107 to 117.

51 — Cited in footnote 4, paragraph 77.

court to set aside any provision of national law which conflicts with Community law, pursuant to the *Simmenthal* case-law? [52]

131. I would argue that, on closer inspection, that is not really the case. It was actually the application of the general principle of non-discrimination on grounds of age that prompted the Court in *Mangold* to decide to that effect. It may be instructive in this respect to note that in its answer to the second question on the compatibility of the national rule, the Court referred in particular to Directive 2000/78, whilst it held in the subsequent paragraph, in answer to the third question, that it is the responsibility of the national court to guarantee the full effectiveness 'of the general principle of non-discrimination on grounds of age'. [53]

132. As I read the judgment, the Court did not therefore accept that Directive 2000/78 has horizontal direct effect; rather, it bypassed the lack of it by ascribing direct effect to the corresponding general principle of law.

133. In adopting that approach the Court set foot on a very slippery slope, not only with regard to the question whether such a general principle of law on the non-discrimination on grounds of age exists, [54] but also with regard to the way it applied that principle.

134. I do not maintain that general principles of law would, as a general rule, fall short of the substantive requirements for direct effect (to be unconditional and sufficiently precise). My point is that the concept of general principle relates to a particular form of rule rather than to a particular content: it describes a source of law which may embrace rules of widely varying content and degree of completeness, ranging from interpretative maxims to fully fledged norms like fundamental rights or the highly developed body of Community principles of sound administration and procedure.

135. Accordingly, the function of general principles varies, too, depending both on the principle in question and the actual context in which it is used. General principles can, for instance, serve as interpretative criteria, as a direct yardstick by which to gauge the lawfulness of Community acts or even to found an enforceable claim to a particular legal remedy in Community law. [55]

52 — *Simmenthal*, cited in footnote 49, paragraph 21.

53 — See *Mangold*, cited in footnote 4, paragraph 78 and the operative part, point 2.

54 — See points 79 to 97 above.

55 — See for an overview on the status and role of fundamental rights as general principles of Community law Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega* [2004] ECR I-9609, points 48 to 66.

136. It should be observed, however, that as a rule, in a context such as the circumstances of the present case, where a directive has been adopted, such an act of secondary Community law may be interpreted in the light of the general principles underlying it and measured against those principles. Thus general principles of law — referred to by the Court on the basis of Article 220 EC as part of primary Community law — are given expression and effect through specific Community legislation. That is in fact the approach followed by the Court in *Caballero* [56] to which it made reference in *Mangold*. [57] In that case, too, the general principle of equality and non-discrimination is not applied autonomously, but as a means of interpreting Council Directive 80/987/EEC. [58]

137. A problematic situation could arise, however, if this concept were to be turned practically upside down by allowing a general principle of Community law which, as in the present case, may be considered to be expressed in specific Community legislation, [59] a degree of emancipation such that it can be invoked instead or independently of that legislation.

138. Not only would such an approach raise serious concerns in relation to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general. It should be recalled in this connection that Article 13 EC expressly reserved to the Council the power, acting in accordance with the procedure provided for under that article, to take appropriate action to combat, inter alia, discrimination on grounds of age — which it has chosen to do by means of a directive. In my view the limitations which this specific Community act entails, notably with regard to horizontal direct effect, should not therefore be undermined by recourse to a general principle.

139. In the light of all the foregoing considerations I conclude that, in the event that the prohibition of discrimination on grounds of age as laid down in Directive 2000/78 or, as the case may be, in a corresponding general principle of Community law, is construed as precluding a national rule such as the STP, the national court would not be obliged to disapply that rule.

56 — Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915.

57 — See, in particular, the answer given by the Court in paragraph 40 of that judgment.

58 — Directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

59 — See above, point 99.

V — Conclusion

140. In the light of the foregoing I propose that the reply to the questions referred to the Court should be:

The principle of non-discrimination on grounds of age as laid down in Article 2(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Member State concerned for entitlement to draw a retirement pension under the relevant contribution regime.