Case C-555/07 Kücükdeveci

Integrating through law

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On February 2\textsuperscript{nd} Pierre Pescatore passed away.\textsuperscript{1} He was one of the fierce promoters of integrating Europe through law, a label assigned to a jurisprudence giving shape to a certain European constitutionalism, most famously through the concepts of direct effect and supremacy. This view of European construction refers to an integrationist agenda of the European Court of Justice (ECJ) driven by audacity, strength and vision. It illustrates the constitutional function of inspirational and far-reaching judgments faced with the constitutional silence of the founding Treaties. Thus, from its beginnings the Court was much more than a mere “bouche qui prononce les paroles de la loi”\textsuperscript{2}.

\textsuperscript{1} Pierre Pescatore, “Le droit de l’intégration”, Bruylant 2005.
\textsuperscript{2} Montesquieu, L’esprit des lois, Barrillot et Fils, s.d. 2 vol. in-4. pp. [VIII], XXIV, 522 + [IV], XVI, 564.
Some have argued that this approach has no place in a modern democratic Union and that the Court needs “to be stopped” because it “should not act as a legislator”.3

The Kücükdeveci decision4, however, illustrates that the Luxembourg twin towers interpret the Treaty on the Functioning of the European Union as reinforcing its powers, the Charter of Fundamental Rights being a mementoes text reinforcing and legitimizing its judgments. While political integration in the European Union is currently at best mediocre, the Court has once again proven to be at the wheel of the European integration process.

In light of what is stated above, it seems safe to say that Kücükdeveci is a groundbreaking decision and that it will in future times be remembered as being one of the most important building blocks of the puzzle between European and national law.

I. The emergence of a new category of European law: directives that lay down general principles

On its face, the decision confirms the existence of a general principle of non-discrimination on grounds of age, as expressed by Directive 2000/78, Mangold5, and the Charter of Fundamental Rights of the European Union. Accordingly, any provision of national legislation that disrespects this principle must not be applied by Member State judges, and this even in proceedings between individuals.

As such the case needs to be seen as the projection of Audiolux6, an important judgment in which the Court proclaimed that general principles have a constitutional status in European Union law and pedagogically

4 Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG.
5 Case C-144/04.
6 Case C-101/08.
explains their formation. It should be underlined that the ECJ also restricts their application to the most fundamental principles of the legal order and excluding a principle of protection of minority shareholders from this category. By virtue of this decision general principles have now to be considered to be primary constitutional law.

However, the main interest of the Kücükdeveci decision does not lie in this affirmation.

In a strong opinion, Advocate General Bot argued that the time had come for horizontal directives to have direct effect, at least when the effect entails no discretion in the hands of the national judge. The Court, in a relatively short response to the Higher Labour Court of Düsseldorf’s preliminary reference does not as such agree with the AG’s opinion. However, the ECJ seems to be laying down the rule that if a directive gives expression to a general principle (such as non-discrimination on the grounds of age), it is relieved of its legal nature of a directive. Thus, the general principle is to be applied and this even in proceedings between individuals. Accordingly, national judges must not apply any conflicting legal provisions contrary to the general principle expressed by the directive.\footnote{Paragraphs 50 and 51.}

This is the proclamation of a new category of rules in European Union Law: directives laying down general principles.

This bold affirmation will not be shielded from criticism. Indeed, there is an argument to be made that a general principle relates to a particular form of law rather than to a particular content, an argument that is not taken into account by the Grand chamber. The judges instead seem to establish the rule that any directive can give expression to a general principle. Thus on the facts the directive (or rather the general principle) is applied in a horizontal relationship between an individual and an undertaking. The
implications of the emergence of this new category are significant as many directives lay down fundamental rights.

Moreover, while both the *Kücükdeveci* and *Audiolux* seem highly important for the development of the legal category of general principles of European law, one can point to the possible incoherence between both. While *Audiolux* proclaims that only the most fundamental principles should be recognized as general principles *Kücükdeveci* strengthens the enforcement of a general principle of non-discrimination on grounds of age which is only treated as a general principle in the national laws of two Members States: Portugal and Finland. While on the facts this may not cause any confusion this possible incoherence should drive the ECJ to further define the principles surrounding the legal category in future decisions.

Even though *Kücükdeveci* can be welcomed as reinforcing the protection of fundamental rights, one can wonder what happened to another general principle: judicial certainty. This fundamental principle requires that every measure having legal effects must be clear and precise and must be brought to the notice of European citizens in order to ascertain the exact time at which the measure starts to have legal effects. There seems to be no clear answer to this question concerning the new category of directives giving expression to general principles of European law.

This concern is reinforced by the affirmation that the Charter has retroactive effects.\(^8\) The message of this extension *ratione temporis* of the Charter is that fundamental rights can never be disregarded within the Union no matter when or where their breach took place.

The *Kücükdeveci* decision can thus be welcomed as reinforcing the European legal order and the protection of fundamental rights. However

\(^8\) Paragraph 22.
there seems to be no doubt that the Court will need to specify the exact contours of this new legal category.

II. Primacy: the new cornerstone of the European legal order

Even though the above might seem to be sufficient legal revolution for a sole decision, another groundbreaking affirmation of the Grand Chamber has yet to come in the following paragraphs of the judgment. Indeed the Court goes on to assert that the criterion whether a legal provision needs to be applied is not direct effect but primacy.\(^9\) Primacy is the criterion that requires that any national measure, which encroaches "upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law" cannot have "any legal effect".\(^10\)

The Kücükdeveci case establishes that direct effect needs to give way to supremacy, which thus becomes the very cornerstone of European Union law. The criterion for application of a legal norm is thus not its substance nor its ability to confer rights in a direct and precise manner. From now on the only relevant criterion is primacy and primacy only. This has to be celebrated especially in view of the fact that while the Lisbon Treaty may recognize this cardinal principle, it makes this affirmation in a mere Protocol to the Treaty.

As such, the judgment is an important building block in the construction of a genuine integrated legal order, a puzzle of European Union and national law. This integrated order from now on has a single uniting criterion: supremacy, an argument previously supported by Koen Lenaerts (one of the Grand Chamber judges in this case).\(^11\)

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\(^9\) paragraphs 50 and 51.

\(^10\) para 18 of Case 35/76 Simmenthal v. Italian Minister for Finance (1976).

III. The legitimacy of integration through law

*Küçükdeveci* is a fundamental decision, however there is much space for further clarification. A fundamental question seems to be whether the Court should be able to proceed in this way. Isn’t this a disregard of the powers within the Union considering that Article 13 EC expressly reserved the power to the Council to combat discrimination on grounds of age?

Another point of concern is how national judges will react to the Court’s boldness. Is this the way to create dialogue with national judges? While the ECJ proclaims primacy to be the sole criterion for the application of a legal norm, some national judges still refuse to recognize supremacy of European law as such.12

Thus, the question of the legitimacy of teleological decision-making is more topical than ever and as a result *Küçükdeveci* will be both hated and glorified. Some will come forward condemning the Court’s arrogant and self-righteous approach while others will worship the case as giving new impetus to the integrating process at a time where the political power seems paralyzed.

Once again, European law is faced with a well-known problem. While the founding Treaties do not establish how to resolve conflict arising between European and national law they inevitably come into conflict with each other and the Court has to resolve the conflicts arising out of the puzzle between European and national law. While the Court is mostly aware of the need to preserve a balance of powers between itself and the national courts it is also aware of the historical need of boldness and provocation to make European law progress. *Küçükdeveci* is one of the provoking cases that push for integration, and the case underlines more than ever the importance of case law in the evolution of the European legal order. It is indeed a systematic approach of the Union judiciary. However it must also

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12 such as France, see Conseil d’Etat, *Sarran* (30 October 1998).
be remembered that sometimes, the Court takes a step too far and then retreats from it, and only time will tell us what happens with the premises of the case. Will the court retreat from this bold affirmation or will it extend the principle to other categories? Is this the first step in the requalification of the legal nature of directives and its invocation, one of the most controversial questions in the European legal order? How will national judges react? It will also be hard for the Court to sustain this case law only within the field of directives giving expression to general principles.

While these debates should and will be lead elsewhere there is no doubt that European law has changed yet again. \textit{Küçükdeveci} reinforces the scope of European Union law yet again. While some might have regretted that \textit{Pescatore}'s death stood for the death of the heroic court of the beginnings, \textit{Küçükdeveci} very much stands for the opposite. The case makes an important step towards \textit{Pescatore}'s vision of a legal order that is “fusionnel et unitaire”.

It is to be hoped that in a few decades we will look back at this decision as being one of the fundamental building blocks of the puzzle between European and national law, just as the cases of \textit{Pescatore}'s time are. Thus any true European lawyer should get used to the pronunciation of this tongue-twister.