

Preliminary References in Germany – the Constitutional Court’s *Honeywell* Decision

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I. Introduction

Honeywell decision

(BVerfG, 6 July 2010, 2 BvR 2661/06, NJW 2010, 3422-30)

Was the preliminary ruling of the Court of Justice in *Mangold* a sufficiently qualified breach of the Treaty's allocation of competences to trigger the ultra vires review to which the German Constitutional feels itself entitled under its *Maastricht* and *Lisbon* decisions?

II. Facts of the Case

Similar to the facts in *Mangold*:

- Claimant had been employed by the defendant in a string of fixed-term contracts since 1999.
- In 2003, the defendant-employer employed the claimant (and 12 others) on a one-year contract, relying on the statutory provision that allowed fixed-term contracts for new employees aged 52 and over without limitations (§ 14 (3)4 of the TzBfG).
- Claimant asks the court in employment matters to declare that he is employed on an indefinite contract, because the fixed-term clause is invalid for breach of EU Law (Directives 99/70 and 2000/78).

III. History of the Case

- First instance and appeal court (decided in 3/2004 and 6/2004 respectively): claim is dismissed as unfounded. Even if § 14(3)4 TzBfG were contrary to Directives 99/70 and/or 2000/78, these directives would not have direct effect, because (1) they do not confer unconditional and sufficiently precise rights, and (2) any direct effect would not affect the horizontal relationship between employer and employee.
- In 2005, the preliminary ruling in Mangold is handed down.
- 4/2006: Federal Court in Employment Matters rejects ultra vires review of Mangold, declines to make a reference to the Court of Justice for the limitation of the temporal effects of Mangold, applies Mangold, disapplies § 14(3)4 TzBfG and finds for the claimant.

IV. The Constitutional Complaint

The complaint argues:

1. The employer's freedom of contract (Art. 12 German Constitution) was restricted by the judgment of the Federal Court in Employment Matters; Mangold purports to justify this restriction by applying supreme EU law, but ***the Mangold decision is methodologically so flawed that it constitutes an ultra vires act***
2. The employer's right not to have his **legitimate expectations** disappointed (derived from Art. 20(3) German Constitution) is infringed, because the **employer reasonably relied on clear national statutory law when employing the claimant.**
3. The Federal Court in Employment Matters infringed the employer's right to the **lawfully assigned judge** (Art. 101(1)2 German Constitution) by not making a preliminary reference to the Court of Justice.

V. The 7:1 majority judgment

I. Ultra-vires review

1. Ultra-vires review requires an act that is **manifestly ultra vires**, and the review has to be exercised cautiously (see paras 55-60)
2. **Only where an act is evidently ultra vires and results in a structurally significant shift of competences contrary to the principle of conferral** can the act be successfully reviewed by the Constitutional Court; only then is the act not covered by the Act of the German Parliament conferring powers to the EU (paras 61-66)
3. In *Mangold*, the competence in question is the competence to regulate age discrimination. The Court of Justice did not conjure this competence out of thin air; it was conferred to the EU in Article 19 TFEU and the Council's legislative action based on it. Therefore, **even if Mangold should be methodologically unacceptably flawed, Mangold would not result in a manifest and structurally significant shift in the allocation of competences** (paras 67-79)
4. Therefore, *Mangold* survives the ultra-vires review.

V. The 7:1 majority judgment

II. Legitimate reliance on the validity of national statutory law

1. It is up to the Court of Justice to limit the temporal effects of its decisions (cf. *Grzelczyk*, *Bidar*); the national court cannot substitute its own judgement (paras 80-84)
2. **Obiter dictum: It is open to Member States to offer compensation to parties that have reasonably relied on national statutory law that is later found to be inapplicable because it is incompatible with EU law** (paras 84-86)
 - Places the financial burden where it belongs: with the MS that did not take into account EU law
 - Query: When would such compensation infringe the principle of effectiveness?
 - Constitutional Court leaves open whether such a claim exists under current law; for a discussion, compare *Karpenstein/Johann*, NJW 2010, 3405-7

V. The 7:1 majority judgment

III. Infringement of the right to the lawfully assigned judge by refusing to make a preliminary reference to the Court of Justice?

1. **Not every infringement of Article 267(3) TFEU constitutes an infringement of the German constitutional right** to the lawfully assigned judge; the national court's decision not to make a reference must "incomprehensible" and "manifestly untenable" (paras 87-89)
2. This qualification is said to be fulfilled in one of three cases (para. 90):
 - First, **where the court recognises the relevance of the question on EU law but nevertheless does not even consider making a reference.**
 - Secondly, **where a court deliberately diverges from the case law of the Court of Justice without making a reference.**
 - And thirdly, **where there is no EU case law on a relevant question, and in filling this gap the national court exceeds its margin of appreciation to an unacceptable degree.**

V. The 7:1 majority judgment

3. Application of these principles to the case (paras 91/92): Judgement of the Federal Court in Employment Matters that the Court of Justice would not limit the temporal effects of Mangold was not manifestly wrong.

4. Criticism in the literature: **at least where the criteria of Article 267(3) TFEU are applied in a manifestly wrong manner**, there should be constitutional review (similarly two recent decisions of three-judge panels at the Constitutional Court, rejected in the *Honeywell*-decision; cf. Matthias Bäcker, NJW 2011, 270-2).

V. The 7:1 majority judgment

Overall: The complaint is dismissed as unfounded (one judge concurring in the result, but not in the reasoning; one judge dissenting)

VI. Dissenting opinion: Judge Landau

- The complaint is well founded (para 94)
- The majority applies a test for the ultra vires review that is too deferential (paras 95-104): As soon as an act manifestly exceeds the limitations of the powers conferred to the EU, the ultra vires review should be triggered; there should not be an additional requirement that this results in a structurally significant shift of competences from the MS to the EU. *Every* evident ultra vires act lacks the required democratic legitimacy.
- Mangold manifestly exceeds EU competences, at least in so far as it extends the direct effect despite the fact that the implementation period of Directive 2000/78 had not yet expired; the justification for assuming a general principle is methodologically misguided (paras 105-111)

VI. Dissenting opinion: Judge Landau

- The principle that MS may not adopt measures incompatible with the objectives of a directive within the period for transposition limits the MS' otherwise existing discretion, and therefore leads to a shift of competences sufficient to trigger the ultra vires review (para 111/112)
- The Federal Court in Employment Matters should not have applied Mangold, but instead **should have made a renewed preliminary reference** to the Court of Justice, detailing its concerns about Mangold and asking the Court to limit the temporal effects (paras 114/115).

VI. Dissenting opinion: Judge Landau

- If the Court of Justice had reaffirmed its Mangold decision in the renewed preliminary ruling, the Federal Court should have tried - without applying § 14(3)4 TzBfG - to reach the same result by other methodologically acceptable means (!) (para 116)
- Only if it had been impossible to reach the desired results in this way, should the Federal Court have made a reference to the Constitutional Court to ask for the formal determination that Mangold would not share in the supremacy of EU law because it was an ultra vires act (para 116)

VII. Conclusion

Relevance of the majority judgment:

- Qualifies the test for ultra vires review (but: what qualifies as a `structurally significant shift of competences`?)
- Obiter suggestion that MS could award compensation for reliance on national statutory law that is incompatible with EU law – query: would such a national remedy infringe the principle of effectiveness?
- Deferential test for the constitutional review of failures to make a preliminary reference

Relevance of the dissenting opinion:

- Mainly with regard to how an ultra vires review would work procedurally.