



**BRIDGING THE AGE GAP –
DEVELOPMENT OF SOCIAL PARTNERS’
INITIATIVES FOR MANAGING
AGE RELATED CHALLENGES**

**BRIDGING THE AGE GAP
– IN THE LIGHT OF THE EQUALITY
PRINCIPLE OF THE EUROPEAN UNION**



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The Prohibition of Discrimination Based on Age

Article 3 of the TEU defines that the main goal of the EU is to establish a social market economy and to promote solidarity between generations. The EU Charter of Fundamental Rights encompasses rights and principles of utmost importance for EU non-discrimination law concerning various age groups, such as equality before the law (Art. 20), non-discrimination (Art. 21), equality between men and women (Art. 23) and rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. (Art. 25). Moreover, Article 21 (1) provides for that discrimination based on age is prohibited. The issue of age is also present in many EU social policies, including the EU2020 Strategy, the European Employment Strategy and the Social Investment Package. The TFEU enables the EU to adopt policies and various measures to support the youth.

While support was given to younger generations as early as the 1970s, the issue of the elderly has been recognised twenty years later. However, in the 1990s it was admitted that ageing is a multifaceted issue in society, including increasing longevity of people and declining fertility rates. Simply the rising of mandatory retirement age is insufficient to solve the problem, as the workplace situation of elderly workers is more precarious.¹ Therefore, it was necessary to take further positive actions to protect older employees. The prohibition of discrimination based on age was first addressed by Directive 2000/78/EC (FED)². The directive aimed to protect people's dignity by shielding them from ageism and other forms stereotyping.

However, in employment and social policies, different treatment on the grounds of age is widespread, including the use of minimum age requirements for certain occupations, maximum age limits for certain employment-related benefits and incremental increases of wages through several age groups. The economic rationale behind these policies may hinder a lenient approach towards age discrimination. The jurisprudence of the Court of Justice of the European Union (CJEU) demonstrates that a wider range of employment-related justifications³ is accepted by the Court compared to other grounds like race and sex. On the other hand, due to the complexity of ageing differentiations will often also lead to disadvantage related to other discrimination grounds, and the non-age grounds (most often sex) typically intersecting with age discrimination in employment.⁴

Concerning age discrimination, the FED allows for the Member States to classify different treatment on the grounds of age as non-discriminatory if this is "objectively and reasonably justified by a legitimate aim, including legitimate employment policy (and) labour market ... objectives" (Art. 6(1)),

¹ ter Haar, B. and Rönmar, M. (2014). *Intergenerational Bargaining, EU Age Discrimination Law and EU Policies – an Integrated Analysis*. Amsterdam: AIAS – iNGenBar.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 , 02/12/2000 P. 0016 – 0022.

³ Art. 6(1) Directive 2000/78/EC, also indicated by recital 25 of Directive 2000/78/EC that the EU legislature recognises the legitimate role of age in many different social policy contexts.

⁴ Schiek, DG (2011). Age Discrimination before the ECJ - Conceptual and Theoretical issues. *Common Market Law Review*, 48 (3). 777 - 799 (22), 779. (Schiek2011)



specifying a number of typical justifications in a non-exhaustive list (Art. 6(2)). Thus, discrimination on the grounds of age can be justified under a looser standard, in addition to those cases where a strict objective justification of different. While implementing the framework agreement on active ageing, social partners need to keep in mind that the ban on age discrimination in EU law is conceptually weaker than other bases of discrimination and pay special attention to create measures which provide effective protection for older employees.

The Role of Collective Agreements

The CJEU confirmed that social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.⁵ Moreover, social partners, through collective agreement can opt for application of national employment or social policy mechanism so that due account may be taken not only of the overall situation in the labour market concerned but also of the specific features of a specific job in question.⁶ This provides considerable flexibility for social partners to opt for, among others, compulsory retirement or automatic termination clauses, considering their capacity to guard the weighing of interests adequately. Generally, the Court is quite lenient in accepting legitimisation set forth by social partners in collective agreements.

On the other hand, concerning age discrimination cases, as opposed to sex discrimination cases, the reference to a fundamental right to collective agreements is utilised to justify restrictions of workers' rights.⁷ This line of argument establishes a difference from earlier case law requiring collective agreements to comply fully with the principle of prohibition of discrimination; in case of age discrimination policies have been introduced by collective agreement can be seen as a legitimating factor. For example, the Court did not require employers to be flexible regarding the wishes of employees to work past the pensionable age. Rather, the CJEU granted social partners a wide discretion in phasing men and women in the “third age” out of gainful employment. However, it does not mean that such clauses in a collective agreement are exempt from any effective review by the courts in the light of the provisions of FED and the principle of equal treatment. Such review is exercised according to the specific features of the clause being examined. It must be ensured, in respect of each agreement, that they fulfil the conditions laid down in Article 6(1) of FED.⁸

⁵ Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63; Case C-411/05, *Palacios de la Villa* [2007] EU:C:2007:604, paragraph 68.

⁶ *Palacios de la Villa*, paragraph 74.

⁷ Case C-271/08, *Commission v. Germany*, EU:C:2010:426, para 37; Case C-45/09, *Rosenbladt*, EU:C:2010:601, paras. 68–69.

⁸ *Rosenbladt*, para 52.



Social partners wide margin of appreciation is based on the presumption that age is a passing personal characteristic. Theoretical approaches are supporting the argument for flexible regulations. The two major approaches in these contexts are the 'complete life view' and the 'fair innings argument'. Both support the argument that equality between individuals on the ground of age should not be assessed at one particular time slot but across one's working life. The complete life approach argues that when different people's share of resources and welfare is assessed, the amounts of things that they receive over the complete course of their lives have to be taken into consideration.⁹ With other words, if everybody is eligible for the same benefits and to the same burdens, no discrimination arises. This approach justifies the less favourable treatment, like mandatory retirement age for elderly workers or lower entry wage for younger employees, because a most favourable treatment compensates it in the past or to be received in the future. The fair innings argument claims that discrimination on the ground of age is justifiable if it aims to avoid inequality or to achieve substantive equality between generations.¹⁰ This argument supports positive discrimination of younger workers to ensure that they will get the same opportunities and acquired advantages as the older generation has had.

On the other hand, it has to be bear in mind that age discrimination – like any other grounds – harms the dignity of a human being or a person's autonomy, especially in cases when the discrimination is based on stereotypes. Thus, justification based on a form of distributive inequality has to be treated with care.

Generally speaking, the CJEU accepts both arguments; when it follows the complete life view approach both age groups have to accept less favourable treatments, and when it considers the fair innings argument, favourable treatment of younger workers can be justified to the detriment of middle-age or old workers. Based on the analysis of the case law, it is argued that overall the CJEU is more lenient in accepting disadvantageous measures for older people and tend to accept justification which protects younger people. Thus, while protecting the interest of the elderly workforce, social partners have to be considerate and find a healthy balance between the interest of all age groups.

Guiding Principles

The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.¹¹ The underlying rationale of anti-discrimination law is that dignity of each person has to be acknowledged. Therefore, instead of categorisation based on

⁹ McKerlie, D (1989). Equality and Time, 99 *Ethics* 475.

¹⁰ Horton, R (2018). Justifying Age Discrimination in the EU. In: Belavusau, U and Henrard, K (eds.): *EU Anti-Discrimination Law Beyond Gender*, Hart, 277-278.

¹¹ Case C-390/12, *Pfleger*, EU:C:2014:281; Case C-414/16, *Egenberger*, EU:C:2018:257.



stereotypes, differences relating to single grounds has to be accommodated. Under these rationales, a ban on age discrimination can be justified if age leads to false stereotyping based on social constructs.¹² In the world of work, there many different stereotypes, like the assumption that people above a certain age are inflexible, inherently conservative or less productive. These stereotypes discourage people above a certain age from looking for challenging positions. On the other hand, the high unemployment rate among young people indicates that there are also stereotypes connected with young ages. Banning age discrimination under the non-discrimination rationale would require allowing only minimal exceptions from this ban, and would also outlaw the widely accepted use of age as a differentiating factor in employment and social policy.

Article 6(1) of the FED allows widespread use of age bands in social and employment policy and gives the Member States an additional justification for maintaining relevant social policies. However, strict divisions between age groups and related life cycles (first an education phase for the youth, second an uninterrupted working life, and third, a well-earned retirement for the elderly) no longer matches the rising demands of individual flexibility in the knowledge-based economy. Social partners need to strive for a more flexible understanding of individual career paths and combat ageism effectively. The below section analysis case law of the CJEU to guide whether the FED should preclude a policy or a measure or not.

Justification

Article 6 of Directive 2000/78 provides that Member States may provide that differences of treatment on the 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 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 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. Social partners enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.¹³

¹² Schiek (2011) supra (fn 4).

¹³ Case C-417/13, *Starjakob*, EU:C:2015:38.



According to settled case-law of the CJEU, the concept of ‘objective reasons’ requires that the unequal treatment found to exist be justified *by the existence of precise and concrete factors, characterising the employment condition* to which it relates, in the particular context in which it occurs and *based on objective, transparent criteria* so it can be determined whether that unequal treatment meets a *genuine need*, is *appropriate* for achieving the objective pursued and is *necessary* for that purpose. Those factors may result, in particular, from the specific nature of the tasks or from the pursuit of a legitimate social-policy objective.¹⁴

A distinction should be made between the ground of discrimination itself and the characteristic related to it. It is the latter which must constitute a ‘*genuine and determining occupational requirement*’ to justify the difference of treatment and not the ground of discrimination *per se*.¹⁵ As far as the condition relating to a ‘genuine and determining’ occupational requirement is concerned, Article 4(1) is unambiguous: the use of the two adjectives ‘genuine and determining’ clearly suggests a strict interpretation of the provision's potential, it 'being a derogation from an individual right laid down in the directive'. Article 4(1) justification applies only 'in minimal circumstances'. The case-law has demonstrated a measured use of this exception and a desire to interpret it strictly, whilst also accepting that it covers instances in which, due to the special nature of the profession in question, the existence of a characteristic linked to age, or another of the grounds of discrimination, appreciably reduces the ability of the person to carry on the profession properly and efficiently.¹⁶

¹⁴ Case C-307/05, *Del Cerro Alonso*, EU:C:2007:509, Case C-72/18, *Ustariz Aróstegui*, EU:C:2019:516,

¹⁵ Case C-229/08, *Wolf*, [2010] ECR I-1.

¹⁶ Opinion of AG Cruz Villalón in *Reinhard Prigge Michael Fromm Volker Lambach v Deutsche Lufthansa AG*, Case C-447/09.



Best Practices

Fixed Term Contract

Employers may wish to employ elderly workers on fixed term contracts. If parties wish to agree during the employment relationship indefinitely to postpone, and on more than one occasion if necessary, the agreed date of termination of the employment contract related to reaching the normal retirement age, simply because by reaching the normal retirement age, the worker qualifies for a retirement pension. It is necessary to have objective reasons justifying the renewal of such employment contracts or relationships, the maximum total duration of those successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships.¹⁷ To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, collective agreements, can, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- objective reasons justifying the renewal of such contracts or relationships;
- the maximum total duration of successive fixed-term employment contracts or relationships;
- the number of renewals of such contracts or relationships.

Social partners shall, where appropriate, may determine under what conditions fixed-term employment contracts or relationships:

- could be regarded as "successive."
- could be deemed to be contracts or relationships of indefinite duration.¹⁸

Fixed term contract may also be concluded with young workers. However, if the contract is being terminated automatically when an employee reaches a certain age, again, it is necessary to prove that the provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary. In the *Abercrombie* case, the Court found that it is not discriminatory for an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate employment policy goal, namely that it achieves a degree of flexibility on the labour market, as undertakings may be encouraged by the existence of an instrument less onerous and costly than the usual contract and thus be prompted to respond more to job applications from young workers. Moreover, the lack of professional experience is a factor which hampers young people, and the possibility of entering the

¹⁷ Case C-184/15 and C-197/15, *Martinez Andrés and Castrejana López*, EU:C:2016:680.

¹⁸ Case C-46/17, *Hubertus John v Freie Hansestadt Bremen*, EU:C:2018:131.



world of work and of acquiring experience, even if it is flexible and limited in time, could constitute a springboard towards new employment opportunities.¹⁹

Setting Maximum Age

Except in the case where the age limit is based on the opportunity for the employee to obtain a retirement pension, the limitation of the duration of the employment contract based on the age of the employee is only justified where, because of the activity the employee performs, the passing of a certain age presents a risk. Age is objectively linked to the reduction of physical capabilities.

Maximum ages can be justified by reference to amortisation of training costs through allowing for a reasonable period of employment before retirement. The “genuine occupational requirement” justification under Article 4 is not specific to age discrimination, however, it is frequently used in these cases. For example, the physical demands of the fire-fighting profession were not free from an age-related stereotype. It was suggested that anyone past the age of 45 or 50 was no longer able to engage in active fire-fighting due to the “medically proven ageing process”. Accordingly, the Court concluded that “very few officers over 45 years have sufficient physical capacity to perform the fire-fighting part of their activities”. Therefore, a measure which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years sufficed as justification to the objective of ensuring the operational capacity and proper functioning of the service concerned.²⁰

On the other hand, in a case where the employment relationship of a Deutsche Lufthansa automatically terminates when he attains 60 years of age the Court found that such a pilot is in a comparable situation to that of a younger pilot performing the same activity for the benefit of the same airline company and/or falling under the same collective agreement. The first pilot whose employment contract terminates automatically when he attains 60 years of age is treated less favourably, on the grounds of his age, than the second.²¹ As regards airline pilots, it is essential that they possess, inter alia, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age. Possessing particular physical capabilities may be considered as a ‘genuine and determining occupational requirement’, within the meaning of Article 4(1) of the FED, for acting as an airline pilot and that the possession of such capabilities is related to age. Although the CJEU found that such provision is necessary, it stated that in fixing at 60 the age-limit from which airline pilots falling within Collective Agreement are considered as no longer possessing the physical capabilities to carry out their occupational activity. At the same time, national and international legislation authorise the carrying out of that activity, under

¹⁹ Case C-143/16, *Abercrombie & Fitch Italia*, EU:C:2017:566

²⁰ *Wolf*, EU:C:2010:3.

²¹ Case C-447/09, *Reinhard Prigge Michael Fromm Volker Lambach v Deutsche Lufthansa AG*, EU:C:2011:573.



certain conditions, until the age of 65, the social partners imposed on those pilots a *disproportionate* requirement within the meaning of Article 4(1) of the FED. Therefore, it concluded that air traffic safety does not constitute a legitimate aim within the meaning of that provision.

Remuneration

To reduce employment costs, employers may need to reduce the salary employees newly entering the establishment compared to those who had been hired earlier. New remuneration conditions are not based on a criterion which is inextricably or indirectly linked to the age of the employees, because one can decide to apply for a position any time throughout the career path; therefore, it cannot be considered that such new rules establish a difference of treatment on the grounds of age.²² A measure which, as of a specific date, provides for the application on the recruitment of new employees of a salary scale and classification on that scale which are less advantageous than that applied, under the rules previous to that measure, to employees recruited before that date does not constitute indirect discrimination on the grounds of age within the meaning of that provision.²³

It must be noted that, as to the justification of direct discrimination, any argument alleging an increase in financial burdens and possible administrative difficulties cannot, in principle, justify a failure to comply with obligations arising from the prohibition of discrimination on the grounds of age.²⁴

Severance pay

In the *Andersen case* the subject-matter of which was a comparable provision (age limit for the payment of a severance allowance), the Court took account of whether workers had to accept early retirement reductions and other cuts in income by comparison with the maximum amount of pension which they would otherwise have been able to draw.²⁵ The measure thus aimed to ensure, under the principle of proportionality and the need to counter abuse, that the severance allowance is paid only to those for whom it is intended, namely those who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment. That measure was claimed to prevent employers from being forced to grant the severance allowance to persons to whom they will also be paying an old-age pension on termination of the employment relationship. Although the Member States have broad discretion regarding Palacio, this discretion "must not have the effect of frustrating the principle of non-discrimination on the grounds of age". The legislative rule was held to be disproportionate because it went over and above what was necessary to achieve its aim in

²² Case C-32/11, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft*, EU:C:2012:329;

²³ Case C-154/18, *Tomás Horgan and Claire Keegan*, EU:C:2019:113.

²⁴ Case C-396/17, *Martin Leitner v Landespolizeidirektion Tirol*, EU:C:2019:375.

²⁵ Case C-499/08, *Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark*, EU:C:2010:600.



withholding the severance payment also from those employees who did not wish to retire on being eligible. Accordingly, this Danish legislation was held to contravene the prohibition of age discrimination. However, the Court tend to apply a looser standard of scrutiny on national legislation encouraging retirement at 65 or 68, relying mainly on the *Palacios de la Villa* ruling.²⁶

Conclusion

Social partners enjoy broad discretion in their choice, they are able to pursue a particular aim in the field of social and employment policy, and also in the definition of measures capable of achieving it. Moreover, social partners, through collective agreement, can opt for application of national employment or social policy mechanism. Therefore, they are able to create a flexible regulatory environment which caters for the exact need of a given workplace and also for the specific features of a job in question.

Social partners enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. Regarding justification, the concept of objective reasons requires that the unequal treatment found to exist be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the particular context in which it occurs and based on objective, transparent criteria; so it can be determined whether that unequal treatment meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result, in particular, from the specific nature of the tasks or the pursuit of a legitimate social-policy objective. A distinction should be made between the ground of discrimination itself and the characteristic related to it. It is the latter which must constitute a genuine and determining occupational requirement to justify the difference of treatment and not the ground of discrimination *per se*.

Generally, in case of age discrimination, policies have been introduced by collective agreement can be seen as a legitimating factor. However, it does not mean that such clauses in a collective agreement do not need to fulfil the conditions set forth by Article 6 (1) of the FED. The directive aimed to protect people's dignity by shielding them from ageism and other forms stereotyping. Age discrimination harms the dignity of a human being or a person's autonomy. Social partners wide margin of appreciation is based on the presumption that age is a passing personal characteristic. However, it has to be bear in mind that social partners have to consider the interest of all age groups and instead of categorisation based on stereotypes, and collective agreement have to accommodate the differences relating to single grounds. In this way, social partners become capable of creating a healthy balance

²⁶ Schiek (2011) *supra* (fn 4).



between the interest of the employer and the employees, and of providing effective protection for employees of all age groups.

