

Age discrimination: new challenges in times of crisis¹

by

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Summary

1. General remarks and key concepts of Directive 2000/78/EC: the inspiration of the Directive in gender discrimination directives; 2. Age discrimination among other sources of discrimination in Dir. 2000/78: the accrued difficulties of non-discrimination principle when applied to age; 3. The role of the ECJ; 4. The formal transposition of the Directive into national Law, in relation to age discrimination and the different practices of the Member States in key issues related to age discrimination; 5. Closing remarks: the structural weakness of the non-discrimination principle when applied to age; age discrimination in times of crisis - the tension between an ageing working population and the growing unemployment in the young generation

1. General remarks and key concepts of Directive 2000/78/EC: the inspiration of the Directive in gender discrimination directives

I. Age has been formally recognized as a possible source of discrimination in Article 13 of the EC Treaty (as approved by Amsterdam Treaty), among other sources of discrimination, such as sex, racial and ethnic origin, religion or belief, disability or sexual orientation². This provision was followed by Article 21 No. 1 of the ECFR, which explicitly prohibits discrimination on several grounds, including age.

¹ A first version of this paper has been published at the *European Labour Law Journal*, Volume 4, No. 2, 2013, pages 109-118, under the title *Age discrimination, retirement conditions and specific labour arrangements: the main trends in the application of directive 2000/78 EC in the field of age discrimination*. The present study updates the first version.

² In fact, age had already been mentioned in paragraph 24 of the Community Charter of the Fundamental Social Rights of Workers (1989) that recognized the right of older people to adequate retirement conditions, or, in the least, to a minimum income and to social and medical assistance in old age. However in this first reference no link is yet established between age and discrimination in employment area.

Article 13 of the EC Treaty – that corresponds now to Article 19 No. 1 of the TFEU, as approved by the Lisbon Treaty – was therefore the formal basis for the further development of non-discrimination principle on other grounds than sex.

II. In relation to employment area, the development of non-discrimination principle on the grounds of age was made mainly by Dir. 2000/78/EC, of 27 November 2000. However, this Directive largely benefited from the previous development of EU Law in the area of gender discrimination, that goes up to 1957 (in Article 119 of the EEC Treaty) and had been going on for many years, especially since 1975, with Dir. 75/117/EEC, of 10 February 1975, regarding gender discrimination in pay, soon followed by several other directives covering different areas of the gender equality principle in relation to employment and social security³.

This *inspiration of Dir. 2000/78 in gender equality Law* is very clear in three ways:

- a) On the one hand, *the Directive takes advantage of the concepts tested along the years in relation to gender discrimination*, both in the directives as by the ECJ (this is case of the notions like direct and indirect discrimination as well as harassment - Article 2 No. 2 a) and b) and No. 3⁴).
- b) On the other hand, *the protective rules of the Directive largely reflect the European acquis in the area on gender equality*, conquered over the years and often after hard discussion. This similarity is evident not only regarding the areas where the protection is granted, as defined in Article 3 (access to employment and promotion, professional orientation, working conditions including remuneration and dismissal, and professional affiliation⁵) but also regarding the enforcement mechanisms (this is the case of affirmative action,

³ Dir. 76/207/EEC, of 9 February 1976, regarding gender equality in access to employment, working conditions, promotions and professional training, changed by Dir. 2002/73/EC, of 23 September 2002; Dir. 97/80/EC, of 15 December 1997, regarding the burden of proof in actions related to gender discrimination. These Directives were replaced in 2006, by the recast Dir. 2006/54/EC, of 5 July 2006. In the area of social security, gender equality principle was developed by Dir. 79/7/EEC, of 19 December 1978 (regarding statutory social security schemes) and by Dir. 86/378/EEC, of 24 July 1986 (regarding occupational social security schemes), this latter also replaced by Dir. 2006/54/EC. Gender equality principle was also developed in relation of independent work by Dir. 86/613/EEC, of 11 December 1986, later replaced by Dir. 2010/41/EU, of 7 July 2010. Finally, gender equality principle is in close relation with the Directives concerning the protection of pregnant women and new mothers at work (Dir. 92/85, of 19 October 1992) and with the parental leave directive (Dir. 96/34/EC, of 3 June 1996, replaced by Dir. 2010/18/EU, of 8 March 2010).

⁴ The notion of indirect discrimination was established for the first time in Dir. 97/80/EC (Article 2 No. 1) and was maintained in Dir. 2002/73/EC, of 23 September 2002 (Article 2 No. 2). The notion of harassment was introduced by Dir. 2002/73/EC, of 23 September 2002 (Article No. 2 and 3).

⁵ The protection against sex discriminatory practises in these areas (except professional affiliation) was established for the first time in Article 1 No. 1 of Dir. 76/207/EEC, regarding gender equality in access to employment, promotions, training and working conditions.

allowed in Article 7⁶, or the reversal of the burden of the proof rule, established in Article 10⁷, among other rules).

- c) Finally, *some of the derogations and exceptions to non-discrimination principle, including on the grounds of age, admitted by the Directive (Article 2 No. 5, and Article 4 No. 1), are also inspired in some derogations admitted in relation to gender equality principle in several directives*⁸.

In short, concepts and rules that now look plain and simple in Directive 2000/78, in relation to non-discrimination in access to employment and in working conditions in large sense, are the final outcome of the long and often troubled evolution of gender equality Law.

III. We point out this inspiration to establish a first conclusion to our topic: *the firm link between gender discrimination and other grounds of discrimination in EU Law justifies that the interpretation and the application of the provisions of Dir. 2000/78 should follow the directions of the ECJ when applying the equivalent provisions in relation to gender discrimination.*

However, this is not always the case and maybe it is not always possible in relation to age discrimination, as we will see.

2. Age discrimination among other sources of discrimination in Dir. 2000/78: the accrued difficulties of non-discrimination principle when applied to age

I. Our second series of remarks deals with the place of age discrimination among the other sources of discrimination contemplated by Dir. 2000/78/EC.

If one looks at the Directive in this perspective, it becomes evident that *non-discrimination principle, when applied to age, seems to be weaker than in relation to other sources of discrimination (maybe with the exception of discrimination based on disability), because it is subjected to more specific derogations and exceptions.*

In fact, when applied to age, non-discrimination provisions can be excluded not only on the general grounds applicable to all discriminatory factors - which are related to the requirements of specific professional activities (for instance an activity to which age

⁶ Affirmative actions were first admitted by Dir. 76/207/EEC (Article 2 No. 4), and only with Amsterdam Treaty were included in Article 141 of the ECT.

⁷ Specific rules on the burden of proof were first admitted by Dir. 97/80/EC (Article 4), regarding the shift of the burden of proof rules in actions related to sex discrimination.

⁸ For instance, discriminatory practices in access to employment, whenever sex is a «determinant requirement», due to the «nature of the activity or to the conditions in which the activity is to be performed» were admitted by Dir. 76/207 (Article 2 No. 2).

would be a determinant factor) or to reasons related to public safety, health or the protection of the rights of other persons, and in specific areas like public social security schemes or nationality, as stated in Article 2 No. 2 b), in Article 2 No. 5, in Article 3 Nos. 2 and 3, and in Article 4 No. 1⁹ - but also on the specific situations indicated in Article 6.

II. Contrary to other sources of discrimination, *different treatment based on age is allowed by Article 6 both in employment area and in social security area.*

As regards employment, Article 6 No. 1 allows the MS to impose special conditions in access to employment and training, as well as regards working conditions, including pay and dismissal, in order to protect or to favor the professional integration of young workers, old workers and workers with care responsibilities, as well as minimum or maximum age requirements to have access to an employment or promotion (Article 6 No. 1 a) b) c)). In these or in other employment-related situations (since this is an open-ended list), different treatment is justified if, under national law, it pursues a «legitimate objective», including objectives related to employment policy, labor market or professional training policies and provided the means chosen to pursue the objective are «appropriate and necessary» (Article 6, No.1).

As regards occupational social security schemes, the Directive allows for the use of age in actuarial factors and the establishment of different age requirements to have access to those schemes or to the pensions attached, provided the age requirements do not result in sex discrimination (Article 6 No. 2)

III. The fact of Article 6 going along with the general limitations already imposed by Article 2 no. 2 b), and No. 5, Article 3 Ns. 2, 3 and 4, and Article 4 No. 1 of the Directive, allows us to establish two conclusions in this point.

The first conclusion is that non-discrimination principle in relation to age is weaker than non-discrimination on other grounds, since it largely complies with situations where different treatment on the grounds of age is considered justified. In this same sense, recital 25 to the Directive, emphasizes the need to distinguish between «discriminatory practices that should be forbidden» and «justified different treatment namely for national employment or labor policies», thus admitting an explicit compromise between non-discrimination principle and admissible discriminations, in the case of age. In short, unlike in other situations, different treatment on the grounds of age cannot be considered exceptional under Dir. 2000/78/EC.

⁹ Article 2 No. 2 b): this provision allows indirect discriminatory practices, in relation to employment and professional activity, under the condition that the different treatment pursues a «legitimate objective» and the means to achieve that objective «are adequate and necessary»; Article 2 No. 5: this provision allows direct discrimination practices justified on the public interest related to some specific professional activities, such as activities related to public safety, health protection and the protection of the rights of third parties; Article 4 No. 1: this provision allows discriminatory practices in access to employment related to the specificity of the professional activity or to the conditions under which that activity is supposed to be performed, provided the discriminatory factor is an «essential and determinant requirement» and the different treatment pursues a «legitimate objective», throughout a «proportional» mean».

The second conclusion is that the practical implementation of the principle at national level largely depends upon the Member States (MS) interpretation of the criteria of «legitimate objectives» related to «employment policy, labor market or professional training policies», given the fact that Article 6 expressly refers those criteria to the national level.

These conclusions draws us to the next two topics of our study: the first one is to take a glance to the ECJ judgments on the subject, in order to see how the Court is interpreting and applying Directive 2000/78, in relation to age discrimination; the second one is to take a look on how the MS are complying with the Directive and what are the more common practices at national level in key issues related to age discrimination in the interpretation of the exceptions and derogations allowed by the Directive.

3. The role of the ECJ

I. The ECJ ruling in the area of age discrimination¹⁰ confirms that *the major problems regarding age discrimination lie in the interpretation of the several exceptions and derogations to the principle admitted under Dir. 2000/78.*

In fact, in all the situations where the ECJ was called upon to deal with discriminatory practices – and age discrimination is, by far, the source of discrimination more frequently brought before the Court - combined or not with problems related to the non-implementation (or to the bad implementation) of the non-discrimination principle in this area by the MS.

II. Where a *question of lack or deficiency in the transposition of the Directive arises*, the ruling of the ECJ has been very consistent in the sense of considering that the principle of non-discrimination on the ground of age relies directly on the Treaty, so it can be called-upon even when the MS has failed to implement Directive 2000/78.

This reasoning was first expressed on the *Mangold* judgment¹¹ and has been reinforced since in several judgments that qualify this principle as a general principle of the EU, founded directly on the common traditions of the MS, that the Directive merely complements or develops at a secondary level, and which is applicable at national level independently of further development by the way of a directive (in this sense, for instance, *Kücükdeveci* case¹²).

In short, the ECJ has developed a *fundamental rights approach to non-discrimination principle on the ground of age* and this approach is very significant since it makes it

¹⁰ The following references to ECJ decisions are mere examples given the high number of age discrimination cases brought before the ECJ. All referred cases can be found at <http://curia.europa.eu/juri/document/document>.

¹¹ Case C-144/04, of 25 November 2005.

¹² Case C-555/07, of 19 January 2010.

possible to overcome the difficulties in the formal implementation of the principle at national level.

III. On the contrary, the ECJ is not as consistent when called upon the *core question of the allowed discriminatory practices under Dir. 2000/78*, and seems to treat the questions related to Article 2 No. 5 and Article 4 No. 1, differently from the questions related to Article 6.

In fact, the ECJ tends to refuse direct discriminatory practices that are solely based on age. In this sense, in *Mangold*, the Court did not accept the change of the labor contract in a fixed-term contract just for the fact that the worker had reached the age of 52 years old; in the same sense, in *Kücückdeveci*, the Court qualified as discrimination the refusal to count the working years before the worker was 25 years old for the purposes of the delay for dismissal; and the same reasoning was applied in *David Hütter* case¹³.

However, *in judgments where Article 2 No. 5 and Article 4 No. 1 are called upon, the Court seems to follow a more strict interpretation of the justification for different treatment according to age, than in the cases regarding Article 6.*

Some examples show this different approach:

- a) In judgments where different treatment regarding age is based upon a criteria related to the professional activity in itself (in the sense of Article 4 No. 1) or on external requirements associated to that activity related to health, safety or the protection of rights of third parties, in the sense of Article 2 no. 5 (for instance, the maximum seniority in the profession of air pilots, appreciated in *Richard Prigge* case¹⁴, or in the profession of dentist, appreciated in *Petersen* case¹⁵, or the case of the *European Commission against Hungary*¹⁶, regarding the mandatory retirement age for judges and solicitors at the age of 62, instead of 70 as the general rule; and as well, the admission of a maximum age for recruitment for the activity of fireman, appreciated in *Wolf* case¹⁷), the Court took position directly on the alleged motive for the different treatment, discussing whether that motive was legitimate and a determinant request for the activity or profession in question, and whether the means to achieve it were justified and proportional.

¹³ Case C-88/2008, of 18 June 2009. In this case, the Court decided that it was discriminatory not to taken into account the professional experience of a worker before he was 18 years old, for the purpose of fixing his the category, when entering the public service.

¹⁴ Case C-449/2009, of 13 September 2011.

¹⁵ Case C-341/2008, of 12 January 2010.

¹⁶ Case C-286/2012.

¹⁷ Case C-229/2008, of 12 January 2010.

- b) Differently, in judgments where Article 6 is directly concerned, like the *Felix Palacios de la Villa*¹⁸, *The Queen*¹⁹ *David Hüttter* or *Vasil Ivanov Georgiev*²⁰ cases, the Court recognized that the employment policy that justifies the difference of treatment on the ground of age is a competence of the MS, therefore avoiding to appreciate the ground for discrimination in itself, or limiting its reasoning to a prima facie declaration that the different treatment related to age is under the wide discretion of the MS, in pursuit of social or employment policies, and must only respect the condition that the worker is not to be discriminated in the future on the ground of age (as in *Gisela Rosenblat* case²¹ and in *Fuchs /Khöler* case²²).

IV. These examples give ground to a conclusion: *it is only possible to control the allowed age discriminatory practices when these practices are based on objective criteria, related to the professional activity or to external but well defined requirements (like public safety, security or health)*. And in those situations, the ECJ tends to rule in a strict way, not only because objective criteria are easier to assess, but also because the Court benefits from a long tradition of similar ruling in the appreciation of those same requests as justified exceptions to gender equality treatment in access to employment and in labour conditions.

On the contrary, the open-ended and national-basis criteria of Article 6 of Dir. 2000/78 seem to be impossible to assess by the Court.

¹⁸ Case C-411/2005, of 16 July 2007.

¹⁹ Case C-388/2007, of 5 March 2009.

²⁰ Joined Cases C-250/09 and C-268/09, of 18 November 2010. In this Case the Court decided that the automatic replacement the open-ended contract of a university professor by a fixed-term contract, on the grounds of the employee having reached the age of 65, is justified if it aims to promote employment for younger professor, but it up to the MS to determine whether this is the intention.

²¹ Case C-45/09, of 2 October 2010. In this case, the employer of M. Gisela Rosenblat terminated her employment contract when she reached the age of 65, as prescribed in a collective agreement and under the justification that at that age, she became eligible to old age pension. The ECJ considered the collective agreement's clause valid, arguing that it was in line with an employment policy to favor the replacement of older workers by younger workers and given the fact that the worker could be engaged in another employment contract, therefore not risking future discrimination on the ground of age.

²² Joined Cases C-159/10 and C-160/10, of 21 July 2011, referring to the establishing of a mandatory age for public prosecutors at 65 years old.

4. The formal transposition of the Directive into national Law, in relation to age discrimination vis à vis the different practices of the Member States in key issues related to age discrimination

I. At one stage or another, all the MS formally declared having adopted Dir. 2000/78 in relation to age or being already in compliance with the Directive²³.

Nevertheless, the more opened and national-reliant system of European Law in the field of age discrimination, that results of Article 6 of Dir. 2000/78, alongside with the other derogations/exceptions of the Directive, allows that very different practices subsist at national level in several key issues for age discrimination, namely in relation to employment.

II. In fact, the admissible discriminatory practices indicated in Article 6 No. 1 of the Directive, as well as other practices are used, to some extent, by all the MS in most of the following areas²⁴:

- a) In relation to access to employment and working conditions, *specific conditions concerning age may be required to protect certain categories of workers* (for instance, minimum working age for minors and more restrictions to the work of young persons, for safety reasons or for educational purposes; and a great variety of schemes regarding working conditions, working time and leaves which are meant to protect workers with care responsibilities).
- b) Still in relation to access to employment, *age is taken into consideration to promote the recruitment of young workers or of older and sometimes long-term unemployed workers* (for instance, fiscal or social security advantages granted to the employers, or the right to pay a lower salary when recruiting young or old persons, as well as specific cases of fixed-term contracts for young or old persons meant to facilitate their recruitment especially in MS where a just cause for dismissal is required).

²³ Nevertheless, the adoption of the Directive was slow and gave reason to infringement proceedings against several MS, that failed to transpose the Directive to national law in due time or did not transpose it well. Most of these proceeding have now been closed. For more information on this topic, see the *Communication of the European Commission to the Council, the European Parliament, the Economic and Social Committee and the Regions Committee, on the implementation of Directive 2000/78/EC, of 27 November 2000, establish a general framework regarding equal treatment in employment and professional activity [SEC (2008) 524]*COM/2008/0225 final*/.*, traced at www.eur-Lex-52008DC0225-PT.

²⁴ On this topic, our study is largely based on the information regarding the Member States included in the Report *Age and Employment* (2011), written in the context of The *European Network of Legal Experts in the non-discrimination field*, by D. O'DEMPSEY / A. BEALE, under the supervision of M. FREEDLAND, and published by the European Commission (DG Justice). The forthcoming information regarding the Member States can be confronted at this Report, which is available at the Network's website.

In most MS, these measures are justified as positive action of employment policy, in the sense of Article 6 No. 1 a).

- c) *Measures lowering the regular level of protection regarding dismissal or other forms of termination of the labor contract, directed mostly to elderly workers* (for instance, mandatory retirement age or the possibility of unilateral dismissal at a certain age or of changing the contract in a fixed-term contract if the worker does not apply for retirement when he is old enough).

Here again, the measures tend to be justified as a necessary tool to achieve employment policies, namely the natural renewal of the labor force by the employers, and the favor of young workers, supposedly because they cost less and are more receptive to technological changes.

- d) *The direct admission of a minimum age for access to employment, higher than the minimum age generally established* (that most MS fix in 16 years old), is also very common in most MS, either for specific professions or generally in the public sector.

In this case, the derogation of non-discrimination principle tends to be justified not only on Article 6 No. 1 b) but also on the specific nature of the activity or in reasons of public nature (e.g, applying either Article 4 No. 1 or Article 2 No. 2 b) i) or No. 5, or even Article 3 No. 4).

- e) *The direct admission of a maximum age for recruitment*, in the sense of Article 6 No, 1 c), which is also common in professions linked with security or police forces (thus, under the provision of Article 2 No. 5), as well as in other cases where age can be considered a determinant factor (making use of Article 4 No. 1).

- f) *The admission of a maximum age to keep working*, either in specific professional activities (for instance pilots, doctors or professors, justified under the provision of Article 2 No. 5, by health, safety or protection reasons) or broadly in the public sector (mandatory retirement at a certain age or after a certain length of service) or even in general mandatory retirement at a certain age), without an evident justification aside the renewal of the labor forces.

- g) On the contrary, *measures aiming to favor a more softly transition from work to retirement*, that were relatively common in some MS some years ago (like the right to transform a full-time labor relation in a part-time job after a certain age, or pre-retirement arrangements, that combined a social security allowance with some professional activity) and that were normally justified as tools to promote the normal replacement of the labor force, are seldom mentioned nowadays, due to the tendency for enlarging the period of active life.

This *tendency for enlarging the period of active life* deserves a closer look, because it seems to be more and more at the core of MS policies regarding old workers.

This new orientation, which is in direct connection with the increasing worries over the financial sustainability of the public social security systems, explains measures adopted by some MS, such as the *increase of retirement age or the financial sanctioning of early retirement, as well as the suspending of previous pre-retirement arrangements programs*. In fact, according to a survey of the OECD on the subject of retirement, since 2009 half of the OECD have started or plan to start to raise retirement age, the tendency being to fix that age around 65 years, which means a medium increase of 2.5 years in males and 4 years in females . This tendency replaces the tendency of the last 50 years that was in the sense of lowering down retirement age and facilitating precocious retirement and pre-retirement arrangements, despite the increase of life-expectancy^{25 26} .

As regards the implementation of Directive 2000/78 at national level, the situation presented allows for the conclusion that the MS make an extensive use of all the exceptions / derogations of the non-discrimination principle in relation to age and that that use is not at all controlled by the EU²⁷.

Nonetheless, it seems also clear that the wide extension in which different treatment in relation to age is allowed under the Directive and especially the fact that the conditions for that treatment widely resting on national standards raises the doubt if any control of age discrimination practices is in fact possible or even desired by the EU.

²⁵ OECD survey *Pensions at a Glance: Retirement income Systems in OECD and G20 Countries (2011)*, confronted at www.oecd.com, under this title. This survey indicates that between 2002 and 2007 most people had access to retirement 4 to 5 years before reaching normal retirement age, that resulted in a medium of 20,3 years and 24,5 of retirement years for men and women, respectively, when considering the medium life expectancy. In the opposite sense, since 2009, 18 countries of the OECD or of the G20 have increased or pan to increase women's retirement age and 14 intend to do the same in relation to men's retirement age.

²⁶ OECD survey *Pensions at a Glance* also shows the direct relation between the topic of retirement age and the financial balance of social security systems on another range of measures that are currently being adopted by many countries, directly regarding the social security systems, like the transformation of social security systems from pay-as-you-go systems to pension-defined systems, and the promotion of complementary of the public social security schemes by private schemes, such as professional and personal insurance schemes.

²⁷ Both the Report *Age and Employment* and the *Communication of the European Commission regarding the implementation of Directive 2000/78* above coted indicate that discriminatory practices regarding age, prior to the adoption of the Directive by the MS, persist in the law and in collective agreements and consider that national surveys on the various topics regarding discrimination are still to be done.

5. Closing remarks: the structural weakness of the non-discrimination principle when applied to age; age discrimination in times of crisis - the tension between an ageing working population and the growing unemployment in the young generation

I. The previous overview of non-discrimination principle in EU Law and of its implementation at national level allows us to close this presentation with four conclusions. The first three conclusions are of a general nature and the last one is directly related to the economic crisis in Europe, and to its reflections in employment and occupation.

II. Our first general conclusion is to confirm that *non-discrimination principle in relation to age is weaker than non-discrimination on other grounds*, since it formally complies with more situations where different treatment is considered justified, than other grounds of discrimination do.

Our second conclusion is to recognize that *the practical implementation of the principle at national level largely depends upon the MS* and their interpretation of the criteria of «legitimate objectives» related to «employment policy, labor market or professional training policies», since Article 6 expressly refers those criteria to the national level and therefore tends to a great diversity.

Our third general conclusion is to say that *this structural weakness of non-discrimination principle in EU Law is most likely to carry on in the future*, because the admissible discriminatory practices under Article 6 are rather difficult to assess by the ECJ and the ECJ tends to interpret part of the derogations and exceptions to non-discrimination principle on the ground of age in a wide sense, that largely comply with the national-wide practices of MS.

III. Coming now to the economic crisis that many European countries have been facing for some time now, and especially to the consequences of that crisis in employment, the examples and trends presented in relation to the practices of the MS in the application of anti-discrimination principle as regards age, allow for one more conclusion: *the derogations and exceptions to non-discrimination principle on the ground of age are being used by the MS as tools to achieve employment policies or other policies, but, in this use, the measures can get into conflict with one another and there is no consistent strategy in this area but rather a fluctuation on the goals pursued.*

As regards the contradictions of the system in this area, it is clear that some of the national practices regarding age, which are allowed under Article 6 of the Directive, as positive action or legitimate differences of treatment in favor of employment and social policies may well go against one another.

For instance, to promote the employment of young or of old workers it is common to adopt measures that reduce their level of protection, thus creating a differentiation in working conditions and facilitating dismissal, that of course leads to unemployment

again. In the same sense, measures like mandatory retirement age or the possibility of the employer terminating a job when the employee reaches a certain age are justified often by the need to promote employment among younger workers but promote unemployment in the older generation. On the contrary, measures intended to prolong active life for more years than before (such as the postpone of retirement age, or simply a strict application of non-discrimination principle towards older workers) promote unemployment in the younger generation and, in the long run, contribute to reduce the sustainability of the social security system, because young people access to the labour market later and therefore they contribute less to the social security

As to the strategy regarding *age and employment*, it seems clear that we are in a period of change. While until a few years ago, one of the main goals was to replace old workers by young workers and favor early retirement, now the MS are inclined to keep older workers longer in the labor market (due to several reasons, but especially due to the necessity of assuring the financial sustainability of social security systems) and this leads to different policies and measures. Anyway, this recent trend seems to be getting more and more consistent and, this being the case, all other employment policies (for instance to protect the employment of younger workers or workers with care responsibilities) should be carried on without prejudice to the level of protection of old workers.

This is however a new challenge for the EU and for the MS, because, due to the economic crisis, many European countries are now facing high levels of unemployment, and the unemployment rate is disproportionately high among young people, that are not able to enter the labor market. In short, the protection of the labor positions of older workers, on the basis of non-discrimination principle, can result in less employment for the young generation and thus create a new discrimination.

The tension between an ageing working population and the growing unemployment in the young generation is inevitable and a strategy to overcome this tension is yet to be defined.

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