

The prohibition of discrimination based on age in the light of recent EUCJ case-law

Marie Mercat-Bruns
CNAM/Sciences Po Law School

Outline of presentation

- I-What is age discrimination?
- II-Ambivalent nature of age discrimination: recognition of a principle of antidiscrimination despite legitimate differential treatment based on age
- III-Exceptions to age discrimination subject to a double tier standard: the EUCJ legitimacy and proportionality test

I- What is age discrimination?

- How do we define age?
- What age is covered by EU employment discrimination case law?

How is age defined as a ground for discrimination?

- No definition of age in EU law:
 - Art. 19 TFUE (Art. 13 of the Treaty of Amsterdam) makes direct reference to the prohibition of age discrimination.
 - Art. 21 EU Charter of fundamental rights
 - Recital 8 and 25 as well as article 2 and 6 of the Directive 2000/78 only mention age without defining it
 - Law in Member States not more specific

What is age in reference to age discrimination?

- This question is essential to understand how EU case law is developing:
- The law only mentions whether it protects age (EU), or over a specific age in the US (40+). The definition of age seems self-evident: it is the *biological* marker of the passage of time from birth to death.
- But *age is often confused with aging* and the process of aging is much more complex.
- This explains the existence of age discrimination and the **subjective and objective** dimensions of age as a social construct

Age: an indicator of *subjective* risks of aging and stereotyping

- Different causes of aging :
 - *Endogenous* to the human being (different medical theories)
 - *Exogenous* since the body is subject to an array of abuses which eventually take their toll, linked to context.So the rate of aging varies from one person to another and chronological age is more an indicator of the possible consequences of aging at certain stages of life.
- Age reflects the risks of degradation associated with aging in terms of physical health for employment, for example, with no automatic causal effect of age.
- This complexity of aging explains why *subjective stereotypes* are associated to young and old age

Age: an *objective* proxy for employment, health and retirement policies

- Age is often used as a proxy for access to seniority, training or pension rights for example. Since benefits offered by social security and employment policies have often been tied to age for economic reasons. Age is seen as a more **objective** criteria, and this has had an impact on the cost or the job security of young and older workers.

What age is covered by EU employment discrimination case law?

- All references to age : young and old. An individual or an age cohort
- For example EU cases on:
 - EUCJ C-416/13 *Mario Vital Perez*: older workers
 - EUCJ C-88/08 *Hutter*: younger workers
 - EUCJ C-262/14 *SCMD*: requires some reference to age (not socioprofessional group or place of employment)
- Difference of age might be covered EUCJ C-427/06 *Barstch*: difference of age between deceased pensioner and his widow

Age: a suspect class?

- Is age like race or sex, a suspect class, **which deserves the highest judicial scrutiny?**
- The US Supreme Court decided that age was **not** a suspect class (Murgia Case)
- In European law, age is seen as more ambivalent: the same as other grounds and yet different:
- **On the one hand, the Directive 2000/78 prohibits discrimination based on age like any other ground**
- Article 1: "The purpose of this 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.
- *Article 2:* 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..."

Age: a suspect class?

- **On the other hand, there are strong limits interpreted by case law on what constitute discrimination based on age:**
- **Article 4 of 2000/78 directive: Occupational requirements**
- *1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. See **Wolf Case C-229/08, See C-416/13 Mario Vital Perez***

C-416/13 Mario Vital Perez (2014): Age is not always an occupational requirement

- According to settled case-law, the possession of particular physical capacities is one characteristic relating to age (judgments in *Wolf*, EU:C:2010:3, paragraph 41, and *Prigge and Others*, EU:C:2011:573, paragraph 67).
- Par. 45: It must, however, be ascertained whether, in fixing that age limit, the national legislation at issue in the main proceedings laid down a requirement that is proportionate, meaning that it is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.

C-416/13 Mario Vital Perez: Age is not always an occupational requirement

- Par. 54: According to the findings of the referring court, given the tasks assigned to local police officers, ... not all of the capacities those officers must possess in order to be able to perform some of their duties are comparable to the 'exceptionally high' physical capacities which are regularly required of officials in the fire service, most notably in fighting fires.
- Par. 56: There is, moreover, nothing in the case-file or in the written observations submitted to the Court to indicate that the objective of safeguarding the operational capacity and proper functioning of the local police service makes it necessary to maintain a particular age structure, which in turn requires the recruitment exclusively of officials under 30 years of age.
- Par. 57: It follows from those considerations that, in fixing such an age limit, Law 2/2007 imposed a disproportionate requirement.

Age: a suspect class?

- **Article 6 of 2000/78 Directive states specifically for age that:**
- *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. See **Palacio Case C-411/05; Fuchs C-159/10***

II-Ambivalent nature of age discrimination:
recognition of a principle of non-discrimination
based on age in EUCJ and national courts

- **The ambivalent nature of discrimination based on age might explain the necessity to treat the prohibition of age discrimination as a part of a general principle of equal treatment to defend its legitimacy and require national courts to disapply national laws in conflict with the principle of non-discrimination based on age, fundamental norm of EU legal order.**

- C-144/04 - Werner Mangold v Rüdiger Helm
- C-555/07 - Seda Küçükdeveci v Swedex GmbH & Co. KG

III- Exception to age discrimination subject to a double tier standard: article 6 (Directive 2000/78) legitimacy and proportionality test

- Most of the case law concerns the scope of the exception:
- 6 (1). 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.

III- Exception to age discrimination subject to a double tier standard: article 6 (Directive 2000/78) legitimacy and proportionality test

- Examples of differences of treatment in art. 6:
- (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

III- Exception to age discrimination subject to a double tier standard: article 6 (Directive 2000/78) legitimacy and proportionality test

- 6 (2). Occupational social security schemes:
- 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. EUCJ two cases , Sept. 26 2013 HK Denmark and Dansk Jurist

HK Danmark, v Experian EUCJ C-476/11 (2013)

Worker was promised old-age insurance and sickness insurance to be provided at the same time as the contract of employment.

6(2) Directive 2000/78 applies to occupational social

- security schemes covering risks of old age and invalidity.
- 6(2) must be interpreted strictly.
- The Court looked at whether or not the practice of age-related contribution levels in an occupational pension scheme would be prohibited on the grounds of being unlawful age discrimination.
- Issue: Must the exception in Article 6(2) of [Directive 2000/78] be interpreted as not precluding a Member State from maintaining a legal situation in which an employer can pay, as part of pay, pension contributions which increase with age, with the result, for example, that the employer pays a pension contribution of 6% for employees under 35, 8% for employees from 35 to 44 and 10% for employees over 45?'

HK Danmark, v Experian EUCJ C-476/11 (2013)

- **Legitimacy test:** The occupational pension scheme was a way for all employees to benefit from reasonable retirement savings, to use when they retired.
- Aim targets the interests of all employees, in the context of social, employment and labor market policy concerns, with a view to ensuring retirement savings of a reasonable amount when an employee retired, might be regarded as legitimate aims.
- **Proportionality test:** Par. 66 "It does not appear unreasonable to regard the age-related increases in contributions as enabling the aims referred... to be achieved". But appreciation was left to the national court.

Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet, C-546/11 (EUCJ 2013)

- Dismissed by reason of redundancy, Mr Toftgaard was not entitled to availability pay as he was then 65 years old and therefore entitled to a civil service pension but T was entitled, but not obliged, to retire (until 70). He told the Ministry he wanted to be transferred to a different post.
- T said the refusal to grant him availability pay was discrimination on grounds of age based on Art 6 (2) on occupational social security schemes.
- Par. 44: In the present case, even supposing that availability pay forms part of an occupational social security scheme, **it is clear that availability pay is neither a retirement benefit nor an invalidity benefit.**

Dansk Jurist C-546/11 (2013)

- So Article 6(1) of that directive was applied:
- **Policy legitimate but not proportionate.**
- Proportionality test applied:
- Under the legislation, both civil servants who wish to retire and who will consequently receive a retirement pension and civil servants who wish to pursue their professional career within the public administration beyond the age of 65 are excluded from receiving availability pay.
- **The legitimate objectives may be attained by less restrictive, but equally appropriate measures.** Provisions which limit entitlement to availability pay solely to civil servants who have temporarily waived their right to receive a retirement pension in order to continue employment, while providing, in cases where civil servants refuse to take up another suitable post, for measures to punish any abuse, ensure that only civil servants who are actually available to take up an alternative post are entitled to receive availability pay.

III- Exception to age discrimination subject to a double tier standard: article 6 (Directive 2000/78) and the CJEU legitimacy and proportionality test

- The other recent string of EU cases including *Specht*, *Schmitzer*, *Starjakob*, *Felber*, *Daniel Unland*, *Ingeniorforeningen I Danmark* provide insight essentially on what are legitimate and proportionate justifications to age differences in policies applying article 6 (1) of the 2000/78 Directive.
- To understand the *double tier analysis* (1) whether a policy which provides a difference in treatment on the grounds of age is legitimate (objectively and reasonably justified by legitimate aim) and (2) whether the means to achieve the policy aim are appropriate and necessary,
- we can distinguish this standard as it applies recently to pay and pension grading systems in the public sector, severance pay policies and retirement policies.

First tier of test: What is a legitimate policy based on age?

- In Mangold, Rosenblatt, and Palacios cases, the Court recalls that Member States enjoy broad discretion in choosing the measures to attain the policy objectives which are appropriate and necessary.
- The Hütter case confirms the array of State action as mentioned by Wolf and Petersen. The measures which can come under strict scrutiny are not always strictly in the public sphere; they extend to dismissals in the private sector based on national legislation which imposes compulsory retirement through collective bargaining or national legislation (Palacios and Age concern cases).

What is a legitimate policy?

- **Legitimate goals are not those of employers**, like individual goals to reduce costs or gain a competitive edge (see Age Concern case), even though policies can take into account the need for business flexibility.
- In the Hütter case, the Court also recognizes the Member states freedom of action to choose public measures to further employment and social policies (to promote apprenticeship for example).
- National laws can list legitimate policies. For example, France has changed her list in the law of 2008 to conform to the 2000/78 directive
- **Prigge (2011): air traffic safety not an employment, training or labor market policy**

What is a legitimate policy?

- Member States may take into account budgetary considerations and **political, social and demographic considerations – but budgetary considerations cannot alone**
- **constitute a legitimate aim** - *Fuchs (2011), Schmitzer (2014)*
- Let's consider now the last cases on pay & pension grading systems in the public sector, severance pay policies and retirement policies

Pay and pension grading system in the public sector

- Reminder of previous cases: *Hennigs and Mai 2011*
- Pay grading based on age can be proportionate if transitional step
- *Hütter 2009*: Not appropriate if means to implement policy not coherent
- More recent cases:
 - *Specht 2014, Schmitzer 2014, Felber 2015, Starjakob 2015 and Daniel Unland 2015*

EUCJ Specht June 19 2014

- Law for civil servants anticipated *Hennigs Mai* - old pay classification scheme based on age
- New scheme based on experience not age
- Transitional adjustments on pay grades determined by reference to the old scheme
- LEGITIMACY TEST: rewarding previous professional experience and protecting acquired rights defended by unions justified by public interest defended by unions.
- PROPORTIONALITY TEST: transitional system perpetuated a discriminatory situation, differential pay solely on account of age continued. However, taking into account **budgetary considerations** (the cost of retroactively assessing individual claims) **and without excessive administrative costs** (no case by case) the arrangements were necessary and were not disproportionate.

EUCJ Schmitzer Nov. 11 2014

- Hütter amended law ending age rule ignoring experience before 18 but civil servants had pay change every 5 years rather than 2 years. Civil servants advantaged under old law did not have to change to the new scheme. Discrimination between the two groups
- LEGITIMACY TEST: budgetary considerations not alone. Need to protect also acquired rights and legitimate expectations (like Specht).
- PROPORTIONALITY Test: but not appropriate for the purpose of establishing a non discriminatory system because **it maintained discrimination indefinitely for disadvantaged category**

EU CJ Case-529/13 *Felber*, January 21 2015

- Under Austrian law, only periods of training and study completed after the age of 18 were taken into account when considering pension rights. Mr Felber had completed three years of education prior to the age of 18. Relying upon the decision in *Hütter*, Mr Felber brought a claim of age discrimination. It creates a discrimination based on the age at which they completed their school education.
- **LEGITIMACY TEST:** the exclusion of the crediting of periods of education completed before the age of 18 is said to be justified; the person is not engaged, in principle, during those periods, in any gainful activity giving rise to contributions to the pension scheme. Equal treatment for all persons in a specific sector relates to the time of retirement regardless if higher education, that aim constitutes a legitimate employment policy objective
- **Proportionality Test:** Policy appropriate because all contribute at same age (18) and necessary because, unlike *Hütter* not on employment: no compulsory contribution to pension during period of education before 18 and optional contribution for compensatory purposes.

EUCJ Starjakob C-417/13 January 28 2015

- Relying on *Hütter*, Mr Starjakob claimed payment of the difference that would have been payable to him if the calculation of his reference date for the purposes of advancement during apprenticeship completed before 18.
- Regional Court dismissed the action that Mr Starjakob could claim that the reference date for the purposes of advancement should be calculated accordingly only if he accepted the consequences linked to that new reference date relating to the extension of the periods required for advancement and if he provided evidence of periods of service. As Mr Starjakob had not yet supplied that evidence, his reference date for the purposes of advancement was maintained. No more discrimination concerning previous system based on age but employees disadvantaged by the previous system, who have the periods of service prior to their 18th birthday taken into account, are subject to Paragraph 53a(2) which provides that every period required for advancement in each of the first three salary steps is extended by one year, which extends the period for the next advancement by three years. Discrimination: Other employees do not have new reference date for advancement.

EUCJ Starjakob (2015)

- Age discrimination is perpetuated for those who used to be under previous discriminatory system. Exception applies.
- **LEGITIMACY test:** the new rules making the review of reference dates conditional on submission of a request by each interested party and those relating to the extension of advancement periods, serve objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations. **Budgetary and administrative considerations legitimate only if added** to political, social or demographic considerations, and general principle of the prohibition of age discrimination respected (Fuchs). Acquired rights and the protection of the legitimate expectations of employees favoured by the previous system constitute legitimate employment-policy and labour-market objectives (Schmitzer).
- **PROPORTIONALITY test:** not appropriate for the purpose of establishing a non discriminatory system because **it maintained discrimination indefinitely for disadvantaged category by extending one year the period required for advancement (like Schmitzer)**

Starjakob (2015)

- Flexibility Proactive Remedy for age discrimination in advancement?
- Article 16 of Directive 2000/78 requires Member States to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished. Par 44: no specific measure to be taken by the Member States or by a private employer but free to choose between the different solutions suitable for achieving equal treatment.
- **No right to financial compensation of employee (whose periods of service completed before the age of 18 have not been taken into account in the calculation of his advancement):** payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received).
- **BUT re-establishing equal treatment involves granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system: both recognition of periods of service completed before the age of 18 and advancement in the pay scale.**

Daniel Unland (September 9 2015, C-20/13)

- Old pay scheme discriminatory according to Specht: Unland who was 29 is recruited as a judge under old pay system which is based on age category. Before 35 pay is calculated according to a « reference age » based on actual age. Judges recruited after 35 : pay is calculated based on actual age + half the years between 35 and the actual age of appointment. New scheme based on experience but rules governing the reclassification of existing judges (new step or transitional step) within a new pay system is determined solely on amount of basic pay under the old pay system, which was discriminatory. So lower pay for some judges.

Daniel Unland (September 9 2015, C-20/13)

- LEGITIMACY & PROPORTIONALITY TEST (applying Specht): Yes
- **The aim of protecting acquired rights** of a category of persons constitutes **an overriding reason in the public interest** AND does not go beyond what is **necessary** for transitional scheme.
- Par 46: The new pay system for all *Land* Berlin civil servants and judges. That law provided, in order to ensure that the acquired rights of existing judges are maintained, a transitional derogation in their regard, whereby a step or transitional step was immediately allocated to such judges (*Specht*)
- Par 47 Old pay scheme applied to all *Land* Berlin judges at the time of their appointment, any discriminatory aspects arising from those provisions **potentially affect all such judges** (*Specht*). There is no valid point of reference under the old pay scheme of civil servants and, contrary to the argument by the applicant, **neither a category of 'young judges' who are at a disadvantage as a result of that Law or a category of 'older judges' who are placed in a more favourable position as a result of those laws..** So does not perpetuate discriminatory categories.

Daniel Unland (September 9 2015, C-20/13)

Proportionality test continued on reclassification measures:

Par 48: Moreover, the detailed rules governing such reclassification must be regarded as compatible with the requirement imposed on Member States by Article 16(a) of Directive 2000/78 to take the **necessary measures** to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

In sum:

Par 49: **Articles 2 and 6(1) of Directive 2000/78 must be interpreted as not precluding** a provision of national law, such as that at issue in the main proceedings, establishing the detailed rules governing the reclassification of existing judges within a new remuneration system under which the pay step that they are now to be allocated is determined solely on the basis of the amount received by way of basic pay under the old remuneration system, notwithstanding the fact that that system was founded on discrimination based on the judge's age, **provided the different treatment to which that law gives rise may be justified by the aim of protecting acquired rights.**

Standards on pay and pension scales based on age

Legitimacy Test:

Retained but no budget or administrative considerations alone

Proportionality Test:

Transitional system often proportionate if not indefinite in perpetuating discrimination (case by case basis to see if perpetuating or not disfavored categories)

Remedy for age discrimination: Re-establishing equal treatment without requiring automatic financial compensation (Starjakob, D. Unland)

Retirement & Severance (Landin February 26 2015 C-515/13)

- **Ingeniørforeningen i Danmark** acting on behalf Landin:

Landin Engineer asks to postpone retirement pension at 65. He is dismissed at 67 with no severance allowance because of pension entitlement. Landin finds new employment and claims severance pay. Law **provides that an employer must, upon termination of the employment relationship of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, pay an amount equivalent to one, two or three months' salary respectively, unless the salaried employee is entitled to receive a State retirement pension.**

LEGITIMACY TEST:

Par. 22 Aim of severance allowance of protecting workers with many years of service in helping them to find new employment is a **legitimate** employment policy and labour market objectives (*Ingeniørforeningen i Danmark*).

Retirement & Severance (Landin February 26 2015 C-515/13)

- **PROPORTIONALITY TEST:**

- Mr Landin, an employee can increase his pension entitlement by continuing to work beyond the normal age of retirement. As indicated by the Danish government's response to a question asked at the hearing, it is possible to receive the State retirement pension whilst continuing to work. Payment of that pension can also be postponed with a view to continuing in employment and thus eventually increase the employee's pension entitlement.
- National legislation providing that an employer must, upon the termination of the employment relationship of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, pay an amount equivalent to one, two or three months' salary respectively, unless the salaried employee is entitled to receive a State retirement pension upon termination of employment constituting **an appropriate and necessary means of achieving that aim. It is for the national court to satisfy itself that this is the case.**

-

Retirement & Severance (Landin February 26 2015 C-515/13)

- Through proportionality test, EUCJ seems to compare not only younger workers plight and older workers entitled to pension but also « workers with many years of service who might be older but not old enough for state pension ».
- In protected category, there are sub-categories that can justify an exception to age discrimination which is appropriate.

Conclusion

- Bullet points to remember on recent case law:
- Legitimacy and Proportionality test does depend on context of rule (pay system scheme, entitlement to retirement)
- Still a certain deference of EU Court, taking into account Member States reforms, transitions and delicate balance between older and younger age cohorts.
- Age discrimination case Law more focused on collective rights rather than age bias (outside of art. 4 exception Directive 2000/78)