

# Discrimination on grounds of age: CJEU case law

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## LEGAL BACKGROUND

## Directive 2000/78

- Lays down a general framework for combating [inter alia] discrimination on the grounds of age
- Broad scope
  - **employment relationship**: recruitment, working conditions, remuneration (e.g. salary, bonus), career (e.g. access to a type of job, classification, advancement), dismissal (cause / conditions)
  - **Private/public sector**
- Prohibits
  - **Direct discrimination**: persons are treated less favourably than other persons in comparable situations on the sole ground of their age
    - Example: Automatic termination of the employment contract when the worker reaches 25 years of age
  - **Indirect discrimination**: the “neutral criterion” must be inextricably or indirectly linked to the age [Horgan & Keegan, C-154/18]

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## Directive 2000/78

- Differences of treatment are not discriminatory if:
  - Direct discrimination
    - 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 (6§1)
    - 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 (4§1)
    - necessary for **public security**, for the maintenance of public order and the prevention of criminal offences, for the **protection of health** and for the protection of the rights and freedoms of others (2§5)
  - Indirect discrimination
    - objectively justified by a **legitimate aim** and the means of achieving that aim are appropriate and necessary (2§2)

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## CASE-LAW

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## Typology (type of requests)

- **Termination of contract** = *Palacios* (C-411/05), *Age Concern England* (C-388/07), *Petersen* (C-341/08 - dentists), *Rosenblatt* (C-45/09), *Georgiev* (C-250/09, age 68 for university professors), *Commission v. Hungary* (C-286/12 - judges) *Fuchs* (C-159/10 - judges), *Prigge* (C-447/09), *Hörnfeldt* (C-141/11)
- **Age of recruitment** = *Wolf* (C-229/08 - firemen), *Perez* (C-416/13 – local police), *Sorondo* (C258-15)
- **Recourse to atypical contracts** = *Mangold* (C-144/04 – fixed-term contract), *John* (C-46-17 - fixed term contract) O. (C-432/14), A & F (C-143/16 - on-call contract)
- **Pay** = *Hennigs* (C-297/10), *Horgan & Keegan* (C-154/18)
- **Career advancement** = *Unland* (C-20/13), *Specht* (C-201/12), *Bowman* (C-539/15), *Hütter* (C-88/08), *Stollwitzer* (C-482/16)
- **Professional experience/classification** = *Tyrolean Airways* (C-132/11)
- **Vocational training** = *de Lange* (C-548/15)
- **Length of period of notice** = *Küçükdevici* (C-555/07)
- **Severance allowance** = *Andersen* (C-499/08), *Teknig* (C-515/13)
- **Social plan package** = *Odar* (C-152/11)
- **Occupational pension** = *Wintjens* (C-251/16) *Bevilacqua* (C-112/15)

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## Typology

- **All countries** involved: Germany, Italy, Bulgaria, Hungary, France, Ireland, Denmark, Spain, UK...
- **All types of regulations** challenged:
  - Law and other statutory rules,
  - Collective agreement,
  - Company's regulation
- **Discrimination against:**
  - Young employees (eg. *Stollwitzer*)
  - Old employees

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## STANDARD RULE: ART. 6(1)

“Differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law,

- they are (...) 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 “

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## Court methodology

- Is the case in the material scope of Directive 2000/78?
- If so, does the national provision establish a difference in treatment based on age?
- If so, is the age-related measure sustained by a **legitimate aim**?
- If so, is the age-related measure **appropriate and necessary** to achieve that aim? (“proportionality test”)

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## Difference of treatment

### – Situations must be comparable

- A student employed on the basis of a fixed-term employment contract for a period during his university vacation, is not, having regard to the aim pursued by the French law, in a situation which is objectively comparable to that of the workers who are entitled to the end-of-contract payment under that provision. The difference in treatment between those two categories of workers therefore does not constitute discrimination on grounds of age” [O., C-432/14].

### – Indirect discriminations are uneasy to identify

- a measure which, as of a specific date, provides for the application on the recruitment of new teachers of a salary scale and classification on that scale which are less advantageous than that applied, under the rules previous to that measure, to teachers recruited before that date does not constitute indirect discrimination on the grounds of age within the meaning of that provision [Horgan & Keegan, C-154/18] = date of recruitment is not an indirect discrimination even if even if it is conceivable that a consequence of the application of the criterion may be to the detriment of a category of

## Legitimate aim: examples

“The Member States 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” [eg. A & F, C-143/16]

- **Economic background characterised by high unemployment:** to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment.
- **Encouragement of recruitment (e.g. of young people)**
- **Mix of different generations** / establishing an **age structure** that balances young and older employees
- **Rewarding experience** that enables a worker to perform his duties better or length of service
- For a **social plan**, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a **fair distribution of limited financial resources**

**Caveat: Budgetary considerations** cannot in themselves constitute a legitimate aim

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## Legitimate aim: analytical view

- aims have a **public interest nature** distinguishable from purely individual reasons particular to the employer’s situation
- Cover only **social policy objectives**, such as those related to employment policy, the labour market or vocational training
- Specification of the aim pursued unnecessary:
  - elements taken from the **general context** of the measure concerned, enable the underlying aim of that law to be identified,
  - a **change in the context** of a law leading to an alteration of the aim of that law does not, by itself, preclude that law from pursuing a legitimate aim

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## Legitimate aim: national courts' task

- **Identification of the aim** is a task which it is for the national court to carry out
  - Article 6(1) is addressed to the Member States and imposes on them, **notwithstanding their broad discretion in matters of social policy**, the burden of establishing to a **high standard of proof** the legitimacy of the aim pursued
- **Mere generalisations** indicating that a measure is likely to contribute to employment policy are not enough to show that the aim

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## Proportionality test

Is the age measure adapted and coherent?

- Member States enjoy **broad discretion** in their choice **in the definition of measures capable of achieving the aim**
- **For the national court to ascertain**, in the light of all the relevant evidence and taking account of the **possibility of achieving aim by other means**, whether national measures is appropriate and necessary
- To find the **right balance between the different interests** involved
  - A regulation which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, is compatible with Art. (6)(1)

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## Proportionality test passed

- **encouragement of recruitment** undoubtedly constitutes a **legitimate aim** of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved + the facilitation of recruitment of younger workers by increasing the flexibility of personnel management constitutes a **legitimate aim**
- a measure which authorises employers to conclude less rigid employment contracts may, having regard to the broad discretion enjoyed by the Member States in that area, be considered as being **appropriate** to achieve a degree of flexibility on the labour market.
  - in a context of a persistent economic crisis and weak growth, the situation of a worker aged under 25 years who, thanks to a flexible and temporary employment contract, can access the labour market is preferable to the situation of someone who does not have such a possibility and who, as a result, is unemployed.
- in the light of the **broad discretion** enjoyed by Member States 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**, the view must be taken that it was reasonable for the national legislature [A & F, C-143/16]

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## Proportionality test failed

- Severance allowance not paid to employees of age 55+ who are eligible to a retirement pension
  - **Legitimate aim**: preventing that allowance from being claimed by persons who are not seeking new employment but will receive a replacement income
  - Age measure **not appropriate**: it deprives workers who have been made redundant **and who wish to remain in the labour market** of entitlement to the severance allowance merely because they could, because of their age, draw such a pension [*Andersen*, C-499/08]

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## Proportionality test failed

- According to the collective agreement, the employee's basic pay is determined on his appointment by reference to the age category to which he belongs
  - An employee recruited at the age of 21 will be classified in age category 21, whereas a 27-year-old new employee recruited the same day will be classified in age category 27
  - **Aim:** to take account of employees' **professional experience**
  - Age measure **not appropriate:** An employee with no professional experience, appointed at the age of 27 will, as from his appointment, receive basic pay equivalent to that received by an employee of the same age, in the same job, but appointed at the age of 21 and with 6 years' length of service and professional experience in his job
- = System of pay is contradictory to the aim! [*Hennigs, C-297/10*]

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## OCCUPATIONAL REQUIREMENTS (ART.4(1))

"Member States may provide that a difference of treatment which is based on a characteristic related to [the age] 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**".

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## Age limit for a job application

- Application for a fireman job disregarded because the applicant was older than the age limit of 30
- It is not the age but a characteristic related to that age which can constitute occupational requirement = **physical fitness**
- ECJ verifies that:
  - There is a **legitimate aim**: to ensure the operational capacity and proper functioning of the professional fire service
  - the possession of especially high physical capacities are a **genuine and determining occupational requirement**
  - The need to possess high physical capacities is **related to age**
  - The 30 year **age limit is appropriate to reach the aim and does not go beyond what is necessary** to achieve it = the fire-fighting duties are part of the intermediate career in the fire service can only be performed by younger officials [*Wolf, C-229/08*]

Article 4(1) must be interpreted strictly

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## Age limit for a job application

- Applicants for local police officer posts not to be older than 30 years of age
- ensuring that newly recruited officers are able to perform the more **physically demanding tasks** for a relatively long period of their career = **legitimate aim**
- not all duties require high physical capacities + disparity in the local regulations (age limit set at 30, 36, 40...) = **disproportionate requirement** [*Perez, C-416/13*]
  - NB: Recruitment of police officers of the Autonomous Community of the Basque Country restricted to candidates under 35 years of age = “the duties performed by the police forces of Autonomous Communities differ from those carried out by the local police” = proportionality test passed [*Sorrondo, C-258/15*]

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## PUBLIC HEALTH & SECURITY (ART. 2(5))

“This Directive shall be without prejudice to Measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”

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## Age limit for an airline pilot

- Broad concept of “public security”
  - Measures that **aim to avoid aeronautical accidents** by monitoring pilots’ aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents are undeniably measures of a nature to ensure public security
- But subject to the proportionality test
  - Since national and international legislation considered that it was not necessary to prohibit pilots from acting as pilots after age 60 but merely to restrain those activities, the prohibition on piloting after that age was not necessary for the achievement of the pursued objective.

Article 2(5) is interpreted strictly

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## Age limit for dentists to practise

- Maximum age for practising as a “panel dentist” (= 68 years)
- Aim: to protect the health of patients against the decline in performance of those dentists after that age,
- Inconsistent with Art. 2(5) since the age limit does not apply to non-panel dentists [*Petersen*, C-341/08]

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## FINAL REMARKS

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## Collective agreements

- Are measures set by agreement subject to a specific analysis?
  - social partners at national level may, on the same basis as the MS, provide for measures which contain differences of treatment on grounds of age
  - Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of EU law, it must, within the scope of that law, be exercised in compliance with that law
  - Consequently, when they adopt measures falling within the scope of Directive 2000/78, the social partners must comply with that directive
  - “The 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”

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## Direct application of Directive

- The existence of a principle of non-discrimination on grounds of age must be regarded as a **general principle of European Union law** which the directive gives specific expression
- Useful for direct application of the directive (in case of absence/incorrect transposition of the directive)
  - for the national court to provide the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, **disapplying if need be any provision of national legislation contrary to that principle**

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