



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Age discrimination: old difficulties, new challenges and the CJEU case law

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Summary

- I. General remarks and key concepts of Dir. 2000/78/EC: the inspiration of the Directive in gender discrimination directives
- II. Age discrimination among other sources of discrimination in Dir. 2000/78: the accrued difficulties of non-discrimination principle when applied to age
- III. The role of the CJEU
- IV. The formal transposition of the Directive into national Law, in relation to age discrimination *vis a vis* the different practices of the Member States in key issues related to age discrimination
- V. Closing remarks: actual trends in relation to age discrimination

I - Main features of Dir. 2000/78: the inspiration of this Directive in gender directives

- The discrimination concepts are the same
- The protective rules of the Directive largely reflect the European *acquis* in the area on gender equality
- Some of the exceptions to non-discrimination principle (Article 2 No. 5, and Article 4 No. 1), are also inspired in derogations admitted in relation to gender equality principle

Conclusion on this topic

- the link between gender discrimination and other grounds of discrimination in EU Law justifies that the interpretation of Dir. 2000/78 should follow the directions of the CJEU when applying the equivalent provisions in relation to gender discrimination
- However, this is not always the case in relation to age discrimination

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

In relation to age, the principle of non-discrimination is weaker because it is subjected to more exceptions:

- General derogations related to the requirements of specific activities, to public safety, health or the protection of rights, and specific areas (Art. 2 No. 2 b), and No. 5, Art. 3 Nos. 2 and 3, and Art. 4 No. 1)
- Specific derogations (Art. 6)

Different treatment related to age in employment area (Art. 6 No. 1)

- special conditions in access to employment, training, working conditions, pay and dismissal, to favor young workers, old workers and workers with care responsibilities;
- minimum or maximum age requirements to have access to an employment or promotion

Justification of the different treatment related to age in employment area

Different treatment is justified if:

- under national law, it pursues a «legitimate objective», including objectives related to employment policy, labour market or professional training policies;
- and provided the means chosen to pursue the objective are «appropriate and necessary»

Conclusions to this point

- Non-discrimination principle in relation to age is weaker than on other grounds, since it largely complies with situations where different treatment on the grounds of age is justified
- the implementation of the principle at national level largely depends upon the MS, since Article 6 refers the criteria for admissible discrimination to the national level

III - The role of the CJEU

The CJEU has been called upon to deal with two types of problems:

- problems related to the non-implementation or to the deficient implementation of the non-discrimination principle by the MS.
- the allowed discriminatory practices in relation to age

The CJEU and the question of lack or deficient transposition of the Directive into national legislation

- the principle of non-discrimination on the ground of age relies directly on the Treaty and in the common traditions of the MS, as a fundamental right, so it can be called upon immediately (*Cases Mangold or Küçükdeveci*)

The CJEU and the allowed discriminatory practices

- direct discriminatory practices solely based on age are not allowed (Cases *Mangold*, *Kücükdeveci* or *David Hütter*)
- In cases related to Art. 4 No. 1 or Art. 2 No. 5 (special requirements for a job), the CJEU's interpretation of the requests tends to be strict (Cases *Petersen*, *Prigge*, *EC v Hungary*, *Wolf*)
- In cases related to Art. 6 (national employment policies), the Court recognizes the difference of treatment as a policy of the MS, avoiding to appreciate the ground for discrimination in itself (Cases *Hütter*, *Palacios de la Villa*, *The Queen*), or accepting the different treatment under the condition that it does not cause age discrimination in the future (Cases *Rosenblat*, *Fuchs/Khöler*)

Conclusions on this topic

- It is possible to control age discriminatory practices when they are based on objective criteria, related to the professional activity or to external but well defined requirements (like public safety, security or health)
- On the contrary, the open-ended and national-basis criteria of Article 6 (e.g. employment policies) seem to be very difficult to assess by the Court

IV - The practices of the MS in key issues related to age discrimination

- Specific age requirements intended to protect certain categories of workers (young and/or old workers)
- Promotion of the recruitment of young, old or unemployed workers
- Lower level of protection regarding dismissal for older workers
- Minimum age for access to employment, higher than the general one, in some activities
- Maximum age for recruitment in some activities
- Maximum age to keep working
- Measures enlarging the period of active life

Conclusions on this topic

- MS make extensive use of all the exceptions to the non-discrimination principle in relation to age with no control by the EU

V - Closing remarks

- non-discrimination principle in relation to age is weaker than on other grounds, since it complies with more admissible discriminatory practices
- the practical implementation of the principle depends largely upon the MS
- this structural weakness is likely to carry on in the future, because the admissible discriminatory practices under Article 6 are rather difficult to assess by the ECJ.

Age discrimination: present trends

- The derogations/exceptions of Art. 6 are being used by the MS as a tool to pursue employment and social policies but they can get into conflict with one another
- There is no consistent strategy on this issue but a fluctuation on the goals pursued
- The tension between an ageing working population and very high unemployment rates in the young generation is yet to be solved

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