

Developments in EU case law in relation to Age Discrimination

1. This paper discusses recent developments in the case law of the Court of Justice relating to the prohibition on age discrimination. In summary it describes the debate over the question of whether it is possible to rely on a general principle of community law, namely equality, in order to prohibit age discrimination. It also describes the emerging interpretation of Article 6 of Council Directive 2000/78 of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (2000/78/EC) ("the Directive")

2. The prohibition on discrimination based on age is in Article 13 of the EC Treaty. The Directive is the Community action taken under Article 13EC.

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

3. The Directive sets out a specific example of the equal treatment rule in European law. This is made clear first by Articles 1 and 2 -

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of ...age...with a view to putting into effect the principle of equal treatment.

Article 2

Concept of discrimination

1. *For the purposes of this Directive the "principle of equal treatment" shall mean that there shall be no discrimination whatsoever on any of the grounds referred to in Article 1.*

2. *For the purposes of paragraph 1:*

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation ...

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a ...particular age, ... at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or ...

4. Article 6(1) of the Directive provides

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), 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.

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 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.

5. The equal treatment rule is a fundamental principle¹ of and part of the foundation of the European Community as the Court of Justice pointed out in **Case C-381/99 Brunnhofer v. Bank Der Österreichischen Postsparkasse Ag** at [28] -

... the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community.

Mangold

6. In (Case C-144/04) **Mangold v Helm** paragraph 14(3) of a German Law² (the national legislation), which transposed into German law Council Directive (EC) 1999/70³ made provision in relation to certain categories of fixed term contracts. A fixed-term employment contract would not require objective

¹ It can also be found in the Charter of the Fundamental Rights of the European Union which at Article 21 states "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited..."

² on Part-Time Working and Fixed-Term Contracts Amending and Repealing Provisions of Employment Law

³ concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

justification if the employee had reached the age of 52 by the date that the fixed-term employment relationship commenced.

7. The applicant was a 56-year-old man. He entered into an employment contract with the respondent. Article 5 of that contract stated that 'the duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers', having regard to the age of the employee.

8. Mr Mangold argued that article 5 of the contract was incompatible with the 1999 directive, and Council Directive (EC) 2000/78. He started proceedings in the Arbeitsgericht München against the respondent who contended that, even if paragraph 14(3) of the national legislation did not expressly lay down such restrictions in respect of older workers, the difficulties experienced by those workers provided an objective reason, within the meaning of clause 5(1)(a) of the framework agreement on fixed-term contracts, that justified the conclusion of a fixed-term contract of employment.

9. The German was unsure whether para 14(3) was compatible with Community law and referred certain questions to the Court of Justice of the European Communities for a preliminary ruling among which was whether art 6 of the 2000 Directive was to be interpreted as precluding a provision of national law which authorised the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 and over, contrary to the principle requiring justification on objective grounds. The court also wanted to know whether it had to refuse to apply the provision of domestic law which was contrary to Community law and apply the general principle of internal law, under which fixed terms of employment were permissible only if they were justified on objective grounds.

10. The Court of Justice stated in relation to the interpretation of article 6 of the Directive that it was intended to promote the vocational integration of unemployed older workers in so far as they experienced difficulties in finding work. That objective was clearly legitimate and could justify a difference of treatment on grounds of age 'objectively and reasonably' pursuant to art 6(1) of the 2000 directive.

11. The effect of the national legislation, however, was that all workers of 52 years of age and over, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, might lawfully be offered fixed-term contracts of employment which may be renewed an indefinite number of times until they reached the age at which they might claim their pension.

12. They would therefore be deprived, solely on the basis of age, of the benefit of stable employment for a substantial part of their working life, which constituted a major element in the protection of workers.

13. In so far as that legislation took the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it had not been shown that fixing an age threshold, regardless of any other consideration linked to the structure of the labour market in question or the

personal situation of the person concerned, was objectively necessary to the attainment of the objective, which was the vocational integration of unemployed older workers, it had to be considered to go beyond what was appropriate and necessary in order to attain the objective pursued.

14. Observance of the principle of proportionality required every derogation from an individual right to reconcile, so far as was possible, the requirements of the principle of equal treatment with those of the aim pursued. Such national legislation could not, therefore, be justified under art 6(1) of the 2000 directive (see judgment paras 64, 65). The Court applies the principles in **Lommers v Minister van Landbouw, Natuurbeheer en Visserij** Case C-476/99.

15. The case also stated that the prohibition on age discrimination was a general principle of EU law.

“74. In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with art 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the member states.

75. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with para 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paras 51 and 64, above), and reference is made to the court for a preliminary ruling, the court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (see *Caballero v Fondo de Garantía Salarial (Fogasa)* Case C-442/00 [2002] ECR I-11915 (paras 30-32)).

76. Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the member states for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned”.

16. The case set the terms for a debate within the Court of Justice as to the proper place of the prohibition on age discrimination within the areas protected by the Directive.

Lindorfer

17. One case in particular was directly practically affected by **Mangold**. **Case C-227/04 P Maria-Luise Lindorfer v Council of the European Union** was a staff case concerning the calculation of the length of pensionable service credited in the Community pension scheme to Ms Lindorfer, a Council official, following the transfer of pension rights previously acquired by her under a national scheme. Advocate General Jacobs gave his opinion on the case before the Mangold judgement. However when that decision was issued, the Court decided that it needed a fresh AG opinion concerning the case and in particular the age discrimination challenge within it.

18. The starting point was paragraph 74 of the Mangold judgement. The participants in the case of **Lindorfer** were asked to express their views on matters including:

(a) the application of the general principle of equal treatment, in particular the extent to which the situation of an official who joins the service of the Community institutions after a period of membership of a national pension scheme is comparable to that of an official who joined the service at an earlier age;

(b) the scope of the prohibition of age discrimination in the same context, in the light of the judgment in *Mangold*; and

(c) the extent to which the 'principle of capitalisation' may be capable of justifying a difference in treatment according to sex or age in the transfer of rights acquired under a national pension scheme to the Community pension scheme, which is characterised essentially by the principle of solidarity.

19. In analysing the Mangold issue, AG Sharpston considered AG Jacob's suggestion that the prohibition on age discrimination "should, both by its very nature and because of its history, be interpreted and applied less rigorously than the prohibition of sex discrimination". Clearly the Court in Mangold had departed from this view. However it has proved a persistent view, and re-emerges in several different forms over the course of the next few cases.

20. AG Sharpston said this:

55. In its judgment, the Court emphasised that the source of the actual principle underlying the prohibition of the forms of discrimination identified in Article 1 of Directive 2000/78 was to be found in various international instruments and in the constitutional traditions common to the Member States. (25) That reference must surely be to the *general principle of equality*. The specific prohibition of age discrimination is, in both national and international contexts, too recent and uneven to meet such a description. (26) The right to equality before the law, however, which may be seen as the ultimate source, is fundamental to the legal systems of the Member States. (27)

56. It is therefore reasonable to read paragraph 74 of the judgment, and the preamble to Directive 2000/78, to the effect that prohibition of discrimination on grounds of age is, like other prohibitions of discrimination on

specific grounds, a 'particular expression of the general principle of equality ... which forms part of the foundations of the Community'. (28)

57. It is true that paragraphs 74 to 78 of the judgment alternate between referring to the general principle of equality of treatment and to the principle of non-discrimination on grounds of age. To the extent that paragraph 75 may be read as having identified a hitherto unacknowledged fundamental principle of Community law ('non-discrimination on grounds of age'), there has been concern in academic circles. (29) A fuller development of the issue and its implications may however evolve in *Palacios de la Villa*, (30) a case in which the Member States have had an opportunity to submit observations.

58. As matters now stand, I suggest that the better reading of *Mangold* is not that there was in Community law a specific pre-existing principle of non-discrimination on grounds of age, but rather that discrimination on such grounds had always been precluded by the general principle of equality, and that Directive 2000/78 introduced a specific, detailed framework for dealing with that (and certain other specific kinds of) discrimination. Such a reading seems to be borne out by the statement in paragraph 76 of the judgment that 'observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age'.

59. In any event, prohibitions of specific types of discrimination clearly fall also within the general rule that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.

21. The distinction is important. If the prohibition on age discrimination was part of the general principle of equal treatment objective justification is still available but there are no specific rules surrounding it, other than the guidance which may be derived from the Court's case-law. If it is simply a specific prohibition, then like all specific prohibitions to varying degrees, it will be "clarified and regulated in Community law by provisions of the Treaty and/or of secondary legislation, so that rules may be formulated with regard, for example, to types of conduct (such as affirmative action) which fall outside the prohibition, to types of justification which may be available and to the burden of proof where justification is invoked."

22. AG Sharpston made the point that Article 13 EC does not have direct effect, but merely empowers the Council to take action to combat such discrimination.

23. She agreed with AG Jacob's assertion at paragraph 83 of his opinion that it was not appropriate or even possible to apply the prohibition of age discrimination as rigorously as that relating to sex discrimination.

24. Perhaps the root of this approach can be seen in the belief deriving from some human rights cases that discrimination on the grounds of age is simply not as "suspect" a ground as, for example, gender or race. Whilst one might see the point that it is not appropriate to apply the prohibition as rigorously, it does not follow that it is not possible to do so. That distinction is important in terms of the development of this area of law. If it is acknowledged that age, like religion or belief, is to be treated

as an irrelevant characteristic, save in defined situations, then the Directive can be seen as the pragmatic expression of the action to be taken to combat it. However if the view prevails that as a less suspect ground (i.e. a more acceptable ground for discrimination), then it will be far more difficult to combat discrimination on this ground. Member states and employers will invoke the value judgement that in a particular context age is a relevant and necessary ground for making distinctions between people to the disadvantage of one based purely on age. Further, if the Court of Justice thinks that this approach is correct, the situations in which it will be possible to challenge age stereotypes will be rare. Employers will be able to make assumptions for example that a person at a particular age will have an entitlement to a pension, so that it is appropriate to dismiss that person. The truth of the situation, as is often the case, may be that the person needs to continue to work past a particular age in order to generate sufficient funds for a pension.

25. The question of the correct approach to the justification of age discrimination is therefore important. Is justification of direct age discrimination a derogation from a principle of equality of treatment, or is it inherent in the definition of the concept of age discrimination? The Lindorfer judgement does not answer the question of whether there is a general principle of community law prohibiting age discrimination.

Case 411/05 Felix Palacios de la Villa v Cortefiel Services SA

26. This case concerned the situation of compulsory retirement in Spain. Due to a shift from viewing compulsory retirement as an instrument favourable to employment to considering it a burden on the social security system compulsory retirement was abolished. However there were clauses in collective agreements providing for the compulsory retirement of workers. The Spanish Supreme Court took the view that, following the abolition of their legal basis, the compulsory retirement clauses included in a number of collective agreements were no longer lawful.

27. At the instigation of social partners, employers' organisations and trade union organisations, compulsory retirement was reinstated by Law 14/2005 of 1 July 2005 on clauses in collective agreements concerning the attainment of normal retirement age ('Law 14/2005'). This law contained one Article as follows:

'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:

(a) Such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.

(b) A worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'

28. There was a transitional law which applied this principle to compulsory retirement provisions already in existence.

‘Clauses in collective agreements concluded prior to the entry into force of this Law, which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided that the agreement stipulates that the workers concerned must have completed the minimum period of contributions and that they must have satisfied the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.’

29. There was no express requirement for compulsory retirement to be linked to objectives consistent with employment policy, which must be set out in the collective agreements concerned.

30. Against that background, in order to establish with greater legal certainty an applicable criterion of interpretation, the Juzgado de lo Social referred the following questions to the Court for a preliminary ruling:

– Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to draw a retirement pension under their contribution regime?

If that is the case:

– Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the Single Transitional Provision of Law 14/2005 cited above?

31. AG Mazak provided the opinion. He stated that Article 13 of the EC Treaty was incapable of direct effect because it was an empowering article. He said however that this does not mean that Article 13 is not important in interpreting Directive 2000/78.

The Role of Recital 14

32. First, however, AG Mazak considered the question of whether a law supporting compulsory retirement was within the scope of the Directive at all as a result of the wording of Recital 14 of the Directive. This states:

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

33. AG Mazak considered whether the law supporting compulsory retirement was within the scope of Article 3 of the Directive. This states that the principle

of discrimination covers situations such as dismissal but also the terms and conditions of a worker. Mr Palacios stated that what had happened to him was dismissal, but the Spanish government said that it was not. It said that he had simply been obliged to retire pursuant to national rules providing for compulsory retirement at the age of 65.

34. AG Mazak took the view that it was not dismissal because the history of Article 13 of the Treaty required a restrained interpretation of the Directive. In particular AG Mazak referred to the AG's Opinion in **Chacon Navas** to this effect. AG Mazak voiced a concern (at para 61) which persists throughout the Court of Justice's consideration of age discrimination:

So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. (19) It is therefore a much more difficult task to determine the existence of a discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators involved are more clearly defined. (20)

35. This concern is that it is more difficult to detect age discrimination because it is not clear in many cases who the correct comparator may be. However such comparisons may take place in subtle cases of discrimination in other fields. Consider discrimination based on religion and belief. The differences on which discrimination may be based can be very subtle indeed. Members of the same belief group may discriminate against each other because of minor (and transient) differences of belief. So the difficulty of detecting age discrimination is no more inherent than in any variable type of characteristic such as religion or belief or disability. To that extent it can be said that the prohibition on religion, belief, or disability discrimination is of a specific nature.

36. It is also not clear what AG Mazak meant by remarking that "age discrimination may be graduated". Discrimination itself, in any context may be graduated. A person who physically assaults another on the grounds of their race is discriminating (most would say) on a far greater scale than one who on one occasion refuses to serve that person. It does not follow that there is greater difficulty in this regard to establishing discrimination by reference to comparators.

37. AG Mazak's point is in fact a more pragmatic one. Age distinctions are relied upon in many social and employment policies. He was concerned that if the Spanish law was within scope it would mean that retirement laws would have to be justified against the standard set down in the Directive. He referred to this as a "Sword of Damocles". In other words it was an unacceptable risk for member states that their retirement related laws could be challenged and would need justification.

38. For those policy reasons AG Mazak concluded that recital 14 prevented the law being challenged at all.

39. What does not appear from AG Mazak's opinion, as clearly as it might, is the fact that a value judgement is being put forward concerning the general

acceptability of discrimination based on age. It is of course possible to read the actions of the community legislators in accordance with the stated aims of the directive. Thus two recitals are relevant

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

40. Recital 23 states that there are very limited circumstances in which a difference in treatment based on a characteristic related to age may be justified, and sets strict reporting requirements on Member States. Recital 25 says that specific provisions may be introduced, which may vary in accordance with the situation in Member States. From these recitals it would appear that justification of age discrimination is to be a very limited form of derogation from the prohibition on age discrimination. However the case law does not bear this thought out.

Justification

41. AG Mazak considered the justification of the discrimination in the Palacios case. He identified the discrimination arising from the application of the law as “the fact that persons who reach the age of compulsory retirement, as opposed to younger persons, are not to be employed any more.” He noted the terms of Article 6(1) of the Directive. The core of the justification arose from the following feature of the case:

71. It appears from the order for reference – and from the submissions of the Spanish Government – that the STP allowing for the inclusion of compulsory retirement clauses in collective agreements was adopted, at the instigation of the social partners, as part of a policy promoting intergenerational employment.

42. He then said that it was obvious that the Spanish law served “a legitimate public-interest aim of employment and labour market policy capable of justifying a difference of treatment on grounds of age in accordance with Article 6(1) of the directive.” The reference to “public-interest” aim is developed in the “Heyday” case. He did not feel that it was necessary for this aim to be referred to explicitly in the

Spanish law. He also said that it was sufficient if the law was justified in the fact and in the result.

43. The reasoning in relation to proportionality is worth setting out more fully.

73. Turning, next, to the requirement under Article 6(1) of Directive 2000/78 that the means used to achieve the legitimate objective at issue be 'appropriate and necessary', it should be emphasised, as the Court pointed out in *Mangold*, that the Member States enjoy broad discretion in their choice of the measure capable of attaining their objectives in the field of social and employment policy. (22)

74. Indeed, as a rule, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature or the other political and societal forces involved in the definition of the social and employment policy of a particular Member State (such as the social partners in the present case). At most, only a manifestly disproportionate national measure should be censured at this level.

75. In *Mangold*, however, the Court, basing itself on the information provided by the national court, concluded that the national rule on fixed-term contracts at issue in that case had to be regarded as going beyond what is appropriate and necessary for the attainment of the objective of the vocational integration of unemployed older workers. In that context, the Court referred inter alia to the fact that a significant body of workers, determined solely on the basis of age, is in danger during a substantial part of its members' working life, of being excluded from the benefit of stable employment. (23)

76. By contrast, in the present case there appear to be no indications to the effect that providing for a compulsory retirement as such or, in the concrete case, the fixing of a retirement age of 65 would go beyond what is appropriate and necessary for the attainment of the objectives pursued.

77. Admittedly, in view of the demographic challenges and budgetary constraints facing most Member States – which induced the Commission just recently to call for urgent action – the crucial issue in Europe seems rather to be to prolong employment and raise pensionable age. But, then again, it is for the Member States to define their policies in this context.

44. AG Mazak then considered the ruling in ***Mangold*** concerning the principle that age discrimination was a general principle of community law. He noted that there had been criticism of the ruling. He noted that save in the case of Finland, none of the member states enshrined a principle of non-discrimination relating to age in the constitution. He described it as a bold proposition to move from the existence of a general prohibition on discrimination to a prohibition on the grounds of age in particular.

45. He took the view that neither Article 13 nor Directive 2000/78 reflected an existing prohibition of all the forms of discrimination to which they refer. Rather it was left to the Community Legislature to take appropriate action to that effect. He thought the consequence, that every ground of discrimination in the Directive would be a general principle of community law, was unacceptable. However he went on to say that **Mangold** simply stated that the general principle was no different to the equivalent provision under the Directive.

46. Finally AG Mazak took the view that the conditions for direct effect of articles 1 and 6 of the Directive were satisfied. The provisions were sufficiently precise and unconditional as to satisfy the substantive conditions for direct effect as regards the setting of a compulsory retirement age. It is clear that the fact that provisions of a directive are subject to exceptions or, as in the present case, provide for justifications does not in itself mean that the conditions necessary for those provisions to produce direct effect are not fulfilled.

47. The **Court of Justice** said this: It is true that Article 6(1) of Directive 2000/78 authorises an exception to the principle of non-discrimination on the basis of age for the purposes of certain legitimate aims, so long as the means to achieve them are appropriate and necessary.

48. However first the Court of Justice stated that recital 14 did not prevent the Directive applying to measures which fix mandatory retirement ages. Because the measure in question permitted the automatic termination of an employment relationship once the employee reached the age of 65 it established a rule relating to employment and working conditions and pay within article 3(1)(c) of the Directive.

49. Having disagreed with the AG, the Court then went on to point out, as he did that the transitional provision which was in issue in the case was adopted at the instigation of the social partners as a part of a national policy seeking to promote better distribution of work between the generations.

50. It was not necessary for the measure to refer explicitly to that aim. However in the absence of such precision it was important that other elements taken from the general context of the measure, concerned enable the underlying aim of that law to be identified. Here it was important that the economic background against which the measure was adopted should be taken into account.

51. The transitional law in question was put in place with the aim of checking unemployment. That was unquestionably a legitimate aim consistent with Article 6 of the Directive. The Court then recalled that the member state and where appropriate the social partners enjoy a broad measure of discretion both in respect of the aims pursued and also in respect of the definition of the measures capable of achieving them. That element of choice was emphasised by recital 25 to the Directive. This states "specific provisions which may vary in accordance with the situation in Member States" in relation to prolonging or shortening working life may be adopted.

52. The Court also said that the competent authorities at national, regional or sectoral level must have the possibility available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation of the member state. The right balance of interests between the competing interests involved is to be achieved by the state.

The measures adopted must not, however go beyond what is appropriate and necessary in order to achieve the aim pursued by the member state.

53. First the Court stated that a measure like that adopted in Spain might be reasonably thought to be appropriate and necessary to achieve the aim of promoting employment. However the Court did consider that the position of the workers who were subject to compulsory retirement had to be taken into account. It did not think that their claims were unduly prejudiced by the transitional law. The court noted that the law took account of the fact that they are entitled to financial compensation by way of a retirement pension. The level of the pension could not be regarded as unreasonable.

54. A further justifying feature was the fact that the social partners in Spain were allowed by the national legislation to opt by way of collective agreements for the application of the compulsory retirement mechanism. This permitted flexibility. It also permitted account to be taken not only of the over all situation in the labour market, but also the specific features of the jobs in question.

55. In other words a significant feature of the law which made it proportionate was that it was not one solution for all problems. It permitted different outcomes in different employment contexts. The law was therefore justified.

56. It is important to say what Palacios does and does not establish. First, it does not establish that all compulsory retirement schemes are justified. Whether they are justified depends on the application of the justification test for measures taken by states which appear to discriminate. They must be justified as an appropriate and necessary means of achieving a legitimate aim. Second it does establish that all retirement schemes involving compulsory retirement termination of employment fall within the scope of the Directive. Third it introduces the concept of public interest aims in the context of justification of directly discriminatory acts.

Case C 427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH

57. Although the disposal of the case was on a limited point, the AG's opinion (Sharpston) again shows the way the debate in the Court of Justice on age discrimination was going.

58. The reference came from the Federal Labour Court, Germany. Under a clause in an occupational pension scheme a widow(er) of a private-sector employee who dies in service is excluded from entitlement to a survivor's pension if that widow(er) is more than 15 years younger than the deceased employee. The national court asked the Court whether such a clause is contrary to the general principle prohibiting age discrimination identified by the Court in Mangold and invited the Court to provide further clarification as to the circumstances in which that principle may apply.

59. The questions referred included:

'(1)(a) Does the primary law of the European Communities contain a prohibition of discrimination on grounds of age, protection under which must be guaranteed by the Member States even if the allegedly discriminatory treatment is unconnected to Community law?
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60. AG Sharpston considered the proposition in Mangold that the prohibition on age discrimination was part of a general principle of equality. She considered her own view in Lindorfer (above) and that of AG Mazak in Palacios, but she also considered the view expressed in Maruko that the prohibition on discrimination in relation to sexual orientation was of a different order to that in relation to age. AG Sharpston took the opportunity to ask again the question which remained unanswered in Palacios or the other cases, including Lindorfer, whether there is such a general principle of community law and if so what its contents are.

61. She notes that the roots of a prohibition on age discrimination go back less far than the roots of the named statuses in Article 14 of the Convention on human rights and fundamental freedoms. She concludes that it is not possible to say that the prohibition is found in the constitutional traditions common to the member states or common international instruments. The Commission had accepted in 1999 that there was very little legislation on age discrimination in the member states.

62. However some communalities can be spotted which are not mentioned in this context by AG Sharpston. The Charter of the Fundamental Rights of the European Union at Article 21 states that any discrimination based on any ground such as age shall be prohibited". Since 1982 the UN General Assembly has passed resolutions on the importance of combating age discrimination. The point, however, that recognition of age discrimination as a problem is comparatively recent is well made.

63. Referring to the Aristotelian maxim that like cases should be treated alike, Sharpston says that it is necessary to establish what differences are relevant for the purposes in the situation with which we are concerned. She reaches the conclusion that the criteria of relevant resemblances and differences varies with the fundamental moral outlook of a given person or society.

In short, the answers to the questions 'who is covered by the principle of equal treatment?' and 'what aspects of economic, social, political, civic and personal life are encompassed by that principle?' are not immutable. They evolve with society. As they do so, the law reflects that change by starting to state explicitly that certain forms of discriminatory treatment, previously unnoticed or (if noticed) tolerated, will be tolerated no longer. Such legal changes are an extension – a new and further expression – of the general principle of equality.

64. Referring to Marshall I, AG Sharpston says that the court did not consider that the termination based on age was, for that reason, in breach of the alleged general principle. It interpreted Directive 76/207 as directly effective against an emanation of the state such as the UK national health service. Although no argument was addressed to the Court on this point and no question put to it raising the issue on age, AG Sharpston relies on this case to suggest that at that time differentiating on the grounds of age was considered obviously relevant and acceptable under the general principle of equality in EC law.

65. Of course the fact that the point was not argued in no way supports the point AG Sharpston seeks to establish. However even if it did the next step taken in the argument bears no relation to whether or not a general principle had earlier been identified. AG Sharpston appears to argue that because the scope of the principle of

equality is not immutable and evolves, that evolution can only take place by the recognition of specific types of treatment as breaching that principle.

66. The criticism that can be levelled at this argument is that whilst it might describe well the political process whereby, for example, universal suffrage was achieved in the UK, it does not describe the process of declaration by a legislature such as that under Article 13. Even if Article 13 merely empowers the Community to take action in relation to specific grounds, it does not qualify any of those grounds so as to indicate that a stepwise definition of the principle of equality is envisaged. Thus age is simply listed as one of the grounds in relation to which action is to be taken. The action to be taken is, moreover, action to combat a form of discrimination which has been recognised without qualification.

67. AG Sharpston says, however that Article 13's reference to legislative action is a reference to action to combat "various forms of unacceptable inequality of treatment – inter alia discrimination on the grounds of age". AG Sharpston then says that Art 13 permits the community legislator to *define* inter alia age discrimination more precisely and to lay down rules to eliminate it.

68. Part of this argument is obviously right. The community legislator was empowered to take action to combat age discrimination. However one of the points at issue in this debate is whether the Directive's goal was to *define* what is meant by age discrimination more precisely.

69. AG Sharpston's analyzes Article 13 as allowing the principle of equality to be developed more effectively. She points out that the Directive says that it is defining what the principle of equal treatment means in different contexts. However it should be noted that the Directive defines those contexts in Article 3 and the Directive treats Article 6 as the expression of the purpose in recital 25 and not more generally as defining age discrimination. Third she says that although the prohibition springs from the general principle of equality, it is only possible effectively to combat it when it has been specifically defined.

70. The AG states that this is because "the difference between (acceptable) differential treatment and (unacceptable) discrimination lies not in whether people are treated differently, but in whether society accepts as justifiable the criteria whose application results in different treatment, or whether, on the contrary, they are considered as arbitrary. Detailed legislation will be needed to address this issue: to classify the application of particular criteria in particular circumstances as acceptable or unacceptable and to give binding legal effect to that classification."

71. She reaches the diplomatic conclusion therefore that "**Mangold** should be read as affirming that discrimination on grounds of age is a specific manifestation of discrimination that is prohibited by the general principle of equality of treatment well known in Community law – a principle that indeed long predates both Article 13 EC and Directive 2000/78. Article 13 EC then plays its allotted part by recognising explicitly certain specific (new) types of discrimination and empowering the Community legislator to act to combat them in particular ways and particular contexts."

72. AG Sharpston therefore concludes that the general principle of equality operates in certain circumstances so as to prohibit discrimination based on age, but that there

was not, ab initio, a separate, detailed principle of Community law that always prohibited discrimination on grounds of age.

73. In other words the Directive permits a “nuanced” approach to be adopted towards age. On this analysis the Directive defines what age discrimination means and recognises that certain age distinctions are considered to form a legitimate basis for differentiation between people. These will differ from country to country.

74. What the existence of a general principle of equal treatment does not entail is that the prohibition on age discrimination has a content separate to that found in the Directive. It appears also that the scope of the concept of discrimination may vary from context to context.

75. However the principle of prohibiting age discrimination starts to look uncertain in this light. It will be possible for countries to define age discrimination in different contexts and that in turn could create economic difficulties (for example because the age laws in one country may make the economic conditions more attractive in that country for potential businesses). Although this analysis by AG Sharpston is attractive it appears to leave too much uncertainty in the concept of age discrimination for it to be ultimately sustainable. It also falls into the trap of potentially entrenching existing forms of age discrimination and rendering the Directive and the principle of equal treatment in this area a non-organic monolith because it will entrench “acceptable” forms of age discrimination.

Does the Directive require listing of treatment which does not constitute direct age discrimination?

76. The last point to be examined from AG Sharpston’s opinion is her approach to Article 6 of the Directive. She considered this from the point of view of whether age discrimination can be justified by the employer’s interest in placing an overall limitation on the costs borne by a voluntary pension scheme.

77. It is worth setting out her analysis in this context:

110. Article 6(1) of Directive 2000/78 deals exclusively with justification for one specific type of differential treatment: discrimination on grounds of age. It opens with the words, ‘Notwithstanding Article 2(2), Member States may provide ...’. Here, no distinction is drawn by the legislator between Article 2(2)(a) (direct discrimination) and Article 2(2)(b) (indirect discrimination). Rather, Member States are permitted to provide that any differences of treatment caught by Article 2(2) ‘shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary’. Certain specific ‘legitimate aims’ are expressly identified (‘including legitimate employment policy, labour market and vocational training objectives’), in what is (given the use of the word ‘including’) meant not to be an exhaustive list. After this introduction, subparagraphs (a), (b) and (c) then identify (again, non-exhaustively) certain types of differential treatment which appear to involve partly direct discrimination, (99) partly indirect discrimination (100) on grounds of age. Article 6(2) makes provision for certain types of age-related differential treatment for occupational social security schemes.

111. It would be fair to say that the majority of the specific illustrations of 'acceptable' differential treatment in Article 6(1) involve the *direct* use of age as a decision criterion ('older workers', 'minimum conditions of age', 'a maximum age for recruitment'). (101) The decision criterion is thus not 'an apparently neutral provision, criterion or practice' (as identified, in Article 2(2)(b) within the definition of indirect discrimination). Rather, it is often differential treatment on grounds of age, pure and simple.

112. The only logical conclusion to be drawn is that Directive 2000/78 expressly permits *particular* kinds of differential treatment based *directly* on grounds of age, *provided* that they are 'objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary'. This analysis of the text is borne out by the Court's judgment in *Palacios de la Villa*, (102) which concerned a compulsory retirement clause in national legislation. (103) Recital 14 of Directive 2000/78 states that '[t]his Directive shall [(104)] be without prejudice to national provisions laying down retirement ages'. However, no substantive provision in the directive exempts retirement clauses from its scope. The Court found that such a clause fell within the directive and constituted direct age discrimination. (105) It nevertheless decided that it served an objective which could, under Article 6(1) of the directive, reasonably and objectively justify a difference in treatment on grounds of age. (106)

78. This raises the question (not answered in **Bartsch**) whether particular kinds of treatment need to be listed in the national law. Although **Palacios** indicated that the aims by reference to which justification was to take place did not need to be listed, the Court did not deal with the question of whether constraints are placed on the form of the national law to be introduced. Does it need to list either the aim by reference to which justification is to take place or must it list the differences of treatment (such as retirement termination for example) which are justified or excepted?

Case C-388/07 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform

79. In the UK this case has become known as the "**Heyday**" case because Heyday was the membership organisation for those over 50 formed by Age Concern, a charity specifically dealing with the concerns of older people. The UK chose to implement the Directive by a set of regulations under which two things were allowed to happen:

- (a) Direct age discrimination (whatever form it takes) can be justified if it is a proportionate means of achieving a legitimate aim;
- (b) Forced retirement of those over the age of 65 is permitted by a rule which says that a dismissal for retirement is not actionable age discrimination.

80. AG Mazak gave his opinion on the following questions:

National retirement ages and the scope of the directive

- (i) Does the scope of the directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?
- (ii) Does the scope of the directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the directive was made?
- (iii) In the light of the answers to (i) and (ii) above
- (1) were section 109 and/or 156 of the 1996 Act, and/or
- (2) are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations,
- national provisions laying down retirement ages within the meaning of Recital 14?
2. The definition of direct age discrimination: justification defence
- (iv) Does Article 6(1) of the directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?
3. The test for the justification of direct and indirect discrimination
- (v) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the directive?

81. The first three of these questions were settled by *Palacios*. The national rules in the UK were capable of being the subject of challenge because they were in the scope of the Directive.

82. The fourth and fifth questions raised issues about the justification of direct age discrimination. The context was that *Age Concern* had brought judicial review proceedings against the State in respect of its implementation of the Directive. It said that the rule which let employers dismiss without fear of legal action those who had reached 65 (provided a notification procedure was followed) was incompatible with the Directive.

83. The AG Mazak stated: the High Court of Justice in its order for reference has deliberately refrained from asking the Court to rule on the compatibility with Directive 2000/78 of the kind of national legislation at issue in the main proceedings, which permits employers to dismiss employees aged 65 or over by reason of retirement.

84. As to the fourth question AG Mazak stated it as “whether Article 6(1) of Directive 2000/78 permits a general justification of differences of treatment on grounds of age, such as that provided for by Regulation 3, or whether it requires Member States to specify the kinds of differences of treatment which may be justified

by means of a list or other measure which is similar in form and content to the list in Article 6(1).” He noted the submission of Age Concern that the expression of the prohibition on age discrimination in the Directive was a particular aspect of the fundamental right to equality of treatment. It argued that Article 6 justification represented an exception to the principle and all such must be construed strictly.

85. The United Kingdom Government submitted that Article 6(1) of Directive 2000/78 does not require Member States to define, by means of a list or other measure which is similar in form or content to the list in Article 6(1), the kinds of difference of treatment which may be justified as constituting a proportionate means of achieving a legitimate aim within the meaning of that provision. It referred to the wording of Article 6(1) of and the 25th recital in the preamble to the directive, the judgment of the Court in **Palacios de la Villa**. It submitted that when drafting Article 6(1) of the directive, the Community legislator was well aware that it would be unrealistic to identify in advance the kinds of situations in which differences in treatment based on age could be justified. It would be even more inappropriate to require the Member States to draw up such a list.

86. By contrast the Commission submitted that any infringement of the principle of non-discrimination on grounds of age, which is a fundamental principle of Community law, must be justified by a public interest/social policy level objective. Article 6(1), interpreted in the light of the 25th recital in the preamble to Directive 2000/78, provides for a limited form of exception to that fundamental principle which is justified by reference to particular social policy considerations prevailing in a given Member State. The Commission argued that article 6(1) implies that it is necessary to introduce a specific national measure which reflects a particular set of circumstances and objectives. Regulation 30, which states that the dismissal of a person at or over the age of 65 is lawful ‘where the reason for the dismissal is retirement’, provides an example of such a measure. The employer thus applies a national policy to specific circumstances, but the choice of that policy lies with the Member State and not the employer.

~~54~~.87. AG Mazak took the view that in order to enable individuals to avail themselves effectively, within the sphere of application of Directive 2000/78, of their right to be treated equally and, more particularly, not to suffer prohibited discrimination on grounds of age, Member States are required, in respect of occupation and employment, to adopt rules within their domestic law providing specifically and with sufficient clarity for the prohibition of discrimination on grounds of age, as set out in particular in Article 1 in conjunction with Articles 2 and 6(1) of Directive 2000/78. Regulation 3 of the UK’s Age Regulations in principle constitutes such legislation, in that it lays down a definition of age discrimination for the purposes of national law.

88. The problem with this approach is of course that it would permit each member state to lay down a widely divergent definition of age discrimination for the purposes of national law. Yet the Directive was adopted because a prohibition on age discrimination satisfied the requirements of subsidiarity. It was action that needed to be taken at a Community, rather than national level. Subject to avoiding abusive laws undermining the fundamental purpose of the Directive, it may be possible to say that such widely divergent laws would satisfy subsidiarity. However it does leave the scope of the prohibition vague if, in accordance with AG Sharpston’s view, the

Directive is *defining* what is meant by the prohibition on age discrimination in the field of employment and occupation.

89. AG Mazak rejected the Age Concern and Commission argument that there should be a list. He said in view of the variety of situations in which such differences of treatment could arise, it would also arguably be impossible to establish such a list in advance without unduly restricting the scope of the justification provided for in the first subparagraph of Article 6(1) of the Directive.

90. As to the fifth question AG Mazak considered the submission of Age Concern. "Age Concern England concludes that Article 6(1) of Directive 2000/78 must be interpreted as meaning that a respondent can justify less favourable treatment on the grounds of age only by showing that the difference in treatment is both objectively and reasonably justified. The use of those terms indicates that such justification is to be permitted only where there are weighty reasons and in very exceptional and limited circumstances of the kind set out in Article 6 of Directive 2000/78 or in specified analogous circumstances."

91. The Commission agreed with the United Kingdom Government that the difference of wording between Article 2(2) and Article 6(1) of Directive 2000/78 is not significant. However it diverged in saying that the key distinction between the two articles relates to the question of who has to provide the justification, its nature, and how it has to be evidenced. The Commission explained at the hearing that it sees Article 6(1) as a form of *lex specialis* in relation to Article 2(2) of the directive, providing the only possible justification of direct age discrimination.

92. In considering these arguments the AG Mazak said the following:

~~68.~~In a perfect world everyone would be judged individually and according to his merits, everyone would be treated in the same way in so far as he is the same and differently in so far as he is different. In a perfect world, everyone would thus be given his due and justice would be done.

~~69.~~Unfortunately, perfect justice in that sense must remain beyond the reach of the law of this world. As a 'rule', law must by its nature be general; it can as such approach reality only through the abstract, and it is then for the courts, administrations and individuals to apply it to individual cases and thus to 'translate' the general law, in the ideal case, into individual justice.

~~70.~~Thus, law generalises and categorises; it addresses individuals and individual situations through the prism of types, categories, characteristics and classes; it differentiates in accordance with certain criteria.⁴ However, over time, some classifications have been recognised by the legal order as being unacceptable and contrary to the values underlying it. In line with Article 13 EC, Article 1 of Directive 2000/78 identifies religion or belief, disability, age or sexual orientation as criteria on which differentiations in law may in principle not be based, that is, unless it is established that such differentiation is objectively justified.

⁴ – If law leaves too much room for individual decisions, it undermines its intrinsic functions of establishing legal certainty and, more generally, the 'rule of law'; applied, on the other hand, with too little account of the individual situation it may lead to unacceptable injustice: *summum ius, summa iniuria* ...

~~71.~~ Classifications or differences in treatment based, directly or indirectly, on those grounds are accordingly in principle 'suspect', and may constitute unlawful discrimination, although it follows from the possibilities of justification provided for by Article 2 of the directive that that need not be so. It all depends – particularly as regards differences in treatment on the grounds of age.

~~72.~~ Specifically with regard to age, the Community legislator emphasised in the 25th recital in the preamble to Directive 2000/78 that it is 'essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited'.

~~73.~~ Age is also singled out among the grounds mentioned in Article 1 of the directive in that Article 6(1) contains a specific justification for differences of treatment on grounds of age – providing such inequalities do not constitute discrimination prohibited under Article 2 – '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 proportionate and necessary'.

~~74.~~ It has been pointed out before that that particularly nuanced approach to differences in treatment based on age is reflective of a genuine difference between age and the other grounds mentioned in Article 2 of the directive.⁵ Age is not by its nature a 'suspect ground', at least not so much as for example race or sex. Simple in principle to administer, clear and transparent, age-based differentiations, age-limits and age-related measures are, quite to the contrary, widespread in law and in social and employment legislation in particular. At the same time, age is fluid as a criterion. Whether differential treatment constitutes age discrimination may not only be a question of whether it is founded directly or indirectly on age, but also a question of what age it relates to. It may therefore be much more difficult than for example in the case of differentiation on grounds of sex to establish where justifiable differentiations on the basis of age are ending and unjustifiable discrimination is starting. Finally, inasmuch as age limits such as the retirement ages provided for by the Regulations entail a distinction based directly on age, they fall automatically to be considered under the head of direct discrimination as defined in Article 2 of Directive 2000/78.

93. Does this "nuanced" approach create a hierarchy among the discrimination grounds? Surely it means that age discrimination is more difficult to eradicate and conversely that the protection offered against it is weaker than, say the protection against being the subject of discrimination on the basis of a religion or belief which you acquired last week and may jettison next week. Yet the same nuanced approach is not adopted in relation to religion or belief.

94. AG Mazak states: "76. Accordingly, and contrary to what Age Concern England appears to suggest, the possibilities under the directive of justifying differences of treatment based on age are more extensive than those based on the other grounds mentioned in Article 1 of the directive. That should, however, not be interpreted as putting age discrimination at the bottom of a perceived 'hierarchy' of

⁵ – See for example, to that effect, my Opinion in *Palacios de la Villa*, cited in footnote 6, points 61 to 63, and the Opinion of Advocate General Jacobs in *Lindorfer*, cited in footnote 5, points 83 and 84.

discrimination grounds under the directive. Rather, it constitutes an expression of the material differences between those grounds and in the way they function as legal criteria. It is not a matter of value or importance, but a matter of how to entrench the scope of the prohibition of discrimination adequately.”

95. AG Mazak therefore stated: no importance should be attached to the use of the word ‘reasonably’ in addition to ‘objectively’. It is apparent from case-law that the Court does not apply, when assessing the justification of national measures under Article 6(1) of the directive, a specific test of ‘reasonableness’ as such. Rather, the Court appears to apply the joint expression ‘objectively and reasonably’ to denote the legitimacy of the aim pursued by the national measure in question.⁶ Moreover, Age Concern England was not able to specify a meaning of ‘reasonably’ which is distinct from ‘objectively’ so far as the level of scrutiny required is concerned.

~~82-96.~~ The AG agreed with the Commission that the objectives capable of justifying direct age discrimination do not have to be set out in the legislation. He said this was arguably also implied by the 25th recital (‘specific provisions’) and the wording of Article 6(1) of the directive itself. Article 6(1) primarily targets national measures, which reflect social and employment policy choices and not individual decisions of employers.⁷ The justification of measures providing for differences of treatment on grounds of age therefore falls to be assessed at Member State level, ‘within the context of national law’.

97. The AG stated that the question to be asked in a case such as the present one, in respect of a rule such as the national law’s rule which permits compulsory termination of an employee’s employment at age 65 and with regard to Article 6(1) of Directive 2000/78, is not whether the individual decision of an employer forcibly to retire an employee is justified, but whether a rule whereby an employer is permitted to do so on grounds of retirement if the employee is aged 65 or over is justified by reference to a legitimate aim, as Article 6(1) envisages.

98. The AG reminded the Court of the principles relating to justification of the aims of the state. Such rules are not precluded if ‘it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose’.⁸

99. What underlies all of these approaches to age discrimination is a belief that age discrimination is not as significant a social evil as the other types of discrimination. The AG Mazak said

“Age is not by its nature a ‘suspect ground’, at least not so much as for example race or sex. Simple in principle to administrate, clear and transparent, age-based differentiations, age-limits and age-related measures are, quite to the contrary, widespread in law and in social

⁶ – See *Mangold*, cited in footnote 4, paragraphs 59 and 60, and *Palacios de la Villa*, cited in footnote 6, paragraphs 64 to 66.

⁷ – See also, to that effect, the reference by the Court to ‘the choice which the national authorities concerned may be led to make’ in *Palacios de la Villa*, cited in footnote 6, paragraph 69.

⁸ See *Palacios de la Villa*, cited in footnote 6, paragraph 77; see also, more explicitly to that effect, AG Mazak’s Opinion in that case, at point 74.

and employment legislation in particular. At the same time, age is fluid as a criterion. Whether differential treatment constitutes age discrimination may not only be a question of whether it is founded directly or indirectly on age, but also a question of what age it relates to. It may therefore be much more difficult than for example in the case of differentiation on grounds of sex to establish where justifiable differentiations on the basis of age are ending and unjustifiable discrimination is starting. Finally, inasmuch as age limits such as the retirement ages provided for by the Regulations entail a distinction based directly on age, they fall automatically to be considered under the head of direct discrimination as defined in Article 2 of Directive 2000/78.”(para 74);

The Court of Justice in Heyday

100. The Court of Justice gave its ruling recently on the Heyday case. Its approach is interesting because although it rejected Age Concern’s approach, it also did not entirely endorse the approach adopted by the UK government or the AG Mazak.

101. On question 4 it noted that the Commission interpreted article 6(1) as providing for a limited form of exception to the fundamental principle of equality which is justified by particular social policy considerations specific to the particular member state. The provisions of Article 6(1) thus imply, in the Commission’s submission, that a specific national measure has been adopted reflecting a particular set of circumstances and objectives. The Court reminded itself that Directives are binding as to result to be achieved but leave to the national authorities the choice of form and methods. They have a duty to ensure that is fully effective, but retain a broad discretion as to methods (para 41).

102. The Court then reasons that no list is required. However during the course of this passage throws up an interesting suggestion.

“42. The transposition of a directive into domestic law does not moreover always require that its provisions be incorporated formally in express, specific legislation. Thus, the Court has held that the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts (see, to that effect, Case 29/84 Commission v Germany [1985] ECR 1661, paragraph 23, and Case 363/85 Commission v Italy [1987] ECR 1733, paragraph 7). A directive may also be implemented by way of a general measure provided that it satisfies the same conditions.

43. In accordance with those principles, Article 6(1) of Directive 2000/78 cannot be interpreted as requiring Member States to draw up, in their measures of transposition, a specific list of the differences in treatment which may be justified by

a legitimate aim. Moreover, it is clear from the words of that provision that the legitimate aims and the differences in treatment referred to therein are purely illustrative, as evidenced by the Community legislature's use of the word 'include'.

44. Consequently, it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision (see, to that effect, *Palacios de la Villa*, paragraph 56).

45. In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary (*Palacios de la Villa*, paragraph 57).

46. It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers."

103. It is important that the underlying aim of the measure should be identified for the purposes of review of its legitimacy by the courts and whether the means to achieve that aim are appropriate and necessary. This can be done from the other elements taken from the general context of the measure.

104. The aims which may be considered legitimate and appropriate for the purposes of justifying derogation from the principle of prohibiting discrimination on the grounds of age are social policy objectives. These are matters such as the state's employment policy, the labour market or vocational training. The ECJ chooses to emphasise that these legitimate aims are distinguishable from purely individual reasons which are particular to the employer's situation.

105. In the context of what can justify direct age discrimination, the Court appears to have ruled that a private employer cannot by reference private reasons justify direct age discrimination, rather the employer must justify by reference to an aim which has this public interest element to it. In the UK this means that any employer can justify direct age discrimination, but can only do so referable to a narrow range of aims which must contain a public interest element. For countries that have mirrored the wording of the Directive at Article 6(1) in their transposition more clearly it means that the employer will have to cite an aim which is similar in nature to those listed. As with the other types of discrimination prohibition, and in particular gender indirect discrimination, cost alone cannot justify discrimination.

106. One of the questions left open by this ruling is whether a completely general test for justification of direct age discrimination is tenable. Thus in one UK case a legal partnership was able to justify its retirement age for a partner by reference to its

desire to have a “collegiate” atmosphere in the partnership (because it would not have to remove a partner who was getting old by means of assessing capability). It is not clear that this aim would have the requisite element of public interest.

107. The ECJ answered question 4 in the following way

“52 Having regard to the foregoing, the answer to the fourth question referred is that Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like Regulation 3 of the Regulations, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. *However, Article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training.* It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States’ discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.”

108. The italicised words, which appear in the operative part of the judgement give rise to the interpretive argument that only social policy objectives are permissible legitimate aims.

109. In relation to the fifth question, the discussion of the question of the difference in the standard of proof also raises one point which is of greater significance than the immediate case. First, the Court of Justice rejected Age Concern’s argument that there was a difference in the standard of proof required when justifying direct age discrimination. In practical terms it was the same test as that for indirect discrimination. However the Court adopted much of the approach of the Commission in relation to this question. The ECJ put it this way:

“58 It must be held that the scope of Article 2(2)(b) and that of Article 6(1) of Directive 2000/78 are not identical.”

“59 Article 2 defines the concept of discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. It draws a distinction, in paragraph 2, between, on the one hand, discrimination directly on those grounds and, on the other, ‘indirect’ discrimination which, although based on an apparently neutral provision, criterion or practice, would put persons on account of their religion, their belief, their disability, their age or their sexual orientation at a particular disadvantage compared with other persons. Only provisions, criteria or practices liable to constitute indirect discrimination may, by virtue of Article 2(2)(b) of Directive 2000/78, escape classification as discrimination, that being the case, under Article 2(2)(b)(i), if it is a ‘provision, criterion or practice ... objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. For differences in treatment constituting direct discrimination, Article 2(1) of the directive does not provide for any derogation.

60 For its part, Article 6 of Directive 2000/78 establishes a scheme of derogation specific to differences of treatment on grounds of age, on account of the recognised specificity of age among the grounds of discrimination prohibited by the directive. Recital 25 in the preamble to that directive makes clear that it is ‘essential to

distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited’.”

110. It is significant the article 6(1) is recognised as a derogation explicitly and not simply as a definition of the concept of age discrimination. The reason given “on account of the recognised specificity of age among the grounds” is opaque. It is, perhaps, a reference to the different treatment given to age in the preamble but is more likely a reference to the discussion among the Advocate Generals. Age now recognised to have a “specificity” which the other grounds appear not to need. The Court of Justice continues:

“61 As stated in paragraph 35 of this judgment, Article 6(1) of Directive 2000/78 authorises *Member States* to provide, notwithstanding Article 2(2) thereof, that certain differences of treatment on grounds of age do 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’. The second subparagraph of Article 6(1) lists several examples of differences in treatment with characteristics such as those referred to in the first subparagraph, which, as a rule, may be regarded as ‘objectively and reasonably justified’ by a legitimate aim.” (Emphasis added).

“62 Article 6(1) of Directive 2000/78 allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which fall in particular within the category of direct discrimination as defined in Article 2(2)(a) of that directive. It is indeed to that extent, in particular, that Article 6(1) must be interpreted as applying, in accordance with the first subparagraph thereof, ‘[n]otwithstanding Article 2(2)’ of that directive. That option, in that it constitutes an exception to the principle prohibiting discrimination, is however strictly limited by the conditions laid down in Article 6(1) itself.”

111. The concept of the strict limitation on justified direct age discrimination is significant. Again the approach appears to be that the Article does not define age discrimination, but that it represents a derogation from the principle of equal treatment. Consistent with AG Sharpston’s view that the directive lays down rules for the application of the principle of equal treatment, the Article can be seen as derogating from the application of the general principle. In the context of cases between individuals in countries that have adopted Article 6(1) by writing it in to the legislation, it will mean that the list of legitimate aims cannot be wholly open ended. Aims such as preserving health and safety might be legitimate in this narrow derogating sense, but aims such as efficiency or improving morale will not be legitimate as these are only internal to the employer.

112. The court in considering the difference in the test however went on to say this:

“63 It is clear from the order for reference that the dispute in the main proceedings concerns the legality of national provisions governing the conditions for dismissal by reason of retirement age. In so far as they introduce conditions governing dismissal which are less favourable with respect to workers who have reached retirement age,

those provisions provide for a form of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78.

64 By contrast, the interpretation of Article 2(2)(b) of Directive 2000/78, which concerns exclusively indirect discrimination, does not appear necessary for the resolution of the dispute in the main proceedings.

65 However, since the referring court is uncertain as to the existence of a difference in the application of the criteria set out in Article 2(2)(b) of Directive 2000/78 as compared with the application of the criteria in Article 6(1), it must be stated that the latter provision gives Member States the option to provide, within the context of national law, that certain forms of differences in treatment on grounds of age do not constitute discrimination within the meaning of that directive if they are 'objectively and reasonably' justified. Although the word 'reasonably' does not appear in Article 2(2)(b) of the directive, it must be observed that it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable. Accordingly, no particular significance should be attached to the fact that that word was used only in Article 6(1) of the directive. **However, it is important to note that the latter provision 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.** (Emphasis added)

113. Thus a private employer can rely on justification of a measure of indirect age discrimination. The State can rely on either piecemeal justification of a measure of indirect age discrimination (article 2(2)) or on a derogation from the principle of non-discrimination in Article 6(1) in respect of a category of measures involving indirect discrimination. However, notwithstanding the broad discretion that exists in relation to choice of social policy aims (for the state) the burden of establishing the legitimacy of the social policy aim is a high one. This is the first time that the Court has ever remarked about the standard of proof in relation to proof of legitimacy of aim. Normally the state's discretion will not attract a high level of scrutiny.

114. The Court went on to remark on the order in which to take the questions of justification.

“66 Although there is no need in this case to give a ruling on whether that standard of proof is higher than that applicable in the context of Article 2(2)(b) of Directive 2000/78, it must be stated that, if a provision, a criterion or a practice does not constitute discrimination within the meaning of the directive, by reason of an objective justification within the meaning of Article 2(2)(b) thereof, it is as a consequence not necessary to have recourse to Article 6(1) of the directive, which, as is clear from paragraph 62 of this judgment, is intended in particular to permit the justification of certain differences in treatment which, but for that provision, would constitute such discrimination.”

115. The court is suggesting that where there is a measure of discrimination which requires justification you should first consider it under Article 2(2)(b) and only if that does not justify it, should you consider whether it is justified under article 6(1). Thus if the measure directly discriminates it is to be assessed under article 6(1). However

since the court has said that there is no difference in the standard of proof for direct or indirect age discrimination, not a great deal can be read into the order in which the point is taken. Clearly the same standard is being used in relation to both indirect discrimination (generally) and direct age discrimination.

116. The phrase “high standard of proof” appears in the Operative part of the judgement. It is worth contrasting the answer given by the AG on this point with that actually given by the court. It may shed some light on what the Court meant. The AG proposed the following answer to the referred question on retirement ages: “a rule such as that at issue in the main proceedings, which permits employers to dismiss employees aged 65 or over if the reason for dismissal is retirement, can in principle be justified under Article 6(1) of Directive 2000/78 if that rule is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.”

117. However the Court’s answer stresses the standard of proof required:

“3. Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word ‘reasonably’ used in Article 6(1) of the directive does not appear in Article 2(2)(b) thereof.”

Conclusion

118. It is difficult to avoid the conclusion that age discrimination is seen as a weaker form of social evil than some of the other grounds under Article 13. There is, in my view, a danger in approaching any kind of characteristic as only being worth of protection because of its “irrelevance” to “proper” decision making. It is important to see how value laden that analysis is. Take race discrimination for example. There have been times in the history of many of the European nations when a country faced a real threat from a particular ethnic group. A risk management analysis would see the ethnicity of a person as a relevant factor in decision making. It is only because a choice has been made that ethnic features should be treated as irrelevant that, in some countries, they are becoming irrelevant to “proper” decision making. Indeed their irrelevance is part of the definition of “proper” decision making.

119. The analysis of the two AG’s discussed above moves into the field of entrenching the use of age factors by employers rather than challenging the use of age as a relevant characteristic. Moreover the difficulty of finding comparators in age cases which are meaningful does not lead to the conclusion that age equality should be weakened by treating age as a “less suspect” ground for discrimination. It simply means that courts and tribunals will have to consider, as has been done in

some of the Irish cases, the context in which the age difference is said to permit a relevant comparison to take place.

120. Whilst it is obviously the case that we all move from cradle to grave, being treated less favourably simply because you occupy a particular position on that continuum clearly undermines your dignity. Having your job terminated (against your will) simply because you reach a particular age is a stark example of how discrimination on the grounds of age undermines a person's dignity.

121. Two points emerge from the current state of the cases:

- (a) The scope for justification of direct age discrimination is limited by the requirement that there should be a public interest element in the legitimate aim chosen;
- (b) In respect of the social policy aims used to justify measures of age discrimination, by member states, the state must justify that aim to a high standard. This probably means that the state will have to show that the aim is justified by reference to some evidential basis.

122. The first of these represents a significant recognition that the aims which justify the use of age as a reason for less favourable treatment must relate to the needs of wider society. This means that the value judgement that needs to be undertaken as to the legitimate relevance of age as a decision making criterion is to take place at the state level and must relate to the needs of the society of the member state. Second the requirement that the state must justify those aims which it permits to be capable of justifying age discrimination to a high standard means that the Member States will have to articulate the basis for adopting those particular aims. For example, if the basis of the adoption of the social aim is, as in **Palacios** a broad measure of agreement between the social partners on those aims, then those aims will be established. For those countries that adopt an industrial relations model which does not encourage dialogue and agreement in this way (for example the English speaking countries), the imposition of an aim on the basis of weak evidence of consultation or need will call into question whether the aims can be established to this level of proof.

123. Of course age discrimination law has been born into a world in the grip of a recession. It is likely in those circumstances that it will develop with a very light regulatory touch as governments will not wish to impose regulation on employers who may be struggling economically. Whilst this is the case, it is precisely at such times that a group rendered economically vulnerable as a result of age (such as those over 65 in the UK) should be protected by equality law.

124. Lastly, with the goods and services Directive, the concept of justification of age discrimination rises again. Here the stakes for human dignity are in many cases higher, and it may be that the "nuanced" approach favoured in the context of the working environment will be less acceptable there.

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