

# **Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age**

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## **Introduction**

Age discrimination in the field of employment and occupation is now subject to legal controls imposed under Directive 2000/78/EC, which limits the circumstances in which the national law of member states may permit employers to subject employees to different treatment on the grounds of age. The prohibition of age discrimination in the Directive received a general (if vague) welcome across the EU. There appeared to be an assumption that the EU should follow other jurisdictions such as the United States, which had enacted legislation prohibiting age discrimination.<sup>1</sup> In addition, the possibility of European legislation on age discrimination appeared to open new opportunities for enhancing protection against prejudice, inequality and the denial of human rights, while also advancing key elements of the EU’s Employment Strategy (the EES, often better known in its revised form as the ‘Lisbon Strategy’), in particular its focus on securing access to employment for older persons.<sup>2</sup> As a result, many member states implemented the Directive into their national law without appearing to give the matter too much consideration.

However, the text of the Directive left many key issues unresolved. In particular, the status of the prohibition on age discrimination was left uncertain. Was age to be treated as a full ground of discrimination, similar to gender or race, or as a lesser, secondary non-discrimination ground? Would the prohibition on age discrimination be treated as touching on fundamental rights, or was it a regulatory measure which should be applied by courts with a light touch, respectful of the important role age distinctions often play in national social and employment policy?

The emerging case-law of the European Court of Justice (ECJ) on these issues has proved to be controversial, far-reaching and perhaps surprising to many. The Court has affirmed the importance of the prohibition on age discrimination, while also linking it with the general principle of equal treatment which it now recognises as a fundamental norm of the EU legal order. This case-law is worth close consideration, because of how it shows how the Court’s emerging equality jurisprudence will take shape in the years ahead, even in the contested and difficult field of age discrimination.

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<sup>1</sup> See e.g. the Age Discrimination in Employment Act 1967 (USA).

<sup>2</sup> See European Council, 2000, Lisbon Presidency Conclusions, 23-24 March 2000; European Council, 2005, Brussels Presidency Conclusions, 23-24 March 2005; European Commission, 1993 *White Paper on Growth, Competitiveness and Employment: The Challenges and Ways Forward into the 21<sup>st</sup> Century*, Bulletin of the European Communities, Supplement 6/93; European Commission, 1997, *Green Paper on the Organisation of Work*, Bulletin of the European Union, Supplement 4/97; J Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Oxford: Hart, 2003); C Barnard, *EU Employment Law* (Oxford: OUP, 2006).

## **The Age Discrimination Provisions of Directive 2000/78/EC**

The EU was given competency to legislate on to prohibit discrimination on a series of new grounds, including age, by the Treaty of Amsterdam in 1997, which inserted Article 13 into the EC Treaty.<sup>3</sup> The enabling power contained in Article 13 was subsequently used as a basis for the enactment of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the 'Framework Employment Equality Directive', referred to in general in what follows as 'the Directive').<sup>4</sup>

Article 2 of the Framework Employment Equality Directive has the effect of prohibiting direct and indirect discrimination in employment and occupation on the grounds of age, as well as on the other non-discrimination grounds covered by the Directive, namely sexual orientation, religion or belief and disability.<sup>5</sup> Age is therefore classified under the Directive as a fully protected ground of non-discrimination, and the Directive places similar restrictions on the use of distinctions based on age as are imposed in respect of the other non-discrimination grounds recognised in EU law, at least in the sphere of employment and occupation.<sup>6</sup>

However, age differs from other non-discrimination grounds covered under EU law in certain important aspects. To begin with, there appears to be a greater range of circumstances where age may constitute be a rational and legitimate reason for distinguishing between different groups of persons than is the case for the other non-discrimination grounds. Age-based distinctions are often based upon stereotyping and prejudice. However, the use of such distinctions may also at times be rooted in rational considerations and serve valuable social and economic objectives: the same is rarely true of the other non-discrimination grounds such as sexual orientation, gender, race or religion.<sup>7</sup>

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<sup>3</sup> Article 13 permitted the European Council, acting unanimously on a proposal from the Commission and after consultation with the European Parliament, to take 'appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

<sup>4</sup> Article 13 was also used as the legislative basis for Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Race Equality Directive'). For analysis of Article 13, see M. Bell, *Anti-discrimination Law and the European Union* (Oxford: OUP, 2002).

<sup>5</sup> Article 2 also prohibits harassment on the grounds of age, as well as instructions to discriminate, while victimisation as a result of bringing an age discrimination claim is prohibited under Article 11.

<sup>6</sup> The Race Equality and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services extend protection against discrimination on the grounds of race and gender beyond the scope of employment and occupation. The European Commission has proposed a draft directive on extending protection across the discrimination grounds covered by the Framework Equality Directive beyond employment: see Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, COM/2008/0426 final, CNS 2008/0140.

<sup>7</sup> The ground of disability gives rise to particular difficulties, as reflected in the provisions governing reasonable accommodation as set out in Articles 2(2)(b)(ii) and 5 of the Directive.

In particular, age may be a useful and fair method of selecting which groups of individuals may benefit from particular measures, or to identify groups for differential treatment, especially when age serves as a rational ‘proxy’ or indicator that particular groups possess certain characteristics in general, such as experience, maturity, good physical capability, or financial stability. Age is often used in such cases to categorise groups in very general and sweeping terms: however, such generalisations are often necessary in the field of social and employment policy and experience indicates that it is harder to avoid the use of age in making these generalisations than it is for the other non-discrimination grounds.

As a result, age discrimination legislation must establish a framework for distinguishing between circumstances where the use of age to differentiate between individuals is justified, and when it is not. That framework is provided by Article 6 of the Directive, and in particular via the provisions of Article 6(1), which provides that differences of treatment on the grounds of age which would otherwise constitute direct discrimination may be permitted in national law, if it can be shown that their use is objectively justified as appropriate and necessary to achieve a legitimate aim.

‘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.’

The references to ‘legitimate employment policy, labour market and vocational training objectives’ in Article 6(1) provide an indication of the type of legitimate aim that may be put forward to justify the use of distinctions based on age. The text of Article 6(1) also takes the unusual step of providing some examples of the type of differences of treatment based directly on age that may be objectively justified.<sup>8</sup>

Article 6(1) thus permits employers to make use of age-based distinctions if the use of these distinctions can be shown to be objectively justified and based upon legitimate aims.<sup>9</sup> This marks age as different from other non-discrimination grounds, as direct

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<sup>8</sup> These include ‘the setting of special conditions on access to employment...for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection’; the ‘fixing of minimum conditions of age, professional experience or seniority’ for access to employment’; and ‘the fixing of a maximum age for recruitment...based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.

<sup>9</sup> For detailed analysis of Article 6(1) and the age discrimination provisions of the Directive, see C. O’Cinneide, *Age Discrimination and European Law* (Luxembourg: Office for Official Publications of the European Communities/European Commission, 2005), pp. 1-57, available at [http://europa.eu.int/comm/employment\\_social/publications/2005/ke6805147\\_en.pdf](http://europa.eu.int/comm/employment_social/publications/2005/ke6805147_en.pdf); also, H. Meenan, ‘Age Equality after the Employment Directive’ (2003) 10 *Maastricht Journal of European and Comparative Law* 9-38; S. González Ortega, ‘La Discriminación por Razón de la Edad’ , 59 *Temas Laborales*, 2001, pp. 93-124.

discrimination based on the other grounds is not permitted.<sup>10</sup> This difference in legal terms reflects the special characteristics of age as a non-discrimination ground and the manner in which the use of age-based distinctions appears to be justifiable in more situations than appears to be the case with the other non-discrimination grounds.

### **The Uncertain Status of the Prohibition on Age Discrimination**

However, the provisions of Article 6(1) also give rise to a more fundamental question: does the special status of age mean that it should be treated as a lesser or subordinate form of discrimination? Should age discrimination be treated as intrinsically less serious and less 'suspect' than gender or race discrimination, or even perhaps other forms of discrimination such as discrimination on the basis of sexual orientation or religion and belief? If so, should national courts applying the provisions of the Directive and the ECJ interpreting its scope grant Member States considerable discretion when they choose to make use of age-based distinctions, or permit employers to differentiate on the basis of age?

This key question also gives rise to wider issues about the extension of EU anti-discrimination law across the new non-discrimination grounds as set out in Article 13 of the EC Treaty. EU law on gender discrimination is rigorous, highly developed and demanding: gender equality is recognised both in the text of the EC Treaty and in the case-law of the ECJ as a fundamental right. However, should some or all of the 'new' non-discrimination grounds be treated in a similar manner?

The 2000 Directives appeared to establish a 'hierarchy of protection' between race and gender discrimination, on the one hand, and the other discrimination grounds on the other.<sup>11</sup> Did this mean that age, sexual orientation, religion or belief and disability are to be treated as second-class discrimination grounds, in contrast to race or gender? Should all these 'new' grounds be treated as 'suspect' and treated in a similar manner, or should distinctions be recognised to exist between each ground, reflecting the very different structures of prejudice that have generated the different types of discrimination that EU law now attempts to redress? Crucially, should the structural elements of EU anti-discrimination law, such as the objective justification test, the reversal of the burden of proof, and the ability for employers to show that a protected characteristic constituted a 'genuine occupational qualification' be applied differently across the different grounds,

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<sup>10</sup> Other differences exist between age and the other non-discrimination grounds within the framework of the Directive. Under Article 6(2), member states are permitted to allow occupational security schemes to fix age limits for admission of new potential beneficiaries, or to set age limits as to when beneficiaries may become entitled to retirement or invalidity benefits (which can include fixing different ages for employees or groups of employees), or to use age criteria in actuarial calculations in such schemes, provided that this does not result in sex discrimination. No similar exception exists for the other grounds. Article 3(4) also specifically permits member states to exempt their armed forces from the age provisions of the Directive: of the other grounds covered by the Directive, such an exception only also exists for disability.

<sup>11</sup> See M. Bell, *Anti-discrimination Law and the European Union* (Oxford: OUP, 2002), 32; M. Bell and L. Waddington, 'Reflecting On Inequalities in European Equality Law' (2003) 28(3) *European Law Review* 349-364.

with varying levels of rigour and intensity depending on the non-discrimination ground at issue?

These general uncertainties become particularly prominent when it came to age. In contrast to the other discrimination grounds, including sexual orientation, religion or belief and disability, few EU member states had taken action to prohibit age discrimination prior to agreement being reached on the text of the Directive.<sup>12</sup> There was no substantive jurisprudence from the European Court of Human Rights on equality issues related to age, and little if any jurisprudence from national courts on this subject either. Age discrimination was not seen as a priority issue in most of the EU, and it was not seen as a core area of concern for discrimination law.

As a result, it was unclear as the transposition period of the Directive neared its end whether the European Court of Justice would apply the objective justification test under Article 6(1) with a similar rigour and intensity of review as it did when applying this test in other areas of discrimination law, such as indirect sex discrimination, or where free movements rights are at issue. In particular, would the ECJ treat age-based distinctions as ‘suspect’, and subject their use to close and exacting scrutiny, or would it adopt a more flexible and permissible approach, allowing the use of age to differentiate between different categories of employees when it was reasonable to do so?

### **The Contested Nature of Age Discrimination**

It was possible to make arguments both in favour and against treating age as a ‘suspect’ ground, of similar status to the others. In the eyes of some commentators, age discrimination constitutes an intrinsically less serious form of discrimination than other types of unequal treatment. As already noted, the use of age-linked requirements to differentiate between employees is common, and can be often rational and justified: therefore, the argument can readily be made that age discrimination is not as serious a form of inequality as other forms of discrimination.<sup>13</sup>

In addition, age discrimination is not linked to historical oppression or to large-scale deprivations of human dignity, unlike the other forms of discrimination. There has been no clear age-linked historical experience to equate to the poisonous legacy of racism and anti-Semitism, or the long centuries of ingrained sexism and homophobia, or the embedded disadvantages faced by many persons with disabilities.<sup>14</sup> In the age discrimination case of *Massachusetts Board of Retirement v. Murgia*, the US Supreme Court stated that ‘old age does not define a “discrete and insular” group ... in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage that each of us will reach if we live out our normal span.’<sup>15</sup>

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<sup>12</sup> C. O’Cinneide, ‘Comparative European Perspectives on Age Discrimination’ in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003), 195-218.

<sup>13</sup> See the general discussion of the ‘sceptical case’ against age discrimination in N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination Law: Theory and Context* (London: Sweet & Maxwell, 2008), Ch. 15.

<sup>14</sup> George Rutherglen has similarly argued that the ADEA ‘cannot be justified in terms of opening opportunities to a historically disfavored group.’ See G. Rutherglen, ‘From Race to Age: The Expanding Scope of Employment Discrimination Law’ (1995) 24 *J. Legal Studies* 491.

<sup>15</sup> (1976) 438 US 285.

Therefore, it is possible to make the argument that age constitutes a lesser form of discrimination, which was less serious than other forms of discrimination and in respect of which a less demanding approach could be adopted when applying the objective justification test set out in Article 6(1) and other elements of European anti-discrimination law. The fact that the Directive provided that direct age discrimination could be objectively justified, in contrast to the other discrimination grounds, could be seen to support this argument. In the United States, Richard Posner has gone so far as to argue that the range of circumstances in which age discrimination is a necessary tool for effective decision-making in employment is so considerable as to justify the repeal or substantial dilution of the US age discrimination legislation.<sup>16</sup>

In addition, the argument could be made that there is also a need to recognise the importance of ‘intergenerational solidarity’, which can be defined as the set of intertwined obligations of social support that the generations owe each other. Age discrimination laws could create the risk that the status and existing entitlements of older workers would be unfairly protected at the expense of younger workers. It also could mean that promotion paths could be blocked and older workers left to occupy senior posts at the expense of younger employees, while employers are left to deal with the declining productivity levels that may be associated in some employment contexts with older workers.<sup>17</sup> Therefore, these concerns could again be cited to justify a ‘light-touch’ approach to age and a flexible application of Article 6 and other elements of the Directive when the use of rational age-based criteria by employers and national governments was at issue.

However, alternative arguments could also be made, to the effect that age discrimination should be treated as a ‘suspect’ form of discrimination and be subject to similar rigorous levels of judicial scrutiny as are applied when applying the objective justification test to other forms of discrimination, such as gender and race. Age-based differences in treatment are often based on generalised assumptions or casual stereotypes, which are often highly inaccurate and based upon misleading and unfair stereotypes that do not reflect the true diversity of individuals within the age groups affected.<sup>18</sup> Both younger and older persons may be affected by such stereotypes: for example, younger persons are often assumed to lack maturity: older persons are often assumed to lack flexibility, motivation and the ability to absorb new ideas.<sup>19</sup> When individuals are subject to discrimination as a result of these demeaning stereotypes, they

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<sup>16</sup> R. Posner, *Aging and Old Age* (University of Chicago Press: Chicago, 1997).

<sup>17</sup> See the detailed argument made in S. Issacharoff and E. W. Worth, ‘Is Age Discrimination Really Age Discrimination? The ADEA’s Unnatural Solution’ 72 N.Y.U. Law Rev. 780.

<sup>18</sup> The Irish age discrimination case of *Byrne v FAS*, DEC-E2002-045 (2002), is a good example of a case involving discriminatory and unfair assumptions. The case found that a 48-year old woman was refused a vocational training place, and was told at interview that older students were less successful at technical drawing and had more conflict with family commitments. The Equality Officer in finding for the claimant observed that no objective evidence to support these comments had been produced, and the interviewer seemed just to have applied a series of discriminatory assumptions in refusing her a place.

<sup>19</sup> See S. Fredman, ‘The Age of Equality’, in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003) 21-70, especially 22-35.

are denied equality of treatment and respect.<sup>20</sup> Therefore, applying a rigorous approach to age discrimination could be said to advance the fundamental right to equality.

Age discrimination also produces negative social consequences. Groups who are subject to age discrimination often suffer social exclusion, high levels of poverty and the denial of access to basic goods and services, which in turn imposes substantial economic and social welfare costs upon society at large.<sup>21</sup> In many European states, older workers who lose their jobs and younger job-hunters who lack extensive work experience often are effectively excluded from the job market, with serious social consequences.<sup>22</sup> Therefore, applying a rigorous approach to age discrimination could be said to advance pressing social objectives, linked to the achievement of the European Employment Strategy.<sup>23</sup>

The ageing population of Europe is also a relevant factor. The age structure of the EU population is expected to change dramatically in coming decades due to shifting patterns in fertility, life expectancy and migration rates. The combined EU population is projected to be slightly larger but much older in 50 years' time than it is now, with population expected to decrease in about half of the EU Member States and the overall EU median age projected to rise from 40.4 years in 2008 to 47.9 years in 2060.<sup>24</sup> Older persons are expected to make up an ever-increasing share of the population, due to continued gains in life expectancy: however, at the same time, the younger proportion of the population will decrease due to below-replacement fertility rates.

As a result of these trends, the EU is expected to move from having 4 working-age people for every person aged over 65 at present to a new ratio of 2 to 1 by 2060.<sup>25</sup> Unless older workers are able and encouraged to remain in the workforce, and younger workers enabled to gain work experience and move onto the career ladder, productivity in Europe may radically decrease over the next few decades, which will make supporting the European social security systems much more difficult. The prevention of age discrimination may therefore be an important element in meeting the challenge of

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<sup>20</sup> See the discussion in Fredman, *ibid*: see also C. O'Conneide, 'Comparative European Perspectives on Age Discrimination' in Fredman and Spencer, *Age as an Equality Issue*, 195-218, especially 214-5; Australian Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (Canberra: HREOC, May 2000); Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (Toronto: 2000).

<sup>21</sup> See for example the analysis in UK Employers' Forum on Age, *The Cost of Ageism* (London: EFA, 1998): see also H. Meenan, 'Age Discrimination in the UK' (2000) 4 *International Journal of Discrimination and the Law* 247-292.

<sup>22</sup> See UK Employers' Forum on Age, *The Cost of Ageism* (London: EFA, 1998), quoted in H. Meenan, 'Age Discrimination in the UK' (2000) 4 *International Journal of Discrimination and the Law* 247-292

<sup>23</sup> See B. Hepple, 'Age as Discrimination in Employment', in S. Fredman and S. Spencer, *Age as an Equality Issue* (Oxford: Hart, 2003), 71-96.

<sup>24</sup> European Commission (DG ECFIN) and the Economic Policy Committee (AWG), *The 2009 Ageing Report: Underlying Assumptions and Projection Methodologies for the EU-27 Member States (2007-2060)* (European Economy), Brussels, 7th December 2008, Brussels, available at [http://ec.europa.eu/economy\\_finance/publications/publication13782\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication13782_en.pdf) (last accessed 20 January 2010). See also Giuseppe Carone and Declan Costello, 'Can Europe Afford to Grow Old?' (2006) *International Monetary Fund Finance and Development Magazine*, available at <http://www.imf.org/external/pubs/ft/fandd/2006/09/carone.htm> (last accessed 20 January 2010).

an ageing society, again pointing towards the need for the rigorous application of the age discrimination provisions of the 2000 Directive.<sup>26</sup>

Therefore, a combination of factors rooted both in social values and public policy support could be cited as supporting the rigorous application of age discrimination legislation by the courts, but other arguments could be made in an opposite direction.<sup>27</sup> The justifications in favour of a rigorous approach to age discrimination appear to be primarily rooted in anti-stereotyping and public policy concerns, and less in a concern for human dignity, which is often advanced as a justification for a rigorous approach across the other non-discrimination grounds.<sup>28</sup> Nevertheless, prohibiting age discrimination can be seen as protecting autonomy, and freedom from age inequality is recognised as a right in Article 21(1) of the EU Charter of Fundamental Rights. However, the counter-arguments already outlined question the ultimate importance of prohibiting age discrimination, and draw attention to the possible negative consequences that rigorous enforcement of age discrimination law may bring about.

### **An Overview of the ECJ's Age Discrimination Case-Law**

As such, when the Directive came into effect in 2003 (or in 2006, for Member States which had taken advantage of the extended transposition period permitted to implement the Directive's provisions on age and disability), it was unclear exactly how the ECJ would strike the balance between these conflicting considerations in applying its age discrimination provisions. This uncertainty was compounded by the absence of substantial national jurisprudence on age discrimination, and the lack of detailed academic commentary on issues of age equality.

This context makes the ECJ jurisprudence on age discrimination that has emerged since the seminal *Mangold* decision in 2007 all the more striking, controversial and significant. The ECJ has surprised many commentators by its strong insistence on the suspect nature of age as a discrimination ground and the need to apply the objective justification test with rigour in age cases.<sup>29</sup> Despite suggestions from several different Advocate-Generals that age should not be treated as equivalent to gender and other 'suspect' forms of discrimination (see below), the Court has clearly indicated in its *Mangold*,<sup>30</sup> *Palacios de la Villa*<sup>31</sup> and *Age Concern* judgments that the prohibition on age discrimination is to be applied with similar rigour as are other anti-discrimination

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<sup>26</sup> For a comprehensive analysis on this point, see H. Meenan, 'The Future of Ageing and the Role of Age Discrimination in the Global Debate' [2005] *The Journal of International Aging, Law & Policy* 1-41.

<sup>27</sup> For a critical analysis of these debates, see N. Bamforth, M. Malik and C. O'Conneide, *Discrimination Law: Theory and Context* (London: Sweet & Maxwell, 2008), Ch. 15.

<sup>28</sup> Christine Jolls has suggested that a prohibition on age discrimination 'cannot be justified on traditional distributive or rights-based grounds', but can be justified on the grounds of fairness and social policy: see C. Jolls, 'Hands-Tying and the Age Discrimination in Employment Act', (1996) 74 *Tex. L. Rev.* 1813, at 1814.

<sup>29</sup> For the Court's explanation of how this test should be applied in the context of gender discrimination, see Case C-170/84 *Bilka Kaufhaus* [1986] ECR 1607.

<sup>30</sup> Case C-144/04, *Mangold v Helm*, [2005] ECR I-9981.

<sup>31</sup> Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.



norms. It has also not hesitated in its decisions in *Mangold* and *Küçükdeveci*<sup>32</sup> to treat the prohibition on age discrimination as an integral aspect of a general principle of equal treatment, which the Court considers to constitute a core value of the EU legal order and which appears to encompass all of the non-discrimination grounds now protected in EU law.

In other words, the Court has chosen to treat age as equivalent as other non-discrimination grounds, and in general to confer the status of superior norms upon the provisions of EU anti-discrimination law in general. In doing so, it has even been willing to depart from its previous reluctance to give directive direct effect in private relationships in order to ensure the effective implementation of the general principle of equality, and the anti-discrimination law that gives expression to this principle.

At the same time, the Court's age discrimination decisions have recognised the distinctive nature of age discrimination. The Court has given a relatively wide margin of discretion to Member States wishing to make use of age-based distinctions, where States can make reasonably strong objective case exists to support the use of these distinctions. It has therefore both affirmed the status of the prohibition on age discrimination and the fundamental importance of anti-discrimination norms in general, while developing a workable and nuanced jurisprudence in the field of age equality.

In discussing the evolution of this case-law, it is worth noting that the age discrimination provisions have generated more preliminary references to the ECJ from national courts than all the other 'new' (post-2000) discrimination grounds taken together, including race and religion. Thus far, the ECJ has made eight significant decisions in the field of age discrimination, compared to one decision in the field of race discrimination,<sup>33</sup> two in the field of disability,<sup>34</sup> one in the field of sexual orientation<sup>35</sup> and none thus far in the area of religious discrimination.

This perhaps reflects the uncertainty that surrounded age discrimination, and the lack of comparable national case-law on the topic: in the absence of clear guidance in the text of the Directive or from other authoritative sources as to how to apply its age discrimination provisions, national courts have repeatedly referred difficult cases to Luxembourg. As a result, the age discrimination provisions of the Directive have thus far generated much more legal controversy than was anticipated in many quarters. Far from being a sleepy backwater of European anti-discrimination law, age has proven to be a difficult and contested area of law.

The ECJ judgments on age discrimination have also been of considerable important in clarifying both how the Directive is to be interpreted in general. The judgments in

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<sup>32</sup> Case C-555/07, *Küçükdeveci v Swedex GmbH & Co KG*, ECJ, Grand Chamber, Judgment of 19<sup>th</sup> January 2010.

<sup>33</sup> Case C-54/07, *Centrum voor gelijkheid van kansen v Firma Feryn NV* [2008] 3 CMLR 22.

<sup>34</sup> C-13/05, *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467; Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603.

<sup>35</sup> Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, ECJ, Grand Chamber, Judgment of 1<sup>st</sup> April 2008.

*Mangold*, *Bartsch*<sup>36</sup> and *Küçükdeveci* have clarified that the Directive should be interpreted as giving effect to a general principle of equal treatment, which the Court considers to be part of the quasi-constitutional framework of core principles that underpins the EU legal order in its entirety. The Court's judgment in the *Wolf* case has clarified how the genuine occupational requirement exception set out in Article 4 of the Directive is to be interpreted,<sup>37</sup> while the scope of the Directive and its applicability to national laws governing retirement ages have been explained in the *Palacios de la Villa* and *Age Concern* judgments.

The age discrimination case-law of the Court is also proving to be increasingly important in clarifying wider issues of EU law. The ECJ decision in *Mangold* has been of particular importance, as well as being particularly controversial, as here the Court recognised the existence of a wide principle of equal treatment encompassing all the different discrimination grounds currently recognised in EU law.<sup>38</sup>

Furthermore, the *Mangold* decision, as clarified by the recent ECJ decisions in the age discrimination cases of *Bartsch* and *Küçükdeveci*, appears to have established that national courts must give effect to this general principle of equal treatment by disregarding national laws linked to the transposition of Directives and other elements of EU law which conflict with this principle. As Advocate General Bot noted in his opinion in *Küçükdeveci*, the requirement for national courts to disapply national laws that conflict with EU legal norms is not wholly new, as it dates back to the *Simmmenthal* decision.<sup>39</sup> However, these cases appear to have developed this doctrine and taken its implications one stage further, by clarifying that national courts must disapply national laws in the case of conflict with this general principle of equal treatment, even where this has the result that in practice the Directive will become applicable in 'horizontal' disputes between private parties. This jurisprudence marks a departure by the Court from its traditional reluctance to avoid giving horizontal direct effect to Directives within national law: now, it appears that Directives may be directly applicable as between private parties when they embody and give effect to fundamental principles of EU law.

In these cases, the Court has therefore re-fashioned key elements of EU law: it has insisted upon the inclusion of the prohibition of age discrimination as a component element of the general principle of equality and non-discrimination in EU law, and used age discrimination cases to give new life, dynamism and status to this principle, establishing it as a core value of the European legal order. Far from being a marginal backwater of EU anti-discrimination law, age discrimination has become a major artery for its development and legal expression.

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<sup>36</sup> C-427/06, *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, ECJ, Grand Chamber, Judgment of 23 September 2008.

<sup>37</sup> C-229/08, *Wolf v Stadt Frankfurt am Main*, ECJ, Grand Chamber, Judgment of 12<sup>th</sup> January 2010.

<sup>38</sup> See Case C-144/04, *Mangold v Helm*, [2005] ECR I-9981.

<sup>39</sup> Case C-555/07, *Küçükdeveci v Swedex GmbH & Co KG*, ECJ, Grand Chamber, Judgment of 19<sup>th</sup> January 2010, Opinion of Bot AG, para. 55.

What is also particularly striking in examining the evolution of the case-law is that the Court's views appear to have been often developed in contrast to the perspective put forward by successive Advocate Generals, who have adopted a more cautious approach to age discrimination. Therefore, it is possible to characterise this case-law as driven by the Court's conscious decision to treat age discrimination as having equivalent status as other ground, and to give wide-ranging effect to the principle of equal treatment.

Why exactly the Court has taken this stance is a question worthy of examination. But, before turning to this point, it is useful to describe the development of the case-law in broad chronological order. Two main strands exist in the case-law: the development of the Court's interpretation of the age discrimination provisions of Directive 2000/78/EC, and its analysis of the relationship between these provisions and the general principle of equal treatment. These two strands appeared woven together initially in *Mangold*, the Court's first decision in respect of the Directive, as well as its first decision on age discrimination. The controversial question of the link between age discrimination and the principle of equal treatment was then left to one side as the Court focused on interpreting the age provisions of the Directive, before the two strands were woven together again in the recent *Bartsch* and *Küçükdeveci* decisions of the Court.

### **First Steps: The *Mangold* Decision**

The *Mangold* case concerned an age-based exception to the general provisions of the German Labour Code that concern fixed-term contracts, which provide that the use of fixed-term employment contracts of more than two years duration, or which are renewed more than three times within two years, must be shown by the employer to be objectively justified. To encourage greater employment of older workers, these general provisions were amended in 2002 by legislation which gave employers the freedom to conclude fixed-term contracts in certain circumstances that were not subject to these limits with workers over the age of 58 (and with workers over the age of 52 until December 2006) without having to show objective justification.<sup>40</sup>

This measure was challenged on the basis that it subjected older workers to lower levels of employment protection and therefore constituted unjustified age discrimination. However, the claimant was faced with the obstacle that the Directive's age discrimination provisions were not in effect in Germany at the time the legal action was commenced, as Germany had taken advantage of the 2006 extended deadline to implement these provisions. To circumvent this obstacle, the claimant argued that the legislation in question was contrary to the obligations of the German government to take effective measures to implement the age discrimination provisions of the Directive by December 2006 and not in the interim to take action which would conflict with the goals and purpose of the Directive.

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<sup>40</sup> The relevant provisions were para. 14(3), fourth sentence, taken together with para. 14(3), first sentence, of the *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen* (TzBfG). The use of fixed-term contracts which were essentially a continuation of, or a substitution for, existing permanent contracts of employment was not permitted, an element of the case which should perhaps have received more attention in the judgment of the Court.

In its judgment, the ECJ agreed that the less favourable treatment afforded to older workers by the 2002 legislation constituted a difference of treatment on the grounds of age. It went on to find that this could not be objectively justified, rejecting the German government's argument that the special discriminatory measures were justified by the goal of ensuring greater employment of older workers.

In the view of the Court, reducing employment protection for individual workers over a particular age could not be objectively justified by reference to vague arguments that this could improve their employability as a collective group.<sup>41</sup> The Court acknowledged that national governments had wide discretion in deciding and giving effect to national employment policies. It also accepted that promoting the 'vocational integration of unemployed older workers' could constitute a legitimate aim in assessing whether the legislation under challenge was justifiable.<sup>42</sup> However, it considered that the use of age as the sole criterion for identifying the affected persons who would lose important forms of employment protection, and the absence of reference in the legislative scheme to other relevant considerations such as the structure of the specific labour markets in question and the personal circumstances of individuals seeking work, had the result that the measure under challenge went well beyond what was permitted under the objective justification test set out in Article 6(1).

What is striking in this part of the judgment is the rigour with which the objective justification test set out in Article 6(1) was applied. This aspect of *Mangold* has often been overlooked in the controversy that surrounded the other elements of the judgment. However, in its analysis of the Directive's provisions, the Court emphasised that Member States would have to show clear objective justification if age limits were used to limit the legal protection available to particular groups. In addition, in para. 65 of its judgment, the Court made explicit reference to the gender discrimination case of *Lommers*, thereby indicating that the objective justification test will be applied to age in a similar manner as it is applied to other discrimination grounds, a point subsequently confirmed in the following cases.

However, the controversy generated by *Mangold* stemmed not so much from the Court's interpretation of the age discrimination provisions of the Directive, but from the extra elements of the Court's analysis in this case. Following this conclusion that the German legislation in question was not in conformity with Article 6(1) of the Directive, the Court proceeded to describe the prohibition on age discrimination set out in the Directive as an expression of a general principle of equal treatment, which it classified as a fundamental norm of the Community legal order.

Specifically, in paragraphs 74–77 of *Mangold*, the ECJ stated that Directive 2000/78 set out a 'general framework' for giving effect to the general principle of equal treatment in the field of employment and occupation, which was a fundamental norm of the EC legal

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<sup>41</sup> From a social rights perspective, *Mangold* is an interesting judgment on account of the Court's evident scepticism that measures which limit employment protection can be justified because of how it might make that group more employable as a whole.

<sup>42</sup> See paragraphs 59 and 60 of the judgment, [2005] ECR I-9981.

order. The Court considered that this principle was embedded in various international treaties and in the constitutional traditions common to the Member States. It then went on to say that ‘the principle of non-discrimination on grounds of age’ was an aspect of this wider principle, appearing to elevate the prohibition on age discrimination to the status of a basic norm of the Community legal order by virtue of its link with the more general principle of equal treatment. By infringing the provisions of the Directive, the Court considered that the national law in question was also incompatible with this general principle of equal treatment: the age discrimination provisions of the Directive were interpreted as an authoritative legislative expression of the general principle.

The Court then went one step further, and concluded that national legislation which conflicted with this general principle of equal treatment should be disapplied by national courts, even if the relevant provisions of the Directive itself were not yet legally binding on the country concerned. In reaching this conclusion, the Court partially relied upon what is often described as the ‘*Inter-Environnement* doctrine’, whereby member states must, during the period set aside for national implementation of a directive, ‘refrain from taking any measures liable seriously to compromise the result prescribed’.<sup>43</sup> However, the Court also introduced a new element into its reasoning, finding 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...’ In other words, the German legislation not alone could be considered to undermine the proper implementation of the Directive, it also conflicted with the general principle of equal treatment and should therefore be disapplied in the context of the private dispute between employer and employee at issue in this case, even though the Directive itself was not as yet legally binding.

Taking all the elements of the *Mangold* decision together, the Court in one sweeping judgment established i) the status of age-based distinctions as ‘suspect’ criteria whose use in the context of employment and occupation must be shown to satisfy the exacting requirements of the standard objective justification test, while ii) also recognising that the prohibition on age discrimination was an integral aspect of a more general principle of equal treatment, which iii) national courts were obliged to respect by disapplying conflicting national laws.

### **The Post-*Mangold* Backlash**

The implications of this were far-reaching: in requiring the German courts to disapply the relevant legislation at issue in *Mangold*, the Court effectively ensured that direct effect was given to the Directive’s provisions, notwithstanding the fact that the implementation date had not yet passed, and also irrespective of the fact that the Court has traditionally been reluctant to give horizontal direct effect to the provisions of directives.<sup>44</sup> As a result, the *Mangold* decision has generated serious controversy in Germany and other member states. The question of whether the German courts should respond to *Mangold* is at the time of writing before the German Constitutional Court in

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<sup>43</sup> Case C-129/96 *Inter-Environnement* [1997] ECR I-7411.

<sup>44</sup> See e.g. Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

a case brought by the company directly affected by the decision in that case, *Honeywell Bremsbelag GmbH*, and the correctness of the judgment remains very controversial.

The Court's judgment has also been subject to severe academic criticism on a variety of grounds. Some of this criticism was directed at the perceived departure from the rules limiting the horizontal direct effect of directives.<sup>45</sup> Others criticised the concept of a general principle of equal treatment, on the basis that the enabling provisions of Article 13 of the EC Treaty could not be treated as sufficient grounds for the recognition of a free-standing principle in Community law, or argued such a general principle lacked sufficient content and precision to be applied as the Court did in *Mangold*.<sup>46</sup>

More specifically, strong criticism was directed by some commentators at the inclusion of age within the scope of this general principle, given the lack of protection offered against age discrimination in national law across the EU. Some commentators have argued that the limited scope of protection offered against age discrimination under the Directive, in particular the potential for direct age discrimination to be objectively justified under Article 6(1) and the lack of protection outside of the field of employment and occupation, means that age should not be seen as covered by the general principle of equal treatment.<sup>47</sup>

In particular, the former President of the German Republic and President of the German Constitutional Court, Roman Herzog, strongly criticised the inclusion by the ECJ in *Mangold* of age within the scope of the general principle of equal treatment in a newspaper article attacking what he argued was excessive judicial activism on the part of the ECJ.<sup>48</sup> He argued that it was a 'fabrication' on the part of the Court to treat age discrimination as contained within the general principle of equal treatment, on the basis that age discrimination was not treated as linked to the equality principle in the vast majority of the constitutional traditions of the member states, or in any international treaty.<sup>49</sup> He also argued that as issues of age discrimination gave rise to little or any

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<sup>45</sup> See e.g. Editorial Comments, *CML Rev.* 2006, pp. 1–8.

<sup>46</sup> See e.g. the discussion in F. Kuitenbrouwer, *Onbescheiden Rechsters*, NRC Handelsblad, 7 February 2006, summarised in J. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' (2007) 34(1) *Legal Issues of Economic Integration* 53–66, 58–60. See also D. Martin, 'L'arrêt Mangold – Vers une hiérarchie inversée du droit à l'égalité en droit communautaire?', *Journal des tribunaux du travail*, 2006, pp.109–116 ; J. Cavallini, 'De la suppression des restrictions à la conclusion d'un contrat à durée déterminée lorsque le salarié est un senior', *La Semaine Juridique Sociale*, 2005, pp. 25 to 28; O. Dubos, 'La Cour de justice, le renvoi préjudiciel, l'invocabilité des directives: de l'apostasie à l'hérésie?', *La semaine juridique*, 2006, pp. 1295 to 1297; O. Le Clerc, 'Le contrat de travail des seniors à l'épreuve du droit communautaire', *Recueil Dalloz*, 2006, pp. 557 to 561; E. Dubout, on 'Mangold' in *Revue des affaires européennes* 2005, pp. 723 to 733; A. Masson and C. Micheau, 'The Werner Mangold Case: An Example of Legal Militancy' (2007) *European Public Law* 587–593.

<sup>47</sup> L.A.J. Senden, *Over ideale en ideale rechtsvorming in de Europese Unie*, inaugural lecture, University of Tilburg, 10 March 2006. The text is available on the website at: <http://www.uvt.nl/webwijs/show.html?anr=687502>, and is discussed in J. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' (2007) 34(1) *Legal Issues of Economic Integration* 53–66, 60.

<sup>48</sup> This article can be found in English translation: R. Herzog and L. Gerken, 'Stop the European Court of Justice', *EU Observer*, 10<sup>th</sup> September 2008.

<sup>49</sup> See also L. Gerken et al., *Mangold' als ausbrechender Rechtsakt* (München: Sellier, 2009).

‘trans-boundary’ impact, the ECJ should defer to national decisions as to how to deal with this problem and not apply the objective justification test with the rigour it did in *Mangold*.

It is clear that some elements of the *Mangold* decision are vulnerable to criticism. In particular, the Court’s reasoning that the German legislation conflicted with the general principle of equality, even though the specific legislative framework through which that principle was expressed, Directive 2000/78/EC, had given countries the option of delaying full implementation was open to question. In addition, key elements of the judgment, in particular the source of the general principle of equal treatment, are not always clearly expressed. However, strong arguments can be made that *Mangold* is less of a departure from previous ECJ case-law than was assumed by many commentators. The judgment of the Court can be seen as simply involving a logical extension of the well-established doctrine of the supremacy of EU legal norms over national law, and as adding yet another situation to the circumstances in which the Court recognises that directives may have direct effect in national legal systems.<sup>50</sup>

The Court had also in previous cases indicated that a general principle of equal treatment existed in EU law,<sup>51</sup> and the inclusion of age within the scope of this general principle appears to be entirely consistent with the text of the Recitals of Directive 2000/78/EC, which link the protection conferred by that Directive against discrimination to national and international human rights standards governing equality and non-discrimination, and which do not differentiate between age and the other non-discrimination grounds.<sup>52</sup> In addition, the arguments cited by Roman Herzog as to the lack of ‘trans-boundary’ effects associated with age discrimination are very problematic, as similar arguments could be made for all forms of discrimination: there is nothing that distinguishes age in this respect from gender and other forms of discrimination.

It could be argued that the reaction to *Mangold* may to some degree stem from a deep unfamiliarity with age discrimination, and even perhaps with anti-discrimination norms in general beyond the well-established gender discrimination case-law. In any case, the case-law of the ECJ on age discrimination has continued to evolve. The ECJ has not renounced its approach in *Mangold*, despite criticism of the vague and uncertain nature of the general principle of equal treatment by Advocate General Geelhoed in his opinion

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<sup>50</sup> See the excellent analysis in J. Jans, ‘The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law’ (2007) 34(1) *Legal Issues of Economic Integration* 53–66.

<sup>51</sup> See the discussion of the relevant case-law in the essays collected in A. Dashwood and S. O’Leary (eds.), *The Principle of Equal Treatment in EC Law* (London: Sweet & Maxwell, 1997).

<sup>52</sup> Advocate General Bot makes this point in his Opinion in the subsequent *Küçükdeveci* case: see para. 76. He also suggests rightly that the Court would have strengthened its case in *Mangold* had it placed emphasis on the specific guarantee of the right to freedom from age discrimination contained in the ‘equality clause’ of Article 21(1) of the EU Charter of Fundamental Rights. For a favourable analysis of *Mangold* from an equality rights perspective, see D. Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ (2006) *Industrial Law Journal* 329-341.

in the *Chacón Navas* case<sup>53</sup> and Advocate General Mazak in his opinions in the *Palacios de la Villa* and *Age Concern* cases.<sup>54</sup> Instead, the Court in the age discrimination cases that have followed *Mangold* has re-affirmed that age will be treated similarly as other forms of discrimination, and that the prohibition on age discrimination in the Directive is an expression of the general principle of equal treatment which requires conflicting national laws to be disapplied even where this results in horizontal direct effect being given to the age discrimination provisions of Directive 2000/78/EC. However, the Court has introduced some more nuanced elements into its approach, which do not represent a departure from its general stance towards age discrimination in *Mangold*, but rather constitute a clarification of the position adopted in that decision.

### ***Lindorfer* and *Palacios*: New Directions?**

At first, in the aftermath of *Mangold*, the direction of the Court's jurisprudence on age discrimination appeared uncertain. In the *Lindorfer* case, which concerned an appeal from the Court of First Instance concerning claims that the claimant's years of pensionable service had been calculated by in a way that constituted discrimination on the grounds of sex and age, Advocate General Jacobs in his initial Opinion written before delivery of the *Mangold* judgment suggested that age could not be treated as equivalent to gender or other forms of discrimination.<sup>55</sup> Subsequently, the Grand Chamber of the Court, having taken over this case from the First Senate of the Court and re-opened the proceedings in the wake of *Mangold*, resolved the case without any reference to age discrimination or even to the general principle of equal treatment, despite seeking the views of parties on both matters and having the benefit of further discussion in a second opinion, by Advocate General Sharpston, on these points.<sup>56</sup> The Grand Chamber was able to do this, as the sex discrimination arguments represented the real substance of the case. However, the absence of any discussion of the general principle of equal treatment, or of age discrimination, in the judgment appeared to cast some doubt over the approach adopted by the Court in *Mangold*, and indicated that perhaps the Court was less than sure of its position.

This perception was reinforced by the criticism of the *Mangold* decision made before the *Lindorfer* decision was handed down by Advocate Generals Geelhoed and Mazák in their Opinions on the *Chacon Navas* and *Palacios de la Villa*<sup>57</sup> cases respectively. As mentioned above, both Advocates General suggested that the general principle of equal

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<sup>53</sup> C-13/05, *Chacón Navas*, [2006] ECR I-6467, Opinion of Geelhoed AG, para. 54.

<sup>54</sup> Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007, para. 86.

<sup>55</sup> Case C-227/04 P *Lindorfer v Council*, [2007] ECR I-6767, Opinion of Jacobs AG, delivered on 27 October 2005, paras. 84-91.

<sup>56</sup> The case was been reopened by Order of the Court of 26 April 2006, with the second Opinion delivered on 30 November 2006 by Advocate General Sharpston, and Judgment was delivered by the Grand Chamber on 11 September 2007. The Opinion by Sharpston AG was more ambiguous and nuanced on the question of the status of age discrimination and its relationship with the principle of equal treatment, but nevertheless echoed the views of Jacobs AG to some extent.

<sup>57</sup> Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, [2007] ECR I-8531



treatment was too uncertain a legal concept to be applied in the manner that the Court had done in *Mangold*.

As a result of their concern that the Court had over-reached itself in *Mangold*, both Advocate Generals also called for the Court to adopt a 'restrained' approach to the application of the provisions of Directive 2000/78/EC, with Mazák AG in his opinion in the second age discrimination case to be decided by the Court, *Palacios de la Villa*, arguing in particular for a very cautious approach to be adopted by the Court in applying the age discrimination provisions of the Directive.<sup>58</sup> However, the Court in *Palacios* chose to adopt an alternative approach, effectively re-affirming the general approach to the age discrimination provisions of the Directive that it had adopted in *Mangold*, while however leaving the issue of the relationship between the prohibition of age discrimination and the general principle of equal treatment open.

The *Palacios* case concerned a reference by a Spanish court concerning the provisions of a national collective agreement which established that employees in workplaces covered by the agreement would cease to be employed at the fixed retirement age of 65, subject to a condition that the employees affected had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. Legislation in 2005 had permitted the inclusion of such compulsory retirement age provisions in collective agreements, after a process of extensive debate as to the potential impact of the abolition of retirement ages on the operation of the Spanish labour market. Therefore, this case not alone re-opened the question of the status of age discrimination, but also raised the question of whether the Directive applied to national rules governing retirement ages, which remained another issue left apparently unresolved by the text of the Directive.

In his opinion, Mazák AG argued that age should be distinguished from other forms of discrimination, as follows:

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. 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....What is more, whilst the application of the prohibition of discrimination on grounds of age thus requires a complex and subtle assessment, age-related distinctions are very common in social and employment policies.<sup>59</sup>

Mazák AG then proceeded to suggest that the Directive should be interpreted as not extending to national rules governing retirement ages, on the basis that the application of the prohibition on age discrimination to such rules was not justified, and that Recital 14 to the Directive recognised this by, as discussed above, providing that the Directive

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<sup>58</sup> Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007.

<sup>59</sup> Paras. 61-63.

was ‘without prejudice’ to retirement ages. He argued that ‘it would... be very problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member States...’<sup>60</sup>

In effect, in his opinion in *Palacios*, Mazák AG was arguing both for age to be treated in a very different manner than gender as a ground of discrimination, and for the Directive to be given a restrictive and cautious interpretation, especially where national rules retirement ages were concerned. In so doing, he was effectively challenging the approach adopted by the Court in *Mangold* that age discrimination should be treated as essentially ‘not different in substance’ from other forms of discrimination.

However, the Court in its judgment in *Palacios* declined to follow this lead. The Court considered that legislation establishing rules relating to employment came squarely within the scope of the Directive, with the result that rules governing retirement ages were subject to the Directive’s age discrimination provisions.<sup>61</sup> In so doing, the Court implicitly rejected the argument made by Mazák AG that the uncertain status of age discrimination justified a narrow interpretation of the Directive in this context.

The Court also emphasised that national measures which were based on age had to meet the high standards of the objective justification test, which it applied in a similar manner as it is applied in other areas of discrimination law. However, the Court nevertheless took the view that considered that the retirement age provisions in question could be regarded as objectively justified under Article 6(1) of the Directive, on the basis that they were objectively and reasonably justified by a legitimate aim relating to employment policy and the effective functioning of the Spanish labour market, and the use of a fixed retirement age did not appear to be inappropriate and unnecessary to achieve this aim in the circumstances.

In particular, the Court at paragraph 53 of its judgment highlighted that the measure in question ‘was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations’. The Court also went on to note that the measure took into account both the age of employees and also their pension entitlements, as well as allowing collective agreements to modify the operation of the retirement age scheme. Therefore, it concluded that the national legislation in question could be regarded as coming within the ‘broad discretion’ accorded to member states in setting and implementing employment policy and as objectively justified under Article 6(1). Given this finding, the Court considered there was no need for it to comment on the

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<sup>60</sup> Paras. 63-65.

<sup>61</sup> At para. 44, the Court made the following observations about the interpretation of Recital 14: ‘It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.’

compatibility of the Spanish provisions with the general principle of equal treatment mentioned in *Mangold*.

Thus, in *Palacios*, the Court implicitly rejected the suggestion by Mazák AG that age should be treated as substantially different from other forms of discrimination, in particular gender. However, the Court in applying the objective justification test in a rigorous manner was nevertheless willing to find the Spanish law governing retirement ages to be in conformity with the Directive. The Court thus re-affirmed the rigorous nature of the prohibition on age discrimination set out in the Directive, while accepting that the complexity of the policy issues which surround the difficult issue of retirement age justified granting states a relatively wide margin of discretion in this area of employment policy. However, it left further consideration of the link between age discrimination and the principle of equal treatment for the future, leaving the status of this aspect of the *Mangold* judgment open. In other words, the analysis of the age discrimination provisions of the directive adopted by the Court in *Mangold* was re-affirmed, while the analysis of the relationship between age discrimination and the general principle of equal treatment also adopted in the case was left to one side.

### ***Age Concern: The Status of Age Discrimination Re-Affirmed***

Subsequently, the Court adopted a similar analysis in the UK case of *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*.<sup>62</sup> This reference again concerned the complex question of retirement age, an issue on which there has been extensive debate in the UK. Previously, UK law had provided that workers over the age of 65 could not bring claims of unfair dismissal if they were employed, which effectively enabled employers to terminate their employment contracts after this date. The provisions of the UK Employment Equality (Age Discrimination) Regulations 2006, which implemented Directive 2000/78/EC into UK law, extended protection against unfair dismissal to employees over 65, to ensure conformity with the prohibition on age discrimination. However, the new Regulations introduced new provisions which permitted employers to terminate the employment contracts of employees who are older than 65: employees who wish to continue to work after this 'mandatory retirement age' can request to stay on, and if they continue to work are protected against unfair dismissal, but employers need only 'consider' this request.

The UK Government justified the existence of this retirement age provision on the basis that many employers wanted to have clarity as to when employees would retire, to assist their recruitment planning and workforce management. However, the strong and prominent network of age equality NGOs in the UK challenged these provisions, on the basis that the use of mandatory retirement ages by employers violated principles of age equality and was not objectively justified under EU law.

This case differed from *Palacios* in three important respects. Firstly, the UK Government cited the workforce management needs of employers to justify the

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<sup>62</sup> Case C-388/07, *Age Concern England* [2009] ECR I-0000, ECJ (Third Chamber), Judgment of 5<sup>th</sup> March 2009.

retirement age provisions: however, this is not specifically listed as a legitimate aim in the list of examples of legitimate aims set out in the text of Article 6(1) (see above), unlike ‘employment policy’, the aim cited by the Spanish Government in *Palacios*. Secondly, unlike the case in *Palacios*, age was the sole criterion taken into account in the application of the UK retirement age provisions: employees could be dismissed at 65 if an employer wished to make use of the mandatory retirement age provisions, even if they had not made enough contributions to qualify for a full pension under the relevant social security legislation. Finally, the UK retirement age provisions had not been agreed through a process of consultation with the social partners.

In their arguments before the ECJ, the coalition of age equality NGOs argued that these differences between the UK and Spanish situations meant that the UK retirement age provisions could not be considered to be objectively justified. In adjudicating this case, the ECJ was also asked by the referring national court to clarify whether the objective justification test to be applied when direct age discrimination was alleged was of similar scope and rigour as the objective justification test to be applied when indirect discrimination on other grounds was at issue. *Age Concern* thus gave rise to more fundamental issues as to the nature of the prohibition on age discrimination set out in the Directive.

Therefore, it was no surprise when Mazák AG in his Opinion took the opportunity to reiterate some of the views he expressed in his opinion in *Palacios*, arguing that age should not be treated as a ‘suspect’ ground of discrimination and therefore the objective justification test should be applied in a less demanding manner than in other contexts. Again, his arguments are worth reproducing in detail:

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 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...

By providing for a specific and additional possibility of justification, Article 6(1) aims to take account of the specific nature and difficulties of age discrimination. It is obviously intended to enable Member States to retain age-based employment practices and to set or preserve age limits in so far as they are justified by a legitimate employment or social policy aim...

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 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.<sup>63</sup>

Mazák AG went on to express his view that the UK legislation on retirement ages could in principle be objectively justified.

In its judgment, the Court agreed that the UK legislation could in principle be considered to be objectively justified, but referred the matter to the national court for final determination.<sup>64</sup> In particular, the Court took the view that the fact that the UK had justified its legislation on the basis that it ensured that employers could conduct effective workforce planning was not necessarily fatal, as this could be considered to constitute a general legitimate interest. The Court also reiterated that Member States enjoy a broad discretion in the area of national employment policy, and took the view that the differences between the Spanish measures at issue in *Palacios* and the UK legislation at issue in *Age Concern* were not so significant as to establish that the UK law was clearly not in conformity with the Directive.<sup>65</sup>

The Court therefore in *Age Concern* placed much less emphasis on the social factors that it had taken into account in *Palacios*, and appeared willing to accommodate the desire of the UK to make life easier for employers. However, despite this shift in emphasis, the Court again implicitly rejected the suggestion by Mazák AG that age discrimination should be analysed as a ‘non-suspect’ form of discrimination. In particular, the Court emphasised at paragraph 67 of its judgment in *Age Concern* that ‘Art. 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification’, and in paragraph 51 that while Member States enjoy broad discretion, ‘that discretion cannot have the effect of

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<sup>63</sup> Case C-388/07, *Age Concern England* [2009] ECR I-0000, Opinion of Mazák AG, delivered on 23 September 2008, paragraphs 74-76. The Italian Government made similar arguments in its intervention before the Court in this case. Advocate General Ruiz-Jarabo Colomer made a broadly similar suggestion in *Maruko*, arguing that the ‘essential character’ of the right to non-discrimination on the ground of sexual orientation is of a different order to that which the Court attributed to the principle of non-discrimination based on age in *Mangold*.

<sup>64</sup> Case C-388/07, *Age Concern England* [2009] ECR I-0000, Judgment of 5<sup>th</sup> March 2009. In the UK, the High Court subsequently held that the retirement age provisions could be regarded as objectively justified in the light of the general approach adopted by the ECJ: however, Blake J., the judge who decided the case, expressed considerable doubts as to whether the UK Government had shown sufficient justification for its selection of 65 as the appropriate retirement age, given changes in employment patterns: see *R(Age UK) v Secretary Of State For Business, Innovation & Skills* [2009] EWHC 2336 (Admin). The retirement age legislation is currently the subject of a review by the UK Government, which is considering increasing the age to 68 or even perhaps abolishing it in its entirety.

<sup>65</sup> The Court also clarified that measures could be justified by legitimate aims which were not specifically included in the list of examples of such aims set out in Article 6(1) of the Directive, as long as they served ‘legitimate social policy objectives’ that were ‘distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness’: see paragraph 46 of the Judgment.

frustrating the implementation of the principle of non-discrimination on grounds of age'. It continued:

Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (see, by way of analogy, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 75 and 76).

This part of the *Age Concern* judgment is particularly significant. It clarifies that the Court will require a rigorous application of the objective justification test in the context of age, notwithstanding the greater possibilities of justifying the use of age-based distinctions permitted by the Directive. The reference to the *Seymour-Smith* judgment also indicated again that case-law from other areas of discrimination law can provide guidance on how the test will be applied, thereby implicitly suggesting that the prohibition on age discrimination can be seen as analogous to other forms of discrimination law.

*Palacios* and *Age Concern* are important judgments. They confirm the Court's general approach to the age discrimination provisions of the Directive that was initially set out in *Mangold*. In both cases, the ECJ have clarified that age discrimination is to be treated similarly as other forms of discrimination, and the objective justification test is to be applied with similar rigour across the different discrimination grounds. However, the Court also made it clear in both cases that the specific nature of age discrimination would be taken into account in applying this objective justification test, and Member States enjoy wide discretion in areas where legitimate aims relating to national employment policy and other general interests were at issue. Age is thus treated as both similar and different to the other discrimination grounds: it is treated as a 'suspect' category which warrants the rigorous application of the objective justification test, but nevertheless the special nature of age and the potential for age-based distinctions to serve rational ends is also factored into the application of this test.

### **Applying the Court's New Template: *Hütter, Petersen and Wolf***

*Palacios* and *Age Concern* have therefore established a general template for how the Court will interpret the age discrimination provisions of the Directive, which echoes the Court's initial approach in this area in *Mangold*. This template does not rely upon the link between age discrimination and the general principle of equal treatment established by the ECJ in *Mangold*: it is based primarily on the text of the Directive, as interpreted by the Court. This template has subsequently been applied in a series of cases, which have further clarified how the discrimination provisions of the Directive should be interpreted and understood.

In the case of *Hütter v Technische Universität Graz*, a preliminary reference from Austria raised the question of the compatibility with the Directive of Austrian

legislation which provided that periods of work under the age of 18 were excluded when calculating an employee's grading for salary purposes.<sup>66</sup> In its judgment, the Court initially considered that this constituted a clear difference of treatment based on age. Turning then to the question of objective justification under Article 6(1), the Court observed that the Austrian Government had suggested that the law in question was designed to achieve two legitimate aims, namely encouraging those under 18 to stay in secondary education, and simultaneously promoting the integration of young people who have pursued vocational training into the labour market, by encouraging employers to train apprentices without later having to incur extra salary costs. The Court considered that while both could constitute legitimate aims, they appeared to be contradictory, as the law could not both encourage students to remain in full-time secondary education and also encourage the full integration into the labour market of those who chose to leave.

In addition, the Court questioned whether the law could be said to rationally advance either aim: the age limit applied irrespective of whether students had staying in secondary education or undergone vocational training, while it also could 'lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages'.<sup>67</sup> Therefore, the age limit 'did not single out a group of persons defined by their youth in order to give them special conditions of recruitment intended to promote their integration into the labour market', and therefore could not be said to advance the aim of integrating particular groups of younger workers. As such, the national law could not be said to be objectively justified under Article 6(1).

*Hütter* demonstrates the willingness of the Court to apply the objective justification test under Article 6(1) with rigour. In the subsequent case of *Petersen v Berufungsausschuss für Zahn für den Bezirk Westfalen-Lippe*,<sup>68</sup> the Court demonstrated a similar concern to ensure that the use of age-based distinctions was clearly directed towards achieving a legitimate aim, but also indicated its willingness to accommodate measures designed to advance broad considerations of public policy, including policies designed to ensure fairness of opportunity across different age groups.

This reference from the German labour courts concerned an age limit of 68, after which dentists providing public care under the German health insurance system lost their authorisation to continue this work. However, this age limit did not apply to dentists in private practice, who were not subject to any upper time limit. The German Government attempted to justify the age limit on two separate grounds. Firstly, it argued the time limit was justified and necessary in order to achieve the legitimate aim of protecting the health of patients obtaining dental care under the national statutory health insurance

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<sup>66</sup> Case C-88/08, *Hütter v Technische Universität Graz*, ECJ, Third Chamber, Judgment of 18 June 2009. The claimant in this case, Hütter, recruited by the Technische Universität Graz (TUG) as a contractual public servant after having completed a period of apprenticeship as a laboratory technician: however, the professional experience he had acquired before the age of 18 was not, however, taken into account in his grading.

<sup>67</sup> Para. 39.

<sup>68</sup> Case C-341/08, *Petersen v Berufungsausschuss für Zahn für den Bezirk Westfalen-Lippe*, ECJ, Grand Chamber, Judgment of 12<sup>th</sup> January 2010.

scheme, as 'general experience' indicated that dentists suffered a decline in performance after the relevant date. Secondly, the Government also justified the measure as necessary to give effect to the legitimate aim of ensuring the stability and continuity of the system for insuring providers of public health insurance care: the age limit served to open up new places on the panel of dentists providing public care to younger dentists, thereby sharing opportunities fairly across the different generations.

In its judgment, the ECJ took the view that the protection of public health could constitute a legitimate aim, but that the German Government had failed to establish that the time limit was justified and necessary on that basis, as no similar age limit had been imposed upon dentists in private practice. It was inconsistent to argue that an age limit was necessary to protect patients against possible decline in the skills of dentists, but not to apply this protection to patients receiving private practice, and this inconsistency called into question the legitimacy and necessity of the age limit.

However, the Court went on to say that the age limit could in principle be objectively justified on the basis of the second alleged legitimate aim, i.e. on the grounds that it was necessary to maintain an equitable balance between older and younger dentists, and to keep open paths of career progression within the public health panels. The necessity for such an age limit would depend on the circumstances of the specific labour market in question and the extent to which there was an excess of dentists wishing to occupy places on the public panel: however, the Court considered that whether these conditions were satisfied in the circumstances of the case was a matter for the national courts to determine.

*Petersen* is interesting for a number of reasons. The rigour of the objective justification test is demonstrated by the Court's refusal to accept that the age limit could be justified as necessary to protect the health of patients on the grounds that it did not apply to dentists in private practice. However, the willingness of the Court to accommodate aims rooted in broad policy considerations can be seen in its acceptance of the second argument based on the need to open up opportunities for younger dentists. This also illustrates that the Court may be willing to give Member States a wide margin of discretion when the use of age-based distinctions are used to advance 'inter-generational solidarity'.<sup>69</sup>

*Petersen* is also notable for the Court's apparent willingness to accept the contention by the German Government that the skills of dentists deteriorated with age. This argument was based on reference to 'general experience', rather than on specific medical studies. There is a concern here that arguments based on 'general experience' in the age context may simply involve stereotyping: while the matter was not decisive in *Petersen*, it remains to be seen whether the Court will require more extensive evidence of links

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<sup>69</sup> This decision echoes that of the UK Employment Appeals Tribunal in *Seldon v Clarkson Wright and Jakes* [2009] IRLR 267, where a law firm's desire to open up partnership opportunities for younger solicitors was held to constitute a legitimate aim that could potentially justify a retirement age of 65.



between age and decline in performance than was offered in this case, or whether it will be in general willing to accept generalisations in this context.<sup>70</sup>

Similar issues of competency and the link between age, physical performance and genuine occupational requirements were at issue in the case of *Wolf v Stadt Frankfurt am Main*,<sup>71</sup> another reference from the German courts which the Grand Chamber of Court decided at the same time as *Petersen*. This case concerned a law which prevented individuals over the age of 30 applying to the fire service. The German Government argued that this measure was designed to achieve a legitimate aim, namely ensuring the operational capacity and effective functioning of the professional fire service. It also argued that the measure in question was justified and necessary to achieve this legitimate aim, on the basis that evidence showed that few fire service employees over the age of 45 years of age would have sufficient physical capacity to fight fires effectively and rescue persons in danger, and that the age limit ensured that individuals recruited to the fire service could perform these tasks for a sustained period of time before they were assigned to less physically demanding duties.

The Court accepted that an age limit in these circumstances could be objectively justified under Article 6(1), but crucially also accepted that it could constitute a genuine occupational requirement under Article 4(1) of the Directive. The Court supported its reasoning in this respect by referring to Recital 18 to the Directive, which provides that the Directive does not require emergency services to recruit or retain persons who cannot carry out the range of functions that they may be called upon to perform in their job. In the view of the Court, high physical capability was a genuine and determining occupational requirement for the posts in question, and the imposition of a maximum age limit served as an adequate and effective ‘proxy’ for the required level of physical fitness.

Again, as in *Petersen*, the Court seems to be willing to accept a link between age and physical capacity for the purpose of determining what constitutes a genuine occupational requirement. This is significant, as it may mark a departure from the Court’s traditionally rigorous approach to determining the existence of a genuine occupational requirement: a narrow application of Article 4 would treat physical capacity as the sole occupational requirement in this case, and the use of age limits would have to be justified solely under Article 6(1).<sup>72</sup>

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<sup>70</sup> There is a need for great caution in assuming that performance declines with age: medical evidence demonstrates that this is not necessarily the case: see J. Grimley-Evans, ‘Age Discrimination: Implications of the Ageing Process’, in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003), pp. 11-20.

<sup>71</sup> C-229/08, *Wolf v Stadt Frankfurt am Main*, ECJ, Grand Chamber, Judgment of 12<sup>th</sup> January 2010.

<sup>72</sup> This judgment contrasts with a decision of an UK employment tribunal in the case of *Baker v National Air Traffic Services*, ET/5596/60, which considered that an upper age limit of 36 in recruitment of air traffic controllers could not be considered to be objectively justified, on the basis that the employer had failed to show that the age limit was necessary to achieve similar legitimate aims as those cited in the *Wolf* case. However, in the *Baker* case, there was no evidence that the performance of air traffic controllers generally declined with age, unlike the case with the fire fighters in *Wolf*.

In this respect, *Wolf* along with *Petersen*, *Palacios* and *Age Concern* may again be said to demonstrate the Court's willingness to accommodate the proportionate use of age limits to serve rational legitimate aims by Member States, even while the decision in *Hütter* shows that the Court remains committed to the rigorous application of the age discrimination provisions of the Directive.

### **Back to *Mangold* – *Bartsch* and *Küçükdeveci***

This rigour has been recently on show again in the Court's recent decision in *Küçükdeveci v Swedex GmbH & Co.*<sup>73</sup> This reference, again from the German labour courts, concerned the second sentence of Paragraph 622 (2) of the German Civil Code (the *Bürgerliches Gesetzbuch*, the BGB), which provided that periods of work under the age of 25 would not be taken into account in calculating minimum notice periods for termination of employment, which were in general based on length of service. This had the effect of ensuring that worker aged under or about 25 years of age had shorter notice periods than other workers: in this specific case, the claimant, Ms Küçükdeveci, had worked for Swedex GmbH & Co for ten years since she was 18 years of age, but when she was dismissed, the employer calculated the notice period as if she had three years' length of employment.

The German Government argued that this measure was objectively justified, as it was necessary to ensure greater flexibility in the labour market and to encourage greater employment of younger workers. The Court accepted the legitimacy of these aims, in line with its judgments in *Palacios*, *Age Concern* and *Hütter*. However, again consistently with its existing jurisprudence, the Court held that the age limit at issue could not be considered to be a justified and necessary measure to achieve these aims, as it applied to all employees who were 25 when they began their employment, regardless of their age or length of service at the time of their dismissal. In other words, the measure in question applied a rigid age-based criterion without reference to the different circumstances of the individual employees affected and their varying lengths of service, and therefore in line with *Hütter* could not be considered to be objectively justified.

*Küçükdeveci* represents the Court's latest re-affirmation of the rigour of its approach to the age discrimination provisions of the Directive. However, the Court also uses this judgment to link its developing case-law on the age discrimination provisions of the Directive back to the general principle of equal treatment recognised in *Mangold*, and returns to the issues of the supremacy of EU law and horizontal direct effect initially analysed in *Mangold*. In effect, the ECJ in *Küçükdeveci* re-affirms its *Mangold* judgment, and takes the opportunity to clarify the impact and consequences of that earlier decision, as well as the relationship between the provisions of the Directive, the requirements of the general principle of equal treatment, and national law.

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<sup>73</sup> Case C-555/07, *Küçükdeveci v Swedex GmbH & Co KG*, ECJ, Grand Chamber, Judgment of 19<sup>th</sup> January 2010.

While developing its case-law on the age discrimination provisions of the Directive, the Court had returned to the controversial terrain of the *Mangold* judgment in yet another preliminary reference from the German courts, *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*.<sup>74</sup> This case concerned an application by Mrs Bartsch following the death of her husband to his employer for a survivor's pension. According to the rules of the employer's pension fund, no survivor's pension would be paid out if the surviving spouse was more than 15 years younger than the deceased former employee, a provision which was compatible with the relevant domestic law. Mrs Bartsch was 21 years younger than her husband and therefore was refused payment. She challenged this on the basis that it constituted age discrimination, and the German courts referred the matter to the Court of Justice.

Significantly, Mrs Bartsch's husband had died before the transposition period of the Directive had expired in 2006. Therefore, the question at issue was not whether the age discrimination provisions of the Directive applied, but whether any age discrimination that had taken place constituted a violation of the general principle of equal treatment recognised by the Court in *Mangold*, and if so whether the national courts were obliged to disapply the relevant national laws that applied in this situation and give direct effect to the prohibition on age discrimination. In other words, *Bartsch* opened again some of the issues at stake in *Mangold*, which had remained untouched since the earlier decision as the subsequent age discrimination cases had all clearly come within the period in which the Directive's age provisions had been in force.

Sharpston AG in her Opinion used this opportunity to propose an approach which would retain the essence of the *Mangold* decision while clarifying its scope and meeting some of the concerns the judgment had generated. She noted that the Court's evolving age discrimination case-law had developed without reference to the general principle of equal treatment, and suggested that the Directive constituted 'detailed legislative intervention' designed to give expression to a new and emerging understanding of the appropriate scope of the general principle of equal treatment.<sup>75</sup>

Sharpston AG then proceeded to argue that national legislation enacted to implement or give effect to Community law, or to take advantage of a derogation permitted under Community law, should comply with this general principle of equal treatment even when the detailed provisions set out in the Directive were not yet in force, as such laws could be said to come within the substantive scope of Community law and therefore could be required to conform to its fundamental norms, including the general principle of equality. She gave the example of the legislation at issue in *Mangold* as an example of such a law, as it had been initially enacted to implement a Community law obligation (the transposition of Directive 1999/70, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43)). National

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<sup>74</sup> Case C-427/06, *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, Judgment of Judgment of 23 September 2008.

<sup>75</sup> At paragraph 58 of her Opinion, she commented that '[I]t is precisely *because* the general principle of equality has now been recognised also to include equality of treatment irrespective of age that an enabling legislative provision such as Article 13 EC *becomes* necessary and is duly used as the basis' for legislation in the form of the Directive.

laws which however remained outside the scope of Community law and which were not yet required to comply with the Directive could not however be required to comply with the general principle, as they lay at that time outside the scope of application of Community law: the laws governing survivors' pensions at issue in *Bartsch* came within this category. Therefore, Sharpston AG argued that, unlike *Mangold*, this case fell outside the scope of Community law and therefore the general principle would not apply to require the national courts to disapply the offending domestic law.<sup>76</sup>

In its judgment, the Court essentially agreed with this analysis, perhaps grateful for an opportunity to clarify its earlier decision. It concluded in its short judgment that the allegedly discriminatory treatment in question in this case had 'no link with Community law', in contrast with the legislation at issue in *Mangold*, which was linked to the implementation of a Directive. Therefore, in *Bartsch*, the Court both signalled its intent to continue to adhere to the full scope of the *Mangold* decision, while also clarifying that its impact was confined to matters that came within the general scope of Community law, thereby providing reassurance to some of its critics.

However, while *Bartsch* provided welcome clarity, it did not address the issues surrounding horizontal direct effect and whether giving effect to the general principle of equal treatment required that national courts disapply conflicting national law, even if it applied in the private sphere. In contrast, the Court's 'return to *Mangold*' in its *Küçükdeveci* judgment addressed these issues head on, as it had been requested to do by the national court that made the reference.

In his Opinion in *Küçükdeveci*, Bot AG suggested that the 'indissociable' link between the Directive's provisions and the general principle of equal treatment meant that the Directive should be given horizontal direct effect, as its 'primary purpose' was to give effect to this fundamental norm of the EU legal order which should apply across the substantive scope of EU law. In its judgment, the Court agreed, describing the age discrimination provisions of the Directive as 'giving expression' to the general principle of equal treatment, which the Court suggested should be the 'basis' of examining the effect of the Directive's provisions. On that basis, and also taking into account Art 21(1) of the EU Charter of Fundamental Rights, which prohibits any discrimination on the grounds of age, the Court took the view that national courts must disapply national laws that conflict with the Directive's age provisions, even in a case involving proceedings between private individuals.

The Court's judgment on this point in *Küçükdeveci* is a little opaque, but appears to complete the post-*Mangold* picture, while simultaneously opening a new front in EU law. The Court in this judgment appears to confirm that the age discrimination provisions of the Directive can be regarded as giving expression to the general principle of equal treatment, and clarifies that the fundamental nature of this principle within the

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<sup>76</sup> Sharpston AG went on to suggest that the general principle of equal treatment could not be given horizontal direct effect in areas that lay outside the scope of Community law and therefore would not be applicable in this case, even if the disproportionate impact of the age-linked restriction in question, and in particular how it operated to deprive Mrs Bartsch of any pension, would not be objectively justifiable under the Directive, in her opinion. The Court did not address these issues in its judgment.

EU legal order requires that national legislation which conflicts with the Directive must be disapplied, even if this ensures that the Directive in effect is given horizontal direct effect. The essence of the *Mangold* decision, as re-interpreted and clarified in *Bartsch*, is thus re-affirmed in *Küçükdeveci*, which also confirms the close link between the prohibition on age discrimination, other areas of anti-discrimination law, and the fundamental values of the EU legal order. In this way, *Küçükdeveci* re-unites the two strands of the Court's age discrimination case-law, and unifies them into a single thread.

## Future Directions

It remains to be seen how the Court will interpret and apply the age discrimination provisions of the Directive in other contexts. Several new preliminary references that concern age discrimination are currently before the Court. Of particular importance are three German cases: the *Rosenblatt* case, which asks the Court whether national laws that enable collective agreements to fix a mandatory retirement age of 65 are compatible with Article 6(1) of the Directive;<sup>77</sup> the *Bulicke* case, which concerns the time-limits within which age discrimination claims can be brought and whether a reduction in these time-limits from those previously applying in gender discrimination cases can be said to constitute unlawful 'regression' under the Directive;<sup>78</sup> and the *Prigge* case, which concerns the mandatory retirement age of 60 imposed on pilots in the interests of public safety.<sup>79</sup> The latter case will be particularly interesting, as the wide scope given to the genuine occupational requirement test in *Wolf* will come under new focus.<sup>80</sup>

Additional issues of particular concern to age discrimination also remain to be resolved. It is unclear whether the discriminatory dismissal of an employee in order to prevent the employee obtaining age-related benefits or employment rights might be capable of justification,<sup>81</sup> or when age discrimination to maintain the financial integrity of pension schemes may be acceptable.<sup>82</sup> It also is uncertain how the comparator requirement will be applied in complex age discrimination cases, when the courts should be willing to make an inference that age-related discrimination has taken place, or how the burden of

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<sup>77</sup> Case C-45/09, Reference for a preliminary ruling from the Arbeitsgericht Hamburg (Germany) lodged on 2 February 2009 - *Gisela Rosenblatt v Oellerking Gebäudereinigungsgesellschaft mbH*.

<sup>78</sup> Case C-246/09, Reference for a preliminary ruling from the Landesarbeitsgericht Hamburg (Germany) lodged on 6 July 2009 - *Susanne Bulicke v Deutsche Büro Service GmbH*.

<sup>79</sup> Case C-447/09, Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 18 November 2009 - *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG*.

<sup>80</sup> The issues discussed in *Petersen* concerning the need to provide younger employees with opportunities for promotion and advancement will also be important in *Prigge*: the Dutch courts have taken the view that requiring pilots to retire at a comparatively early age is justified and necessary to ensure younger pilots receive sufficient opportunities. See Dutch Supreme Court, 8 October 2004, Nr. C03/077HR, *16 Pilots v. Martinair Holland NV and the Vereniging van Nederlandse Verkeersvliegers*; 8 October 2004, Nr. C03/133HR, *Applicant v. Koninklijke Luchtvaartmaatschappij NV (Royal Dutch Airlines) and the Association of Dutch Traffic Pilots*.

<sup>81</sup> This was discussed by the UK Employment Appeal Tribunal (EAT) in the case of *London Borough of Tower Hamlets v Wooster*, UKEAT/0441/08, which is currently under appeal.

<sup>82</sup> See for example the UK case of *Bloxham v Freshfields Bruckhaus Deringer*, 2205086/2006 (ET), where an Employment Tribunal upheld the introduction of special transitory pension arrangements for partners of a leading London law firm over the age of 55 on the basis that this measure was objectively justified as necessary to maintain the financial well-being of the law firm's pension scheme..

proof provisions of the Directive should apply. It also remains to be seen when the use of age-based distinctions to identify groups targeted for positive action will be deemed to be proportionate and justified, and in what other circumstances will arguments rooted in 'inter-generational solidarity' be deemed to be objectively justified.

Beyond the scope of age discrimination, the Court's judgments in *Mangold*, *Bartsch* and *Küçükdeveci* will in all likelihood continue to generate new developments. The age discrimination provisions of the Directive are one type of expression of the equal treatment principle: by logical extension, the other provisions of the Directive, and the provisions of the Race Equality and revised Gender Equality Directives are also expressions of this principle and therefore conflicting national legislation must be set aside in their case as well. It remains to be seen what impact this will have in the context of horizontal private relationships post-*Küçükdeveci*.

It also remains to be seen what other general principles of EU law exist that require directives which give expression to their provisions to be given effective horizontal direct effect via the disapplication of conflicting national legislation. If the Data Protection Directive gives expression to a general principle of privacy, should conflicting national laws in line with *Küçükdeveci* be disapplied, and the Directive applied directly as between private parties? Does this also apply to directives giving effect to social rights, or to directives that can be interpreted as protecting rights set out in the EU Charter of Fundamental Rights? Bot AG at paragraph 90 of his Opinion in *Küçükdeveci* has highlighted the issues that arise in this context:

... given the ever increasing intervention of Community law in relations between private persons, the Court will, in my view, be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights. Those situations will probably increase in number if the Charter of Fundamental Rights of the European Union becomes legally binding in the future...

The age discrimination case-law of the Court has opened new terrain in EU law: it remains to be seen how it will be filled.

## **Conclusion**

The Court has surprised many commentators in how it has interpreted the age discrimination provisions of Directive 2000/78/EC, and how it has linked these provisions with the general principle of equal treatment, which is now classified as a fundamental norm of the EU legal order. Some of this surprise was directed at the Court's willingness to treat age discrimination as a 'suspect' ground of discrimination and to apply the objective justification test with similar rigour as is done with the other non-discrimination grounds, even if in its case-law it grants Member States some degree of discretion when age-based distinctions are used to achieve legitimate aims. There was also surprise at the Court's willingness to give horizontal direct effect to the equal treatment within the scope of Community law, and therefore to the age provisions of the

Directive. *Mangold* and *Küçükdeveci* indicate that EU anti-discrimination norms have a special status, on account of their link to the equal treatment principle: along with gender equality, which is well-embedded in the EU legal order, the new non-discrimination grounds set out in Article 13 seem to be coming of age through the provisions of the 2000 Directives and the overarching equal treatment which they express and embody.

It is interesting to speculate why the Court has chosen to protect the age ground with the rigour it has, given the debates that surround its status and legitimate concerns about the impact of age discrimination law, while also insisting in the face of strong criticism on the link between the prohibition on age discrimination and the principle of equal treatment. It may be the case that the Court is eager to make clear the commitment of the EU legal order to non-discrimination norms, at a time when equality and discrimination issues loom large across Europe, and the European Court of Human Rights has begun to develop its own historically neglected discrimination case-law. The rhetorical and moral significance of the language of equality, the recognition of a right to equal treatment in Article 21(1) of the Charter, and the Court's strong commitment in the past to gender equality may all also be playing a role. What is apparent is that the emerging ECJ case-law on discrimination is going to be dynamic, and may disrupt existing assumptions as to the state and scope of EU law. Perhaps unexpectedly, the age discrimination case-law appears to be leading the way.