Age discrimination in the context of Europe’s aging population

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Outline of presentation

- I-What is age discrimination?
- II-Ambivalent nature of age discrimination: recognition of the principle of antidiscrimination in EU case law
- III-Exceptions to age discrimination subject to a double tier standard: the EUCJ legitimacy and proportionality test
I- What is age discrimination?

- How do we define age?

- What age is covered by EU employment discrimination case law?
How is age defined as a ground for discrimination?

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

- This question is essential to understand how EU case law is developing:

- Either the law only states generally that it protects age (EU), or else it mentions a specific age (40+ in the US). The definition of age seems self-evident: it is a biological marker of the passage of time from birth to death.

- But age is often confused with aging and the process of aging is much more complex.

- This may explain the existence of age discrimination and the **subjective and objective** dimensions of age as a social construct.
Age: an indicator of subjective risks associated with aging and stereotyping

- Different causes of aging:
  - *Endogenous* to the human being (different medical theories)
  - *Exogenous* since the body is subject to an array of abuses which eventually take their toll, linked to context.
    So the rate of aging varies from one person to another and chronological age is more an indicator of the possible consequences of aging at certain stages of life.

- Age reflects the risks of degradation associated with aging in terms of physical health for employment, for example, with no automatic causal effect of age.

- This complexity of aging explains why subjective stereotypes are associated with young and old age.
Age: an *objective* proxy for employment, health and retirement policies

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

- All references to age: young and old. An individual or an age cohort

- For example, in EU case law:
  - EUCJ C-341/08 *Petersen*: older workers
  - EUCJ C-88/08 *Hutter*: younger workers

- Judgments may refer to a difference in age
  - EUCJ C-427/06 *Barstch*: difference in age between deceased pensioner and his widow
Is age like race or sex, a suspect class, which deserves the highest judicial scrutiny to protect the principles of equality and antidiscrimination?

The US Supreme Court decided that age was not a suspect class and so not of the same order as gender or race (Murgia Case).

In European law, age is seen as more ambivalent, the same as other grounds and yet different:
Age: a suspect class?

- On the one hand, Directive 2000/78 prohibits discrimination based on age like any other ground:
  - Article 1: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”
  - Article 2: “For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”
Age: a suspect class?

- On the other hand, there are strong limits interpreted by case law on what constitutes discrimination based on age:

- Article 4 of Directive 2000/78: Occupational requirements
  - “1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” See Wolf C-229/08; Prigge C-447/09

- Article 6 of Directive 2000/78 states specifically for age that:
  - “Member states may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that aim are appropriate and necessary.”
  - See Palacio Case C-411/05; Fuchs C-159/10
The ambivalent nature of discrimination based on age might explain the necessity to treat the prohibition of age discrimination as a part of a general principle of equal treatment to defend its legitimacy alongside other grounds:

“It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, Mangold, paragraphs 74 to 76).”

“In those circumstances, it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.”

C-555/07 – Külünkdeveci, (50) and (51)
Recognition of the general principle of non-discrimination based on age in EUCJ and national courts

- “Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.”

- “It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.” C-144/04 - Werner Mangold v Rüdiger Helm (78)

- In the recent cases Hennig C-297/10 and Prigge C-447/09, The Court states that the prohibition of all discrimination on grounds of age is incorporated in Article 21 which the same legal status as the treaties.

- The non-discrimination principle based on age has been cited in French Courts (Soc. 11 May 2010 n° 08-43681)
III-Exceptions to age discrimination subject to a double tier standard: Article 6 (Directive 2000/78) and the CJEU legitimacy and proportionality test

- **Recital 25**
- The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. **However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States.**

- **Article 6 Directive 2000/78:**
- Differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

- Such differences of treatment may include, among others:
  - (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (  
  - b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;  
  - (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
Exception to age discrimination subject to a double tier standard: article 6 (Directive 2000/78) and the EUCJ legitimacy and proportionality test

- The string of EU cases including Mangold, Palacio, Age concern, Hutter, Petersen, Rosenbladt, Andersen, Georgiev, Fuchs and Henning provide insight essentially on what are legitimate and proportionate justifications to age differences in public policies applying Article 6 of the 2000/78 Directive.

- The Court provides a double tier analysis:

- Article 6 (1) refers to two conditions for establishing whether a policy which provides a difference in treatment on the grounds of age is justified: one is the existence of a legitimate aim, and the other is whether the means to achieve the policy aim are “appropriate and necessary”, in other words, proportionate.
First tier of test: What is a “legitimate aim of social policy”?

- In the *Mangold* and *Palacios* cases, the Court recalls that Member States enjoy broad discretion in choosing the measures to attain the policy objectives which are appropriate and necessary.
- The *Hutter* judgment confirms the array of possible State action.
- The measures subjected to judicial scrutiny are not necessarily in the public sphere; they extend to dismissals in the private sector based on national legislation which imposes compulsory retirement through collective bargaining or national legislation (*Palacios* and *Age Concern England* judgments).
What is a legitimate policy aim and can this assessment evolve with time and demographics?

- The difficulty is that the legitimacy of policies can change with the economic context. The mandatory retirement in the Palacios judgment was justified by an economic downturn.

- The influence of the economic context on policymaking is a real issue, as confirmed by the Petersen case, where the government had planned to abolish the contested refusal to licence the practice of older accredited dentists by the time the case came to court. In other words, when do you assess the legitimacy of a social policy? When the legislation is adopted, or when the case comes to court? – See Fuchs case C-159/10
What is a legitimate aim for social policy?

- Legitimate aims are not the aims of employers, in the sense of individual aims designed to cut costs or gain a competitive edge (see Age Concern), even though policies can take into account the need for business flexibility.

- In its Hutter judgment, the Court also recognizes the discretion of Member States to define public measures essential to promoting employment and social policies (in this case, apprenticeships). National laws can list legitimate policies. For example, France amended its list in Law 2008-496 of 27 May 2008 to comply with Directive 2000/78.
What is a legitimate policy?

- Examples of policies for young and older workers which are objectively and reasonably justified by a legitimate aim.
- The Court seems to adopt fairly flexible standards for judicial review of what constitutes legitimate social policy in Member States: Küçükdeveci C-555/07; Andersen C-499/08, Rosenbladt C-45/09, Georgiev C-250/09, Fuchs C-159/10, Henning C-297/19.
- The Georgiev judgment was about a university professor who contested the fixed-term contract which he had been obliged to accept and also his compulsory retirement at the age of 68:
  - (45): “the training and employment of teaching staff and the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, put forward by the University and the Bulgarian Government, may be consonant with the intention of allocating the posts for professors in the best possible way between the generations, in particular by appointing young professors. As regards the latter aim, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States’ social or employment policy (Palacios de la Villa, paragraph 65), in particular when the promotion of access of young people to a profession is involved (see, to that effect, Petersen, paragraph 68). Consequently, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim.”
- French case law is similarly indulgent (Soc. 17 Nov. 2010).
Second tier of test (proportionality): What are “appropriate and necessary” means for achieving social policy?

- The Mangold ruling is very explicit on this point: indefinitely renewing short-term contracts only in the case of older workers (over 52) is seen as going beyond what is necessary to promote the employment of older workers.

- In the Palacios decision, the desire to implement retirement policies was seen as appropriate in the light of employment policy and can be extended to the social partners, and the payment of a pension is seen as “not inappropriate and unnecessary” to promoting the policy without focusing solely on the age of the beneficiary. The Court uses the negative form in this second example. Why?

- More recently, in its Andersen, Rosenbladt, Georgiev, Fuchs and Henning judgments, the Court seems to distinguish within its review of proportionality between appropriate and necessary, seeking to identify means which are unreasonable, excessive or incoherent in the pursuit of a legitimate social policy based on age.
Testing the proportionality of age discrimination: what means are appropriate? (Exceptions)

- The “appropriate” standard (*Georgiev, para. 52*):

- “Those findings are also relevant as regards engaging in employment such as that of a university professor. In so far as the posts for university professors are, in general, of a limited number and open only to people who have attained the highest qualifications in the field concerned, and since a vacant post has to be available for a professor to be appointed, the Court takes the view that a Member State may consider it appropriate to set an age limit to achieve aims of employment policy such as those mentioned in paragraphs 45 and 46 of this judgment.”

- In order to assess the degree of accuracy of the evidence required, the Member States enjoy broad discretion in the choice of measure they consider appropriate (*ECJ Fuchs*, pt 80, 82)
As for the age limit applied by the national legislation at issue in the main proceedings, namely 68, it is apparent from the case-file that it is five years higher than the statutory age at which men may normally acquire the right to a pension and be made to take retirement in the Member State concerned. It therefore allows university professors, who are offered the opportunity to work until 68, to pursue their careers for a relatively long period. Such a measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings (Palacios de la Villa, § 73).

It follows that the setting of an age limit for the termination of a contract of employment does not exceed what is necessary to attain employment policy aims such as those mentioned in paragraphs 45 and 46 of this judgment, provided that that national legislation reflects those aims in a consistent and systematic manner.
Testing the proportionality of age discrimination: what means are necessary?

- In *Hennig*:
- Pt 74: The recourse to the criterion of length of service is, as a general rule, appropriate to achieve that aim, since length of service goes hand in hand with professional experience (Cadman, pts 34 et 35; Hütter, pt 47).
- Pt 75: While the measure at issue in the main proceedings enables an employee to ascend in step in the salary group to which he belongs as his age advances and hence his length of service increases, it is clear that, on his appointment, the initial classification in a particular step in a particular salary group of an employee with no professional experiences is based purely on his age.
- Pt 76: Thus an employee with no professional experience, appointed at the age of 30 to a job in one of salary groups III to X will, as from his appointment, receive basic pay equivalent to that received by an employee of the same age, in the same job, but appointed at the age of 21 and with nine years’ length of service and professional experience in his job...
- Pt 77: The determination according to age of the basic pay step on appointment of a public sector contractual employee goes beyond what is necessary and appropriate for achieving the legitimate aim … of taking account of the professional experience acquired by the employee before he is appointed.
CONCLUSIONS

- Article 6 of the Directive sets a comprehensive framework for judicial scrutiny and gives the EUCJ a relatively strong capacity to determine what policies are legitimate and appropriate in the Member States.
- European case law also discusses the risks of age bias in cases like Petersen, Wolf or Prigge linked to the application of Article 4 on occupational requirements and Article 6.
- The EUCJ has not yet given indications on how to pinpoint indirect discrimination linked to age (French case law on the question is rather restrictive in its interpretation. Soc. 30 April 2009; Soc. 19 October 2010.)
- Moreover, occupational activity will bring growing risks of age discrimination as the retirement age is pushed back and some people are retained in employment beyond that age (cf. Soc. 29 June 2011).