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# **Age discrimination in the light of ECJ-case law**

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# A. Legal Bases

## I. EU-Charter of Fundamental Rights, Art. 21 (1):

“Any discrimination based on any ground such as sex, race, color, ethnic or social origin, language, religion or belief, political or any other opinion, membership in a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

# **Scope of the Fundamental Rights' Charter:**

**ECJ, 1. March 2011 Case C-236/09  
„Test-Achats“ No. 16**

“Art. 6 (2) TFEU provides that the EU is to respect fundamental rights as guaranteed by the European Convention...and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Those fundamental rights...have the same legal status as the Treaties”.

**I. Directive 2000/78/EC (Framework Directive) for the implementation of the principle of equal treatment in employment and occupation in relation to discrimination on grounds of age, sexual orientation, disability, religion, and belief.**

# Scope of equal treatment

- • Establishment and termination of the employment relation
- • Employment conditions
- • Promotion
- • Access to training

# Scope of equal treatment; Art. 2 (2) Directive

- • direct discrimination
- • indirect discrimination
- • harassment

But: power to derogate from protection from direct age discrimination, Art. 6

# **Age Discrimination as a special ground? ECJ, 22.2.2005 Case C-144/04 „Mangold“**

„The principle of non-discrimination on grounds of age must be regarded as a general principle of Community law“

- reiterated in Case C-555/07 „Kücükdeveci“  
No. 21, 22.

→ seems to apply no lesser standard for age than for other grounds

**Art. 6 (1) Directive 2000/78/EC allows for broad “justifications” of directly age related discrimination under the conditions that a differential treatment:**

- serves a legitimate aim (of social/labour market policy)**
- is achieved by means that are proportionate, i.e. “appropriate and necessary” to reach that aim.**



# ECJ Principles

- • Member States/social partners enjoy broad margin of discretion in choosing the means for reaching their aims
- • Legitimate aims are of public interest nature, even if they may take into account a company's need for flexibility
- • proportional means are such that do not go beyond what is necessary to reach the aim pursued, i.e. that are neither unreasonable, excessive or inconsistent.

# Standards of judicial review

- • lenient for age limits, general retirement age common in many Member States
- • strict for special retirement ages for specific jobs, provided for only in some Member States
- • strict for age related terms or conditions of employment as they vary from one legal order to the next

# **B. Age related topics in the ECJ-case-law**

Retirement age

Recital 14 Directive 2000/78/EC: “This Directive shall be without prejudice to national provisions laying down retirement ages”.

Shall this recital exclude all retirement age related decisions from the application of the Directive?

## **ECJ Case C-411/05 „Palacios de la Villa“ No. 44**

The 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 retirement age...has been reached“.

# **Can a mandatory retirement age be justified against the standard of Art. 6 Directive?**

**ECJ, 16.10.2007 Case C-411/05 „Palacios de  
la Villa“, No. 68-75**

Member States and the social partners at national level enjoy a broad discretion in pursuing a specific aim in social and labour market policy and in defining measures capable of achieving them.

# Balancing the interests in „Palacios de la Villa“

- personal autonomy of the worker
- freedom to stay in employment
- economic necessities
- addressing high unemployment rates
- entitlement to substantial pension benefits providing a living income
- not imposed unilaterally but negotiated by social partners

Result: mandatory retirement was “not unreasonable”.

## **ECJ, 5.3.2009 C-388/07 „Age Concern England“**

What aims may a Member State have when making a derogation under Art. 6?

No. 46: „...aims which may be considered ‚legitimate‘ within the meaning [of Art. 6 (1)] and appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives... By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employers‘ situation, such as cost reduction or improving competitiveness...

→ Reiterated in ECJ, 18.6.2009 Case C-88/08 „Hütter“ No. 41 and in ECJ, 19.5.2011, Case C-447/09 „Prigge“

## **ECJ, 12.1.2010 Case C-341/08 „Petersen“**

- Maximum age of 68 for practicing a profession („panel dentist“)

legitimate aim: protecting the health of patients,  
intergenerational fairness

but: internal inconsistency between the means  
(= maximum age for panel dentists, but not  
for private practice)

and the intended legitimate aim



## **ECJ, 12.1.2010 Case C-229/08 „Wolf“**

Maximum age of 30 for recruitment to intermediate career posts in the fire brigade

legitimate aim:     guaranteeing the operational capacity and proper functioning of the professional fire service

genuine and determining occupational requirements [Art. 4 (1)]: high physical capacities

→ scientifically valued proof of facts,  
not challenged before national Courts

## **ECJ, 19.5.2011 Case C-447/09 „Prigge“**

- Maximum age of 60 for active airline pilots, set in collective agreements

legitimate aim: guaranteeing safety of passengers

- no genuine and determining occupational requirement according to Art. 4 (1)] as inconsistent with other national and international rules allowing for piloting until 65.
- no justification according to Art. 6, as air traffic safety does not count among the aims listed there
- no justification through the margin of discretion offered to social partners

## **ECJ, 12.10.2010 Case C-499/08 „Andersen“**

Excluding workers from receipt of a severance allowance on dismissal because they are entitled to claim a pension

legitimate aim: helping workers with many years of service to find new employment constitutes a legitimate labour market objective

measures to achieve such goal not appropriate and necessary: those eligible for pension were treated as if they actually received it, even if they intend to exercise their right to work.

## **ECJ, 12.10.2010 Case C-45/09 „Rosenblatt“**

Setting an automatic termination of employment contracts at the age of 65 in the cleaning industry by collective agreement

Legitimate aims as referred to by the ECJ

- Sharing employment between generations (questionable evidence, “myth of job blocking”)
  - Having to dismiss individuals due to lack of capacity is humiliating (questionable evidence that being “too old” is less humiliating)
  - Age limit is set by collective agreement (this in itself cannot provide for a justification)
- Question of whether the collective agreement really provided for a “mandatory” retirement age

## **ECJ, 18.11.2010 Case C-250/09 „Georgiev“**

Setting a mandatory retirement age at 68 for University professors allowing them to work beyond the regular retirement age of 65 only by means of fixed-term one year contracts renewable max. twice

legitimate aim: labour market policy of pursuing the best possible allocation of jobs between generations, high quality teaching through mix between experience and innovation

but: national courts must review the facts whether the social policy aim was not merely a pretext.

# **ECJ, 8.9.2011 Case C-297/10, C-298/10 „Hennings“ and „Mai“**

Transitional arrangements from previously discriminatory collective agreements determining basis pay in individual salary groups by age.

Previously age related determination of basic pay is not justified by the legitimate aim of rewarding professional experience because this aim would be served by determining pay groups according to seniority much better.

Transitional arrangements pursue the legitimate aim of protecting employees from substantial loss of income.

but: Social partners need to respect EU law including the Framework Directive's prohibition of age discrimination when setting collective pay standards in their agreements.

# ECJ, 21.7.2010 Case C-160/10 „Köhler“ und „Fuchs“

legitimate aim for a compulsory retirement age for civil servants

legitimate aim: labour market policy through facilitating  
recruitment and promotion of young employees, through  
enjoying planning certainty regarding the retirement of  
employees,  
through providing for a “favorable age structure”.

Internal consistency of setting a compulsory retirement age if  
there is a possibility of remaining in employment beyond that age,  
depending entirely on the employee having special interests in  
the continuation?