I. Introduction

- An ageing population requires active ageing – an important strategic goal for the EU
- The ban on age discrimination is potentially an important legal mechanism to achieve this
- But, the ban on age discrimination may also turn out to be a weak companion for older workers, reflected in
  - the acceptance of compulsory retirement
  - its elitist design
  - the risk that Labour Law ‘strikes back’
  - furthering the flexibilisation of work
- This is what this presentation is about
Outline

I. Introduction
II. Age-Discrimination and the Double Bind
III. Age-Discrimination and Compulsory Retirement
IV. Age-discrimination and Pre-retirement
V. Upholding the ban
VI. Other cases (younger workers, wage-setting)
VII. Conclusions for the future

II. Age-Discrimination and the ‘Double Bind’

• The challenge for the ban on age-discrimination is to change hitherto normative perceptions on belonging and exclusion and to purport social integration and justice – at societal and individual level
• This reflects the 'Double Bind' of non-discrimination regulation Instrumental interests v human rights, or, the collective policy interest approach v the individual rights approach
• Age discrimination an extreme example
II. Age-Discrimination and the Double Bind

- The individually related fundamental rights approach (art. 21 the Charter)
- Preamble 14 & 25 of Directive 2000/78/EC
- The collectively related organising role of age in society (art. 6.1 Directive 2000/78/EC)
- The collectively related strategic goal of active ageing (Europe 2020, Employment Guidelines, etc)
- Genuine Occupational Requirements (art. 4), public security (art. 2.5) and armed forces (art. 3.4 Directive 2000/78/EC) – Wolf C-229/08, Petersen C-341/08, Prigge C-447/09
- An ambiguous directive - the balance to be struck at application level
  - It’s all about justification (Bercússon)
  - And, the CJEU has been flooded with cases …

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II. Age-Discrimination and the Double Bind.
Art. 6.1 the Employment Equality Directive

- ‘MS may provide that differences of treatment on grounds of age shall not constitute discrimination, if, … 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.’
II. Age-Discrimination and the Double Bind. The Mangold approach

• Mangold C-144/04
  The ban on discrimination on the grounds of age a general principle of EU Law
• Confirmed in Kücükdevici C-555/07 also mentioning the CFR
• Then differing approaches:
  mentioning only the Directive: Andersen C-499/08, Rosenbladt C-45/09
  mentioning the general principle: Tyrolean Airways C-132/11, Odar C-152/11
  mentioning also the CFR: Hennigs C-297/10, Prigge C-447/09

III. Age-Discrimination and Compulsory Retirement

• Compulsory retirement generally accepted by the CJEU in cases such as
• Palacios de la Villa C-411/05, Age Concern England C-388/07, Rosenbladt, C-45/09, Hörmfeldt C-141/11
• Acceptable to the CJEU since ‘the automatic termination of employment contracts for employees who meet the conditions as regards age and pension rights has, for a long time been a feature of employment law in many MS and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations’ (Hörmfeldt p 28), and, as pension rights concern, these are to be considered, not at individual level but rather at systems level.
• Other accepted aims: intergenerational fairness in terms of access to employment and the prevention of humiliating forms of employment termination
III. Age-Discrimination and Compulsory Retirement

- This case law represents
  - a fairly weak standard of justification (compare, however, (Georgiev C-250/09, Fuchs & Köhler C-159/10 and Petersen C-C-341/08),
  - the ambiguity of the age discrimination ban, and
  - age as a traditional social stratifyer,
  - linked to the standard employment contract, and
  - part of its implicit contract

IV. Age-discrimination and Pre-retirement

- Cases Andersen C-499/08, Odar C-152/11, Toftgaard C-546/11, Commission v Hungary C-286/12

- A stricter standard of justification
  - upholding the ban on age-discrimination and
  - the implicit contract
V. Upholding the ban

• But, what would a ban on compulsory retirement imply?
• Risks weakening employment protection also before retirement age
• since discrimination law is elitist i character, and,
• creates an increased emphasis on ‘capability’ in working life
• to the detriment of employment protection,
• thus furthering the flexibilisation of work
• (flexibilisation even a companion to compulsory retirement)

VI. Other cases (younger workers, wage-setting)

• *Hennigs C-297/10, Specht et al C-540-541/12* experience/length of service an accepted criterion but a more ‘automatic’ age-related system is not. Special role for the social partners though …
• *Hütter C-88/08*, work experience before 18 years of age ignored for wage-setting – not appropriate
• *Kücükdevici C-555/07*, length of service before 25 years of age ignored for notice period – not appropriate

• Part of the implicit contract and thus age as a social stratifier
• Nevertheless, a stricter standard of justification
VII. Conclusions for the future

• Multiground regulations risk a ‘down-hill’ development with erosion of key concepts of discrimination law
• A special concern is the possibility to justify also direct discrimination
• However, there is also hope for truly transformative developments due to the more than double bind of non-discrimination regulations
• True acceptance of the ban on age discrimination puts labour law in general at risk, though,
• working towards ultimate flexibilisation
• Age may result a necessary social stratifier also for the future and the proportionality principle the way to manage this!

THANK YOU FOR YOUR ATTENTION!

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