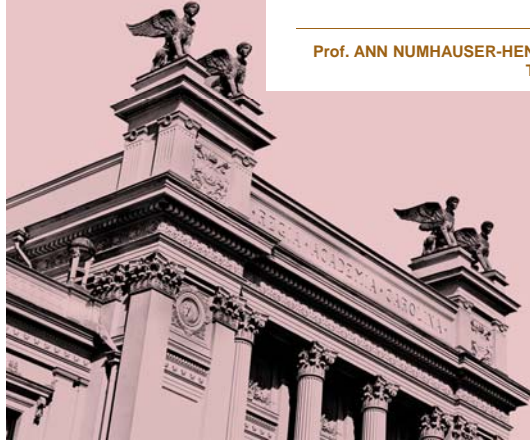


## The EU Ban on Age-Discrimination in the case law of the CJEU

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Trier, 19 May 2014



### I. Introduction

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- 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

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- 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'

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- 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

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- 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 ...



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

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- '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

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- *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

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- 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*, *Hörfeldt 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' (*Hörfeldt* 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

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- 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 stratifier,
  - linked to the standard employment contract, and
  - part of its implicit contract



### IV. Age-discrimination and Pre-retirement

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- 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

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- 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 furhtering the flexibilisation of work
- (flexibilisation even a companion to compulsory retirement)



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

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- *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
- *Kçükdevici 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

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- 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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