

# **Discrimination on Grounds of Age: Recent Case Law of the CJEU**

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# I. Primary and secondary law

- The relationship between the two layers of law:
  - EU primary law: Articles 15, 21 CFR – Non-discrimination; Art. 6(3) TEU – General principles of EU law
  - EU secondary law: Article 2 Directive 2000/78/EC – “age” as a ground of discrimination, according to the CJEU: characteristic
- CJEU: C-144/04 “Mangold” (parallelism and reinforcement); C-411/05 “Palacios” (primary law not mentioned); Article 21 CFR regularly mentioned since 1 Dec. 2009

## II. Prohibition of age discrimination

- Scope of the Directive (Art. 3)
  - Provisions in legislation, collective agreements, employment contracts
    - Requirements to be met by legislation on right of collective bargaining: CJEU, C-447/09 “Prigge”: provisions in collective agreements are admissible if security clearance rules are sufficiently precise so as to ensure that the collective bargaining parties fulfil the requirements set out in Article 2(5).
    - Right of collective bargaining as set out in Article 28 CFR does not take precedence over the prohibition of age discrimination (CJEU, C-297/10 “Hennings”)
  - Civil service law: AG Bot, Opinion of 28 Nov. 2013, C-501/12 Specht et al.: Fixing of seniority in step for civil servants

## II. Prohibition of age discrimination

- Concept of discrimination (Article 2(a) Directive)
  - Direct discrimination: provisions which make age itself a differentiating criterion
    - Age limits
  - Indirect discrimination: provisions which have the de facto effect of discriminating against a certain age group
    - Differentiating employment conditions etc.

# III. Justification of differences of treatment

- Granting different degrees of scope for action and creative freedom
  - General regimes are treated more generously than specific ones
  - Recognition of general needs for action in the field of social policy (protection of social security systems, “intergenerational equity”, political disagreement with regard to the merit of “early retirement” or the need to push back the retirement age)
  - However: prohibitions must not be “undermined”
- Differentiation in terms of proportionality test
  - Frequent complaint: lack of rigour and consistency

# III. Justification of differences of treatment

- Article 4(1) Directive 2000/78/EC – genuine occupational requirements
  - C-229/08 “Wolf ” (fire service): Admissibility of national provision setting a maximum age of 30 years for the recruitment of officials to posts in the fire service
- Application of a strict yardstick; “genuine and determining requirement” must be demonstrated after introducing such a measure
- Defining consistency requirements

# III. Justification of differences of treatment

- Article 2(5) Directive 2000/78/EC – public security, maintenance of public order/protection of health/rights of others
- CJEU, C-447/09 “Prigge” (pilot): Inadmissibility of an age limit from which airline pilots are considered as no longer possessing the physical capabilities to carry out their occupational activity, which, for no reason, is different from national and international legislation (no justification under Articles 4 or 6(1)(a) Directive).
- C-341/08 “Petersen” (panel dentist): Inadmissibility of a provision setting a maximum age of 68 years for practice as a panel dentist, if this is justified by the desire to protect the health of patients (inconsistency)

### III. Justification of differences of treatment

- Article 6 Directive 2000/78/EC – objectively justified aims such as employment policy, labour market and vocational training objectives etc. are achieved by appropriate and necessary means
  - List of justifying aims is not exhaustive; application has to be proportionate and consistent; in some cases, the players involved have broad discretion.
  - Article 6(1) of Directive 2000/78/EC imposes the onus on Member States to prove that the aim used as justification is legitimate, and the standard of proof to be satisfied is high.
  - No particular significance should be attached to the fact that the term “reasonably” used in Article 6(1) of this Directive is not contained in Article 2(2) lit. (b) of the Directive.

# III. Justification of differences of treatment

- Article 6 Directive 2000/78/EC and general age limits:
  - CJEU, C-411/05 “Palacios”: Admissibility of general labour market policy objectives to justify automatic termination of employment relationship at age 65; standard of review is almost arbitrary.
  - CJEU, C-388/07 “Age Concern”: Admissibility of national provisions authorising employers to dismiss workers aged 65 or over by reason of retirement.

# III. Justification of differences of treatment

- Article 6 Directive 2000/78/EC and general age limits:
  - C-45/09 “Rosenblatt” (cleaner): Admissibility of an age limit provided for in a collective agreement, even if the acquired entitlement to a retirement pension is not sufficient to provide for old age; legitimacy of “traditional age limits” is recognised; reference to practice in Member States.
  - C-141/11 “Hörnfeldt” (employee of Swedish postal services agency): Admissibility of automatic termination of the employment relationship upon reaching the age of 67; level of retirement pension not taken into account, but basic coverage.

# III. Justification of differences of treatment

- General age limits:
  - Broad discretion granted to Member States: “intergenerational equity”, maintaining balanced age structure in companies etc.
  - Endorsement of competence of national courts; typical wording: “It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States’ discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.”
  - However: legislation needs to be objectively and reasonably justified by a legitimate aim of employment and labour market policy, and the means chosen must be appropriate and necessary to achieve that aim.

# III. Justification of differences of treatment

- Article 6 Directive 2000/78/EC and specific age limits
  - C-341/08 “Petersen” (panel dentist): Inadmissibility of a provision setting a maximum age of 68 years for practice as a panel dentist, if this is justified by the desire to protect the health of patients (inconsistency) (no justification under Article 5 Directive).
  - C-286/12 “Commission v Hungary” (judges): Inadmissibility of national scheme requiring compulsory retirement of judges, prosecutors and notaries on reaching the age of 62; disproportionate burden due to extremely short duration of transitional periods.

# III. Justification of differences of treatment

- Article 6 Directive 2000/78/EC and specific age limits
  - Strict test, no discretion granted
  - Distortion, in particular if there are justification problems and inconsistencies

# III. Justification of differences of treatment

- Article 2(2), Article 6 Directive 2000/78/EC – Justification of indirect discrimination: means of achieving the aim must be appropriate; consistency
  - Differences of treatment with regard to employment conditions (e.g. job grading rules, termination rules).
  - C-88/08 “Hütter”: Inadmissibility of national legislation which excludes accreditation of any professional experience acquired before the age of 18 for the purposes of grading contractual staff within the scale for a Member State’s public service in order to achieve the aim of not treating general education less favourably than vocational education and of promoting the integration of young apprentices into the labour market.
  - C-555/07 “Kücükdeveci” (notice periods): Inadmissibility of legislation not taking into account the period of employment completed before the employee reaches the age of 25 for calculating the notice period.

# III. Justification of differences of treatment

- Article 2(2), Article 6 Directive 2000/78/EC
  - C-297/10 “Hennings and Mai” (salary groups under collective agreement): Inadmissibility of a scheme according to which, within each salary group, the basic pay of a public service employee is determined on his appointment by reference to the age category to which he belongs.
  - C-499/08 “Andersen” (administrative employee): Admissibility of a provision according to which no severance allowance is paid to workers who are entitled to an old-age pension on termination of the employment relationship; inadmissibility of a provision according to which workers who joined the pension scheme before attaining the age of 50 years are excluded from entitlement to severance allowance.

# III. Justification of differences of treatment

- Article 2(2), Article 6 Directive 2000/78/EC
  - C-152/11, “Odar”: Admissibility of rules providing for differences of treatment in the calculation of compensation on termination of employment; reduction in the amount of redundancy compensation paid to workers who are more than 54 years old; in this specific case, however, this treatment constituted discrimination on grounds of disability.
  - C-132/11 “Tyrolean Airways” (cabin crew): Admissibility of a provision according to which, for the purpose of grading staff in employment categories under the collective agreement, and thus determining the level of remuneration, takes account only of their skills and knowledge which they have acquired as cabin crew members with one specific airline but not the substantively identical skills and knowledge which they have acquired with another airline within the same group of companies.

## IV. Transitional provisions

- Recognition in principle of the need to introduce transitional regimes
  - C-297/10 “Hennings and Mai” (salary groups under collective agreement): Admissibility of a measure in a collective agreement which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.
  - AG Bot, C-501/12 Specht et al.: Inadmissibility of a transitional scheme which perpetuates the effects of discrimination

## V. Legal consequences

- Duty of the State to disapply a discriminatory regime
  - e.g. C-341/08 “Petersen” (panel dentist): If national legislation were contrary to Directive 2000/78, it would be for the national court hearing a dispute between an individual and an administrative body to decline to apply that legislation, even if it were prior to that directive and national law made no provision for disapplying it.

## V. Legal consequences

- Duty to disapply a discriminatory regime also in the horizontal relationship between individuals
  - C-555/07 “Kücükdeveci” (notice periods)  
Principle 2: It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.

## V. Legal consequences

- Duty to apply the more favourable regime as long as the infringement persists (upward “harmonisation”)
  - However, Member States may introduce a non-discriminatory regime at a lower level for the future (problem: vested rights).
  - AG Bot, Opinion of 28 Nov. 2013, C-501/12 Specht et al. (determination of salary level): No duty to automatically assign the highest salary level; instead, assessment of each case on its own merits.

## V. Legal consequences

- Duty of national courts to fully “safeguard rights which individuals derive from EU law”
  - It is for the Member States to lay down procedural rules in accordance with the principles of equivalence and effectiveness“ (CJEU, C-89/10 “Q-Beef”)
  - e.g. Judgment of 16 Jan. 2014, C-429/12 “Pohl”: Admissibility of a 30-year limitation period; the Member State may therefore provide that a discriminatory classification in a wrong salary scale, which occurred more than 30 years ago, does not have to be corrected.

- Thank you for your attention!