

CJEU case law in matters of age-based discrimination

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Contents

- 1. Regulatory context.
- 2. Age as a basis for discrimination: specific issues.
- 3. Guide for the legal application of the prohibition of age discrimination in CJEU case law.
- 4. Case study: justification for different treatment on the basis of age in CJEU case law.
- 5. Conclusions.

1. Regulatory context

- 1.1. Prohibition of discrimination in the Treaties:
 - Origin: Amsterdam
 - Art. 19 TFEU (*ex Art. 13 TEC*)
 - Art. 157 TFEU (*ex Art. 141 TEC*)
 - Treaty of Lisbon:
 - Art. 2 TEU
 - Art. 10 TEU
 - Art. 21 CFREU.
 - Some unique features with regard to national constitutional regulations.

1. Regulatory context

- 1.2. Current implementing legislation.
 - Directive [2004/113/EC](#) of 13 December 2004: equal treatment between men and women in the access to and supply of goods and services.
 - Directive [2000/78/EC](#) of 27 November 2000, a general framework for equal treatment in employment and occupation
 - Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
 - Directive [2006/54/EC](#) of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
 - Overall assessment of the implementing regulations: different regulations according to discriminatory features covered by common conceptual elements. [Directive 2000/78](#) as the essential framework of reference in matters of discrimination based on age.

2. Age as a basis for discrimination: specific issues.

- 2.1. **Question:** the application of the age criterion is the subject of much controversy at the CJEU in light of difficulties with using it in the standard practice of national courts. What are the reasons for this?
- 2.2. **Substantive reasons:** the fact it is new, lack of uniformity, conventional criterion for differentiation, *weak* criterion compared to sex and ethnic or racial origin.
- 2.3. **Reasons of doctrine:** general principle, competence or fundamental right. The role of implementing legislation (Mangold Case).

2. Age as a basis for discrimination: specific issues.

- 2.4. **Strictly positive reasons:** Complexity of the exceptions under different provisions (Arts. 2(5), 4(1) and 6 Directive 2000/78).
- 2.5. **Practical reasons:** diversity of situations in which it has been cited and an abundance of case law.
- 2.6. A **partial conclusion:** the delicate position of the judge applying the age criterion in the prohibition of labour discrimination.

3. Legal application guide

- 3.1. **Question:** the key question must be: how should judges handle cases concerning age-based discrimination?
- 3.2. A step-by-step legal application:
 - **Step 1:** Establish whether the directive is applicable. Relation with Article 21 CFREU.
 - **Step 2:** Determine whether a difference in treatment exists. In particular, determine whether it is direct or indirect discrimination. Types of restrictive measures.
 - **Step 3:** Decide whether the difference in treatment is justified.

3. Legal application guide

- 3.3. Particularly: **step 3.** Justification of measures for a difference in treatment based on age: "three possible courses with an identical legal methodology"
 - 3.3.1. "**Three possible courses**":
 - The ordinary case in matters of age: Art. 6(1) Directive 2000/78.
 - The general case of discrimination: Art. 2(5) Directive 2000/78.
 - The specific case of certain professional training: Art. 4(1) Directive 2000/78.

3. Legal application guide

– 3.3.2. "**with an identical legal methodology**": the method for determining whether or not the measure is justified is always the same: the existence of a legitimate aim and making a proportionality judgement. There are also 3 steps.

- **Step 3.1: Determination of a legitimate aim.**

- The range of legitimate aims included in the legislation.
- The margin of discretion of national authorities.
- The task of the judge where the legislator has not been specific.
- The possible existence of objectives of a different nature (public health – Art. 2(5) – and employment policy measure – Art. 6(1)).

3. Legal application guide

- **Step 3.2: Determine whether the measure is *appropriate*:**

- It is a judgement as a means to an end.
- It is not about determining or finding the "most" appropriate measure, only whether it is *suitable* for achieving the aim sought.
- Measures might not be appropriate for several reasons:
 - » Measures unfit for achieving the aim.
 - » Measures incoherent with the aim sought.
 - » Measures neutral with regards to the aim.
 - » Measures with an effect contrary to that intended.
- Whose responsibility is it to prove the suitability or otherwise of the measure?
 - » Idea based on the general theory of the proportionality judgement.
 - » Idea based on the reversal of the burden of proof in assessing the discrimination.

3. Legal application guide

- **Step 3.3: determining whether the measure is *necessary*:**
 - Strictly speaking, it includes a judgement of both necessity and proportionality.
 - Necessity test: finding the least intrusive measure possible with the same level of effectiveness. The equally effective alternative measure should be determined and adjusted to the intensity of harm to the non-discrimination principle. Relevant criteria to take into account. Types of unnecessary measures:
 - » Measures clearly less injurious and with a manifestly identical functionality.
 - » Arbitrary measures.
 - Proportionality test in the strict sense: reasonable balance between the cost to discrimination victims and the positive effect achieved. Relevant criteria (intensity of the measure, importance of the aim sought, transience, etc.)

4. Case study

- 4.1. First line: Art. 6(1). Cases in which the various steps are satisfied or not:
 - Legitimate objective
 - Appropriate measure
 - Necessary measure
- 4.2. Second line: Art. 4(1). Cases in which the various steps are satisfied or not
- 4.3. Third line: Art. 2(5). Cases in which the various steps are satisfied or not

5. Conclusions

- Presence of specific difficulties in legally applying this criterion.
- Absence of general criteria for determining when a measure is discriminatory on the basis of age.
- Existence of various mechanisms for justifying measures for unequal treatment on the basis of age.
- Clear establishment of the argument mechanism through which the judge has to decide the case.
- Normal acceptance of the existence of a legitimate purpose.
- Case by case examination of the appropriateness and necessity of the measures adopted.
- Recognition of a wide margin for discretion for national authorities or social actors in the establishment of the aims and of the measures to fulfil such aims.