

Current reflections on EU Gender Equality Law

Recent CJEU case law on other non-discrimination issues

Julie Brohée

*Référéndaire for Judge Arabadjiev
President of the 6th Chamber, CJEU*

*(Master of International & European Law, Aix-en-Provence Law School,
LLM in EU Law at Institut d'études européennes, Université Libre de Bruxelles)*

“Treat like cases as like”

(Aristotle, Nicomachean Ethics)

Directive 2000/43 and Directive 2000/78 :

- significant progress in ensuring protection against discrimination in the EU
- significant changes to national law in all Member States

Grounds :

racial or ethnic origin, religion or belief, disability, age and sexual orientation.

General scheme of analysis :

- Jurisdiction - Admissibility

- Relevant ground

- Comparability

- Difference of treatment

- Direct or Indirect



discrimination established

Justification & proportionality

Exception for the ground of AGE

(Article 6)

AGE * DISABILITY * ETHNIC ORIGIN

AGE

is just a number...

The 'Hennigs & Mai' Family

Age of 21 → Grade A11, step 1

Age of 23 → Grade A11, step 2

1. Specht and Others (19 June 2014)

A. Old remuneration system:

→ Difference in treatment that is **directly** based on age

→ Justified?

Goes **beyond what is necessary** for achieving the legitimate aim

B. New remuneration system

→ Transitional system **perpetuates** a discriminatory situation

 Liable to be perpetuated by the new Law

→ Justified?

 The domestic legislature did not exceed the limits of its discretion

C. Consequences?

→ Highest standard? No valid point of reference

→ Francovich?

2. Unland (9 September 2015)

- Specht 'bis' - Reclassification and career progression of **judges**
- New law would '**exacerbates**' the discrimination

A. New remuneration system:

- Reclassification of judges is no different from that of civil servants
- perpetuation of the discrimination

B. Consequences

- No valid point of reference
- Compatible with Article 16(a) of Directive 2000/78

C. New difference in treatment based directly on grounds of age

- Justified?

Context - Broad discretion - Very full explanation of the reasons -
No evidence challenging the claim that the new system is
appropriate and necessary

The Hütter Family

Experience acquired before or after reaching the age of 18

3. Schmitzer (11 November 2014)

New **non-discriminatory** method of determining the reference date that, **concurrently**, provide for an **extension** of the periods which must be completed in order to move from one incremental step to the next (+ 3)

Law applicable: Directive 2000/78 alone

A. Difference of treatment?

- Continues to apply differing treatment
- + 3 – 3 = Neutralizes the advantage
- Places at a disadvantage only the civil servants disadvantaged by the previous system
- Adverse effects have not ceased entirely

B. Justified?

- Budgetary considerations - Considerations of an administrative nature
- **Not appropriate** : Objectives cannot justify a measure that **maintains definitively**, if only for certain persons, the age-based difference in treatment **which the reform is designed to eliminate**

4. ÖBB Personenverkehr “Starjakob“ (28 January 2015)

Periods of service prior to the 18th birthday

Every period required for advancement in each of the first three salary steps is extended by one year (+1, +1, +1).

A. Perpetuation?

→ Continues to treat employees disadvantaged by the previous system and those favoured by that system differently

B. Justified?

→ Intend to establish a non-discriminatory system of remuneration and advancement (Schmitzer)

C. Consequence?

- Article 16 of Directive 2000/78 does not prescribe a specific measure to be taken
- Observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category (Jonkman, par. 39 and Landtová, par. 51)
- Only if there is a valid point of reference (Specht, par. 96). That is so in the case.

D. Obligation of cooperation of the employee?

- Necessary

5. Felber (21 January 2015)

Periods of **school education** before the age of 18, for the calculation of the **pension rights**

Justified?

→ Aims observance of the principle of equal treatment and relates to an essential element of their employment relationship, such as the time of retirement, that aim constitutes a legitimate employment policy objective

→ Appropriate and necessary?

Not periods of employment, as in Hütter

Appears coherent in the light of the justification

6. O (1 October 2015)

Refusal to grant young persons, on the expiry of a fixed-term employment contract, an end-of-contract payment.

Fictitious dispute

A. Worker?

→ very limited number of hours

→ tbc

B. Situation is objectively comparable?

→ Compensation for the job insecurity

→ The national legislature in no way exceeded the bounds of its discretion in the field of social policy

7. Vital Perez (13 November 2014)

Condition of recruitment of local police officers

Fixing of a maximum age of 30

Justified?

→ ensuring the operational capacity and proper functioning of the police service

→ Appropriate and necessary?

- A clear disparity in the legislations
- The condition has been abolished
- Difference with judgment in Wolf (EU:C:2010:3)

8. Ingeniørforeningen i Danmark “Landin“ (26 February 2015)

Severance allowance equivalent to 1, 2 or 3 months’ salary, not to be paid where the salaried employee, upon termination of employment, is **entitled to receive a State retirement pension**

A. Age?

Minimum age requirement of 65

→ Thus based upon a criterion which is **inextricably linked to the age of the employee** (see, by analogy, *Ingeniørforeningen i Danmark*, “Andersen”, C-499/08, par. 23)

B. Justified?

Objectives: Facilitate the move to new employment for older workers

- ➔ Restriction intended to guarantee, in a simple and rational manner, that employers do not pay compensation twice to long-serving employees who have been dismissed
- ➔ Does not appear unreasonable or manifestly inappropriate

Goes beyond what is necessary?

- ➔ In principle no but ‘collateral damage’ (*Ingeniørforeningen i Danmark*, par. 41).
- ➔ BUT Facts can be distinguished. Does not appear capable of causing a **significant loss of income** to the departing employee in the long term

DISABILITY

9. FOA (18 December 2014)

Mr Kaltoft's dismissal, allegedly on the basis of his obesity.

A. Obesity?

Is there a General principle of non-discrimination on grounds of obesity as such as regards employment and occupation?

- ➔ No provision of the TEU or TFEU prohibits discrimination on grounds of obesity as such
- ➔ Obesity cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination (*Chacón Navas*, par. 57)

B. Disability?

- ➔ Impossibility of exercising a professional activity - hindrance to the exercise of such an activity (Z., EU:C:2014:159, paragraph 77).
- ➔ Obesity could be covered by the concept of ‘disability’ within the meaning of Directive 2000/78

Race, colour and ethnic origin

10. CHEZ Razpredelenie Bulgaria (16 July 2015)

Electricity meters installed for all the consumers of an area inhabited mainly by persons of Roma origin at a height of between 6 and 7 m (not 1.70 m)

Applicant was not of Roma origin herself

A. Criteria?

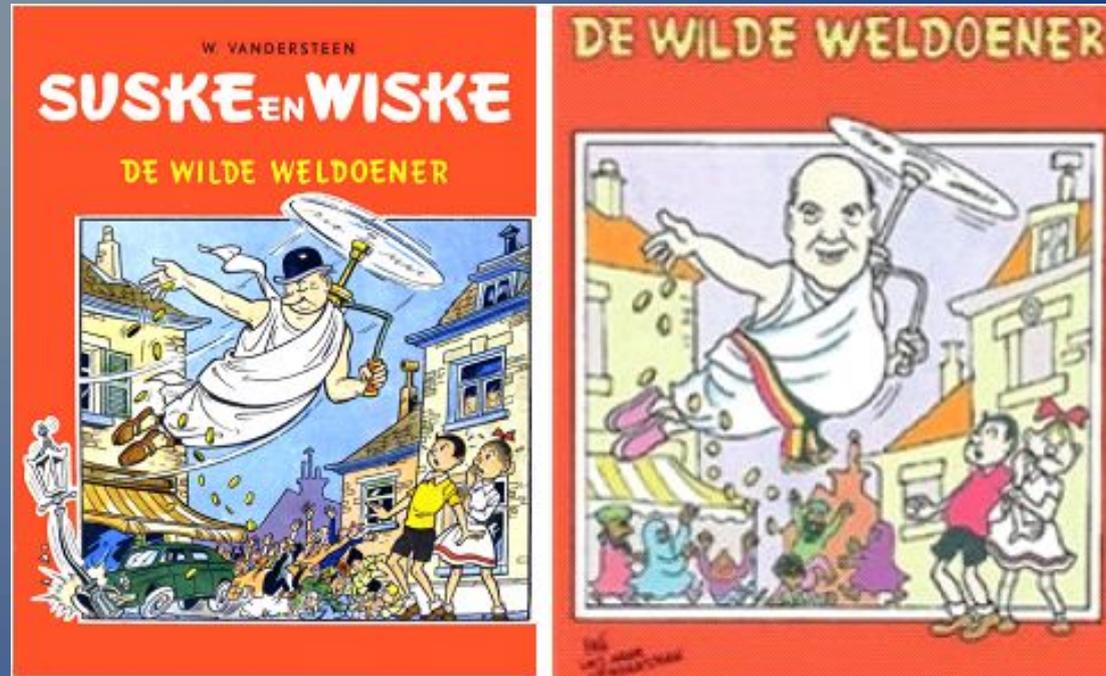
→ “Principle of equal treatment applies to those who, although not themselves a member of the ethnic group concerned, suffer, together with the former, less favorable treatment or a particular disadvantage on account of a discriminatory measure”

- ➔ Unfavourable treatment to the detriment of the inhabitants concerned on account of both its **offensive and stigmatizing nature**
- ➔ Extremely difficult or even impossible to check their electricity meters for the purpose of monitoring their consumption

B. Justified?

- ➔ Protection of the security of the electricity transmission network and the due recording of electricity consumption constitute legitimate aims
- ➔ The disadvantages caused **appear disproportionate** to the objectives pursued (tbc)

11. Deckmyn et Vrijheidsfonds (3 September 2014)



- Attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin (Dir. 2000/43 + Article 21(1) of the Charter)
- If a parody conveys a discriminatory message, a person holding rights (Dir. 2001/29) in the parodied work may demand that that work should not be associated with that message

Conclusion

Judgment in [Specht and Others](#), C-501/12 to C-506/12, C-540/12 and C-541/12,
EU:C:2014:2005

Judgment in [Unland](#), C-20/13, EU:C:2015:561

Judgment in [Schmitzer](#), C-530/13, EU:C:2014:2359

Judgment in [ÖBB Personenverkehr](#), C-417/13, EU:C:2015:38

Judgment in [Felber](#), C-529/13, EU:C:2015:20

Judgment in [O](#), C-432/14, EU:C:2015:643 1 October 2015

judgment in [Vital Pérez](#), C-416/13, EU:C:2014:2371

Judgment in [Ingeniørforeningen i Danmark](#), C-515/13, EU:C:2015:115

Judgment in [FOA](#), C-354/13, EU:C:2014:2463 18 December 2014

Judgment in [CHEZ Razpredelenie Bulgaria](#), C-83/14, EU:C:2015:480 16 July 2015

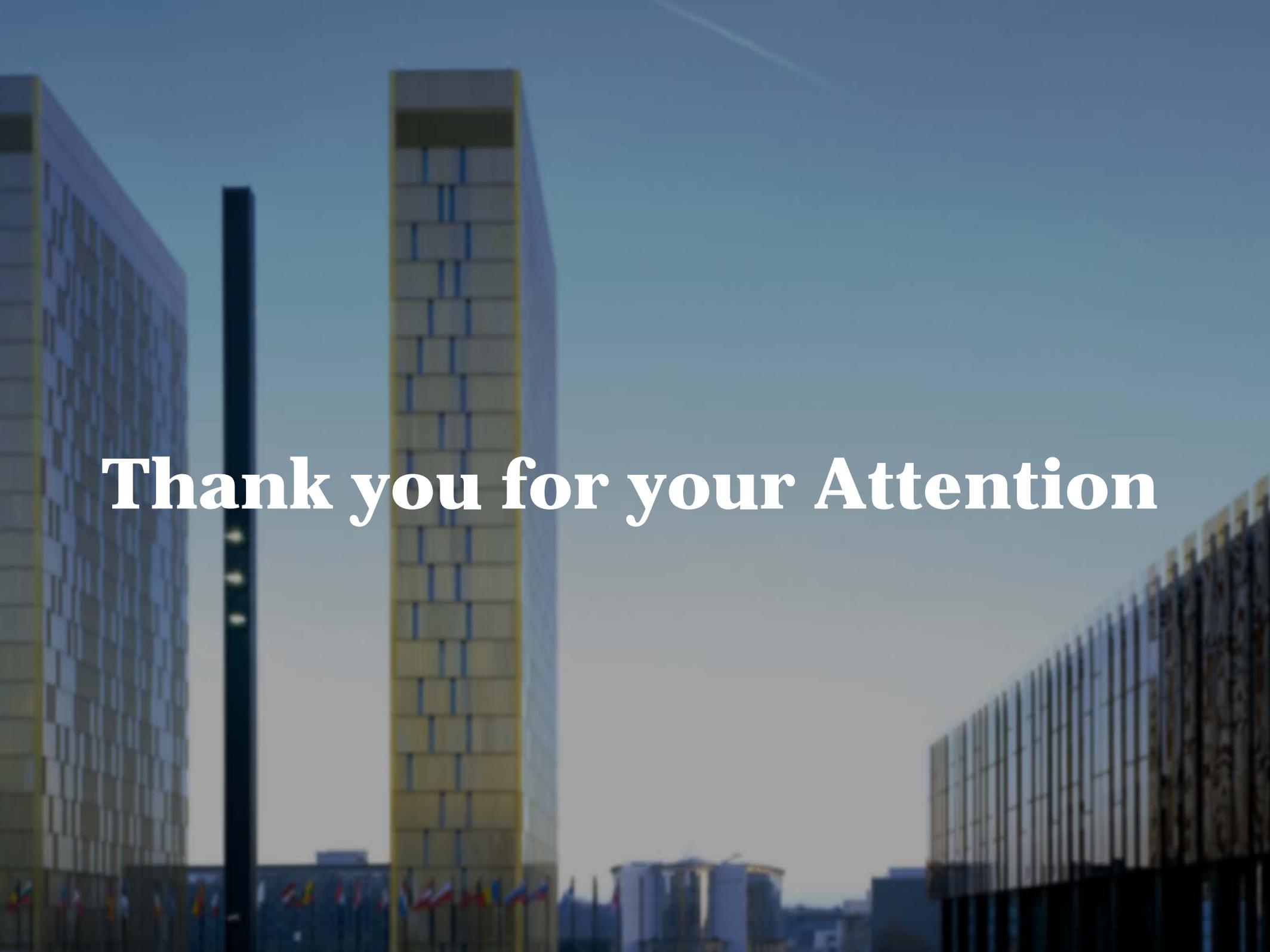
judgment in [Deckmyn and Vrijheidsfonds](#), C-201/13, EU:C:2014:2132

judgments to come:

Ajos, C-441/14

Lesar, C-159/15

C, C-122/15

A photograph of a modern building complex at dusk. The sky is a deep blue, and a thin white contrail is visible in the upper right. The buildings are illuminated from within, showing a grid-like pattern of windows. A tall, dark, cylindrical structure stands in the foreground on the left. The text "Thank you for your Attention" is overlaid in the center in a white, serif font.

Thank you for your Attention