

# EU non-discrimination on grounds of age

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## Agenda

1. Age as discrimination ground
2. EU approach
  - Policy
  - Legislation
3. Art. 6 Directive 2000/78
4. Three approaches (theory)
5. Case law
6. Conclusions
7. Questions



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# 1. Age as discrimination ground

Not as evident as it may seem

1. There are many situations in which it is “normal” to make a distinction based on age

- Minimum age for drinking, driving a car, voting etc
- Maximum age for working, sports, modelling,

2. Age is a passing personal characteristic

- We’ve all been young
- We all get older



3. Arguments to treat age as discrimination ground different from other grounds

# 2. EU approach – Policy: young

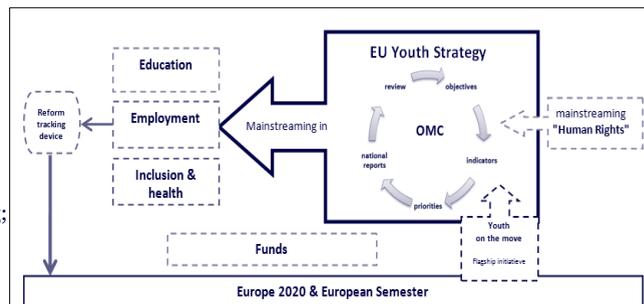
- **Investing in Youth:** putting in place greater resources to develop policy areas that affect young people in their daily life and improve their well-being.
- **Empowering Youth:** promoting the potential of young people for the renewal of society and to contribute to EU values and goals.

• Europe 2020 **Flagship initiative Youth on the move:**

1. improve young people’s education and employability
2. to increase the youth-employment rate

• Youth Employment Package – **NEETs**

1. Preventing early-school leaving;
2. Developing skills that are relevant to the labour market;
3. Supporting a first work experience and on-the-job training;
4. Access to the labour market: getting a (first) job



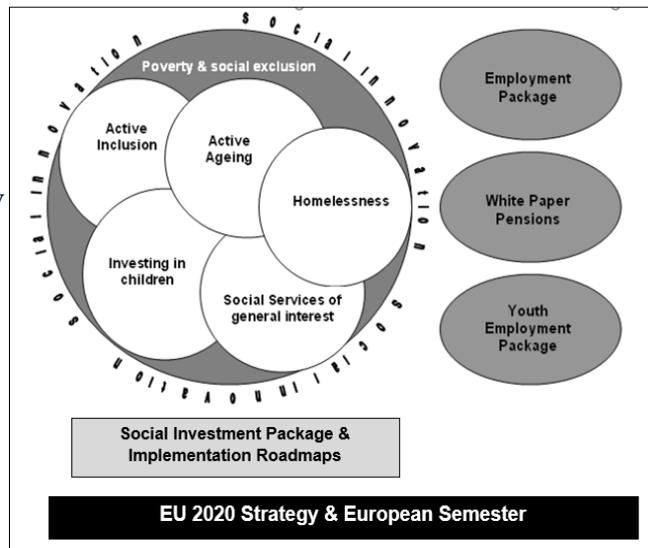
## 2. EU approach – Policy: old

- Art. 25 EUCFR **Rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life

- **Active ageing and intergenerational solidarity**

1. **Life long learning**
2. **Healthy working conditions**
3. **Age management strategies**
4. Employment services for older workers
5. Prevent age discrimination
6. Employment-friendly tax / benefit systems
7. **Transfer of experience**
8. Reconciliation of work and care



## 2. EU approach – Policy: young vs old

### Young

- Investment
- Opportunities
- Support



### Old

- Life cycle approach
- Support

### 3. Article 6 Directive 2000/78

#### Preamble (25)

differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.



### 3. Article 6 Directive 2000/78

#### Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, 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.
2. Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

### 3. Article 6 Directive 2000/78

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

### 3. Article 6 Directive 2000/78

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#### General attitude CJEU

- Lenient in accepting legitimate aim
  - Especially when social partners are involved
- Strict in evaluation appropriate and necessary



### 3. Article 6 Directive 2000/78

Examples legitimate aim

- the vocational integration of unemployed older workers (*Mangold*)
- the best possible allocation of posts for professors between the generations (*Georgiev*)
- to take into account the different cover needs for remuneration bands below and above the ceiling for the calculation of contributions (second pillar pension scheme) (*Kelinsteuber*)
- not to give young people stable access to the labour market, but merely to give them an initial opportunity of entering it (*Abercrombie & Fitch*)
- to exclude accreditation of professional experience acquired before full legal capacity has been attained, at the age of 18, in order not to place persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education (*Hütter*)
- to ensure the operational capacity and proper functioning of the professional fire service (*Wolf*)
- promoting access to training for young people and, consequently, improving their position on the labour market (*De Lange*)

### 3. Article 6 Directive 2000/78

**Appropriate** = suitable to reach the aim

**Necessary** = no other / no less harmful means to reach the aim

**How to assess this?**

- Age is passing
- Three approaches



## 4. Three approaches (theory)

### 1. Complete life view

- Average achieved/opportunities over the course of (working) life
- Acceptance disadvantaged treatment at certain ages
- Acceptance end of working life (retirement)

### 2. Fair innings argument

- Creating equal opportunities for all
- Intergenerational approach
- Acceptance that old should make way for young

### 3. Traditional human rights approach

- Human dignity
- Autonomy



CJEU has **not** made a choice what approach to apply

## 4. Three approaches (theory)

### 2. EU approach – Policy: young vs old



### Problem

**Fair innings** = favourable for young workers – older workers have to accept less favourable treatment to give young workers the same opportunities they have had

**Complete life** = disadvantageous for older workers – acceptance end of working life and average achievements over the course of life, including disadvantaged treatment at young age

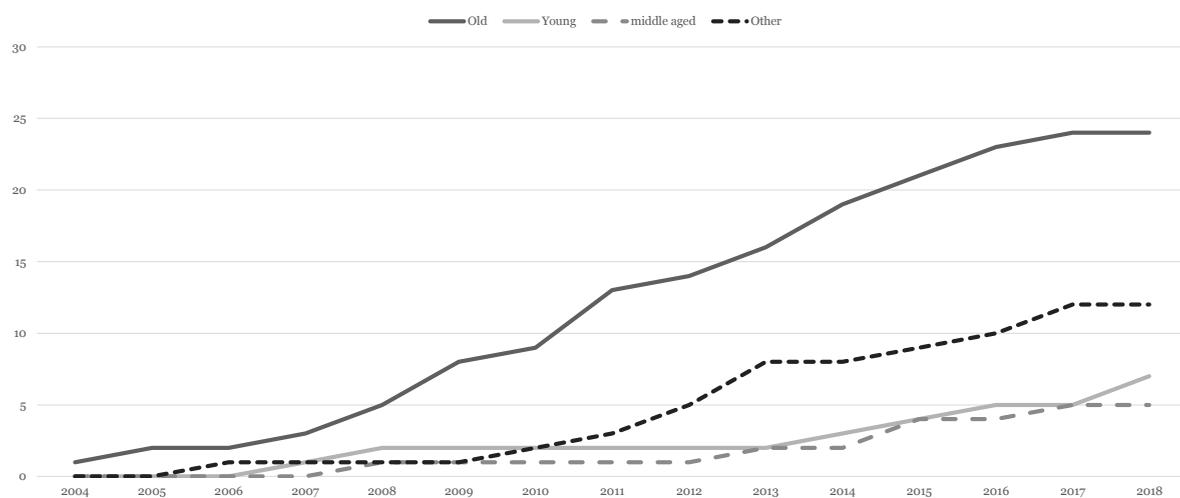
## 4. Three approaches (theory)

### Problem (continued)

When there are more measures under the complete life view accepted that negatively affect older workers than younger workers  
and

there are more measures under the fair innings argument that positively affect younger workers at the detriment of older workers,  
the overall picture is that younger workers are treated more favourably than older workers

## 5. CJEU Case law



## 5. CJEU Case law

Category	Topic	Rulings CJEU – measure precluded	
		Yes	no
Old	Mandatory retirement; fixed age for retirement; automatic termination	Commission v Hungary	Palacios de la Villa; Age Concern; Petersen; Rosenblatt; Georgiev; Fuchs & Köhler; Hörnfeldt
	Severance payment, etc. when at retirement age	Ingeniørforeningen i Danmark; Dansk Jurist; Rasmussen	Odar; Ingeniørforeningen i Danmark v Tekniq
	Retirement in physical requirements / capabilities	Prigge	
	Age related retirement contributions / limited entitlements to retirement schemes / other limitations related to retirement schemes		HK Denmark; Parris; Kleinstüber; Felber
	Prohibition combining retirement pension with other incomes		Florescu; SCMD
Young	Older workers and fixed term contracts	Mangold	Hubertus
	Age limitation on calculating years of experience / development of pay-grades / salary reductions	Küçükdeveci; Hütter	Lesar; Escibano Vindel; Horgan and Keegan
	Access to severance/compensation payments		O.
Middle-aged	Special types of employment contracts limited to age		Abercrombie
	Maximum age for recruitment	Vital Pérez	Wolf; Salaberria Sorondo
Other	Access limitations based on age		De Lange
	Reclassification measures to correct previously discriminatory measures / transitional system to protect established advantages	Starjakob; Schmitzer; Leitner	Hennings and Mai; Specht e.o.; Stollwitzer; Unland; Österreichischer Gewerkschaftsbund
	Relative age issues		Bartsch
	non-specific age and experience related issues		Tyrolean Airways; Bowman
	Miscellaneous		Pohl

## 5. CJEU Case law

Reasons not precluded	Old	Yng	M	Other	Reasons precluded	Old	Yng	M	Other
Not in scope / not on age	C			Bartsch; Pohl					
No discrimination on grounds of age	SCMD; Florescu	O; Escibano Vindel; Horgan & Keegan		Tyrolean airlines; Bowman					
Exception Article 6(2) FED	Parris	Lesar							
Access alternative income / income security	Palacios de la Villa; Age Concern; Rosenblatt; Georgiev; Hörnfeldt; Hubertus; Odar; Tekniq	Horgan and Keegan			Reduction in (alternative) income / interest persons not enough taken into account	Ingeniørforeningen i Danmark; Rasmussen; Dansk Jurist; Commission v Hungary			
Labour market situation taken into account	Petersen; Felber	Abercrombie	De Lange		Measure results in unequal treatment of persons in same age group		Küçükdeveci; Hütter		
Age indirectly – length of service (pro rata temporis)	HK Denmark; Kleinstüber				Age sole criteria	Mangold			
Age as job requirement / balanced age structure	Fuchs & Köhler; Werner Fries		Wolf; Salaberria Sorondo		Age as job requirement is inappropriate	Prigge		Vital Pérez	
Sufficient neutralisation previously discriminatory effect, incl. protection established advantages				Hennings & May; Specht e.o.; Stollwitzer; Unland; Österreichischer Gewerkschaftsbund	Insufficient neutralisation previously discriminatory effect				Starjakob; Schmitzer ; Leitner

## 5. CJEU Case law

	Not Precluded				Precluded			
	Old	Young	Middle-Aged	Other	Old	Young	Middle-Aged	Other
<b>Complete life view</b>	Palacios de la Villa; Age Concern; Hubertus; Petersen; Kleinsteuber; Rosenblatt; Hörnfeldt; Odar; HK Denmark; Ingeniørforeningen i Danmark v Teknik; Fejerskov-Danias	Lesar; Escibano Vindel; Horgan and Keegan		Tyrolean Airlines; Bowman	Mangold; Ingeniørforeningen i Danmark; Rasmussen; Dansk Jurist			
<b>Fair innings argument</b>	Georgiev; Fuchs & Kohler; Florescu; SCMD	O; Abercrombie	De Lange	Pohl; Hennings & May; Specht e.o.; Unland; Stollwitzer; Österreichischer Gewerkschaftsbund	Commission v Hungary	Hütter; Küçükdeveci		Starjakob; Schmitzer; Leitner
<b>Traditional anti-discr. approach</b>	Werner Fries		Salaberria Sorondo; Wolf		Prigge		Vital Pérez	

## 6. Conclusions

1. Age discrimination is treated differently compared to other discrimination grounds

2. Justification of direct and indirect discrimination is possible

3. CJEU is lenient in accepting legitimate aims related to employment, labour market and educational and training policies

4. CJEU is strict in the assessment of the appropriateness and necessity of the measure

5. Three ways to assess appropriateness and necessity

- Complete life view
- Fair innings argument
- Human rights approach

6. CJEU has not made a choice

7. Complete life view is often applied in cases related to older workers

8. Fair innings argument is often applied to protect young workers (at the cost of older workers)

Consequence: CJEU is discriminating in age discrimination cases

## Questions



**Advanced LLM Global and European Labour Law**

# Thank you for your attention



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