

Reflections on recent case law of the CJEU on age discrimination:
Hurrying slowly or going anywhere in particular?

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First the Big Picture

Historic Development

On **21 May 2024**, the UN Open-ended working group on ageing (OEWGA) adopted a decision recommending a binding document on the human rights of older persons

BUT

- will it be a **legally binding instrument** (convention) or **Optional Protocols** (on the protection and enjoyment of the human rights of older persons) **to existing Human Rights Treaties?**

And,

- when will it be realised?

It has taken 13 years and 900 documents to reach this point (GAROP, Joint Statement for OEWG 14, May 19, 2024)

Note,

- WHO, *Global Report on Ageism*, 2021

Found that one in every two people worldwide are ageist

Where are we now in Europe?

- The **European Continent** has the highest proportion of people over age 65 in the world (Statista 2023)
- and,
- Has the second oldest population in the world (World Economic Forum, 2023)

The European Union

The EU is experiencing rapid demographic change

- In **2023** children under 14 years = 14% of the population
- People between ages of 15 and 64 = 63.9% and,
- People over 65 years = 21.1% of the population and will reach 32.4% by **2100**
- **2025** will be the 25th anniversary of the adoption of the Race Equality **Directive 2000/43** and, the Employment Equality **Directive 2000/78** (religion or belief, disability, age, sexual orientation) (the twin Directives)

Time to celebrate the silver anniversary of the EED + RED?

What does it mean for age?

- Age is included among EU protected non-discrimination grounds
- Age benefits from a common core of provisions but,
- Certain exclusions and justifications apply for age and,
- The twin directives are not the whole equality story...
- Is age falling behind other grounds in the EU?
- Is age in fact the most inclusive ground of all?

General Exceptions to Dir. 2000/78 (all grounds)

Public Interest Measures

- **Article 2.5** “This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

Genuine Occupational Requirements (GOQs)

- **Article 4.1** “Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” (emphasis added)

Objective justification for indirect discrimination (all grounds)

Under Article 2.2.(b)i

An indirectly discriminatory provision, criterion or practice may be objectively justified by,

- a legitimate aim and,
- the means of achieving that aim must be appropriate and necessary
- Note: additional clause 2.2.(b)ii in relation to persons with a disability

Exception for disability and age

- **Article 3(4)** “Member States **may** provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.”

Early academic criticism: too broad? Note also recital 19

Justification of differences of treatment *only* on grounds of age

- **Article 6.1** Employment & vocational training
- **Article 6.2** Occupational social security schemes

Article 6.1

'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.'

Such differences in treatment may include,

- special conditions on access to employment for **young people, older workers and those with caring responsibilities,**
- **minimum conditions of age, professional experience or seniority for access to employment** or to certain advantages linked to employment and finally,
- **maximum ages for recruitment** which are **based on the training requirements of the post** or **the need for a reasonable period of employment before retirement** (emphasis added)

Age Discrimination in the CJEU – Highlights

- Age was the first ground before CJEU under the ‘twin directives’ in, *Werner Mangold v Rudiger Helm*, Case C-144/04
- By **24 May 2024** CJEU heard 116 cases on the 5 grounds in the twin Directives
- 64 of these on age discrimination, in nearly 20 years
- Age represents 55.17% of all cases on 5 grounds so far

How does this compare with sex?

- c. 269 cases on equality between men and women in 53 years
- 64 age cases in nearly 20 years = 23.7% of sex cases in 53 years

The state of play in 2024 - Most litigated fields

➤ 1st Pay (mainly state sector)

➤ 2nd Pensions

➤ 3rd Retirement / exclusion retired persons

4th Max age recruitment/access/GOQ

4th Dismissal/redundancy/severance

5th Fixed term contracts (FTC)

5th Max age to practise, Art. 2.5 public health/safety/security/rights and freedoms of others

Note: a small number of cases cross two fields

& these categories fluctuate greatly e.g. in 2011 retirement was in the lead!

Where do referrals come from?

Germany	20
Austria	15
Denmark	6
Italy	5
Spain	4
Ireland	3
Romania	3
8 States x	1

12 Member States have not referred any age discrimination cases yet

Interpretation of Substantive Provisions

Article 6.1 (Justification)	39 (60.9% of age cases)
Article 4.1 (GOQ)	6
Article 2.5 (Public Interest)	4
Article 6.2 (Occupational pensions)	4
Other (enforcement, abuse of rights etc)	4

Note: some overlap/crossover here too

Note: increase in cases involving **Article 2.2(b)** (indirect discrimination)

Recent Cases of the CJEU

13 cases between 2020 and 24 May 2024, 8 concern **Art. 6.1**

- **Austria 4** 3 x pensions (2 Civil Servants, 1 company 51% state owned) 1 seniority civil servants' pay
- **Italy 3** 1 max age limit 30 police commissioner, 1 max age limit 50 notary profession, 1 exclusion of retired persons from municipality job
- **Germany 2** 1 acquired rights of judges and civil servants + retrospective payment, 1 job offer age limit for personal assistant for student with disability
- **Romania 2** 1 university lecturers without doctoral supervisor status, only FTCs after retirement, 1 higher salary for some judges than others
- **Greece 1** reduction of pay public sector workers close to retirement, time of acute economic crisis
- **Denmark 1** scope of Dir. 2000/78 age limit for union sector convenor

Themes from selected recent cases

- Interpretation of indirect discrimination
- *Disability rights and Age rights* conflict or harmony?
- Development of law on age limits under Articles 4.1 & 6.1
- Are grounds in Art. 1 Directive 2000/78 exhaustive?
- Appreciation of the benefits of work to older workers?

A period of further refinement?

Deeper understanding of older workers?

Insight into conflict of rights...

Indirect discrimination

1) *CO v Commune di Gesturi*, Case C-670/18, 2 April 2020

- Retired private or public sector employees prohibited from paid consultancy roles in municipality
- CJEU: prohibition on retired persons based indirectly on a criterion linked to age (retirement)

amounted to an indirect difference in treatment under Art. 2.2(b), could it be justified under Art. 6.1? Interesting language/approach...

Two aims a) revise public expenditure/reduce operating costs and, b) rejuvenation of public sector personnel by promoting employment of young people (see Article 6.1(a))

- a) Cannot be a legitimate aim on its own and b) ‘unquestionably constitutes a legitimate aim,’ para. 37
Were means appropriate and necessary? **Did the law unduly prejudice the legitimate aims of retired persons?** Although, based on age of retirement pension, it would be relevant to take account of the level of retirement pension, was it reasonable? Paras. 48-49

CJEU: 1) the prohibition of age discrimination must be read in light of the right to engage in work, Art. 15(1) EU Charter 2) “particular attention must be paid to the **participation of older workers in the labour force and thus in economic, cultural and social life. Retaining older workers....promotes diversity in the workforce,**” 3) but their continued employment “must be taken into account in respecting other potentially divergent interests,” para. 44

2) **YS v NK AG**, Case C-223/19, 24 September 2020

- YS retired employee of NK, a 51% state owned company, received occupational pension since 2010
- From 1/1/2015 NK withheld part pension and cancelled indexation above certain thresholds, per new Austrian law
- Measure fell within the scope of both Dir. 2000/78 and Dir. 2006/54 (equal treatment of men and women)
- Age Discrimination
- Did Dir 2000/78 preclude the legislation, where an amount of pension is withheld, indexation is cancelled and, it only affects recipients above a certain age?
- CJEU applied the same test as for indirect discrimination on grounds of sex, thus **indirect discrimination on grounds of age “can be established only if it is shown that national legislation has a negative effect, without justification, on a significantly higher proportion of persons of a certain age compared with other persons...it is necessary to take into consideration all those workers subject to the national legislation...”** Para. 71

2) *YS v NK AG*, continued...

- The national court had not indicated whether among the persons in scope, a significantly higher proportion of persons is put at a disadvantage by the legislation, para. 74
- Arts. 2.1 and 2.2(b) must be interpreted as not precluding the legislation...on the sole ground that the legislation affects only recipients above a certain age
- Note: also not precluded on grounds of sex...

Also interesting for,

- The CJEU found that Articles 16, 17, 20 and 21 of the EU's Charter must be interpreted as not precluding such legislation of a Member State
- Note arguments on **discrimination on grounds of property** in Article 17(1) Charter, the CJEU held that a contract for an occupational pension generates a proprietary interest but the right in Art. 17(1) is not absolute, it cannot be interpreted as entitling a person to a pension of a particular amount... paras. 85 & 90-92
- Note: Article 25 Charter, Rights of the Elderly not invoked...

Age and Disability

- Conflict of rights not addressed ‘generically’ by the twin Directives (Robin Allen KC, ‘Article 13 EC, evolution and current contexts,’ in H. Meenan Ed. *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, (Cambridge, 2007))
- But note recent case law of CJEU and note Article 2(5) Dir. 2000/78

JMP v AP Assistenzprofis GmbH, C-518/22

- A 28 year old female student with a disability, applied for a personal assistant
- AP advertised a job for a female, ‘preferably between 18 and 30 years old’ to help in all areas of life
- JMP aged 50 years was rejected
- German law ‘...the legitimate wishes of persons entitled to receive services shall be respected...account shall be taken of the personal circumstances, age, sex, family and religious philosophical needs of persons entitled to receive services.’
- Q: whether Arts. 2.5, 4.1 6.1 read in light of the Charter and Art. 19 UN Convention, preclude recruitment of personal assistant subject to an age requirement where national law requires account to be taken of the individual wishes of persons entitled to personal assistance as a result of their disability?
- examined under Art. 2.5 ‘...the protection of the rights and freedoms of others.’
- The objective of the rule: to protect the self-determination of persons with disabilities...by giving them the right to express their wishes and to make choices freely...since those services concern all areas of life...

***JMP v AP Assistenzprofis GmbH*, C-518/22 continued...**

- The candidate had to be able to fit into A's personal, social and university circle, para. 64
- Art. 2.5 read in light of Art. 26 Charter + Art. 19 UN CRPD did not preclude recruitment subject to an age restriction where account is to be taken of individual wishes of person entitled to assistance...
 - **Max. age limit recruitment police commissioner**
 - ***VT v Ministero dell'Interno*, C-304/21**
- Competition for 120 police commissioner posts, age limit 30 years
- VT already 30, therefore online application impossible
- VT sued, allowed to apply and passed pre-selection tests but age limit deemed 'reasonable'
- CJEU Age restriction was a difference in treatment based on age, was it justifiable under Art. 4.1 or 6.1?
- **Art. 4.1** Possession of 'particular physical abilities' is one characteristic relating to age and police may require physical force BUT was police commissioner a more managerial/administrative role?

VT v Ministero dell'Interno continued...

- National Court must decide if having regard to duties performed **on a regular basis** by police commissioners, possession of particular physical capacities is a GOQ
- Aims: to ensure operational capacity and proper functioning of the police force (accepted in *Vital Perez* and *Salaberria Sorondo*)
- CJEU distinguished this case from *Wolf*, C-299/08 (firefighters, 'exceptionally high levels'...)
- Max. age limit of 30 imposed a disproportionate requirement, CJEU did not think police commissioner duties require 'exceptionally high physical capacities' paras. 59-61
- Where there is no need to restore a satisfactory age pyramid, **“the existence of an eliminatory physical fitness test in the competition would ...constitute an appropriate and less onerous measure than the fixing of a maximum age limit of 30 years...”** para. 66-67
- see also **Art. 6.1** Could it be justified under Art. 6.1.(c) training requirements + reasonable period of employment before retirement? Are means appropriate and necessary?
- Retirement age of state police was 61, therefore cannot be considered necessary in light of Art. 6.1.(c), measure precluded by Articles 2.2, 4.1 and 6.1 read in light of Art. 21 Charter

Two cases from Romania confirm grounds of non-discrimination in Art. 1 Dir. 2000/78 are listed exhaustively

1) *FT v Universitea 'Lucian Blagu' Sibiu & Ors, C-644/19*

- Lecturers who reach age 65 (statutory retirement age) without status of doctoral supervisor can continue only with FTC and lower pay than tenured lecturers
- Such difference in treatment is based on 'professional category' (not even indirectly on age) and outside scope of Dir. 2000/78
- BUT was precluded by Art. 4.1 of the Framework Agreement on fixed-term work-
- Was the different treatment between permanent workers and fixed -term workers justified on objective grounds?
- No: objectives to address increase in number of professors and lecturers compared to non-tenured teaching staff + financial balance between sustainability and the university's development
- CJEU found these amounted to personnel management + budget considerations not based on objective and transparent criteria, paras. 50-53

2) *Curtea de Apel Alba Iulia & Ors. V YF & Ors., C-301/21*

- Between 2006 to 2009 the majority of judges in Romania sued for a pay increase
- From 1 January 2010 a new law calculated salaries for *all* judges but existing judges received retrospective payments until 2015
- Referring court asked if judges employed after 1/1/2010 were in a less favourable situation because of their age as they were not in post at the relevant time
- CJEU: no direct age discrimination and, as the referring court had not identified any specific category of judges at a disadvantage associated with age, no indirect age discrimination either, para. 54
- The national court asked if Dir.2000/78 precludes discrimination only where it is based on criteria in Art. 1 or, do they “possibly supplemented” by other provisions of EU law, preclude one employee from being treated differently from another regarding pay, where he performs the same work, for the same employer during the same period under the same conditions? (emphasis added)
- The criterion is in no way connected with age or any ground in Dir. 2000/78, which could not be ‘supplemented’ by other EU provisions, which the national court did not specify...

Concluding thoughts...

- A sense that ordinary claimants' cases might not be coming before the CJEU – factors at national level too?
- Case law often dominated by state employees including judges, those who already enjoy relatively good job security and terms of employment
- Case law also dominated by issues relating to pay, pensions...
- Protection from age discrimination is particularly incomplete, needs legislation on multiple and intersectional discrimination and,
- A Directive prohibiting discrimination outside the employment field is necessary for example,
- If we care about long-term care in the EU, the need for this will rise by 21% between 2020 and 2070 (M. Belmonte et al., *Demographic micro simulation of long term care needs in the European Union*, (Publication Office of the European Union, 2023))
- and not everyone is an employee...

Do we know where we are going to?

- **2 July 2008** Proposal for a Council Directive on equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation other than in the field of employment and occupation, (COM(2008) 426 final)
- **24 April 2024** a new re-drafted Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in fields outside employment

Includes, discrimination based on a combination of these grounds + a combination of one or more of these grounds + any of the grounds protected under Directive 2000/43/EC, Directive 2004/113/EC and Directive 79/7/EEC (Racial or ethnic origin, sex and equal treatment of men and women in matters of social security, respectively)

- Enormous potential for older persons but,
- Previous proposal of 2008 drifted for 16 years...

- Expansion of non-discrimination grounds must likely await future legislation!