Age Discrimination in the light of the CJEU case law

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Rasmussen

The debate over *Mangold* and *Kücükdeveci* has escalated[2] with *Rasmussen*[3] suggesting that the general principle prohibiting discrimination on grounds of age is given concrete expression in employment and occupation by the Directive and therefore that there is a requirement if it is established that a domestic law conflicts with the general principle, national courts are not entitled to balance the general principle against legal certainty and protection of legitimate expectations and then conclude these take precedent over the general principle.

The national courts ("the courts") must provide the legal protections which individuals derive from EU law and must ensure that those provisions are fully effective.

Directives do not impose duties on individuals, but have a duty to achieve the result envisaged by the Directive and must take all appropriate measures (general or particular) to achieve that result.

This principle cannot be the basis for interpretation of national law against other general principles of law ("*contra legem*"). However the fact that a provision of national law has been consistently interpreted in one way is no basis for refusing to apply EU law.

Even if the courts think it impossible to arrive at a national law interpretation consistent with the Directive, they must provide that full and effective individual legal protection and, if necessary, disapply any provision of national law contrary to EU law.[4]

The effect of this is that the general principle confers an individual right which persons may invoke as such. The fact that litigants may have legitimate expectations of the continued application of the inconsistent law is irrelevant, and would create illegitimate temporal limitations on CJEU judgments. The existence of claims against the state for non-implementation also makes no difference.

Thus, even in disputes between private persons, the courts must disapply non-compliant national law provisions.[5]

In *Lindorfer*[6] AG Sharpston had suggested that the comparability of situations is less rigorous in cases in which the general principle of equal treatment is relied upon, as opposed to the rules defined in the Directive.[7] The CJEU has now stated that the Directive is a more specific expression of the general principle. Therefore, its application

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[2] *Mangold v Helm* C-144/04 [2005] ECR I-9981, para 74 and *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 33 paragraphs 20 and 21.

[3] C441/14. *Dansk Industri (DI), acting on behalf of Ajos A/S,v Estate of Karsten Eigil Rasmussen*.

[4] Rasmussen [35].

[5] See *Rasmussen*, (para 36) citing C 176/12 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, [2014] EUECJ C-176/12.

[6] Opinion of AG Sharpston 30 November 2006, Case C-227/04 *P Maria-Luise Lindorfer v Council of the European Union*.

[7] Lindorfer [21-23 and 60 ff]. See also the recent suggestions that direct discrimination could be "justified" without breach of the general principle from AG Kokott in *C-157/15 Achbita v G4S Secure Solutions NV.* For my commentary on that Opinion (in English only) see http://www.cloisters.com/blogs/samira-achbita-v-g4s-secure-solutions-nv-a-dangerous-new-concept-of-direct-discrimination

is a consistent subset of the general principle. Comparability cannot be different. The CJEU's suggestion in *Rasmussen* concerning the Directive's role creating exceptions to the application of the general principle is a better approach. The same principle is at work and the same concept of comparability is used, but the Directive creates clear derogations.

Is there any discrimination? Comparability

Sometimes courts have struggled with making comparisons to see if there is direct (or indeed indirect) discrimination. *Tyrolean Airways Tiroler Luftfahrt Gesellschaft*[8] concerns the importance of comparability of situations.[9] It considered a provision in a collective agreement relating to group companies in the airline industry. The Agreement took into account experience acquired as a cabin crew member from the date of recruitment by airline company 1 for pay grading. It was alleged that this was *indirect age discrimination* because the agreement did not take account of the skills and knowledge of older workers acquired with airline 2. Cabin crew who had acquired experience with airline 1 obtained advancement at an earlier stage than those who had it from airline 2. There was no indirect discrimination as there was no evidence of a link between the starting age of employees at the airline 1 and the criteria. The difference is neither, directly nor indirectly, based on age or on an event linked to age.

> "It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment".

The court's language may suggest that there must be an inextricable or indirect link to the age of employees. However, it identified a difference in circumstances between the comparative groups that made the difference which did not relate to age, and was material to the analysis. What made the difference was not the length of experience, but the length of service with the airline 1. This is not a length of experience rule, but a length of service-with-an airline rule.

Justifications before Article 6(1)

Recently more attention has been given to the order in which one should consider the exceptions which might apply to the general principle of equal treatment in relation to age in particular:

1. Do any of the exceptions under article 2(5) apply?
2. Does the treatment amount to a genuine and determining occupational requirement under Article 4?
3. Do the principles of article 6(2) apply because the treatment relates to certain features of occupational social security schemes?
4. Finally can the treatment be justified under Article 6(1)?

Article 2(5)

The CJEU in *Petersen*[10] considered legislation relating to a specific profession which prohibited practice as a public panel dentist after 68. Its aims, of protecting the health of patients (and controlling public health expenditure), were legitimate. The CJEU considered the exception in Article 2(5) for measures "necessary . . . for the protection of health". It held that prohibiting such practice but not private practice after 68 was

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[8] *Tyrolean Airways Tiroler Luftfahrt Gesellschaft* C-132/11, see [29].

[9] The CJEU has encouraged courts to be specific about comparability: "it is required not that the situations be identical, but only that they be comparable and"…"the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of "[the subject matter of the case] Case 432/14 *O v Bio Philippe Auguste SARL* [32].

[10] *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] 2 CMLR 31.

inconsistent with protecting patients' health.[11] Thus it was not necessary to have the panel dentist retire at 68 in order to protect patient health if you let him or her continue working as a private dentist.

Genuine and Determining Occupations Requirements (GDOR)

Article 4 of the Directive permits states to legislate to permit age based differential treatment, where, because of the nature of the occupational activity or its context a characteristic related to age constitutes a genuine and determining occupational requirement, if the objective is legitimate and the requirement is proportionate.

Wolf v Stadt Frankfurt am Main:[12] a regulation set firefighters' maximum recruitment at the age of 30. This could be justified under Article 4(1), as the physical capabilities required for the job were related to age. Note that there was evidence offered for the link between the characteristic and age.

Perez v Ayuntamiento de Oviedo: concerned maximum recruitment ages and Article 4. Spanish laws permitted setting a maximum age for access to the police force, and some authorities set it at the age of 30. The CJEU held that the courts must identify a characteristic related to age which constitutes the GDOR in Article 4. If there is evidence of a link between age and a particular physical capacity, it could be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) for the purposes of employment as a local police officer. Further ensuring the operational capacity and proper functioning of the police service constitutes a legitimate objective in Article 4. However, recital 23 the Directive states that Article 4 applies in 'very limited' circumstances: as a derogation it is strictly interpreted. Evidence must show that the characteristic is inevitably related to a particular age and is not found in persons (over or under) that age.[13] Proportionality could then be considered: Different authorities had different ages and some had none, as did the national police force. The CJEU noted *Wolf* was based on a finding "on the basis of scientific data submitted to it, that some of the tasks of persons in the intermediate career of the fire service, such as fighting fires, required 'exceptionally high' physical capacities and that very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities".[14] The national court had found in Perez that the physical capacities required were not of that high capacity. Therefore, the local law was disproportionate under Article 4.[15]

Article 6 provided no justification. The legitimate aims were "based on the training requirements of the post in question and the need for a reasonable period of employment before retirement or transfer to another activity." However, the broad discretion in the choice of measures capable of meeting State objectives could not frustrate implementation of non-discrimination. The objective concerning training requirements was not evidenced. Nothing showed that the age limit for recruitment was appropriate and necessary for that aim.

A maximum recruitment age of 30 could not be considered necessary to ensure that officers have a reasonable period of employment before retirement.

Article 6(2)

[11] *Petersen* [63, 64].
[12] *Wolf v Stadt Frankfurt am Main,* Case C-229/08.
[13] *Perez v Ayuntamiento de Oviedo* C-416/13 [48].
[14] *Perez* [52-3].
[15] The CJEU will have another opportunity to deal with Article 4(1) in C-258/15 *Salaberria Sorondo v Academia Vasca de Policía y Emergencias* in which the question referred states: "Is the setting of a maximum age of 35 years as a condition for participation in the selection process for recruitment to the post of officer of the police force of the Autonomous Community of the Basque Country (Policía Autónoma Vasca) compatible with the interpretation of Article 2(2), Article 4(1) and Article 6(1)(c)?"

The terms of Article 6(2) must be strictly satisfied.
Article 6(2) states that Member States may provide that the fixing, for occupational social security schemes ("OSSS"), of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age. This exception to the principle of non-discrimination on grounds of age must be interpreted restrictively. It applies only to occupational social security schemes that cover the risks of old age and invalidity, and not all aspects of an OSSS covering such risks come within the exception. It is only those that are expressly referred to in Article 6(2). In *Lesar v Telecom Austria AG* [16] the CJEU took a definition of "occupational Social Security Scheme" from a gender Directive[17] OSSS are 'schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'.

The scheme in *Lesar* fixed the age from which members began to pay contributions to the civil service pension scheme and acquired the right to receive a full retirement pension in order to guarantee, inter alia, equal treatment of civil servants in that respect. The CJEU held that the legislation sought to ensure the 'fixing … of ages for admission or entitlement to retirement or invalidity benefits' within the meaning of Article 6(2), and was therefore within the exception created by Article 6(2).

In *Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet,*[18] the employer refused to grant "availability pay" to the claimant because he was aged 65 and in an Occupational Pension Scheme ("OPS"). It was paid for three years to civil servants who had been dismissed because their post had ceased to exist. It was conditional on them being available to take up any suitable post which they might be offered during that period. It was not paid to those aged 65 and over. At that age civil servants became entitled to draw their pension although they were not obliged to retire until the age of 70. The CJEU held that Article 6(2) only exempts occupational social security schemes defined in Art 6(2). Even if availability pay was part of an occupational social security scheme, it was not a retirement benefit, nor invalidity benefit. The derogation under Article 6(2) did not apply because the list of exceptions under it is supposed to be exhaustive.

There was a difference of treatment based on age. Both civil servants who wished to retire and civil servants who wished to pursue their professional career within the public administration beyond the age of 65 were excluded from receiving availability pay. The aim of the measure was to prevent availability pay being claimed by persons who were not seeking to take up a new post but who would receive a replacement income in the form of a retirement pension.

In *HK Danmark v Experian A/S,*[19] the Court of Justice considered that OPS contributions were within the scope of the Directive because they constitute part of pay. Article 6(2) excludes only occupational social security schemes covering risks of old age and invalidity but which are not pay.

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[16] C-159/15 *Lesar v Telekom Austria AG*, [27]. This case deals with a point first raised but not answered in Case C-529/13*, Felber v Bundesministerin für Unterricht, Kunst und Kultur*.
[17] Directive 2006/54/EC of the European Parliament and of the Council 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
[18] [2013] EUECJ C-546/11 (26 September 2013).
[19] HK Danmark, v Experian A/S C-476/11.

Article 6(1)

Article 6(1) operates as a derogation from the principle of equal treatment in relation to direct discrimination based on age. It is construed narrowly therefore.

Having identified a difference of treatment which is based on age, the question of whether that constitutes direct age discrimination depends on whether it is possible to justify the treatment by reference to certain types of aims.

To justify direct age discrimination, the aim cited must relate to "employment policy, the labour market or vocational training", and not "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness".[20] Consistency with employment policy aims is insufficient. The measure must have such an aim. There are fewer aims which can justify direct discrimination than those justifying indirect discrimination.

The need for a public interest *employment policy* aim was emphasised starkly in *Prigge and Others.*[21] The Grand Chamber found that a collective agreement providing for the employment of Lufthansa pilots to terminate automatically at the age of 60 could not be justified.

The justification did not fall to be considered under Article 6(1) because the suggested aims had to do with the safety and security of air travel. As these were not related to employment policy etc., they needed to be considered either within Article 2(5), or (in relation to the physical capabilities required for flying a plane) within Article 4(1). Neither international nor national legislation considered that an absolute ban at the age of 60 was necessary to achieve these aims, so the rule could not be justified under these derogations either.

Courts should always clarify what is meant by the Defendant's stated aim. Thus employee flexibility is not a legitimate aim in itself. It might be a means to other aims.[22] Legitimate objectives must have a public interest nature. Mere flexibility of the workforce does not.

The case law has identified two main types of aim alleged by employers into which aims generally fall:[23]

(i) *inter-generational fairness.* This means, depending upon the circumstances of the employment:
   a. facilitating youth access to employment;
   b. enabling older people to remain in the workforce;
   c. fairly sharing limited opportunities to work in a profession between the generations;
   d. promoting diversity and the interchange of ideas between younger and older workers.

Dignity e.g. avoiding the need to dismiss older workers on the grounds of incapacity or underperformance (preserving their dignity and avoiding humiliation); or as avoiding the need for costly and divisive disputes about capacity or underperformance.

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[20] *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07 [46] "…social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers."

[21] Prigge and others v Deutsche Lufthansa AG, Case C-447/09 ECLI:EU:C:2011:573.

[22] See AG Bot in *Kücükdeveci* AG 44-49.

[23] This synthesis is based on [50] of the UK Supreme Court's decision in *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16 (25 April 2012) URL: http://www.bailii.org/uk/cases/UKSC/2012/16.html and see paragraphs 32 and following of that decision.

In *Age Concern England,* the CJEU held that states are not required to draw up a list of differences in treatment which might be justified by a legitimate aim, [24] if it is possible to identify the aim in order to review whether it is legitimate and the means of achieving it are appropriate and necessary. [25]

The degree of scrutiny of aims which should be adopted is suggested by the following passage:

> ". . . it is important to note that [article 6(1)] is addressed to the member states and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued."[26]

Thus a national court should drill down into the ultimate aim of the employer, and ask whether that is legitimate in the sense given by the court.

A good illustration of this is *Kücükdeveci.* The CJEU considered the justification of a law which calculated the length of (service related) notice of termination to which employees were entitled. The law disregarded all service pre-25. Facilitating the recruitment of young people (who it was said could react more easily to the loss of their jobs) by increasing the flexibility of personnel management did "belong to employment and labour market policy" within the meaning of Article 6(1),[27] and appears to have been considered legitimate. However the flexibility aimed at was not flexibility as an end in itself, but as a means to encourage recruitment of young people. Flexibility is not a legitimate aim when viewed in isolation. The flexibility here aimed at enhancing intergenerational fairness. That was why it was legitimate.

In *Fuchs and another v Land Hessen*,[28] the aims of the retirement age scheme[29] were
1. intergenerational balance,
2. efficient planning of the departure and recruitment of staff,
3. encouraging the recruitment or promotion of young people,
4. avoiding disputes about older employees' ability to perform their duties[30]; and also
5. promoting interchange between the experience of older colleagues and the recently acquired knowledge of younger ones. All of these could constitute legitimate aims.[31]

Finally, in *Commission v Hungary*[32] the CJEU noted that aims such as standardisation of retirement ages (ensuring the elimination of inequalities), and the creation of age balance in a sector were legitimate aims. The case law does not appear therefore to have broadened out the two general types legitimate aim identified by the earliest cases. For example, standardisation of retirement ages is a means to the aim of ensuring opportunities are shared fairly between the generations in a consistent way (i.e. intergenerational fairness).

In *Ingeniørforeningen i Danmark v Region Syddanmark,*[33] a Danish law facilitating severance allowances resulted in differential treatment. It did not apply to people

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[24] *Age Concern England* [43].
[25] *Age Concern England* [44, 45].
[26] *Age Concern England* [65].
[27] *Kücükdeveci* [35, 36].
[28] C-159/10 and C-160/10 Fuchs and another v Land Hessen [2011] 3 CMLR 4.
[29] Permanent civil servants retired at the end of the month in which they reach the age of 65 (age limit) but could have a yearly further employment up to a maximum age of 68 if it was in the interests of the service.
[30] Fuchs [47]
[31] Fuchs [49-50].
[32] C-286/12 Commission v Hungary [59]
[33] *Ingeniørforeningen i Danmark v Region Syddanmark*, Case C-499/08 [2011] 1 CMLR 35.

dismissed when they had qualified for a retirement pension. The severance allowances were aimed at facilitating transition to new employment for those finding it difficult to obtain new employment because of the length of time they had been with their old employer. (The aim therefore was integration of older workers into the workforce with dignity).

A case which might (but does not) suggest a broader set of aims is *Georgiev v Tehnicheski Universitet Sofia, Filial Plovdiv*. [34] Professors were justifiably compulsorily retired when they reached 68 and could only work beyond 65 on one year fixed term contracts (renewable twice), if retirement pursued an aim such as the **delivery of quality teaching and the best possible allocation of posts for professors between the generations**. This might be analysed as a case concerning intergenerational fairness as the "delivery of quality teaching", in and of itself is a contentious aim. There would have to be substantial evidence of a decline in performance related to age before it could be said that unless you have a retirement age quality teaching would be effected. Only in those circumstances could the aim of providing "quality teaching" be regarded as a legitimate aim. Much will depend on the facts of each reference. In fact, in *Georgiev,* there was evidence of a need to create a more age balanced workforce. The average age of Bulgarian professors was 58 and younger people were generally not interested in entering academia. There was therefore an apparent real need to encourage younger entrants. It was left to the national court to decide whether these actually were the aims of the Bulgarian legislature.

Supporting collective bargains: The public interest can be served by collective bargains and some cases have found aims to be legitimate in part because the social partners had agreed on them. [35] However in such cases the aim cannot merely be promoting collective bargains between social partners. This was suggested as a possibility in Prigge (AG Opinion) but was not pursued.

Cases involving aims derived from collective bargains include:

- *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 33
- *Rosenbladt*[36] where a clause in a collective agreement for a sector provided for automatic termination upon entitlement to a retirement pension or, at latest, the end of the month in which 65 was reached. Legislation supported such agreements, which were listed as justifiable when appropriate and necessary. The legislation's aims included sharing employment between the generations; making it easier for younger workers to find work, particularly in a time of chronic unemployment; protecting the rights of older workers whose pensions serve as replacement income; and not requiring employers to dismiss older workers on grounds of incapacity, which may be humiliating.[37]

Appropriate and necessary (proportionality)

The states (and social partners) have broad discretion in the choice both of the aims and means to pursue them.

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[34] *Georgiev v Tehnicheski Universitet Sofia, Filial Plovdiv*, Joined Cases C-250/09 & C-268/09 [2011] 2 CMLR 7

[35] See *Rosenbladt* (below), and e.g. *Félix Palacios de la Villa v Cortefiel Servicios SA*, Case C-411/05 European Court Reports 2007 page I-08531 where legislation permitted collectively agreed compulsory retirement. The encouragement of recruitment was legitimate. The states (and social partners) enjoyed a broad discretion in the choice both of the aims and means to pursue them. The measure did not unduly prejudice the legitimate claims of the workers because it was based, not only on a specific age, but also on having qualified for a pension.

[36] *Rosenbladt v Oellerking GmbH*, Case C-45/09, [2011] 1 CMLR 32.

[37] Rosenbladt [43-45].

Appropriate: The aims in *Hutter*[38] were contradictory and so the law was not "appropriate" to achieve them.[39] Aims should not be self-contradictory. In *Petersen* risk avoidance was a legitimate aim. Retirement might be necessary if there were too many panel dentists or a "latent risk" of such excess (a matter for the national court).[40] In *Kücükdeveci* the law was not "appropriate" because it applied to all employees who joined before the age of 25 irrespective of their age at dismissal. Nor was it appropriate to the aim of strengthening the protection of workers according to their length of service.[41]

By contrast in *Rosenbladt*[42] legalizing collective agreements on retirement did not prejudice the legitimate interests of the workers concerned. They were based not only on age but also on entitlement to a replacement income. The collective agreement was an important justification factor:

> "That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question (*Palacios de la Villa*, [74])."

So the CJEU upheld the national law, but emphasised that the collective agreement implementing it must itself pursue a legitimate aim in an appropriate and necessary manner.[43] The clause offered stability of employment and the promise of foreseeable retirement while offering employers "a certain flexibility" in the management of their staff, thus reflecting "a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment" It was not unreasonable for social partners to regard the clause as appropriate.[44]

Necessity:
Rosenbladt considered the significant financial hardship caused to workers in the commercial cleaning sector, where poorly paid part time employment is typical. It considered whether there were less onerous measures. After retirement age people could continue to work, and whilst finding work were protected against age discrimination. They were not forced to withdraw from the labour market. So the Directive permitted the measure. [45]

Syddanmark[46]*:* not inappropriate to exclude persons from claiming a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment because they had qualified for a pension and actually intended to retire. However, it was not necessary to exclude those who wished to waive their pension claims in order to try to continue working. So the measure was precluded.

HK Danmark v Experian A/S:[47] The aim of the scheme was to enable older workers, who entered the service of the employer at a later stage in their working life, to build up reasonable retirement savings over a relatively short contribution period. Young workers in the same scheme could at an early stage have at their disposal a larger proportion of

[38] David Hütter v Technische Universität Graz, Case C-88/08.
[39] Hütter [46-50].
[40] Petersen [73-77].
[41] *Kücükdeveci* [40-41].
[42] Rosenbladt [47-49].
[43] Rosenbladt [53].
[44] Rosenbladt [68-69].
[45] Rosenbladt [71-75].
[46] Syddanmark [34-35] and [44-47].
[47] HK Danmark, v Experian A/S C-476/11.

their wages. The scheme took account of the lower rate of employee contribution that was applied to them. It therefore gave a means for all employees to amass reasonable retirement savings, to use when they retired.

Aims which take account of the interests of all employees, in the context of social, employment and labour market policy concerns, with a view to ensuring retirement savings of a reasonable amount when an employee retired, can be regarded as legitimate aims. They have the necessary public interest nature.

Proportionality was left to the national court.

Dansk Jurist: the CJEU noted that the law deprived those wanting to remain in the labour market of the entitlement to availability pay simply because they could because of their age, draw a pension. This might force them to accept a pension lower than that to which they would be entitled if they remained in employment for more years. This would particularly happen if they had not made contributions for a sufficient number of years to be entitled to draw a full pension. The aims could be achieved by less restrictive, but equally appropriate, measures and as civil servants who were eligible to draw a retirement pension were automatically excluded from receiving availability pay, the legislation went beyond what was necessary to ensure the objectives.

Fuchs referred to the non-frustration of the aims of the Directive emphasising that this must be read in the light of the fundamental right to engage in work. Particular attention must be paid to the participation of older workers in the labour force. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life. This interest must be taken into account in respecting the other, potentially divergent, interests.

> "Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (see Palacios de la Villa, [68] and [69]). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (…Palacios de la Villa … [69], [71] …Rosenbladt… [44])."[48]

Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim within Article 6(1).[49] The retirement age scheme[50] might be appropriate to the aim of facilitating access to employment by younger people, in a profession where the number of posts is limited. Nor did it go beyond what was necessary to achieve its aims, given that the prosecutors could retire at 65 on generous pensions, continue working until 68, and practise as lawyers after leaving.[51]

Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai[52]*:* the CJEU held that determining pay grades by reference to age at first appointment could not be justified. Rewarding experience was a legitimate aim (see *Hütter*), but while length of service was appropriate to achieve that aim, age did not always correlate with experience.

Practical approaches & indirect discrimination

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[48] Fuchs [62-65].
[49] Fuchs [74].
[50] Foot note 27 above
[51] Fuchs [68].
[52] *Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai,* Joined Cases C-297/10 and C-298/10, ssee [74-76].

In *Valeri Hariev Belov*[53] the AG considered the approach to justification which it is suggested ought to apply to direct age discrimination cases:

1. the fact that the reasons for a measure are "generally known" does not release the Defendant from proving that the principle of equal treatment has not been breached; how well known the motives for the undertaking's conduct are does not say anything about their justification and in particular their proportionality;
2. A measure is appropriate if it is suitable for achieving the legitimate aim pursued; this means that the measure *can actually* achieve the aim.[54]
3. "It should be noted that the suitability of a measure must always be assessed having regard to the aim pursued by it". It will be suitable, for example, if it contributes in an appreciable way to the achievement of the aim;
4. If suitable then ask the question whether it is also necessary for the identified purpose. "A measure is necessary where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means. It must therefore be explored whether or not there were less restrictive means of… [achieving the aim]" (i.e. whether the equally suitable means have less detrimental effects);[55]
5. The cost of alternative means can be taken into account, when considering whether the alternative means are equally suitable. The question will be whether those means can be adopted at a financially reasonable cost.

A careful analysis must be carried out. It is insufficient for an employer simply to assert that after a particular age "everyone knows" that a particular ability declines. There must be evidence.

Transitional schemes, budgets and acquired rights

Maintaining acquired rights (but not permanent differentials) may be a legitimate aim (relating to dignity). Achieving age equality is a legitimate aim (referred to as intergenerational fairness above). Finally the role that budgets and costs play in justification needs to be looked at.

In *Schmitzer v Bundesministerin für Inneres*[56] the CJEU held that the Directive precluded a transitional law aimed at ending age-based discrimination in civil service pay. The claimant benefited from the previous pay progression scheme which progressed those in his job for every two years of service. However, that system did not take account of training before the age of 18. The amendment extended the progression period to three years for civil servants who had their training before 18 excluded under the old law. Moreover, they had to apply for a review of reference dates. This, and the rule relating to the extension, "serve objectives of procedural economy, of respect for acquired rights and of the protection of legitimate expectations."

The rule also had budgetary aims and

> "…EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.".

Further,

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[53] *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* C-394/11 and see C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*
[54] *Belov AG Opinion* [108].
[55] *Belov* [116].
[56] *Schmitzer v Bundesministerin für Inneres Case C-530/13.*

> "respect for the acquired rights and the protection of the legitimate expectations of "[those]" favoured by the previous system with regard to their remuneration, … constitute legitimate employment-policy and labour-market objectives which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age" [57]

These cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of a discriminatory system, of which such a measure forms part, is designed to eliminate. Such a measure, even if it is capable of ensuring the protection of acquired rights and legitimate expectations with regard to civil servants favoured by the previous system, is not appropriate for the purpose of establishing a non-discriminatory system for civil servants who were disadvantaged by that previous system.

In *Specht*[58] a civil servant's length of service based pay system was challenged. Seniority was calculated from when the person reached the age of 21 but a new law excluded certain periods. Established civil servants were treated differently to the way in which new civil servants were in relation to pay. Established civil servants were gradually being moved onto a less discriminatory pay system.

The legitimate aim of the scheme was to reward previous professional experience in a standard manner whilst guaranteeing a uniform administrative practice as the aim of rewarding experience enabling a worker to perform duties better is a legitimate aim. The criterion of length of service was generally an appropriate means of achieving that aim. The civil servants could move up the steps of a grade as their age advances and length of service increases. At the time of appointment, however, age was the sole criterion by which a position in a particular grade is allocated. Therefore, the old system went beyond what was necessary to achieve the stated aim.

The claimant argued that the transitional law perpetuated the discrimination because the reclassification of the established civil servants was by reference to their basic pay. The new law no longer laid down age bands or seniority: an experience step was initially allocated. Then pay progressed by length of service. However, there was a difference of treatment which was aimed at ensuring that the civil servants received a reference pay point yielding an equivalent to that received under the old system. This perpetuated the age discrimination. However, the transition scheme was justified. Protecting acquired rights, and legitimate expectations, as to future progress of pay was a legitimate aim. The unions had insisted on the preservation of these. The law would not have their support without this concession and the law would have failed. Protection of acquired rights of a category of persons constitutes an overriding reason in the public interest. Simply placing the established civil servants in the new scheme would cause them a loss. The CJEU found that the means adopted was appropriate.[59]

The transitional law did not go further than was necessary. Although the civil servants could have been placed on the same, favoured, level of pay until they had gained the experience required to qualify for higher pay under the new scheme, it was not enough to identify an alternative. The transitional measure must be placed in context. The damage liable to be caused for those concerned must be considered.[60] The state repealed the old law to eliminate the age discrimination and adopted the transitional law which was a transitional derogation aimed at achieving a non-discriminatory pay structure. The reform had to be made at neutral cost, and without excessive use of administrative resources. They had to avoid case by case consideration.

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[57] *Schmitzer* [41-42].
[58] C 501/12 *Specht v Land Berlin.*
[59] Specht [67-8].
[60] Specht [79].

More recently in *Unland,*[61] there was a measure under which existing judges were placed on a step under a new pay system solely according to the amount of the basic pay they received under the old (discriminatory) remuneration system on the date of transition to the new system. Further progression to higher steps was subsequently calculated essentially according to the periods of experience acquired since the entry into force of the transitional law, irrespective of the judge's total period of experience. Under the transitional scheme the previous pay level (tainted with age discrimination) was taken into account. This perpetuated the previous age discrimination. However, the aim of protecting acquired rights of a category of persons can constitute a legitimate aim. These are the rights of persons benefited by a previous scheme which is being phased out over time. A scheme which permanently had this effect would not be justified. Plainly over time the discriminatory effect would reduce in these transitional cases.

A recent example of insufficient time to reach equality: In *Commission v Hungary*[62] the CJEU found that the retirement law was found to be disproportionate because it had the effect of very abruptly and significantly lowering the retirement age. The transitional provisions did not give people adequate time to make financial provision for the future. There was no evidence that the same aim could not have been achieved by less discriminatory measures. Thus it might be achieved by staggering the change over a number of years. So too long a transitional period may be disproportionate and too short a period may also be disproportionate.

Budgets

In *Specht* the CJEU reaffirmed that justification cannot be based on increased financial burdens or potential administrative difficulties.[63] However, a transitional scheme (which is means of to the aim of achieving equality) must remain technically and economically viable. In that case the complexities were relevant:
(a) high numbers of employees with diverse periods and backgrounds for consideration;
(b) difficulties that could arise concerning the determination of earlier periods of activity the employees could validly claim,
(c) individual examination of cases (excessively complex and entailing a high risk of error).

The domestic law did not exceed the limits of a state's discretion.

Starjakob [64] concerns the lawfulness of the occupational remuneration system adopted by the Austrian legislature with a view to ending discrimination based on age. After *Hütter* (C 88/08) Mr Starjakob litigated against the ÖBB Personenverkehr AG for the residue of the pay from 2007 to 2012 he would have received if the calculation of his reference date for the purposes of advancement had taken into account the period of apprenticeship completed before his 18th birthday.

The CJEU considered Article 21 of the Charter, and Articles 7(1), 16 and 17 of the Directive, to determine whether the Directive precluded the state from legislating to permit an incorrect and discriminatory increment reference date to be used for accreditation of previous periods of service. Does the state have the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation, but without financial compensation? Can it set a new increment reference date and extend the period for advancement to the next salary step? The state argued this was permissible if it had

[61] C 20/13 Daniel Unland v Land Berlin.
[62] C-286/12.
[63] Specht [77].
[64] Case C 417/13 *ÖBB Personenverkehr AG v Starjakob.*

a neutral effect on pay and was intended to preserve the employer's liquidity and avoid unreasonable expense resulting from recalculation.

The CJEU said[65] that the extension to each relevant advancement period was applicable only to a group defined by age (i.e. with pre-18 service). The difference in treatment was directly based on age.

Was it justifiable? The CJEU noted the broad discretion for states in the choice of aims and means.

Establishing a non-discriminatory pay advancement scheme and requiring the employee to apply for a review of the reference date served objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations. The CJEU pointed out that EU law does not preclude States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.[66]

While budgetary considerations may underpin a state's chosen social policy and influence the nature or extent of the measures that that Member State wishes to adopt, they cannot be the aim. Administrative considerations also cannot be the aim.

However, the means were not appropriate. While a transitory legitimate aim, protection of acquired rights cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference. The measure was not appropriate for the purpose of establishing a non-discriminatory system for employees who were disadvantaged by that previous system.

Conclusion

A judge confronted with an age discrimination case involving EU law could usefully use the following approach in cases between private individuals and between private individuals and the state:

1. Is there less favourable treatment? (Claimant to prove)
    a. Is it less favourable than the treatment of an actual comparator (who?) or a hypothetical comparator? (Gained from evidence of similar but different situations suggesting the employer would have treated someone of a different age more favourably).
    b. Is that comparator in the same (or not materially different) circumstances as the Claimant? (These differences should not include differences that are in fact linked to age)

If this is not proved by the Claimant the case fails.

2. Do any of the exceptions apply? Does article 2(5) apply[67]? Does Article 4(1) apply?[68] Does article 6(2) apply?[69]

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[65] [31] and see *Schmitzer* [35].
[66] *Starjakob* [36].
[67] (i) is there a measure laid down by national law?
(ii) in a democratic society, is it necessary for one of the following aims:
- public security,
- the maintenance of public order and the prevention of criminal offences,
- the protection of health or
- for the protection of the rights and freedoms of others?

[68] (i) is there a difference of treatment which is based on a characteristic related to age;

3. If none of those specific exceptions apply then ask, (the burden of proof is on the Defendant) is the difference in treatment based on age justified?[70]

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(ii) is it a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?
(iii) is the objective legitimate and
(iv) is the requirement is proportionate

[69] Is the treatment related to an occupational social security scheme?
(i) is it the fixing of ages for admission or entitlement to retirement or invalidity benefits,
(ii) is it the use, in the context of such schemes, of age criteria in actuarial calculations? (if neither (i) nor (ii) Article 6(2) does not apply).
(iii) does the use of this treatment result in discrimination on the grounds of sex? (If so it does not fall under article 6(2)).

[70] a. What is the aim pursued by the treatment? (Consider whether the measure in question pursues a defined, specific, legitimate aim. Justification must be considered in relation to that specific aim);
b. Is the aim legitimate? (It must be an employment policy aim, not just one with a public interest to them). It must be necessary in the circumstances of the Defendant;
c. Are the means adopted appropriate to the specific aim?
d. Are the means reasonably necessary to the achievement of that aim? (Does the employer satisfy the Valeri Hariev Belov approach?)