EU AGE DISCRIMINATION IN LIGHT OF EU'S DEMOGRAPHIC CHALLENGES AND ECJ CASE LAW*

Yrd. Doç. Dr. Gözde KAYA**

Abstract

Unjustified discrimination on grounds of age in workplace is prohibited under both national and international law. Though age discrimination covers also young people, in practice, it is mostly the older people who suffer more from this unfair treatment. Discrimination on age becomes more critical when the future demographic challenges the EU is likely to face, are taken into account. Those changes such as the decrease in fertility rates and the increase in life expectancy of older people have serious effects in the increase of social burdens imposed on the Member States. Statistics reveal that the working age population of the EU is likely to decrease and hardly to confront the old age dependency within the coming decades unless the Member States invoke some concrete measures which include raising the retirement ages and increasing the employment rate of older workers that is inevitably expected to increase productivity and enhance competitiveness of the EU at the global level.

In EU legal system, non-discrimination on grounds of age in employment is a protected right under Directive 2000/78. Article 6(1) of the Directive provides the Member States with the opportunity to invoke differentiated treatment on grounds of age if it is objectively and reasonably justified by a legitimate aim. Most of the recent cases brought before the

---

* An earlier version of this paper was presented at the International Labour Organization's (ILO) Fourth Regulating for Decent Work Conference held on 8-10 July 2015 in Geneve, Switzerland.

** Dr. Gözde **Kaya** is an Assistant Professor of European Law at the Department of International Relations, Faculty of Business, Dokuz Eylül University, Izmir, Turkey. (e-mail: gozde.kaya@deu.edu.tr.) (Makale Gönderim T.: 7.01.2016/Kabul T.: 14.01.2016)

ECJ have common points for raising the need to question the justifiability of the legitimate aims pursued by the Member States when requiring compulsory retirement ages for different professions in national legal schemes. At first sight, such measures undertaken by Member States, while coping with higher unemployment rates among younger workers (with the possible incentives that recruitment opportunities of young people are likely to be increased by dismissing older people)seem to contradict with the common aim of increasing the employment rate of older workers at the Union level. Yet, this is worth to be taken under a closer and deeper analysis.

Hence, this study seeks to question in light of EU's demographic challenges, the reality/acceptability of this possible contradiction by analysing the recent case law of the ECJ through focusing on the underlying reasons and the boundaries/limits of Member States' discretion when they are introducing compulsory retirement schemes and the criteria the ECJ has been invoking when deciding on those cases.

Keywords

EU Age Discrimination, EU Demographic Challenges, ECJ Case Law.

AB'NİN DEMOGRAFİK VERİLERİ VE ABAD'IN İÇTİHAT HUKUKU IŞIĞINDA AB'DE YAŞA DAYALI AYRIMCILIK

Öz

İşyerinde yaşa dayalı olarak ortaya çıkan ve haklı nedenle gerekçelendirilemeyen ayrımcı muamele, hem uluslararası hukuk hem de ulusal hukuk alanında yasaklanmıştır. Yaşa dayalı ayrımcılık gençleri de kapsamasına rağmen, uygulamada daha ziyade yaşlı kişilerin bu ayrımcılığa maruz kaldıkları görülmektedir. Yaşa dayalı ayrımcılık, özellikle AB'nin gelecekteki demografik verileri göz önüne alındığında daha büyük bir önem arzetmektedir. Doğum oranlarının azalması ve belirli bir yaşın üzerindeki

bireylerin ortalama yaşam sürelerinin uzamasının, üye devletlerin sosyal güvenlik harcamalarında ciddi artışlara yol açması beklenmektedir. İstatistiklere göre AB'nin aktif işgücü azalmaktadır ve bu sebeple AB'nin, önümüzdeki yıllarda yaşlı ve bağımlı nüfusun ihtiyaçlarını karşılamada, Birliğe üye devletler tarafından emeklilik yaşlarının yükseltilmesi ve yaşlıların istihdam oranlarının arttırılması gibi önlemler alınmadığı takdirde güçlük yaşaması kuvvetle muhtemeldir. Bu önlemlerin aynı zamanda AB'nin global düzeydeki rekabetini ve üretimini arttırması da beklenmektedir.

AB hukuk düzeninde, istihdamda yaşa dayalı ayrımcılık yapılması yasağı, 2000/78 Sayılı Yönerge çerçevesinde korunmaktadır. Bu Yönerge md.6/1'e göre, üye devletler haklı ve makul şekilde ve meşru bir amaç çerçevesinde gerekçelendirilmek suretiyle yaşa dayalı farklı muamelede bulunabilirler. ABAD'ın önüne gelen pek çok dava, üye devletler tarafından özellikle ulusal planlarında farklı meslek grupları için öngörülen zorunlu emeklilik yaşlarına ilişkin ortaya konulan meşru amaçların haklı şekilde gerekçelendirilebilmesine ilişkindir. İlk bakışta, üye devletler tarafından özellikle de genç işssizlikle mücadele esnasında alınan bu tür önlemler, yaşlı çalışanların Birlik seviyesinde istidam oranını arttırmayı hedefleyen ortak amaçla çatışır nitelikte gözükmektedir. Bununla birlikte konunun daha derinden analiz edilmesi gerekmektedir.

Bu sebeple bu çalışmada, söz konusu olası çatışmanın mevcudiyeti/kabul edilebilirliği sorununun, AB'nin demografik verileri ışığında ve ABAD'ın bu konudaki güncel içtihat hukuku, üye devletlerin zorunlu emeklilik planları öngörürkenki takdir yetkilerinin sınırları, sebepleri ve ABAD'nın bu davaları incelerkenki kriterleri çerçevesinde incelenmesi amaçlanmıştır.

Anahtar Kelimeler

AB'de Yaşa Dayalı Ayrımcılık, AB'nin Demografik Güçlükleri, ABAD İçtihat Hukuku.

INTRODUCTION

Age discrimination occurs when one is treated less favourably than others solely on the ground of his/her age without any justified reason. Unjustified different treatment on grounds of age in workplace is prohibited and guaranteed under both international and national documents. Age discrimination laws protect both young and old workers in the employment market. However, as observed from the cases brought before the courts, it is particularly the older people who are more likely to face and challenge this unfair treatment.

In most cases, unfair treatment arises when older workers are kindly invited to leave the labour market through the introduction of an automatic termination of their employment contracts after they reach a certain age and are entitled to receive a full pension. Countries, in general enact rules supporting retirement due to common assumptions with regard to getting older and due to the stereotypes that people over certain ages will unlikely to be capable of performing well in comparison to their youth.[1] Due to those prejudices, older workers are mostly considered as missing in health, productivity and coming up with new ideas which result in different treatment on grounds of age.[2] Moreover, countries in general require older workers to leave the labour market to open up new employment and recruitment opportunities for younger workers, particularly where youth unemployment is recorded at high levels.

Cases brought before the courts mainly question whether or not the unfair treatment concerned covers any justified reason which might also be called as a legitimate objective. In European Union (EU) anti-discrimination law, age discrimination is a protected right laid down in the Article 6/1 of the Directive 2000/78[3]. This specific provision creates an exception to the

---

1 Dagmar **Schiek**, "Age Discrimination Before the ECJ-Conceptual and Theoretical Issues", *Common Market Law Review*, Vol.48, No. 3, July 2011, p. 786.

2 Colm **O'Cinneide**, "Age Discrimination and Mandatory Retirement", *European Anti-Discrimination Law Review,* No.6/7, 2008, p. 13.

3 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303, 2.12.2000) This Directive is also referred to as the Framework Directive.

general ban on age discrimination. Hence there are several legitimate aims which the EU Member States can rely on under article 6/1 in order to justify the measures they invoke as long as the aim is objectively and reasonably justified and is relevant to that specific country's national employment policy, labour market and vocational training objectives. In cases particularly related to compulsory retirement, the European Court of Justice (ECJ) is likely to reveal a looser standard of scrutiny compared to other cases of discrimination. The flexible approach adopted by the ECJ raises criticisms since it gives precedence to the economic considerations of Member States' labour markets when compared to the individual's fundamental right to work.

Discrimination on grounds of age becomes a more sensitive issue when the future demographic challenges of the EU are taken into account. Likewise all other parts of the world, the population of the EU is rapidly ageing. Life expectancies of people are getting longer while the fertility rates and the active working population are declining. This circumstance is likely to lead to serious financial burdens on the social security systems of the Member States unless some concrete measures are taken at both the EU and the Member State levels including the enhancing and facilitating of older workers participation to the labour markets and raising the retirement ages. This is supported by the EU 2020 Strategy[4] which the EU identified several targets including the employment area where it will cope against its rivals such as the US and Japan.

This study seeks to demonstrate whether the compulsory retirement policies introduced by the Member States contradict with the common policy of increasing the participation of older workers in the labour market that is targeted at the EU level. The first part of the study is dedicated to the concept of discrimination in theoretical terms, the legal base of the age discrimination under both the international documents and the European Union law. This part is followed by the active ageing policy of the EU in light of its demographic challenges and the more general employment policy

---

4 Communication from the Commission Europe 2020- A Strategy for Smart, Sustainable and Inclusive Growth, Brussels 3.3.2010, COM (2010) 2020 final. (hereinafter Europe 2020 Strategy)

context which are examined and supported by the current statistical data. Accordingly, the approach and the level of scrutiny adopted by the ECJ in compulsory retirement cases is analysed from a critical perspective. Some critical remarks are provided with regard to the compulsory retirement policies of the Member States where the retirement is questioned as whether it can be regarded as a right or a duty. The last part of the paper puts the focus on the analysis of some selected current cases of the ECJ particularly with regard to compulsory retirement.

I. THE CONCEPT OF *DISCRIMINATION*

The concept of discrimination indeed is closely linked with the Aristotelian equality paradigm. According to Aristotle's definition of equality, 'only like cases should be treated alike whereas unlike cases may be treated differently in proportion to their unlikeness.' The first sentence of this definition corresponds to formal equality where two similar persons in a society should be treated the same in order to reach a procedural fairness. Formal equality does not focus on whether or not there occurs an equality of results at the end of this process.[5] Formal equality is satisfied as far as the sides concerned are treated equally well or equally badly regardless of the result taking place.[6]

Therefore, substantive equality is formulated that forms the second sentence of Aristotle's definition. Substantive equality establishes the equality as an aim and focuses on the equality of results. It seeks to guarantee that members of a society should be treated as social equals instead of being treated procedurally the same in line with formal equality.[7]

The concepts of equality and discrimination are closely related with each other. Equality points out to the general principle of non-

---

5 R. **Ben-Israel** and P. **Foubert,** "Equality and Prohibition of Discrimination in Employment", in Comparative Labour Law and Industrial Relations in Industrialized Market Economies, ed.by Roger Blanpain, Kluwer Law Int., 2004, pp. 321-324.

6 Christa **Tobler,** Indirect Discrimination, A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law, E. M. Meijers Instituut, Social Europe Series, Vol.10, Intersentia, Belgium, 2005, p. 25.

7 R. **Ben-Israel** and P. **Foubert,** p. 325.

discrimination.[8] There are scholars who regard these two concepts as the positive and negative sides of the same coin which can be used interchangeably. However, according to others equality refers to a broader concept since it encompasses also measures with regard to positive action.[9] Discrimination in lexical meaning is defined as 'making an unfair distinction or acting arbitrarily or unjustly.'[10] Departing from Aristotle's definition of equality, Ben-Israel and Foubert emphasize that treating like cases differently and unlike cases the same way without any justification, shall amount to discrimination. Discrimination shall appear direct if the discriminator makes a classification explicitly on one of the prohibited grounds laid under the legal system. However, it shall amount to indirect discrimination where a neutral criterion or practice indeed reveal an adverse effect and place a certain category of people at a disadvantaged position by creating the same results with direct discrimination.[11] In that context, discrimination within the context of formal equality can merely appear as direct discrimination whereas substantive equality includes the discrimination both to be made in direct or indirect way.[12]

II. AGE DISCRIMINATION IN ILO DOCUMENTS

Discrimination on grounds of age has neither been specifically laid down in international documents of the International Labour Organization (ILO) or the Council of Europe.[13] However, the ILO adopted the 'Older

---

8 Ibid, p.328.

9 For a detailed theoretical analysis of those two concepts see, Gözde **Kaya**, Avrupa Birliği İş Hukuku'nda Cinsiyet Aycımcılığı, Avrupa Birliği Bakanlığı Akademik Araştırmalar Serisi-1, Ankara, 2012, p.98.

10 R. **Ben-Israel** and P. **Foubert,** p.328; Longman Dictionary of Comtemporary English, available at: http://www.ldoceonline.com/dictionary/discrimination [10.05.2015]

11 R. **Ben-Israel** and P. **Foubert,** pp. 329-331.

12 Tobler, p. 25.

13 The Discrimination Recommendation of the ILO adopted in 1958 which calls on the member countries to combat discrimination in employment and occupation, defines the term discrimination as encompassing "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or

Workers Recommendation'[14] in 1980 which "applies to all workers who are liable to encounter difficulties in employment and occupation because of advancement in age."[15] The ILO Recommendation does not include a definition of older workers. Yet, it gives the discretion to more precisely define the specific age-related target group of the Recommendation to member countries in a manner consistent with national legislation, practice and local conditions.[16] The ILO Recommendation though laying down arrangements for elderly workers, indeed puts the focus on the employment problems and protection of all workers in the whole society by stating as follows:

> "Employment problems of older workers should be dealt with in the context of an over-all and well balanced strategy for full employment and, at the level of the undertaking, of an over-all and well balanced social policy, due attention being given to all population groups, thereby ensuring that employment problems are not shifted from one group to another."[17]

The Recommendation invites the member countries to take all the necessary measures within their national policies, laws and practice to strengthen the principle of equal treatment for workers regardless of their age and to combat discrimination in employment and occupation directed

---

treatment in employment or occupation." See, Art. 1(1) of R111 Discrimination (Employment and Occupation) Recommendation, 1958, Geneva, 42nd ILC session (25 Jun 1958), available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312449 [11.05.2015]

As seen, the Recommendation does not give place to discrimination on grounds of age. However, this does not mean that the Recommendation does not include any possibilities to add this to the list. See, Helen **Meenan,** "The Future of Ageing and the Role of Age Discrimination in the Global Debate", *Journal of International Ageing, Law and Policy*, Vol.1, Fall 2015, p. 9.

14 R162 Older Workers Recommendation 1980, Geneva, 66th ILC session (23 Jun 1980), available at : http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312500 [11.05.2015]

15 Older Workers Recommendation Art.1(1).

16 Ibid, Art.1(2).

17 Older Workers Recommendation Art. 2.

against older workers.[18] By saying so, the Recommendation accepts the approach that discrimination on grounds of age can affect young workers as well.[19] Despite the fact that the Recommendation in principle provides the old workers the right to equally participate in employment without facing any discrimination, it also leaves an open room for exceptional cases where age limits may be set due to special requirements, conditions or rules with regard to certain types of employment.[20] This can be regarded as a normal consequence when different professions notably the ones which are closely linked with the physical capabilities of the workers are taken into account.

It is noteworthy that the Recommendation -under the title of 'Preparation for and Access to Retirement'- advises member countries to take measures -in possible cases- with a view to allowing a gradual transition from working life to retirement life by paving the way to voluntary retirement.[21] Hence, in cases where it is possible, member countries should take measures which guarantee that retirement is voluntarily chosen by old workers who really want to leave the working life. Moreover, the Recommendation advocates measures to be taken for the purpose of fixing the age qualifying for old-age pension, flexible.[22]

III. LEGAL BASE OF AGE DISCRIMINATION IN THE EU LAW

A. In Primary Legislation

Prohibition of age discrimination in sources of EU Primary law is laid down under the Article 19 of the Treaty on the Functioning of the EU (TFEU, Lisbon Treaty) which has been introduced to the founding treaties within the Amsterdam Treaty of 1999. This general principle of non-discrimination is still mostly referred to as the famous ex Article 13 Treaty on European Community (TEC) which gives the Council after consulting the European Parliament the competence to take the necessary measures to

---

18 Ibid, Art. 3.

19 **Meenan,** pp. 10-11.

20 Older Workers Recommendation Art.5 (b) (i).

21 Ibid, Art.21(a).

22 Ibid, Art.21(b).

combat discriminations based on several grounds including sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Hence, this article constitutes the specific legal base of the secondary legislation further to be adopted by the Council on the above-mentioned discrimination grounds.

What's more, the TFEU extended the scope of protection against non-discrimination by adding a new provision (Art. 10 TFEU) in which the EU is expected to combat all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation when defining and implementing its policies and activities.

Charter of Fundamental Rights of the EU[23] (hereinafter Charter) which has become legally binding within the Lisbon Treaty in 2009, also recognized the prohibition of age discrimination amongst several grounds formulated in a non-exhaustive list under Article 21.[24] The Charter also imposes on the EU the duty to recognize and respect the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.[25] Furthermore, the Charter guarantees the EU's recognition and respect of the "entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age…" under Article 34/1.

B. In Secondary Legislation

Within the context of the secondary legislation of the EU, discrimination on grounds of age is specifically laid down under the Directive 2000/78/EC. Directive 2000/78 is introduced for providing a

---

23 The Charter of Fundamental Rights of the EU was initially proclaimed at the Nice European Council of the EU on 7 December 2000. However it was only within the introduction of the Lisbon Treaty in 2009 that the Charter started to have a binding legal effect on EU institutions and Member States.

24 Article 21 of the Charter reads as: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

25 Art. 25 of the Charter.

general framework to combat all forms of direct and indirect discrimination on different prohibited grounds to ensure the exercise of the principle of equal treatment in Member States.[26]

Article 6 of the Directive 2000/78 draws particular attention since it provides an exception to the general principle of equal treatment laid down in this Directive. Hence Member States may provide differential treatment on grounds of age if it is objectively and reasonably justified by a legitimate aim which is related to that specific country's national employment policy, labour market and vocational training objectives, provided that the means of achieving that aim are appropriate and necessary.[27] It also covers an extensive list of justifications[28] which the Member States may legally rely on. Therefore a difference in treatment on grounds of age which would otherwise, amount to direct discrimination, shall not be considered as such since it is objectively justified under specific conditions.[29] However, according to Ellis, justification should be limited to indirect discrimination and linking it to direct discrimination, in logical terms is likely to cause serious risks and affect the non-discrimination principle negatively. Hence, the introduction of such a 'general defence' mechanism by the Art. 6 of the

---

26 Article 1 of the Directive 2000/78 reads as: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

27 Art.6/1 of the Directive 2000/78.

28 The non-exhaustive list of differential treatment which the Member States may justify, is laid down in Art.6/1(a)-(b)-(c) of the Directive 2000/78 and covers 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; the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; 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.

29 Elaine **Dewhurst,** "The Development of EU Case-Law on Age Discrimination in Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four'", *European Law Journal*, Vol.19, No.4, July 2013, p. 523.

Directive 2000/78 as pointed out by the author is likely to serve to the economic interests of the Member States. Therefore, Ellis advocates that the wide discretion possessed by the ECJ should cautiously be handled notably when defining the boundaries of the term 'reasonably justified by a legitimate aim'. Otherwise, discrimination on grounds of age could be legalized by this article which can pose serious problems in light of EU's current demographic challenges to be mentioned below.[30]

Moreover, Member States under Art. 6/2 of the Directive 200/78 were entitled to fix different ages for admission or entitlement to retirement or invalidity benefits within the context of occupational social security schemes as long as these measures did not include sex discrimination.

IV. ACTIVE AGEING IN LIGHT OF EU'S DEMOGRAPHIC CHALLENGES AND EMPLOYMENT STRATEGIES

Discrimination on grounds of age becomes a sensitive as well as a critical issue when the future demographic challenges the EU is likely to face, are considered. It's been a widely accepted fact that the population of the EU has been ageing within the last decades. There has been a decrease in fertility rates accompanied by an increase in life expectancy of older people throughout the whole EU.

It's indeed noteworthy that ageing currently affects most of the modern societies at a global level ranging from the EU to the US and Japan. The ageing of the population becomes a crucial demographic fact when the economic sustainability is to be affected due to the changes arising in employment market and social security systems as well as the changes linked to social cohesion.[31] This gradual transformation in the demographic structure of the EU is expected to have serious financial effects in the increase of social burdens imposed on the Member States. Schlachter rightfully argues that apart from the human rights aspect, age discrimination

---

30 Evelyn **Ellis,** EU Anti-Discrimination Law, Oxford University Press, New York, 2005, pp. 295-296.

31 Ann **Numhauser-Henning,** "The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls", *The International Journal of Comparative Labour Law and Industrial Relations* Vol. 29, no.4, 2013, pp. 391-392.

has also been closely linked to the economic necessity to strengthen the devices to be invoked for social security and health-care schemes for the future.[32]

Eurostat's latest population projections (EUROPOP 2013) reveal that the total population of the EU-28 countries is around 505.665 million in 2013 and is expected to reach a peak point at 525.5 million by 2050 before declining to 520 million in 2080. The median age of the EU-28's population was 41.9 years by 2013 which shows that almost half of the EU-28's population was older than 41.9 years. Compared to the median age of the EU average of 38.3 years recorded in 2001, it's obvious that the median age is steadily in an increase.

The most important data, the old age dependency ratio for the EU-28 was 27.5 % in 2013 which corresponds to the fact that there were around four persons of working age for every person aged 65 or over. However, during the period between 2013 and 2080, the working age population of the EU-28 is deemed to decline continuously while older persons are likely to amount to an increasing share of the total population. Therefore, those aged 65 or over are expected to account to 28.7 % of the EU-28's population by 2080 when compared with 18.2% in 2013. In short, the EU-28's old age dependency ratio is projected to double from 27.5 % in 2013 to 51 % by 2080 which means that every two persons of working age are likely to afford a person aged 65 or over.[33]

Those statistics reveal that due to the decrease of the working age population, the EU is hardly to confront the old age dependency under the future projections unless the Member States invoke some concrete measures which include raising the retirement ages and increasing the employment

---

32 Monika **Schlachter,** "Mandatory Retirement and Age Discrimination under EU Law", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol.27, No. 3, 2011, p.288; see also "The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies", European Commission (DG ECFIN) and the Economic Policy Committee (AWG) European Economy 8/2014 available at : http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/ee8_en.pdf [13.05.2015]

33 Eurostat Population Structure and Ageing, Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing [10.06.2015]

rate of older workers that are inevitably expected to increase productivity and enhance competitiveness of the EU at the global level. The EU indeed puts the goal of increasing the activity of all different age groups in the employment market to the highest level possible.[34] Hence, the EU has been pursuing the aim of increasing the participation of older workers aged above 55 to the labour market and accordingly this is considered as an effective device in terms of EU employment strategies.[35]

In 2010, the EU adopted the Europe 2020 Strategy[36] to establish a smart, sustainable and inclusive economy with high levels of employment, productivity and social cohesion. In that sense five target areas have been determined including the employment field.[37] The Europe 2020 Strategy set a target to reach a total employment rate of people aged 20 to 64 of at least 75% in the EU by 2020. Despite the negative effects of the financial crisis, the employment rate of the working age population in the EU, for the first time started to increase in 2014 and reached a level around 69.2%, but still far from its peak in 2008 with a 70.3 %. More specifically, the employment rate of men is recorded as 75% in 2014 while the employment rate of women continued to increase to 63.5 % even higher than the 2008 records.[38] It's also noteworthy that there has been a continuous increase in the employment rates of people aged between 55 and 64 in the EU. Since 2002, the employment rate of people aged between 55 and 64 has continued to

---

34 **Meenan,** p. 4.

35 **Numhauser-Henning,** p. 407.

36 *Cited* supra note 4.

37 The other target areas in the Europe 2020 Strategy are research and development, climate change and energy, education and poverty reduction which are to be reached by the year 2020. Member States have transferred them into their national strategies and determined how to contribute to these common targets. See, "Europe 2020 Strategy - How is the European Union progressing towards its Europe 2020 targets?" European Commission Press Release Database, 2 March 2015, available at: http://europa.eu/rapid/press-release_STAT-15-4525_en.htm [13.06.2015]

38 "Employment rate of people aged 20 to 64 in the EU up to 69.2% in 2014", Eurostat News Release, 7 May 2015, p.1, available at: http://ec.europa.eu/eurostat/documents/2995521/6823708/3-07052015-AP-EN.pdf/7e507ea0-43c7-452f-8e6a-b479c89d2bd6 [13.06.2015]

increase to 51.8 % in 2014 in comparison to the rate of 38.4 % recorded in 2002.[39]

These data reveal that the oldest part of the working age population has the tendency of increasing. Yet these rates though revealing a gradual progress stay far behind the EU targets set out in the Strategy and need to rise to cope against the global rivals of the EU. The employment rates as explained in the Europe 2020 Strategy to a large extent are lower than the other parts of the world such as the US and Japan. The participation of female workforce to the labour market is still considered to be unsatisfactory when compared to the rate of male workforce in the EU. The Europe 2020 Strategy emphasized that the demographic ageing is accelerating for Europe and the combination of a smaller group of active working population and an increased share of retired people is likely to place additional burden on the social security systems of the Member States. Yet, the Strategy argues that the rate of older workers (aged between 55-64) in the EU still stay behind the rate of over 62 % belonging to the US and Japan. According to the Strategy, the Europeans work almost 10 % fewer hours in comparison to their US or Japanese colleagues.[40]

In that regard, İçduygu and Karaçay offer three different alternatives for combating the EU's ageing population and its potential negative outcomes on the economies. These are listed as increasing the total employment rate of the working age population at the EU level, raising up the age for getting retired and conducting a more effective migration policy. In case that the EU chooses the first two alternatives, then it is obvious that it has to achieve higher rates for labor force participation and catch up with those met by particularly Scandinavian countries and has to implement higher retirement ages. If the EU will succeed in putting those alternatives in place, then the ageing population is likely to have less serious impacts on the employment and social policies as well as the economies of the Member States. However, if the EU does not prefer those options together or in case that it cannot implement them fully, then by 2050 inevitably it is likely to challenge a serious decline in the size of the labour force unless it decides to invoke

---

39 "Employment rate of people aged 20 to 64 in the EU up to 69.2% in 2014", p.4.

40 Europe 2020 Strategy, p.7.

other measures such as receiving migrant workers from third countries which remains as both a sensitive and a questionable issue.[41]

V. GENERAL APPROACH ADOPTED BY THE ECJ WHILE EXAMINING AGE DISCRIMINATION CASES

A large majority of the cases brought before the ECJ on age discrimination concern the disputes arising from the retirement age and have not been successful. As pointed out by Schiek, the cases on age discrimination brought before the ECJ have been mushrooming particularly in a short period of time in comparison to cases relied on other grounds of discrimination.[42]

Dewhurst offers a stage model with regard to the ECJ's examination in age discrimination cases. In that regard, the Court's examination can be divided into four different stages. The first stage consists of the Court's examination of whether the case at hand falls under the scope of the Directive 2000/78. This is followed by the second stage in which the possible existence of the different treatment on grounds of age is determined. The third stage encompasses the examination whether the different treatment can be objectively justified by a legitimate aim including employment policy, labour market and vocational training objectives. If the Court finds out that there is an objective justification, then the last stage is dedicated to the assessment of whether the method invoked for reaching the specific objective is appropriate and necessary.[43]

According to Dewhurst, application of the first stage does not encounter any serious problems. Directive 2000/78 provides that it operates without

---

41 Gözde **Kaya**, "The Quest for Turkish Migration to the European Union, Exploring the Misconceptions" (Chapter Three) in Global Migration, Old Assumptions, New Dynamics, eds. Diego Acosta Arcarazo and AnjaWiesbrock, Volume 2, Prager, May 2015, p.58; for a further detailed analysis see Ahmet **İçduygu** and Ayşem **Biriz Karaçay,** "Demography and Migration in Transition: Reflections on EU-Turkey Relations, in Turkey, Migration and the EU: Potentials, Challenges and Opportunities, eds. Seçil Paçacı Elitok and Thomas Straubhaar, (Hamburg Institute of International Economics, edition HWWI, 2012) p. 27.

42 **Schiek,** p. 777.

43 **Dewhurst,** pp. 525-526.

prejudice to national laws on retirement age. The ECJ approves that the Directive has left the discretion of setting compulsory retirement ages to the Member States since the competences with regard to social and employment policies in the EU exclusively rest on the Member States. However according to the Court, this does not mean that the Court shall not apply the Directive to the cases before it. Dewhurst interprets this approach of the Court in two ways. In the first possibility, the Court may be willing to act as a 'protective parent' with a view to the harmonious implementation of the Directive throughout the whole Union since the principle of non-discrimination is of high importance. Another possibility is that the Court may choose to guarantee or to approve the implementation of the age-linked policies put forward by the Member States in accordance with their economic policies.[44]

The second stage also does not invoke any critics since in almost all of the cases the Court found that a different treatment existed. However, it is the third stage of the Court's examination that raises criticisms. In almost 93 % of the cases brought before the ECJ, the Court had concluded that the Member States pursued legitimate objectives which were indeed closely linked with their economic policies. The ECJ has delivered a large degree of discretion to the defendant Member States when they invoke their legitimate objectives for justifying the different treatment in question.[45] Schiek interprets this situation as a contrast between the prohibition of age discrimination and the commonly usage of age to justify the difference of treatment in employment and social policy. The author argues that such contrast is likely to cause a 'certain ambiguity of EU age discrimination law.'[46] Dewhurst refers to the words 'objective and reasonable' laid down in Article 6/1 of the Directive 2000/78 when the Court -by acting within such a flexible approach- delivers a wide discretion to the Member States.[47] According to Schiek, the 'looser standard' applied by the Court in justifying age discrimination cases differs from other discrimination cases where the

---

44 Ibid, p. 527.

45 Ibid, pp.527- 529.

46 **Schiek,** p. 784.

47 **Dewhurst,** p. 529.

ECJ looks for a strict and objective justification of the different treatment on a limited number of cases under Art.2/5[48] and 4/1[49] of the Directive 2000/78.[50]

It's noteworthy that the Court does not require the Member States to expressly define or state the legitimate objectives on which they rely when they invoke their measures. It'll be sufficient that the Member States will implicitly refer to them or elaborate on them after being asked for. The Court still considers the specific measure legitimate even in case of any changes linked to the legitimate policy which has been followed by another one.[51] This view has been supported by the Advocate General Bot within the case *Petersen*[52] in which it was advocated that the specific measure could still be invoked even in circumstances where the original policy aims do alter by new aims in accordance with changing social, economic, demographic and financial conditions.[53]

Schiek argues that though the ECJ currently applies more flexible standards while accepting the legitimate objectives of Member States in cases brought before it, it has not consistently done so. For instance in *Mangold*[54] -the first case that was delivered on age discrimination by the ECJ- the Court had applied a stricter approach while expressly stating that 'Art.6/1 of the Directive 2000/78 provides indeed for an exception from an

---

48 The limited grounds of justification for different treatment laid down in Article 2/5 of the Directive 2000/78 can be summed up as the public security, public order, public health and protection of the rights and freedoms of others.

49 The limited ground of justification laid down in Art.4 of the Directive 2000/78 refers to occupational requirements provided that the objective is legitimate and the requirement is proportionate.

50 **Schiek,** pp.784-785.

51 **Dewhurst,** p. 530.

52 Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047.

53 Case *Petersen, cited* supra note 52, para.49.

54 C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.The case *Mangold* is also of significant value since in that case the ECJ ruled that 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'. See, **Dewhurst,** p. 523.

individual right.'[55] After examining whether or not the difference of treatment was objectively justified, the Court concluded that the national legislation could not be justified under Art.6/1 of the Directive 2000/78.[56] However, in *Palacios de la Villa*[57], the ECJ had invoked a more flexible scrutiny and emphasized that both the Member States as well as the social partners where appropriate, 'enjoyed a broad discretion…in their definition of measures of achieving' their particular aim within the context of their social and employment policy.[58] According to Schiek, the Court balanced these two different levels of scrutiny in the case *Age Concern*[59] where it concluded that the level of discretion of Member States shall not 'have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age.' Yet, Dewhurst reads the strict scrutiny of the ECJ in *Mangold* linking it to another assumption. She argues that the ECJ pursues a stricter examination where the policies of the Member States are brought to support and facilitate older workers. She advocates that the reverse happens where the national legislation is introduced with a view to supporting younger workers such as in the case within the objective of intergenerational balance. The reason behind the ECJ acting within a looser level of scrutiny with regard to the national measures in favour of young workers lies within the assumption that policies supporting younger people are more likely to be to the advantage of the labour market and the economies of Member States.[60]

The last stage of the ECJ's examination in age discrimination cases is related to the analysis of the principle of proportionality with regard to the measures invoked by the Member States. Dewhurst criticizes the Court's flexible level of scrutiny for this stage with similar reasons put against the former stage. She advocates that the ECJ grants a wide discretion to Member

---

55 Case *Mangold, cited* supra note 54, para.65; **Schiek,** p. 785.

56 Case *Mangold, cited* supra note 54, para.65.

57 Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA*, [2007], ECR I-8531.

58 Case *Palacios de la Villa*, *cited* supra note 57, para.68; **Schiek,** p. 785.

59 Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] I-1569, para.51; **Schiek,** p. 786.

60 **Dewhurst,** p.533.

States particularly in compulsory retirement cases. Therefore all the workers' employment contracts who have reached a certain age such as 65 are likely to be automatically and lawfully terminated regardless of their state of health, profession, level of skills or their intention whether or not to continue working. According to Dewhurst, the Court indeed pays very little attention as to whether the particular legitimate aim put forward could have been attained with less discriminatory means than the one invoked at the case concerned. The Court in this stage is again criticized for leaving a wide level of discretion and flexibility to Member States in accepting the proportionality of their measures in comparison to other discrimination cases.[61]

VI. SOME REMARKS ON COMPULSORY RETIREMENT POLICIES OF EU MEMBER STATES

Member States conduct retirement policies at a pensionable age with a view to sufficiently conduct their employment market requirements.[62] These policies are mostly supported by the introduction of mandatory/statutory/ compulsory retirement ages which restrains older employees from continuing their professions. In that respect, employment contracts are terminated automatically after employees reach a certain compulsory retirement age. Thus, the employers do not need to dismiss them which are quite often considered to be humiliating by the employers themselves.

O'Cinneide draws attention to the difference between pensionable age and retirement age after providing a definition of those concepts. In that regard, a pensionable age is the age which employees are entitled to have a pension granted either by the state or occupational pension scheme paid by a private employer. However, a retirement age is a certain age which the employment contract is terminated upon reaching. In general in practise, both of those ages are determined to be the same. In general, 65 is the common age for many European countries to provide a standard pensionable age and a retirement age. However O'Cinneide rightfully argues that there is indeed no concrete link between those two ages to necessitate people entitled

---

61 **Dewhurst,** pp.534-536.

62 **Schiek,** p. 787.

to a pension, to get retired.[63] The fact that in most cases employees who reach the compulsory retirement age have already been entitled to a full pension shall not be the reason to automatically terminate the employment contract of anyone against his/her will. In that sense termination of employment contracts automatically after reaching a particular age raises serious doubts and critics. The ECJ ruled in *Palacios de la Villa* that the national legislation concerned was objectively justified since it provided the implementation of the compulsory retirement provision only to the employees who had been entitled to a full pension.[64] It should be borne in mind that people in general are able to earn better salaries and have higher standards of living as long as they work in comparison to what they are entitled through their retirement pensions. Therefore there might be people who would indeed like to continue working after reaching the retirement age as well as the ones who would prefer to leave the labour market due to health reasons or the stressful nature of their particular jobs. For the group of workers who choose to have rest after a certain age are likely to consider such early fixed retirement ages as social benefits. This perception is reflected in Art.25 of the Charter of Fundamental Rights of the EU which lays down the rights of older persons to lead a life of dignity and independence. However, the other side of the coin relates to the ones who would either willingly prefer to work further or feel obliged to continue working due to low levels of their retirement pensions.[65] Thus, the compulsory retirement ages and the automatic termination of the employment contracts are likely to contradict with the fundamental right 'to engage in work' provided under the Art.15 of the Charter.

Measures invoked with a view of leaving older people outside of the labour market indeed rests on the idea of opening up new employment opportunities for young people in terms of coping against high unemployment rates in most of the Member States. The unemployment rates in the EU differ among the Member States. By April 2015, Germany is recorded to have the lowest rate of unemployment with 4.7 % in the EU

---

63 **O'Cinneide,** p. 16.

64 Ibid, p.16; Case *Palacios de la Villa*, *cited* supra note 57, para. 73.

65 **Sclachter,** p. 289.

while Greece and Spain hold the highest levels with 25.4 % and 22.7 % respectively. The EU-28 unemployment rate is 9.7% while the EU-28 youth unemployment (under 25) is recorded higher around 20.7 % for the same period. As obvious, youth unemployment rates are much higher than the unemployment rates for all ages which render it more difficult for them to find a job in the labour market.[66] Thus, these high unemployment rates among the young generation constitute a legitimate ground for the Member States when determining on the compulsory retirement ages for older workers.

Apart from the high youth unemployment rates, also the assumptions or prejudices that people after certain ages are unlikely to be able to perform their professions as efficient as in the past, leads to the idea that they shall be replaced by younger ones. It is true that in terms of some certain professions, the nature of the profession or the way it is performed is closely linked with the physical skills that are likely to be affected negatively or lost after getting older such as in the case within the tasks related to civil aviation, underground mining or police/army forces, fire fighting. However, this might not be the case for every profession.

Member States particularly rely on 'promoting intergenerational employment' as a legitimate objective in most of the cases brought before the ECJ. The Court accepts this legitimate ground and the measures created to materialise it such as the introduction of compulsory retirement ages which indeed is considered to cause an exception to the general prohibition of discrimination on grounds of age. However when it comes to proving a concrete link between the recruitment of young people and the retirement of the older ones, the ECJ acts more cautiously within a stricter approach notably with regard to the professions of dentists, university professors and public prosecutors.[67] Malcolm Sargeant makes reference to the 'lump of

---

66 "Unemployment Statistics, Main Statistical Findings-Recent Developments in Unemployment at a European and Member State Level", Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics [12.06.2015]

67 Malcolm **Sargeant,** "Employer Justified Retirement Ages", Paper Presented at the Academy of European Law Anti-Discrimination Seminar (ERA) 8 October 2012, p. 4;

labour fallacy' which was put forward by a UK economist David F.Schloss in one of his articles published in the nineteenth century. According to this assumption, the number of the jobs in an economy is fixed and new employment opportunities for young people can only be created by terminating the employment of older workers. Measures for realising this assumption appears in the form of compulsory or early retirement policies, introduction of a maximum number of working hours for old people or measures to decrease the number of women workers.[68]

However, it is not easy to build a linkage between the recruitment of young people and the removal of older workers from the labour market. As truly argued by Sargeant, there is indeed nothing to prove the correlation between youth unemployment and old workers' employment.[69] These two different sets are indeed unlikely to intersect since they have different characteristics and are unlikely to compete with each other. Dewhurst supports this approach by advocating that it is not always possible to efficiently fill the task performed by an old experienced worker by a younger but less qualified one. The author rightfully draws attention to cases where there may not be sufficiently qualified young workers to replace a top position performed by an old experienced worker[70] since experience and seniority are acquired through working. Keeping in mind that in most cases the tasks left by older workers will mostly correspond to the ones which necessitate both experience and seniority it will unlikely be sufficient to fill these tasks by recruiting young people instead.

VII. ECJ RECENT CASE LAW ON AGE DISCRIMINATION

The first set of cases to be analysed concerns some particular professions which the ECJ handles within a considerably stricter standard such as in the cases of Petersen, Georgiev and Fuchs[71] to be mentioned

---

available at:http://www.era-comm.eu/oldoku/Adiskri/08_Age/2012_Sargeant_2_EN.pdf [17.06.2015]

68 **Sargeant,** p. 7.

69 Ibid, p. 7.

70 **Dewhurst,** pp.532-533.

71 **Numhauser-Henning,** p. 406.

below. The other cases to be examined are also the recent ones with regard to compulsory retirement and the last two cases are chosen to reveal the ECJ's approach when the national measures questioned, went beyond the legitimate aims put forward.

A. Case C-341/08 *Petersen*

The first case *Petersen*[72], concerns a dentist -Ms Petersen- who was admitted to provide dental care in Germany in 1974. However, her authorisation to provide panel dental care was terminated by the national competent bodies after she became 68 years old in 2007. Hence she made a complaint against that decision. Legitimate objectives put forward in that case included the protection of the health of patients covered by the statutory health insurance scheme due to the declining performance of dentists after reaching a certain age and the distribution of employment opportunities among the generations as well as the financial balance of the German health system.[73]

The ECJ considered the first and the last objectives related to public health together and examined them in light of Art.2/5 of the Directive 2000/78.[74] In that regard, the ECJ first reminded that the discretion to organize and to conduct health policies were left to the Member States. Accordingly the Member States were entitled to retain the power to shape their social security systems and to adopt the necessary provisions governing the organisation and delivery of health services and medical care under Art.152/5 EC.[75] The ECJ ruled in view of the discretion provided to Member States, that it was possible for a Member State to set an age limit for the practice of a medical profession such as that of a dentist in the case at hand with a view to protecting the health of patients in accordance with Art.2/5 of the Directive 2000/78.[76] The Court concluded that since the age limit with regard to the national measure concerned did not apply to non-panel dentists,

---

72 Case *Petersen*, *cited* supra note 52.

73 Case *Petersen*, *cited* supra note 52, para.38.

74 Case *Petersen*, *cited* supra note 52, paras.44 and 50.

75 Case *Petersen*, *cited* supra note 52, para.51.

76 Case *Petersen*, *cited* supra note 52, para.52.

the Art.2/5 of the Directive must be read as precluding such a national measure. Thus, the combined first and the last objectives were considered to lack any justification. However, with regard to the second objective linked to sharing the employment opportunities among the generations, the ECJ argued that Art.6/1 of the Directive allows Member States to invoke that measure as long as the measure is appropriate and necessary for achieving that aim.[77]

B. Joined Cases C-250/09 and C-268/09 *Georgiev*

Another ECJ case worth to mention is the Case *Georgiev*[78] which concerns the issue of compulsory retirement for university academicians in Bulgaria. Mr Georgiev started to work at the university as a lecturer in 1985 and his employment contract was terminated in 2006 after he reached the retirement age of 65. However the University authorised Mr Georgiev to continue working on the basis of a new one year employment contract which was then extended for a further one year. In 2007, Mr Georgiev was appointed to the post of professor. Following that, the employment contract was extended for another year. In 2009, after he reached the compulsory retirement age of 68, the employment relationship between Mr Georgiev and the university was terminated in accordance with the national labour code. Mr Georgiev brought two actions before the national court.[79]

The national legislation in the case concerned forces the compulsory retirement of university professors at the age of 68 and precludes the ones who are over 65 from concluding contracts of indefinite duration.[80] The University and the Bulgarian Government advocated that the national legislation pursued a social policy aim linked to training and employment of teaching staff as well as the application of a specific labour market policy that takes into consideration the situation of the staff of this discipline.[81] In

---

77 Case *Petersen*, *cited* supra note 52, para.82.

78 Joined cases C-250/09 and C-268/09 *VasilIvanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* [2010] ECR I-11869.

79 Case *Georgiev*, *cited* supra note 78, paras. 14-21.

80 Case *Georgiev*, *cited* supra note 78, paras. 29-30.

81 Case *Georgiev*, *cited* supra note 78, para.41.

other words, the legitimate objectives put forward were to allocate the posts for professors in the best possible way between the generations with a view to appointing young professors. In that regard the Court ruled that the encouragement of recruitment and the promotion of access of young people in higher education could constitute a legitimate objective.[82] However, Mr Georgiev pointed out to an important factor peculiar to this post by claiming that the average age of university professors was 58 accompanied by the fact that they were not crowded in amount. According to Mr Georgiev, this reveals that young people indeed are not that much interested in pursuing a career path as a professor. Therefore, he argued that the national legislation did not encourage the recruitment of young people.[83] However, the ECJ after leaving the discretion to determine on the facts of the case to the national court[84], concluded that Art.6/1 of the Directive 2000/78 must be read as not precluding national legislation which provide compulsory retirement ages for university professors when they reach the age of 68 with a view to pursuing a quality teaching and providing intergenerational balance.[85]

As seen in case *Georgiev*, it is thought-provoking to consider that the posts of such high ranking positions could be replaced by young and less experienced persons. It is doubtless that a university professorship is acquired gradually through following some certain and obligatory academic steps which necessitate long and effortful working years. However the exchange of knowledge and the rise of academic quality in both research and teaching could indeed better be maintained through authorising those university professors to train and transfer their knowledge and experience to the young generation instead of being removed from workplace.

C. Joined Cases C-159/10 and C-160/10 *Fuchs*

Case Fuchs[86] deals with state prosecutors in the Land Hessen in Germany. The applicants Mr Fuchs and Mr Köhler, both were born in 1944

---

82 Case *Georgiev*, *cited* supra note 78, para. 45.

83 Case *Georgiev*, *cited* supra note 78, para.47.

84 Case *Georgiev*, *cited* supra note 78, para.48.

85 Case *Georgiev*, *cited* supra note 78, para.79.

86 Joined cases C-159/10 and C-160/10 *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v Land Hessen* [2011] ECR I- I-06919.

and worked as State prosecutors till they reached the age of 65 -the compulsory retirement age (when they were entitled to a full pension)- in 2009. Each of the applicants applied to work for a further year. However, the Ministry of Justice of the Land Hessen rejected their applications.[87]

The national court examined that the compulsory retirement provision concerned was introduced at a time when the dominant view was that fitness for work declined after reaching that certain age. It also explained that current research revealed that such fitness indeed varied from one person to another. The original law was enacted in 1962 and amended in 2009. The aim of the new law was to promote the employment of younger people and accordingly to ensure an appropriate age structure.[88]

It's worth noting that the national court referred to some very crucial points before it started the preliminary ruling procedure to the ECJ. First of all, the Court stated that ensuring an appropriate age structure was unlikely to constitute a legitimate objective since the national law did not provide any criteria for the definition of an age structure. Moreover, the Court assumed that it would not serve any public interests and the Land Hessen could not explain its reasons for ensuring such an age structure. The national Court by means of the figures provided, found that indeed a significant proportion of the public ministry's staff already comprised young people. Hence the national court pointed out to a very important fact by saying that recent studies revealed that there was no correlation between the compulsory retirement of persons who have reached a certain age limit and younger persons entering their profession. Moreover the national Court stated that the national legislation concerned rather served to the interests of the employer and the Land Hessen intended to make some budgetary savings through this measure.[89]

The ECJ firstly provided that the national legislation which set the retirement age of civil servants at 65 did not indeed clearly state the aim pursued. However, the Court also stressed that the alteration of the aim by a new law does not lead to the lack of any legitimate aims for the specific

---

87 Case *Fuchs*, *cited* supra note 86, paras.18-20.

88 Case *Fuchs*, *cited* supra note 86, paras.24-25.

89 Case *Fuchs*, *cited* supra note 86, paras.25-26.

measure.[90] This means that it is possible to update the legitimate aims pursued by Member States.[91]

It's noteworthy that both the Land Hessen and the German Government submitted that the number of posts in the civil service particularly the ones at the highest senior levels such as the prosecutors' posts, were quite limited in terms of budgetary constraints. Moreover, the opportunities of creating new posts were also limited. Hence prosecutors, who were appointed permanently, only rarely resigned from their posts voluntarily and prematurely. Therefore according to the Land and the Government, the setting of a compulsory retirement age for prosecutors was the only device for guaranteeing a fairly distributed employment among the generations.[92]

Another point to be highlighted is the reference made by the ECJ to its earlier case law[93]. The court stated that it had already accepted that retirement at an age introduced by law facilitated access to employment by younger people related to professions in which the number of posts available was limited.[94] That's why the ECJ ruled that it was not unreasonable for the Member State concerned to take this measure and also reiterated that Member States enjoyed broad discretion in the definition of measures capable of achieving that aim. However the Court also stressed that the Member States should not frustrate the prohibition of discrimination on grounds of age laid down in the Directive 2000/78. Thus, that prohibition must be read in light of the right to engage in work recognised under Art. 15/1 of the Charter of Fundamental Rights of the EU. Therefore ECJ emphasized that in the case at hand there were divergent interests since keeping older workers in the labour force strengthened diversity in the workforce, which was recognised as an aim in recital 25 in Directive 2000/78. The Court concluded that it is for the national authorities to find the right balance between these divergent interests (whether to prolong people's

---

90 Case *Fuchs*, *cited* supra note 86, para.38 and 41.

91 **Sargeant,** p. 6.

92 Case *Fuchs*, *cited* supra note 86, para.57.

93 For the profession of panel dentists, the ECJ made a reference to *Case Petersen, cited supra note 52,* para. 70 and for university professors Case *Georgiev*, *cited* supra note 78, para. 52

94 Case *Fuchs*, *cited* supra note 86, para.58.

working life or to provide early retirement) in the context of defining their social policies based on political, economic, social, demographic and/or budgetary considerations.[95]

As revealed in the Case Fuchs, it is even challenging for the ECJ to solve this problem of the overlapping interests between the sides. On one hand the Court favours the collective public interest argument put forward by the Member States and on the other hand it recognizes the right to work related individual personal interest put forward by the applicants. Still, the Court favours a flexible level of scrutiny with regard to compulsory retirement cases.

D. Case C-141/11 *Hörnfeldt*

Case C-141/11 *Hörnfeldt*[96] is related to the compulsory retirement of a part time worker in Sweden. Mr Hörnfeldt had been working part time in Swedish Postal Services Agency since 1989. His employment contract was terminated on the last day of the month he had reached the age of 67 in 2009. This measure was taken in accordance with the 67 year rule laid down in the national legislation and the collective agreement covering his contract.[97] It's noteworthy that his retirement pension was quite below the Swedish standards for an average living.[98] So, Mr Hörnfeldt brought an action against his compulsory retirement.

The national court firstly found that the 67-year rule was established to give individuals the right to work longer and increase the amount of their retirement pension. It also stated that the national rule could be regarded as reflecting a balance between considerations relating to budgetary matters, employment policy and labour-market policy.[99]

Secondly, the national court made a reference to the Case *Palacios de la Villa* and stated that one condition which an employment contract could

---

95 Case *Fuchs*, *cited* supra note 86, paras.60-65.

96 Case C-141/11 *Torsten Hörnfeldt v Posten Meddelande AB* [2012]

97 Case *Hörnfeldt, cited* supra note 96, paras.12-13.

98 **Numhauser-Henning,** p. 403.

99 Case *Hörnfeldt*, *cited* supra note 96, para.16.

be terminated when the employee had reached a certain age was whether or not that employee was able to benefit from financial compensation in the form of payment of a retirement pension financed by contributions. The national court also reminded the judgment of the ECJ in the case *Rosenbladt*[100] which the ECJ made no reference to the level of the retirement pension received by the person concerned. The national court concluded that in the case at hand, the 67-year rule had no connection whatsoever with the pension which the individual employee might have ultimately received.[101]

The ECJ had to determine whether the national 67-year rule was justified by a legitimate aim and whether the means put in place to achieve that aim were appropriate and necessary. The Court found that the national legislation indeed made no precise mention of the aim pursued by the 67 year rule. However, the ECJ explained that the lack of an expressly mentioned aim was not decisive and if it was possible to identify the specific aim by means of other elements derived from the general context of the measure concerned, it would be sufficient for the Court.[102]

In terms of the aims of the national 67 year rule, the Swedish Government put forward a wide set of arguments including the avoiding of termination of employment contracts in situations which were humiliating for workers by reason of their advanced age; enabling retirement pension regimes to be adjusted on the basis of the principle that income received over the full course of a career had be taken into account; reducing obstacles for those who wished to work beyond their 65th birthday; adaptation to demographic developments and anticipating the risk of labour shortages; establishing the compulsory retirement age of 67 as a right instead of an obligation and lastly facilitating it for the young people to enter the labour market.[103]

The ECJ held that the automatic termination of the employment contracts of employees who met the conditions as regards age and the

---

100 Case C-45/09 *Rosenbladt, Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH* [2010] ECR I-09391.

101 Case *Hörnfeldt*, *cited* supra note 96, para.17.

102 Case *Hörnfeldt*, *cited* supra note 96, paras.22-24.

103 Case *Hörnfeldt*, *cited* supra note 96, para. 26.

acquisition of their pension rights had for a long time, been a characteristic of employment law in EU Member States. This mechanism was based on the balance to be established between several factors such as political, economic, social, demographic and/or budgetary considerations and the Member States' independent choices to be made between prolonging people's working lives or, adversely encouraging early retirement.[104] The court also accepted the arguments of the Swedish Government with regard to the encouragement of the access of young people to the labour market as well as the other aims put forward.[105]

Despite the fact that the ECJ made a reference to the right to engage in work laid down under the Art. 15/1 of the Charter, it concluded that the Directive 2000/78 did not preclude such a national measure which allowed an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 irrespective of the level of the retirement pension to be received since that measure was objectively and reasonably justified.[106]

Case *Hörnfeldt* as rightfully put by Numhauser-Henning, showed that the ECJ indeed focused on the system level instead of the individual level. This case once more revealed how crucial the justification issue is in terms of legitimizing the specific national measure. However balancing of individual and collective interests on a case basis depending on the acceptability of several justifications put forward, is certainly not an easy task for the Court, particularly when age discrimination cases are considered.[107]

E. Case C-546/11 *Økonomforbund*

Another significant case on old age discrimination to be mentioned is the Case *Økonomforbund*[108] which concerns the refusal of an availability pay

---

104 Case *Hörnfeldt*, *cited* supra note 96, para.28.

105 Case *Hörnfeldt*, *cited* supra note 96, paras.29-34.

106 Case *Hörnfeldt*, *cited* supra note 96, para.47.

107 **Numhauser-Henning,** pp. 405-406.

108 Case C-546/11 *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet* [2013] Reports of Cases not published yet.

to the applicant who worked at the district administration of Vejle (Denmark). Mr Toftgaard was dismissed due to the ground that his post had ceased to exist. He was not entitled to availability pay since he was then 65 years old and accordingly entitled to a civil service pension. It's worth noting that the compulsory retirement age for civil servants when Mr Toftgaard was dismissed, was 70 years. Hence the applicant indeed was not obliged to get retired, he was solely entitled. He informed the Ministry that his intention was to be transferred to another post even in case of a possible reduction in his salary. Mr Toftgaard conducted several other posts within a modest income after his dismissal. However, he claimed that he was discriminated on grounds of age after he was refused to be granted an availability pay.[109]

The national law provided that a civil servant who was dismissed on the ground that his post had ceased to exist because of restructuring or reorganisation of working methods, would continue to receive his current salary for three more years in the form of availability pay. However, this availability pay would not be granted to the ones who had reached the age of 65 since they were entitled to a retirement pension.[110]

The Ministry argued that the availability pay should have been regarded as an occupational social security scheme and be covered under the Article 6(2) of Directive 2000/78. The ECJ first examined whether the national legislation concerned, fell under the scope of the Directive 2000/78. The court explained that the Directive must be read to exclude social security or social protection schemes since these benefits were not equal to pay within the meaning of Art.157/2 TFEU.[111]

The ECJ stated that the civil servant was obliged to remain available to his employer during the period in which he received the availability pay. Moreover, if his employer offered him a suitable alternative post, the civil servant was obliged to take it since otherwise he would lose the entitlement to availability pay. Hence, according to the Court, the availability pay

---

109 Case *Økonomforbund, cited* supra note 108, paras.16-18.

110 Case *Økonomforbund, cited* supra note 108, para.10.

111 Case *Økonomforbund, cited* supra note 108, paras.19 and 22.

constituted pay within the meaning of Art.157/2 TFEU.[112] The Court went on by stating that Art.6/2 of the Directive 2000/78 applied only to social security schemes covering the risks of old age and invalidity. The ECJ explained that even if it was supposed that the availability pay constituted a part of an occupational social security scheme, that pay would neither be regarded as a retirement benefit nor an invalidity benefit. Accordingly the Court concluded that Art.6/2 of the Directive would not be applied to the circumstance related to the case at hand.[113]

The ECJ then examined whether the national measure concerned, fell under the scope of Articles 2 and 6/1 of the Directive 2000/78. The Court concluded that the national measure could force people over the age of 65 to accept a retirement pension which probably would be lower in comparison to a pension to which they would be entitled if they had remained in the employment for longer. This would especially have a significant value where those old employees had not yet made enough contributions for a sufficient number of years to be entitled to a full pension.[114]

Therefore, the ECJ concluded in this case that the legitimate objectives pursued by the national legislation could be attained by less restrictive measures. Hence, the national legislation which automatically deprived civil servants who were entitled to draw a retirement pension from being entitled to availability pay, went beyond what had been necessary to catch up with the legitimate objectives.[115]

F. Case C-447/09 *Prigge*

Another landmark case worth to examine is the Case *Prigge*[116] that concerns airline pilots. The applicants Mr Prigge, Mr Fromm and Mr Lambach were employed by Deutsche Lufthansa for many years as initially pilots and afterwards as flight captains. However, the airline company

---

112 Case *Økonomforbund, cited* supra note 108, paras.28-29.

113 Case *Økonomforbund, cited* supra note 108, para.44.

114 Case *Økonomforbund, cited* supra note 108, paras.47, 67 and 68.

115 Case *Økonomforbund, cited* supra note 108, para.72.

116 Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG* [2011] ECR I-8003.

terminated their employment contracts in accordance with the Collective Agreement in 2006 and 2007 respectively after they had reached the age of 60.[117]

The national court explained that though the social partners enjoyed autonomy when laying down provisions limiting the duration of employment contracts by fixing a certain age limit, the State requires that this limitation should be justified by an objective reason. Yet, the social partners had the margin of appreciation in the definition of this objective reason. According to the national court, the age limit for pilots such as in the case concerned guaranteed not only the proper conduct of the profession but also the protection of life and health of all persons including the crew, passengers and even the ones over which the aircraft had flown. Here, it's worth noting that age was considered in this case as objectively linked to the possible reduction of physical capabilities.[118]

The ECJ first examined whether air traffic security was included in the objectives laid down under Art.2/5 of the Directive 2000/78 and whether the collective agreements could amount to 'measures laid down by national laws' within the meaning of the same article. According to the Court since the Directive did not refer to any specific legal instruments, the collective agreements could amount to measures laid down by national laws. The ECJ accepted that the fixing of such an age limit for pilots within the collective agreement, pursued objectives relating to public security and the protection of health as truly provided by the national court. However, the Court also emphasized on the points which were explained initially by the national court in paras.14-16 that neither national nor international legislation indeed prohibited pilots reaching the age of 60 from acting as pilots. They let pilots to perform their profession in a limited manner such as acting as a member of a multi-pilot crew till the age of 65, the age after which they were totally prohibited from doing their profession. That's why the ECJ concluded that prohibition on piloting after the age of 60 such as in the case concerned, was not necessary for the achievement of the pursued objective.[119]

---

117 Case *Prigge*, *cited* supra note 116, paras.22-23.

118 Case *Prigge*, *cited* supra note 116, paras. 27-28.

119 Case *Prigge*, *cited* supra note 116, paras.61-64.

The ECJ then examined whether that national measure constituted a legitimate objective under Art.4/1 of the Directive 2000/78 which laid down occupational requirements. The Court explained that with regard to airline pilots, it was essential for them to have particular physical capabilities and any physical defects in that profession might have significant consequences. The Court also accepted that those capabilities diminished with age. Hence the ECJ decided that the aim of the national measure which was to guarantee air traffic safety constituted a legitimate objective within the meaning of Art.4/1 of the Directive. However the Court arrived at the same conclusion as with the interpretation of Art.2/5 at this case, concluding that a full prohibition of performing their duties at the age 60 while national and international legislation permitted them to continue till 65 years under certain conditions, the national measure was regarded to be disproportionate within the meaning of Art.4/1 of the Directive.[120]

Lastly the ECJ was asked whether air traffic safety could be regarded as a legitimate aim provided under the scope of Art.6/1 of the Directive 2000/78 and the Court replied this question negatively since the legitimate aims set out in that provision were related to employment policy, labour market and vocational training.[121]

Case *Prigge* is crucial in terms of revealing that with regard to some certain professions, the nature of the activity or the way it is performed might carry some potential risks for the public when it is still to be performed after a certain age. Taking those risks into account, in such cases it becomes easier to argue in favour of collective public interests in comparison to individual interests. Such circumstances are of significant value since any potential negative outcomes of such cases will undoubtedly lead to irreversible consequences and accordingly will have larger negative effects on public in comparison to an individual's being deprived of his right to work after a certain age.

---

120 Case *Prigge*, *cited* supra note 116, paras.67.76.

121 Case *Prigge*, *cited* supra note 116, para.82.

CONCLUDING REMARKS

It is evident that the ECJ has adopted a looser standard of scrutiny when adopting the legitimate grounds put forward by the Member States in age discrimination cases in comparison to other discrimination cases in which it applies a stricter analysis. In most cases, the ECJ has simply accepted the automatic termination of the employment contracts of older workers as long as this was objectively and reasonably justified by the Member States in the context of their labour markets. The Court pursues a collective public interest approach instead of an individual right based approach.

The Court accepts the legitimate objectives put forward by the Member States as long as the individual concerned is entitled to a full pension. Thus the court is unlikely to prefer dealing with further details of the case such as the still lasting capabilities, skills, health and will of the individual concerned since the employment market necessities such as providing an intergenerational balance among the generations, prevail over the fundamental right to engage in a work. Accepting that coping against higher unemployment rates among the young generation is a difficult topic to handle, it is indeed hard to find any linkages between sending older workers to rest and recruiting younger workers instead. It is hard to assume that these two different sets have an intersection point. The high position posts left by older workers which necessitate deeper knowledge and experience are unlikely to be filled by recruiting young workers. That's the reason why people should better be left free to choose whether to continue or to leave the labour market on their own will after reaching a particular age instead of being automatically left out of the game. This solution will without question be a more compatible one with the individual's fundamental right to work. However, given some particular professions which are closely linked with the physical capabilities of performing a task might be excluded with public security reasons. Even within those professions, there still shall exist positions which will not cause any threats or be performed with a less physical ability that might be arranged for older workers who'd wish to continue.

Given the demographic challenges the EU is likely to face within the coming decades, increasing the labour market participation of older workers

shall definitely have positive impacts on the welfare systems of the EU countries. It's noteworthy that an increase in the old age working population of the EU will inevitably affect the EU's global competitiveness against the US and Japan and will be in line with the EU 2020 Strategy. It's interesting that the ECJ has been criticized for acting in line with the EU Member States' economic considerations when it pursues a flexible approach in age discrimination cases. However, the effects of the globalisation process and the economic concerns also rise when one talks about the costs of a rapidly ageing society such as the EU and the need to raise the retirement ages and accordingly increase the employment rate of older workers. Hence, it will not be wrong to say that both sides of the coin shall have effects which are somehow linked to economic considerations either at the Member State or the EU level. Yet, that remains as the main problem to tackle.

BIBLIOGRAPHY

Ben-Israil, R. and P. **Foubert**: "Equality and Prohibition of Discrimination in Employment", in Comparative Labour Law and Industrial Relations in Industrialized Market Economies, ed.by Roger Blanpain, Kluwer Law Int., 2004.

Communication from the Commission Europe 2020- A Strategy for Smart, Sustainable and Inclusive Growth, Brussels 3.3.2010, COM (2010) 2020 final.

Eurostat Population Structure and Ageing, Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing [10.06.2015]

Europe 2020 Strategy - How is the European Union progressing towards its Europe 2020 targets?"European Commission Press Release Database, 2 March 2015, available at: http://europa.eu/rapid/press-release_STAT-15-4525_en.htm [13.06.2015]

"Employment rate of people aged 20 to 64 in the EU up to 69.2% in 2014", Eurostat News Release, 7 May 2015, available at: http://ec.europa.eu/eurostat/documents/2995521/6823708/3-07052015-AP-EN.pdf/7e507ea0 -43c7-452f-8e6a-b479c89d2bd6 [13.06.2015]

Dewhurst, Elaine: "The Development of EU Case-Law on Age Discrimination in Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four'", *European Law Journal*, Vol.19, No.4, July 2013, pp.517-544.

Ellis, Evelyn: EU Anti-Discrimination Law, Oxford University Press, New York, 2005, pp. 295-296.

İçduygu, Ahmet and Ayşem **Biriz Karaçay**: "Demography and Migration in Transition: Reflections on EU-Turkey Relations, in Turkey, Migration and the EU: Potentials, Challenges and Opportunities, eds. Seçil Paçacı Elitok and Thomas Straubhaar, (Hamburg Institute of International Economics, edition HWWI, 2012)

Kaya, Gözde: "The Quest for Turkish Migration to the European Union, Exploring the Misconceptions" (Chapter Three) in Global Migration, Old Assumptions, New Dynamics, eds. Diego Acosta Arcarazo and Anja Wiesbrock, Volume 2, Prager, May 2015.

Kaya, Gözde: Avrupa Birliği İş Hukuku'nda Cinsiyet Aycımcılığı, Avrupa Birliği Bakanlığı Akademik Araştırmalar Serisi-1, Ankara, 2012.

Meenan, Helen: "The Future of Ageing and the Role of Age Discrimination in the Global Debate", *Journal of International Ageing, Law and Policy*, Vol.1, Fall 2015, pp.1-44.

Numhauser-Henning, Ann: "The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls", *The International Journal of Comparative Labour Law and Industrial Relations* 29, no.4, 2013, pp.391-414.

O'Cinneide, Colm: "Age Discrimination and Mandatory Retirement", *European Anti-Discrimination Law Review,* No.6/7, 2008, pp.13-21.

Schiek, Dagmar: "Age Discrimination Before the ECJ-Conceptual and Theoretical Issues", *Common Market Law Review*, Vol.48, No. 3, July 2011, pp. 777-799.

Schlachter, Monika: "Mandatory Retirement and Age Discrimination under EU Law", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol.27, No. 3, 2011, pp.287-299.

Sargeant, Malcolm: "Employer Justified Retirement Ages", Paper Presented at the Academy of European Law Anti-Discrimination Seminar (ERA) 8 October 2012, available at: http://www.era-comm.eu/oldoku/Adiskri/08_Age/2012_Sargeant_2_EN.pdf [17.06.2015]

Tobler, Christa: Indirect Discrimination, A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law, E.M. Meijers Instituut, Social Europe Series, Vol.10, Intersentia, Belgium, 2005.

"The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies", European Commission (DG ECFIN) and the Economic Policy Committee (AWG) European Economy 8/2014 available at : http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/ee8_en.pdf [13.05.2015]

"Unemployment Statistics, Main Statistical Findings-Recent Developments in Unemployment at a European and Member State Level", Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics [12.06.2015]