

promoting access to White Rose research papers



Universities of Leeds, Sheffield and York
<http://eprints.whiterose.ac.uk/>

White Rose Research Online URL for this paper:

<http://eprints.whiterose.ac.uk/76331/>

Paper:

Schiek, DG (2011) *Age Discrimination before the ECJ - Conceptual and Theoretical issues*. *Common Market Law Review*, 48 (3). 777 - 799 (22).

AGE DISCRIMINATION BEFORE THE ECJ – CONCEPTUAL AND THEORETICAL ISSUES

DAGMAR SCHIEK*

1. Introduction

Since EU law first addressed age discrimination through Directive 2000/78/EC, due for implementation in 2003 (with the possibility of extension to 2006), case law on this particular ground has been mushrooming. The ECJ data base already shows 12 cases on age discrimination,¹ of which eight were heard by the Court's Grand Chamber,² and six more cases are pending.³ This seems a high number for a relatively short period of time if compared to other discrimination grounds. The first case on sex equality was brought 23 years after the equal pay clause was included in the Treaty of Rome in 1957,⁴ and also the other discrimination grounds contained in Article 19 TFEU are less relevant before the Court.⁵ This apparent popularity of age discrimination resonates with the fact that this form of discrimination is expected by everyone, rather

* Chair in European Law, University of Leeds, Centre of European Law and Legal Studies (<www.law.leeds.ac.uk/european>). I would like to thank my colleague Anna Lawson and the anonymous referees of the CML Rev. for valuable hints to enhance this piece. The usual disclaimer applies.

1. Cases C-144/05, *Mangold*, [2005] ECR I-9981; C-227/04 P, *Lindorfer*, [2007] ECR I-6767; C-411/05, *Palacios de la Villa*, [2007] ECR I-8531; C-388/07, *Age Concern England*, [2009] I-1569; C-341/08, *Petersen*, judgment of 12 Jan. 2010, nyr; C-555/07, *Küçükdeveci*, judgment of 19 Jan. 2010, nyr; C-246/09, *Bulicke*, judgment of 8 July 2010, nyr; C-88/08, *Hütter*, judgment of 18 June 2010, nyr; C-449/08, *Andersen*, judgment of 12 Oct. 2010, nyr; C-45/09, *Rosenblatt*, judgment of 12 Oct. 2010, nyr; C-250/09, *Georgiev*, judgment of 18 Nov. 2010, nyr; and C-229/08, *Wolf*, judgment of 1 Dec. 2010, nyr

2. *Mangold*, *Lindorfer*, *Palacios de la Villa*, *Bartsch*, *Petersen*, *Küçükdeveci*, *Andersen*, *Rosenblatt* and *Wolf*, cited *supra* note 1.

3. Case C-447/09, *Prigge et al.*; Case C-86/10, *Balaban*; Case C-159/10, *Fuchs*; Case C-160/10, *Köhler*; Case C-297/10, *Mai*; and Case C-298/10, *Henning*; all pending.

4. Case 80/70, *Defrenne I*, [1971] ECR 445.

5. E.g. so far the Court has only heard one case involving substantive issues of race discrimination at national level (C-54/07, *Feryn*, [2008] ECR I-5187) and two cases involving substantive issues of disability discrimination (C-13/05, *Chacon Navas*, [2006] ECR I-6467, and C-303/06, *Coleman*, [2008] ECR I-5603), notwithstanding a number of infringement procedures concerning implementation of Directives 2000/43/EC and 2000/78/EC and a few staff cases involving discrimination on racial and ethnic origin.

than only suffered by a part of the population.⁶ Accordingly, prohibiting age discrimination has the rumoured capacity to bring non-disabled, heterosexual white men into the fold of discrimination law lobbyists.⁷ As if aspiring to create as many beneficiaries as possible, EU law prohibits discrimination on grounds of any age, rather than only addressing discrimination against people above a certain age (as in the US).⁸ However, so far age discrimination is only addressed in the employment context (Art. 3 Directive 2000/78/EC).⁹

In this field especially, different treatment on grounds of age is very common, as witnessed by the widespread use of minimum age requirements for certain occupations, maximum age limits for certain employment related benefits and incremental increases of wages through a number of age bands. Consequently, even those defending age equality in principle admit that a wider range of justifications for different treatment on grounds of age may be available than in relation to grounds such as sex or race.¹⁰

The rationale of prohibiting age discrimination is accordingly contested. It oscillates between reasons related to employment policy on the one hand and reasons stemming from the general rationale behind anti-discrimination law and policy on the other. On the one hand, increased longevity of the population

6. Thus, e.g., Riach and Rich conclude their paper “An experimental investigation of age discrimination in the English labor market”, IZA Discussion Paper No. 3029, Sept. 2007, with the statement “Another significant distinction in respect of age-based affirmative action is that, whereas whites never become black, and only rarely do males become female, the young *do* become old. In other words we should expect lesser hostility from the ‘majority’ group, as in this case they stand to benefit in their turn” (p. 23).

7. See for the situation in the US in the 1990’s Rutherglen, “From race to age: The expanding scope of employment discrimination law”, 24 *Journal of Legal Studies* (1995), 491–532, with a table at 512 showing that age discrimination cases are lodged with courts mainly by white men (74% of all cases), while less than 5% of all other discrimination cases are brought by white men.

8. For further references see Sergeant, *Age Discrimination in Employment* (Gower Publishing, 2006), pp. 4–6.

9. Plans to expand the scope of the prohibition to access to and supply with goods and services, education, social security and social advantages have not been successful to date. The proposed Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (COM(2008)426 final) has not been received favourably in the Council, and is still pending in the EU legislative process. The last debate in the Council in Dec. 2010 was minuted as finding that “there is no current prospect of achieving unanimity” (PRES/10/331).

10. See e.g. Fredman, “The age of equality”, in Fredman and Spencer (Eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003), p. 21, stating that age does neither circumscribe a discrete group, and that classifying people in age groups is “not always invidious”; and Gerards, “Discrimination grounds”, in Schiek et al. (Eds.) *Cases. Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), p. 149, who does not perceive a “degree of social prejudice comparable to that visible with respect to race, ethnic origin, sexual orientation or gender”.

and declining fertility rates are quoted as necessitating a more positive approach to older employees from an economic point of view.¹¹ On the other hand, if based on the general rationale of anti-discrimination policy, age discrimination should be prohibited in order to protect the dignity of older people against stereotyping¹² and to combat “ageism” against “older people” in general, which by some accounts affects anyone over forty.¹³ These original non-discrimination rationales are, however, in danger of playing second fiddle to the more economically motivated ones referred to above. As will be shown in more detail below, economic rationales also threaten to promote a more lenient approach towards age discrimination than to other grounds of discrimination. This raises the interesting question which standards should apply in cases where discrimination on grounds of age intersects with discrimination on another ground, such as sex, race or disability.¹⁴

While it would be possible to expand on each of these theoretical points in monograph-type dimensions,¹⁵ this article endeavours to expound them through the lens of recent case law. Interestingly, recent case law of the Court of Justice from 2010,¹⁶ mainly by its Grand Chamber,¹⁷ has touched upon each of them: the Court has been asked to consider employment-related justifications of age-related different treatment in a number of cases, many of which could have been discussed under the notion of multiple and intersectional discrimination as well, and it has used different levels of scrutiny. This begs the question whether it has treated age discrimination with more leniency than it would have treated other forms of discrimination, and if so, whether this endangers adequate levels of protection, in particular when age discrimination and other forms of discrimination intersect.

The argument pursued is based on three interrelated hypotheses. First, it is submitted that age is seen as an important factor for Member States to rely on in their employment and social policy, which again is the base for specific justifications of distinctions based on age (Art. 6 Directive 2000/78/EC). An

11. This aspect is emphasized e.g. by Shaw and Shaw, “Recent advancements in European employment law: Towards a transformative legal formula for preventing workplace ageism”, 26 *International Journal of Comparative Labour Law and Industrial Relations* (2010), 273–294.

12. Fredman, *op. cit. supra* note 6.

13. See e.g. Shaw and Shaw, *op. cit. supra* note 11.

14. On the specific relevance of these three grounds see the contributions to Schiek and Lawson (Eds.), *European Union Non-Discrimination Law and Intersectionality* (Ashgate, 2011).

15. See e.g. Calasanti and Slevin, *Age Matters: Realigning Feminist Thinking* (Routledge, 2006); and Davies (Ed.), *Age Discrimination* (Kluwer, 2007), in addition to Sergeant, *op. cit. supra* note 8 and Fredman and Spencer, *op. cit. supra* note 10.

16. *Petersen, Küçükdeveci, Bulicke, Hütter, Andersen, Rosenblatt, Georgiev and Wolf*, cited *supra* note 1.

17. *Petersen, Küçükdeveci, Andersen, Rosenblatt and Wolf*, cited *supra* note 1.

analysis of recent case law relating to age-related employment policy will show that the European judiciary has reconciled these policy demands and the ban on age discrimination by relinquishing a strict standard of scrutiny in favour of a looser one at times. Second, it is suggested that the underlying rationales of age-related social policy decisions are the reason why differentiations on grounds of age will often also lead to disadvantage related to other discrimination grounds. Again, recent case law will be used to demonstrate the point. The third hypothesis is that if the ground “age” is used with preference over other underlying grounds, this may lead to scrutiny levels that are not appropriate to the non-age grounds typically intersecting with age discrimination in employment.

The article will proceed as follows. It will first briefly introduce a discrimination-based rationale for banning age-related differentiation, and contrast this with the reasons for the continued use of age as a parameter for employment and social policy. It will then show how the outdated reasons for age differentiation in employment command greater leniency on the part of the European judiciary towards age discrimination than, for example, towards sex and race discrimination, considering the different doctrinal structures of a general principle of equal treatment on the one hand, and a non-discrimination principle on the other hand. It will next consider which cases would have warranted specific attention because age discrimination was inextricably linked with another ground. It will conclude that age discrimination cases must be approached with special caution so as not to extend the generous justification regime found there to discrimination on other grounds, in particular sex and race.

2. Age – between non-discrimination and employment flexibility

2.1. *Why ban age discrimination in employment?*

All the difficulties in applying the EU law ban on age discrimination adequately may make it seem questionable why such a ban should exist at all. To answer this question, it is useful to consider rationales behind bans of discrimination more generally. As expanded elsewhere in more detail,¹⁸ bans on discrimination are based on two different rationales, which usually reinforce each other.

18. Schiek, “Broadening the scope and the norms of EU gender equality law: Towards a multidimensional conception of equality law”, 12 MJ (2005), 427–466, at 443–448; Schiek, “Organizing EU equality law around the nodes of ‘race’, gender and disability”, in Schiek and Lawson (Eds.), *op. cit. supra* note 14, pp. 20–22.

First, discrimination can undermine the human desire to develop an individual identity by subjecting individuals to stereotyped judgment. Thus, the first rationale for banning discrimination is the rationale of individuation as enabling persons to choose beyond stereotypes imposed on them. The individuation rationale suggests that human beings have more in common than any traditional stratifier such as sex, race or disability would suggest. Accordingly, even if people are different in relation to sex, race or abilities, this does not suffice to treat them differently. The fact that people deserve equal treatment irrespective of sex, race and disability should not distract one from the fact that there are some differences between persons related to sex, race, disability and other “discrimination grounds”. For example, only women can bear children, and some people are unable to see or to jump stairs. If discrimination law were to ignore these differences, social disadvantage based on stereotypes would persist. Acknowledging the dignity of each person despite differences is thus another rationale underlying non-discrimination law. This rationale demands one to avoid assimilationist pressure and may require the accommodation of differences relating to single grounds.

Under these rationales, a ban on age discrimination can be justified if age leads to false stereotyping based on social constructs. Such stereotypes can include the assumption that people above a certain age are inflexible, inherently conservative and less productive.¹⁹ Entrenched stereotypes can prevent people above a certain age from choosing challenging occupations. At the same time, a dominant culture of youthfulness can pressurize older people into appearing younger than they are, and wasting time and other resources on maintaining such an appearance to avoid stereotyping. As the high unemployment rates of people under 25 indicate, there are also stereotypes connected with young ages.

Banning age discrimination under the non-discrimination rationale would require allowing only very limited exceptions from this ban, however, and would also outlaw the widely accepted use of age as a differentiating factor in employment and social policy.

2.2. *Age as a factor in employment and social policy*

The wide-spread generosity towards age-related differentiations is based on the traditional use of age as a stratifier in employment and social policy, which again is related to traditional functions of European welfare regimes.

19. See on these Evans, “Age discrimination: Implications of the ageing process”, in Fredman and Spencer, op. cit. *supra* note 10, 16–19, Sargeant, “Disability and age – Multiple potential for discrimination”, 33 *International Journal of the Sociology of Law* (2005), 19.

Since the beginning of industrialization, European welfare regimes have served to synchronize life-courses of the working population into a three phase model, commencing with childhood and education, continuing with adulthood and employed work or unpaid work while mothering, and ending with old age dedicated to leisure and recovering from a lifetime's work.²⁰ Entitlements to old age pensions in particular have contributed to the general expectation that people of pensionable age will no longer seek employment, and no longer compete with the young. The more recent entitlements to free education and even support for students were traditionally based on the assumption that younger ages are dedicated to education, and may well have generated expectations for young people not to work.

In synchronizing life-courses, welfare States also entrenched the life cycle rhythms seen as characteristic for the typical worker, the male bread winner. In particular in the so-called conservative models of welfare States,²¹ entitlements were threatened by interruptions of employment as a consequence of motherhood and related phases of housewifery. Beyond this, the life cycle rhythms instituted by welfare regimes and employment also entrenched dominant life models, resulting in potentially negative effects on parts of the populace not coming within the fold of dominant patterns of employment.

Such traditional welfare regimes have long come to be seen as inadequate, as socio-economic circumstances have changed immensely since their inception in the late 19th century.²² Among the four conditions quoted as favourable for the emanation of European welfare States,²³ the Fordist organization of the

20. See e.g. Guillemand, "The advent of a flexible life-course and the reconfiguration of welfare", in Andersen et al. (Eds.), *The new face of welfare* (Policy Press, 2005), pp. 132–133 with numerous references to sociological literature on welfare.

21. This refers to the categorizations offered by Esping-Andersen, who distinguished three core social models within Europe: the liberal model (represented by the UK and Ireland in the EU), the social-democratic model (represented by the Scandinavian countries) and the conservative model (represented by continental States such as Germany, France, and Italy). See Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press & Princeton, 1990), refined and defended in Esping-Andersen, *Social Foundations of Postindustrial Economies* (OUP, 1999), ch.5 (Comparative welfare regimes re-examined), pp. 72–94.

22. On the history of European welfare States see Kuhnle and Sander, "The emergence of the western welfare State", in Castles, Leibfried, Lewis, Obinger and Pierson (Eds.), *The Oxford Handbook of the European Welfare State* (OUP 2010), pp. 61–79.

23. These are commonly listed as: (1) stable growth of an economy dominated by a manufacturing sector governed by principles associated with "Fordism", (2) dominance of a family structure which provides unpaid (female) labour for caring for children, frail persons and other excluded groups while supporting a (male) wage earner, (3) governments dedicated and able to manage their national economies relying on post-Keynesian principles, and (4) coordinated interaction between the middle and working classes within national societies supporting a social compromise (see e.g. Taylor-Gooby, *New Risks, New Welfare – The Transformation of the European Welfare State* (OUP, 2004), p. 1, with references to Scharpf, Pierson, Ferrera and Rhodes).

economy constitutes a decisive element. Its tendency towards standardization of production and consumption also supported a standardization of life courses, in particular for male breadwinners, which was in turn underpinned by the synchronization function of traditional welfare States.

The progressive development of the European economies has resulted in re-deployment of manufacturing to other parts of the world and an increased focus on service-related industries in Europe. While a service-based economy can easily result in low-quality and low-education employment,²⁴ the European Union has endeavoured to establish itself as the world's most competitive knowledge-based economy while maintaining a European Social Model,²⁵ an aim which is now to be pursued through "smart, sustainable and inclusive growth".²⁶ The knowledge-based economies constitute the more profitable sectors of the service industry, and are characterized by fast-moving development and demand for ever higher and more adaptive qualifications.

This also requires new and more flexible²⁷ paradigms for life-courses of those contributing to the knowledge-based economy. A discrete educational phase ending in early adulthood is replaced by the concept of life-long learning; stable, full-time employment relations during mature adulthood are replaced by flexible employment arrangements interspersed by phases of further education, non-employed work or unemployment; and a lack of adequate social networks to nurture a leisurely "third age" necessitates active ageing, including ongoing remunerated work.²⁸

In short, rigid life-course patterns are no longer adequate, and related patterns of employment and social policy are increasingly dysfunctional.²⁹ Thus, age-related social and employment policy may need to be overcome in the long term. In the short term, age remains an important instrument to devise the policies leading towards this future.³⁰ Accordingly, there is some incentive

24. See Taylor-Gooby, op. cit. *supra* note 23, with further references.

25. This was the aim of the EU's Lisbon Strategy, officially inaugurated by an EU summit in Lisbon in 2000 (Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, "Putting decisions into practice: A more coherent and systematic approach").

26. This slogan characterizes the new EU 2020 strategy, spelled out in the Commission Communication, "European Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth", COM(2010)2020 final, and adopted by the European Council of June 2010 (EUCO 7/10), both available from <ec.europa.eu/europe2020/index_en.htm>.

27. See for the model of the "Transitional Labour Markets" as containing this flexibility the contributions in Rogowski (Ed.), *The European Social Model and Transitional Labour Markets* (Ashgate, 2008).

28. See Jessop, "Critical semiotic analysis and cultural political economy", 1 *Critical Discourse Studies* (2004), 169.

29. See Maydell et al., *Enabling Social Europe* (Springer, 2006), pp. 86–88.

30. Further on the interrelation on national social policy and age discrimination law see Mabbet, "Age discrimination in law and policy: How the Equal Treatment Directive affects

for the courts not to curb the flexibility Member States and social partners may need in order to overcome the life-cycle orientation of European welfare States in socially acceptable ways.

2.3. *Legislative and judicial approaches to age-specific differentiation*

The contrast between the ban on age discrimination and the widespread use of age to justify different treatment in employment and social policy leads to a certain ambiguity of EU age discrimination law.

EU non-discrimination law is generally based on a “closed list approach”,³¹ specifying explicitly the grounds on which basis discrimination is not tolerated. In accordance with this, direct discrimination on any of these grounds cannot be generally justified.³² Direct discrimination can only be based on specific exemptions provided for by the legislature.

By contrast, a general principle of equal treatment grants a much lower level of protection. It only “requires that similar situations shall not be treated differently unless different treatment is objectively justified”.³³ This means that policy-makers and also economic actors can justify any different treatment on any ground, as long as they find a good reason, and the differentiation is proportionate to this reason.

In relation to age discrimination, EU law seems to take a position in between those two poles. As indicated by recital 25 of Directive 2000/78/EC, the EU legislature recognizes the legitimate role of age in a number of different social policy contexts. Accordingly, the Directive allows for Member States to classify different treatment on grounds of age as non-discriminatory if this is “objectively and reasonably justified by a legitimate aim, including legitimate employment policy (and) labour market ... objectives” (Art. 6(1)), specifying a number of typical justifications in a non-exhaustive list (Art. 6(2)). Thus, discrimination on grounds of age can be justified under a looser standard, in addition to those cases where a strict objective justification of different

national welfare States”, in Ross and Borgmann-Prebil (Eds.), *Promoting Solidarity in the European Union* (OUP, 2010).

31. By contrast, under the ECHR as under many national constitutions, an “open list approach” is pursued, listing some characteristics which must not form the starting point of different treatment, and leaving the development of further grounds to the judiciary. In practice, open lists are operated by subjecting different treatment on different grounds to different degrees of scrutiny (see Gerards, *op. cit. supra* note 10, 33–35). Accordingly, an open list system always allows for justifications of direct discrimination, and does not require the legislature to provide for specific exemptions.

32. For a defence of this principle, with reference to some aberrations in ECJ case law, see Ellis, *Eu Anti-Discrimination Law* (OUP, 2005), p. 111.

33. E.g. C-127/07, *Arcelor Atlantique*, [2008] ECR I-9895, paras. 23–57.

treatment based on a limited number of motives is possible (Arts. 2(5) and 4(1) Directive 2000/78/EC).

The difference between these two standards of justification has been acknowledged by the Court in *Age Concern England*.³⁴ However, refraining from viewing the ban as a specific case of the general principle of equal treatment,³⁵ the Court classified Article 6(1) as another exception to the ban of discrimination, which must be read narrowly.³⁶ Thus, Article 6(1) does not necessarily move age discrimination outside the scope of non-discrimination. However, it pays tribute to the widespread use of age bands in social and employment policy, and gives Member States an additional justification for maintaining relevant social policies.

The Court's standards in applying this specific justification have varied so far. In *Mangold*, the Court had applied a strict standard of judicial review, stressing explicitly that Article 6(1) Directive 2000/78/EC provides for an exception from an individual right.³⁷ Accordingly, the Court considered specifically whether different treatment on grounds of age was sufficiently targeted so as to meet the alleged aim of the legislation (enhancing the labour market prospects of those unemployed and older than 52), and held that the contested national rule was not justified.³⁸ In *Palacios de la Villa*, the Court applied a much looser standard of scrutiny, stressing that the Member States and, where appropriate, the social partners, "enjoy a broad discretion ... in their definition of measures capable of achieving" the regulatory goal.³⁹ The Court also allowed the regulators to change their assessment⁴⁰ and stressed the added value of flexibility gained by allowing the social partners to opt for compulsory retirement, considering their capacity to guard the weighing of interests adequately.⁴¹ Accordingly, the Court considered the national rule justified. While the Court decided on the question whether the national legislation was justified in these

34. *Age Concern England*, cited *supra* note 1, paras. 59–67.

35. For a defence of such a view, in reliance on the *Mangold* decision, see Thüsing and Horler, case note on Case C-555/07, *Seda Küçükdedveci v. Swedex*, judgment of 19 Jan. 2010, nyr, 47 CML Rev. (2010), 1167. This article does not discuss the effect of a general principle of non-discrimination of age in EU law, which has recently been used by the Court to enhance effects of directives based on such general principles (on this aspect see Lenaerts and Gutiérrez-Fons, "The constitutional allocation of powers and general principles of EU law", 47 CML Rev. (2010), 1629–1649, Editorial Comments, 47 CML Rev. (2010), 1589–1596 and Muir, "Of ages in – and edges of – EU law", 48 CML Rev. (2011), 39–62).

36. *Age Concern England*, cited *supra* note 1, para 62.

37. *Mangold*, cited *supra* note 1, para 65.

38. *Ibid.*

39. *Palacios de la Villa*, cited *supra* note 1, para 68, (case note by Waddington, 45 CML Rev. (2008), 895–905).

40. *Ibid.*, para 70.

41. *Ibid.*, para 74.

two cases, it left that decision to the national court in the *Age Concern* case. However, in *Age Concern* the Court also stressed that the level of discretion left to the Member States must not “have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age”.⁴²

3. Justifying employment policy demands for age-related distinctions – recent case law

Clearly, these were contradictory judgments, which raised more questions than gave answers on how to balance the tension between banning age discrimination and respecting the conventional use of age differentiation in employment and social policy. Thus, it is not surprising that these tensions have been further explored in recent references. Four cases concerned compulsory retirement or other restrictions on grounds of reaching a certain age,⁴³ another one a maximum age limit for commencing a certain career,⁴⁴ and two related to legislation according to which seniority accrued before a certain minimum age fails to convey specific employment rights.⁴⁵

3.1. Retirement policies

In line with the assumption that employees can be expected to cease working upon reaching the “third age”, national legislation and collective agreements frequently contain rules encouraging or even requiring employees to drop out at a certain age. In the four cases recently decided in this field, the Court has mainly accepted the justifications brought forward by Member States, thus respecting the long tradition on which these differentiations were based.

Often, rules encouraging retirement are based on general assumptions regarding the human ageing process and the related stereotype that people over the pensionable age will usually not be sufficiently fit to deliver employment-related tasks.

In the *Rosenbladt* case,⁴⁶ referred by a German labour tribunal, the Court made this assumption explicit. Mrs Rosenbladt’s part-time contract of

42. *Age Concern England*, cited *supra* note 1, para 51.

43. *Petersen, Andersen, Rosenbladt* and *Georgiev*, cited *supra* note 1. The references in Fuchs and Köhler, *op. cit. supra* note 3, likewise relate to compulsory retirement of public servants.

44. *Wolf*, cited *supra* note 1.

45. *Hütter* and *Küçükdeveci*, cited *supra* note 1. *Bulicke*, cited *supra* note 1, is not discussed in detail, because the reference question only referred to the time limit for bringing discrimination claims.

46. *Rosenbladt*, cited *supra* note 1.

employment as an untrained cleaner stipulated that the employment relationship would end with the month when the employee could first claim a pension. This clause relied on the relevant sectoral collective agreement, according to which the employment relationship ended either with the month when the employee turned 65 or with the month when the employee could first claim an old-age pension if the contract of employment did not explicitly state otherwise. The German Equal Treatment Act deemed such clauses in collective agreements and individual employment contracts to constitute objectively and reasonably justified age-related distinctions. At the same time, the Social Security Code stipulated that unilateral dismissal upon reaching the pensionable age was not justified. The question referred to the Court was whether this proviso for contractual termination of the employment relationship violated the ban on age discrimination. The Court accepted the German legislation as justified under Article 6 Directive 2000/78/EC, stressing the difference between unilateral dismissal and a rule requiring the employee's or her trade union's consent to a contractual retirement clause,⁴⁷ and demanding that each individual and collective agreement must be subjected to judicial scrutiny as well. The German court had identified the need to plan personnel development and to allow access to the employment market by young people as regulatory aims. The Court accepted this justification, relying on Mrs Rosenblatt's ability to find other employment after her 65th birthday, and also endorsing the German Government's position that "automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age".⁴⁸

Also, retirement at pensionable age has traditionally been used to manage the employment market. The encouraged or compulsory retirement at age 65 or similar is thus based on the idea of revolving doors towards employment, which by steering older people out of employment, can allow access for younger ones. The Court has accepted such justifications in two cases, the *Petersen* case and the *Georgiev* case, but rejected them in the *Andersen* case.

In the *Petersen* case, the Grand Chamber considered German legislation establishing the age of 68 as upper limit for dentists accredited to treat patients covered by public health insurance (panel dentists). The justification of that rule was twofold. On the one hand, it was meant to secure high quality treatment of patients and thus to avoid health risks. An additional justification was seen in the aim to "ensure a balanced sharing of burdens between the generations"⁴⁹ of panel dentists, securing employment opportunities for the

47. *Rosenblatt*, cited *supra* note 1, paras. 49–50.

48. *Ibid.*, paras. 43, 45.

49. *Petersen*, cited *supra* note 1, para 22, referring to the position of the Federal Social Court.

young upon retirement of the old. This justification was particularly pertinent while a quota system restricting the number of panel dentists per district was operated until December 2006. The Court of Justice left it to the national courts to decide which justifications were relevant. The justification relating to protection of patients' health (see Art. 2(5) Directive 2000/78/EC⁵⁰) was dismissed on grounds of inconsistency: after all, dentists were under no age-related restriction to practise on patients seeking privately funded dentistry. Accordingly, the case would turn on the question whether the sharing of burdens between generations could justify age-restriction on publicly funded dentistry under Article 6(1) Directive 2000/78/EC. The Court did not bother much with the principle of proportionality, and also did not refer to the second chamber decision in *Age Concern*. Within two meagre paragraphs, it considered the measure justified, should a shortage of positions for panel dentists still exist or threaten to re-occur.⁵¹ The *Petersen* ruling thus seemed to establish a rather loose standard of scrutiny for judging age-related retirement policies motivated by employment market pressures, reminiscent of the *Palacios* case.

The recent ruling in *Georgiev*,⁵² also on compulsory retirement at the age of 68, seems to confirm this tendency. It related to retirement policies in the Bulgarian university sector, where legislation required university professors to retire from their public servant position at the age of 65, allowing for reappointment under a succession of fixed term contracts until the age of 68. Challenging these rules, referring to the ban of age discrimination, the claimant alleged that they do not pursue any specified objective. If they would aim – as assumed by the Commission and some governments – at securing employment opportunities for younger university staff by retiring the old, they were disproportionate because young people were not interested in the relevant careers. Moreover, he submitted that the retirement policy was inconsistent in only applying to professorial positions, but not to lecturers and non-permanent teaching staff. Again, the Court used a loose standard of scrutiny, stressing that encouraging recruitment of younger people by dismissing older ones was a legitimate aim for a policy relying on differentiation by age. The Court had to distinguish this case from *Mangold*, as Bulgarian law, too, allowed fixed-term contracts with employees beyond a certain age. It relied *inter alia* on the fact

50. This provision is specific for Directive 2000/78/EC, but not for age discrimination. It allows differentiation to be upheld generally if necessary (*inter alia*) for the protection of health. See for a critical assessment Bell, "Direct discrimination", in Schiek et al. (Eds.), *Cases, Materials and Text on International, Supranational and National Non-Discrimination Law* (Oregon, 2007), 289–384.

51. *Petersen*, cited *supra* note 1, paras. 73 and 76, with the result stated in para 77.

52. *Georgiev*, cited *supra* note 1.

that the age threshold of 68 was much higher,⁵³ and that the employees affected were eligible for a pension.

In *Andersen*,⁵⁴ the Court was less accepting. The case related to severance payments, which under Danish law were owed to any employee dismissed after having accrued eight years seniority. However, employees eligible to claim a pension from an employer-funded “second pillar pension scheme” which they had joined before their 50th birthday were excluded from the statutory severance payment. Statute subjected eligibility to claim a 2nd pillar pension to a minimum age, which could vary according to the relevant collective agreement, and fixed at 60 in Mr Anderson’s case. The justification brought forward by the Danish Government relied on employment policy: while the severance payment is usually meant to cover expenses of workers while searching for new employment, the legislature assumed that employees eligible for an occupational pension would leave the employment market and not need this support. In considering whether this rule can be justified, the Court first stressed the Member States’ broad discretion with reference to *Palacio*, but emphasized in the same paragraph that this discretion “must not have the effect of frustrating the principle of non-discrimination on grounds of age”.⁵⁵ The Grand Chamber thus endorsed a principle first developed in the ruling on *Age Concern England*.⁵⁶ In contrast with the other cases discussed above, the Grand Chamber used a strict standard of scrutiny in judging Mr Andersen’s case. It subsequently discussed whether the measure was disproportionate because it affected employees actually drawing occupational pension as well as those who wished to continue working. In what seemed a complete turnaround from *Palacios*, the legislative rule was held to be disproportionate because it went over and above what was necessary to achieve its aim in withholding the severance payment also from those employees who did not wish to retire on being eligible. Accordingly, the Danish legislation was held to contravene the prohibition of age discrimination.

With *Andersen* being the exception to the rule, the Court applied a looser standard of scrutiny on national legislation encouraging retirement at 65 or 68, relying mainly on the *Palacios de la Villa* ruling.⁵⁷ As a result, Member States could successfully rely on the viability of age-determined life cycles, although

53. *Ibid.*, para 63 (the age after which fixed term employment contracts were always deemed to be justified was 52).

54. *Andersen*, cited *supra* note 1.

55. *Ibid.*, para 32.

56. *Age Concern England*, cited *supra* note 1, paras. 59–67.

57. *Rosenbladt*, cited *supra* note 1, paras. 41, 48–49, 51, 62, 67. The decision in *Age Concern* is referred to in paras. 44 and 58, but the formula that the wide discretion for national policy-makers must not frustrate the principle of non-discrimination on grounds of age is not reiterated.

these are less and less viable under increasing demands of individual flexibility and the knowledge-based economy. While flexibility was duly stressed, the Court did not require employers to be flexible regarding the wishes of employees to work past the pensionable age. Rather, the Court granted Member States and social partners a wide discretion in phasing men and women in the “third age” out of gainful employment.

Overall, it seems that the ban of age discrimination offers little protection against being pressurized into retiring once able to claim an old age pension – even if that pension is far from sufficient to cover living expenses, as in the *Rosenbladt* case.

3.2. *Protecting educational commitments in the first phase of the life-cycle*

Regarding the first phase of the life-cycle, at stake in the cases *Küçükdeveci* and *Hütter*, the Court appears to show more determination to effectively ban age discrimination.

The German rule under scrutiny in the *Küçükdeveci* case⁵⁸ referred to statutory notice periods. Paragraph 622 section 2 of the German civil code provided for the basic statutory notice period of four weeks to increase with seniority to up to seven months. However, as an exception, the second sentence of the same provision proclaimed that seniority accrued before an employee’s 25th birthday was to be disregarded. As this obviously constitutes a direct discrimination on grounds of age, the Court was again challenged to assess justifications under Article 6(1) Directive 2000/78/EC. The rule (originating from 1929) endorsed the demand for younger workers to change employers frequently in order to gain experience, and encouraged this by avoiding any incentive to accrue seniority before the age of 25. The German Government, however, identified the aims of the rule as demanding greater flexibility from younger workers.⁵⁹ After duly stressing the broad discretion awarded to Member States in choosing aims of employment legislation,⁶⁰ the Court determined that the consequences of the rule at stake are not only felt by younger workers, but also by workers long past the age of 25. Thus the rule failed the test for its inconsistency.

The Grand Chamber, deciding in *Küçükdeveci*, confirmed the approach taken by the Third Chamber in the *Hütter* case.⁶¹ This case concerned an

58. *Küçükdeveci*, cited *supra* note 1. The case has become famous as a follow-up to *Mangold* for its new doctrine on horizontal effects of general principles of EU law. This aspect is not covered here, as it has been discussed widely, e.g. Lenaerts and Gutiérrez-Fons, *op. cit. supra* note 35, Muir *op. cit. supra* note 35.

59. Related in *Küçükdeveci*, cited *supra* note 1, para 35.

60. *Küçükdeveci*, cited *supra* note 1, para 38.

61. *Hütter*, cited *supra* note 1.

Austrian act on grading of public servants, according to which any seniority accrued before the age of 18 would be disregarded in determining salary increments. Again, this rule differentiated on grounds of age, and it affected worker throughout their career. For example, Mr Hütter found that he earned less than a colleague commencing employment on the same day, and having completed an identical apprenticeship. The justification ultimately related to the role of education: the rule encouraged commencing employment after the 18th birthday, deeming it more important to engage in full-time education to a level allowing access to higher education in principle. Based on a detailed engagement with the aims brought forward, the Court found that the preconditions for higher education could be acquired at any age, which again rendered the rule inappropriate to achieve the alleged aims.

3.3. *Maximum recruitment age*

Finally, in the *Wolf* case, the Court's Grand Chamber had to deal with a statutory maximum recruitment age of 30 for fire-fighters established in a German *Land*.

Three justifications were submitted: first, the legislation sought to ensure that the public employer could profit from the relative expensive training for a long time; second, a balanced age structure was aimed at; third, in order to ensure sufficient time to accrue a State pension, a minimum duration of employment before retirement. These motives seem to describe a typical human resources approach to hiring younger people, in order to save additional costs. In this respect, the referring court clearly aimed to receive some clarification on Article 6(1)(c) Directive 2000/78/EC, which provides that maximum ages can be justified by reference to amortization of training costs through allowing for a reasonable period of employment before retirement. However, the Court chose to steer the case towards the "genuine occupational requirement" justification under Article 4, which is not specific to age discrimination. However, the arguments submitted by the German Government concerning the physical demands of the fire-fighting profession were not free from age-related stereotype. It was suggested that anyone past the age of 45 or 50 was no longer able to engage in active fire-fighting due to the "medically proven ageing process".⁶² Accordingly the Court concluded in 8 paragraphs that "very few officers over 45 years have sufficient physical capacity to perform the fire-fighting part of their activities".⁶³ This sufficed as justification.

62. *Wolf*, cited *supra* note 1, para 34.

63. *Ibid.*, para 41.

3.4. *Achieving flexibility through collective agreements*

In line with the enhanced flexibility required by the Lisbon strategy and its successors, the Court also found additional arguments in favour of flexibility in the collective bargaining process. As already in *Palacios*,⁶⁴ the Court stressed the role of social partners in providing flexibility by relaxing employees' protection in the *Rosenbladt* case.⁶⁵ Interestingly, the Court refers to a decision where it had likewise acknowledged the fundamental rights quality of collective bargaining rights, but established that the choices made by the social partners could not override EU legislation aiming to liberalize the market in public contracts.⁶⁶ In relation to age discrimination cases, by contrast, the reference to a fundamental right to collective agreements is utilized to justify *restrictions* of workers' rights.⁶⁷ This line of argument also establishes a difference from earlier case law on sex equality.⁶⁸ While the Court was adamant that rules in collective agreements needed to comply fully with the prohibition of sex discrimination,⁶⁹ it now seems to view the fact that retirement policies have been introduced by collective agreement as a legitimating factor. The role of collective agreements in relation to age discrimination will be further explored by the Court in the pending cases *Mai* and *Hennings*, which refer to age-related salary increments and a severance plan for collective redundancy respectively, established by collective agreements.⁷⁰

3.5. *Balancing age-related stereotype and legitimate employment policy*

As has been shown, the case law on age discrimination is still in development. Accordingly, the Court is still finding its way to a consistent approach to applying Article 6(1) Directive 2000/78/EC. However, it is possible to make an interim assessment at this point.

First of all, it should be acknowledged that the Court has applied a strict standard of scrutiny in three out of eight cases analysed in more detail here.

64. *Palacios de la Villa*, cited *supra* note 1, on this aspect see text accompanying *supra* notes 37 and 39.

65. This was stressed in *Rosenbladt*, cited *supra* note 1, para 69.

66. Case C-271/08, *Commission v. Germany*, judgment of 15 July 2010, nyr, para 37

67. *Rosenbladt*, cited *supra* note 1, paras. 68–69.

68. On the Court's case law on sex equality from 2000 to 2006 see Castello and Davies, "The case law of the Court of Justice in the field of sex equality since 2000", 43 CML Rev. (2006), 1567–1612.

69. First established in Case C-33/89, *Nimz*, [1990] ECRI-2591, paras. 12–13 and C-184/90, *Kowalska*, [1991] ECR I-297, paras. 20–21, this has more recently been reaffirmed, e.g., in C-284/02, *Sass*, [2004] ECR I-11143, para 59.

70. *Mai* and *Hennings*, cited *supra* note 3.

Such a strict standard seems appropriate when adjudicating on a directive which, after all, expresses fundamental rights.

However, in the majority of cases, the Court has taken a more generous approach, at times displaying a limited degree of sensitivity to the realities of age discrimination. Both in the cases of *Rosenbladt* and *Wolf*, the Court accepted reference to stereotyping, to the effect that older people will always become incapable of performing physically demanding tasks⁷¹ or any tasks in a sensible way at all, necessitating a paternalistic approach to older employees who should not be subjected to the humiliation of being declared unfit to work.⁷² Such stereotyping is at the heart of any form of discrimination in social practice. An approach based on principles of non-discrimination would suggest that employers must make individual assessments rather than using age-related stereotypes. As it is, the Court seems prepared to allow flexibility in favour of life-cycle policies without considering how a reinforcement of stereotypes undermining the dignity of older workers can be avoided.

4. Intersections between age and other grounds

Having considered the way in which the Court balances the necessity to provide flexibility for social and employment policies and the demands of safeguarding the non-discrimination principle in relation to age, we shall now approach our second hypothesis: is the ground “age”, because agreeable to all parts of the population, now used more frequently in litigation even if on the facts different discrimination grounds would apply in addition to age? And if that is the case, would defendants profit from relaxed standards of justification applicable to age, although they would have to defend their decisions very seriously, under stricter standards of scrutiny applied, for example, race and ethnicity. The case of the combination of age discrimination with other grounds is thus not only an interesting aspect of the theoretical discussion of intersectionality:⁷³ the choice of the “wrong” discrimination ground can have huge practical consequences.

71. *Wolf*, cited *supra* note 1, paras. 39–41. This issue, along with a justification for different treatment in order to maintain a “balanced age structure” in the work force will be revisited in the *Balaban* reference, Case C-86/10.

72. *Rosenbladt*, cited *supra* note 1, para 43, reporting the position of the German Government that “automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age”. The Court then endorses this as in principle objectively and reasonable justifying different treatment (para 45).

73. See on this the contributions in Schiek and Lawson, *op. cit supra* note 14; Schiek and Chege (Eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, (Routledge-Cavendish, 2009); and Grabham, Cooper, Krishnadas and

4.1. *Is age really the white men's privilege?*

Of those cases discussed above, the cases *Küçükdeveci*, *Rosenbladt* and *Petersen* are based on facts indicative of multiple discrimination. Accordingly, they could also have been approached under a different ground in addition to age.

The *Küçükdeveci* case offers an interesting example. The full case was certainly less “dull”⁷⁴ than the part at stake before the Court of Justice. When Seda Küçükdeveci was dismissed after 10 years continuous employment with Swedex GmbH & Co KG aged 28, she had had a part-time position as a manual worker in the company’s shipping department in O. for a gross monthly wage of just above € 700. When her employer closed down the shipping department in O., having stopped the production in the same location earlier that year, she hoped for a transfer to sales another of Swedex’s branches, in F. Upon her return from parental leave in mid-2005, she had already negotiated such a possibility, and she knew that this particular department was again inviting applications. In spite of this, she was dismissed with effect from 31 January 2007. With her claim to Mönchengladbach Labour Court, she challenged this dismissal also for discrimination on grounds of ethnic and racial origin. In doing so, she relied on paragraph 2(2) KSchG (German Employment Protection Act), according to which a dismissal is – among others – not justified if the employer is able to offer alternative employment. She alleged that such alternative employment existed, but was denied to her for reasons based on discrimination on grounds of racial and ethnic origin. In relation to the post in sales, her employer had been adamant that she was not suitable for the post, among others because her German was slightly accented and she would have to be trained in typing and data processing. The first instance court, in its judgment on 15 June 2007,⁷⁵ held in favour of the claimant and declared the dismissal ineffective relying on paragraph 2 KSchG and the prohibition of discrimination on grounds of racial and ethnic origin. The Labour Court found that in denying the claimant’s suitability for the position in sales because of her accented German, the employer had discriminated against her on grounds of race, which violated paragraphs 2 and 7 Allgemeines Gleichbehandlungsgesetz – AGG (German General Equal Treatment Act).

Seda Küçükdeveci’s lawyer had pleaded both grounds of discrimination, but was only partly successful before the Düsseldorf Regional Labour Court. However, even if only considering the notice period legislation in paragraph

Herman (Eds.), *Intersectionality and Beyond. Law, power and the politics of location* (Routledge-Cavendish, 2009).

74. See Thüsing and Horler, op. cit. *supra* note 31.

75. Case no 7 Ca 84/07 (available from Juris and Beck online).

622 section 2 German Civil Code, the claimant could have alleged not only age discrimination, but also indirect ethnic and gender discrimination. As explained above, the rule in question contributes to synchronizing life-cycles along the lines of dominant patterns. The secret model is the trained male manual worker, who starts employment at a young age, but changes employers frequently before achieving a more satisfactory, and stable position. This model did not apply to Seda Küçükdeveci, who after taking up a semi-trained position at age 18 remained with the same employer for 10 years. This situation is rather typical for ethnic minority women, as they are often required to contribute to the family income before attaining a (lower paid) training position, and find it difficult to change employers due to structural discrimination on the labour market. Protection against discrimination on grounds of gender and racial or ethnic origin is less ambiguous under EU law than protection against age discrimination. In particular, there is no specific justification relating to flexible labour markets. Also, basing the claim on all three grounds could have afforded the claimant specific damages under the German Equal Treatment Act, rather than only gaining a few months additional salary.

Similarly, compulsory retirement policies such as those at stake in the *Peterson* and *Rosenbladt* case could be scrutinized for indirect gender discrimination. As explained above, the underlying rationale presupposes a certain model of working life, according to which a worker accumulates sufficient pension rights to retire comfortably at the specified age. Those structurally excluded from traditional career patterns (e.g. women who take time out to care for children or other family members, and others whose entry into or progress in working life is delayed due to gender or race discrimination) are often unable to accumulate sufficient entitlements and may therefore wish to continue working beyond that age. In the *Rosenbladt* case, the national court had highlighted that the claimant's claim to a pension, based on her part-time work as cleaner, would hardly suffice to sustain her. This is a typical situation for female manual workers. Accordingly, in addition to the seemingly easy claim of direct age discrimination, a parallel claim of indirect sex discrimination could have been explored. The argument would have been that – due to limited pension entitlements – women would be more frequently inclined to continue working past 65, and would thus be put at a particular disadvantage compared with men. Again, the claimant in the *Petersen* case only started practice as a panel dentist aged 35. While she still had sufficient earnings to build up a pension, this pension would have been lower than that of a dentist starting at a younger age. Accordingly, the question should have been explored whether a shorter period to accumulate pension entitlements was more typical for women dentists, and thus a case of indirect discrimination could have been established.

Further, the effects of a maximum recruitment age, relevant in the *Wolf* case, can be seen as more detrimental for women than for men. In particular, it is worth noticing that women who had a career break will more often have difficulties in complying with maximum age limits. However, also the effects of a hostile employment market regarding atypical career choices (such as fire-fighting for women) must be considered in assessing discriminatory effects of such age-related barriers.

4.2. *Consequences of preferring “age” over other grounds*

As shown in the beginning of this article, the ban on age discrimination in EU law is conceptually weaker than other bans on discrimination. This is based on the widespread use of age as a stratifier in employment and social policy, which seems to require enhanced flexibility in favour of Member States and national social partners, even if the underlying paradigms are no longer entirely adequate. As a consequence, the EU legislature has provided for specific justifications in favour of age-related differentiation justified by employment and social policies (Art. 6(1) Directive 2000/78/EC). The leniency towards age discrimination signalled by this legislative step has been enhanced by the Court of Justice, which tends to accept employment-related justifications for age-related differentiations with surprising ease. While the Court has taken seriously the requirement that the discretion left to the Member States must not “have the effect of frustrating the implementation of the principle of non-discrimination”⁷⁶ in some cases, they are few and far between. Mainly, the formula of Article 6(1) has been used to dilute the difference between a principle of non-discrimination and a general principle of equal treatment. The doctrinal difference between these two principles lies in the fact that non-discrimination requires strict obedience. Exceptions can only be accepted where these are provided for in legislation. Even if such a legislative justification is available, strict scrutiny is required in applying the proportionality test.

Under a general principle of equal treatment, any distinction is capable of being justified in principle. This justification is only scrutinized lightly, giving the institution establishing different treatment a wide discretion in choosing the aims for its distinction, and relieving it from proving that no less intrusive alternative for achieving this aim could be found. Arguably, Article 6(1) Directive 2000/78/EC is positioned somewhere between an exception from a prohibition to discriminate and a mere justification requirement. It thus establishes a less stringent test for age-related distinctions, as long as the aims pursued with those distinctions are related to employment and social policy.

76. This formulation from *Age Concern*, cited *supra* note 1, para 51 has been endorsed by the Grand Chamber in *Andersen*, cited *supra* note 1, para 32.

Considering cases where age and other grounds, such as sex or race, but also disability, intersect, the question arises which standard of scrutiny is to be applied to each case. There is no explicit rule on this in EU law. However, the purpose of EU non-discrimination law to enforce non-discrimination as a fundamental right (Art. 21 of the Charter) and as a general principle of EU law, would suggest that the multiplication of discrimination grounds must not lead to slackening the standards of protection. If anything, a stricter protection would seem necessary. While it is inadequate to use national law principles as binding on EU judges, national rules can be useful in order to interpret EU law in cases of doubt. Against this background, paragraph 4 German Equal Treatment Act is worth mentioning. According to this provision, “discrimination based on several grounds ... is only capable of being justified ... if the justification applies to all the grounds liable for the difference of treatment”.⁷⁷ Accordingly, where age intersects with other discrimination grounds, different treatment is only justified if the stricter standard of a ground such as sex or race is satisfied.

This approach has been demonstrated (if not explicitly) in the recent *Kleist* judgment,⁷⁸ which related to compulsory retirement upon reaching pensionable age in a jurisdiction where the statutory pensionable age still differed by gender. Rather than relying on a general social policy justification of this age-related differentiation, the Court stressed that an “exception for the prohibition of discrimination on grounds of sex ... must be interpreted strictly”.⁷⁹ This excluded any justification by the objective of “promoting employment of younger persons,”⁸⁰ although this justification has been readily accepted for different types of age discrimination.⁸¹

In cases of intersecting discrimination, such as *Küçükdeveci*, *Petersen* and *Rosenblatt*, an additional justification for the underlying gender and ethnic discrimination should have been sought. Admittedly, the underlying gender discrimination in the latter two cases was only indirect. This renders the establishment of the gender discrimination case more difficult than that of the direct age discrimination case. However, the effort should be made in order not to forgo an efficient remedy for violation of a fundamental principle of EU law such as the principle of non-discrimination.

77. English translation from Schiek et al., op. cit. *supra* note 10, p. 180.

78. Case C-359/09, *Kleist*, judgment of 18 Nov. 2010, nyr.

79. *Ibid.*, para 39.

80. *Ibid.*, para 45.

81. See text accompanying *supra* notes 46–51.

5. Conclusion

In conclusion, the Court has attempted to remain within the non-discrimination framework in its case law on age discrimination so far. However, at times it has used a less strict standard of scrutiny in judging policies related to retirement ages, in particular if supported by collective agreements. This approach relied on the specific justification, foreseen in Article 6(1) Directive 2000/78, which was introduced into EU legislation in order to allow EU non-discrimination law to take account of legitimate social policy aims at national level.

However, while age is a widely used stratifier in national social policy, the resulting synchronization of life-cycles is no longer adequate to the rising demands of individual flexibility in the knowledge-based economy. While national social policy slowly develops in other directions, there are still a great number of rules that support strict divisions between an education phase in the youth, an uninterrupted working life in phase two and a well-earned retirement in phase three. As the strict distinction of life cycles was most frequently used in countries following the conservative welfare model, it is hardly surprising that so many references in this field come from Germany. After all, this country supports a conservative welfare model. At the same time, it shows some reluctance to embrace discrimination grounds such as racial and ethnic origin and gender, with the same verve as age. This tends to deflect conflict away from these main issues towards the more innocent age ground.

In addition, differentiation on grounds of age and the resulting synchronization of life cycles through social policy also has the effect of excluding non-dominant ways of life. Thus, rules on compulsory retirement, age limits for the access to certain occupations or rules placing seniority accrued at the start of a career at a detriment will often affect women or persons of minority ethnicity and put them at a particular disadvantage. These cases of multiple discrimination are as yet hardly treated as such. This should be reconsidered. Findings of stereotyping against older people and against people in certain age bands combined with other characteristics such as gender or alleged race, suggest the need to provide protection against discrimination in the classic fashion, with strict scrutiny levels.

The field will certainly develop further in rapid fashion, and also with upcoming constellations inviting such multidimensional analysis. For example, the pending reference in *Henning*, which questions the role of age-bands in managing collective redundancies,⁸² may well be a case in point. The underlying rules, decreed by works council agreement, award higher severance payments to those with longer continuous employment – a group in which men

82. *Henning*, cited *supra* note 3.

are frequently overrepresented. Like the pending case *Mai*,⁸³ this case also gives the opportunity to further specify case law on the relation of age discrimination and fundamental rights to collective bargaining.

The principle of non-discrimination on grounds of age is guaranteed to generate more controversial, and at the same time theoretically challenging case law. It is to be hoped that the cases where a strict scrutiny principle is applied and multiple grounds of discrimination are being considered will become more numerous over time than at present.

83. *Mai*, cited *supra* note 3.

COMMON MARKET LAW REVIEW

Subscription information

Online subscription prices for 2011 (Volume 48, 6 issues) are: EUR 682/USD 965/GBP 502 (covers two concurrent users). Print subscription prices for 2011 (Volume 48, 6 issues): EUR 720/USD 1018/GBP 529.

Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

Subscription orders should be sent to:

All requests for further information and specimen copies should be addressed to:

Kluwer Law International
c/o Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
e-mail: sales@kluwerlaw.com

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

or to any subscription agent

For advertisement rates apply to Kluwer Law International, Marketing Department, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Please visit the Common Market Law Review homepage at <http://www.kluwerlawonline.com> for up-to-date information, tables of contents and to view a FREE online sample copy.

Consent to publish in this journal entails the author's irrevocable and exclusive authorization of the publisher to collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in Article 17, paragraph 2, of the Dutch Copyright act of 1912 and in the Royal Decree of 20 June 1974 (S.351) pursuant to Article 16b of the Dutch Copyright act of 1912) and/or to act in or out of court in connection herewith.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM; IBZ-Online; IBZ-International Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.