Chapter 7
Equal treatment and age-discrimination - inside and outside working life

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1 Introduction

The ageing population is posing a significant challenge for post-modern societies around the globe, including in Europe, where low fertility tends to exacerbate this demographic trend. The need to address its potential consequences has been one of the driving forces behind the development of European Union (EU) age discrimination law and elder policies in the last twenty years. However, one important characteristic of EU age discrimination law- and the focus of this chapter – is its weaker template as compared to that extended to other protected grounds, and the related fact that direct age discrimination can be justified to a considerable extent.[2] As we show here by drawing on examples from within and outside of working life context, this distinctive character of age discrimination, and the higher level of its acceptance, can be attributed in part to a wider uncertainty about its 'wrongness' when compared to discrimination of other protected grounds. Of great significance is also the fact that age hitherto has been used as an important social stratifyer in policy development.

The EU's Europe 2020 Strategy[3] has expressed the ambitions of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. A general goal of Europe 2020– reflected also in the 2010 Employment guidelines[4] – is to attain an employment rate of 75 per cent of all 20- to 64-year-olds by the year 2020. Support of active ageing across all aspects of life is one of the key measures for meeting this objective. Yet, with high youth unemployment and the difficult situation of younger workers also deemed an important strategic aim, the development of active ageing policies may be potentially more difficult. Thus, the EU declared 2012 'The Year of Active Ageing and Solidarity between Generations',[5] and this declaration was accompanied by a number of 'Guiding Principles for Active Ageing and Solidarity between Generations' in terms of employment, participation in society, and independent living.

These strategies find support in the EU Treaty provisions. The Lisbon Treaty now cites solidarity between generations as one of the Union's objectives (Article 3.3 TEU) and the EU Charter of Fundamental Rights (CFR) apostrophises (in Article 25) the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Article 34.1 mentions social security and social assistance in the case of old age and Article 15 refers more generally to the right to work. Younger workers and young people are also

[1] This work was carried out within the Norma Elder Law Research Environment (www.jur.lu.se/elderlaw) funded by Ragnar Söderberg's Foundation and The Marianne and Marcus Wallenberg Foundation.
[2] Compare also Fudge, 'Dignity, Disadvantage and Age: Putting Constitutional and Fundamental Rights to Work for Older Workers', Chapter 3 in this book.
[3] Commission Communication, Europe 2020, *A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final. See also the Commission's Communication *Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, COM(2014) 130 final.
[4] Council decision 2010/707/EU of 21 October 2010. See especially guidelines 7, 8 and 10.
[5] Decision No 940/2011/EU, 14 September 2011, OJ 23.09.2011, No. 246/5.

specifically targeted by Treaty provisions (Articles 47 and 165 TFEU). Both the functioning of labour markets and the dependency ratio between active and inactive persons are crucial from this perspective, as are the interrelations between work and pensions and other parts of social security/social welfare institutions.[6]

Social dialogue is one of the main pillars of the EU social model also in relation to active ageing.[7] 'The 2015-2017 Work Programme of the European Social Partners. Partnership for inclusive growth and employment' entered into by BUSINESSEUROPE, CEEP, UEAPME and ETUC in 2015 is the fifth bipartite work programme to improve the functioning of labour markets 'achieving solutions that are fair, responsible and effective, contributing to economic recovery, building up social cohesion'. The 2015-2017 programme identifies the increase of the active workforce to meet the demographic change challenge as one of the most important policy challenges for Europe 'to fully seize its growth and job potentials,' and the social partners have declared their intention to negotiate an autonomous framework agreement concerning these issues.

In a labour market context older persons generally are understood as those who are perceived to be approaching their post-employment years[8] and – from an EU policy point of view – 'the critical period with regard to old age and employment begins in the early end of a person's working life, …., which mainly concerns employees from the age of just above fifty years of age and older. It is also reflected in research on age discrimination, and on perceptions and attitudes regarding employee age.'[9] Thus, age discrimination bans are an important way to counteract 'ageism' or 'false stereotyping based on social constructs'[10]. Butler in 1975 defined ageism as 'a process of systematic stereotyping and discrimination against people because they are old, just as racism and sexism accomplish this for color and gender'.[11] Ageism has later been defined as 'negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them being "old" or "elderly". Ageism can be implicit or explicit and can be expressed on a micro-, meso- or macro-level.'[12] This definition thus refers to the behavioural component of discrimination as one that is key at the same time indicating that differential treatment on the grounds of age may work both to the detriment and advantage of old people. As we will see in section 3 it is not always easy to tell when a measure is to the detriment or advantage of elderly workers, and, certainly, given that the EU ban on age discrimination is 'neutral' in that it covers all ages, any measure can be discussed in an intergenerational perspective.

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[6] Compare, for instance, *An Agenda for Adequate, Safe and Sustainable Pensions*, COM(2012) 55 final. See also the report *Implementation of the EU White Paper on pensions, Status as of 20/03/2014*.

[7] Compare A Numhauser-Henning, La prohibición de la UE contra la discriminación por edad y el papel de los agentes sociales, in J Gorelli Hernández (ed.), *El derecho a la negociación colectiva, Liber amicorum Profesor Atonio Ojeda Avilés* (Junta de Andalucía 2014) and A Numhauser-Henning and M Rönnmar 'Age Discrimination Law and Social Partners and Collective Bargaining´, in … (forthcoming).

[8] Compare K Boudiny, '"Active Ageing": from empty rhetoric to effective policy tool' (2013) 33 Ageing&Society 1077.

[9] J Julén Votinius, 'Intersectionality as a Tool for Analysing Age and Gender in Labour Law, in: Simonetta Manfredi and Lucy Vickers (eds), *Challenges of Active Ageing* (Palgrave Macmillan 2016).

[10] Dagmar Schiek, 'Age discrimination Before the ECJ – Conceptual and Theoretical Issues' (2011) CMLR 48: 777-799, 781. See also Julia Shaw and Hillary Shaw, 'Recent Advancements in European Employment Law: Towards a Transformative Legal Formula for Preventing Workplace Ageism' (2010) IJCLLIR 26, no. 3 273.

[11] R.N. Butler, *Why survive? Being old in America* (Harper and Row 1975).

[12] Iversen, Larsen and Solem, 'A conceptual analysis of Ageism' (2009) Nordic Psychology Vol. 61(3), 4.

Non-discrimination is then an important tool within active ageing strategies. It is of course also an expression of the growing importance of the right to non-discrimination and/or equal treatment as a fundamental legal principle gaining ground world-wide, including in the EU, over the last two decades – not least with important inspiration from the US. According to Schiek, a genuine aim, and the main common rationale for non-discrimination law, is 'the aim of overcoming disadvantages related to *ascribed otherness*'.[13] From this, two other rationales can be derived: the right to individuation (or to enable persons to choose beyond stereo-types imposed on them) and the aim to preserve diversity (also requiring accommodation). Against this background, and as in the case of the US, non-discrimination regulation is traditionally designed as complaints-led individual claims in the liberal tradition.

Characteristic of age discrimination, however, is a wider uncertainty about its 'wrongness' when compared to other grounds, according to O'Cinneide.[14] Age-based distinctions are not linked to historically embedded patterns of group subordination and thus do not have a negative impact upon human dignity to the same degree as do distinctions based on archetypical non-discrimination grounds such as gender and race.[15] This has led to – again with O'Cinneide – courts worldwide typically applying a light-touch 'rationality' test in relation to age discrimination. Similarly, in relation to the EU ban on age discrimination we deal with what was already in Chapter 4 described as a 'double bind' – apart from the individual approach relating to the ban on age discrimination as a human right, we have a collective approach, housing active ageing concerns but also prolonged attention to age as a traditional social stratifyer. With respect to the latter, Schiek has identified two different social policy concerns related to age discrimination specifically: the difficulties of complying with expected pension claims due to an ageing population, and the dysfunctional nature of certain traits of hitherto established labour law in relation to the more flexible life-course perspective required 'for the service-oriented economy or the knowledge and information society'.[16]

This double bind has resulted in the 'weaker format' of the age discrimination ban as compared to other non-discrimination bans, which is reflected in the fact that direct age discrimination can in some cases be justified under the Employment Equality Directive. This distinctive approach seeks to balance the both dignitarian and distributional concerns and has been a central concern for the CJEU's interpretation of the Employment Equality Directive in the Court's case law. This balancing of distributional and dignitarian concerns is also known to lead to particularly problematic or unfair results in cases of multiple or intersectional discrimination; that is, in cases where age interacts with other characteristics, such as disability, gender, or race, which are also prohibited grounds of discrimination to produce distinct forms of disadvantage.

So, why is age discrimination still accepted to such a great extent in the context of the current EU age discrimination regulation within working life? And, can we draw upon these

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[13]Dagmar Schiek, 'Proportionality in Age discrimination Cases: Towards a Model Suitable for Socially Embedded Rights' in Ann Numhauser-Henning and Mia Rönnmar (eds), *Age discrimination and Labour Law, Comparative and Conceptual Perspectives in the EU and Beyond* (Wolters Kluwer 2015) 83. See also Schiek (2011).

[14] Colm O'Cinneide, 'Constitutional and Fundamental rights Aspects of Age Discrimination' in Numhauser-Henning and Rönnmar (2015) 54. Compare also, ibid., the discussion on 'suspect' and less suspect categories of discrimination. See also A.G. Poiares Maduro in case C-303/06 *Coleman v Attridge Law* EU:C:2008:61.

[15] O'Cinneide (2015) 54.

[16] Schiek (2015) 85.

rationales also when explaining the differential treatment of age compared to other grounds in areas outside working life – this time not only due to instrumental social interests but also in terms of external and internal comparisons? The aim of this chapter is to highlight these characteristics/concerns of EU age discrimination law with emphasis on the situation of older employees. In the following, section 2 introduces age discrimination law in general and provides overview of this law at the EU level. In section 3 we shift to a closer discussion of EU age discrimination law in the area of working life, drawing upon hitherto studies in the Norma Elder Law Research Environment.[17] Next, section 4 addresses age discrimination bans outside working life through the example of the Swedish ban on age discrimination in medical care/elder care. This latter area is one that has been far less studied by ourselves[18] as well as by others.[19]

2 Age-discrimination regulation – introductory remarks

2.1 International/constitutional level

EU developments are, of course, closely related to those at the international level. The use of age-based distinctions in different social contexts has become increasingly controversial also in a global perspective. Already in 1967, age joined sex and race as a ground of prohibited discrimination in the US, in the form of the Age Discrimination in Employment Act (ADEA). At domestic level, age as a prohibited ground has subsequently appeared in the constitutions of countries such as Canada[20], South Africa and Finland. However, age is not expressly referred to in international instruments such as the Universal Declaration of Human Rights, the UN International Covenant on Civil and Political Rights, [21] ILO Convention No 111

[17] See Numhauser-Henning and Rönnmar (2015), A Numhauser-Henning, 'Labour Law in a Greying Labour Market – In Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law' (2013) European Labour Law Journal, Volume 4, No. 2, 84, A Numhauser-Henning, 'The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls' (2013) *IJCLLIR* Vol 29, Issue 4, 391, and, A Numhauser-Henning and M Rönnmar, 'Compulsory Retirement and Age Discrimination - The Swedish Hörnfeldt Case Put in Perspective', in Lindskoug, P et al (eds), *Essays in Honour of Michael Bogdan*, (Juristförlaget i Lund 2013) 401. See also Ann Numhauser-Henning and Mia Rönnmar, 'Age Discrimination and Labour Law in a Comparative Perspective', in Laura Carlson, Örjan Edström and Birgitta Nyström (eds), *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective* (Iustus 2016) and Jenny Julén Votinius (2016).

[18] See, however, Titti Mattsson and Håkan Jönson (eds.) (2014) *Socialvetenskaplig Tidsskrift* nr 3-4 Special Issue, Tove Harnett and Håkan Jönson 'Sill och potatis till den ena och entrecote till den andra?' in (2014) Socialvetenskaplig Tidskrift nr 3-4, S Erlandsson, '"Gammal" eller "funktionshindrad"' in (2014) Socialvetenskaplig Tidskrift nr 3-4 and Håkan Jönson and Tove Harnett, *Socialt arbete med äldre* (Natur & Kultur 2015).

[19] Compare however Angela Kydd and Anne Fleming, 'Ageism and age discrimination in health care: Fact or fiction? A narrative review of the literature' (2015) Maturitas 81 432. Cited literature tend to concentrate on ageist attitudes/practices in health care, studied empirically, or on health rights proper (see also Aart Hendriks, 'The Right to Health in National and International Jurisprucence', (1998) European Journal of Health Law 5:289 and also 'Patients' Rights and Access to Health Care' (2001) Med Law 20:371.

[20] Compare Fudge, Chapter 3 in this book.

[21] This lack of reference notwithstanding, various UN declarations regarding the rights of younger and older persons have been endorsed by the UN General Assembly, for instance, the Vienna International Plan of Action on Ageing, the United Nations Principles for Older Persons (1991), and the Madrid International Plan of Action of Ageing; and, an Open-ended Working Group on Ageing (UNGA) was established by General Assembly

Concerning Discrimination in Respect of Employment and Occupation, the European Convention of Human Rights (ECHR)[22] or the European Social Charter; in addition, there is still no international covenant proper on the prohibition of age discrimination.[23]

Despite this uncertain status of age discrimination as such in constitutional and international human rights law, national apex courts have to a certain extent been willing to review the compatibility of age-based distinctions with constitutional guarantees of equal treatment and non-discrimination, often though accepting age-based distinctions 'if they can be shown to be rationally linked to the achievement of legitimate aim'.[24] Moreover, in 2014 the Committee of Ministers of the Council of Europe adopted a new recommendation on the promotion of human rights of older persons, and, in June 2015 the Members of the Organisation of American States adopted a binding regional treaty protecting the elderly's rights[25].

2.2 EU level

In the EU, the Amsterdam Treaty (now Article 19 TFEU) provided new competences for EU institutions to take measures against discrimination inter alia on the grounds of age. [26] The EU Charter of Fundamental Rights (after the Lisbon Treaty, legally binding and part of primary law) in its Article 21 contains a ban on discrimination concerning, among other grounds, age. Against this background, the European Council's Directive 2000/78/EC (the Employment Equality Directive) was adopted in December 2000[27]. It covers age as a ground for discrimination, among others, in the working life context. Later on, an initiative was taken to broaden the scope of protection against discrimination, including on the basis of age to areas beyond working life, in parallel with that of the 2000/43/EC Directive, dealing with discrimination on ground of ethnicity. [28] Finally, the Commission's proposal for a European Accessibility Act regarding products and services on the internal market[29] is the most recent development in this area. We will return to this issue below in Section 4.1.

Resolution 65/182 in December 2010 to explore the need for a UN treaty on the human rights of older persons in particular.

[22] The European Court of Human Rights has recognised in its case law, however, that discrimination on the grounds of age can constitute a violation of Article 14 of the Convention in combination with Article 8.

[23] See further, for intsance, Barbara Mikolajczyk, 'Ageism versus Dignity. Remarks from an International Law Perspective' (2015, unpublished?)

[24] Compare O'Cinneide (2015) 59.

[25] The Inter-American Convention of Protecting the Human Rights of Older persons, adopted on 6 June 2015.

[26] Bob Hepple has referred to the following period as one of 'comprehensive and transformative equality', wheres Mark Bell has described it as a time hallmarked by 'widening and deepening' of equality law, see B Hepple, 'Equality at Work*'* in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe, A comparative Study of 15 Countries 1945-2004* (Hart Publishing 2009) 129-130 and M Bell*, '*The Principle of Equal Treatment; Widening and Deepening' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2011). Comprehensive and widening refer to the broadened scope of non-discrimination regulation post-Amsterdam and transformative and deepening imply both the constitutionalisation of non-discrimination and equal treatment as a fundamental right, but also a more 'substantive' approach to systemic inequalities.

[27] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

[28] OJ L 180, 19.7.2000 COM(2008) 426 final.

[29] COM(2015) 615 final.

Equal treatment or non-discrimination on the grounds of age as a fundamental principle of EU law – and indirectly also Article 21 of the CFR – was first put to the test in the *Mangold* case.[30] Despite the fact that the Employment Equality Directive had not been implemented at the time, the CJEU considered a German rule on free access to fixed-term employment when the employee was 52+ in relation to Community law and Article 5(1) of the Fixed-term Work Directive 1999/70/EC, finding that the rule was contrary as 'the principle of non-discrimination on grounds of age must (…) be regarded as a general principle of Community law' and that 'consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed for the Member States for the transposition of a directive'. Later, in *Kücükdevici*,[31] the Court elaborated further on the relation between this fundamental principle and the Employment Equality Directive. Here the Court reiterated the character of equal treatment on the grounds of age as a general principle of EU law – this time with an express reference to Article 21(1) of the CFR – and stated that 'the [Employment Equality], directive does not in itself lay down the principle of equal treatment … but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age'. This time, the rule at stake was found to be contrary also to the specific regulation in Article 6.1 of the Employment Equality Directive. At the moment there is a Finnish case pending, again testing the scope of the equal treatment principle within the EU law and Article 21(1) CFR.[32] The case relates to a Finnish supplementary tax on pensions and whether such a tax is precluded by the Employment Equality Directive and/or Article 21(1). Advocate General Kokott in her opinion delivered on 28 January 2016 concludes that the Employment Equality Directive does not apply to taxation of pension income, nor can this be assessed under article 21(1) CFR since we are not implementing EU law in this case.[33]

Finally, some words on multiple or intersectional discrimination. As indicated in the introduction, the balancing of distributional and dignitarian concerns that is involved in age discrimination cases already raises a number of tensions because of competing policy interests in encouraging and supporting longer work lives on the one hand and distribution of labour market opportunities in accordance with the principle of intergenerational solidarity on the other. The CJEU's tendency to defer to national government's employment policies, especially in relation to compulsory retirement and pension eligibility (see further Sec. 3 below), has proven to be particularly problematic – and revealing – in cases where age interacts with other grounds on which discrimination is prohibited, such as gender, ethnicity, or disability.[34] Because many workers belonging to these groups have not historically followed the normative employment pattern inherent in the standard employment contract and life course on which the prevalent notion of intergenerational solidarity is based, policy rules that seek to uphold the latter tend to disadvantage them in ways that are not only unfair but also inherently systematic.[35] For example, age or service-related requirements or cut-offs

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[30] C-144/04 *Mangold v Helm* EU:C:2005:708.
[31] C-555/07 *Kücükdevici* v. *Swedex GmbH Co KG* [2010] ECR I-00365.
[32] Case C-122/15 *Korkein hallinto-oikeus* EU:C:2016:65
[33] Compare also the pending case C-548/15 *de Lange*.
[34] Dagmar Schiek (2011); Paul Chaney, 'Mainstreaming Intersectional Equality for Older People? Exploring the Impact of Quasi-federalism in the UK' (2013) 28 *Publ. Pol. Admin*., 21 (2013); Lynn Roseberry, 'Multiple Discrimination' in Malcolm Sergeant (ed.), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* 16 (Cambridge University Press 2011).
[35] Judy Fudge and Ania Zbyszewska, 'An Intersectional Approach to Age Discrimination in the European Union: Bridging Dignity and Distribution?' in Numhauser-Henning and Rönnmar (2015).

typically fail to account for the fact that disabled workers or women will likely have work histories that do not reflect the norm, as they are more prone to have career interruptions or work atypical jobs by reason of their disability in the first case or because of their engagement in provision of unpaid care work within the home. Such workers may be unable to accrue pension entitlements that are as high as those of other workers, or even sufficient to live on, or be entitled to wage increments or other employment-related benefits that are tied to seniority and years of service.

Yet, while the aggravated consequences of discrimination operating on multiple grounds have been recognized by the European Commission[36] and the Parliament,[37] no prohibition on such basis has been enacted at the EU-level, nor in most EU Member States. Instead, as it currently stands, the variegated structure of the Employment Equality Directive tends to promote an approach that treats various grounds of discrimination as parallel but separate harms.[38] Similarly, the CJEU's approach to cases where multiple discrimination grounds interact – whether expressly or not – confirms not only the Court's unwillingness to question Member State policies, or require national courts to more deeply probe evidence presented by national states to justify their policies, but also the Court's 'blindness' to the systemic nature of the disadvantage that such policies create.[39]

3 Equal treatment and age discrimination – inside working life

3.1 The EU Employment Equality Directive

The Employment Equality Directive applies to conditions for access to employment, self-employment or occupation; to vocational guidance and training; to employment and working conditions, including dismissals and pay; and to membership of and involvement in a trade union or an employer's organisation (Article 3). The Directive applies to Member States when legislating, to social partners when concluding collective agreements, and to employers. The Employment Equality Directive is aligned with the other non-discrimination directives and encompasses prohibitions of direct and indirect discrimination, harassment, and instruction to discriminate, as well as provisions on positive action and active measures and a rule on a reversed burden of proof.

However, the ban on age discrimination differs from bans for most other discrimination grounds in that direct differential treatment can be justified if it concerns a legitimate aim, and the measure at issue is both appropriate and necessary (Article 6.1). Legitimate aims shall be related to employment policy, labour market and vocational training objectives, and the Member States – as well as the social partners – enjoy broad discretion to define both these aims and the measures of achieving it. Article 6.2 of the Directive also

[36] European Commission, *Strategy for equality between women and men 2010-2015* document drawn on the basis of COM (2010) 49 final, SEC 92010 1080, 11.
[37] European Parliament, Legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 P6 TA (2009) 211.
[38] Compare case C-152/11 *Odar*:EU:C:2012:772
[39] Compare the cases of *Rosenbladt v. Oellerking Gebaudereinigungsges mbH*, C-45/09 [2010] ECR I-09391 and *Kücükdevici*, which both illustrates this particularly well.

states that Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits (including the use of age criteria in actuarial calculations in the context of such schemes) does not constitute discrimination on the grounds of age. Moreover, Article 4 contains an exemption covering all grounds under the Directive for so-called GOR (genuine and determining occupational) requirements. There is also Article 2.5 and the exemption for legislative measures necessary for public security and public order as well as for the protection of health and the rights and freedoms of others. Finally we have Article 3.4 and the exception for the armed forces in relation to age and disability.

3.2 The EU age discrimination ban at work

3.2.1 Introduction

The EU ban on age discrimination and its implications for both older workers and labour law is an issue developed in numerous publications within the Norma Elder Law Research Environment[40] as well as by other authors.[41] The relevant case law is by now fairly generous and has caused significant discussion – and also criticism – especially in relation to the different standards of the proportionality test applied by the CJEU.[42] Moreover, given the ambiguity of the age discrimination ban set out in the Directive these interpretations work both to the detriment, as well as protection, support and empowerment of older people in intrinsic ways as described here.

3.2.2 Compulsory retirement and pension-related working conditions

A significant number of cases brought before the CJEU has concerned compulsory retirement, which despite the ban on age discrimination – and in stark contrast with the US – is still an acceptable practice in EU law.[43] Whereas retirement age as such is outside the scope of the Employment Equality Directive, the termination of employment in terms of retirement is not. Despite compulsory retirement in principle amounting to direct age discrimination, the practice may be acceptable under the exception rule in Article 6.1. Significant for cases of mandatory retirement is the lenient proportionality test applied by the CJEU. Schlachter, for instance, has distinguished two separate standards when it comes to the

[40] Compare supra n. 17.

[41] Compare, for instance, Christa Tobler, 'EU Age Discrimination Law and Older and Younger Workers: Court of Justice of the European Union Case Law Developments' in Numhauser-Henning and Rönnmar (2015) and, for example, Schiek (2011), M. Schlachter, 'Mandatory Retirement and Age Discrimination under EU Law', (2011) IJCLLIR 27, C. Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture' (2011) Industrial Law Journal, Vol. 40, No. 3, September 2011 and E. Dewhurst, 'Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national courts in finding a balance between the generations' (2013) 50 Common Market Law Review 1333.

[42] Compare footnote 17 and 41.

[43] See *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05 [2007] ECR I-8531, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07 [2009] ECR I-01569, *Rosenbladt, Georgiev v. Technicheski Universitet, Sofia*, C-250/09 and C-268/09 [2010] I-11869, *Fuchs and Köhler v. Land Hessen*, C-159/10 and C-160/10 [2011] ECR I-06919, Case C-141/11 *Torsten Hörnfeldt v. Posten Meddelande AB*, EU:C:2012:421, and, Case C-341/08 the *European Commission v. Hungary*, EU:C:2012:687.

justification of differential treatment in this area; one 'control standard' as regards general systems of compulsory retirement such as in the cases *Rosenbladt* and *Hörnfeldt,* and another, considerably stricter standard when it comes to special professional groups such as in the cases *Petersen,*[44] *Georgiev, Fuchs and Köhler* and, later, *the Commission v Hungary*.[45]

To make people work beyond pensionable age is a core concern in active ageing policies. The practical and the legal possibility of a longer work life, however, depends, in part, on whether compulsory retirement continues to be accepted. Yet, in cases addressing retirement policies in various EU Member States, the CJEU has so far recognised as legitimate the aims of intergenerational fairness in terms of access to employment, prevention of humiliating forms of employment termination, and a reasonable balance between labour market and budgetary concerns. Thus, the Court has given a lot of consideration to Member States' traditions because 'the automatic termination of the employment contracts for employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships'.[46][47] Not only the Member States but also the social partners, when applying Article 6.1 in the Employment Equality Directive, are said to have a broad margin of discretion 'in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it'.[48]

In situations concerning pension reform and/or pension-related age-differentials in redundancy/dismissal situations, the CJEU is known to apply a stricter standard.[49] The case *Commission v Hungary* concerned pension reform for judges, prosecutors and notaries, lowering the age of compulsory dismissal from 70 to 62 years of age. The 'standardisation' of compulsory retirement age was a relevant aim in relation to Article 6.1, according to the CJEU, but the regulation did not meet the requirements to be appropriate and necessary. An individual assessment proved 'the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned' (judgment pp. 67-68).

The *Andersen* case concerned reduced redundancy payments in a situation of collective dismissals for employees entitled to employer-paid retirement benefits already at

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[44] *Petersen v. Beerufungsausschuss fur Zahnärzte fur den Bezirk Westfalen-Lippe*, C-341/08 [2010] ECR I-00047.

[45] M Schlachter (2011). Compare also Schiek (2011) and Fudge, Chapter 3 in this book.

[46] *Hörnfeldt*, the judgment p. 28.

[47] According to a 2011 report, based on the situation per 31 December 2009, 24 of 29 Member States did have a set age of for automatic termination (compulsory retirement), concerning specific professions and/or public employees. However, 23 out of 29 Member States *did not* have a general rule on compulsory retirement that was also applicable to the private sector; Declan O'Dempsey and Anna Beale, *Age and Employment*, Report from the Network of Legal Experts in the non-discrimination field to the European Commission 1 July 2011 (2011).

[48] The quote is from *Palacios de la Villa* – the first to accept compulsory retirement (the judgment p. 68). Compare also the later cases *Rosenbladt* p. 67, *Hörnfeldt* p. 32 and *Odar* p. 47 and further Numhauser-Henning and Rönnmar (2016).

[49] See cases *Petersen*, *Ole Andersen v. Region Syddanmark*, C-499/08 [2010] ECR I-09343, *Prigge v. Deutsche Lufthansa AB*, C-447/09 [2011] ECR I-08003, Case C-152/11 *Johann Odar v. Baxter Deutschland GmbH*, EU:C:2012:772, Case C-476/11 *HK Danmark v. Experian A/S*, EU:C:2013:590, Case C-546/11 *Toftgaard v. Indenrigs- og Sundhedsministeriet*, EU:C:2013:603 and Case C-515/13 *Ingeniörforeningen i Danmark v. Tekniq* EU:C:2015:115.

the age of 63.[50] Whereas the CJEU found 'the aim of preventing compensation on termination from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension to be legitimate' (the judgment p. 44), upon closer scrutiny the measure was found to be neither appropriate nor necessary as it neglected the individual employee's wish not to opt for the pension but to continue working.[51] In *Odar*, however, reduced redundancy payments related to the date of a right to early retirement was deemed appropriate since 'it made sense to reduce the severance pay of employees who are financially secure, and to facilitate the transition to new employment for employees with more limited financial resources' (the judgment p. 48) and also necessary since it only provided for a reduction in the amount of compensation granted to older workers (the judgment pp. 51-52). In *Toftgaard*, the refusal to grant availability pay to civil servants who had reached the age of 65 – the default retirement age for the civil servants was in fact 70 years of age – and who were entitled to a pension, was indeed (and in parallel to that in *Andersen)* regarded to go beyond what was necessary, however.

A conclusion following *Toftgaard* was that whenever we deal with age-related working conditions and situations 'pre'-default retirement age, a stricter standard applies, and this may also be the case where there is no default age for retirement.[52] Recent case law, however, may call for a revision of this conclusion. In *Tekniq,* severance allowance – a few months extra pay to the long-time employed (12, 15 or 18 years) – was not paid to workers entitled to a state retirement pension. The aim – to help older (but not 65+) workers find new employment was found a legitimate aim under Article 6.1, whereas restricting the allowance to those not entitled to a state pension did not appear unreasonable and thus not 'manifestly inappropriate'. Nor was the fact that the rule treated those who will actually receive a state pension in the same way as those who are eligible for such a pension enough to make it inappropriate/unnecessary. Here, the consequences for the employees at issue were carefully scrutinized – in paralell with both *Andersen* and *Toftgaard* – though found to be proportionate; 'a limited lump sum which does not appear capable of causing a significant loss on income to the departing employee in the long term'. The solution at stake 'does not appear unduly to prejudice the legitimate interests of workers who have reached the ordinary age of retirement' (judgment p 44). Now, we have to conclude that the CJEU in regard to working conditions such as redundancy and availability pay apply a stricter proportionality test also in relation to workers 65+ – or beyond the applicable default retirement age – scrutinising the effects for the individual employee (despite, as in *Tekniq,* accepting differential treatment of workers in right to a state pension when these effects were limited).

[50] Compare also case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2015:776.

[51] Compare also *Prigge.*

[52] Compare Ann Numhauser-Henning, 'Labour Law, Pension Norms and the EU Ban on Age Discrimination: Towards Ultimate Flexibilization?' in Numhauser-Henning and Rönnmar (2015).

3.2.3 To uphold the ban on age-discrimination or not

Whereas upholding the ban on age discrimination would have meant an attack on, or at least a partial replacement of, the standard employment contract as developed during the twentieth century,[53] the continued acceptance of compulsory retirement is rather an integral part of the standard employment contract.[54] Accepting compulsory retirement thus implies support for the standard employment contract and the continued use of age as a social stratifyer, challenging the flexibilization functions of non-discrimination law. Anti-discrimination law has thus generally been seen as an expression of the general trend towards individualization going hand in hand with the flexibilization of labour markets experienced in the last decades. The ban on (age) discrimination is thus, generally speaking, stepping in as a *replacement* for employment protection in times of the flexibilization of work.[55]

At first glance it would, of course, promote not only active ageing in terms of work beyond retirement age, but also employment protection to eliminate compulsory retirement – in itself implying the immediate cease of employment – and, at individual level older workers typically push for legislation that makes compulsory retirement illegal. This mainly seems to be to the detriment of the younger generations in the sense that older workers thus do not abstain from their developed employment protection, or from 'senior' working conditions, whether these comprise wages or vacation. However, a frequent argument in favour of compulsory retirement, now also accepted by the CJEU, is that should there be no formalised 'end' to the employment relationship; as the employee grows old we cannot avoid situations in which employment contracts are terminated in forms which are humiliating for older workers.[56]

The ban on age discrimination is first and foremost in place to tackle dismissals related to the individual. To what extent sickness and reduced working capacity amount to just cause for dismissal on personal grounds differs among the Member States. There are, however, good reasons to believe that to uphold the ban on age discrimination and thus, as a general rule, require just cause for dismissal at any age, would lead to an increased emphasis on 'capability' as an employment requirement and the undermining of not only active ageing strategies but also employment protection well before retirement age. Thus, in the UK one result of the abolishment of the statutory compulsory retirement is assumed to be an increased use of performance management, that is regular reviews, consultation and documentation in

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[53] See further Mark Freedland, 'Burying Caesar: What Was the Standard Employment Contract? in Katherine Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) and Kendra Strauss, 'Equality, fair mutualisation and the socialisation of risk and reward in European Pensions' in Nicola Countouris and Mark Freedland (eds*), Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013).

[54] Compare E Lazear and his mandatory retirement theory, Edward Lazear, 'Why Is There Mandatory Retirement? (1979) Journal of Political Economy vol. 87, No. 6, 1261. Compulsory retirement thus builds on an implicit contract model, stating that employers pay employees a wage premium towards the end of their careers on the assumption that the employment relationship will come to an end at a predictable, fixed point in time.

[55] Compare the US, where bans on discrimination always were regarded to have a key (replacement) function in relation to the dismissal at-will doctrine, compare J Fineman, 'The vulnerable subject at work: a new perspective on the employment at-will debate' (2013) Southwestern Law Review Vol 43 (2013) 278. On this line of argument see further Mia Rönnmar et al., 'Employment Protection and Older Workers', Chapter 9 in this book.

[56] *Hörnfeldt*. Compare also *Rosenbladt, Georgiev* and *Fuchs and Köhler*. Compare Julie C Suk, 'From antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' (2012) 60 Am. J. Comp. L.

order to monitor the performance of the employee, and to build up a case for either voluntary retirement or a dismissal that will hold up against the UK unfair-dismissal legislation.[57]

A weakening of employment protection in such terms, generally speaking, will make way for an increase in flexible employment (if any) for workers coming of pension age. No one – and certainly not the old employer – will be willing to go through a dismissal for personal reasons again. Ironically, this is also why hitherto acceptance of compulsory retirement in itself seems to support an increase in flexible employment beyond retirement. [58] In both *Rosenbladt* and *Hörnfeldt* the Court – in accepting compulsory retirement at a certain age – pointed to the fact that there still was the possibility of other employment (under the auspices of the ban on age discrimination), should the individual prefer not to retire. Often enough, such employment would take the form of a fixed-term contract, whether with the old or a new employer. [59] Likewise, otherwise restricted use of fixed-term employment is frequently more generous beyond 'normal' pension age. This is the case in Sweden where there are no restrictions whatsoever concerning individuals 67+. Whether there really is an unlimited scope for fixed-term work beyond retirement age has been discussed in relation to the Fixed-term Work Directive, in principle requiring some kind of restriction. [60] Already in *Mangold* the CJEU made it clear that a German rule on fixed-term employment at the age of 52, which was put in place to facilitate access to the labour market, was disproportionate in respect of the Fixed-term Work Directive and the general principle of non-discrimination. However, in a reasoned opinion the Commission has now accepted old age (67 years of age) to be an objective criterion under article 5.1a of the Directive.[61] There is yet no case arguing that an employer's preference for a fixed-term contract over a permanent one with regard to workers coming of age in itself amounts to age discrimination, though.

What we have not discussed so far is the inherent weaknesses of the discrimination ban in itself – the substitute for employment security in times of flexibilization as it were – due to the 'elitist' design of non-discrimination regulation in general. Age discrimination may well turn out to be a weak friend in need![62] Indeed, the design, generally speaking, works to the detriment of older workers, because the reference norms representing the foundation of comparison in cases of alleged discrimination are basically meritocratic. Therefore, the non-hiring of an older applicant may well be defended by arguments about the more 'up-to-date' education of a younger candidate, while a dismissal may be defended by arguments about the older worker's ability to work and availability in terms of working time. Some of these problems could possibly be avoided by requiring 'proactive' measures (compare reasonable accommodation) in relation to age as well, but such a development is yet to be seen.

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[57] Compare Catherine Barnard and Simon Deakin, 'Age Discrimination and Labour Law in the UK: Managing Ageing' in Numhauser-Henning and Rönnmar (2015).
[58] Numhauser-Henning (2013).
[59] Cases such as *Georgiev* and *Fuchs and Köhler* show us that in certain professions, the compulsory retirement regime comes with an institutionalised order of (only) fixed-term work openings.
[60] Compare the infringement case between the Commission and Sweden concerning whether Sweden has rightfully implemented the Fixed-term Work Directive, among other things pointing to the fact that Sweden is accepting unlimited fixed-term work, post-67 years of age. Cf. MEMO/08/69 31 January 2008 of the European Commission and the European Commission's reasoned opinion 21 February 2013 C(2013) 822 final with a complementary reasoned opinion 22 April 2014 C(2014) 2380 final.
[61] Supra n. 60.
[62] Compare Colm O'Cinneide, 'Completing the picture: the complex relationship between EU anti-discrimination law and "Social Europe", in Freedland and Countouris (2013) with further references to Alexander Somek, *Engineering Equality: An Essay on European Anti-discrimination Law* (Oxford University Press 2012).

3.2.4 Age-related wage-setting, etc

Finally, just a few words about age-related wage-setting. This is seen as a constituent of the standard employment contract, whereas seniority wage-setting practices tend to work to the detriment of active ageing as they become very expensive when employees grow older. Still, these practices are common and the question is to what extent they – as compulsory retirement – are still found to be compatible with a ban on age discrimination. It is already evident from the CJEU's case law in sex discrimination cases that experience in terms of length of service – and thus with an indirect connection to age – is a justified criterion as far as wage-setting is concerned, without the employer having to establish the importance this experience has in the performance of specific tasks entrusted to the employee at stake.[63][64] This does not mean that a more 'automatic' age-related wage-setting system is acceptable as is shown by the *Hennigs* case.[65] A collective agreement, providing that the basic pay determined on appointment of the employee was based directly on the employee's age, was found impermissible under Article 6.1 of the Employment Equality Directive, whereas there was a broad scope for the social partners providing a transitional way out of these practices also in somewhat discriminatory terms.[66]

The experience of countries that have already eliminated compulsory retirement is that there is a continued need of age distinctions in employee benefits (also indicated by the very exception in Article 6.2 of the Employment Equality Directive). For instance, Canadian legislation and case law recognise 'the principle that even in the absence of compulsory retirement employers, employees and government policymakers cannot simply disregard the inevitable consequences of ageing when establishing employment benefits' such as long-term disability plans, and 'the need to balance the competing interests that bargaining unit members have at different times in their lives is an inherent part of the collective bargaining process. Moreover, younger employees generally want higher wages, while older employees may prefer such benefits as life insurance, pensions or retirement allowances.'[67]

4 Equal treatment and age discrimination – outside working life

4.1 Introduction

At the EU level a proposal is currently pending for a directive extending the prohibition against discrimination on the grounds of (among others) age beyond working life – the so-

[63] See, for instance, *Danfoss* C-109/88 [1989] ECR 3199 and *Cadman* C-17/05 [2006] ECR I-09583.
[64] See also *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v. Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt* C-132/11 [2013] ECR I-00000.
[65] *Hennigs v. Eisenban-Bundesamt and Land Berlin v. Alexander Mai* C-297/10 and 298/10 [2011] ECR I-07965.
[66] See further, A Numhauser-Henning and M Rönnmar (2016) and cases C-501/12 *Specht et al v Land Berlin* EU:C:2015:2005 and C-20 *Unland v Land Berlin* EU:C:2015:561. Compare also the case *HK Danmark v. Experian A/S* where age-related retirement contributions – increasing with age – was considered legitimate under Article 6.1 of the Directive
[67] Robert Charney and Matthew Horner, 'Defending Age Distinctions in Employee Benefits after the Elimination of Mandatory Retirement' (2013) Canadian Labour & Employment Law Journal, Vol. 17 No. 1, 255.

called Horizontal Directive.[68] The proposal covers among others the area of social protection, including social security and healthcare. Despite encountering serious difficulties over the years[69] – the adoption of the Horizontal Directive requires unanimity – the proposal was 'resuscitated' by the Juncker commission[70] and, following a progress report, the Council of the EU concluded in June 2015that there was 'a strong political will in favour of continuing this work'.[71] Still, there is considerable resistance towards adopting the Horizontal Directive. Major concerns have regarded the proposal infringing on national competences as well as the inclusion of social protection and education. There are also Member States that would have preferred more ambitious provisions in regard to especially disability.[72] The Commission still clings to its original proposal containing a scope for the justification of direct age discrimination *whenever* there was a legitimate aim and the means appropriate and necessary, i.e. even broader than that of the Employment Equality Directive. The double bind thus prevails in this context as well. Moreover, the Latvian presidency in 2015 added a new exemption for preferential charges, fees or rates in respect of persons in a specific age group (Article 2(6)(c), the aim being to allow commercial entities to charge different rates based on the age of the customer, an amendment opposed by certain Member States as being too broad. Whereas the future of the Horizontal Directive is still uncertain (to say the least), several EU Member States, for example Germany, Poland and Sweden, have already expanded the scope of the ban on age discrimination beyond working life. Here we will discuss the example of Sweden.[73]

In Swedish law, gender, age, and other discursively and institutionally constructed categories such as ethnicity and sexual orientation, are not identified as intersecting. In the preparatory works of the Swedish (2008:567) Discrimination Act, the covariance of several grounds of discrimination is only touched upon briefly, and solely from the point of view of how the supervision of the various bans on discrimination should be organized.[74] The case law on discrimination involving more than one ground is very limited, and the few cases where age has been treated as part of the same legal matter as other grounds for discrimination all relates to working life.[75] Common for hitherto court cases is that they have been framed as cases of multiple discrimination.[76] It is thus only in parallel to each other that age and other categories have been recognized as important in the legal context;

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[68] OJ L 180, 19.7.2000, COM(2008) 426 final.
[69] See further Lisa Waddington, 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' (2011) European Law Review 36(2) 163–184.
[70] The Juncker Commission has made it a priority to maintain the proposal and convince national governments to give up their current resistance in the Council. Juncker's opening statement in the European Parliament Plenary Session *A New Start for Europe: New Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission*, http://ec.europa.eu/priorities/docs/pg_en.pdf.
[71] Outcome of the Council Meeting 3398m 18 abd 19 June 2015 8. See also the Progress Report 9011/15, Brussels 4 June 2015. Compare also the footnoted consolidated text of the proposal presented to the Council of the European Union on the 11 December 2014, 15705/14 ADD 1 _REV 1, Brussels 4 December 2014.
[72] Compare further also Waddington (2011).
[73] Concerning Poland, see for instance Leszek Mitrus, 'Age Discrimination and Labour Law in Poland' and concerning Germany Monika Schlachter, 'Age Discrimination and Labour Law in Germany, both in Numhauser-Henning and Rönnmar (2015).
[74] Government White Paper SOU 2006:22, p. 217.
[75]Since the adoption of the Discrimination Act in 2008, The Equality Ombudsman have brought action in less than ten cases involving more than one ground of discrimination relating to working life, the provision of goods and services, and to the area of education. Three cases involve discrimination on the ground of age: Swedish Labour Court judgments AD 2009 No 11, 2010 No 91 and AD 2013 No 64.
[76] Schömer, Eva, 'Multiple discrimination A smokescreen over differences' (2012) *Retfærd* 36(3/138).

intersectional effects of age and other categories are not addressed in a more general and comprehensive way as a question of legal significance in its own right.

4.2 The Swedish ban on age discrimination in medical care/elder care

The Swedish (2008:567) Discrimination Act implements the hitherto EU law regulations on age discrimination. But the Act goes further than this. It has the character of a 'single non-discrimination act' covering all regulated grounds – sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age – as well as various areas of society. It has been an express aim of the Swedish legislator to create a discrimination regulation treating all covered grounds equally. The Act is monitored (all grounds and areas) by the Equality Ombudsman (*Diskrimineringsombudsmannen*, DO). Now, all grounds, including age, are thus in principle covered by the existing bans in different areas of society.[77] This does not mean that the protection is necessarily equal. As we will see, in particular the ban on age discrimination is limited by a broad scope for justified differential treatment – just as is the case in EU law and the Employment Equality Directive only just described above. The areas covered are however thus considerably broader in the Swedish Discrimination Act than in hitherto EU law. They include working life, education, goods, services and housing, health/medical care and social services, the social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service as well as public employment when assisting the public. Age is still excluded as a protected ground concerning national military service and civilian service. Here we will look deeper into the implications of an age related ban on discrimination in the area of health and medical care and social services.

According to Chapter 2 Section 13 in the 2008 Discrimination Act discrimination on any ground, including age, is thus prohibited with regard to 1. Health and medical care and other medical services, 2. Social services activities, and, 3. Support in the form of special transport services and national special transport services and housing adaptation allowances. Chapter 2 Section 13b contains a rule on the scope for continued differential treatment on the grounds of age. The ban thus does not apply to 1. The application of a certain age requirement prescribed in law, and, 2. Other differential treatment on the grounds of age with a legitimate goal and where the means to achieve that goal are appropriate and necessary to attain the aim – thus articulating a fairly broad scope for direct age discrimination.

Generally speaking, in relation to health services and medical care 'need/necessity' is the decisive criterion – a criterion that shall not have to yield for age.[78] However, the regulation thus contains an exemption concerning age parallel to that of the Employment Equality Directive but with no specification whatsoever. According to the preparatory works the ban covers both administrative/procedural acts and factual acts and can regard the access to care, the coverage and contents of care and the cost implied.[79] Care priorities are set by national guidelines.[80] Priority is thus decided by need/necessity and in accordance with three

[77] Age outside working life included since 1 January 2013, see further Prop. 2011/12:159.
[78] Prop. 2011/12:159 46. (SOU 2010:60 13.)
[79] Additionally, a discriminatory treatment/reception/attitude by public employees attending the public is per se generally banned by Ch. 2 Sec. 17 the DA. This may be of special importance precisely in care activities.
[80] Prop. 1996/97:60, bet. 1996/97:SoU 14 and rskr. 1996/97:186.

ethical principles: the human dignity principle (*människovärdesprincipen*), the need- and solidarity principle (*behovs- och solidaritetsprincipen*), and, the cost-efficiency principle (*kostnadseffektivitetsprincipen*). The latter implies that there shall be a reasonable relation between costs and effects – in terms of health and quality of life – when making a choice between certain activities or measures. The cost-efficiency principle is second to both the other two principles. Severe conditions precede less severe ones despite costs, age and other personal characteristics are of no concern in relation to need, but, in the individual case attention may be given to circumstances limiting the 'utility' (*nyttan*) of care measures. Here (old) age may well be relevant.

Actually legally fixed ages aims as it is first and foremost to the protection of young persons. Otherwise fixed ages may concern payment (for instance care free of charge for certain age groups such as the young or retired) and/or preventive measures offered to certain groups (such as flue vaccination for ages 65+). Here there is a certain scope of discretion for regional and local authorities.[81]

The extended ban on age discrimination in Sweden in relation to health care and medical services has thus been given the same ambiguous or weak template as the EU ban in working life according to the Employment Equality Directive, and – eventually – the Horizontal Directive. At a more practical level there also seems to be a parallel to the double bind disguised in the cost-efficiency principle, which thus opens up for the justification of direct age discrimination in terms of cost v efficiency in what has to be regarded a collective interest approach.

So far, there is little or no case law on the bans of discrimination and their application in health care and medical services in Sweden.[82] According to a report by the Swedish Equality Ombudsman (Diskrimineringsombudsmannen, DO) typical for experienced discrimination in – among others – the health/medical care sector is a combination of the attitudinal treatment being 'stereotyped' and the actual treatment.[83] According to another DO report care is typically construed to meet the needs of 'normal' human beings and individuals tend to be categorised into groups and also reduced to these categories – the psychologically ill gets less somatic care, it is 'normal' for the oldest old to be in pain so they get less painkillers, etc.[84] It is also well known that care is far from equally distributed in Swedish society.[85] First, women make up two thirds of all people 80+, which makes equal care a gender issue. Moreover, men to a larger extent can rely on their spouses whereas women – living longer – are likely to live alone. Women gets more psykofarmaka causing confusion then elder men, and, the elderly, generally, are less often treated with alternative methods (such as for example KBT). The better educated gets more expensive and more modern psykopharmaka and better access to specialised medical care

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[81] Prop. 2011/12:15946 ff.

[82] The Supreme Court in case T 5507-12, judgment 26 June 2014, found discrimination on grounds of sexual orientation to be at hand. A lesbian woman was not provided care (a fertility investigation) at her regular care unit (*vårdcentral*) but was referred to a special clinic for homosexual women.

[83] DO, Delar av mönster (Parts of Patterns), Report 2014:1, 60. See also Kydd and Fleming (2015) concluding that negative attitudes are usually reported in acute health care settings, where targets and quick turnover are encouraged.

[84] DO, Rätten till sjukvård på lika villkor (The right to care on equal terms), Report 2012:4 46.

[85] Compare the report 'Ojämna villkor för hälsa och vård. Jämställdhetsperspektiv på hälso- och sjukvården' (Unequal conditions for care. An equal treatment perspective on health care and medical care), December 2011 110 ff.

An interesting conclusion in social work research related to the Norma Elder Law Research Programme is that equality in elder care seems to be discussed rather in relation to internal comparisons (with other patients, eventually with the same disease) than in relation to external comparisons as is the tradition in relation to the disabled (generally compared to other non-disabled groups in society).[86] Another study concludes that there are considerable differences in relation to how support for elderly and younger persons, respectively, are construed – in two different categories, not really comparable, and with the result that differential treatment is not perceived as age discrimination.[87] According to Harnett and Jönson a potential external reference in elder care is that the older person shall be able to live like before. This is however a weak reference, frequently rejected by reference to the disability as what has led to the transfer to an elder care facility in the first place. The resulting limitations was seen not as related to lacking support for older persons but as related to weakening abilities as such. It is more about what you can (not!) do than about the support you need to be in a comparable situation with others. In a disability context external comparisons are legio.[88] Disabilities are seen as caused by lacking accommodation and are discussed in terms of accommodation and inclusion/integration whereas elder care is contextualized precisely in a discourse of care. The question is, should a person in elder care be compared with persons his/her age in general, or, with younger disabled persons?[89] Erlandsson shows us how – despite that the development of social services is being guided by the principles of justice, universalism and equal treatment – adults in need of care are still divided into two categories; persons 65+ and disabled persons (mainly less than 65 years of age). These categories have different rights to support depending on their current age and also the age at which the 'disability' occurs. Persons 65+ were thus found to be constructed as united by care needs stemming from their ageing bodies. Persons with disabilities were construed as citizens with a joint experience of discrimination and difficulties caused by an inaccessible society. 'In accordance with this, elderly policy documents focus mainly on issues related to elder care, while disability policy documents emphasize issues of participation, equality and accessibility.'[90]

In the design of EU discrimination law (basically reflecting the civil rights approach, age discrimination included) we do not see this difference – it is generally argued precisely in terms of participation, equality and accessibility. Non-discrimination regulation as well as ageing policies are thus often discussed in terms of inclusion and the ageing individual is compared to other individuals of different ages in a similar situation. This perspective is also the one at the hearth of non-discrimination law and the one that really fosters an intergenerational approach. The application of 'another' context can, however, be disguised in the interpretation of what is to be regarded as a similar/comparable situation as well as within the accepted scope for justification of also direct age discrimination! The double bind permits a collective approach on age differentials when compatible with the European social model. In a context like the Swedish one, where the ban on age discrimination apply also to the areas of health care, medical care and social services, practices such as the described may well be decisive for the potential impact of non-discrimination regulation. A principle of need

[86] Compare Harnett and Jönson (2014).
[87] S Erlandsson, '"Gammal" eller "funktionshindrad"' (2014) Socialvetenskaplig Tidsskrift nr 3-4.
[88] SOU 2008:77, *Möjlighet att leva om andra*.
[89] Harnett and Jönson (2014) 263.
[90] Ibid 284. Compare also H. Gautun and A.S. Grødem, 'Protitising care services: Do the oldest users lose out?' (2015) Int J Soc Welfare 2015:24 73.

may well be decisive as the distribution of health/medical care is concerned, but a continued focus on the (differentiated) need for 'care' contextualized in certain ways tends to leave issues of the accessibility/quality of support out. And, this at the same time as 'health must lie at the core of society's response to population aging' and prohibitions of age discrimination are regarded as a crucial tool in making rights and dignity in ageing 'the norm'.[91] This may well be typical for age discrimination bans in the area of social services/elder care not only in Sweden but generally. Only the future will tell! It also makes us revisit the capability issue as the center of concern. No doubt, lacking capability is a real concern in regard to many elderly. A real ambition of inclusion as the goal for equal treatment/a ban on age discrimination must therefore be accompanied by requirements of reasonable accommodation not yet introduced in relation to age.

5 Concluding remarks

The principle of equality is a principle of universal application and it does, as Doron says, send 'a positive message regarding the status of the elderly in society' – 'its implicit notion of normalization' make the older population an integral and equal part of society.[92] In hiterto EU law – restricting the ban on age discrimination to the area of working life – the weaker template of precisely this discrimination ban as compared to those of other grounds does reflect, however, that older workers still may be treated differently to a considerable extent. According to the Employment Equality Directive and its Article 6.1, direct age discrimination may be justified and the ban is characterized by its 'double bind' opening up for the ban to work in intrinsic ways – to the detriment as well as protection and support for older workers. The double bind implies that the ban balances often conflicting distributional and dignitarian concerns.

The current state of EU age discrimination law reflects its underlying, partly conflicting human rights and economic rationales, respectively. The EU Charter of Fundamental Rights, and the right to equality, the right to non-discrimination and the rights of the elderly emphasise the human rights rationale. At the same time, the traditional role age plays in the organisation of labour markets and the design of labour laws is partly maintained and reflected in the broad scope for justification of age-related differential treatment such as compulsory retirement. This practice honour traditional use of age as a social stratifyer and may well be favourable to older workers protecting them in relation to the precareisation of both work and pensions. At the individual level it is easy to see that this continued acceptance of compulsory retirement works to 'stereotype' the old-age individual in terms of ageism and dignity harm.

In EU law we have yet not seen a ban on age discrimination beyond working life. The Swedish example – having adopted a ban on age discrimination in (among others) areas health/medical services and social services/elder care – shows that there is high likelihood that a broad scope for justification of continued differential treatment on the grounds of age will prevail applying a double bind also here, creating a scope for the collective interest approach within a cost-efficiency logic. Add to this a tradition within social services/elder

[91] Lawrence O. Gostin and Anna Garsi, 'Governing for Health as the World Grows Older: Healthy Lifespans in Aging Societies' (2014) The Elder Law Journal Volume 22 111 114, 121.
[92] I Doron 'A Multi-Dimensional Model of Elder law' in Doron (ed.), *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Springer 2009) 61.

care of dealing with people 65+ in terms of care and internal comparisons rather than using concepts of traditional discrimination law in the liberal tradition such as inclusion and equality in comparison with more externalised categories. Such practices undermines the potential effects of a ban on age discrimination and maintain attitudes of paternalism and dependency. Moreover, it also disregards the value of real quality in health and medical care from an ageing society point of view. It is true that the quality or level of health care is not as such an issue for non-discrimination law – nor are distributional concerns – but they may well be an effect of the comparisons made/allowed!