

## **Compulsory retirement and the fixing of a maximum age for recruitment**

### **- lawful or unlawful age discrimination?\***

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This paper is about age discrimination – thereby focusing in particular on a maximum recruitment age and mandatory retirement with regard to specific professions. Its key aspects are the following: First, age should not play a major role in the field of employment and occupation. Secondly, the crucial point is the justification of age discrimination and the level of scrutiny. Thirdly, the legal battle as to the unlawfulness of compulsory retirement has been lost and has now become a political issue. Fourthly, the setting of age limits for recruitment is suspicious and could probably constitute unlawful age discrimination.

#### Overview

I. Introduction

II. Case law on mandatory retirement and maximum recruitment age

III. Legal assessment

IV. Where do we stand? Observations – Guidelines – Examples – The Need for Flexible Solutions

#### **I. Introduction**

To tackle the problem of age discrimination, it is useful to start with the following question: What does age stand for at all in the field of employment and occupation? What can it be a proxy for? The answer to these questions is: not a lot. Modern gerontological findings suggest that ageing is rather an individual process. A higher age does not go in line with a constantly declining productivity. If anything, age could stand for a declining physical fitness, but only where physical fitness is absolutely crucial. Take MR Berthold Beitz, for example. He is not only the chairperson of the board of trustees of the Krupp foundation but also the honorary chairperson of the supervisory board of Thyssen Krupp plc. Apart from his fascinating and controversial biography what matters here is that he is 98 years old and still working, every day – certainly an extraordinary exception.

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If ageing is an individual process it follows that, in principle, there can be no generalisations with regard to age. This is where human rights step in – such as Article 21 of the Charter of Fundamental Rights of the EU (hereafter the Charter). This is because they do not allow the legislature, social partners, or an individual employer to standardise their rules and framework by means of crude elements or proxies and, consequently, to treat the contractual partner to a greater extent as a group member rather than as an individual. To be sure, this is a principle and open to exceptions. But the rule is that a human right entitles the individual to be judged on an individual basis and not merely on group membership. It follows that one should have a doubtful stance towards rules in the field of employment and occupation that use age as an abstract criterion.

As far as mandatory retirement is concerned, it is interesting to know some of its historical origins. At least in Germany, it stems from clauses Prussian civil servants were subject to. When they reached the age of 65 years, they were irrefutably presumed to be unfit for service – having no opportunity of proving the contrary. Imagine, from one day to the other you were deemed to be incompetent and unfit for work. The former Reichsgericht had no problem with that view when it upheld this clause in 1922. Admittedly, the then underlying assumption is no longer used today. Other legitimate aims have replaced the historical one. Nowadays, general mandatory retirement is widespread in employment and occupation.

There are two other points that are noteworthy. First, from a legal point of view a compulsory retirement clause transforms an open-ended contract or appointment into a fixed-term contract or appointment. So, however much you might feel or might have felt you entered into a contract for indefinite time, don't forget: it is just fixed-term and terminates automatically at the age of, for example, 65 years. Only the nine judges of the US Supreme Court in Washington know what lifetime appointment really means. And secondly, because it is just this one time limitation, clause 5 point 1 of the framework agreement on fixed-term work does not apply. It requires successive fixed-term employment contracts. Otherwise it is rather difficult to state that abuse has taken place. This is what Rüdiger Helm and Werner Mangold forgot back in 2005, when they constructed an infamous test case.

## **II. Case law on mandatory retirement and maximum recruitment age**

The first case Wolf is about the setting of a maximum recruitment age for the post of a fire worker. The other four cases Petersen, Georgiev, Fuchs and Köhler as well as Prigge and others concern mandatory retirement of panel doctors, prosecutors, professors and pilots. The case Fuchs and Köhler is highly to be recommended, because it summarises the guiding principles of the settled-case law in the area of age discrimination.

## **1. Colin Wolf – case C- 229/08**

The case Colin Wolf, the fireworker case, was held in January 2010. It does not concern mandatory retirement but the legal issue of a maximum recruitment age. MR Wolf wanted to become a fire fighter in the operational divisions of the professional fire service. The post he was aiming at belongs to the intermediate service. In Germany, as regards our civil service one distinguishes between simple service, intermediate service, higher service and senior service. Recruitment to these special intermediate career posts as a fire fighter is only open to persons of no more than 30 years of age. Whereas the average applicant for the intermediate service would be about 21 years old, it was clear from the outset that MR Wolf would be older than 30 years by the time of employment. Furthermore, no exception to that maximum recruitment age applied. Thus, after his application was rejected by the City of Frankfurt, MR Wolf challenged the pertinent regulation, arguing that he was unlawfully discriminated on the ground of age. The case finally reached the European Court of Justice (hereinafter the Court).

In its reasoning the Court confirmed the application of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter the “Framework Directive”) as well as that the treatment on the ground of age constituted direct discrimination. But unlike the referring Administrative Court the Court in Luxembourg reverted to Article 4(1) rather than Article 6(1) of the Framework Directive in order to justify the difference of treatment.

In view of Recital 18 the Court accepted that the safeguarding of the operational capacity and proper functioning of the professional fire service constitutes a legitimate aim for the purpose of Article 4(1). It also confirmed that the possession of especially high physical capacities may be regarded as a genuine and determining occupational requirement for carrying out the occupation of a person in the intermediate career of the fire service, above all in respect to tasks such as fighting fires and rescuing persons.

The crucial question of whether high physical fitness is a characteristic related to age was answered in the positive. The German government produced convincing and uncontested data suggesting that respiratory capacity, musculature and endurance diminish with age. Thus, very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities. As for rescuing persons, at the age of 50 the officials concerned no longer possess that capacity – leaving these two age groups with other, physically less demanding tasks such as environment protection, helping animals and dealing with dangerous animals, as well as supporting tasks such as the maintenance and control of protective equipment and vehicles. In the light of these facts the Court

held it to be appropriate and necessary to set at 30 years the maximum recruitment age in order to ensure the proper and efficient functioning of the intermediate career in the fire service.

There are two main reasons for this convincing result: First, you need a maximum recruitment age because only then you can ensure there are enough younger officials to perform the most demanding tasks over a sufficiently long period of time. Secondly, should the officials turn older than 45 or 50, they need to be assigned to duties, which are less physically demanding. If this is the case, it requires them to be replaced by young officials. Thus, you need a maximum recruitment age to keep the whole system working in a rational way, thereby also guaranteeing a balanced relation between physically demanding and less demanding posts. The system would be undermined if you accepted late recruitment at the age of 40 or even 45.

## **2. Domnica Petersen – case C-341/08**

The case Domnica Petersen, another German case held the same day as the case Wolf, concerns compulsory retirement of panel doctors, dentists and therapists at the age of 68 years. MS Petersen became a victim of section 95(7) of Book V of the Social Security Code – a statute which establishes a part of the German National Health System. About 90 percent of the people in Germany are members of it – either obliged or voluntarily. The rest can enjoy a more luxurious treatment when consulting a doctor or undergoing an operation, because they are privately insured.

Mandatory retirement for panel doctors had been provided for since the end of 2003 but was abolished effective January 2009. Despite this fact the case is interesting because of the Court's reasoning. It is submitted that – would this section still be in force – the referring social court of Dortmund and, ultimately, the Federal Social Court would have upheld this norm.

The contested section itself provided for three exceptions. A fourth one resulted from the fact that the legislation's scope affected only doctors, dentists and therapists practising in the panel system. Outside that system doctors and dentists can practise without being subject to any age limit.

Three objectives were adduced: first, the protection of the health of panel patients, it being thought that the performance of dentists declines after a certain age. Secondly, the financial balance of our German national health system. Thirdly, the distribution of employment opportunities among the generations of panel doctors, dentist and therapists. The Court tested the first and second objective against Article 2(5) and the last objective against 6(1) of the Framework Directive.

Article 2(5) expressly mentions the protection of health and is favourable towards measures laid down by national law which, in a democratic society, are necessary inter alia for the protection of that good. It is settled case law that not only the objective of maintaining a high-quality medical service but also that of preventing the risk of serious harm to the financial balance of the social se-

curity system are covered by the objective of protection of public health. Both contribute to achieving a high level of protection of health. Member States enjoy a margin of discretion as to determining the level of protection which they wish to afford to public health and the way in which that level is achieved. In view of that discretion the Court accepts the assertion that it might be necessary to set an age limit for the practise of a medical profession within the panel system – irrespective of whether the objective of the protection of health is considered from the point of view of the competence of dentists or the financial balance of the national healthcare system.

However, and this is the interesting part, in order to be necessary for the purpose of Article 2(5) the Court furthermore demands pertinent legislation to be consistent with the pursued objective. In other words: the four exceptions surrounding compulsory retirement must be coherent with the objective of the protection of health. In this context the Court stresses Article 2(5) must be interpreted strictly, because it is an exception to the principle of the prohibition of discrimination.

Against this principle of coherence the Court does not accept the argument that mandatory retirement is necessary in order to protect the health of patients, if the reason behind it is the competence of the medical professionals of the panel system. The reason is obvious: If the ten percent of the population in Germany that are privately insured are exposed to allegedly incompetent doctors over 68, legislation lacks consistency and runs counter to the objective pursued. However, the finance argument – the control of public health sector expenditure – still holds. This legitimate aim is not incoherent.

As far as the third objective is concerned, the equal distribution of employment opportunities among generations, the Court turns to Article 6(1) of the Framework Directive. Like in the case *Palacios de la Villa* it repeats that the encouragement of recruitment undeniably constitutes a legitimate social policy or employment policy objective. The measure is also coherent in the light of the exceptions our legislation provided for. However, there is one interesting caveat. In order to be an appropriate and necessary measure the factual assumption underlying the application of an age limit must be shown in the present case. This concerns either the excess of, for example, panel doctors or the latent risk that such a situation will occur. It is for the national court to ascertain whether such a situation exists. This is not a *carte blanche*.

### **3. Vasil Georgiev – case C-250/09**

The case *Vasil Georgiev* is a Bulgarian case. It is about a professor whose “permanent” contract with the Technical University of Sofia ended when he reached the age of 65. Subsequently, the University prolonged his employment three times on the basis of three fixed-term contracts, each of them with a duration of one year, until he finally had to retire at the age of 68.

The main question was if this treatment that constituted direct age discrimination could be justified pursuant to Article 6(1) of the Framework Directive. Like in the case Petersen the Court accepts as a legitimate aim the encouragement of recruitment – this time in the field of higher education by means of offering posts as professors to younger people. It also stresses the proper functioning of the university system as such, because the intergenerational exchange of experiences and innovation help to develop the quality of teaching and research. In principle, the Court accepts compulsory retirement in an area, where posts for university professors are limited in number, to be an appropriate and necessary means. In the light of the cases Palacios and Petersen this is no surprise. Moreover, it has to be mentioned that Professors seem to enjoy the possibility of working five years longer than the average employee who has to retire at the age of 63.

However, it seems that MR Georgiev made sufficiently convincing submissions to cast doubts in Luxembourg as to whether the Bulgarian Law really reflects the reality of the labour market concerned and if the aim asserted by the University – the encouragement of recruitment – really corresponds to the facts. Again, it is for the national court to examine the facts and ascertain whether such a situation exists.

As for the justification of the conclusion of a limited number of fixed-term one year contracts the Court considers this difference in treatment to be appropriate and necessary. Unlike in the infamous case Mangold, the statutory restrictions meet the requisites of clause 5 point 1 of the framework agreement on fixed-term work. Furthermore, it has to be borne in mind that the conclusion of these fixed-term contracts takes place at a time when the professor is already entitled to full retirement pension. Because of the relatively short limitation of one year it is also guaranteed that upon termination of such a contract a younger professor can be appointed whereas his older counterpart will have to depart.

#### **4. Gerhard Fuchs and Peter Köhler – joint cases C-159/10 and C-160/10**

The fourth case concerns two senior state prosecutors, Gerhard Fuchs and Peter Köhler, and their compulsory retirement at the age of 65. Both are civil servants. On the one hand, the case is about a specific profession, namely the one of a prosecutor. On the other hand, it is about mandatory retirement at the general pension age in the civil service, which up until last year was 65 (now it is 65 and one month, gradually increasing up to 67 years in 2029). Thus, the claimants could have been judges or professors of a state university, for example. The pertinent statute of the Land Hesse, like the statutes of some other federal states (Länder) and the Federal Republic (the Bund), also provides for a limited prolongation, if it is in the interest of the service and if the civil servant so requests. By this means, retirement can be postponed beyond the age of 65 for periods of no more than one year, whereby the overall retirement age limit shall not exceed 68 years. This is more or less similar to

the case in *Georgiev*, the main difference being that prolongation is executed via an administrative act rather than by an employment contract. With regards to prosecutors the interest of the service can be adduced if in criminal proceedings the competent administration might regard it as preferable to keep the older prosecutor in post instead of appointing a replacement who would have to get acquainted with an unfamiliar case.

By now, it should be no surprise that the pertinent section of the statute from the Land Hesse to compulsory retire prosecutors (and all other civil servants of the Land) returned from Luxembourg unharmed. The coherent measure could be justified pursuant to Article 6(1) of the Framework Directive – especially in view of a civil servant's comfortable pension, the mitigating effect of the possibility to exceptionally prolong the service and the possibility for a prosecutor to continue to practise as a legal adviser in the private sector.

This case is so important for three reasons: First of all, the Court this time explicitly ruled that establishing a balanced age structure between young and older civil servants in order to encourage recruitment and promotion of young people as well as to improve personnel management, thereby ensuring a high-quality public service can be considered as a legitimate aim pursued by a single Land as a single employer for the purpose of Article 6(1) of the Framework Directive. This is noteworthy because finally the Court took the opportunity to dwell on the fine distinction between public interests on the one hand and purely individual reasons particular to the employer's situation on the other hand. Cost reduction or improving competitiveness fall into the latter group and the Court does not consider them to be legitimate aims.

Secondly, the Court made it clear that despite the broad discretion it grants the Member States when relying on Article 6(1) of the Framework Directive, budgetary considerations cannot themselves constitute a legitimate aim within that article, but merely underpin the chosen social policy and influence the nature or extent of the measures that the Member State wishes to adopt. In the case *Palacios de Villa* – held in October 2007 – it seemed that legitimate aims could comprise political, economic, social, demographic and/or budgetary considerations – independent from one another. This is a helpful clarification and more in line with the settled case-law in the area of fundamental freedoms.

Thirdly, the Court – as it did in *Petersen* or *Georgiev* – recalled that it is for the national court to assess not only if the measure concerned is appropriate and necessary, but also that the measure does not appear unreasonable in the light of the aim pursued and is supported by evidence.

## **5. Reinhard Prigge and others – joint cases C-447/09 and others**

The fifth and last case is about mandatory retirement of Pilots at the age of 60. Who does not remember the heroic deed of “Sully” three years ago, when he safely landed an Airbus 320 on the cold Hudson river after a fatal bird strike? Chesley Sullenberger, aged 57 back then, proved that older pilots are rather fit and cold blooded and they can still react very quickly. Had he been 60, maybe the German Federal Labour Court itself would have held mandatory retirement of pilots at that age to be incompatible with Community law. Instead, it referred the case Reinhard Prigge and others to the Court in Luxembourg and the latter had to rule that a respective clause laid down in a collective agreement of Lufthansa constituted unlawful age discrimination.

The chances to save that clause were meagre, because German law, implementing international standards of the Joint Aviation Authorities, provides that commercial pilots aged over 60 are allowed to fly until the age 65 – provided they are members of a multi-pilot crew and the pilot concerned is the only pilot in the flight crew who has attained the age of 60. If the area of operation is limited to the territory of the Federal Republic of Germany, pilots are allowed to fly until the age of 65 even without that restriction. Note that from April onwards the international requirements will be implemented by FCL.065 in Annex I of Council Regulation 1178/2011.

If you remember that modern crews in commercial aircrafts nowadays just consist of two pilots and that there is no empirical judgement whatsoever that it is always the older pilot that will receive a fatal heart attack or stroke, the German government and social partners were fighting a losing battle. Of course, air traffic safety and the protection of the health of pilots, passengers and persons in the areas over which aircrafts fly are legitimate aims. But if national legislation allows pilots to exert their profession until the age of 65, a clause in a collective agreement restricting this freedom will not meet the test of proportionality. It is neither a necessary measure for the purpose of Article 2(5) nor a proportionate genuine and determining occupational requirement for the purpose of Article 4(1) of the Framework Directive. In other words: Pertinent national and Community legislation is cogent and social partners may not deviate from it.

Apart from the judgement’s sound result four aspects of the Court’s reasoning should be mentioned: First, however narrowly the Court construes Article 2(5), it does not prevent member states from authorising – through national rules to that effect – social partners to adopt measures that fall within the scope of Article 2(5) provided that these delegation clauses are sufficiently precise to safeguard the exceptional character of Article 2(5). Secondly, also Article 4(1) is to be strictly interpreted. Interestingly enough, within this context the Court for the first time cites famous precedents stemming from the area of gender discrimination, such as the cases Johnson or Sirdar.



Thirdly, the legitimate objective of air traffic safety does not constitute a legitimate objective for the purpose of Article 6(1). Although the list of possible legitimate aims is not exhaustive, other, not mentioned objectives need to be commensurable, and, thus, be ascribed to social policy or employment objectives. Air traffic safety has nothing to do with objectives stemming from the social and employment sphere.

Forthly, the Court as well as Advocate General Cruz Villalón did not resort to the principle of coherence, although – at first sight – the legal situation was inconsistent. This is not only due to the startling discrepancy between national legislation and the collective agreement but also because of inconsistent regulation within the corporate group of Lufthansa itself. Some Lufthansa companies provide for mandatory retirement at the age of 60, others at the age of 65. Imagine what passengers in row 1 to row 35 might think, if air traffic safety was claimed to be the very legitimate aim while they are welcomed to a flight within Germany with two pilots who are both over 60 years old. This is not credible at all.

A possible reason why the principle of coherence has not been applied in this case could be the fact that the alleged inconsistency must be attributable to the same regulator or employer. Here, there were two responsible entities, Lufthansa plc on the one hand and the Federal legislature on the other hand. But this is arguable.

### **III. Assessment of selected case law in the field of age discrimination**

The following section tries to summarise what could be considered as the legal gist with respect to mandatory retirement in special professions and the fixing of a maximum recruitment age. Four points are worth mentioning:

#### **1. Scope / no obligation to cite legitimate aim / no “Mangold-trick”**

The first aspect has to do with three issues that will not play a major role in cases dealing with this type of age discrimination.

First of all, it is common ground that the prohibition of age discrimination is now enshrined in Article 21 of the Fundamental Charter. It is a general principle of the EU and has been given specific expression in the Framework Directive. However, when dealing with these cases, it is very likely there will be no need to set aside a national rule in a private dispute by resorting to primary law. Catherine Barnard once described this way as committing a “Mangold” – it sounds like a legal crime, but has its charm. The reason why “Mangold” will not play a role is that an individual can directly invoke the Framework Directive, if his or her employer is the state. As far as the private sector is concerned all agreements which are lower ranking than national legislation have to abide

by the laws transposing the Framework Directive. And should age limits apply, in many instances the competent body repealing or granting a licence will stem from the public sphere. Thus, again an individual can directly rely on the Framework Directive against the state.

Second, if you are dealing with cases concerning mandatory retirement and maximum recruitment age, the application of the Framework Directive will barely cause any problems. Such clauses will inevitably affect the personal and material scope of the directive and constitute a difference in treatment on the grounds of age.

However, the exception proves the rule: The German Federal Court of Justice (the Bundesgerichtshof) doubts that the EU has the competence to regulate the profession of notaries public. In Germany they have to retire at the age of 70. The Court supposes neither Article 19 TFEU nor Article 153 TFEU confer the necessary competence. It might that the Federal Court of Justice forgot to consider Article 352 TFEU. At least his predecessor ex-Article 308 EC could provide for the necessary power. But anyway, having the case *Georgiev and Fuchs/Köhler* in mind, it is very likely the Court would not declare mandatory retirement of notaries public to be unlawful. The Federal Court of Justice for its turn is of the same opinion, because – being a professional Court – it also alternatively assessed the justification pursuant to Article 6(1) and found no need to refer the case to Luxembourg, invoking *CILFIT* and the “*acte clair*”.

The third and last point is that there is no obligation to cite a legitimate aim and that objectives underpinning a norm can change. This is conclusive and means that lawyers, judges, jurists and we all here can continue with our jobs and interpret and construe the law. But do not forget that – in the end – it is vital to ascertain and state a legitimate aim!

## **2. It is all about the level of scrutiny**

The second point has to do with the possible justification of a difference of treatment on the ground of age. This is the main focus. Here, everything hinges upon the level of scrutiny. Analysing the 14-odd cases in the range of age discrimination it is fair to state that the Court possesses a dogmatic tool box which enables its judges to apply any level of scrutiny desired, be it a strict one, an intermediate one or based on a rational basis test – sometimes even lower. It can even be argued that at least in one case the level of scrutiny applied was zero. The dogmatic switch points are the granting of a margin of discretion and the application of the traditional rule that exceptions to a principle must be strictly interpreted.

This all too flexible approach has led to an oscillating level of scrutiny. Both member states as well as social partners can benefit from it. The latter have to fear a strict scrutiny test as soon as the dangerous key words “*Viking*” and “*Laval*” fall, otherwise the Court bows low to them in a manner

German lawyers are just used to as regards their own Federal Labour Court. And even if the Court emphasises a wide margin of discretion, it can be but a mere lips service and, in truth, the provision undergoes a strict level of scrutiny – as was the case in Mangold.

To reveal this alternating level of scrutiny, one just has to juxtapose the pertinent case law. A few examples can suffice: Palacios, which in principle upheld general mandatory retirement in Spain, is inconsistent with Mangold. Rosenblatt, which upheld general mandatory retirement in Germany, is inconsistent with Palacios and Mangold, because compulsory retirement in Germany can even cause financial hardship to the employee. The cases Petersen and Georgiev are inconsistent with Rosenblatt and Palacios, because the Court indicated that it was up to the national courts to assess, if the factual assumptions underlying the application of mandatory retirement can be shown. The case Fuchs and Köhler is inconsistent with Rosenblatt, because all of a sudden a reasonable pension did play a role again, as well as the fact, that prolongation of employment under certain conditions can be considered as an aspect mitigating the rigidity of compulsory retirement. Finally, the case Prigge is inconsistent with Rosenblatt, because had the stricter level of scrutiny of the former case been applied to the latter case, the way general mandatory retirement works in Germany would have been caught by the Framework Directive.

This fluctuating level of scrutiny also affects the principle of proportionality. At least in cases dealing with general mandatory retirement one has to state its improper application. This concerns all three levels of this principle, i.e. appropriateness, necessity and proportionality *in strictu sensu*. Flexible general retirement is a less infringing measure and must be chosen at the level of necessity at the latest. It is flexible, not rigid, mandatory retirement that does not go beyond what is really necessary to achieve the legitimate aims pursued.

In principle, there is nothing wrong with different levels of scrutiny. As can be shown, Articles 2(5) and 4(1) seem to enjoy a higher level of scrutiny than Article 6(1). But the point which has to be criticised is that it is legally inconsistent and, thus, not convincing. It is submitted that the reason for the incoherent way in which the Court is handling cases concerning age discrimination, is that after the very hefty criticism in the wake of the Mangold judgement the Court shied away from interfering too much with Member States' social and employment policies on that crucial aspect.

The only constant line of the Court that can be detected is the following: Where mandatory retirement is applied in a homogenous way, thus affecting a large group of employees, civil servants or certain professions, such a clause is – in principle – compatible with EU law. However, this approach leads to a hierarchy of the forbidden grounds laid down in Article 1 of the Framework Directive.

### 3. The Principle of Coherence

The third aspect has to do with the principle of coherence. This principle is an extremely powerful argument, because it enables one to challenge the appropriateness of a measure – particularly, if incoherent exceptions can be spotted. The Court seems to react towards inconsistent legislation and provisions in quite an allergic way. In the range of age discrimination this concept was introduced in the case Hütter and referred to again in the cases Petersen, Georgiev as well as Fuchs and Köhler. But it is by no means unknown as regards other areas of Community law. Remember the case Test Achats, where the Court finally paved the way for unisex premiums and benefits in insurance contracts; other cases concern fundamental freedoms.

This principle can be ascribed to the general principle of equality. Thus, it can be a legal yardstick for lower-ranking provisions. This principle requires that the legislature establishes consistency not only within the whole legal order, but also within special areas of law and pertinent subsystems created therein. It obliges the legislature to give objective and comprehensible reasons for what it is enacting and to explain when deviating from a principle. It has to be borne in mind that the principle of coherence only seems to apply if the provision concerned can be attributed to the same regulator. This could be the reason why it did not play a role in the case Prigge. The different age limits in question stemmed from different air companies of the Lufthansa Group as well as national and international legislators. In the light of the oscillating level of scrutiny and the sometimes unconvincing application of the principle of proportionality it goes without saying that it is quite ironic to observe that the Court calls for strict adherence to that principle, whereas the Court itself takes the liberty to act in a coherent manner or not.

### 4. Differentiation of Justification: Articles 2(5), 4(1) and 6(1)

The fourth aspect deals with the articles that play a main role when it comes to justifying a difference of treatment on the ground of age. The settled case-law of the Court has brought some clarification as to how to justify direct age discrimination. This concerns Articles 2(5), 4(1) and 6(1) of the Framework Directive.

As regards article 2(5) it has to be borne in mind that it only addresses the legislature. However, it does not prevent the legislature from allowing the social partners to adopt measures in the area covered by article 2(5) as long as the reach of this delegation is sufficiently clear. Although the article's wording indicates it is not exhaustive (see the expression "*protection of rights and freedoms of other*"), it is submitted the Court will limit this clause to the classical *ordre public*.

As far as article 4(1) is concerned, already recital 23 speaks of "*very limited circumstances*", in which a difference of treatment may be justified. In general, there are not many characteristics re-

lated to age, which can constitute a so-called genuine and determining occupational requirement. In the range of employment and occupation only physical and mental fitness will play a major practical role. But this will only concern specific professions where high physical fitness and stamina is absolutely crucial. In Germany the example of Romeo & Juliet is also discussed, thinking that the enchantment and romance of the balcony scene would be seriously flawed if Romeo was played by a 60 year-old actor adoring young Juliet. It is to be hoped that this example is moot and will remain within the academic sphere. If at all, directors and theatre managers choose younger actors, because their salary is much lower.

With regard to Article 6(1) it seemed at the beginning that almost any legitimate aim falls under this clause to justify direct age discrimination. Admittedly, the Court made it clear that Article 6(1) is indeed non-exhaustive. However, the legitimate aims must be linked to social policy and employment policy objectives. No other legitimate aim falls under Article 6(1). The case Prigge made that very clear. Air traffic safety has nothing to do with social or employment policy. This approach is not unreasonable.

The case law on mandatory retirement and maximum recruitment age suggests that there are two main legitimate aims in order to make a successful case for a justified difference of treatment. One is the *encouragement of recruitment* combined with the intergenerational argument, the favourable age structure or the exchange of experiences and innovation. If posts are limited or restricted in the area concerned, this can be a convincing argument. The other legitimate objective is the *proper functioning of the entity* concerned. Depending on the profession in question an argumentation can be based on Articles 2(5), 4(1) and/or 6(1).

From a formal point of view the Court's approach strengthens the normative substance of the Framework Directive with respect to the justification of age discrimination. As regards Articles 2(5) and 4(1) a strict level of scrutiny will apply. They are exceptions to the principle of the prohibition of discrimination and must be interpreted narrowly. However, in the range of health it is settled case-law that the level of protection can lie in the Member States' hands.

As far as Article 6(1) is concerned the level of scrutiny is extremely flexible. At the same time the legitimate aims are constrained to those of social policy and employment policy objectives. It seems the most contentious cases of the Court are the ones that just dealt with Article 6(1) – the paradigm example is the case Rosenbladt. Particularly if this article is concerned, the Court resorts to its dogmatic toolbox and draws the wild card to set whatever level of scrutiny it deems to be appropriate.

And yet, even the mere fact that the legitimate aims for the purpose of Article 6(1) are limited, can effectively combat age discrimination. One month ago in a very interesting proceeding the German Federal Administrative Court (the Bundesverwaltungsgericht) quashed a maximum age limit of 68

respectively 71 years which applies to officially appointed and sworn experts. It held that the adduced legitimate aim of safeguarding legal relations in an orderly way (Sicherstellung eines geordneten Rechtsverkehrs) does not fall under Article 6(1) of the Framework Directive. After being previously overturned by the Federal Constitutional Court, the Federal Administrative Court was now even too shy to refer the case to Luxembourg. It consequently did not raise the interesting question whether or not this objective could be regarded as a legitimate aim for the purpose of Article 2(5).

#### **IV. Where do we stand?**

Where do we stand today – six and a half years after the case Mangold? What can be practical guidelines for lawyers and other experts dealing with age discrimination?

##### **1. General observation**

It is submitted that with regard to the prohibition of age discrimination the European Court established a general framework of working and employment life. It ranges from 15 years to the respective general retirement age in each of our Member States. The first age limit results from the prohibition of child labour – an age limit which, of course, should not be quashed. Clauses that provide for compulsory retirement at the other end of the time bar were all upheld by the Court. The same applies to age limits for specific professions that lie beyond general retirement age.

The legal battle as to whether mandatory retirement for employees and permanent civil servants is lawful or unlawful has been fought. The Court in Luxembourg has upheld what can be considered as the most age discriminating clause of all. The price was too high. For the sacrifice are legal consistency and the principle of proportionality. Moreover, it did not even think of considering compulsory retirement to be indirect discrimination on the ground of sex, for example – as could have been the case in Rosenblatt. We all know that the European Court of Justice will provide all the interpretative criteria needed by the national court for the purposes of determining whether national rules are compatible with EU law – whether or not the national court has referred to these issues in its questions.

With regard to mandatory retirement it is interesting to observe that the public sector provides for more flexibility at the end of one's employment life. Regrettably, the personal interest of a civil servant respectively employee does hardly play any role at all. He or she can make a request – yes. But it is just the "*interest of the service*", which is tantamount to the employer's interest, that does really matter. Citing the right to work enshrined in Article 15 of the Fundamental Charter, as the Court did in the case Fuchs and Köhler, is nothing but a mere lips service. In contrast to the public

sector its private counterpart shows far more flexibility at the beginning of one's professional life. This is because, in principle, no maximum recruitment age is set.

## **2. Practical guidelines**

Which possible guidelines and useful criteria could help indicate whether or not you can make a case for unlawful compulsory retirement or the unlawful setting of a maximum age for recruitment? There will be no need for a ruling on each profession. The advantage is that one can already infer some abstract criteria from the existing case law.

An important question is whether the termination of a special profession is coupled with general retirement age. If so, chances are low that it will be held unlawful. The same applies, in principle, to compulsory retirement beyond general retirement age. However, there seems to be some leeway because in *Petersen and Georgiev* the Court made it clear that the factual assumptions underlying the legitimate objectives must be shown. This has to be ascertained by the national court. Apart from that the Court considers it to be a benefit that the individual can exercise his profession longer than the average.

Conversely, should the age limit be fixed before general retirement age, this could be a first indication for possible unlawfulness. This would be even more the case if this age limit is set by the social partners and national legislation takes a more liberal approach, i.e. it provides for a higher age limit or none at all. The case *Prigge* is the best example: The collective agreement provided for 60 years, whereas national and international legislations allow pilots to exercise their profession until the age of 65.

Another important aspect is the identification of possible legitimate aims and the question under which Article they can be subsumed. Above all, this concerns Article 2(5) and Article 4(1). In principle, the latter can be ruled out if the profession concerned does not require high physical and mental fitness, unlike the profession of a pilot or an air traffic controller. The latter is deemed to be even more strenuous than the former. If just Article 6(1) is concerned, the party relying on it has high chances to win the case.

Recalling the Court's case law it is of utmost importance to check the legislation concerned for inconsistencies and incoherent lines of argumentation, in particular with regard to exceptions that might apply. If they are not limited in time and scope there is a high likelihood that the principle of coherence will consider the rule concerned to be not appropriate. For incoherent measures do not ensure the attainment of the legitimate aim pursued. The cases *Hütter* and *Petersen* show the impact of this powerful principle very plainly.

Finally, it is vital that you substantiate your case as the judgements in Petersen and Georgiev indicate. So, use statistics, empirical research, scientific findings and other data to make your case. If it is not the European Court itself that will find your submissions convincing, it will be up to the national courts to make use of them.

### **3. Outlook: possible age discriminations to target**

Unless you know of a clause like the one in the pilot case Prigge the main focus of interest will be directed towards provisions setting a maximum age for recruitment. There are two examples that could possibly constitute unlawful age discrimination.

The first example concerns a specific age limit. Lufthansa sets a maximum age of 26 respectively 28 years for the recruitment of its pilots. The age difference results from the fact that there are two different careers paths.

It is submitted that this age limit is not justifiable. Considering the case Wolf neither Article 2(5) nor Article 4(1) will apply. Whereas fire workers in the intermediate service lose their physical ability to perform their duties of fire fighting and rescuing persons starting from 45 years onwards, pilots are allowed to fly commercial aircrafts up until the age of 65. This is an extra time of 20 years!

As regards Article 6(1) it is unlikely that the conditions are met to rely on the example in point (c). This subsection allows the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement. Candidates who want to become a pilot pay half of their training costs themselves (about 60.000 EUROS) and in many cases the employer's training costs (the remaining 60.000 EUROS) are compensated because they rent out their training facilities to other air companies. If not, these costs amortize fairly quickly, once the pilots commence their job. Having the case Prigge in mind, which now gives pilots in Germany an extra five years of practising their profession, there is a high likelihood that the Court would consider this employment condition to run counter to Community law should a case be referred to Luxembourg. The Federal Labour Law Court has recently quashed a similar age limit of 30 years.

The second example concerns the setting of a general maximum age for recruitment of civil servants. North Rhine-Westphalia has set an age limit of 40 years for recruitment to all career posts. Leaving some inherent exceptions aside, what matters is that the settled case law of the Federal Administrative Court justifies this age limit with the creation of a balanced age-structure and a balanced relation between the period of employment and retirement time. The latter is actually the real reason. Unlike pensions of former employees, pensions for civil servants are funded by the state's budget and thus paid by the (future) tax payer. These pensions are substantially higher. As you can



see, these are largely budgetary considerations. They are not only underpinning or governing but rather superimposing the intergenerational argument. This stands in stark contrast with the case Fuchs and Köhler. The Court made it clear that mere budgetary considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1).

The legal situation is also inconsistent because the federal state does not preclude the employment of personnel beyond the age of 40 on the basis of an ordinary employment contract. The pertinent collective agreement does not provide for such a clause. This can be considered as a permanent exception to which the Court is quite allergic as we noticed in the case Petersen. You see, it is all about the withholding of the privileged status of a civil servant.

The federal government of the German Republic for its part has recently quashed all general age limits for recruitment. This is to be welcomed. However, the real problem is that job advertisements in the civil service only concern posts at the beginning of the career. Career change between private sector and civil service is the legal and factual exception in Germany. If at all, it will take place at the beginning of one's career. Just ask yourselves: Who wants to climb up the job ladder again and forgo a substantial part of one's salary and other perks after having worked in the private sector for 10, 15 or 20 years? The question is moot.

#### **4. Advocate flexible solutions at the end of employment life**

There is one final point to mention: Combating discrimination does not solely take place before European and national courts. Although the Court has upheld compulsory retirement, it does not mean that the underlying problems have been solved. Because the discussion as to the legality of mandatory retirement has now shifted to the political level, this is an important area for equality bodies to engage in. Working before and beyond retirement has not necessarily to be burdensome. It can be rather satisfying and fulfilling. A famous gerontologist once described the group of people aged over 55 as a buried treasure which would be worth lifting up to the surface. Flexible instead of rigid solutions need to be devised in order to better reconcile the interests of the parties concerned and stop sorting out older people from employment and occupation. French labour law provides for such a flexible clause (Article L1237-5 Code du travail), for example. This is a key message to promote. After all, the right to engage in work and pursue an occupation is a human right. Moreover, the looming demographic change of our European society calls for a sustainable solution. Our acquired wealth is at stake.