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The Development of EU Case Law on Age Discrimination in Employment: ‘Will you still need me? Will you still feed me? When I’m Sixty-Four.’¹

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Abstract:

This article addresses the development of age discrimination law in the Court Of Justice through an analysis of statistical trends emerging from the case law, through a discussion of the development of the prohibition on age discrimination as a general principle of community law and through a detailed analysis of the four stage process utilized by the Court Of Justice in the determination of age discrimination cases. It will be concluded that there is a marked difference in the level of discretion given to Member States in cases relating to mandatory retirement policies. The article will critique the approach of the Court Of Justice to the legitimate objective test and the proportionality test in retirement cases. The article will also argue that the decisions of the Court Of Justice to date have all involved cases with very similar factual scenarios and the article hypothesizes how a different conclusion might be reached in cases with different factors. It also considers the impact of the Charter of Fundamental Rights on such cases. The article concludes by arguing that mandatory retirement policies may no longer be compatible with EU law and that there is a need to move towards more flexible retirement policies.

Keywords: age discrimination law, equality law, EU law

I. Introduction

Fifty percent of the age discrimination cases before the Court Of Justice involve workers who are over the age of 60 years. The majority of these cases (almost 90%) involve the issue of retirement age and none of these cases have been successful before the Court Of Justice. This contrasts sharply with the success rate of approximately 45% for cases involving younger workers and terms and conditions of employment. So what are the reasons for the divergences in the case law, what

¹ ‘When I’m Sixty-Four’ (Lennon/McCartney) © 1967 Sony/ATV Music Publishing LLC.

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interests are being best served by the decisions of the Court Of Justice and how could (or should) this divergence be rectified?

This article will attempt to address these concerns through an analysis of the case law of the Court Of Justice relating to the issue of age discrimination. Firstly, the article will assess some statistical trends emerging from the case law including the age groups most likely to take a case, whether there is a gender differential in the case law, the types of workers involved, the Member States most active in this area and the main areas of employment that are targeted. Secondly, the article will examine the initial approach of the Court Of Justice in relation to age discrimination cases during which the position of the prohibition of age discrimination was solidified and strengthened in EU law. Thirdly, the article will analyze the courts interpretation of EU law provisions on age discrimination by means of the structure normally adopted by the court. Four stages will be identified: stage 1 which relates to the scope and application of the Directive, stage 2 which examines whether a difference in treatment has occurred, stage 3 which involves an examination as to whether the measure adopted by the particular Member State was adopted for some legitimate objective and stage 4 which involves an examination of the proportionality of the measure. Finally, this is followed by a reconsideration of the doctrine of proportionality in mandatory retirement cases in light of arguments based around pension levels, the importance of flexibility and less intrusive measures and the right to earn a livelihood

Four major conclusions arise from this qualitative analysis of the Court Of Justice's decisions in age discrimination cases. Firstly, it will be submitted that the Court Of Justice affords too much discretion and gives inadequate consideration to the Member States in identifying legitimate objectives to justify a difference in treatment on grounds of age during stage 3. Secondly, it will be submitted that the Court Of Justice shows a remarkably more flexible approach to the issue of proportionality (stage 4) in retirement cases than it does in other cases and that it rarely considers arguments relating to less intrusive measures capable of achieving the same aim. Thirdly, it is submitted that if certain factors were different in a given case relating to mandatory retirement before the Court Of Justice, a different conclusion might be reached. Three arguments are put forward to support this conclusion. These arguments are based on some of the distinguishing features of the previous cases (which involved individuals with reasonable pension levels, the skills to find alternative work, and mandatory retirement ages which were agreed by the individuals through collective bargaining or at least provided some level of flexibility to the worker) and on the right to earn a livelihood guaranteed by the Charter of Fundamental Rights of the European Union ('CFR'). Finally, it will be concluded that the Court Of Justice shows signs that it is moving towards a more flexible approach in retirement cases and recognition that a more strict equality model is more in line with the prohibition of age discrimination and the principle of equality enshrined in Directive 2000/78 ('the Directive'), the Treaties and CFR.

II. The Judicial Statistics

While accurately measuring the exact levels of age discrimination in employment in the EU is almost impossible³, some indicators of the increasing incidence of age discrimination can be isolated. Legal academics, for example, have indicated that the case law before the Court Of Justice ‘has been mushrooming’⁴, particularly when one compares age discrimination to other forms of discrimination.⁵ The number of cases directly related to age discrimination in employment before the Court Of Justice currently amounts to eighteen.⁶ Other sociological surveys also reveal that perceptions of the level of age discrimination in the EU is also spiraling, with age forming the most common ground for complaints reported by respondents who were asked if they had experienced age discrimination in the preceding 12 months.⁷ These figures may be attributed ‘to the fact that age is an attribute everyone has and young and old may be susceptible to discrimination under various (often differing) circumstances’⁸.

While the number of cases in the area of age discrimination is limited, some interesting statistical insights emerge from an analysis of the decisions before the Court Of Justice. Of significant interest are the age differentials evident from the cases. Fifty percent of the cases relate to individuals over the age of 60 years, suggesting either a significant amount of age discrimination in this age group or significant age related policies impacting on individuals of this age in Member States. These results are also comparable to the results obtained from the Special Eurobarometer Survey on Discrimination in the EU which reported that respondents over the age of 40 years are more likely to perceive age discrimination as widespread.⁹ The next highest age group affected are individuals in the 40-50 year age group (over 22%), followed by the 30-40 age group (just over 11%) with only 5% of the cases emanating from the 50-60 age group and the under 30 age group. There could be many reasons for this statistical bias in relation to the 60+ age cohort unrelated to age discrimination issues, including the fact that perhaps older workers are more comfortable with enforcing their employment rights, or are more aware of their employment rights or have greater financial resources to enforce these rights. However, at least part of this significantly high figure has to be related to the amount

³ This is due to the statistical difficulties in taking measurements from case law (as this contains a selection bias due to the fact that only people who have been allegedly discriminated against will take a case and also only represents a certain number of the people who have decided to take cases) or from self-reporting mechanisms.

⁴ D. Schiek, ‘Age Discrimination Before the Court Of Justice – Conceptual and Theoretical issues’ (2011) 48 *Common Market Law Review* 777 at 777.

⁵ Although this may have more to do with the uncertainty inherent in Art. 6, as opposed to any increase in the level of age discrimination.

⁶ At the time of writing: C-144/04, *Mangold* [2005] ECR I-09981; Case C-227/04, *Lindorfer* [2007] ECR I-06767; Case C-411/05, *Palacios de la Villa* [2007] ECR I-08531; Case C-427/06, *Bartsch* [2008] ECR I-07245; Case C-388/07, *Age Concern England* [2009] ECR I-01569; Case C-555/07, *Seda Küçükdeveci* [2010] ECR I-00365; Case C-88/08, *Hütter* [2009] ECR I-05325; Case C-229/08, *Wolf* [2010] ECR I-00001; Case C-341/08, *Petersen* [2010] ECR I-00047; Case C – 499/08, *Ingeniørforeningen i Danmark* [not yet published]; Case C-45/09, *Rosenbladt* [not yet published]; Case C-246/09, *Bulicke* [2010] I-06999; Case C-268/09, *Georgiev* [not yet published]; Case C-447/09, *Prigge and Others* [not yet published]; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler* [not yet published]; Joined Cases C – 297/10 and C-298/10, *Hennigs and Mai* [not yet published]. There are also two cases pending before the Court Of Justice: Case C-141/11 *Hörnfeldt* and Case C-132/11 *Tyrolean Airways*.

⁷ Special Eurobarometer Study 296, ‘Discrimination in the European Union: Perceptions, Experiences and Attitude’ (2008) *European Commission* 63.

⁸ Special Eurobarometer Study 296, cited *supra* note 7 at 63.

⁹ Special Eurobarometer Study 296, cited *supra* note 7 at 60.

of discriminatory age specific policies existing in Member States including issues relating to retirement age. Of the nine cases involving individuals over the age of 60 years before the Court Of Justice, seven of these related to retirement policies.

Another interesting trend emerging from a preliminary analysis of the case law is that the gender differential is not very wide. While 56% of the cases are taken by males, a relatively similar amount (almost 40%) is taken by females. This suggests that the concept of age discrimination is not necessarily linked with gender and this trend is also visible in sociological studies examining perceptions of age discrimination.¹⁰ The small gender differential that does exist may be explained by factors related to labour market participation rates at different age levels. Interestingly, only one of the cases¹¹ before the Court Of Justice could be linked to a case of multiple discrimination (sex and age)¹². However, it may well be that some of the cases do involve cases of multiple discrimination, but this may not be raised before the Court Of Justice.¹³ Schiek argues that some of the cases¹⁴ are based on facts ‘indicative of multiple discrimination’¹⁵. For example, there was potentially a claim for gender and racial discrimination in the case of *Küçükdeveci*¹⁶ and indirect gender discrimination in the cases of *Rosenblatt*¹⁷ and *Petersen*.¹⁸

There a variety of countries represented in the case law but one country, Germany, represents over two thirds of all the cases before the Court Of Justice. Other countries represented include Spain, UK, Austria, Denmark and Bulgaria. There may be a number of disparate and unconnected reasons for this phenomenon. Firstly, an obvious conclusion to draw from this statistic is that age discrimination or age discriminatory policies are more widespread in Germany than in other parts of the EU. Schiek says that it is ‘hardly surprising that so many references in the field come from Germany’ as Germany follows the conservative welfare model which uses a ‘strict distinction of life cycles’¹⁹ in its social and economic policies, therefore offering more opportunities to individuals to challenge age-related distinctions. There

¹⁰ Special Eurobarometer Study 296, cited *supra* note 7 at 60. The report reveals that women are more likely to see age discrimination as widespread than males (although the percentage gaps in this perception are very small (44% women v. 39% males).

¹¹ *Lindorfer*, cited n 6 *supra*.

¹² For more detailed discussion on intersectionality and the issue of multiple discrimination (not necessarily related to age as this is a relatively new topic) see M. Verloo, “Multiple Inequalities, intersectionality and the European Union” (2006) 13(3) *European Journal of Women Studies* 211; M. Bell, *Critical Review of Academic Literature Relating to the EU Directives to Combat Discrimination* (Brussels: European Commission, 2004); S. Fredman, “Double Trouble: Multiple Discrimination and European Union Law” (2005) 2 *European Anti-Discrimination Law Review* 13; E. Holzleitner, “Mainstreaming Equality: Dis/Entangling Grounds of Discrimination” (2005) 14 *Transnational Law and Contemporary Problems* 926; C. McCrudden, “Thinking about the Discrimination Directives” (2005) 1 *European Anti-Discrimination Law Review* 17; M. Shaw, “Mainstreaming Equality and Diversity in the European Union” (2005) 58 *Current Legal Problems* 255. The works of D. Schiek and A. Lawson, *European Union Non-Discrimination Law and Intersectionality* (Surrey: Ashgate, 2011) and V. Chege, *Multidimensional Discrimination in EU Law: Sex, Race and Ethnicity* (Baden-Baden: Nomos, 2010) provide very detailed discussions on this issue.

¹³ This is due to the strict question formulation of the preliminary reference procedure.

¹⁴ *Küçükdeveci*, cited n 6 *supra*; *Rosenblatt*, cited n 6 *supra* and *Petersen*, cited n 6 *supra*.

¹⁵ Schiek, cited n 4 *supra* at 794.

¹⁶ *Küçükdeveci*, cited n 6 *supra*.

¹⁷ *Rosenblatt*, cited n 6 *supra*.

¹⁸ *Petersen*, cited n 6 *supra*.

¹⁹ Schiek, cited n 4 *supra* at 798.

is also a general perception in Germany that age discrimination is widespread²⁰, although the figures from this study report that residents of the United Kingdom, Bulgaria, Austria and Spain report higher perceptions of age discrimination.²¹ However, there may be other more subtle explanations such as the fact that Germany, as one of the largest EU Member States, would be expected to have higher rates of litigation and Germany has also traditionally been the one of the Member States that makes the most preliminary references to the Court Of Justice. Of further interest are the states that intervene in the cases brought before the Court Of Justice. Naturally, Germany intervenes in the majority of cases (78%) while Ireland intervenes in about 50% of cases. Other Member States such as the Netherlands and the UK intervene in about 28% of cases, while Italy and Denmark intervene in about 22% of cases. Other states such as Spain, Czech Republic, Austria, Poland, Hungary, Bulgaria, Slovakia and Belgium have also intervened but normally only when a case arises against them or specifically if there is a particular issue that also affects the interpretation of their national laws.

Posner²² has put forward two distinct theories in relation to age discrimination claims generally which are certainly confirmed by the statistics gleaned from the cases before the Court Of Justice. Firstly, Posner claims that ‘most plaintiffs in age discrimination cases are not ‘workers’ (unskilled / semi-skilled) at all, but managers, professionals, and executives’²³. Certainly an examination of the case law before the Court Of Justice would support this trend with most cases being brought by pilots, engineers, organizational managers, laboratory technicians, firemen, dentists, university lecturers and state prosecutors. Only a few cases have been brought by general operatives and cleaners which were not related to any professional or managerial sector. Secondly, Posner also argues that age discrimination cases tend to be related to employment conditions or termination and retirement because of practical difficulties in calculating damages and providing evidential proof of age discrimination in the hiring process.²⁴ This is certainly evident from the eighteen cases studied in this article. All of the cases (except for one)²⁵ related to conditions of employment, (including fixed term contracts, dismissal and notice periods, pay and conditions) or retirement age or conditions on retirement. This would certainly suggest that age discrimination in the hiring stage is still not reaching the Court Of Justice, despite the reach of the Directive in this regard.

The above trends indicate a number of interesting features about age discrimination cases in the EU. Firstly, age discrimination is widespread and is particularly affecting individuals over the age of 60 years, although, as other cases have shown, not exclusively. There is a very small gender differential in the cases, with both men and women experiencing age discrimination at various stages of their lives. Most of the individuals involved in these cases are skilled workers, and the cases generally

²⁰ 34% of Germans reported that they perceived age discrimination to be widespread. Special Eurobarometer Study 296, cited n 7 *supra* at 59.

²¹ 42% of Europeans see age discrimination as widespread. 34% Germans, 48% UK, 38% Bulgarians, 35% Austrians, Denmark 28%, Spain 39%. Special Eurobarometer Study 296, cited n 7 *supra* at 59.

²² Posner, ‘Employment Discrimination: Age Discrimination and Sexual Harassment’ (1999) 19 *International Review of Law and Economics* 421.

²³ Posner, cited n 22 *supra* at 424.

²⁴ Posner, cited n 22 *supra* at 426.

²⁵ One case related to recruitment into the fire service after the age of 30: *Prigge and Others*, cited n 6 *supra*.

involve terms and conditions of employment, retirement or dismissal. The Court Of Justice has only once ruled in one case involving age discrimination in the hiring process, which may be reflective of the problems individuals face in bringing such cases before national courts in the first instance.

III. The Case Law: An Initial Rights Based Approach

The first incarnation of age discrimination was in the TEU and took the form of Article 13 TEU (ex 6a EC) which provided that ‘the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on ...age’. While this provision would appear to be limited to legislative action in the area (i.e. not directly effective in its own right), this has been disputed in later case law. This embodiment was further extended and reformed by the Treaty on the Functioning of the European Union (Lisbon, 2010) (‘TFEU’) which reiterated the protection against non-discrimination more generally and age discrimination more specifically.²⁶ The Charter of Fundamental Rights (‘CFR’) has also identified ‘age discrimination’ as a ground of discrimination and ensures its place at the heart of EU anti-discrimination policy.²⁷

At a legislative level, Council Directive 2000/78/EC (‘the Directive’) provides for the prohibition of discrimination on grounds of age in employment and occupation across the EU Member States.²⁸ The Directive applies the standard discrimination model, that is, both direct and indirect discrimination are prohibited but certain justifications are possible in the case of indirect discrimination.²⁹ However, the Directive also makes specific and ‘flexible’³⁰ provision for discrimination on grounds of age. This particular provision represents ‘a new departure for discrimination law’³¹ and is an acknowledgement of the ‘difficulties in achieving agreement between Member States as to the extent to which they were prepared to give age...the same recognition which

²⁶ Art. 10 and Art. 19 (ex 13), TFEU.

²⁷ Art. 21, CFR.

²⁸ Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, p. 16–22). See the discussion on the belated nature of the Directive and other aspects of the Directive in S. Fredman, “Equality: A New Generation” (2001) 30(2) *Industrial Law Journal* 145; P. Skidmore, “EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy” (2001) 30(1) *Industrial Law Journal* 126; M. Bell, “The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?” (2008) 79(1) *The Political Quarterly* 36; D. Schiek, “A New Framework on Equal Treatment of Persons in EC Law” (2002) 8(2) *European Law Journal* 290. See also more general works on the discrimination law in the EU including: S. Fredman, *Discrimination Law* (Oxford: Clarendon Press, 2nd ed., 2011); P. Bartelings, *Age Discrimination Law in Europe* (The Netherlands: Kluwer Law International, 2009); M. Sergeant (ed.), *The Law on Age Discrimination in the EU* (The Netherlands: Kluwer Law International, 2008); C. O’Cinnéide, *Age Discrimination and European Law* (Brussels: European Commission, 2005); M. Bell, “Advancing EU Ant-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive” (2009) 3 *The Equal Rights Review* 7; E. Howard, “The European Year of Equal Opportunities for All- 2007: Is the EU Moving Away from the Formal Idea of Equality?” (2008) 14(2) *European Law Journal* 168.

²⁹ Art. 2, the Directive.

³⁰ P. Skidmore argues that it is in the ‘field of age discrimination that the greatest flexibility has been accorded to Member States’. P. Skidmore, ‘EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?’ (2001) 30 *Industrial Law Journal* 126 at 130.

³¹ P. Skidmore, cited n [30](#), *supra* at 129.

they have accorded to race and sex³². Schiek notes that the Directive espouses an unusual model somewhere ‘between those two poles’ of the ‘closed list approach’ (under which direct discrimination cannot be justified) and the equal treatment approach (which allows for a wide variety of objective justifications).³³

Article 6 of the Directive provides that a difference in treatment on grounds of age (which would normally be considered to be direct discrimination) can be objectively justified in certain circumstances, and thus will not amount to direct discrimination on grounds of age. It provides that ‘Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’³⁴..

In the very first case based on Article 6 of the Directive the Court Of Justice in *Mangold*³⁵ sought to encourage the age discrimination agenda by holding that the ‘principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law’³⁶. While there was little support offered for this assertion other than the fact that the Directive provides a framework for a much broader principle which could be found ‘in various international instruments and in the constitutional traditions common to the Member States’³⁷, much criticism and heated discussion followed this assertion.³⁸ However, despite the criticisms leveled at the Court Of Justice, this statement signaled a rights-based approach to non-discrimination on grounds of age, affording EU citizens a very wide measure of protection.

Three criticisms were leveled at the Court Of Justice as a result of the decision in *Mangold*³⁹. Firstly, it was argued that the assertion extended age discrimination

³² P. Skidmore, cited n 30, *supra* at 129.

³³ D. Schiek, ‘Age Discrimination before the Court Of Justice – Conceptual and Theoretical Issues’ (2011) 48 *Common Market Law Review* 777 at 784.

³⁴ Art. 6, Directive 2000/78/EC. The Directive also provides examples of such differences in treatment by stating in Article 6 that: ‘Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) 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’

³⁵ *Mangold*, cited n 6 *supra*.

³⁶ *Mangold*, cited n 6 *supra*.

³⁷ *Mangold*, cited n 6 *supra*.

³⁸ See the opinion of A.G. Mazák in *Palacios de la Villa*, cited n 6 *supra*, at para 83.

³⁹ *Mangold*, cited n 6 *supra*. See also for more discussion on the impact of the Mangold judgment more generally D. Schiek, “The ECJ decision in Mangold: A further twist on effects of Directives and Constitutional Relevance of Community Legislation” (2006) 35(3) *Industrial Law Journal* 329; M. Schmidt, “The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ’s Mangold Judgment” (2006) 7(5) *German Law Journal* 704; A. Eriksson, “European Court of Justice: Broadening the Scope of European Non-Discrimination Law” (2009) 7(4) *International Journal of Constitutional Law* 731 and K. Sawyer, “The Principle of ‘*interprétation conforme*’: How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?” (2007) 28(3) *Statute Law Review* 165; E. Muir, “Of Ages in – And Edges of – EU

beyond the original conception of Member States potentially acting as a constraining factor on the actions of Member States. There was a concern that Article 13 (ex Article 6a) TEU and the principles enshrined therein, in particular age discrimination, were not meant to be considered as fundamental principles of community law, and that what forms of discrimination are considered to be covered by the prohibition on discrimination must be allowed to ‘evolve with society’ as opposed to being made more fundamental principles of Community law⁴⁰.

Secondly, there was some disagreement as to the foundation upon which the court rested its formulations of this principle. Some argued that the principle suggested by the court was simply a restatement of the guarantee of general equality while others felt it referred specifically to the principle of age discrimination. If the latter was true, it was argued that this was structurally and integrally unsound. It was submitted that as the Court Of Justice referred to the ‘constitutional traditions of Member States’ this could only be referring to the general principle of equality as most Member States at the time did not recognize age discrimination expressly. The judgment in *Mangold*⁴¹ would appear to support this assumption as it refers firstly to the Directive and the principles underlying the Directive as deriving from the constitutional traditions of Member States (the general principle of equality) and this is followed by a statement to the effect that non-discrimination on grounds of age is a fundamental principle of community law. Equally relevant are the interchangeable references to the general principle of equality and the principle of non-discrimination on grounds of age in *Mangold*^{42, 43}. Further support for this proposition can be identified in the opinion of Advocate General Sharpston in the case of *Lindorfer*⁴⁴ who argued that the principle of age discrimination could not amount to a fundamental principle of Community law as it was ‘too recent and uneven to meet such a description’⁴⁵ and Advocate General Mazák mirrored this concern in *Palacios de la Villa*⁴⁶. It was contended that prior to the enactment of the Directive in 2000, very few member states had any legislation on age discrimination on their statute books⁴⁷ and so the Court Of Justice, it was argued, could not have meant to elevate such an uncertain principle to a fundamental principle of EU law.

Thirdly, there was also a judicial legitimacy argument arising from the uncertainty of seeking general principles of law from the ‘Platonic heaven of law rather than in the law books’⁴⁸ and many called for a reassessment of the principle to include a determination that the prohibition on age discrimination, far from being a fundamental principle of community law, was in fact merely a specific incarnation of the ‘general principle of equality which forms part of the foundations of Community law’⁴⁹. AG

Law” (2011) 48(1) *Common Market Law Review* 39; M. Sergeant, “Age Discrimination, Redundancy Payments and Length of Service” (2009) 72(4) *Modern Law Review* 628.

⁴⁰ *Bartsch*, cited n 6 *supra*, opinion of A.G. Sharpston at 46.

⁴¹ *Mangold*, cited n 6 *supra*.

⁴² *Mangold*, cited n 6 *supra* at paras 74-78.

⁴³ See also the opinion of A.G. Sharpston in cited n 6 *supra* at para 57.

⁴⁴ *Lindorfer*, cited n 6 *supra*, opinion of A.G. Sharpston at para 55.

⁴⁵ *Lindorfer*, cited n 6 *supra*, opinion of A.G. Sharpston at para 55.

⁴⁶ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 84.

⁴⁷ M. Schmidt, ‘The Principle of Non-Discrimination in Respect of Age: Dimensions of Court Of Justice’s *Mangold* Judgment’ (2005) 7(5) *German Law Journal* 505 at 519.

⁴⁸ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 84.

⁴⁹ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 94.

Sharpston criticized the Court Of Justice for deciding ‘of its own volition, without good reason and against the wishes of the legislature’ to extend the Directive in this manner which produced a situation of ‘considerable legal uncertainty’⁵⁰. Reisenhuber was particularly concerned by the fact that the ‘‘constitutionalisation’ of the prohibition of age discrimination severely restricts the legislator’s prerogative and discretion, takes anti-discrimination policies out of the democratic process, and interferes with the institutional balance of the Treaty.’⁵¹ Reisenhuber even went so far as to argue that the court ‘trespasses on – and threatens to occupy – foreign territory. It should use the next opportunity to retreat and give it back to its owner, the European legislator.’⁵²

Despite these criticisms, the Court Of Justice has continued to reiterate the principle of non-discrimination on grounds of age as a fundamental principle of community law, so it must be assumed that they support the reading of *Mangold* as establishing age discrimination as a general principle of Community law and they can now claim any legitimacy they require from the CFR which explicitly recognizes the principle of non-discrimination on grounds of age.⁵³ There is in fact a theory that the Court Of Justice was referring to the CFR in *Mangold*⁵⁴ when it referred to the constitutional tradition of Member States⁵⁵. Whatever the meaning to be attached to these words, the approach of the Court Of Justice in *Mangold*⁵⁶ was a commendable one (despite its uncertain foundation) in that it secured the principle of non-discrimination on grounds of age in the Treaties. However, more relevant is the manner in which this principle has been enforced by the Court Of Justice. Sex discrimination, for example, has also been considered to be a fundamental principle of Community law but there are a growing number of academics who feel that age discrimination is subjected to a looser standard of scrutiny that that applied in other discrimination related cases.⁵⁷

IV. A Stage Analysis

Having considered the statistical information that can be derived from the case law, and the fact that non-discrimination on grounds of age is a fundamental principle of Community law, this author contends that more significant information on the import attached to the principle of non-discrimination on grounds of age can be extracted from the case law⁵⁸. Of import, firstly, is the manner in which the court decides such cases. A stage model can be drawn to analyze the court decisions. In the first stage, the court always considers whether the particular case falls within the terms of the Directive. The second stage involves the identification and determination that there has been a difference in treatment on grounds of age. Stage three involves an assessment as to whether the difference in treatment can be objectively justified by reference to a particular legitimate aim, including legitimate employment policy,

⁵⁰ *Lindorfer*, cited n 6 *supra*, opinion of A.G. Sharpston at para 31.

⁵¹ K. Reisenhuber, ‘Case Note’ (2007) *European Review of Contract Law* 62 at 68.

⁵² K. Reisenhuber, cited n 51, *supra* at 71

⁵³ Art. 21, CFR.

⁵⁴ *Mangold*, cited n 6 *supra*, at paras 74-78.

⁵⁵ M. Schmidt, cited n 47, *supra* at 519.

⁵⁶ *Mangold*, cited n 6 *supra*, at paras 74-78.

⁵⁷ See for example, D. Schiek, cited n 4 *supra* at 779.

⁵⁸ For a useful review of the case law of the Court of Justice see C. O’ Cinnéide, ‘Age discrimination and the European Court of Justice: Equality Law comes of Age’ (2009/2010) 17(2) *Revue des Affaires Européennes* 253.

labour market and vocational training objectives. Finally, if the court decides that there is an objective justification, the Court Of Justice in stage four will examine whether the method chosen for meeting this particular objective is appropriate and necessary. It will be argued that the case law is relatively predictable using this stage model. However, an analysis of the cases reveals that different considerations will apply depending on the particular fact scenario in dispute. In cases relating to pay and terms and conditions of employment, the court generally applies a strict equality based model. However, in cases relating to retirement and, in particular, mandatory retirement ages, the court applies a more economic model, giving Member States a large degree of discretion in implementing their policies. This creates large differences in the results of cases before the Court Of Justice, particularly at stages 3 and 4.

A. Stage 1: Does it fall within the scope of the Directive?

The first stage which relates to the application of the Directive to a particular case always produces very similar results. An analysis of the case law reveals that the Court Of Justice has succeeded time and time again in passing cases through this initial phase even where the Directive was not yet implemented in the Member State and even where national authorities are opposed to its application in the particular case.⁵⁹ Of the cases with arguments based on the Directive, 100% were successful in falling within the scope of the Directive.

In the seminal case of *Palacios de la Villa*⁶⁰, it was argued by Spain, Ireland, the Netherlands and the UK that national laws which allowed collective agreements to set down compulsory retirement ages did not fall within the scope of the Directive, particularly when one considers that the Directive specifically provides that the Directive operates without prejudice to national laws on retirement age. Advocate General Mazák opined that it would be ‘problematic to have this Sword of Damocles’ (the Directive) interfering and hanging over all national provisions relating to retirement ‘especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with Member States’⁶¹.

However, the Court Of Justice went on to hold, in an attempt to ensure jurisdiction over the matter, that in fact the Recital ‘merely states that the Directive does not affect the competence of Member States to determine retirement age and does not in any way preclude the application of the Directive’ to the circumstances before it⁶². Thus the setting of compulsory retirement ages, even if this is essentially within the preserve of national law⁶³, has also been considered by the Court Of Justice as falling within the scope of the Directive.⁶⁴ Laws dealing with pay and conditions of employment (for example, laws which exclude the consideration of periods of employment before the age of 25 for the calculation of notice periods, or which preclude periods of employment before the age of 18 for the purposes calculating

⁵⁹ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 42.

⁶⁰ *Palacios de la Villa*, cited n 6 *supra*.

⁶¹ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 64.

⁶² *Palacios de la Villa*, cited n 6 *supra*, at para 44.

⁶³ *Age Concern England*, cited n 6 *supra*, at para 28.

⁶⁴ *Age Concern England*, cited n 6 *supra*, at para 2.; *Rosenbladt* cited n 6 *supra*, at para 36 and see also the opinion of A.G. Tizzano at para 32.

salary entitlements), recruitment (for example, laws which prevent recruitment to the fire service after the age of 30⁶⁵), or termination of employment (for example, laws preventing dentists from remaining on a statutory panel after the age of 68⁶⁶ and severance allowances paid only to persons not entitled to a pension) have all been found to fall within the scope of the Directive.⁶⁷

Therefore, there appears to be a great acceptance on the part of the Court Of Justice to consider a variety of cases which relate to employment issues. This acceptance can be interpreted in two specific but diverging ways. Firstly, perhaps the Court Of Justice, in line with its ruling in relation to the fundamental importance of the principle of non-discrimination, has taken on the role of a protective parent in relation to the Directive and wants to ensure compatible and harmonious interpretation of the Directive throughout the EU Member States. Therefore, it is eager to include all employment related issues (however tenuous) within the scope of the Directive and subject them to review. Secondly, and more cynically, perhaps the Court Of Justice wants to ensure that age related policies enacted by Member States in pursuit of economic goals are examined and are given the seal of approval by the Court Of Justice so as to ensure their continuous operation free from litigation in Member States. This interpretation of the role of the Court Of Justice is certainly evidenced in stage 2 of the courts analysis.

B. Stage 2: Does a difference of treatment occur?

This stage of the courts analysis relates to a finding that a difference in treatment on grounds of age has occurred in an individual case. Once again, similar to the situation in relation to stage 1, the court has always found (in 100% of cases) that a difference of treatment actually exists. However, this has more to do with the fact that the differences in treatment have been so stark in these cases as opposed to any protective role that the Court Of Justice might be seen to be taking in such cases.

The Court Of Justice takes a very pragmatic approach to the identification of differences in treatment which usually involves a very simple comparison between the individual involved, who is of a certain age (X), with an individual of a different age (Y). Advocate General Kokott defined difference in treatment as existing ‘not only where one person is treated less favorably than another is, has been or would be treated in a comparable situation expressly on grounds of age, but also where such treatment is afforded to that person on the basis of a criterion which is inextricably linked to absolute or relative age’.⁶⁸ Thus, in *Ingeniørforeningen i Danmark*⁶⁹ a provision which provided for severance payments for workers who had not yet reached retirement age but not to those who had, was considered to be a direct difference in treatment on grounds of age.⁷⁰ Other examples of difference in treatment on grounds of age include the cases of *Mangold*⁷¹, where the German national law⁷²

⁶⁵ *Wolf*, cited n 6 *supra*, at paras 26 and 27.

⁶⁶ *Petersen*, cited n 6 *supra*, at para 33.

⁶⁷ *Küçükdeveci*, cited n 6 *supra*, at para 27 and the opinion of A.G. Bot at para 32. See also *Hütter*, cited n 6 *supra*, at para 36.

⁶⁸ *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 36.

⁶⁹ *Ingeniørforeningen i Danmark*, cited n 6 *supra*.

⁷⁰ *Ingeniørforeningen i Danmark*, cited n 6 *supra*.

⁷¹ *Mangold*, cited n 6 *supra*, at paras 74-78.

permitted employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52⁷³, and *Palacios de la Villa*⁷⁴ and *Age Concern UK*⁷⁵ where mandatory retirement ages were challenged. Similarly, in the case of *Küçükdeveci*⁷⁶, Advocate General Bot, in his opinion on whether a provision of German law that excluded periods of employment before the age of 25 in the calculation of notice periods on dismissal, noted that the provision imposed ‘less favourable treatment on dismissed workers who commenced their employment relationship with their employers before the age of 25 compared to dismissed workers who commenced such a relationship after that age’⁷⁷ and the Court Of Justice added that the provision introduced ‘a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking’⁷⁸. Therefore, the assessment of the Court Of Justice is really a very simple one. Would a worker aged (X) be treated differently if he/she were aged (Y)? If yes, then the Court Of Justice normally considers this to be a difference in treatment.

The test used by the Court Of Justice to determine difference in treatment to date has been a very simple one, most notably because all the cases to date have involved very obvious differences in treatment, which if related to any other ground of discrimination, would be directly discriminatory. Therefore, where cases relating to terms and conditions of employment or retirement arise which have a clear age based structure e.g. mandatory retirement at 65 years, this will obviously create a difference in treatment between a person who is, for example, aged 65 and a person who is, for example, aged 64. It will be interesting to see if the court will enhance this simplified test in cases where more indirect forms of discrimination may arise in the age context. This approach mirrors that taken in other discrimination cases more generally,⁷⁹ where direct discrimination is taken to occur where “the only reason for less

⁷² Para 1 of the *Beschäftigungsförderungsgesetz* (Law to promote employment), as amended by the law of 25 Sep. 1996 (BGBl. 1996 I, p. 1476) (‘the BeschFG 1996’).

⁷³ *Mangold*, cited n 6 *supra*, at para 59.

⁷⁴ *Palacios de la Villa*, cited n 6 *supra*. For more discussion on the impact of this decision see M. Connolly, ‘Compulsory Retirement and Age Discrimination: A New Deference to Derogation’ (2008) 9(3) *International Journal of Discrimination Law* 181; S. Bredt, ‘Compulsory Retirement as an Instrument to Strengthen Labour Market Opportunities for Young Employment Seekers - An Annotation to the European Court of Justice’s Decision C-411/05 - *Palacios de la Villa*’ (2008) 10 *European Journal of Social Security* 190.

⁷⁵ *Age Concern England*, cited n 6 *supra*. For more discussion on this case see M. Connolly, ‘Forced Retirement, Age Discrimination and the Heyday Case’ (2009) 38(2) *Industrial Law Journal* 233.

⁷⁶ *Küçükdeveci*, cited n 6 *supra*. See T. Roes, ‘Case Law: Case C-555/07 *Seda Küçükdeveci v. Swedex GmbH & Co. KG* (2010) 16 *Columbia Journal of European Law* 497; A. Wiesbrock, ‘Case Note, Case C-555/07 *Küçükdeveci v. Swedex*’ (2010) 11(5) *German Law Journal* 539; M. de Mol, ‘*Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*’ (2010) 6(2) *European Constitutional Law Review* 293.*

⁷⁷ *Küçükdeveci*, cited n 6 *supra*, opinion of A.G. Bot at para 36.

⁷⁸ *Küçükdeveci*, cited n 6 *supra*, at para 29. Similar sentiments were expressed in the case of *Hütter*, cited n 6 *supra*, at para 29.

⁷⁹ See E. Ellis, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005) at 88-91; M. Bell, ‘Direct Discrimination’ in D. Schiek et al (eds.), *Cases, Materials and Text on National, Supranational and international Non-Discrimination Law* (Oxford: Hart Publishing, 2007) at Chapter 2; V. Chege, *Multidimensional Discrimination in EU Law: Sex, Race and Ethnicity* (Baden-Baden: Nomos, 2010) at 156 and S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) at 92; J. Bowers and E. Moran, ‘Justification in direct sex discrimination law: Breaking the taboo’ (2002) 31 *Industrial Law Journal* 307.

favourable treatment is the ground in question”⁸⁰. Thus, a similar structural approach to establishing a difference in treatment can be identified in cases relating to all prohibited grounds of discrimination.⁸¹

C. Stage 3: Is there a legitimate objective justifying a difference in treatment?

It is really at stage 3 that the decisions of the Court Of Justice become more interesting as it is here that the principle of equal treatment on the grounds of age comes into conflict directly with the economic policies of the Member States. This stage essentially involves an analysis of whether the difference in treatment so identified can be considered to be objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives reflecting the approach of the Court of Justice, in relation to indirect discrimination claims on other grounds, where the Court of Justice will not find discrimination to have occurred where there are “objectively justified factors which are unrelated to any discrimination”⁸². In approximately 93% of all age discrimination cases at this stage, the Member State has been successful in arguing that they have a legitimate objective.

The Court Of Justice has expressly stated on numerous occasions that Member States have a very broad discretion in relation to the choice of aims and subsequent measures which they take in the field of social and employment policy.⁸³ This has certainly been bourn out in practice. Of the cases studied for this article, there is only one case where the court held that the State had not produced a legitimate aim but the decision turned out to be irrelevant as the Court Of Justice went on to decide this case on other grounds.⁸⁴ In all other cases, even where the plaintiff was ultimately successful at a later stage, the court held that the State had presented legitimate aims for the purposes of objectively and reasonably justifying the difference in treatment.

This wide discretion is evidenced by the interpretation of the words ‘objective and reasonable’ in Article 6(1). The Court Of Justice has held that no independent significance should be attached to these latter terms.⁸⁵ In the case of *Ingeniørforeningen i Danmark*⁸⁶, Advocate General Kokott considered the ‘rather unwieldy form of words’ in Article 6(1) and concluded that the terms ‘objective’ and ‘reasonable’ do ‘nothing other than set out the general requirement governing the justifications for the differences of treatment recognized under European Law’.⁸⁷

⁸⁰ V. Chege, n.79, *supra* at 156.

⁸¹ See for example in the case of sex the structural approach of the court in the case of C-400/93 *Specialbejderforbundet I Danmark v. Dansk Industri, formerly Indutriens Arbejdsgivere, acting for Royal Copenhagen A/S* [1995] ECR I-1275; Case 157/86 *Murphy v. Bord Telecom Eireann* [1988] ECR 673; Case 129/79, *McCarthy Ltd. v. Smith* [1980] ECR 1275.

⁸² See Case 170/84 *Bilka-Kaufhaus GmbH v. Weber Von Hartz* [1986] ECR 1607 and confirmed by the Court of Justice in Case C-381/99 *Brunnhofner v. Bank de Österreichischen Postsparkasse AG* [2001] ECR I-4961. See also E. Ellis, n.79, *supra* at p. 109.

⁸³ *Mangold*, cited n 6 *supra*, at para 31 and *Palacios de la Villa*, cited n 6 *supra*, at para 68.

⁸⁴ The court held in this case that air traffic safety did not constitute a legitimate aim with the meaning of Art. 6 of the Directive. See *Prigge and Others*, cited n 6 *supra*.

⁸⁵ *Palacios de la Villa*, cited n 6 *supra*, at paras 56-57 ; *Age Concern England*, cited n 6 *supra*, at paras 44-45; *Petersen*, cited n 6 *supra*, at paras 39-40; *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 43.

⁸⁶ *Ingeniørforeningen i Danmark*, cited n 6 *supra*.

⁸⁷ *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 42.

Objectivity refers merely to the fact that ‘facts and considerations relied on in order to justify a difference in treatment must be verifiable’ and indicates that ‘irrelevant considerations’⁸⁸, cannot be used to justify a difference in treatment on grounds of age. Similarly, the Court Of Justice has held that Member States do not have to list in their age discrimination laws the specific types of differences in treatment that can be justified on grounds of age.⁸⁹ Requiring states to do this would be ‘impossible’⁹⁰ in view of the large number of justifications which might be possible under the legislation.

In furtherance of their broad discretion, it has been held that Member States do not need to expressly state the legitimate objectives behind a measure when enacting a measure which imposes a difference in treatment on grounds of age. The Court Of Justice has held that it is sufficient that the ‘national law is in actual fact and in the result justified by such a legitimate aim’⁹¹. The test, therefore, is one of express or easily implied legitimacy⁹². Therefore, not only do the Member States have a very broad discretion in the scope of their legitimate justifications but there is also no need for any express reference to such legitimate justification in enacting such measures as long as this can be readily implied and explained by the Member State when it is required.⁹³ Further still, it has been opined and accepted by the Court Of Justice that a legitimate policy may change and that other policies could take its place and the measure would still be considered legitimate under the Directive. Advocate General Bot in the *Petersen* case opined that original policy aims may alter but that a ‘measure may be maintained even if it pursues new aims, in the light of developments in social, economic, demographic and budgetary conditions’.⁹⁴

The Court Of Justice has held that social policy objectives, such as those related to employment policy, the labour market or vocational training will be considered to be legitimate objectives under the Directive.⁹⁵ Some examples of such legitimate aims include measures enacted to promote the aim of integrating older workers into the labour force (although this engendered very little discussion)⁹⁶, policies promoting ‘intergenerational employment’⁹⁷ and policies to ‘encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees’ fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service’⁹⁸. While, in general,

⁸⁸ *Ingeniørforeningen i Danmark*, cited *supra* note 6, opinion of A.G. Kokott at para 45.

⁸⁹ *Age Concern England*, cited n 6 *supra*.

⁹⁰ *Age Concern England*, cited n 6 *supra*, at para 52. See also opinion of A.G. Mazák in the same case at para 54.

⁹¹ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 71 and judgment of the court at para 55.

⁹² *Petersen*, cited n 6 *supra*, opinion of A.G. Bot at para 43.

⁹³ This is reflected in other areas of anti-discrimination law also. See for example in the Joined Cases C-4&5/02 *Schönheit v. Stadt Frankfurt am Main* (judgment of 23 October 2003) the Court of Justice held that the Member State is not restricted to the measures set out when adopting the measure as these might alter over time.

⁹⁴ *Petersen*, cited n 6 *supra*, opinion of A.G. Bot at para 49.

⁹⁵ *Age Concern England*, cited n 6 *supra*, at para 46, and *Hütter*, cited n 6 *supra*, at para 41; *Prigge*, cited n 6 *supra*, at para 81.

⁹⁶ *Mangold*, cited n 6 *supra*, at para 61. See also *Kücükdeveci*, cited n 6 *supra*, opinion of A.G. Bot at paras 38-40.

⁹⁷ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 71.

⁹⁸ *Fuchs*, cited n 6 *supra*, at para 50.

the Court Of Justice has decided that a Member State must provide a detailed exposition of the legitimate policy pursued and that ‘generalized claims’⁹⁹ are insufficient to prove that a measure is objectively justified¹⁰⁰, it would appear that a much broader discretion with limited analysis has been given to policies relating to the automatic termination of employment contracts on reaching a certain age. In this context the Court Of Justice has decided that a balance has to ‘be struck between political, economic¹⁰¹, social, demographic and/or budgetary considerations and the choice to be made between prolonging people’s working lives or, conversely, providing for early retirement’.¹⁰² Schiek concludes that the *Rosenblatt*¹⁰³ ruling, which related to this issue of mandatory retirement, seemed ‘to establish a rather loose standard of scrutiny for judging age-related retirement policies motivated by employment market pressures’¹⁰⁴.

The only restriction that the Court Of Justice has placed on what constitutes a legitimate policy objective is what can be referred to as the ‘public interest test’. The Court Of Justice has drawn a very clear distinction between aims which are individual to a particular organization as distinguishable from aims which have a public interest objective. While in general, the former, including aims of cost reduction in a particular enterprise or improving competitiveness, are scrutinized much more than the latter and are not generally accepted by the Court Of Justice,¹⁰⁵ there have been occasions where the broad discretion given to Member States has caused the Court Of Justice to be creative in its examination and acceptance of what constitutes a legitimate aim. This arose in the case of *Hütter*¹⁰⁶, where the employer, the public service, sought to claim that legislation treating those over the age of 18 different to those under the age of 18 for the purposes of calculating salary was devised essentially in order to promote the integration of young people who have pursued vocational training into the labour market.¹⁰⁷ While, these may be considered the individual aims of an organization, having a very tangential association with social policy or public interest, the Court Of Justice considered that the individual aim of the public sector could in fact be linked to a broader social aim of wages policy and the policy of rewarding experience so as to enable a worker to perform his duties better.¹⁰⁸

Another interesting aspect of the Court Of Justice decisions is the deference given to what is described as the maintenance of ‘intergenerational balance’ in the labour market which is most often raised in cases relating to mandatory retirement policies.

⁹⁹ *Rosenblatt*, cited n 6 *supra*, opinion of A.G. Tizzano at para 132.

¹⁰⁰ This is also reflected in equal pay claims where the Court of Justice has held that “mere generalisations” are not enough to show that the aim of a measure is unrelated to discrimination. See Case C-167/97 *R v. Secretary of State for Employment, ex parte Seymour-Smith* [1999] ECR I-623.

¹⁰¹ The use of economic objectives has also been highlighted in equal pay claims. E. Ellis, *supra* n. 79, at 169 notes that the Court of Justice has accepted the existence of an economic defense and refers to Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911 in support of this.

¹⁰² *Rosenblatt*, cited n 6 *supra*, at para 44.

¹⁰³ *Rosenblatt*, cited n 6 *supra*.

¹⁰⁴ D. Schiek, cited n 4 *supra* at 788.

¹⁰⁵ *Rosenblatt*, cited n 6 *supra*, opinion of A.G. Tizzano at para 117.

¹⁰⁶ *Hütter*, cited n 6 *supra*.

¹⁰⁷ *Hütter*, cited n 6 *supra*, at para 40.

¹⁰⁸ *Hütter*, cited n 6 *supra*, at para 41. See Case C-17/05 *Cadman* [2006] ECR I-9583, para 34, and *Hütter*, cited n 6 *supra*, at para 47 and *Hennigs and Mai*, cited n 6 *supra*, at para 72.

The case of *Georgiev*¹⁰⁹ is illustrative of this point. This case involved a university professor who was dismissed at the age of 65, placed on successive fixed term contracts until the age of 68, at which point he was obliged to take mandatory retirement. The legitimate aim of this policy proffered by the Bulgarian government was that the measures ensured ‘the specific situation of the staff in the discipline concerned, the needs of the university establishment under consideration and the professional abilities of the person covered’.¹¹⁰ The German and Slovak Governments along with the Commission also submitted that the aim of such legislation was essential in ensuring the ‘quality of teaching and research’ and ‘establishing a balance between the generations’.¹¹¹ In previous cases, the Court Of Justice had considered that the ‘encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States’ social or employment policy,¹¹² in particular when the promotion of access of young people to a profession is involved.¹¹³ Consequently, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim¹¹⁴. The court supported the opinion of Advocate General Bot to the effect that intergenerational balances in universities, ‘is such as to promote an exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities’.¹¹⁵

There are two distinct problems with the analysis of the Court Of Justice at stage 3 which works to make it extremely difficult for a claimant to succeed in such cases. Firstly, the Court Of Justice rarely challenges the legitimate objectives proposed by Member States. The Member States are rarely, if ever, requested to provide any more than meager evidence to support their reliance on such claims. The question as to whether a legitimate objective is actually required in a Member State is normally a matter for the national court to determine, with the Court Of Justice often sanctioning the objective theoretically.¹¹⁶ While there is nothing inherently wrong with this process, it does mean that certain theoretical legitimate objectives, despite the fact that they may be based on stereotypical assumptions, go unchallenged at the European level and the national court then can only enquire as to whether circumstances justifying this objective exist. This is particularly the case where the policies can be claimed to be assisting in the development of intergenerational balance, despite the fact that these types of arguments can be ‘as damaging to the affected employees as that based on simple prejudice’¹¹⁷ because they are poorly formulated, are not sufficiently challenged by the Court Of Justice and are often based on stereotypical assumptions about older workers. Little consideration, for example, was given by the Court Of Justice to arguments against intergenerational balance such as the fact that

¹⁰⁹ *Georgiev*, cited n 6 *supra*.

¹¹⁰ *Gorgiev*, cited n 6 *supra*, at para 41.

¹¹¹ *Geogiev*, cited n 6 *supra*, at para 42.

¹¹² *Palacios de la Villa*, cited n 6 *supra*, at para 65.

¹¹³ *Petersen*, cited n 6 *supra*, at para 68.

¹¹⁴ *Georgiev*, cited n 6 *supra*, at para 45.

¹¹⁵ *Georgiev*, cited n 6 *supra*, at para 46.

¹¹⁶ This often occurs in other areas of EU anti-discrimination law. See E. Ellis, *supra* n.79, at 109 and the cases of *Brunnhofner* n 83 *supra* and Case C-79/99 *Schnorbus v. Land Hessen* [2000] ECR I-10997. See also T. Hervey, “EC Law on Justifications for Sex Discrimination in Working Life” in R. Blanpain (ed), *Collective Bargaining, Discrimination, Social Security and European Integration* (Kluwer, Deventer, 2003).

¹¹⁷ C. Duncan, ‘The dangers and limitations of equality agendas as a means for tackling old-age prejudice’ (2008) 28 *Aging and Society* 1133at 1137.

there may not, in certain circumstances, be sufficiently qualified younger workers available to take up a post in a particular profession, that even if such younger workers exist that they may not be skilled enough to replace the highly skilled older worker or that while a top position may become available this may not necessarily be filled by a younger worker or the fact that an argument for intergenerational balance assumes that stereotypical older workers are not performing to the best of their ability and therefore should be replaced by younger, apparently fitter and more skilled workers. The claimant will find it particularly difficult to raise arguments against a particular objective, where the Court Of Justice does not challenge the Member State to justify its reliance on a certain principle.¹¹⁸ It is interesting that a pending case before the Court Of Justice, *Hörnfeldt*¹¹⁹, has questioned whether a national retirement provision is compatible with Article 6 if it is not clearly determinable from the context the aim or purpose the measure is serving. It is likely that Sweden will raise the defense of intergenerational balance but it is hoped that the Court Of Justice would take the opportunity to exact more rigorous challenges to such alleged objectives than it has previously done.

Secondly, there appears to be an imbalance in the level of scrutiny imposed by the Court Of Justice on certain policies. There is some evidence that this imbalance is also evident in other areas of anti-discrimination law and, most particularly, in the social security context¹²⁰ but, in general, the Court of Justice imposes a strict scrutiny on Member States in discrimination cases.¹²¹ However, in age discrimination cases, it would appear that where policies are introduced to facilitate older workers, such as occurred in *Mangold*¹²², these will come under very strict scrutiny with Member States being required to justify their position with evidence. This is because there is a potential that the policy will have a disproportionate effect, no effect or only a 'theoretical' beneficial effect on younger workers.¹²³ However, the court does not apply the same level of scrutiny when the provision is implemented to facilitate younger workers, for example, in relation to the intergenerational balance objective. Again there is a stereotypical assumption inherent in this analysis that policies in favour of younger workers are more advantageous to the labour market and economies of the Member States. Therefore, it can be concluded that the broad

¹¹⁸ C. Duncan, cited n 117, *supra* at 1137.

¹¹⁹ *Hörnfeldt*, cited n 6 *supra*.

¹²⁰ See Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. See also E. Ellis *supra* n. 79, at 369-372 where she refers to the following cases of evidence of a weaker level of scrutiny on the part of the Court of Justice in social security cases. See Case C-226/91 *Molenbroek v. Bestuur van de Sociale Verzekeringsbank* [1992] ECR I-5943; Case C-317/93 *Nolte v. Landesversicherungsanstalt Hannover* [1995] ECR I-4625; Case C-444/93 *Megner and Scheffel v. Innungskrankenkasse Vorderplatz* [1995] ECR I-4741 (E. Ellis notes that the latter two cases prompted the editors of the *Equal Opportunities Review* to comment that the decisions reduced "significantly the standard of proof required of a Member State in order to justify indirectly discriminatory legislation" (1996) 67 *Equal Opportunities Review* 43 at 44; Case C- 343/92, *De Weerd, née Roks* [1994] ECR I-571; Case C- 280/94 *Posthuma-van Damme v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1996] ECR I-179.

¹²¹ See in the context of equal pay, Case C-50/96 *Deutsche Telekom v. Schröder* 2000 ECR I-743 and Joined Cases C-270 & 271/97 *Deutsche Post v. Sievers and Shrage* 2000 ECR I-929 in which the Court of Justice applied a much stricter scrutiny to the measures imposed by the Member States .

¹²² *Mangold*, cited n 6 *supra*.

¹²³ *Küçükdeveci*, cited n 6 *supra*, opinion of A.G. Bot at paras 45-51.

discretion afforded to Member States during stage 3 severely impacts on the capacity of the claimant to challenge ‘legitimate objectives’ proposed by Member States.

D. Stage 4: Is the measure proportionate?

This final stage involves a complex consideration of the appropriateness and necessity of the legitimate aim pursued, and is essentially ‘the proportionality test usually applied in European law’.¹²⁴ The concept of ‘appropriateness’ involves a measurement of the suitability of the measure in relation to the aim sought to be achieved and only where the measure is deemed to be ‘manifestly unsuitable’ will the Court Of Justice consider it to be inappropriate.¹²⁵ The concept of ‘necessity’ requires a consideration of whether the legitimate aim pursued could have been achieved ‘by an equally suitable but more lenient means’.¹²⁶ It is at stage 4 that a divergence between cases involving terms and conditions of employment and retirement policies can be identified. A much broader discretion is afforded to Member States in cases relating to retirement policies, particularly mandatory retirement. While normally 45% of claimants are successful in arguing that a measure is disproportionate, 0% of cases relating to retirement ages have been successful at this stage.

In relation to the issue of appropriateness, the Court Of Justice appears to apply different standards to cases involving terms and conditions of employment and to cases relating to mandatory retirement ages. In relation to the first set of cases, the Court Of Justice has held, as evidenced by the case of *Mangold*¹²⁷ and successive cases, that where the measure is arbitrarily constructed on age grounds, as opposed to other social factors, this will not be considered to be appropriate.¹²⁸ In *Mangold*¹²⁹, for example, the court concluded that the legislation leads to a situation where all workers at the age of 52, regardless of the fact that some might have been employed previously, and as such would not benefit from the legitimate aim of integrating older workers into the workforce, could be offered an indefinite number of fixed term contracts up to the point of retirement. However, in cases relating to mandatory retirement age, the court has taken an entirely more flexible approach and has concluded that it was for the national courts to balance the legitimate aim of the Member State with a suitable measure ‘on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people’s working life or, conversely, to provide for early retirement’¹³⁰. Therefore, the court appears to assume that there is nothing inappropriate about choosing an arbitrary age band for mandatory retirement or for prolonging working life for older workers to meet particular labour

¹²⁴ *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 46. For a discussion of this principle in the context of age discrimination law see P. Loi, “The Reasonableness Principle in the European Court of Justice Age Discrimination Cases” In MA. Moreau (ed.), *Before and After the Economic Crisis: What implications of the ‘European Social Model’?* (Cheltenham: Edward Elgar Publishing, 2011).

¹²⁵ *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 53.

¹²⁶ *Ingeniørforeningen i Danmark*, cited n 6 *supra*, opinion of A.G. Kokott at para 60.

¹²⁷ *Mangold*, cited n 6 *supra*.

¹²⁸ *Palacios de la Villa*, cited n 6 *supra*, opinion of A.G. Mazák at para 75.

¹²⁹ *Mangold*, cited n 6 *supra*.

¹³⁰ *Palacios de la Villa*, cited n 6 *supra* at para 70.

market objectives. However, this means, contrary to *Mangold*¹³¹, that all workers who have reached the age of 65 (for example), without distinction, whether or not they are in the same state of health, the same profession or have the same level of skill, may lawfully, have their employment terminated at this age. ‘This significant body of workers, determined solely on the basis of age, is thus in danger’ of being excluded from employment even though they are still entirely capable of, and willing to contribute to, the labour market. While the Court Of Justice in *Mangold*¹³² examined the possibility of both actual and theoretical discrimination (workers out of employment and workers within employment) which is generally the approach permitted by the Directive in other areas of anti-discrimination law¹³³, the Court Of Justice in retirement cases only appears to be concerned with the particular worker before them, as opposed to a theoretical worker, thus ignoring the potential discriminatory effect of the decision on other workers.

In relation to the issue of necessity, the main question is whether there are more lenient measures that would achieve the same aim. This question is inextricably linked with the appropriateness context and it is very difficult to divide the two issues from each other (which often the Court Of Justice does not do). In relation to cases relating to terms and conditions of employment, the court has applied a very simple test, whether an age threshold as the primary factor in determining the measure is objectively necessary.¹³⁴ The Court Of Justice assumes, in these cases, that not all age cohorts are homogenous and that allowance must be made for heterogeneity. However, in cases relating to retirement, the Court Of Justice has not dealt directly with the choice of an age threshold or considered whether it is objectively necessary and has normally left this to the discretion of national courts. The court does not deal with the issue of heterogeneity of the 65 plus age cohort some of whom may not be capable of working but more of whom are both competent and want to continue working. The court does not seek tangible evidence to the effect that imposing mandatory retirement at the age of 65 is necessary in the pursuit of a particular legitimate aim. Instead it is willing to accept, based upon mere generalizations, that it is not ‘unreasonable for the authorities of a Member State to take the view that a measure,... [such as mandatory retirement age] ...may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy’¹³⁵ and has further concluded that this is a matter for the national courts to determine whether a particular national employment policy warrants the imposition of an age threshold.¹³⁶ Interestingly, similar features emerge from the case law in the context of discrimination in social security where it has been argued that as no empirical evidence has to be produced to demonstrate that the measure was actually necessary to achieve the objective pursued, “it now appears sufficient under EC law if the Member State government could reasonably be entitled to take that view”¹³⁷. This

¹³¹ *Mangold*, cited n 6 *supra*.

¹³² *Mangold*, cited n 6 *supra*.

¹³³ See E. Ellis *supra* n. 79, at 90 who notes that the definitions of direct and indirect discrimination in the Equality Directives “all embrace hypothetical comparisons, as well as comparisons with the treatment received by actual persons”. See also L. Waddington and M. Bell, “More Equal than Others: Distinguishing European Equality Directives” (2001) 38 *Common Market Law Review* 587 at 596 who also comment on this.

¹³⁴ *Mangold*, cited n 6 *supra* at para 65; *Hütter*, cited n 6 *supra*, at para 49.

¹³⁵ *Palacios de la Villa*, cited n 6 *supra* at para 72.

¹³⁶ *Petersen*, cited n 6 *supra* at para 74.

¹³⁷ Editorial (1996) 67 *Equal Opportunities Review* 43 at 44.

limited scrutiny has been criticized in the social security context as limiting the ability of the concept of indirect discrimination to “achieve true substantive equality” in this field.¹³⁸ Similar criticism could also be advanced in relation to the prohibition on age discrimination and its ability to achieve equality between persons of different ages when the level of scrutiny imposed by the Court of Justice is so low.

This same discretion is evident in *Rosenblatt*¹³⁹ (concerned with mandatory retirement age in a collective agreement in the cleaning industry) and *Georgiev*¹⁴⁰ (concerned with mandatory retirement ages in the university sector). More recently, in the joined cases of *Fuchs and Köhler*¹⁴¹, the court had an opportunity to examine a compulsory retirement age of 65 in the State prosecutorial service in Germany. The court again applied this flexible test and held that ‘in connection with professions in which the number of posts available was limited that retirement at an age laid down by law facilitated access to employment by younger people’.¹⁴² Therefore, the Court Of Justice has taken a very flexible approach in such cases to the issue of proportionality leaving a large amount of discretion to the Member States to determine retirement age based on economic policies in place at the time.

Very little consideration is given to the question of whether a less disproportionate means could have been introduced (which is not based solely on some arbitrary age preference), to achieve a similar aim.¹⁴³ There is evidence that Member States are moving towards more flexible policies in this regard and introducing default retirement ages and other flexible retirement policies. However, this is not something that has been considered by the Court Of Justice in the context of cases dealing with mandatory retirement and again has been left to the ultimate discretion of the national courts. This approach leaves too much discretion and flexibility to Member States in retirement cases which are not evident in other age discrimination cases. This has the effect of reducing the protection afforded by the Directive, the harmonization of age discrimination policies in Member States and impacts adversely on older workers.

V. Future Cases – Future Arguments

There is some evidence that in the right case the Court Of Justice might take a different view to the issue of proportionality of mandatory retirement measures or that it may reverse its previous decisions based on a more strict equality based reading of Article 6. There are three essential arguments that can be made: (1) an argument relating to pension levels and alternative work, (2) an argument relating to the importance of flexibility and (3) an argument based on the CFR and the right to earn a livelihood.

A. Pensions and Alternative Work

¹³⁸ E. Ellis, n.79, *supra* at 374.

¹³⁹ *Rosenblatt*, cited n 6 *supra*.

¹⁴⁰ *Georgiev*, cited n 6 *supra*

¹⁴¹ *Fuchs and Köhler*, cited n 6 *supra*.

¹⁴² *Fuchs and Köhler*, cited n 6 *supra* para 58.

¹⁴³ See M. Schlachter, “Mandatory Retirement and Age Discrimination under EU Law” (2011) 27(3) *International Journal of Comparative Labour Law and Industrial Relations* 287.

The Court Of Justice in all mandatory retirement cases considers during the proportionality test whether or not the individual will be unduly prejudiced by the finding that the measure is proportionate. Unusually, the Court Of Justice seem to place a lot of emphasis in the retirement cases on the fact that the worker will not be unduly prejudiced as they can be compensated by pension entitlements upon retirement or are free to find alternative work where such a mandatory retirement age does not exist. There are a variety of problems with this analysis which leaves room for argument if a different case arose before the Court Of Justice.

Firstly, in relation to the issue of pension entitlements, it is submitted that the decisions of the Court Of Justice to date have been based on an assumption that retirement age is always linked with pension age, which may not always be the case. For example in *Palacios de la Villa*¹⁴⁴, the court held that the workers would not be unduly burdened by the retirement age as they would be entitled to ‘financial compensation by way of a retirement pension at the end of their working life...the level of which cannot be regarded as unreasonable’¹⁴⁵. Similarly, in *Rosenblatt*¹⁴⁶, the determination of appropriateness and necessity once again involved an examination of the potential financial prejudice affecting such workers. Retirement clauses were not considered to be ‘unduly’ prejudicial to the ‘legitimate interests of the workers concerned’¹⁴⁷ because such workers are ‘entitled to financial compensation by means of a replacement income in the form of a retirement pension at the end of their working life’¹⁴⁸. However, in future cases the Court Of Justice are going to have to consider mandatory retirement provisions which are devised without reference to the pension which a worker may ultimately receive or which may not be linked to pension age and which may therefore be burdensome to the worker.

Secondly and connected to this initial argument is the fact that there is substantial evidence to confirm that older workers, despite reasonable pension levels, are amongst the most impoverished group in the EU. Even with ‘not unreasonable’ financial provision, older people still face ‘a higher risk of poverty than the general population, reaching a rate of around 19% of those aged 65 years and over in 2008 in the EU-27’ with women being at a higher risk of poverty than men.¹⁴⁹ With provisions such as mandatory retirement, more and more people are going to be facing uncertain and hard financial circumstances, which will differ depending on the case in question. It is interesting that in the pending case of *Hörnfeldt*¹⁵⁰ the national court has raised a question in relation to whether a mandatory retirement rule can be proportionate if it does not take account of factors such as the pension which the individual may ultimately receive. This raises the interesting question as to whether the Court Of Justice should consider both actual and theoretical financial burdens in examining the proportionality of mandatory retirement measures. Normally, the Court Of Justice has looked only at the individual applicant and whether their pension level is appropriate for their actual needs. However, while the mandatory retirement age may not actually

¹⁴⁴ *Palacios de la Villa*, cited n 6 *supra*.

¹⁴⁵ *Palacios de la Villa*, cited n 6 *supra* at para 73.

¹⁴⁶ *Rosenblatt*, cited n 6 *supra*.

¹⁴⁷ *Rosenblatt*, cited n 6 *supra* at para 47.

¹⁴⁸ *Rosenblatt*, cited n 6 *supra* at para 48.

¹⁴⁹ ‘Role of women in an ageing society’, European Parliament resolution of 7 Sep. 2010 on the role of women in an ageing society (2009/2205(INI)) OJ, 2011, C 308E , p. 49–55 at point D.

¹⁵⁰ *Hörnfeldt*, cited n 6 *supra*.

affect the individual before them in a burdensome way, this is not to say that it is not affecting another individual who is not receiving the same pension conditions. The question that the court has to consider is whether a mandatory retirement measure when enacted should consider the impact on all individuals that might be affected by the rule. Where it does not do so, this could, in fact, potentially make the measure disproportionate.

Thirdly, the argument that a worker may be able to find alternative work (such as contract or self-employed work or full time work in areas where a mandatory retirement age does not apply) does not take into consideration the impact of age discrimination on such workers, which is only further enhanced by mandatory retirement ages. The Court Of Justice has argued that workers in looking for work will be protected by age discrimination rules. However, some Member States do not provide protection for workers against age discrimination over the age of 65 years.¹⁵¹ Even where workers are protected (and this is borne out by the statistics of the cases before the Court Of Justice), it is very difficult for employees to prove that they have been discriminated against during the hiring process. The idea proposed by the Court Of Justice that workers are free to seek alternative work may be appropriate for certain types of skilled workers (such as lawyers, dentists and doctors) but the impact of age discrimination on semi-skilled and unskilled workers, in particular, should not be underestimated.

Fourthly, there is a strong ethical argument to be made that the provision of some form of compensation (whether in the form of a pension or in the form of alternative work) is not a reason to deny that discrimination has occurred and certainly cannot be used as a reason to justify discriminatory measures. It must be questioned whether the provision of financial assistance or the potential for the worker to find alternative work are appropriate considerations in such cases. There is an argument that such considerations would be entirely irrelevant if the discrimination at issue were race or sex and as such age is being treated in an entirely different way to these other forms of discrimination. For example, if it was argued that a woman should not be given maternity leave because she would be receiving adequate financial compensation from the state and was free to find another job once her child was born, there is no question that this would be considered to be sex discrimination and the court would, no doubt, find such arguments highly objectionable.

B. Flexibility and Consent

There is growing evidence, notwithstanding the existing jurisprudence of the court, that the Court Of Justice is moving towards recognition of the fact that non-discretionary mandatory retirement ages may no longer be consistent with anti-discrimination guarantees of EU law and that flexibility is a more proportionate method of meeting the expectations of the employer, worker and State. This is evidenced by the references to flexibility and consent in many of the judgments relating to retirement ages. For example, in *Palacios de la Villa*¹⁵² and *Rosenblatt*¹⁵³, the Court Of Justice seemed to place emphasis on the fact that the workers in both cases had been party to the collective bargaining agreement laying down the

¹⁵¹ See the Employment Equality Act 1998, as amended by the Equality Act 2004, Ireland.

¹⁵² *Palacios de la Villa*, cited n 6 *supra*.

¹⁵³ *Rosenblatt*, cited n 6 *supra*.

retirement age and therefore had consented to the terms of the agreement. In other cases, the Court Of Justice seemed swayed by the fact that the worker had worked out a more flexible package with their employer allowing them to work beyond the mandatory retirement age for a limited period of time subject to certain conditions (for example, *Georgiev*¹⁵⁴, *Petersen*¹⁵⁵, *Age Concern UK*¹⁵⁶ and *Fuchs and Köhler*¹⁵⁷), thus ameliorating the rigid effect of the mandatory retirement rule.

To date there have been no cases where a worker has been forced to take mandatory retirement by virtue of a national rule to which there is no exception and/or where the worker was not able to work out any flexible package with their employer. It is therefore possible that in such a case that the court could rule that a mandatory retirement age which admits no exceptions may not be proportionate under EU law. The case *Hörnfeldt*¹⁵⁸ where the Swedish national court has asked the Court Of Justice to consider whether a mandatory retirement rule that admits of no exceptions is proportionate under EU law may be just that case. It will be very interesting to see if the Court Of Justice uses this flexibility and consent argument in finding the measure disproportionate or whether it will continue to view mandatory retirement as entirely proportionate and therefore compatible with EU regardless of the flexibility or consent issue.

C. The Right to Earn a Livelihood

Finally, and more significantly, the determination of the Court Of Justice in retirement cases potentially amounts to an interference with the right of the worker to earn a livelihood,¹⁵⁹ a right which is common to the constitutional traditions of Member

¹⁵⁴ *Georgiev*, cited n 6 *supra*.

¹⁵⁵ *Petersen*, cited n 6 *supra*.

¹⁵⁶ *Age Concern UK*, cited n 6 *supra*.

¹⁵⁷ *Fuchs and Köhler*, cited n 6 *supra*.

¹⁵⁸ *Hörnfeldt*, cited n 6 *supra*.

¹⁵⁹ The author is aware of the weaknesses inherent in this argument and contends that this argument would be most significant in cases where the pension or other alternative sources of income would be entirely inadequate to support the individual. A useful example of where this may arise is the case of Ireland where conditional upon the EU/ IMF Programme of Financial Support for Ireland and the Irish Memorandum of Understanding on Specific Economic Policy Conditionality, Ireland agreed to implement structural reforms to increase progressively the state pension age from the standard age of 65 years to the age of 68 years. This was achieved in Ireland through a number of measures including the abolition of the State Pension (Transition) from 2014 which is available to persons age 65. The State Pension (Transition) is available on fulfillment of certain criteria among which is that the individual claimant must be 65 years. At the age of 66 years, the individual will become entitled to receive a State Pension (Contributory) (Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland), section 10). As and from the 1st January 2014, the State Pension (Transition) will be removed, effectively raising the pension age to 66 (Section 114(9), Social Welfare (Consolidation) Act 2005 as inserted by section 6, Social Welfare and Pensions Act 2011 (Ireland)). The Social Welfare and Pensions Act 2011 also makes provision for raising the pension age to 67 in 2021 and 68 in 2028 (Section 2(1), Social Welfare (Consolidation) Act 2005 (Ireland) as amended by section 7(1) and (2), Social Welfare and Pensions Act 2011 (Ireland)). However, no change has been made to the public sector pension age of 65 (for those who have joined prior to 2004). This means that public sector workers will have to retire at 65 in 2014 but will not receive a pension until they turn 66. In the meantime, many of these workers will be forced to take unemployment benefit or seek alternative (and potentially part-time) work which may provide an entirely inadequate source of income for such workers.

States¹⁶⁰ and is now copper fastened in Article 15(1) of the CFR. The reference to a right to work in Article 15(1) CFR is unique in the European regional human rights context, with no mention of the right under the ECHR. Prior to the adoption of the CFR, the right was protected to a certain extent by the property guarantee under Article 1, Protocol 1 of the ECHR and, even after the adoption of the CFR, the link between this right and the right to property is still evident. While the Court of Justice has yet to deal directly with a claim relating to the right to earn a livelihood under the CFR, specific attention must be drawn to the protection of the right under the ECHR and, in particular, under Article 1, Protocol 1 of the ECHR. This section will outline the protection of the right under Article 1, Protocol 1 and will highlight areas in which the CFR may have a differential impact on the outcome of a decision.

In order to fall within the terms of Article 1, Protocol 1, “a livelihood” must be something which can fall within the definition of “possession” for the purposes of the ECHR. It has been held by the European Court of Human Rights (“Court of Human Rights”) that the right extends, not only to professional practices and existing business, but to legitimate expectations of business.¹⁶¹ Certainly, there is no doubt that the ECHR applies to the practice of professions¹⁶² such as doctors and lawyers. It could also be argued that it applies equally to any job or work. However, the lack of case law on this area does leave some room for doubt in this context. One benefit of the CFR in this context, is that the CFR expressly protects a right to freely engage in work in Article 15(1) and therefore, the problem of a lack of precedence in the Court of Human Rights on this issue will be ameliorated by the clear protection of the right under the CFR.

If it could be established that a job or a profession fell within Article 1, Protocol 1, it must then be demonstrated that there has been an interference with this right. While not expressly stated in Article 15(1) it is envisaged that similar considerations would apply when considering a case under the CFR. In a case involving the annulling of the registration of a Romanian lawyer, the Court of Human Rights has held that a limitation on the ability of the lawyer to provide a full range of services, and the associated loss of income, was an interference with his property rights under Article 1, Protocol 1 of the ECHR.¹⁶³ Similar decisions have been reached in the context of medical doctors.¹⁶⁴ It is arguable that a mandatory retirement provision would be an interference with a possession within the meaning of Article 1, Protocol 1 as it would prevent the applicant from continuing in work and their ability to provide the services that they would normally provide on a discriminatory basis. There is evidence that discrimination might amount to an interference with the right to earn a livelihood in the opinion of Advocate-General Kokott in the case of *Pensionsversicherungsanstalt v*

¹⁶⁰ Case C-1/11, *Interseroh Scrap and Metals Trading GmbH v Sounderabfall-Management Gesellschaft Rheinland Pfalz mbH (SAM)* 29 March 2012 (not yet published).

¹⁶¹ See for example *Okleßen v. Sweden* Application No. 35264/04; See also *Van Marle and Others v the Netherlands*, Application Nos. 8543/79; 8674/79; 8675/79; 8685/79; and *Buzescu v Romania* Application No. 61302/00; *Prince Hans-Adam II of Liechtenstein v Germany* Application No. 42527/98; *Öneryildiz v Turkey* Application No.48939/99 and *Zhigalev v Russia* Application No. 54891/00.

¹⁶² See for example *Malik v. United Kingdom* Application No. 23780/08 and *Karni v Sweden* Application No. 11540; *Olbertz v Germany* Application No. 37592/97; *Döring v Germany* Application No. 37595/97; and *Wendenburg v Germany* Application No. 71630/01.

¹⁶³ *Buzescu v. Romania* (2005) Application no. 61302/00 at para 88.

¹⁶⁴ See for example, *Malik v. United Kingdom* Application No. 23780/08.

*Christine Kleist*¹⁶⁵ where Dr Kleist, who was employed as Chief Physician at the Austrian Pensionsversicherungsanstalt, was compulsorily retired at the age of 60 by her employer. The basis for this mandatory retirement condition was a provision of a collective agreement under which doctors could be retired upon reaching the statutory normal pensionable age. Under Austrian law the normal pensionable age was at the time 65 for men and 60 for women. The question arose as to whether this constituted discrimination on the grounds of sex. While the ECJ did not deal with the question of the engagement of Article 15 in this case, Advocate-General Kokott in his opinion clearly envisaged that Article 15 might be engaged in a case of this sort and he commented that women are “adversely affected to a greater extent than their male colleagues in respect of their right to engage in work and pursue their occupation”. Therefore, Article 15 might be engaged and interfered with in cases where discrimination interferes with a certain person’s right to engage in work and pursue their occupation.

Finally, it has been held in the context of the ECHR, that such interferences can be justified in circumstances where the Court of Human Rights is satisfied that the interference is lawful and not arbitrary, and has struck a fair balance between the general interests of the community and the requirements of the protection of the individual’s fundamental rights.¹⁶⁶ In this regard, there must be a ‘reasonable relationship between the means employed and the aims pursued’.¹⁶⁷ The importance of the protection of the right to earn a livelihood and the limitations on this right were also recognized by the Court of Justice in the seminal case of *Fuchs and Köhler*¹⁶⁸. The Court of Justice held that the right to earn a livelihood was not absolute and that a balance had to be struck between the diverging interests of older workers and the importance of sharing work among the generations.¹⁶⁹ States may choose to prolong working life or provide for early retirement and it is for the State to ‘find the right balance between the different interests involved, while ensuring that they do not go beyond what is appropriate and necessary to achieve the legitimate aim pursued’.¹⁷⁰ It would be interesting to see if the Court of Human Rights would take a similar approach in such a case, where the doctrine of the margin of appreciation may be invoked to give greater latitude to states in the implementation social and economic policy.

While it is entirely possible that Article 15(1) of the CFR, in conjunction with Article 1, Protocol 1 of the ECHR, would protect a right to engage in work and would find mandatory retirement provisions a discriminatory interference with this right, given the decision of the Court of Justice in *Fuchs and Köhler*, it is likely that where a balancing exercise is conducted, the lack of scrutiny imposed by the Court of Justice on the legitimate aims put forward to defend differences in treatment would hamper a finding of a violation of Article 15(1). However, recent case law¹⁷¹ relating to CFR

¹⁶⁵ Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist*.

¹⁶⁶ *Buzescu*, cited n 163, *supra* at para 89.

¹⁶⁷ *Buzescu*, cited n 163, *supra* at para 89.

¹⁶⁸ *Fuchs and Köhler*, cited n 6 *supra*.

¹⁶⁹ *Fuchs and Köhler*, cited n 6 *supra* at para 64.

¹⁷⁰ *Fuchs and Köhler*, cited n 6 *supra* at para 65.

¹⁷¹ See for example the cases of: Case C-400/10 *PPU McB* [2010] ECR I-8965; Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke and Eifert* [2010] ECR I-11063; Case C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH* [2010] ECR I-13849; Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL* (1 March 2011 – not yet published); Joined Cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt, Land Berlin v. Mai* (decision of 8

rights more generally highlights the deferential approach of the Court of Justice to the CFR¹⁷², despite some uncertainties surrounding the operation of the CFR,¹⁷³ and might suggest that a stricter scrutiny will be placed on Member States who attempt to legitimate an interference with one of the rights protected by the CFR.¹⁷⁴ Therefore, a finding of a violation of Article 15(1) of the CFR may be possible were the Court of Justice to consider more directly and closely the impact of mandatory retirement provisions on Article 15(1) of the CFR.

VI. Conclusions: Flexibility as the Key to Equality

Age discrimination law is relatively young (a mere 15 years old) when compared with the prohibition of other forms of discrimination in EU law and it could, therefore, be argued that it is still in a state of flux and development.¹⁷⁵ It is hoped that future development will ameliorate some of the hardship that has been imposed on older workers as a result of the existing jurisprudence of the Court Of Justice in retirement cases.

September 2011 – not yet published); Case C-34/10 *Oliver Brüstle v. Greenpeace e.V.*; Joined Cases C-411/10 *N.S. v. Secretary of State for the Home Department* and Case-C493/10 *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (not yet published).

¹⁷² The following works are useful in the examination of the approach of the Court of Justice to human rights issues prior to the introduction of the CFR. See for example, P. Alston (ed.), *The European Union and Human Rights* (Oxford: Oxford University Press, 1999); L. Besselink, “Entrapped by a maximum standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union” (1998) 35 *Common Market Law Review* 629; J. Coppel and A. O’Neill, “The European Court of Justice: Taking Rights Seriously” (1992) 29 *Common Market Law Review* 669; J. Weiler, “Eurocrasy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community” (1986) 61 *Washington Law Review* 1103; I. Pernice, *Grundrechtsgehalte in Europäischen Gemeinschaftsrecht* (Baden-Baden: Nomos, 1979)

¹⁷³ See the conclusion of F. Fontanelli, “The European Union’s Charter of Fundamental Rights two years later” (2011) 3(3) *Perspectives on Federalism* 22 at 39-40 where he highlights the uncertainty of the use of the doctrine of margin of appreciation in EU law, among other issues.

¹⁷⁴ See for example Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke and Eifert* where the Court of Justice held that the measure failed to pass the strict balancing test (proportionality) under the CFR. See also for more information on the CFR and its impact the works of E. Spaventa, “Federalisation versus Centralisation: tension in fundamental rights discourse in the European Union” In M. Dougan and S. Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart Publishing, 2009) at 343; K. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2nd ed., 2008) at 111-140; A. Hinarejos, “Recent Human Rights Developments in the European Union Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists” (2007) 7(4) *Human Rights Law Review* 793; J. Morijn, “Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and omega in Loght of the European Constitution” (2006) 12(1) *European Law Journal* 15; A. Menéndez, “Chartering Europ: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union” (2002) 40(3) *Journal of Common Market Studies* 471; C. Engel, “The European Court of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences” (2001) 7(2) *European Law Journal* 151; A. von Bogdandy, “The European Union as a Human Rights Organisation: Human Rights and the Core of the European Union” (2000) 37 *Common Market Law Review* 1307.

¹⁷⁵ D. Schiek, cited n4 *supra* at 792.

Firstly, it is submitted that the Court Of Justice needs to vigorously and equitably challenge all legitimate objectives raised in defense by Member States, regardless of whether those objectives are for the benefit of younger or older workers. The Court Of Justice needs to impose greater pressure on States to justify the imposition of differences in treatment and should not accept mere assertions or generalizations that are not necessarily linked to the measures in question. More scrutiny needs to be placed on arguments such as intergenerational balance which provides very wide discretion to Member States to impose a variety of differences in treatment on the grounds that this might assist younger workers in the employment market.

Secondly, it is submitted that the Court Of Justice needs to consider the possibility of more proportionate and less intrusive means of maintaining intergenerational balance. Some options in this regard might include the development of more flexible retirement policies, such as an option to continue in work subject to performance appraisal, or short term work schemes over a certain age. The Court Of Justice briefly considered the possibility of this flexible performance appraisal model in *Georgiev*¹⁷⁶ but concluded rather swiftly that it would be impractical or humiliating in the case of a worker found to be falling short of their expected work capacity. However, this case can be distinguished on the grounds that it involved university academic staff where the issue of performance appraisal has been a ground of serious debate in numerous jurisdictions for many years and should not be seen as a definite sign that the Court Of Justice would rule out such possibilities in other professions. In the majority of professions or organizations, such systems can and do operate with little impracticality or humiliation. There are many organizations that operate staff performance appraisal on an annual basis at all ages and successfully tie salary, terms and conditions and even dismissal to this process.

Thirdly, it is submitted that the Court Of Justice might be persuaded to conclude differently should certain factors be present in a particular case. This article put forward three hypothetical arguments that might be made before the Court Of Justice including arguments relating to pension age, flexibility and consent and the right to earn a livelihood. It was essentially argued that there may be cases where a mandatory retirement rule could be unduly burdensome on an individual, such as where the pension age does not coincide with retirement age or where the pension may not be reasonably sufficient for the worker's needs. Equally, it has been shown that due to the operation of age discrimination, the chance that a person of retirement age will find alternative work is limited. It is also argued that the Court Of Justice has not yet considered a case where a mandatory retirement rule was imposed without any consent or flexibility in its operation. Were such a case to arise, this may in fact persuade the court towards a different finding on the proportionality ground. Finally, it is submitted that there is also a significant risk that the current rules on mandatory retirement fall foul of the right to earn a livelihood guaranteed by the CFR.

Since 2009, there have been many developments in the age discrimination agenda in the EU and there appears to be recognition that flexibility and choice are the more appropriate means of achieving equality for older workers. Such workers 'represent an economic resource and a fund of experience'¹⁷⁷. There have been moves to

¹⁷⁶ *Georgiev*, cited n 6 *supra*.

¹⁷⁷ 'Role of women in an ageing society' cited n [149](#), *supra*.

increase labour force participation of older workers and to encourage active aging¹⁷⁸ which also contributes directly to an increase in the health and productivity of the economy and government finances.¹⁷⁹ Employment rates of older workers is still very low in the EU and encouraging such workers to continue in work will require the ‘removal of employment obstacles, such as mandatory retirement ages, and introduction of flexible retirement mechanisms allowing them to choose when to retire and to earn additional pension entitlements.’¹⁸⁰ Therefore, there is recognition that there is a need for choice to be at the heart of retirement policies in the future, a point that the Court Of Justice, thus far, in an effort to protect the broad discretion of Member States, has failed to consider adequately. The court needs to develop a ‘more rights based approach to aging so that older people can act as empowered subjects instead of objects’¹⁸¹. It is time to encourage, and not discourage, an active and aging workforce and to embrace the skills, flexibility and inherent wisdom of older workers.

¹⁷⁸ Decision No 940/2011/EU of the European Parliament and of the Council of 14 Sep. 2011 on the European Year for Active Ageing and Solidarity between Generations (2012) OJ, 2011, L 246, p. 5–10.

¹⁷⁹ Opinion of the Committee of the Regions on Dealing with the impact of an ageing population in the EU (2009 Ageing Report) OJ, 2010, C 232, 7–13 at point 20.

¹⁸⁰ 2009 Aging Report, cited n [Error! Bookmark not defined](#), *supra*, at point 2.

¹⁸¹ ‘Role of women in an ageing society’ cited n [149](#), *supra* at point D