



**WHEN CAN AGE MATTER? DRAWING THE LINE BETWEEN
JUSTIFIABLE DIFFERENTIATIONS ON THE BASIS OF AGE AND
IMPERMISSIBLE AGE-BASED DISCRIMINATION:**

**RECENT JUDGMENTS OF THE E.C.J. ABOUT THE ADMISSIBILITY OF
AGE-BASED LIMITATIONS IN EMPLOYMENT LEGISLATION**

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I. INTRODUCTION

The general principle of European Union law prohibiting all discrimination on the grounds of age is acknowledged by the case law of the Court of Justice of the European Union (CJEU)¹ and is given specific expression in Directive 2000/78.² This Directive has the purpose of laying down a general framework for combating discrimination on various grounds including age.³ Pursuant to the Directive, however, a difference of treatment on the basis of age may be justified under certain circumstances.⁴ In fact, while different treatment based on race or sex will be clearly inadmissible in most cases, age-based differentiations, age-limits, and age-related measures are widespread in social and employment legislation.⁵ As Advocate General Mazák remarked in *Age Concern*, “[a]ge is not by its nature a ‘suspect ground,’ at least not so much as for example race or sex.”⁶ In addition, age is a fluid criterion: whether differential treatment constitutes inadmissible age discrimination may not only be a question of whether a measure is founded directly or indirectly on age, but also of what age it relates to.⁷ Therefore it is often difficult to draw the line between justifiable differentiations on the basis of age and impermissible discrimination. Three judgments of the CJEU, all decided in January 2010, may help shed further light on Member States’ obligations with regard to the prohibition of discrimination on the grounds of age by providing some guidance as to when legislation fixing age-based limitations can be justified.

II. ARTICLE 6(1) OF THE DIRECTIVE

The first subparagraph of Article 6(1) of the Directive states that a difference of treatment on grounds of age does “not constitute discrimination if, within the context of national law, [it is] objectively and reasonably justified by a legitimate aim, including legitimate employment policy,

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¹ See Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-09981 ¶ 75.

² Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

³ *Id.* art. 1.

⁴ *Id.* art. 6(1).

⁵ Opinion of Advocate General Mazák, Case C-388/07, *Age Concern Eng. v. Sec’y of State for Bus., Enterprise and Regulatory Reform*, ¶ 74.

⁶ *Id.*

⁷ *Id.*

labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”⁸

Examples of such “differences of treatment” include:

- 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.⁹

The language of the Directive leaves relatively broad discretion to the Member States to permit such differences of treatment so long as they are reasonably justified by a legitimate aim, in particular by legitimate employment policy and labor market objectives. It also leaves them a fair amount of freedom in their choice of the measures capable of attaining those objectives. Thus, recent cases decided by the CJEU in that field are of particular interest as they indicate the limits of that discretion.

III. CASE 555-07, KÜCÜKDEVİCİ V. SWEDEX GMBH & CO. KG¹⁰

In *Küçükdevici*, the CJEU had to decide whether certain German legislation—under which periods of employment completed before the age of twenty-five are not taken into account for the purposes of calculating the notice period applicable to dismissal—was contrary to the principle of non-discrimination on the grounds of age as laid down by the Directive.

Under the German Civil Code, the notice periods which an employer must comply with in the case of dismissal increase progressively according to the length of the employment relationship.¹¹ However, periods of employment completed by an employee before reaching the age of twenty-five are not taken into account in the calculation of the notice period.¹²

Ms. Küçükdevici, employed by a company since the age of eighteen, was dismissed at the age of twenty-eight with one month’s notice, as the company calculated the notice period without taking into account the periods of employment completed before her twenty-fifth birthday. Had her full period of employment been taken into account, the notice period would have been four months.

⁸ Council Directive 2000/78/EC, *supra* note 2, art. 6(1).

⁹ *Id.* art. 6(1).

¹⁰ Case C-555/07, *Küçükdevici v. Swedex GmbH & Co. KG*.

¹¹ Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBL] 195, as amended, § 622, ¶ 2, sentence 1.

¹² *Id.* § 622, ¶ 2, sentence 2.

According to the referring national court, this legislation is based on the German legislature's assumption that older employees are more seriously affected by unemployment because of their family and economic obligations and because of decreasing flexibility and mobility. Linking the extension of the notice period to a minimum age tends to strengthen the protection of older workers against unemployment, as the legislature believes that younger employees usually react more easily and more quickly to the loss of their jobs and greater flexibility can therefore be demanded of them. In addition, according to the national court, the measure also aims to reduce the higher level of unemployment among younger workers by creating conditions which facilitate their recruitment by increasing their employers' flexibility of personnel management.

The CJEU held that these objectives fall within employment and labor market policy as defined by Article 6(1) of the Directive. However, while such aims could in general be legitimate, the legislation was not appropriate and necessary to achieve those aims. The judgment emphasizes that Member States enjoy broad discretion in the choice of measures capable of achieving their objectives in the field of social and employment policy. Therefore, national legislation aimed at giving employers greater flexibility in personnel management by imposing less onerous conditions relating to the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal and occupational mobility, can be regarded as legitimate. However, the Court held that the German legislation was not appropriate for achieving that aim, as it applies to all employees who joined the workforce before the age of twenty-five, irrespective of their age at the time of dismissal. The Court also added that the legislation affects young employees unequally, as it penalizes young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training. The Court concluded therefore that the German legislation was contrary to the principle of non-discrimination on the grounds of age.

This decision suggests, nevertheless, that the CJEU would not necessarily declare illegal a measure imposing less strict conditions for the dismissal of young workers if it was intended to have a positive effect on the recruitment of young workers and was appropriate to achieve that aim. Clearly, it appears necessary to provide some flexibility to national governments to adopt measures that encourage enterprises to recruit young employees in order to deal with the high rates of unemployment affecting that age group. However, while measures relaxing dismissal conditions applicable to that age group may encourage employers to dismiss younger workers, any positive effect on their recruitment remains uncertain.¹³

IV. CASE 229/08, WOLF V. STADT FRANKFURT AM MAIN¹⁴

In *Wolf*, the CJEU held that fixing a maximum recruitment age of thirty does not constitute prohibited discrimination on the grounds of age in the case of firemen directly involved in firefighting.

¹³ See Op. Advoc. Gen., *Küçükdeveci*, ¶ 45 (indicating that in the present case “the claim that such a measure has a positive effect on the recruitment of young workers seems theoretical, to say the very least”).

¹⁴ Case C-229/08, *Wolf v. Stadt Frankfurt am Main*.

The State of Hessen in Germany applies an age limit of thirty for the recruitment of officials to an intermediate career in the fire service, whose duties include firefighting. Mr. Wolf applied for such a post, but as he was over thirty years old his application was not considered.

The CJEU held that this age limit meets all the conditions for justification laid down by the Directive. First, the concern of ensuring the operational capacity and proper functioning of the professional fire service expressed by the German Government constitutes a legitimate aim. In addition, the possession of especially high physical capabilities may be regarded as a genuine and determining occupational requirement for carrying out the occupation of a firefighter whose tasks include fighting fires and rescuing people. The Court relied on scientific data submitted by the German Government according to which very few officials over the age of forty-five possess sufficient physical capability to perform the firefighting part of their tasks, and concluded that the need to possess full physical capability to carry on that activity is related to the age of persons in that career. Finally, according to the Court, the age limit does not go beyond what is necessary to achieve the objective of ensuring operational capacity and proper functioning. Accordingly, this age limit is permissible.

V. CASE C-341/08, PETERSEN V. BERUFUNGSAUSSCHUSS FÜR ZAHNÄRZTE¹⁵

Petersen concerned the age limit set by the German Social Security Code according to which admission to practice as a panel dentist in the national statutory health insurance scheme expires at the end of the calendar quarter in which the dentist reaches the age of sixty-eight.¹⁶

Ms. Petersen, admitted to provide panel dental care since 1974, reached the age of sixty-eight in April 2007. When the Admissions Board for Dentists decided that her authorization to practice as a panel dentist would expire at the end of June 2007, she appealed the decision.

The CJEU held that a Member State may legitimately consider it necessary to set an age limit for the practice of a medical profession such as that of a dentist in order to protect the health of patients. However, the judgment concluded that the measure in the present case lacked consistency, as the age limit applied only to panel dentists. Outside the panel system, dentists could practice their profession regardless of their age. Therefore, the measure could not be regarded as necessary for the protection of patients' health. However, according to the judgment, this does not mean that the measure is necessarily prohibited by the Directive. The Court held that an age limit could be admissible where its aim is to facilitate access to employment by younger dentists if, taking into account the situation in the particular labor market, the measure is appropriate and necessary for achieving that aim. In that context, the Court concluded that the age of sixty-eight would appear to be sufficiently high to serve as the endpoint of admission to practice as a panel dentist. Consequently, the Court determined that it is for the national court to

¹⁵ Case C-341/08, *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*.

¹⁶ Sozialgesetzbuch V [SGB V] [Book Five of the Social Insurance Code] Dec. 20, 1988, BGBl. I at 2477, as amended by Gesetz, Nov. 14, 2003, BGBl. I at 2190, § 95, ¶ 7, third sentence http://www.sozialgesetzbuch.de/gesetze/05/index.php?norm_ID=0509500, and § 72, ¶ 1, third sentence, http://www.sozialgesetzbuch.de/gesetze/05/index.php?norm_ID=0507200. Section 95, ¶ 7, third sentence of the statute applies to all panel doctors of the German statutory health insurance system. Under the second sentence of § 72, ¶ 1 of the statute, that provision applies by analogy to panel dentists.

identify the aim pursued by the age limit for panel dentists and decide accordingly about its permissibility under the Directive.

VI. CONCLUSION

Three recent judgments of the CJEU reaffirm that Member States enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. They are also allowed to introduce age limits on the basis of health-related concerns. However, these decisions emphasize the importance of the limits set by the Directive according to which the measures have to be “appropriate and necessary” to achieve those aims. Accordingly, inconsistent or ineffective measures may not be admissible according to CJEU standards. While these judgments do not provide an ultimate, easy-to-use test for the determination of age-based discrimination, they may help to draw a somewhat clearer picture of the scope of permissible age-based differentiations under E.U. law.