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**Inter-generational Bargaining:  
towards integrated bargaining for younger and older workers in EU countries**

**Social-legal study at the EU-level**

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**Intergenerational Bargaining, EU Age Discrimination Law  
and EU Policies – an Integrated Analysis**

**Beryl ter Haar and Mia Rönmar**

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# Intergenerational Bargaining, EU Age Discrimination Law and EU Policies – an Integrated Analysis

Beryl ter Haar<sup>1</sup> and Mia Rönnmar<sup>2</sup>

## 1. Introduction

At present, due to a rapidly ageing population in the EU and the labour market realities of (post) economic crisis, there is an urgent need to advance the inclusion of both younger and older workers in the labour market, to combat youth unemployment and to promote active ageing and longer and healthier working lives for older workers. In recent years, much of the case law from the Court of Justice of the European Union (CJEU) in the non-discrimination field has evolved around age discrimination, and particularly old-age discrimination.

This report aims to provide a discussion and analysis of EU age discrimination law and EU policies for younger and older workers and persons, and the interaction of law and policies. Furthermore, the ways in which EU law and policies hinder or enable intergenerational bargaining and age-related regulation and measures for younger and older workers will be investigated. In this regard intergenerational bargaining refers to the integration of policies and strategies for younger and older workers through collective bargaining and social dialogue. Younger and older workers must be defined in a contextual way. EU statistics often cover the age groups of 15–24 and 55–64. EU legislation and policy initiatives may have a different and broader scope; for example, when it comes to policy initiatives the notion of younger persons often refers to persons up to the age of 29.

The outline of this report is as follows. Section 2 provides an introduction to the legal basis of age discrimination law and age-related policies and measures in the Treaties of the EU and the EU Charter of Fundamental Rights. Section 3 provides a historical overview of the development of EU policies and strategies for younger and older workers and persons and an inventory of EU governance initiatives in these fields. Furthermore, it holds an analysis whether, and if so, to what extent social partners at European level develop policies for younger and older persons in general and to what extent this also includes an intergenerational dimension. Section 4 presents an analysis of EU age discrimination law, including case law developments from the CJEU. Particular attention is paid to the role of social partners at national level. Section 5 concludes the report with an integrated analysis of EU law and policies in this area, and their implications for intergenerational bargaining and age-related measures and regulation.

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## 2. Treaty Provisions and the EU Charter of Fundamental Rights

The Lisbon Treaty of 2009 introduced a social market economy and solidarity between generations as main aims of the EU. Thus, Article 3(3) TEU states that the ‘Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress [...] It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations’. According to Article 2 TEU, the EU is founded *inter alia* on the values of respect for human dignity and human rights, and these values are said to be common to the Member States in a society in which, for example, pluralism, non-discrimination, tolerance and solidarity prevail. According to Articles 8 and 10 TFEU, the EU must adopt a *mainstreaming* approach in relation to equality and non-discrimination, and in *all* its activities and policies it must aim to eliminate inequalities, promote equality between men and women and combat discrimination, on age as well as other grounds. According to Article 151 TFEU, the Union and the Member States, having in mind fundamental social rights,<sup>3</sup> shall have as their objective ‘the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.’ Thus, according to Article 153 TFEU the EU shall support and complement the activities of the Member States as regards, for example, improvement of the working environment to protect workers’ health and safety, working conditions, social security and social protection of workers, the integration of persons excluded from the labour market, the combating of social exclusion, and the modernisation of social protection systems.<sup>4</sup>

Some Treaty provisions target younger workers and young people specifically. Article 47 TFEU is part of the provisions on the free movement of persons, and stipulates that the Member States ‘shall, within the framework of a joint programme, encourage the exchange of young workers’. Article 165 TFEU is part of Title XII, which deals with education, vocational training, youth and sport. More particularly, Union action regarding youth should be aimed at ‘encouraging the development of youth exchanges and [...] encouraging the participation of young people in democratic life in Europe’.<sup>5</sup> There are no specific provisions in the TFEU targeting older workers or persons.

The TFEU, furthermore, recognises the importance of collective bargaining and social dialogue for social policy (Article 151 TFEU). The EU not only has to respect the autonomy of the social partners (Article 152 TFEU); it also has to promote social dialogue at EU level (Articles 152, 154–155, and 156 TFEU). Article 153(3) TFEU recognises the role of social partners at the national level by providing the option for social partners to implement directives that have been adopted pursuant to Articles 153(2) and 155 TFEU.

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<sup>3</sup> Set out in international human rights sources such as the Council of Europe’s European Social Charter and the EU’s Community Charter of the Fundamental Social Rights of Workers.

<sup>4</sup> However, according to Article 153(4) TFEU the ‘provisions adopted pursuant to this Article: shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof’.

<sup>5</sup> Article 165(2) TFEU, fifth subparagraph.

The CJEU jurisprudence on fundamental rights and general principles of EU law has been developed with reference to constitutional traditions common to the Member States and from international conventions, most especially the European Convention of Human Rights (ECHR). After the Lisbon Treaty, and according to Article 6 TEU, the EU Charter of Fundamental Rights is made legally binding and part of primary EU law. Furthermore, Article 6 TEU determines that the EU is to accede to the ECHR.<sup>6</sup> The EU Charter of Fundamental Rights encompasses rights, freedoms and principles of great relevance to both EU non-discrimination law and different age groups, such as equality before the law (Article 20), non-discrimination (Article 21), equality between men and women (Article 23)<sup>7</sup> and rights of the elderly (Article 25).<sup>8</sup> Article 21(1) of the EU Charter of Fundamental Rights, with an ‘open list of discrimination grounds’, states that ‘[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, *age* [our emphasis] or sexual orientation shall be prohibited’.<sup>9</sup> Article 25 of the EU Charter of Fundamental Rights establishes the rights of the elderly and states that ‘[t]he Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life’.<sup>10</sup> Furthermore – and of importance for intergenerational bargaining – Article 28 of the EU Charter of Fundamental Rights recognises the right to collective bargaining and collective action.<sup>11</sup>

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<sup>6</sup> The Amsterdam Treaty also highlighted fundamental rights. The protection of fundamental social rights in working life was strengthened, for instance through express reference in the Treaty to the European Social Charter from 1961 and the 1989 Community Charter of Fundamental Social Rights of Workers, cf. Article 136 EC.

<sup>7</sup> Article 24 recognises the rights of the child. However, in this report we discuss younger workers, not children, and the intergenerational relation between younger workers and older workers.

<sup>8</sup> According to Article 52a, distinction is to be made between *rights* and *principles* when it comes to interpretation and application (where principles, for example, will not be directly effective in the national courts). However, the CJEU has not always adhered strictly to this distinction. For example, in the *Viking* and *Laval* cases, when interpreting the right to collective action in Article 28 of the EU Charter of Fundamental Rights (which forms part of the Solidarity Chapter, encompassing *principles*), the CJEU said that ‘the right to take collective action must therefore be recognised as a fundamental *right* [our emphasis] which forms an integral part of the general principles of Community law’, see Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval* [2007] ECR I-11767.

<sup>9</sup> Cf. C. Kilpatrick, ‘Article 21 – Non-Discrimination’, In: S. Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing, Oxford 2014), 579–603.

<sup>10</sup> The Explanations relating to the EU Charter of Fundamental Rights emphasises that this Article draws on Article 23 of the European Social Charter, and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. See *Explanations relating to the Charter of Fundamental Rights*, (2007/C 303/02). See further C. O’Conneide, ‘Article 25 – The Rights of the Elderly’, In: S. Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing, Oxford 2014), 693–708 and M. Mikkola, *Social Human Rights of Europe* (Karelactio, 2010).

<sup>11</sup> Notwithstanding this recognition, the fundamental right of collective bargaining and collective action has been challenged and restricted *inter alia* by the freedom of establishment and the free movement of services, most notably in the CJEU judgments in the *Viking* and *Laval* cases; see, for example, C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–08 (Oxford: Hart Publishing, 2008) and E. Ales & T. Novitz (eds), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (Antwerp: Intersentia, 2010). Apart from the rules and procedures related to the European Social Dialogue, EU labour law does not regulate the function, content or legal effects of (national) collective agreements. Instead this is a matter for collective labour law in the Member States. See further, for example, C. Schubert, ‘Collective Agreements within the Limits of Europe. Collective Autonomy as Part of the European Economic System’, *European Labour Law Journal* 4 2013(3), 146–170.

The provisions of the Charter are ‘addressed to the institutions, bodies and offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.<sup>12</sup> According to the explanations to the Charter, the requirement to respect fundamental rights is binding on the Member States when they act within the scope of Union law. According to settled case law of the CJEU, general principles of EU law, including fundamental rights, apply when Member States implement, derogate from and act within the scope of EU law.<sup>13</sup> The Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the EU.<sup>14</sup>

### 3. Age in EU Social Policies

#### 3.1. Introduction

The issue of age is present in many EU social policies, including the Europe 2020 Strategy, the European Employment Strategy, and the Social Investment Package. These strategies coordinate the use of different EU governance initiatives that aim to redirect or influence domestic policy choices by the Member States. These initiatives include the open method of coordination, European funds, policy recommendations and guiding resolutions. In this section we provide a historical analysis of the development of the policies for younger and older people, including age-related regulations and measures; an analysis of the governance initiatives used; and an analysis of the extent to which these initiatives promote an intergenerational approach that could encourage (national) social partners to follow up (Sections 3.2. and 3.3). Furthermore, we analyse whether, and if so to what extent, the European social partners are encouraged by these European policies to negotiate intergenerational and age-related issues, and to what extent they respond to this (Section 3.4).

#### 3.2. EU Policies for Younger Workers and Persons

The TFEU leaves the EU ample room to adopt measures and policies addressing younger persons particularly. Both provisions, Article 47 and 165(2) TFEU, are supportive and complementary in nature; they encourage exchanges and the participation of younger persons in democratic life. Despite this weak (legal) competence, EU youth policy developed during the 1990s<sup>15</sup> when it gained political momentum and manifested itself on the European agenda.<sup>16</sup>

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<sup>12</sup> Article 51 of the EU Charter of Fundamental Rights.

<sup>13</sup> See Case C-5/88 *Wachauf* [1989] ECR 2609, Case C-260/89 *ERT* [1991] ECR I-2925 and Case C-309/96 *Annibaldi* [1997] ECR I-7493. Compare also Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-00000. See also C. Barnard, *EU Employment Law*, 4th edn (OUP, 2012), at 28 ff.

<sup>14</sup> Article 51(2).

<sup>15</sup> This does not mean that there was no attention for the situation of young people before this period; ever since the 1970s the issue of youth unemployment has appeared on the European agenda occasionally. For instance: Commission Recommendation on vocational preparation for young people who are unemployed or threatened by unemployment (OJ [1977] L180/18); Council Resolution on linked work and training for young persons (OJ [1980] C1/1; and Council Resolution on the promotion of employment for young people (OJ [1984] C29/1).

This started with the Commission's white paper on *Growth, Competitiveness and Employment*, which drew attention to the issue of youth unemployment<sup>17</sup> and which is further elaborated on by the Commission's white paper on *European Social Policy*.<sup>18</sup> These white papers shifted the narrative of EU employment and social policy from one which concerned workers and the establishment and protection of their rights, to one in which unemployment and the increase of employment were to be the central focus.<sup>19</sup> This shift became tangible with the introduction of the European Employment Strategy (EES) in the Treaty of Amsterdam. The inclusion of the issue of youth unemployment in the EES was the beginning of significant policy activism towards the introduction of an independent and comprehensive EU Youth Policy and its mainstreaming in other (existing) policies.<sup>20</sup> A new political momentum was gained in 2005 just after the re-launch of the Lisbon Strategy, which resulted in the adoption of the European Youth Pact.<sup>21</sup> The aim of the Youth Pact was to create greater coherence and consistency in the various policy initiatives, in particular in the areas of employment integration and social advancement; education, training and mobility; and the reconciliation of work and family life. These issues were also addressed in the 2008 renewed *Social Policy Agenda*,<sup>22</sup> which is further elaborated in Commission Communication *Youth – Investing and Empowering*<sup>23</sup> and consolidated in the Council Resolution *A renewed framework for European cooperation in the youth field (2010–2018)*,<sup>24</sup> also called the *EU Youth Strategy*.<sup>25</sup> The resolution defines one overarching objective, namely 'to enable all young women and men to make the best of their potential'. This is further worked out in two sub-objectives: 1) more and equal opportunities for young people in education and in the labour market and 2) active citizenship, social inclusion and solidarity of young people.

In addition to the framework resolution, the issue of youth is also part of the strategy Europe 2020. As successor of the Lisbon Strategy, Europe 2020 aims for an economy based on 'knowledge and innovation'; that is 'resource efficient' and 'greener'; and that fosters 'high employment' and 'social and territorial cohesion'.<sup>26</sup> To achieve this aim, it holds integrated common objectives and targets on all four subjects (economic, employment, environment and

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<sup>16</sup> For a detailed account of the historical development of EU Youth policy, see: P. Copeland and B.P. ter Haar, 'The Increment Integration of EU Youth Policy via Soft Law and Open Methods of Coordination', in B.P. ter Haar, *Open Method of Coordination. An analysis of its meaning for the development of a social Europe*. (Dissertation Leiden University; 2012), at 131–135.

<sup>17</sup> COM(1993) 700.

<sup>18</sup> COM(1994) 333.

<sup>19</sup> S. Velutti, *New Governance and the European Employment Strategy*, (Routledge, 2010), at 111–115.

<sup>20</sup> Cf. Copeland and Ter Haar, *op cit.* note 16, at 133. A conclusion that is deduced from among other policy documents, the Mixed Resolution on *Youth Participation* (OJ [1999] C42/1); the Commission's white paper on *A New Impetus for European Youth* COM(2001) 681 final; and the Mixed Resolution regarding *the Framework of European Cooperation in the youth field* (OJ [2002] C168/2).

<sup>21</sup> OJ [2005] C292/3.

<sup>22</sup> European Commission, *Renewed social agenda: Opportunities, access and solidarity in 21st century Europe*. COM(2008) 412 final.

<sup>23</sup> COM(2009) 200 final.

<sup>24</sup> OJ [2009] C311/1.

<sup>25</sup> [http://ec.europa.eu/youth/policy/youth\\_strategy/index\\_en.htm](http://ec.europa.eu/youth/policy/youth_strategy/index_en.htm)

<sup>26</sup> European Commission (2010) *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020.

social), and it introduces the European Semester, which coordinates the different governance structures, among which the European Employment Strategy is included.<sup>27</sup> Furthermore, Europe 2020 introduces flagship initiatives, which include a *Platform to combat poverty and social exclusion* and an initiative called *Youth on the Move*. The latter is a package of policy initiatives on education and employment to improve the situation of young persons in the labour market. The policy initiatives include the *Youth Opportunities Initiative*, *Youth Guarantee*, *European Quality Framework on traineeships*, *Your First Eures Job* and placement programmes like *Erasmus & Leonardo da Vinci*, *Erasmus for Entrepreneurs* and *European Voluntary Service*.<sup>28</sup> The former is interesting, since the policy responses of the *Platform* are in line with the *Social Investment Approach*.<sup>29</sup> The *Social Investment Approach* or *Package* focuses on target groups, including younger and older persons. This whole panoply of initiatives has been brought together in and is coordinated by the governance structure of the *EU Youth Strategy*.

More particularly, the *EU Youth Strategy* brings together eight policy action fields that cover a wide scope of issues involved with the life of young people. Furthermore, it creates some coherence between the different governance initiatives by coordinating them via the open method of coordination and a structured dialogue. Table 1 gives an overview of the aims of the relevant policy action fields (five out of eight)<sup>30</sup> and the different governance initiatives that are applied to achieve those aims. What stands out in this table is that most of the attention is on education and training and on employment and entrepreneurship. Furthermore, the term *intergenerational* is used only once, as in creating solidarity between generations by means of volunteering by young people. However, this is not further elaborated on (yet). Indirectly, via a more general initiative (new skills for new jobs), the concept of life-long learning is also included. Life-long learning could be considered as intergenerational in the sense that it takes the full working-life cycle into account – starting working life with sufficient qualifications and skills and maintaining and updating them throughout working life up to reaching the retirement age. With the exception of these two, the vast majority of the policies address the situation of younger persons only, without any apparent sensitivity for intergenerational dimensions of the issues.

**Table 1** Overview of five out of eight policy action fields and their governance initiatives

Policy action field	Focus/aim	Governance initiatives	Remarks in light of intergenerational policies
Education and training	Reduce skills mismatch and ease transition from education to employment	<b>Youth-specific:</b> - Funding via Erasmus+ programme	

<sup>27</sup>Armstrong (2012), ‘The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance’, in Copeland and Papadimitriou (eds.), *Evaluating the EU’s Lisbon Agenda* (Basingstoke: Palgrave Macmillan); Commission Communication (2010) *Europe 2020 – A strategy for Smart, Sustainable and Inclusive Growth* (COM(2010) 2020 final).

<sup>28</sup><http://ec.europa.eu/social/main.jsp?catId=1006&langId=en> (visited on 30 September 2014)

<sup>29</sup><http://ec.europa.eu/social/main.jsp?catId=961&langId=en> (visited on 30 September 2014)

<sup>30</sup>The eight policy fields are: education and training; employment and entrepreneurship; health and well-being; participation in civil society; voluntary activities; social inclusion; youth and the world; and creativity and culture.



		<ul style="list-style-type: none"> <li>- Policy guidelines in several recommendations, resolutions, and conclusions</li> </ul> <p><b>General:</b></p> <ul style="list-style-type: none"> <li>- European Employment Strategy</li> <li>- Platform combating poverty and social exclusion</li> </ul>	
Employment and entrepreneurship	Promotions of youth employment and entrepreneurship	<p><b>Youth-specific:</b></p> <ul style="list-style-type: none"> <li>- Youth opportunities initiative</li> <li>- Youth guarantee</li> <li>- Your first Eures Job scheme</li> <li>- Youth employment package</li> <li>- European Alliance for apprenticeships</li> <li>- policy paper on a quality framework for traineeships</li> </ul> <p><b>General</b></p> <ul style="list-style-type: none"> <li>- Europe 2020 Strategy</li> <li>- new skills for new jobs</li> <li>- funding by ESF and EaSI</li> </ul> <p><b>External</b></p> <ul style="list-style-type: none"> <li>- joint European Commission - OECD policy briefing on youth entrepreneurship</li> </ul>	<b>Includes life-long learning</b>
Participation in civil society	Seeks to encourage young people to participate in the democratic process and in society	<p><b>Youth-specific</b></p> <ul style="list-style-type: none"> <li>- structured dialogue (forum)</li> <li>- funding by Erasmus+</li> </ul>	<b>Not explicitly mentioned, but it could include involvement in trade unions / social dialogue</b>
Voluntary activities	<p>Recognises and promotes volunteering as an important form of informal learning for young people.</p> <p>Includes the promotion of <b>intergenerational solidarity</b> through voluntary activities.</p>	<p><b>Youth-specific</b></p> <ul style="list-style-type: none"> <li>- European Voluntary Service</li> <li>- Youthpass</li> </ul> <p><b>General:</b></p> <ul style="list-style-type: none"> <li>- Life-long learning</li> </ul>	<b>This aim is not further worked out or elaborated on.</b>
Social inclusion	Aims to combat social exclusion and poverty among	<p><b>Youth specific</b></p> <ul style="list-style-type: none"> <li>- European knowledge centre</li> </ul>	

	young people. Follows the approach of social investment	for youth policy  <b>General</b> - European platform against poverty and social exclusion - Social investment package - Funding via ESF and EaSI	
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### 3.3 EU Policies for Older Workers and Persons

As for younger people, the position of older persons in the labour market is a precarious one, since they ‘tend to occupy a relatively low status in the labour market, experience discrimination with regard to job recruitment represented among the long-term unemployed.’<sup>31</sup> Since the issue of an ageing population is multifaceted, just raising the retirement age is not a solution, because it makes the situation of the older workers more precarious.<sup>32</sup> While the position of younger persons has had the explicit attention of the EU dating back to the 1970s, the position of older persons has not been this explicit until late in the 1990s.<sup>33</sup> One explanation for this could be the fact that the Treaties do not contain provisions addressing older persons as a specific group for EU regulation or policies. However, the position of older persons became tangible on the European agenda with the recognition by the European Commission of the demographic development of an ageing European society.<sup>34</sup> This subject soon became part of a wider context, namely that of social protection, which includes the issues of safe, sufficient and sustainable pensions.<sup>35</sup>

A first overall policy approach is presented by the Commission in the Communication *Towards a Europe for All Ages – promoting Prosperity and Intergenerational Solidarity*.<sup>36</sup> In this communication the Commission elaborates twice on the notion ‘intergenerational’ – in both

<sup>31</sup>C. Phillipson and A. Smith, *Extending working life: A review of the research literature*. London: Department of Work and Pensions, Research Report 299 (2006).

<sup>32</sup>D. Kaneci, ‘Active Ageing: the EU Policy Response to the Challenge of Population Ageing’, *European Papers on the New Welfare*, paper 8 (2007).

<sup>33</sup> Even in some initiatives that are more general in nature, for instance dealing with the labour market situation in the EU, younger persons are singled out as a specific target group – but this is not the case for older persons. See for instance: Council Resolution on Community action to combat unemployment (OJ [1982] C186/1); and Council Resolution on an action programme on employment growth (OJ [1986] C340/2). An exception to this is: Council Resolution on action to assist the long-term unemployed of May 1990 (OJ [1990] C157/4), which mentions that ‘young people have benefited more from the decline in unemployment than have older age groups’. However, older age groups are not singled out as a specifically vulnerable group for whom specific measures should be undertaken.

<sup>34</sup>E.g. European Commission (1995 & 1997), *The demographic situation in the European Union* ([http://ec.europa.eu/employment\\_social/soc-prot/ageing/95report/demog95\\_en.pdf](http://ec.europa.eu/employment_social/soc-prot/ageing/95report/demog95_en.pdf) and [http://ec.europa.eu/employment\\_social/soc-prot/ageing/97report/demog97\\_en.pdf](http://ec.europa.eu/employment_social/soc-prot/ageing/97report/demog97_en.pdf)); and European Commission, *The Social Protection Report*(COM (95) 457 final).

<sup>35</sup>Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies; European Commission (1995), *on the future of social protection: a framework for a European debate* (COM (95) 466 final); and European Commission (1997), *on modernising and improving social protection in the European Union* (COM (97) 102 final).

<sup>36</sup>COM(1999) 221 final.

instances in relation to pensions. In the first instance it is addressed in the context of making pension systems less sensitive to demographic changes. More particularly, it promotes a policy that '[solidifies] the implicit inter-generational contract by striking a sound balance in pension systems between long-term financial sustainability, intergenerational solidarity and equity between and within generations'.<sup>37</sup> The second instance is found in a footnote in the part that addresses the guarantee of an adequate minimum income. Whereas it is asserted that 'a large share of pensioner households have a disposable income per head equal to or above those of young, two earner families with children', a traditional view on the redistribution of resources between groups based on age would be too simplistic, because 'many older people use significant parts of their surplus resources to support their children or grandchildren'.<sup>38</sup> Although this Communication defines some policy actions, in its follow-up Communication on *A concerted strategy for modernising social protection*,<sup>39</sup> the Commission has worked out a more clear governance structure which could be considered as an embryonic version of the streamlined social OMCs –social inclusion, pensions and healthcare and long-term care. Content-wise, though, the concept of intergenerational solidarity and equity has fallen; instead it is more strongly about older persons remaining active in the labour market, longer and in healthier condition.

As from this point onwards, the promotion of active ageing is reflected in two complementary targets the EU has set itself: the 2001 Stockholm European Council agreed that half of the EU population aged 55–64 should be employed by 2010 and the 2002 Barcelona European Council concluded that 'a progressive increase of about five years in the effective average age at which people stop working in the European Union should be sought by 2010'.<sup>40</sup> The basis for these objectives is found in the 2000 Lisbon Strategy, which states that '[t]he employment rate is too low and is characterised by insufficient participation in the labour market by women and older workers'<sup>41</sup> and that in light of an ageing population the long-term sustainability of public finances, including pensions, needs to be ensured.<sup>42</sup> Both objectives have been incorporated in the European Employment Strategy, whose 2001 policy guidelines on youth employment are directly followed by guidelines on *Developing a policy for active ageing*.<sup>43</sup> This has been continued in subsequent employment guidelines up to the 2005 and the 2008 guidelines, which both include guideline 18 for promoting a lifecycle approach to work through, among other policies, 'support for active ageing, including appropriate working conditions, improved (occupational) health status and adequate incentives to work and discouragement of early

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<sup>37</sup>*Idem*, at 15

<sup>38</sup>*Idem*, at 16 (footnote 10).

<sup>39</sup>COM(1999) 347 final.

<sup>40</sup> D. Kaneci, 'Active Ageing: the EU Policy Response to the Challenge of Population Ageing', *European Papers on the New Welfare*, paper 8 (2007). See also: Commission Communication on *Realising the European Union's Potential: Consolidating and extending the Lisbon Strategy*, (COM(2000) 79 final), section 10 'Effective social protection for an ageing population', p. 26–27.

<sup>41</sup> European Council (2000), *Presidency Conclusions* March 23–24, 2000 (Lisbon Strategy), par. 4.

<sup>42</sup>*Idem*, paras. 23 and 31.

<sup>43</sup> 2001/63/EC Council Decision of 19 January 2001 on *Guidelines for Member States' employment policies for the year 2001* (OJ [2001] L22/18).

retirement’.<sup>44</sup> Furthermore, they have been integrated in the social OMCs, in particular the strands on ‘making a decisive impact on the eradication of poverty and social exclusion’ and on ‘providing adequate and sustainable pensions’.<sup>45</sup>

The ageing population is also a topic in Strategy Europe 2020, where it is not only part of the general target that 75% of the population aged 20–64 should be employed, but also part of the flagship initiatives *Innovation Union* – where it is a topic of research; *An agenda for new skills and jobs* – which promotes life-long learning strategies to increase labour participation; and *European Platform against poverty* – which not only incorporates the social OMCs, but also the *Social Investment Package* (SIP). SIP is about investing in people in order to face the challenges posed by the economic crisis and the demographic changes. With respect to the latter it is emphasised that ‘the working-age population in Europe is shrinking, while the proportion of older people is growing. Solutions must be found to ensure sustainable and adequate social protection systems’.<sup>46</sup> More particularly, SIP provides guidance to Member States on how to best use EU financial support to implement the policy guidelines.<sup>47</sup> With respect to active ageing, policy guidelines are followed that have been developed in the context of the European Year 2012, which was about the promotion of active ageing as a basis for solidarity between generations.<sup>48</sup> Although this European Year includes the notion ‘intergenerational’, exactly what it entails and means in terms of policy activities remains ambiguous. It is mentioned twice: first that the issue of ageing is undoubtedly a challenge for the whole generation and also a matter for intergenerational solidarity and for the family<sup>49</sup>, and secondly that 29 April will annually be ‘the day’ of intergenerational solidarity, which is considered as a ‘good opportunity for the Union to renew its commitment to strengthen solidarity and cooperation between generations in order to promote a fair and sustainable society’.<sup>50</sup> More generally it promotes an overall approach on active ageing, as it clarifies that active ageing means

creating better opportunities so that older women and men can play their part in the labour market, combating poverty, particularly that of women, and social exclusion, fostering volunteering and active participation in family life and society and encouraging healthy ageing in dignity. This involves, inter alia, adapting working conditions, combating negative age stereotypes and age discrimination, improving health and safety at work, adapting life-long learning systems to the needs of an ageing workforce and ensuring that social protection systems are adequate and provide the right incentives.<sup>51</sup>

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<sup>44</sup> 2005/600/EC Council decision of 12 July 2005 on *Guidelines for the employment policies of the Member States* (OJ [2005] L205/21); and 2008/618/EC Council Decision on *Guidelines for the employment policies of the Member States* (OJ [2008] L198/47).

<sup>45</sup> Cf. Commission Communication on *Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union* (COM(2005) 706 final).

<sup>46</sup> <http://ec.europa.eu/social/main.jsp?catId=1044&langId=en> (visited on: 30 September 2014) and more elaborately: Commission Communication *Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014–2020* (COM(2013) 83 final).

<sup>47</sup> <http://ec.europa.eu/social/main.jsp?langId=en&catId=1044&newsId=1807&furtherNews=yes> (visited on: 30 September 2014).

<sup>48</sup> Decision No 940/211/EU of the European Parliament and of the Council of 14 September 2011 on *the European Year for Active Ageing and Solidarity between Generations (2012)* (OJ [2011] L246/5).

<sup>49</sup> *Idem*, paragraph 6 preamble.

<sup>50</sup> *Idem*, paragraph 25 preamble.

<sup>51</sup> *Idem*, article 2.

The overall aim of the *Year of Active Ageing and Solidarity between Generations* is to raise awareness, to stimulate debate and the exchange of information, to offer a framework for commitment and concrete action, and to promote activities which help to combat age discrimination.<sup>52</sup> As such this approach contributes to the fight against ageism.<sup>53</sup>

The *Year of Active Ageing and Solidarity between Generations* has been followed up by a *Declaration* of the Council, which includes an Annex of the Employment Committee and the Social Protection Committee on guiding principles for active ageing and solidarity between generations.<sup>54</sup> This declaration provides a definition of solidarity between generations as a right of older persons:

‘Solidarity between generations in an ageing society notably requires creating conditions which permit older people to achieve more independence that will allow them to take better charge of their own lives and to contribute to society, enabling them to live in dignity as full members of society. This requires a balanced distribution of resources and opportunities between generations.

The right of the elderly to live a life of dignity and independence and to participate in social, economic, cultural and civic life is embedded in the EU’s commitment to the active ageing and solidarity between generations’ agenda, as is the need for a society for all ages.’<sup>55</sup>

The guiding principles work this out in three areas: employment; participation in society; and independent living. The policies proposed in the area of employment include guidelines that follow a life-cycle approach, thus taking into account that people age. For instance, a guideline on ‘age management policies’ promotes the adaptation of careers and working conditions ‘to the changing needs of workers as they age, thereby avoiding early retirement’.<sup>56</sup> The policies also include one guideline that makes a connection between the value of older workers for younger workers: ‘transfer of experience’ by capitalising ‘on older workers’ knowledge and skills through mentoring and age-diverse teams’.<sup>57</sup> The two other areas are characterised by guidelines fostering rights and policies for older workers specifically. Table 2 provides an overview of the three areas, the policy guidelines and related governance initiatives.

**Table 2** Three policy areas and related governance initiatives

Policy area	Focus/aim	Related governance initiative	Remarks in light of intergenerational policies
Employment	<ol style="list-style-type: none"> <li>1. Continuing vocational education and training</li> <li>2. Healthy working conditions</li> <li>3. Age management strategies</li> <li>4. Employment services for older workers</li> </ol>	<p>European Employment Strategy</p> <p>Platform combating poverty and social exclusion</p> <p>Employment Equality</p>	<p><b>Life-cycle approaches</b> in:</p> <p>1 (life-long learning);</p> <p>2 (life-long employability);</p> <p>3 (adaptation of working conditions to changing needs of workers as they age);</p> <p>8 (adaptation of working conditions to</p>

<sup>52</sup> *Idem*, article 2.

<sup>53</sup> See A. Numhauser-Henning, ‘Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law’, *European Labour Law Journal*, 2013(2).

<sup>54</sup> Council Declaration on *the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward* Brussels, 7 December 2012 (SOC 992).

<sup>55</sup> *Idem*, paragraph 2 Promoting EU values and solidarity between generations.

<sup>56</sup> *Idem*, p.8 (Annex to the Council Declaration).

<sup>57</sup> *Idem*, p.9 (Annex to the Council Declaration).

	<ol style="list-style-type: none"> <li>5. Prevention of age discrimination</li> <li>6. Employment-friendly tax / benefit systems</li> <li>7. Transfer of experience</li> <li>8. Reconciliation of work and care</li> </ol>	<p>Directive 2000/78/EC</p> <p>European social fund (indirectly)</p>	<p>allow informal carers to remain in employment)</p> <p><b>Generational</b> connection between young and old in: 7 (capitalisation of knowledge and skills of the elderly for the young)</p>
Participation in society	<ol style="list-style-type: none"> <li>1. Income security</li> <li>2. Social inclusion</li> <li>3. Senior Volunteering</li> <li>4. Life-long learning</li> <li>5. Participation in decision making</li> <li>6. Support for informal carers</li> </ol>	<p>European Employment Strategy</p> <p>Platform combating poverty and social exclusion</p> <p>European social fund (indirectly)</p>	<p><b>Life-cycle approach</b> in: 4 (life-long learning)</p>
Independent living	<ol style="list-style-type: none"> <li>1. Health promotion and disease prevention</li> <li>2. Adapted housing and services</li> <li>3. Accessible and affordable transport</li> <li>4. Age-friendly environments and goods and services</li> <li>5. Maximised autonomy in long-term care</li> </ol>	<p>Platform combating poverty and social exclusion</p> <p>European social fund and Horizon 2020<sup>58</sup></p>	<p><b>Life-cycle approach</b> in: 4 (design-for-all-approach)</p>

In order to measure the extent to which a country meets these objectives, the policy guidelines are supported by the Active Ageing Index (AAI). The AAI measures ‘the level to which older people live independent lives, participate in paid employment and social activities as well as their capacity to actively age’.<sup>59</sup> The AAI is constructed by 22 indicators, which enables the EU to rank the countries by their overall active ageing performance and per domain-specific indices, which comprise the three policy fields (employment, participation in society, and independent living) and the capacity of elderly for active ageing.<sup>60</sup>

### 3.4 European Social Partners and Intergenerational Bargaining

On European level the role of social partners in the field of social matters is recognised and the Commission has the task to promote the involvement of social partners (Articles 151, 154 and 155 TFEU). The question we address here is whether and if so, to what extent, the European social partners are encouraged by these European policies to negotiate intergenerational issues.

Regarding both policy fields dealing with young and older workers and persons, social partners are not explicitly involved with the furthering of the policies on European or national level. Instead, they are named as one of the stakeholders that are involved in these fields, along with the European institutions, the Member States, business and civil society. Occasionally social partners have been consulted on European level about the development of a particular policy. This is for instance the case with the development of the *Quality Framework for Traineeships*.

<sup>58</sup> Via the European Partnership on Active and Healthy Ageing ([http://ec.europa.eu/research/innovation-union/index\\_en.cfm?section=active-healthy-ageing](http://ec.europa.eu/research/innovation-union/index_en.cfm?section=active-healthy-ageing) – visited on 30 September 2014).

<sup>59</sup> (visited on 30 September 2014).

<sup>60</sup> <http://www1.unece.org/stat/platform/display/AAI/II.+Ranking> (visited on 30 September 2014).

Regarding EU policies for younger workers, social partners have agreed on a *Framework of Actions on Youth Employment*.<sup>61</sup> Basically this framework endorses EU policies as it focuses on three interrelated challenges; this coincides largely with the first two policy action fields of the *EU Youth Strategy*:

1. Create more and better jobs and attractive career opportunities for young people;
2. Strengthen the quality and relevance of education and training at all levels to address skills mismatches;
3. Optimise the role of industry, in particular SMEs, and of high-performing public services in Europe as a driver of sustainable and inclusive growth.<sup>62</sup>

In this *Framework of Actions*, social partners emphasise that their actions must comply with the aims of intergenerational solidarity. More particularly, they acknowledge that

Coaching, tutoring and mentoring, including through intergenerational cooperation, can facilitate the integration of young people in their first job. Such an approach can help enterprises promote simultaneously young and older workers' employment.<sup>63</sup>

However, this is as far as it goes.

With respect to active ageing, social partners on European level are involved in an integrated project under the heading of 'life-long learning'. In this project, which resulted in a conference by means of follow-up on the *European Year for Active Ageing and Solidarity between Generations*, both sides of the industry presented their respective plans.<sup>64</sup> Similar to the *Framework of Actions on Youth*, these plans endorse the EU approaches on active ageing, albeit that the actions are limited to those related to employment and education and less to participation.<sup>65</sup> Whereas the employers in particular emphasise the importance of inter-generational engagement in learning – training and knowledge transfer – the ETUC takes a wider interpretation and also stresses the need for strong, sustainable and adequate public pension schemes based on inter- and intra-generational solidarity and the need to be more generally concerned about the employment situation of young AND older persons (capitalisation added).

To conclude on the involvement of social partners.: in their policies, the European institutions are not very explicit about the particular involvement of social partners as one of the main actors; instead they consider them as one of many stakeholders. However, social partners themselves do endorse the EU policies in their own policies and indicate what they consider to be their role in this. To a large extent their role is limited to either the level of the European Union, by getting involved in the European initiatives, or the level of companies. The latter is particularly true regarding active ageing, where social partners follow separate plans.

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<sup>61</sup>[http://www.etuc.org/sites/www.etuc.org/files/201306\\_Framework\\_of\\_Actions\\_Youth\\_Employment\\_1.pdf](http://www.etuc.org/sites/www.etuc.org/files/201306_Framework_of_Actions_Youth_Employment_1.pdf) (visited on 30 September 2014).

<sup>62</sup>*Idem*, p.3.

<sup>63</sup>*Idem*, p.12.

<sup>64</sup> ETUC *Action Plan on Active Ageing and Solidarity between generations*, Adopted at the Executive Committee Meeting of 5–6 December 2012; and 'Employers' practices for Active Ageing' Final synthesis paper of the European Employers' organisations project on age management policies in enterprises in Europe, Published: December 2012. Both available at: <http://erc-online.eu/integrated-projects/lifelong-learning/active-ageing/> (visited on 30 September 2014).

<sup>65</sup> This makes sense, because the latter concerns mostly issues that are part of the competence of the governments of the Member States.

## 4. EU Age Discrimination Law

### 4.1. Introduction

EU non-discrimination law is regulated by a complex mix of Treaty provisions, fundamental rights and general principles of EU law, directives and case law from the CJEU. Furthermore, EU non-discrimination law interacts in a dynamic and multifaceted way with national law. Age has traditionally been given an important role in the organisation of the labour market and the design of labour law, and has thus served as a legitimate social and economic stratifier (reflected, for example, in the practice of mandatory retirement and the use of age or length of service as a criterion for wage-setting and working conditions).<sup>66</sup> Age discrimination law, as non-discrimination law more in general, is characterised by a tension between its different underlying rationales – the human-rights rationale and the economic/market rationale. Likewise, the tension between an individual rights approach and a collective interest approach influences the development of age discrimination law and the case law of the CJEU.<sup>67</sup> Section 4.2 discusses the (2000/78/EC) Employment Equality Directive, including the role of social partners and collective agreements in this respect. Section 4.3 discusses and analyses case law of the CJEU in relation to age discrimination of older and younger workers.

### 4.2. The (2000/78/EC) Employment Equality Directive

The principle of non-discrimination on the basis of nationality is essential to the EU, and EU regulation in the area of sex and gender discrimination is comprehensive. In 1999, through the Amsterdam Treaty, the EU's competence in the non-discrimination field widened, and in 2000 two new directives were adopted: the Race Directive<sup>68</sup> and the Employment Equality Directive.<sup>69</sup> The latter covers discrimination on grounds of religion or belief, disability, age and sexual orientation.

The purpose of the Employment Equality Directive is to 'lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' (Article 1).

The Employment Equality Directive applies to conditions for access to employment, self-employment or to occupation; to vocational guidance and training; to employment and working conditions, including dismissals and pay; and to membership of and involvement

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<sup>66</sup> See, for example, D. Schiek, 'Age Discrimination Before the ECJ – Conceptual and Theoretical Issues', *Common Market Law Review* 48 2011, 777–799, at 781 and A. Numhauser-Henning, 'Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law', *European Labour Law Journal*, 2013(2).

<sup>67</sup> Cf. S. Fredman and S. Spencer (eds), *Age as an Equality Issue* (Hart Publishing, Oxford 2003) and F. Hendrickx, Age and European Employment Discrimination Law, In: F. Hendrickx (ed.), *Active Ageing and Labour Law. Contributions in Honour of Professor Roger Blanpain* (Intersentia, Antwerp 2012).

<sup>68</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>69</sup> Council Directive 2000/78/EC of 17 November 2000 establishing a general framework for equal treatment in employment and occupation.



in a trade union or an employers' organisation (Article 3).<sup>70</sup> The Directive applies to Member States when legislating,<sup>71</sup> to social partners when concluding collective agreements, and to employers.<sup>71</sup>

The Employment Equality Directive encompasses prohibitions on direct and indirect discrimination, harassment and instruction to discriminate, as well as provisions on positive action and active measures and a rule on a reversed burden of proof. According to Article 2(2)(a) direct discrimination shall be considered to have occurred where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the protected grounds, and according to Article 2(2)(b) indirect discrimination shall be considered to have occurred where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>72</sup>

According to the preamble, paragraph 25, 'prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce'. At the same time, age, as grounds for discrimination, and the legal regulation of age discrimination stand out in some respects. The protection against age discrimination covers all chronological ages; thus, both old people and young people are protected. Discrimination on grounds of age, even direct discrimination, can be justified to a greater extent than discrimination on other grounds.<sup>73</sup> Thus, paragraph 25 of the preamble continues, 'differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited'. This is related to the traditional role given to age in the labour market and in labour law.

Article 6 of the Employment Equality Directive on justification of differences of treatment on grounds of age is a key provision around which most of the case law in the area of age discrimination revolves. Article 6(1) states that:

'Notwithstanding Article 2(2), 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

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<sup>70</sup> According to Article 3 of the Employment Equality Directive, the Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

<sup>71</sup> Cf. the *Hennigs and Mai* case where the CJEU emphasised that the social partners must exercise their rights, such as the right to collective bargaining according to Article 28 of the EU Charter of Fundamental Rights, within the scope of the Employment Equality Directive, see Joined Cases C- 297/10 and C-298/10 [2011] ECR-07965.

<sup>72</sup> For a thorough discussion of the Employment Equality Directive, see, for example, E. Ellis and P. Watson, *EU Anti-discrimination Law*, 2nd edn (Oxford University Press, Oxford 2012).

<sup>73</sup> With the exception of part-time and fixed-term work, cf. the non-discrimination principle in the (1997/81/EC) Part-Time and (1999/70/EC) Fixed-Term Work Directives.

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

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.<sup>74 75</sup>

In addition, Article 4 on occupational requirements provides for a further exception from the prohibition on age discrimination – applicable also when it comes to discrimination on other grounds. Article 4 states that

‘1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.<sup>76 77</sup>

The first case on age discrimination was the *Mangold* case in 2005, which created a lot of attention and controversy.<sup>78</sup> In this case the CJEU declared that not only was age discrimination covered by the Employment Equality Directive, but that EU law encompassed a general principle of non-discrimination on grounds of age. This was reaffirmed in 2010 in the *Kücükdeveci* case (despite academic debate ‘post-*Mangold*’ and strong national opposition and even constitutional

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<sup>74</sup> In addition, Article 6(2) states that ‘Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.’ See further Case C-546/11 *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v. Indenrigs- og Sundhedsministeriet* [2013] ECR I-00000.

<sup>75</sup> The list of legitimate aims and different forms of differences of treatment contained in Article 6 is illustrative, not exhaustive; see, for example, Case C-388/07 *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-01569, para. 43.

<sup>76</sup> Cf., for example, Case C-229/08 *Colin Wolf v Stadt Frankfurt* [2010] ECR I-00001.

<sup>77</sup> According to Article 4 the Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. Furthermore, Article 2(5), which applies not only to age but to all protected grounds of the Directive, states that ‘[t]his Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’. In this regard, see Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047 (public health, upper age limit of 68 for practising as a dentist) and Case C-447/09 *Prigge v. Deutsche Lufthansa AB* [2011] ECR I-08003 (public security, mandatory retirement of pilots at the age of 60).

<sup>78</sup> See Case C-144/04 *Werner Mangold v. Rudiger Helm* [2005] ECR I-09981.

challenge in Germany, where the case originated). In the *Küçükdeveci* case the CJEU also referred to Article 21 of the EU Charter of Fundamental Rights.<sup>79</sup>

Since the adoption of the Employment Equality Directive, some twenty cases related to age discrimination have been decided by the CJEU.<sup>80</sup> There are far more age discrimination cases than cases on any the other grounds covered by the Race Directive and the Employment Equality Directive. Almost half of the age discrimination cases have dealt with mandatory retirement, and in addition to these cases, some further cases have dealt with issues of premature retirement. The absolute majority of cases have dealt with old-age discrimination, and only a couple of cases so far have dealt with young-age discrimination.

In principle, as Article 6 on justification of differential treatment on grounds of age constitutes a derogation from the general principle of non-discrimination, it should be narrowly construed.<sup>81</sup> The CJEU, however, seems to have developed different standards of justification depending on the issue at hand. The most lenient, ‘control’ standard, is applied as regards more general systems of mandatory retirement, while a stricter standard is applied when it comes to mandatory retirement for specific professional groups or premature retirement. Likewise, a stricter standard seems to be applied in cases related to collective dismissals and the age discrimination of younger workers.<sup>82</sup>

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<sup>79</sup> See Case C-555/07 *Seda Küçükdeveci v. Swedex GmbH & Co* [2010] ECR I-00365.– For reasons of space, we leave out the discussion on the horizontal effect of the general principle of non-discrimination of grounds of age and of Article 21 of the EU Charter of Fundamental Rights following *Mangold* and *Küçükdeveci*; see further, for example, D. Schiek, ‘Constitutional Principles and Horizontal Effect: Küçükdeveci revisited’, *European Labour Law Journal*, 2010, 1(3), 368-378 and C. Barnard, *EU Employment Law*, 4th edn (Oxford University Press, Oxford 2012), 28 ff.

<sup>80</sup> See, for example, Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios SA* [2007] ECR I-8531, Case C-388/07 *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-01569, Case C-45/09 *Rosenblatt v. Oellerking GebäudereinigungsgesmbH* [2010] ECR I-09391, Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047, Cases C-250/09 and C-268/09 *Georgiev v. Technicheski Universitet, Sofia* [2010] ECR I-11869, Case C-229/08 *Colin Wolf v. Stadt Frankfurt* [2010] ECR I-00001, Case C-499/08 *Ole Andersen v. Region Syddanmark* [2010] ECR I-09343, Case C-447/09 *Prigge v. Deutsche Lufthansa AB* [2011] ECR I-08003, Cases C-159/10 and C-160/10 *Fuchs and Köhler v. Land Hessen* [2011], Case C-141/11 *Torsten Hörnfeldt v. Posten Meddelande AB* [2012], Case C-286/12 *European Commission v. Hungary* [2013], Case C-152/11 *Johann Odar v. Baxter Deutschland GmbH* [2013], Case C-476/11 *HK Danmark v. Experian A/S* [2013], Case C-546/11 *Dansk Jurist- og Økonomforbund v. Indenrigs- og Sundhedsministeriet* [2013] and Case C-429/12 *Siegfried Pohl v. ÖBB-Infrastruktur AG* [2014]. – Pending cases on age discrimination include, for example, Case C-529/13 and Case C-530/13.

<sup>81</sup> See C. Barnard, *EU Employment Law*, 4th edn (Oxford University Press, Oxford 2012), 368 and Case C-447/09 *Prigge* [2011].

<sup>82</sup> On the issue of justification and the different standards developed by the CJEU, see, for example, D. Schiek, ‘Age Discrimination Before the ECJ – Conceptual and Theoretical Issues’, *Common Market Law Review* 48 2011, 777–799, M. Schlachter, ‘Mandatory Retirement and Age Discrimination under EU Law’, *International Journal of Comparative Labour Law and Industrial Relations* 27 2011, C. Kilpatrick, ‘The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture’, *Industrial Law Journal*, Vol. 40, No. 3, September 2011, A. Numhauser-Henning, ‘Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law’, *European Labour Law Journal*, 2013(2) and E. Dewhurst, ‘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’, 19(4) *European Law Journal* 2013, 517 and E. Dewhurst, ‘Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national courts in finding a balance between the generations’ 2013 50 *Common Market Law Review* 1333.

Already in the early case on mandatory retirement, *Palacios de la Villa*,<sup>83</sup> the CJEU held that it ‘should be recalled in this context that, as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it’ (para. 68).<sup>84</sup>

Thus, the social partners enjoy a broad margin of appreciation – perhaps even broader than the Member States – when it comes to justifying differential treatment on grounds of age. In its case law the CJEU has pointed to the fact that collective agreements differ from measures adopted unilaterally by Member States. The CJEU stated in the *Rosenbladt* case, in relation to a provision on mandatory retirement in a collective agreement, that it was ‘the result of an agreement negotiated between employees’ and employers’ representatives exercising their right to bargain collectively which is recognised as a fundamental right (Case C-271/08 *Commission v Germany* [2010] ECR I-0000, paragraph 37). The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement’.<sup>85</sup> In an analysis of age as a distinguishing criterion for collective dismissals in EU, Belgian and Dutch law – and with specific discussion of the *Odar* case<sup>86</sup> – Foubert *et al.* find that ‘the social partners at national level were given broad discretion in choosing the appropriate aims and measures to safeguard the company’s viability. The required legitimate aim was found in the fact that the social plan under consideration must provide for a distribution of limited resources, so it may fulfil its “transitional function” in respect of all workers, not just older workers’.<sup>87</sup> But Foubert *et al.* also question this broad margin of appreciation afforded to social partners, and argue that ‘[o]ur biggest concern, however, is that the CJEU’s tendency – followed by the national courts – to give more leeway to the social partners is not necessarily the best way to achieve greater equality. With respect to sex discrimination in particular, it has been argued that the collective negotiation structure in itself reproduces inequality. Trade unions indeed appear to be bastions in which inequality is often deeply ingrained. As a result, one may wonder whether the permissive CJEU approach to agreements between the social partners does not risk consolidating inequality’.<sup>88 89</sup>

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<sup>83</sup>Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios SA* [2007] ECR I-8531.

<sup>84</sup>Cf. also Case C-45/09 *Rosenbladt v. Oellerking Gebäudereinigungsges mbH* [2010] (para. 67), Case C-141/11 *Hörnfeldt v. Posten Meddelande AB* [2012] (para. 32) and Case C-152/11 *Johann Odar v. Baxter Deutschland GmbH* [2013] (para. 47).

<sup>85</sup> Case C-45/09 *Rosenbladt v. Oellerking GebäudereinigungsgesmbH* [2010] (para. 67).

<sup>86</sup> Case C-152/11 *Johann Odar v. Baxter Deutschland GmbH* [2013].

<sup>87</sup> See P. Foubert *et al.*, ‘An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands’, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29(4), 2013, 416–432, at 430.

<sup>88</sup> See P. Foubert *et al.*, ‘An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands’, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29(4), 2013, 416–432, at 432. Cf. also D. Schiek, ‘Age Discrimination Before the ECJ – Conceptual and Theoretical Issues’, *Common Market Law Review* 48 2011, 777–799, at 781.

<sup>89</sup>In 2008 the European Commission put forward a proposal, on the basis of Article 19 TFEU, for a Directive aimed at extending the protection against discrimination on grounds of religion or belief, disability, age or sexual orientation beyond working life to the areas of social protection, including social security and health care, social advantages, education and access to and supply of goods and services in parallel with the Race Directive. So far, the negotiations have been unsuccessful (due to the difficulty in reaching an agreement according to the requirement of

## 4.3. Case Law on Age Discrimination of Older and Younger Workers

### 4.3.1. Older workers

Ageism – beliefs, attitudes, norms and values to justify age-based prejudice, discrimination and subordination – has been put forward as the most important reason why older workers are prevented from working longer. Thus, the prohibition of old-age discrimination helps to reduce ageism, and is also an important part of the EU strategy for active ageing.<sup>90</sup> An ageing population and the resultant increasing costs for future pensions have resulted in reforms of pension systems in many Member States in the EU in recent years. Through the ‘pension process’, pension systems in the Member States are also being coordinated, with an aim to achieve sustainable pension systems. Over time, pension systems in Europe have become income-related to a large degree. In recent years there has been a change towards pension systems based on longer earning periods or life-long average earnings combined with a higher pensionable age or non-fixed pensionable age.<sup>91</sup> Statutory pension systems often also provide for rules on guaranteed basic levels. Rules on mandatory retirement are found in some Member States of the EU. Numhauser-Henning describes how rules on mandatory retirement form part of the prevailing ‘pension norm’, which implies that there is ‘a right and a duty to retire at a certain age’.<sup>92</sup> This ‘pension norm’ and rules on mandatory retirement contravene the promotion of active ageing, and complicate the efforts to make older workers work to – and beyond – pensionable age. Furthermore, there is a need to increase the pensionable age.

Many of the cases on age discrimination of older workers have dealt with mandatory retirement rules, and whether these are acceptable despite the ban on age discrimination.<sup>93</sup> Mandatory retirement – in contrast with the general welfare question of pensionable age<sup>94</sup> – is covered by the Employment Equality Directive, and the CJEU basically deems rules on mandatory retirement to be age-discriminatory. However, the CJEU (for example, in the cases of *Palacios de la Villa*, *Age Concern England*, *Rosenblatt*, *Georgiev*, *Fuchs and Köhler* and *Hörnfeldt*) has in many cases accepted such mandatory retirement rules and found them justifiable. The Member States – and the social partners – have been given a broad margin of appreciation, and when

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unanimity in Article 19 TFEU). See COM(2008) 426 final. See also COM(2008) 412 final. See further L. Waddington, ‘Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive’, *European Law Review*, 2 (2011), 163.

<sup>90</sup> See A. Numhauser-Henning, ‘Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law’, *European Labour Law Journal*, 2013(2).

<sup>91</sup> The notion of pensionable age generally refers to the age for retirement benefits within the public pension scheme; see further D. O’Dempsey and A. Beale (supervised by M. Freedland), *Age and Employment*. European Network of Legal Experts in the non-discrimination field (European Commission, 2011).

<sup>92</sup> A. Numhauser-Henning, ‘Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law’, *European Labour Law Journal*, 2013(2).

<sup>93</sup> See, for example, Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-388/07 *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-45/09 *Rosenblatt v. Oellerking GebäudereinigungsgesmbH*, Cases C-250/09 and C-268/09 *Georgiev v. Technicheski Universitet, Sofia*, Cases C-159/10 and C-160/10 *Fuchs and Köhler v. Land Hessen*, Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-499/08 *Ole Andersen v. Region Syddanmark*, Case C-447/09 *Prigge v. Deutsche Lufthansa AB*, and Case C-141/11 *Hörnfeldt v. PostenMeddelande AB*.

<sup>94</sup> Cf. the preamble to paragraph 14, which states that ‘This Directive shall be without prejudice to national provisions laying down retirement ages’.

applying Article 6(1) the CJEU has found the differences of treatment on grounds of age to be objectively and reasonably justified by the legitimate aims, such as intergenerational fairness in terms of access to employment, prevention of humiliating forms of termination of employment, and a reasonable balance between labour market and budgetary concerns. In the *Rosenblatt* case the CJEU stated, in relation to intergenerational fairness, that the practice of mandatory retirement reflected a longstanding political and social consensus in Germany, which was based on ‘notion of sharing employment between the generations. The termination of the employment contracts of those employees directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment. The rights of older workers are, moreover, adequately protected as most of them wish to stop working as soon as they are able to retire, and the pension they receive serves as a replacement income once they lose their salary’.<sup>95</sup>

In addition, the means for achieving these aims have frequently been found appropriate and necessary. The CJEU has also, in some instances, taken into account whether or not the employee is receiving a reasonable compensation, by way of an old-age pension.<sup>96</sup> Numhauser-Henning argues, however, that ‘*Palacios de la Villa* seems to make the case that the legitimacy of compulsory retirement should be dependent on the existence of a “reasonable” pension for individuals. The latter case *Rosenblatt*, however, demonstrates that there really is no room to scrutinise the actual level of pension benefits – the case concerned a part-time cleaner who received a fairly inadequate pension in absolute terms – but rather at system level. That the amount of retirement pension at stake cannot be taken into account at the individual level becomes even clearer in the *Hörnfeldt* case’.<sup>97</sup> The CJEU’s case law so far indicates that mandatory retirement at a set (65+) age is seen to meet the Employment Equality Directive’s requirements, provided there is a reasonable system of pensions in place.<sup>98</sup> In its case law the CJEU has also referred to the fact that a rule on mandatory retirement does not necessarily mean a definite withdrawal from the labour market from the point of view of the individual. Working life can continue, often in fixed-term employment.

As mentioned before, the CJEU has also decided some cases on mandatory retirement for specific professional groups or premature retirement. In the cases of *Ole Andersen*<sup>99</sup> and *Prigge*<sup>100</sup> the termination of employment contracts at pre-normal retirement age was seen as a disproportionate measure, considering the individual’s economic interests. In the case *Commission v. Hungary*,<sup>101</sup> the lowering of the age of retirement from 70 years of age to 62 for

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<sup>95</sup> Case C-45/09 *Rosenblatt v. OellerkingGebaudereinigungsgesmbH* [2010] para. 43.

<sup>96</sup> However, in *Ole Andersen* the CJEU found the Danish rule and practice not to pay severance payment to the employee in case of redundancy dismissal when the employee was eligible for old-age pension, to be disproportionate, unjustifiable and age discriminatory – since the rule did not take into consideration whether or not the employee in question actually received old-age pension or continued to work; see Case C-499/08 *Ole Andersen v. Region Syddanmark* [2010] ECR I-09343.

<sup>97</sup> See A. Numhauser-Henning, ‘Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms. The Position of Older Workers in Labour Law’, *European Labour Law Journal*, 2013(2).

<sup>98</sup> See further A. Numhauser-Henning and M. Rönmar, ‘Compulsory Retirement and Age Discrimination – the Swedish Hörnfeldt Case Put in Perspective’, In: *Festschrift to Michael Bogdan* (Juristförlaget i Lund, Lund 2013).

<sup>99</sup> Case C-499/08 *Ole Andersen v. Region Syddanmark* [2010] ECR I-09343.

<sup>100</sup> Case C-447/09 *Prigge v. Deutsche Lufthansa AB* [2011].

<sup>101</sup> Case C-286/12 *European Commission v. Hungary* [2013].

certain professionals was considered disproportionate against an argument of legitimate expectations and economic loss for the individual, whereas a gradual change might have been acceptable.

The vulnerability of older workers has influenced the content of the employment protection regulation in many Member States. Thus, employment protection regulation may provide for various kinds of special protection for older workers. In some Member States, such as Sweden, there is a general and important rule that sickness or old age does not constitute objective grounds for dismissal. The extent to which sickness or reduced working capacity constitutes objective grounds for dismissal differs in the Member States, though. In addition, seniority rules – such as the last-in-first-out principle – may offer protection for older workers in redundancy situations and make them less vulnerable.<sup>102</sup> Seniority principles can also be influential when it comes to wage-setting and working conditions, such as periods of notice and length of annual leave.

These issues have not yet all been explicitly dealt with by the CJEU in its case law (compare, however, the discussion in Section 4.2. on the role of the social partners in concluding collective agreements and developing social plans). Seniority rules, such as the last-in-first-out principle, are potentially indirectly age-discriminatory. There are, however, signs that seniority rules such as these may be found acceptable according to EU law. The Advocate-General argued in *Kücükdeveci* that ‘[t]he purpose of the extended period of notice is clearly to protect workers whose capacity to adapt, and the possibility of their being retrained, was regarded by the German legislature as reduced when they have been employed for a long time in an undertaking. If an employer decides to dismiss a worker who has been in his undertaking for a long time, an extended period of notice certainly facilitates the movement of that worker to a new employment situation, in particular, the search for a new job. That strengthened protection of dismissed workers on the basis of the time they have spent in the undertaking can, to my mind, be regarded as seeking to achieve an employment policy and labour market objective within the meaning of Article 6(1) of Directive 2000/78’.<sup>103</sup> Similarly, O’Conneide argues that ‘it is also worth noting that many other relevant factors in redundancy decision making may have an indirectly discriminatory effect ... Granting older workers greater protection during redundancies can be seen as a positive action strategy, especially in particular member states where specific historical and economic factors may cause older workers may [sic] be in a much more vulnerable position than younger workers. Therefore, provided it is proportional, such preferential treatment might be treated as reasonably justified. Article 6(1)(a) again supports this interpretation, with its reference to “dismissal and remuneration conditions” as an example of appropriate measures to

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<sup>102</sup>In Sweden, for example, the statutory seniority rules imply that the priority and selection of employees is to be made according to the last-in-first-out principle, i.e. according to each employee’s total period of employment with the employer (and in the event of equal periods of employment giving priority to senior age, section 22 of the (1982:80) Employment Protection Act). – Compare also P. Foubert *et al*, ‘An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands’, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29(4), 2013, 416–432 on the Belgian age-pyramid principle and the Dutch mirror-principle.

<sup>103</sup>Opinion of Advocate-General Bot in Case C-555/078 *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, para. 43. – For a discussion on length of service and professional experience as justification for age-related differential treatment, see *Hennigs and Mai* Joined Cases C- 297/10 and C-298/10 [2011] ECR-07965 and *Specht and others v Land Berlin* Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 [2014] ECR I-00000.

protect older workers. However, shifting social conditions ... may call into question the proportionality of such measures and leave them over time more exposed to legal challenges'.<sup>104</sup>

### 4.3.2. Younger workers

The CJEU has tried only a couple of cases related to the age discrimination of younger workers. In the *Hütter* case<sup>105</sup> professional experience acquired before the age of 18 years old was excluded when determining the pay for contractual public servants in Austria. The question was if this differential treatment on grounds of age could be justified in accordance with Article 6. The CJEU found that the aims pursued by the Austrian legislation – not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market – could, in principle, objectively and reasonably justify the differential treatment on grounds of age. However, the CJEU pointed to a lack of internal consistency and partly contradictory aims, and found neither of the aims to be appropriate. The Court held that the criterion of the age at which the vocational experience was acquired 'does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education',<sup>106</sup> and since that criterion 'does not take into account people's age at the time of their recruitment, a rule such as that at issue in the main proceedings is not therefore appropriate for the purposes of promoting entry into the labour market of a category of workers defined by their youth'.<sup>107</sup>

In the *Küçükdeveci* case<sup>108</sup> (apart from confirming the *Mangold* case law on the general principle on non-discrimination based on age), the CJEU found the German legislation at issue, which provided that periods of employment completed by an employee before reaching the age of 25 years should not be taken into account in calculating the notice period for dismissal, to be contrary to the ban on age discrimination in the Employment Equality Directive. The CJEU found the underlying aim of the national legislation – 'to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility'<sup>109</sup> – to be objective and reasonable. However, even if the Member States enjoyed a broad discretion in the choice of measures capable of achieving their objectives in the field of social and employment policy, the CJEU found the legislation not to be appropriate for achieving the stated aim, 'since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal'.<sup>110</sup>

Thus, in both these cases the CJEU adopted a stricter standard towards the justification of differential treatment on grounds of age than the standard applied in, for example, the mandatory

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<sup>104</sup> See C. O'Conneide, *Age Discrimination and European Law* (European Commission, 2005), 40.

<sup>105</sup> Case C-88/08 *David Hütter v. Technische Universität Graz* [2009].

<sup>106</sup> Para. 48.

<sup>107</sup> Para. 49.

<sup>108</sup> Case C-555/078 *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [2010].

<sup>109</sup> Para. 39, cf. also para 35.

<sup>110</sup> Para. 40.



retirement cases.<sup>111</sup> In the wake of the economic crisis, several Member States have introduced specific labour law reforms aimed at combating youth unemployment through the ‘levelling-down’ of employment rights for younger workers. So far, these reforms have not been tried by the CJEU against the ban on age discrimination.<sup>112</sup>

## 5. Concluding Analysis

The discussion so far has revealed that by now, EU age discrimination law and EU policies on youth and active ageing are well-developed. This concluding section aims at an analysis of EU law and policy and their interaction, and implications for intergenerational bargaining and age-related regulation and measures. Solidarity between generations is one of the main – and ambitious – aims of the EU. However, its realisation poses a challenge, not least at present. The economic crisis, high youth unemployment and austerity measures and legal reforms in many Member States have increased tensions between younger and older workers.

Although EU Treaties provide a strong legal basis for the prohibition of age discrimination, the legal basis to adopt policy measures specifically addressing younger or older workers and persons is weak to non-existent. Within the field of EU Youth Policies, two provisions provide a legal basis (Articles 47 and 165 TFEU); however, their material scope is limited to that of exchange programmes in the context of education and participation in the democratic society. With respect to older persons there is no legal basis at all. Nonetheless, in both fields momentum has been gained to develop policies addressing the position of both age groups in the labour market.

This was mostly possible, since the initiatives that are used for the development of these policies do not require the attribution of competence to the EU. These initiatives include the open method of coordination, recommendations, resolutions and European funds. Effectively they coordinate and support the Member State policies by guiding them into certain directions, but leave it up to the Member States to decide whether and to what extent they follow these guidelines. Through the use of the funds, incentives are created to undertake activities in line with those policy guidelines; however, Member States are not obliged to apply for this financial support. This leaves these policy initiatives rather weak in terms of influencing Member States’ policies.

When considering the content, most of these EU policy initiatives address the specific situation of these groups separately, meaning that within Youth Policies, the focus lies solely with the position of young persons, and in Active Ageing Policies the focus lies with older persons. While within the development of the latter, a sense for the need of an intergenerational approach can be found, this is lost in the actual formulation of the policies. There is one exception. Both policy fields include life-long learning as a means to improve the situation of their respective age groups – young and old. In a sense, life-long learning can be considered as an intergenerational

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<sup>111</sup> See further D. Schiek, ‘Age Discrimination Before the ECJ – Conceptual and Theoretical Issues’, *Common Market Law Review* 48 2011, 777–799 and D. Schiek, ‘Constitutional Principles and Horizontal Effect: Küçükdeveci revisited’, *European Labour Law Journal*, 2010, 1(3), 368–378.

<sup>112</sup> See further J. Julén Votinius, ‘Young Employees – Securities, Risk Distribution and Fundamental Social Rights’, *European Labour Law Journal*, Vol. 5, 2014, No. 3–4, 387–410.

approach, because it takes the course of working life into account, starting with sufficient qualifications and skills to make the transition from school into the labour market and maintaining and updating these throughout working life up to reaching the retirement age. Both policy fields also promote the creation of internships/traineeships for young workers and of coaching positions for older workers. Although both policy fields approach this from the position of the respective age groups, it includes an intergenerational dimension, as they are related: young workers are trained on the job by older workers, who in their turn make room for younger workers and transfer their knowledge and skills to younger workers. The company benefits from it, since it maintains all the knowledge and skills it has acquired in the course of time.

It is this latter issue that has also been picked up by the social partners on European level. Moreover, this is also the only intergenerational dimension we found in their respective action plans addressing the situation of younger and older workers. With respect to older workers the ETUC takes a broader approach, since it also stresses the need for strong sustainable and adequate pension schemes based on inter- and intra-generational solidarity. However, in general the involvement of social partners is limited. This is the case with the development of the policies for younger and older workers on the European level as well as with implementation or follow-up of these policies on other levels. We derive the latter from the fact that social partners are addressed as one of several stakeholders that should take the policy guidelines into account when developing their own policies.

EU age discrimination law has grown in importance in recent years, and its content and development is determined by a number of different legal sources, including Treaty provisions, the EU Charter of Fundamental Rights, the Employment Equality Directive and an expanding case law from the CJEU. The EU mainstreaming approach to equality and non-discrimination implies that the EU in all its activities and policies must aim to eliminate inequalities, to promote equality and to combat discrimination. The current state of EU age discrimination law reflects its underlying – partly conflicting – human rights and economic rationales, respectively. The EU Charter of Fundamental Rights, and the right to equality, the right to non-discrimination and rights of the elderly, emphasise the human rights rationale. At the same time, the traditional role afforded to age in the organisation of labour markets and the design of labour laws is partly maintained and reflected in the broad scope for justification of age-related differential treatment, and age-related regulation and measures for younger and older workers.

The protection against age discrimination covers all chronological ages and both younger and older workers. Discrimination on grounds of age can be justified to a greater extent than discrimination on other grounds. According to Article 6(1) of the Employment Equality Directive, differences of treatment on grounds of age do not constitute discrimination if 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.

The CJEU case law on age discrimination is expanding, and the great majority of cases have dealt with old-age discrimination. The CJEU seems to have developed different standards of justification. The most lenient, ‘control’ standard is applied as regards more general systems of mandatory retirement, while a stricter standard is applied when it comes to mandatory retirement of specific professional groups or premature retirement. A stricter standard also seems to be applied in cases related to collective dismissals and the age discrimination of younger workers.

Rules on mandatory retirement are found in some Member States of the EU. The CJEU basically deems rules on mandatory retirement to be age-discriminatory. At the same time, in many cases the CJEU has accepted mandatory retirement rules and found them justifiable. When applying Article 6(1) of the Employment Equality Directive, the CJEU has found the differences of treatment on grounds of age to be objectively and reasonably justified by legitimate aims, such as intergenerational fairness in terms of access to employment for younger workers, prevention of humiliating forms of termination of employment, and a reasonable balance between labour market and budgetary concerns. The means for achieving these aims have frequently been found appropriate and necessary. In the few cases on alleged discrimination of younger workers that the CJEU has tried, the Court has applied a stricter standard towards the justification of differential treatment on the grounds of age.<sup>113</sup> The CJEU has not (yet) tried any of the Member States' 'post-crisis' labour law reforms aimed at combating youth unemployment through the 'levelling-down' of employment rights for younger workers against the ban on age discrimination.

The CJEU has afforded Member States and social partners a broad discretion in their choice to pursue a particular aim in the field of social and employment policy, and in their choice of measures used to achieve the aim. Thus, the case law of the CJEU reveals that the social partners enjoy a broad margin of appreciation – perhaps even broader than the Member States – when it comes to justifying differential treatment on grounds of age. Article 28 of the EU Charter of Fundamental Rights recognises the right to collective bargaining and collective action, and this has been confirmed by the CJEU in its case law. According to the TFEU the EU has an obligation to respect the autonomy of the social partners and to promote European social dialogue. The CJEU has held that collective agreements differ from measures adopted unilaterally by Member States, as they are the result of negotiations between social partners, exercising their fundamental right to bargain collectively. Thus, in principle, EU age discrimination law enables intergenerational bargaining and collective bargaining on age-related measures for younger and older workers.

According to the preamble to the Employment Equality Directive, the prohibition of age discrimination is an essential part of meeting the aims set out in the European Employment Strategy and the Employment Guidelines and for encouraging diversity in the workforce. The prohibition of old-age discrimination helps to reduce ageism, and is also an important aspect of the EU Active Ageing Policy. Thus, EU policy on employment and active ageing here seems to coincide with EU age discrimination law. At the same time, the CJEU's acceptance of rules on mandatory retirement – often in terms of justification on grounds of intergenerational fairness in relation to younger workers and their access to employment, both at a general labour market level and in a more specific organisational context – contravene the promotion of active ageing and efforts to prolong working lives for older workers. The CJEU's reasoning also contrasts with economic research (of both theoretical and empirical nature), which emphasises the 'lump of labour fallacy', and opposes propositions that mandatory (or premature) retirement schemes will help to combat youth unemployment or that older workers crowd younger workers out of the

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<sup>113</sup> See further D. Schiek, 'Age Discrimination Before the ECJ – Conceptual and Theoretical Issues', *Common Market Law Review* 48 2011, 777–799 and D. Schiek, 'Constitutional Principles and Horizontal Effect: Kückickdeveci revisited', *European Labour Law Journal*, 2010, 1(3), 368–378.

labour market.<sup>114</sup> The picture is complex, though. An abolition of mandatory retirement risks weakening employment protection before actual retirement age is reached.<sup>115</sup> Furthermore, the CJEU's acceptance of mandatory retirement with reference to intergenerational fairness is contradictory to one of the general aims of both Youth Policies and Active Ageing Policies, namely, the development of an age-diverse working force. This aim has also been 'picked up' by the social partners in their activities at EU level in terms of intergenerational engagement in learning, training and knowledge transfer within the company. Such intergenerational engagement helps to fight ageism, since it recognises the value of older workers for the company, and it also facilitates the transitions of younger persons from education into the labour market through training and coaching in the job.

In the CJEU's case law on mandatory retirement, reference is also made to the importance of income security for older workers. The CJEU, for example, considers the existence of a reasonable system of pensions (*Hörfeldt*), the economic interests of the individual worker (*Ole Andersen* and *Prigge*), and legitimate expectations and economic loss for the individual (*Commission v. Hungary*). The CJEU has also pointed to the fact that a rule on mandatory retirement does not necessarily mean a definite withdrawal from the labour market from the point of view of the individual. All these considerations coincide with considerations underlying the second policy area of the guiding principles for active ageing and solidarity between generations, i.e. participation in society, which includes income security, senior volunteering, and support for informal careers. Thus, in this area we find coherence between the considerations of the CJEU and the policy initiatives concerning active ageing (in the absence of specific cross-references, however, this might not be deliberate).

The involvement of social partners as relevant actors in the promotion and adoption of measures for younger and older workers is acknowledged in the EU policy initiatives as well as in EU age discrimination law. In the policy initiatives, the social partners are merely one of several actors. When it comes to age discrimination law the CJEU has acknowledged the social partners – and collective bargaining – as particularly important and relevant. The CJEU has acknowledged the right of social partners to bargain collectively on age-related measures, and granted them a broad margin of appreciation when it comes to justifying differential treatment on grounds of age. However, critics have pointed to developments in the gender equality area, and the risk that the collective bargaining structure in itself may reproduce inequality, and they have also questioned the broad margin of appreciation granted to social partners. The activities of the social partners at EU level differ when it comes to younger and older workers, respectively. As regards younger workers, the social partners have found common ground and agreed on promoting the position of younger workers in line with the policy actions on education and training and employment and entrepreneurship. As regards older workers and active ageing, the social partners are still largely on 'separate tracks'. The employers focus on the importance of intergenerational engagement in learning, training and knowledge, and the ETUC takes a broader approach, and stresses also the

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<sup>114</sup> On the 'lump of labour fallacy', mandatory retirement and EU age discrimination law, see E. Dewhurst, 'Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national courts in finding a balance between the generations' 2013 50 *Common Market Law Review* 1333, with further references.

<sup>115</sup> See, for example, A. Numhauser-Henning and M. Rönmar, 'Compulsory Retirement and Age Discrimination – the Swedish Hörfeldt Case Put in Perspective', In: *Festschrift to Michael Bogdan* (Juristförlaget i Lund, Lund 2013).

need for strong sustainable and adequate pension schemes. This latter subject is, in general, considered as a theme in the interest of particularly older workers.

To conclude: at EU level, in principle, policies and age discrimination law do not hinder intergenerational bargaining and age-related measures for younger and older workers. Few policies reflect an intergenerational approach. Instead they focus separately on the two different age groups – younger and older workers. The CJEU refers to intergenerational fairness in terms of access to employment for younger workers as justification for age-differential treatment of older workers, such as mandatory retirement. Social partners and collective bargaining are afforded a key role in age discrimination law and the case law of the CJEU – as in labour law and industrial relations generally – while their role in EU policies is more ambiguous.

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