Elder law

Rönnmar, Mia

2015

Prof. Dr. Mia Rönnmar
Dean of the Faculty of Law, Lund University
Sweden

Elder Law

1. Introduction

An ageing population, increased intergenerational tension, a need to advance the inclusion of older workers in the labour market and to extend working lives, and an increased importance of age discrimination law form the background for my presentation.

The aim of my presentation is thus to discuss and analyse the legal situation of older workers and the design, content and future challenges and development of labour law in light of elder law and active ageing perspectives. Throughout my presentation I will highlight EU, comparative and general perspectives, and refer to the Swedish labour law system as one interesting national example.

Swedish industrial relations traditionally build on self-regulation, co-operation between the social partners, and autonomous collective bargaining. The trade unionisation rate is about 70 percent and the collective bargaining rate is about 90 percent. In the Swedish autonomous collective bargaining system wages and other terms and conditions of employment are generally set by collective bargaining. There is no minimum wage legislation and no system for declaring collective agreements generally applicable. Collective bargaining is accompanied by well-established and strong mechanisms for information, consultation and 'co-determination', and workers' influence is channelled solely through trade unions in a so-called single-channel model. The 1970s witnessed an increase in legislative activity, and since then, labour law legislation is very frequent in Sweden. EU membership since 1995 has added to this legislation, and today labour law legislation covers areas such as employment protection, non-discrimination, working time, working environment, freedom of association, collective bargaining and the right to collective action and information, consultation and co-determination. A distinguishing feature of most Swedish labour law legislation is its 'semi-compelling' character, which allows for deviations, both to the advantage and detriment of

employees, from the statutory provisions by means of a collective agreement entered into by the employer and the trade union.

After a brief discussion of the demographical trend of an ageing population and the challenges it poses to the labour market, social security and society as a whole I will introduce the research area of elder law and its characteristics and basic conceptual starting points.

I will then proceed to discuss and analyse three key labour law areas of relevance for older workers and active ageing, namely:

- age discrimination law
- working conditions and working environment
- flexible employment, employment protection and compulsory retirement

I will end by making some concluding remarks.

My presentation refers to research that I and my colleagues within the Norma Elder Law Research Environment at the Faculty of Law at Lund University have conducted, for example, a forthcoming book on age discrimination and labour law (covering EU law and a comparative analysis of national law in nine EU Member States and five countries beyond the EU, co-edited with Ann Numhauser-Henning) and reports written within an EU-funded and comparative and interdisciplinary research project on intergenerational collective bargaining.[1]

2. An Ageing Population Posing Challenges

Demographical developments and economic, societal and welfare state conditions interplay in crucial ways with labour law, and influence the situation of older workers.

An ageing population is a general and urgent European trend that is equally relevant for developed countries in other parts of the world, such as Australia, Japan and the US. Population ageing entails increases in the share of elderly persons of the population, in life

[1] See www.jur.lu.se/elderlaw. The Norma Elder Law Research Environment is funded by Ragnar Söderberg's Foundation, the Marianne and Marcus Wallenberg Foundation and the Faculty of Law at Lund University. – See further A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015), B. ter Haar and M. Rönnmar, *Intergenerational Bargaining, EU Age Discrimination Law and EU Policies – an Integrated Analysis. Report for the project iNGenBar*, 2014, and M. Rönnmar, *Intergenerational Bargaining in Sweden. Report for the project iNGenBar, Intergenerational Bargaining: towards integrated bargaining for younger and older workers in EU countries*, 2014.

expectancy and in the economic dependency ratio (that is, persons aged 65 or above relative to those aged 15–64) (in 2060 the economic dependency ratio is projected to have shifted from four working-age persons for every person over 65 to only two working-age persons).[2]

An ageing population brings increased costs for pensions, health care and elder care, and a risk of increasing intergenerational tension, not least in times of economic crisis, high youth unemployment and austerity.

The Swedish labour market is generally characterised by high employment rates. In comparative European terms, the labour market situation of older workers in Sweden is good. The employment rate among older workers is high – about 73 percent in the age group 55–64 – and the average retirement age is about 65 years. Still, in some sectors, such as industry and health care, it is difficult for employees (especially blue-collar employees) to stay in working life until 'normal' retirement age.[3]

At present, there is a trend in the EU towards increasing employment rates among older workers as well as increasing retirement ages, but this development must be intensified, and creative and efficient solutions and regulatory and policy measures need to be found. There is a need to advance the inclusion of older workers in the labour market, and to adapt work and the working environment. There is also a need not only to make people work until 'normal' retirement age, but also to prolong working life beyond this point. To this end, existing pension norms have to be changed and pension systems further reformed.[4]

Subsequently, 2012 was the European Year of Active Ageing and Solidarity between Generations, and the EU Active Ageing Policy, which is integrated into the Europe 2020 Strategy and the European Employment Policy, aims to promote a healthy and active ageing population, increase the labour market participation of older workers (55+) and prolong working life.[5] Article 25 of the EU Charter of Fundamental Rights establishes the right of the

[2] Cf. the chapter by Anxo in A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Conceptual and Comparative Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015).

[3] Cf. the chapter by Julén Votinius in A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Conceptual and Comparative Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015).

[4] 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).

[5] See, for example, 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).

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'.[6]

Against the backdrop of an ageing population, pension systems in many countries have been reformed or are in the process of being reformed with the aim of achieving better sustainability. In the EU the substantive content of social security is in principle a matter for the respective Member States and national legislation. However, the coordination of social security in the EU and between the Member States was implemented early on as a way to facilitate the free movement of workers. Through soft law and the open method of coordination, the so-called 'pension process', pension systems in the Member States are being coordinated, with an aim of achieving sustainable pension systems.

General trends in pension reform refer to an increase in the pensionable age or the introduction of a flexible pensionable age, a lowering of benefits, longer earnings periods (or life-long average earnings) and an adaptation to life expectancy. The Swedish pension reform in the late 1990s was an early attempt to adapt to demographical developments and an ageing population. Now, the pension system is built on a lifetime earnings principle and flexible retirement, and provides freedom to combine work with pensions.[7]

In 2013 a Government Inquiry Report proposed a number of measures in the areas of work environment, skills and training etc. in order to promote active ageing and increase the actual retirement age. The Inquiry Report also proposed to increase the age until which you have a right to stay in employment to 69 years, and to introduce a recommended retirement age (related to the development of average life expectancy), to which other pension-related age limits could be linked.

To change existing pension norms – through pension or labour law reform or other measures – is challenging. In many countries rules on compulsory retirement form part of a pension norm, which implies that there is 'a right and a duty to retire at a certain age'. This pension norm contravenes the promotion of active ageing, and complicates efforts to make older workers work until and beyond pensionable age. Alternative pension norms, more in line with

[6] See 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.

[7] The pension system has three components: income pension, based on a person's full life-time earnings and financed on a pay-as-you-go-basis; premium pension, a smaller, funded part of the income-based pension, invested in a fund of the individual's own choice or in a 'default' fund; and guarantee pension, which provides a basic income for all persons, irrespective of earlier earnings. The pension amount will increase the longer retirement is postponed. The statutory pension system is complemented by collectively bargained occupational pension schemes, which cover about 90% of the Swedish workforce.

active ageing, would imply that 'you have both a right and a duty to work according to your abilities', and 'to retire is a personal and individual choice'.[8]

Beyond the EU, in Latin America, for example, the pension norm, related to the societal realities of poverty and a lack of pensions and social protection, implies 'work through old age' (or more drastically, 'work until you drop').[9]

3. Elder Law – a Research Area

The development towards an ageing population and the challenges it entails form an important background for elder law, and the *Norma Elder Law Research Environment* at the Faculty of Law at Lund University. Elder law is a legal-interdisciplinary research area of great societal significance, focusing on the legal situation of elderly persons. Our research environment is aimed at establishing elder law research at national and European level. To this end we study, for example, labour law, social security and social welfare law, family law, EU law and human rights law – and the crucial links and interplay between these legal disciplines, and between the legal regulation and societal and economic developments.

The concept of *age* is of course central in this context. In general, the concept of age can refer to chronological age, biological age, social age and functional age. According to the (2000/78/EC) Employment Equality Directive, the protection against age discrimination covers, for example, all chronological ages, and both old people and young people are protected.[10] Elderly persons – as well as older workers – must be defined in a contextual way. EU statistics often refer to the 55–64-year age group, and in discussions related to working life older workers are thus often workers 55 years or older.[11]

[8] 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).

[9] See the chapters by Gamonal and Rosado Marzán and Smit in A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015).

[10] The concept of *pensionable age* generally refers to the age for pension benefits within the public pension scheme.

[11] Reference is sometimes also made to 'younger old' (the 65–75 age group), 'old' (the 75–85 age group) and 'oldest-old' (the 85+ age group).

Elder law as a legal research area resembles in many ways women's law (later feminist law) or child law, in the way that focus is placed not on a legal discipline but on the legal situation, interests and needs of a specific group, here old(er) people. Elder law thus also has an 'emancipatory' character.

Elder law is since more than twenty years a legal discipline in the US and Australia – generally, though in quite an 'applied' or practice-oriented setting, focusing *inter alia* on the counselling of elderly persons.[12] Against the backdrop of the Swedish and European welfare state models our approach is rather more structural and social-science oriented, and aimed at a theoretical and critical analysis of the development of national and EU law and its interplay with society as a whole.

The theoretical framework of our research environment is multifaceted and entails, for example, theories on the flexibilisation of working life, Christensen's theory of law as normative patterns in a normative field (according to which law can be described as basic normative patterns put into play in a normative field, and where important basic normative patterns in the legal regulation of the social dimension are the market-functional pattern, the pattern of protection of established position and the pattern of just distribution[13]) and Fineman's vulnerability theory (according to which vulnerability is a universal human condition, characterizing the relationship between the individual and the state[14]). Different methods, such as legal-dogmatic method, comparative method and qualitative and quantitative empirical methods, are applied in order to critically discuss and analyse legal developments in this area.

The Norma Elder Law Research Environment started out with three focus areas, namely the legal empowerment of elderly workers; the legal empowerment of elderly citizens; and, the legal empowerment of elderly migrants. The legal empowerment of elderly workers relates to issues of labour law, such as age discrimination, intersectional discrimination, flexible employment, employment protection and compulsory retirement. The legal empowerment of elderly citizens addresses family law and social welfare law issues concerning, for example,

[12] Cf., for example, I. Doron (ed.), *Theories of Law and Ageing* (Springer, Heidelberg 2009), I. Doron and A. Soden (eds), *Beyond Elder Law* (Springer, Heidelberg 2012), the *Elder Law Journal* and A. Numhauser-Henning, An Introduction to Elder Law and the Norma Elder Law Research Environment, *European Journal of Social Law*, No. 3, September 2013.

[13] See A. Numhauser-Henning and M. Rönnmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Hart Publishing, Oxford 2013.

[14] See M. Fineman, The Vulnerable Subject and the Responsive State, 60 *Emory Law Journal*, 2010, 251.

mentally disabled elderly person's fundamental rights, the right to elder care and the elderly person's right to live in dignity and independence and to participate in social life. The legal empowerment of elderly migrants has a clear EU free movement dimension and deals, for example, with the coordination of migrants' rights to pensions and social security benefits when moving within the EU and rights to cross-border health care within the EU.[15]

4. Age Discrimination Law

Age discrimination law plays an important role for older workers' situation, labour law and active ageing. Age discrimination law, as non-discrimination law more generally, is characterized by a tension between different underlying rationales – the human rights rationale and the market rationale. Likewise, the tension between an individual-rights approach and a collective-interest approach – the so-called 'double-bind' – influences the development of age discrimination law and the case law of the Court of Justice of the European Union in this field.[16] Age has traditionally been given an important role in the organization 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 use of age or length of service as a criterion for wage-setting and working conditions. In general, age discrimination can be justified to a larger extent than discrimination on other grounds. This difference has been discussed in terms of age being a less 'suspect' or 'forbidden' ground.[17]

The current state of EU age discrimination law reflects these underlying – partly conflicting – rationales. The EU Charter of Fundamental Rights, and the right to equality, right to non-discrimination and rights of the elderly, emphasize the human rights rationale. At the same time, the traditional role age plays in the organization of labour markets and the design of labour laws is partly maintained and reflected in the broad scope for justification of age-

[15] See further www.jur.lu.se/elderlaw and A. Numhauser-Henning (ed.), Introduction to the Norma Elder Law Research Environment. Different Approaches to Elder Law (the Norma Research Programme, Lund 2013).

[16] Cf. S. Fredman and S. Spencer (eds), *Age as an Equality Issue* (Hart Publishing, 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, 2012).

[17] Cf., for example, the chapters by O'Cinneide, Schiek and Gamonal and Rosado Marzán in A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015).

related differential treatment, and age-related regulation and measures for older (and younger) workers.

International law and the international fundamental rights framework provide an uncertain protection against age discrimination.[18] The (2000/78/EC) Employment Equality Directive[19] introduced the ban on age discrimination in secondary EU law, and the CJEU has also ruled that EU law encompasses a general principle of non-discrimination on grounds of age.[20] 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 – i.e. beliefs, attitudes, norms and values to justify age-based prejudice, discrimination and subordination – and is also an important aspect of the EU Active Ageing Policy.

The Employment Equality Directive bans discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. The 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.

Since the adoption of the Employment Equality Directive some thirty cases related to age discrimination have been decided by the CJEU. A large part of these cases have dealt with compulsory retirement and premature retirement. The absolute majority of cases have dealt with old-age discrimination, and only a few cases with young-age discrimination.

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

[18] Age is not expressly referred to in international instruments such as the Universal Declaration of Human Rights, the UN International Covenant on Civil and Political Rights, the ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation, the European Convention of Human Rights or the European Social Charter.

[19] Council Directive 2000/78/EC of 17 November 2000 establishing a general framework for equal treatment in employment and occupation.

[20] See C-144/04 *Werner Mangold v. Rudiger Helm* [2005] ECR I-09981 and Case C-555/07 *Seda Kücükdeveci v. Swedex GmBH& Co* [2010] ECR I-00365. Furthermore, Article 21 of the EU Charter of Fundamental Rights contains an 'open list of discrimination grounds' and 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* [my emphasis] or sexual orientation shall be prohibited'.

union or an employer's organisation.[21] The Directive applies to Member States when legislating, to social partners when concluding collective agreements, and to employers.[22] There is a proposal currently pending for extending the protection against discrimination on the grounds of *inter alia* age to areas beyond working life. In 2014 the Juncker Commission declared that this proposal had been made a top priority.[23] Several EU Member States have already expanded the scope of the ban on age discrimination beyond working life, including Sweden.

EU law provides both for a general justification of age-related differential treatment in Article 6 and for some specific exemptions.[24] According to paragraph 25 of the preamble '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'.

According to Article 6(1), 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.[25] The list of legitimate aims and various forms of differences of treatment contained in Article 6 is illustrative, but not

[21] Article 3. The Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

[22] Cf. the *Hennigs and Mai* case where the CJEU emphasized 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.

[23] See COM(2008) 426 final. See further L. Waddington, Future prospect for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive, 36(2) *E.L. Rev*. 163–184 (2011).

[24] Cf., for example, Articles 2(5) and 4.

[25] Such age-related differences of treatment may include the setting of special conditions on access to employment and vocational training, employment and occupation for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment or 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.

exhaustive.[26] In principle, as Article 6 constitutes a derogation from the general principle of non-discrimination, it should be narrowly construed.[27]

The CJEU, however, seems to have developed different standards of justification depending on the issue at hand. The most lenient, the 'control' standard, is applied as regards more general systems of compulsory retirement, while a stricter standard is applied when it comes to compulsory retirement of 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.[28]

In some Member States, for example in Sweden and the UK, we find single-non-discrimination acts.[29] In other Member States the ban on age discrimination was implemented both by way of non-discrimination legislation and labour law legislation. Added to this is sometimes also regulation in criminal law, administrative law and human rights law. Judging from the national experiences – in the EU and beyond – such 'fragmentation' of age discrimination law seems more prone to create tensions, uncertainties and lacunae, than mutual re-enforcement and increased protection.

[26] Cf., 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.

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

[28] 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.

[29] The Swedish (2008:567) Non-Discrimination Act, a so-called single non-discrimination act, implements the Employment Equality Directive and other EU equality directives. The Act not only gathers different discrimination grounds but is also applicable in part outside the realm of working life; for example, in goods and services, public employment services, education, health care, social services, and social security. See Governmental Bill Prop 2007/08:95 and Governmental Inquiry Report SOU 2006:22.

5. Working Conditions and Working Environment

We have seen that age has traditionally been afforded an important role in the organization of the labour market and the design of labour law. This is reflected, for example, in the use of age or length of service as a criterion for wage-setting and working conditions, in the practice of compulsory retirement and in rules providing specific protection for older and younger workers. Can such, directly or indirectly, age-related differential treatment still be justified in the light of age discrimination law; and what are the labour law implications of the introduction of a ban on age discrimination, and of a resultant abolishment of age-related differential treatment?

In general (and despite trends towards individualization, weakened collective structures and declines in trade union organization and collective bargaining coverage rates), collective bargaining and the social partners are central to EU labour law and the labour law and industrial relations systems in many EU Member States, and most certainly in Sweden and the other Nordic countries. In addition, 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 compulsory 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'.[30] Thus, in principle, EU age discrimination law enables collective bargaining on age-related measures for older workers.[31]

[30] Case C-45/09 *Rosenbladt v Oellerking Gebaudereinigungsges. mbH* [2010] ECR I-09391 (para. 67).

[31] This broad margin of appreciation has been questioned by authors such as Foubert *et al*. who are concerned 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 … one may wonder whether the permissive CJEU approach to agreements between the social partners does not risk consolidating inequality'. See P. Foubert *et al*, 'An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands', Vol. 29(4) *International Journal of Comparative Labour Law and Industrial Relations*, 416–432, at 432 (2013).

Seniority principles and age and length of service have traditionally been – and still are – influential in many EU Member States when it comes to wage-setting and working conditions, such as periods of notice, length of annual leave, severance pay and specific bonuses. A reference to age and length of service in this context gives rise to directly or indirectly age-related differential treatment and thus needs to be justified. I will develop the discussion on the assessment of justification and proportionality in the context of redundancy dismissals and seniority rules below. Legitimate aims put forward in this context are, for example, the value of experience on the job and of rewarding loyalty as well as the need for extra protection of older workers.[32] [33]

Working environment regulation is relevant for the inclusion of older workers in the labour market and the prolonging of working life. The (89/391/EEC) Framework Directive on Health and Safety[34] provides that the employer has a duty to ensure the safety and health of workers in every aspect related to work. In Sweden, for example, the (1977:1160) Working Environment Act entails an obligation to adapt the working environment to the needs of the individual worker.

Flexible working time is not only a way of balancing work-family responsibilities; but it can also be a way of adapting the working situation to the needs of older workers and thereby prolonging working life. Beyond the EU, in Australia, a right was introduced in the Fair Work Act in 2013, by which workers over 55 can request flexible working hours. This right builds on a previous right for employees with caring responsibilities. Employers are obliged to consider the request, and to provide 'reasonable business grounds' if they wish to refuse the request. Similar rights to request (or genuine rights) to flexible working hours (for care-givers, parents or employees etc.) are found in, for example, the Dutch, Swedish and UK settings and

[32] Traditionally, in Sweden length of service influenced wage-setting, and there might still be some indirect influence of this factor and an expectation from employees that the wage will increase with the length of service. However, there are few (if any) directly seniority-related wage provisions in the collective agreements. Instead, aspects such as the employee's qualifications and performance are central in individual wage-setting. – In Sweden, for example, a collective bargaining scheme where the periods of annual leave are extended as a function of higher age (at 30, 40 and 50 years etc.) is viewed as justified with reference to older workers' need of special protection and recovery.

[33] Several EU Member States also set specific minimum or maximum age requirements for recruitment, in general or in relation to specific professions. These age requirements must be justified, either with reference to specific exemptions, such as 'genuine and determining occupational requirements' or public security or public health, or in light of Article 6(1) of the Employment Equality Directive.

[34] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

also in EU law.[35] Similarly, in some EU Member States, statutory or collectively bargained (as in Sweden) schemes provide for partial retirement or part-time work for older workers. These schemes differ from traditional schemes on early retirement, as their purpose is to enable the older workers to prolong working life. The issues of working environment adaptation and flexible working hours are closely related to the issue of pro-active measures and reasonable accommodation within the age discrimination law framework proper.

In some EU Member States intergenerational strategies, schemes or measures have been developed both to advance the inclusion of older and younger workers in the labour market and to promote active ageing and longer working lives for older workers and to combat youth unemployment.

An EU-funded comparative and interdisciplinary research project on intergenerational collective bargaining, i.e. the integration of policies and strategies for younger and older workers through collective bargaining and social dialogue, covered collective bargaining practices in six EU Member States, including Sweden.[36] In Sweden, collective bargaining developments display a lack of direct and explicit intergenerational bargaining. However, several indirect and implicit intergenerational elements can be found in collective agreements on so-called introduction employment contracts for younger workers, collective agreements on partial retirement for older workers, and transition agreements to be applied in redundancy dismissals. These indirect intergenerational elements relate, for example, to generational renewal in terms of future competence provision, competence development and transfer of knowledge and experience between older and younger workers, and older workers' participation in education and supervision of younger workers, as a way of adapting the working environment to enable a longer working life. Intergenerational redistribution of employment between older and younger workers is alien to Swedish public policy and collective bargaining.

---

[35] See Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

[36] See further intergenerationalbargaining.eu, where a number of country reports, dealing with France, Germany, Italy, the Netherlands, Sweden and the UK, can be found, as well as reports containing an EU and comparative analysis. – For example, traditionally in France there was an emphasis on early retirement and intergenerational redistribution. In 2013 a new, and different, attempt at intergenerational solidarity was made through the *contrat de generation*, based on the complementarity of younger and older workers. Under this scheme companies may recruit a younger worker with a permanent employment contract and at the same time maintain (or hire) an older worker. Intergenerational supervision and education is part of the scheme, and the state provides economic subsidies. It is still too early to evaluate the scheme, and account must be taken not only of the numbers of employees hired but also of a resultant change of attitudes and prejudices.

6. Flexible Employment, Employment Protection and Compulsory Retirement

6.1. Flexible employment and fixed-term employment contracts for older workers

EU law regulates aspects of flexible employment through the (97/81/EC) Part-Time Work Directive,[37] the (99/70/EC) Fixed-Term Work Directive,[38] and the (2008/104/EC) Temporary Agency Work Directive,[39] which form part of the EU law flexicurity strategy aimed at a combination of flexibility and security. The purpose of the Fixed-Term Work Directive is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.[40] When it comes to the measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, the Member States shall introduce one or more of the following measures, in a manner which takes into account the needs of specific sectors and/or categories of workers: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; or the number of renewals of such contracts or relationships.[41] However, the Directive does not introduce any requirement for objective reasons for the parties' first entry into a fixed-term employment contract.

In many of the EU Member States, and in countries beyond the EU, specific fixed-term employment contracts for older workers (and younger workers) are used as a means to promote the prolonging of working life for older workers (and the entry into the labour market for younger workers).

The seminal *Mangold* case[42] concerned the German regulation providing a broader scope for fixed-term employment contracts for older workers and its relation to the Fixed-Term Work Directive and the Employment Equality Directive and the ban on age discrimination. Swedish law provides for an unlimited access to fixed-term employment for employees above the age

[37] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

[38] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[39] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[40] Clause 1.

[41] Clause 5.

[42] Case C-144/04 *Mangold v Helm* [2005] ECR I-09981.

of 67 years (the compulsory retirement age), as a way of promoting work after compulsory retirement and a prolonged working life.[43]

6.2. Employment protection, older workers and dismissals for personal reasons or reasons of redundancy

There is a close relationship between fixed-term work and employment protection. Regulation of fixed-term employment contracts serves to prevent circumvention of the employment protection linked to permanent employment contracts. At EU level employment protection is only partly regulated, for example by Article 30 of the EU Charter of Fundamental Rights, the Fixed-Term Work Directive, and the (2001/23/EC) Transfers of Undertakings[44] and the (98/59/EC) Collective Redundancies Directives,[45] as well as by the different non-discrimination directives, which ban discriminatory dismissals.

The vulnerability of older workers has influenced the content of employment protection in many EU Member States, and special protection for older workers, for example by way of seniority rules, has been afforded.[46]

---

[43] Flexible work has increased in Sweden, as in other EU Member States. Fixed-term work is regulated in the (1982:80) Employment Protection Act (LAS). In Sweden permanent employment is the main rule and fixed-term employment contracts are permitted only when agreed upon, and when specifically provided for by law or collective agreements. In order for a fixed-term employment contract to be legal, the detailed rules of the (1982:80) Employment Protection Act must be adhered to, Sections 4, 5 and 6. These provisions are semi-compelling, and collective agreements regulating fixed-term contracts in specific, narrower or broader ways are frequent. The regulation on fixed-term work was amended in 2007, and this reform partly represents a new standpoint on fixed-term employment contracts. A long list of fixed-term employment contracts has been replaced by a new form of fixed-term employment contracts – the general fixed-term employment, Section 5 LAS, supplemented only by temporary substitute employment, seasonal employment, fixed-term contracts for employees above the age of 67 years and probationary employment. Thus, the scope for fixed-term employment contracts has broadened. The employer is free to conclude general fixed-term employment contracts, and there is no requirement for objective reasons. However, when an employee has been employed under a general fixed-term employment contract or as a temporary substitute by one employer for a total of two years during the last five years, the contract is automatically converted into an indefinite permanent employment contract, Section 5 subsection 2 LAS. The European Commission has issued two reasoned opinions in relation to the Swedish implementation of the (1999/70/EC) Fixed-Term Work Directive. The Commission claims that Sweden has failed to correctly implement Clause 5.1 of the Framework Agreement of fixed-term work. See further S. Engblom, Fixed-Term-at-Will: The New Regulation of Fixed-term Work in Sweden, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 24, N0 1, 2008 and http://www.tco.se/vara-fragor/Arbetsratt/Visstid/.

[44] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[45] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[46] In Sweden, for example, an important background to the first Employment Protection Act from 1974 was the need for social protection of especially vulnerable workers due to old age or sickness, and the need to counteract

In some EU Member States – for example, Sweden – there is a general and important rule that sickness or old age does not constitute just cause for dismissal. Swedish employment protection is traditionally viewed as strong, and the employer must have just cause (or objective grounds) for dismissal. Coupled with this basic just-cause requirement are different rules obliging the employer (depending on whether the dismissal relates to personal reasons or reasons of redundancy) *inter alia* to negotiate with trade unions, give notice, provide the employee with alternative work, warn the employee, retrain the employee, apply seniority rules, and if necessary conditions are met, re-employ dismissed employees. Thus, in line with an *ultima ratio* principle, the employer must make an effort to avoid dismissing employees by first taking less radical measures. The employer has extensive obligations to rehabilitate the employee and to adjust the working environment and the job duties or tasks. An employee can be dismissed only after such measures have been taken, and the employee can no longer perform work of any importance for the employer. – The extent to which sickness or reduced working capacity constitutes just cause for dismissal differs in the Member States, though.[47]

Seniority rules (such as the last-in-first-out principle, LIFO) and different forms of directly or indirectly age-related differential treatment still influence redundancy regulation in many countries in the EU and beyond. In Sweden the last-in-first-out principle is the main rule when it comes to redundancy selection. The employer has a unilateral right to decide when and if a redundancy situation exists, and in principle redundancy amounts to just cause. 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). The employee has to have sufficient qualifications for the tasks which remain after the redundancy. In principle, the order of dismissals encompasses all employees in the same production unit and who are covered by the same collective agreement

a segmented labour market, with a division between young and well-educated employees on the one hand, and old, disabled and less educated employees on the other. See Governmental Bill Prop. 1973:129, 126.

[47] In contrast, in Poland, despite a requirement for employers to justify dismissal, the scope for managerial prerogative is broad and older workers are specifically vulnerable. Poor or inaccurate work performance may be a ground for dismissal, and a dismissal is justified if the employer has a reasonable ground to believe that hiring another person would lead to better work results. – In France it is feared that the procedure for a consensual termination, introduced in 2008, will be used to encourage older workers to leave their jobs prematurely. – Some Member States, for example, Poland and Lithuania, provide specific protection for older workers during a 'pre-retirement' period. In Poland the employer may not dismiss an employee who will reach retirement age in less than four years if the employee's employment period would enable him or her to receive an old-age pension upon reaching this age. However, this rule is sometimes 'circumvented' through the employer dismissing the employee before he or she reaches the pre-retirement age. As a result, the protection is undermined and working life shortened.

(redundancy unit).[48] These rules are thus potentially indirectly age-discriminatory (with a directly age-discriminatory element, in the way in which the employee's age is decisive in situations when the period of employment of two or more employees is the same). However, the seniority rules are semi-compelling, and by concluding a local collective agreement the employer and the trade union may deviate from the statutory rules when determining the order of dismissals.[49] [50] In Germany the rules on social selection apply with the aim of selecting the employees least in need of social protection for dismissal. Four decisive criteria must be taken into account: seniority within the company; age; number of dependents; and disability.

Seniority rules, such as the last-in-first-out principle, are thus potentially indirectly age-discriminatory. These rules have not yet been explicitly tried by the CJEU against the ban on age discrimination. However, such rules may be found acceptable according to EU law.[51] [52]

[48] If the employee is actually dismissed, this employee has a priority right to re-employment, a rule that facilitates access to employment for older workers. Any employment opening within nine months from the expiry of the former employment should be offered to employees dismissed by redundancy, on the condition that the employees are sufficiently qualified and have been employed in total for more than 12 months during the last three years with the employer (Section 25 LAS). The order of employees being offered employment is decided in accordance with the last-in-first-out principle.

[49] See further M. Rönnmar and A. Numhauser-Henning, 'Swedish employment protection in times of flexicurity policies and economic crisis', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 28, No 4, 2012, 443–467.

[50] Traditionally in the UK, age and length of service have been important, and the application of the last-in-first-out principle may be justified if used as one of a number of criteria. In the Netherlands the age bracket or mirror principle was introduced in 2006. In a redundancy situation the employees within each category of interchangeable positions are divided into five age groups (15 to 25; 25 to 35; 35 to 45; 45 to 55 and 55+). Since 2014 the employees who have reached the state retirement age are then (first) selected for dismissal; thereafter the selection within each age group is done on the basis of the last-in-first-out principle. This process aims at spreading the dismissals evenly over different age groups in the company. Cf. also the similar Belgian age-pyramid principle and P. Foubert *et al*, 'An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands', Vol. 29(4) *International Journal of Comparative Labour Law and Industrial Relations*, 416–432 (2013).

[51] Compare the Opinion of Advocate-General Bot in Case C-555/078 *Seda Kücükdeveci v. Swedex GmBH& Co. KG*, para. 43. – For a further 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.

[52] Also O'Cinneide 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 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'. See C. O'Conneide, *Age Discrimination and European Law* (European Commission, 2005), 40.

In several EU Member States (such as France, Germany, the Netherlands, Poland, Sweden and the UK), and in some countries beyond the EU (such as Australia and Japan), severance pay and other forms of compensation in redundancy situations, set by legislation or collective bargaining or negotiation with works councils (such as transition agreements in Sweden or social plans in Germany and France), are or may be seniority-based and linked to length of service. At the same time older workers, having reached pre-retirement or retirement age, sometimes receive less or no compensation in such situations, with reference to their access to pensions and social security benefits.[53]

6.3. Employment protection and compulsory retirement

Rules on compulsory retirement reflect important links between labour law, employment protection and pension systems, and the substantial amount of case law from the CJEU in this area reveals that such schemes prevail in a number of EU Member States (and in some countries the compulsory retirement age has been increased as part of pension reform). However, compulsory retirement is not a general norm, and many different compulsory retirement rules can be found in the EU Member States.[54] In some Member States rules on compulsory retirement have been abolished as a result of the introduction of a ban on age discrimination.

A compulsory retirement age can be set by legislation, collective agreements or personal employment contracts. Compulsory retirement rules may provide for the automatic termination of the employment relationship when the employee reaches a certain age (for example the pensionable age) or imply a possibility for the employer to terminate the employment relationship at a specific age. Added to this are rules on pre-retirement for employees in specific professions.

[53] However, in the *Ole Andersen* case the CJEU found the Danish rule and practice of not paying severance to an employee in case of redundancy dismissal, when the employee was eligible for old-age pension, to be disproportionate, unjustifiable and age discriminatory – because 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.

[54] Cf. D. O'Dempsey and A. Beale, *Age and Employment*, Report from the Network of Legal Experts in the non-discrimination field to the European Commission, 1 July 2011.

In Sweden compulsory retirement is regulated through the '67-year rule' in the (1982:80) Employment Protection Act,[55] tried and upheld by the CJEU in the *Hörnfeldt* case.[56] An employee has a right to stay in employment up until the age of 67, when the employer may terminate the employment relationship after one month's notice and without having to provide objective grounds for dismissal. If the employer does not make use of this possibility, the permanent employment relationship continues; however, it does so with limited employment protection (for example, the employee has one month's notice, and is given no right of priority in accordance with seniority rules or rules on re-employment in redundancy situations). – A Government Inquiry Report has proposed to raise this age from 67 to 69 years (section 2 above).

Many of the CJEU cases on age discrimination of older workers have dealt with compulsory retirement rules, and whether these rules are acceptable despite the ban on age discrimination. Compulsory retirement (in contrast with the general question of pensionable age[57]) is covered by the Employment Equality Directive, and the CJEU basically deems rules on compulsory retirement to be age-discriminatory. However, in many cases the CJEU has accepted such compulsory retirement rules and found them justifiable. The Member States and the social partners have been given a broad margin of appreciation, and when 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.

The CJEU's case law so far indicates that compulsory 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. In its case law the CJEU has also referred to the fact that a rule on compulsory 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. The CJEU has also decided some cases on compulsory retirement of

[55] Sections 32a and 33.

[56] Case C-141/11 *Hörnfeldt v Posten Meddelande AB*, judgment of 5 July 2012. Here the CJEU stated that 'the automatic termination of the employment contracts for employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships', para. 28. See also A. Numhauser-Henning and M. Rönnmar, 'Compulsory Retirement and Age Discrimination – the Swedish Hörnfeldt Case Put in Perspective', In: *Festskrift to Michael Bogdan* (Juristförlaget i Lund, Lund 2013).

[57] Cf. the preamble paragraph 14, which states that 'This Directive shall be without prejudice to national provisions laying down retirement ages'.

specific professional groups or premature retirement, and here the Court has applied a stricter standard for justification.[58]

The UK example can be used to illustrate alternative ways of ending the employment relationship, and the labour law implications of the abolishment of compulsory retirement. According to the traditional UK approach it was possible for the employer to terminate the employment contract when the employee reached retirement age. The ban on age discrimination in the Employment Equality Directive was implemented in 2006. Compulsory retirement, and a derogation from the ban on age discrimination was maintained.[59] In 2011 the statutory default retirement age was repealed. As a result employees can now work for as long as they are able or willing, and employers are liable for unfair dismissal and age discrimination claims if they choose to dismiss older workers. The employment relationship must now be brought to an end through voluntary retirement, financial incentives to leave, performance management (followed by a possible dismissal on grounds of lack of performance) or the establishment of an employer-justified retirement age (to be tried against Article 6(1) of the Employment Equality Directive). At present, before further guidance has been provided by UK courts or the CJEU, there is great uncertainty as to the justification of the employer-justified retirement age. There is here a possible tension between economic and societal interests related to active ageing at macro level and employer interests related to transparency and human resource management at micro level.

The CJEU's acceptance of rules on compulsory 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 organizational 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 a theoretical and empirical nature), which emphasizes the 'lump of labour fallacy', and opposes propositions that compulsory (or premature) retirement schemes will help to combat youth

[58] In *Prigge* (C-447/09 *Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-08003) the termination of employment contracts pre-normal retirement age was seen as a disproportionate measure considering the individual's economic interests. In the case *Commission v. Hungary* (Case C-286/12 *European Commission v. Hungary* [2013]) the lowering of the age of retirement from 70 years of age to 62 for 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.

[59] The scheme regarding the statutory default retirement age of 65 was complex and controversial, but upheld by the CJEU, in the *Age Concern England* case. See further the chapter by Barnard and Deakin on the UK in A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Conceptual and Comparative Perspectives in the EU and Beyond* (Kluwer Law International, forthcoming 2015).

unemployment or that older workers crowd younger workers out of the labour market.[60] The picture is complex, though. An abolition of compulsory retirement risks weakening employment protection before actual retirement age is reached (for example, by way of performance management and a weakening of the just-cause requirements and a principle holding that sickness or old age does not constitute just cause for dismissal).[61]

7. Concluding Remarks

Elder law is an important research area, which enables a legal-interdisciplinary, social-science-oriented and multi-facetted analysis of the situation of older workers and the future challenges facing labour markets and labour law. I have tried to highlight and discuss some of these challenges in the areas of age discrimination; working conditions and working environment; and flexible employment, employment protection and compulsory retirement.

Solidarity between generations is one of the main aims of the EU – but its realisation poses a challenge, not least at present. An ageing population, the economic crisis, high youth unemployment and austerity measures in many Member States have increased tensions between younger and older workers. In a sense, the Court of Justice of the European Union's acceptance of intergenerational fairness and redistribution as a justification for compulsory retirement confirms the fear and logic of perceived intergenerational conflict.

A comparative analysis of age discrimination law in EU law and the Member States reveals that there is still a strong emphasis on the individual complaints-led model and on the discrimination bans. There are few examples of the regulation – and successful use – of more active measures, such as a duty of reasonable accommodation or an adaption of the working time or working environment as a way to combat age discrimination and promote active ageing. Thus, one can raise serious doubts as to the transformative, or even substantive, potential of age discrimination law, even more so given the wide scope for justification and exemptions.

[60] On the 'lump of labour fallacy', compulsory 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?' 50 *Common Market Law Review* 1333 (2013), with further references.

[61] See, for example, A. Numhauser-Henning and M. Rönnmar, Compulsory Retirement and Age Discrimination – the Swedish Hörnfeldt Case Put in Perspective, in *Festskrift to Michael Bogdan* (Juristförlaget i Lund, 2013).

There is still a large number of age-related labour law rules and practices in the areas of recruitment, working conditions, flexible employment and employment protection, and the introduction of age discrimination law has not been able to successfully challenge the existing order. Specific fixed-term employment contracts for older workers are used as a means to prolong working life for older workers. Seniority principles and age and length of service have traditionally been – and still are – influential in many EU Member States, to wage-setting and working conditions. A reference to age and length of service in this context gives rise to directly or indirectly age-related differential treatment and thus needs to be justified.

The CJEU's acceptance of rules on compulsory retirement – often in terms of justification on grounds of intergenerational fairness in relation to younger workers and their access to employment – contravene the promotion of active ageing and efforts to prolong working lives for older workers. However, an abolishment of compulsory retirement requires alternative ways of ending the employment relationship, such as voluntary retirement (encouraged with financial incentives) or performance management (followed by a possible dismissal on grounds of lack of performance). This entails a risk of weakening employment protection before actual retirement age.

There is no doubt still a long way to go in building future sustainable labour markets and societies.