THE EU BAN ON AGE-DISCRIMINATION AND ELDERLY WORKERS – POTENTIALS AND PITFALLS

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1. Introduction

Population ageing is an important challenge for modern society, not least for the European Union (EU). An ageing population is a general demographic trend challenging economic sustainability in terms of employment, pensions and health care systems, as well as overall social cohesion in terms of intergenerational solidarity. The 2012 Ageing Report[2] presents a picture from an EU point of view of the economic developments 2010-2060 that could result in a 'no-policy change' scenario, and details the expenditure projections covering pensions, health care, long-term care, education and unemployment transfers for all Member States. By 2060, the share of young people (0-14) will remain fairly constant, while the group of those aged 15-64 will become considerably smaller (a reduction from 67% to 56%). Those aged 65 and above will represent a much larger share of the population (rising from 17% to 30%). The number of persons aged 80 and above will come close to the number of 0-14 year olds (rising from 5% to 12%). This will result in an economic dependency ratio (persons aged 65 or above relative to those aged 15-64) which doubles, shifting from four working-age persons for every person over 65 to only two working-age persons. Active ageing is therefore a must for sustainable societies. At the same time, "55+" workers have notorious difficulties when it comes to labour-market integration.

A ban on age discrimination was introduced by the EU through the European Council's Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation[3] (the Employment Equality Directive), and covering age among other grounds of differential treatment. Notwithstanding, as early as the *Mangold* case[4] the CJEU stated that the principle of non-discrimination on grounds of age is to be regarded as a general principle of EU law. Age is also among the non-discrimination grounds in the (non-exhaustive) list in Article 21 of the EU Charter on Fundamental Rights 2000, a part of primary law after the Lisbon Treaty (cf.

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[2] The 2012 ageing report, Economic and budgetary projections for the 27 EU Member States (2010-2060), *Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG)*, European Economy 2, 2012.

[3] OJ 2 December 2000 L 303/16.

[4] *Mangold v Helm*, C-144/04 [2005] ECR I-9981.German legislation making way for an unlimited series of fixed-term employments already from the age of 52 was found in this case to be disproportionate in relation to the general aim of promoting employment for people 52+, and this despite the fact that the Employment Equality Directive was not yet implemented – the case involved the implementation of the Fixed-term Work Directive.

Article 6 TEU). The EU Charter's Article 25 also contains a more general rule on the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life, Article 34.1 mentions social security and social assistance in the case of old age and Article 15 refers to the right to work, more generally.

The prohibition of discrimination on the grounds of age is potentially an important legal mechanism to promote active ageing in relation to different aspects, such as combating premature resigning, making people work beyond pensionable age and facilitating the employment of older workers. However, used as a legal strategy to come to terms with the marginalisation of workers aged 55+, equal treatment and non-discrimination law may well turn out to be less successful than expected. Concerning the ambition to make people work beyond pensionable age, the ban on age discrimination has so far shown itself to be a weak companion. The broad scope for accepting discriminatory practices in employment policy, as well as labour-market and vocational training objectives, in accordance with Article 6.1 of the 2000/78 Directive has thus led to the CJEU accepting compulsory retirement – to the detriment of the overall ambitions to make people work beyond pensionable age. It can also be argued that in general, the 'elitist' design of non-discrimination rules works to the detriment of older workers, as the 'reference norms' representing the foundation of comparison in cases of alleged discrimination are basically meritocratic. In addition, the realisation of the potential of the ban on age-discrimination in the form of future ban on compulsory retirement poses threats, this time in terms of undermining traditional employment protection and more articulated 'decent-work' regimes (generally speaking). This article is about the potentials and pitfalls of non-discrimination law in relation to EU ambitions for realising active ageing and in relation to labour law.[5]

2. Non-Discrimination Regulation – Recent Developments

Both the ban on age discrimination and the current 'era' of EU equality and non-discrimination law started with the Amsterdam Treaty back in 1997 and its Article 13 (now Article 19 in the TFEU), broadening the scope of anti-discrimination measures beyond sex and nationality. Bob Hepple has described this era as comprehensive and transformative, and sees it as 'a response to the growing social and economic inequalities between and within states under the impact of global capitalism'.[6] In a somewhat later article Mark Bell pictures EU anti-discrimination law after 1999 in terms of *widening* and *deepening*.[7] Widening corresponds fairly well with

[5] For earlier articlespartly along the same lines, see A Numhauser-Henning, *Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms*, in the General Proceedings from the 5th Annual Legal Seminar of the European Labour Law Networks, The Hague, 11-12 October 2012 – http://www.labourlawnetwork.eu/publications/prm/73/size__1/index.html. and A Numhauser-Henning and M Rönnmar, Compulsory Retirement and Age Discrimination – the Swedish *Hörnfeldt* Case Put in Perspective (forthcoming).

[6] B Hepple and B Veneziani (eds), The Transformation of Labour Law in Europe, A comparative Study of 15 Countries 1945-2004 (Oxford, Hart Publishing, 2009). Bob Hepple sketches equality at work in four stages: (1) human rights in the new world order (1948-58), (2) formal equality (1957-75), (3) substantive equality (1976-99) and (4) comprehensive and transformative equality (2000-04).

[7] M Bell, The Principle of Equal Treatment: Widening and Deepening, in: P Craig and G de Búrca, (eds) The Evolution of EU Law (Oxford, Oxford University Press, 2011).

comprehensive, whereas deepening – with Shaw[8] – denotes the progressive constitutionalisation of the equal treatment principle. In the following, EU non-discrimination law development will be described in terms of these 'twin processes' – comprehensive and transformative or – if you will – widening and deepening.[9] The description reflects some general developmental traits also of relevance for the understanding of age-discrimination regulation.

To begin with, and already in the Treaty of Rome back in 1957, only two grounds of discrimination were present in EU law: nationality and sex. Much later – also in close relation to the internal market and freedom of movement, and following the Maastricht Treaty – the principle of equal treatment on the grounds of nationality was expanded to include not only workers and some other categories, but also 'Union Citizens'. To put it simply, in relation to free movement, Union citizens and their family members are entitled – at least in principle – to equal treatment as nationals. In addition, third-country nationals, legally residing long-term in a Member State, have been successively provided the right of equal treatment as regards free movement. – Then, the principle of equal treatment and non-discrimination was widened to cover certain categories of so-called flexible workers. The first two directives are based on framework agreements banning discrimination of part-time workers and fixed-term workers.[10] Both directives adhere to the principle of equal treatment or non-discrimination as a central means to improve the quality of part-time and fixed-term work. The application of the principle of non-discrimination to part-time/fixed-term work poses special problems as compared to other, more traditional, fields of application. One problem is that what is forbidden by the non-discrimination provision – differential treatment as regards employment conditions – is at the same time part of what constitutes the groups that are to be protected; this problem is reflected in the *Wippel* case, where full-time workers in another contract form were found not to be comparable to Mrs Wippel, who working on a 'work-on-demand' contract.[11] Another 'problem' is that these directives also introduce the justification of direct discrimination. – The two directives are a result of the Maastricht social protocol and the amended rules on the Social dialogue, to be complemented later on – in 2008 – by the Temporary Agency Directive.[12]

The next step refers to the evolution post-Amsterdam. We are now at the end of Hepple's period of substantive equality, entering into the period of comprehensive and transformative equality. An important feature of the Amsterdam Treaty from our perspective is thus Article 13, which provides a legal basis for Community institutions to take action to combat discrimination on a whole new range of grounds, and within any area of Community activities – thus creating a floor for comprehensive or widened equality. Early on, the Commission adopted an Action Plan for non-discrimination and subsequently the two directives on Ethnic Equality[13] and Employment

[8] J Shaw, The European Union and Gender Mainstreaming: constitutionally Embedded or Comprehensively Marginalised? (2002) 10 *Feminist Legal Studies* 213.

[9] For an earlier presentation along those lines see also A Numhauser-Henning, EU Equality Law – Comprehensive and Truly Transformative?, in: M Rönnmar (ed), *Labour Law, Fundamental Rights and Social Europe*, Swedish Studies in European Law, Vol. 4 (Oxford, Hart Publishing, 2011).

[10] The Council's Directive 97/81/EC on Part-time Work Directive [1998] OJ L14/9, and Directive 99/70/EC on Fixed-term Work, [1999] OJ L175/43, respectively.

[11] See the judgment in the case C-313/02 *Wippel* [2004] ECR I-09483.

[12] Council Directive 2008/104/EC on temporary agency work [2009] OJ L327/9.

[13] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22.

Equality were adopted, introducing ethnicity, religion and other beliefs, disability, sexual orientation[14] and age as new non-discrimination grounds.

With the widening to include new grounds for discrimination, there is also a widening of the areas covered by such legislation. It started out with the ban on sex discrimination in terms of equal pay and then legislation broadened to include working life more generally. Later on came the directives concerning sex discrimination and social security, self-employment and helping spouses, and occupational pension schemes. The 2000/43 Ethnic Equality Directive was considerably more comprehensive than previous ones, covering not only working life and social security, but also education, health care, social advantages, and goods and services including housing and insurance.

Here is the moment to consider the matter of a hierarchy of rights. It is obvious that the Employment Equality Directive, adopted after the Ethnic Equality Directive, has a considerably narrower field of application – covering only working life and a few closely related issues such as membership in trade unions, as opposed to the whole range of areas covered by the Ethnic Equality Directive. Gender or sex discrimination is still regulated separately, one reason being the different basis for such directives treaty-wise. Later on we had the 2004/113 Goods and Services Directive[15] concerning gender, but this still leaves gender in a middle position as compared to ethnicity and the other grounds in Article 19. The Ethnic Equality Directive has thus been said to create a hierarchy in discrimination, to the detriment of both sex equality law and a number of other grounds including age. The fact that sex discrimination is lagging behind is further underpinned by the Commission's proposal for a new Article 19 Directive, extending the scope of protection for all grounds except sex to that of the Ethnic Equality Directive.[16] A recent initiative, however, is also the Commission's gender-specific proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges, and related measures.[17]

As for the transformative part – and despite Hepple's periodisation – I think that it is only after Amsterdam that Community law can be said, treaty-wise, to have moved from formal to substantive equality. And first this development concerned sex equality.[18] The then-new Treaty

[14] As for sexual orientation there is reason to point also to the earlier development in case law concerning the expansion of the sex concept to include *transsexuality* and the case of gender reassignment as in the case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143 (but not sexual orientation as shown in the case C-249/96 *Grant v South-West Trains* [1998] ECR I-621). – In the Swedish (2008:567) Discrimination Act 'transgender identity or expression' as a specific non-discrimination ground was introduced.

[15] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37.

[16] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final. The outcome of this process is still uncertain, though, to say the least! Amended proposals have been submitted by the different presidencies since its presentation, questioning the scope regarding, for instance, social protection and education, and it is now blocked in the process. See further L Waddington, Future Prospect for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive, in E: Rev. 2011 36(2) 163-184.

[17] Proposal for a Council Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final.

[18] See for instance S Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality. The Proposed Amendment of Directive 76/207, Comments and suggestions* (Athens, Marangopoulos Foundation for Human

provisions thus proclaimed equality between men and women as a 'task' and an 'aim' of the Community and imposed a positive obligation to 'promote' it in all Community activities.[19] The new Article 13 was argued in 'softer terms' to be a way to 'combat' discrimination.

Post-Amsterdam, we have also seen important developments at constitutional level, such as the adoption of the EU Charter of Fundamental Rights in 2000 and later on the Lisbon Treaty, which gave treaty status to the Charter. Let's start with the TEU and Articles 3 and 6 on the values and goals of the union and also on fundamental rights. Article 3.3 apostrophises the Union as a 'Social Market Economy' based on full employment and social progress. Article 6 refers to the fundamental rights in three categories: the Charter as adopted in Strasbourg in 2007 and now a part of primary law, the European convention for the Protection of Human Rights and Fundamental Freedoms and the Union's accession, and fundamental rights as general principles in Union law. According to Article 7 TFEU, the Union shall ensure consistency between all its policies and activities, both economic and social. Behind these treaty provisions there is arguably a change in the perception of social rights in an internal market perspective.[20] In this perspective, equality and social rights are regarded as economic assets or as Sen has put it: 'Market works best when supported by a proper framework of social entitlements, which ensure productive and skilled workers'. The EU social market economy is a model which synthesises economy, social policy, the market and the State, and this is what characterises the Lisbon Treaty as well as many policy documents such as the EU 2020 Strategy[21] and the integrated economic and employment guidelines.[22] Here, the Lisbon Treaty implies some important changes. In terms of being truly transformative, intertwining economic and social goals makes equal treatment and even more compelling goal.

There are also innovative and transformative uses of the discriminatory concepts reflected in recent case law. In *Coleman,*[23] before the Lisbon treaty, the Court 'used' the Employment Equality Directive in a transformative way by accepting transferred discrimination or discrimination by association. When finding that Ms Coleman had been discriminated against when she was treated differently and harassed because of her son's disability, the Court turned to the overall purposes of the directive, linking them to the realisation of personal autonomy and empowerment. Then there is the *Feryn* case,[24] dealing with discrimination by declaration. The Court found that a public statement by an employer that he will not recruit employees of a certain ethnic or racial origin constituted direct discrimination within the meaning of Article 2(2) of the Directive 2000/43/EC, and this despite how the article is worded: 'direct discrimination shall be taken to occur where *one person* is treated less favourably than another…'. – Reasonable accommodation is another way to counteract inequality in terms of positive duties placed on the employer. It now applies to disability discrimination, but it is also discussed in relation to

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Rights, 2001). See also AG Christine Stix-Hackl, Opinion in Case C-186/01 Dory [2003] ECR I-2479 paras 102-105.

[19] Arts. 2 and 3(2) EC.

[20] Sandra Fredman has elaborated on this in terms of the *Third Way* … a kind of compromise in the struggle between neo-liberalism and socialdemocracy, see S Fredman, Transformation or Dilution: Fundamental Rights in the EU Social Space (2006) 12 *European Law Journal* 41.

[21] COM(2010) 2020 final.

[22] Council decision 2010/707/EU of October 2010, later extended to 2011, 2012, compare Council decision 2012/239/EU of 26 April 2012.

[23] C-303/06 *Coleman* [2008] ECR I-5603.

[24] C-54/07 *Firma Feryn* [2008] ECR I-5187.

working life and family reconciliation as well as age discrimination. Here, too, we have recent important case law in *HK Danmark*[25] where the CJEU interpreted Article 5 in the Employment Equality Directive in a fairly comprehensive way.

These cases, also reflect EU anti-discrimination law as truly transformative. This was true as early as the establishment of case law based on the concept of indirect discrimination; this comprises a qualitative leap in anti-discriminatory legislation, and contains tremendous potential. As soon as it is possible to establish that a certain norm results in a worse outcome for the protected group, a court may review the content of the applied reference norm.[26] This is a truly pro-active and transformative approach, within the individual complaints-led model.

This presentation is thus made in terms of comprehensive and transformative, as well as the concepts of widening and deepening. Deepening has been articulated as a constitutionalisation of EU discrimination law – a trend reflected not only in Treaty provisions but also in case law. An important example is the *Mangold* case, recognising the principle of equal treatment on the grounds of age on a treaty basis, well before the entering into force of secondary legislation in the form of the Employment Equality Directive. Another is the *Test-Achat* case,[27] where the CJEU declared article 5(2) of the Access to and Supply of goods and services Directive invalid because it is incompatible with Articles 21 and 23 of the Treaty based Charter of Fundamental Rights. Another case worth mentioning in this context is *HK Danmark,* where the CJEU interpreted the concept of disability in the Employment Equality Directive in accordance with the UN Convention on the Rights of Persons with Disabilities, now formally approved by the Union and thus an integral part of the EU legal order.

Some other important traits or trends in subsequent European non-discrimination legislation and its interpretation can also be said to be related to the two major parallel processes mentioned previously. One is the development towards Single Acts and Single Bodies – a natural companion as it may seem to 'the comprehensiveness and widening trends'. A catalyst of this trend is of course the multi-ground Equality Employment Directive –followed up later with the directive proposal on extended protection for the grounds covered by this directive in parallel with the Ethnic Equality Directive. As already indicated, however, this proposal now seems to be blocked for the foreseeable future.[28]

There are also the (so far) very much neglected situations implying different forms of compound discrimination. Legal design and poor experience have nurtured worries about the possibility of success for complaints based on multiple-grounds discrimination, especially so-called

[25] C-335/11 and 337/11, HK Danmark [2012] ECR I-00000.

[26] Compare further A Christensen, Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change, in: A Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (the Hague, Kluwer Law International, 2001).

[27] C-236/09 *Test-Achat* [2011] ECR I-00773.

[28] Compare Waddington (2011).Lisa Waddington questions whether the future really is a new multi-ground directive or rather a new series of ground-specific equality directives. One argument for the latter is her analysis of the process concerning the very proposal implying (1) a questioning of the proposal for being 'unconstitutional' or outside the scope of the Union's competences, (2) purporting at its best a 'more-of-the-same' solution and thus a missed opportunity to introduce rules on, for instance, multiple discrimination and single bodies, or (3) in particular furthering a more ambitious approach in relation to disability discrimination law, an area where the required unanimity is most likely to occur.

intersectional discrimination.[29] Multiple discriminations claims may be furthered by single discrimination acts. In the EU case law we now have, finally, a case of alleged compound multiple discrimination in relation to the Employment Equality Directive, namely the *Odar* case.[30] In this case, according to a German 'Sozialplan', redundancy payments were related to the right to early retirement so that such a right resulted in, and in certain ways reduced, payment. This was accepted from the age-discrimination point of view, whereas taking into consideration the 'extra' retirement rights available to disabled workers amounted to unacceptable discrimination on grounds of disability according to the Directive. The concept of multiple discriminations was not mentioned, nor was a case of multiple discriminations thus found to be at hand.[31]

3. Age Discrimination in Particular

Generally speaking, the reason for the legislator to contemplate non-discrimination legislation to protect a certain group is that unacceptable differential treatment – social injustice – has been identified in the real world and at a structural level. Not just individuals are identified as being worse off than others; an entire group is considered as such. This means that anti-discriminatory legislation is connected with processes of normative change. Processes of normative change are in turn connected with processes of material change.[32] As a consequence of these changes, differential treatment which used to be regarded as perfectly legitimate is transformed into impermissible discrimination. The goal is thus to change hitherto normative perceptions about belonging and exclusion and to achieve social justice and integration – at individual and societal level. This is precisely the challenge of age-discrimination regulation. Now, active ageing is also a central concern.

Bob Hepple identified the human rights interest behind the first stage of European Anti-discrimination regulation. However, the introduction into the Treaty of Rome of both the ban on nationality discrimination and on sex discrimination in the form of gender-differentiated pay has generally been characterised as instrumental. Gillian More has even discussed these bans in terms of 'market unifiers'.[33] The principle of equal pay in the Treaty of Rome was thus drafted so as to be neutral in respect of sex, but the historical background of this principle is found in the low wages paid to women. At the time of the Treaty of Rome, France had already introduced the equal-pay principle in its national legislation. The reason why it was also introduced in the

[29] Intersectionality is when several grounds not only add to each other but *interact* concurrently. The classic example is the U.S. General Motors' case where black women were discriminated against as opposed to white women *and* black men. See further K Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory an Antiracist Policies, in: D K Weisberg (ed), *Feminist Legal Theory Foundations* (Philadelphia, Temple University Press, 1993).

[30] C-152/11 *Odar v Baxter Deutschland GmbH* [2013] ECR I-0000.

[31] I have seen the design of the Swedish (2008:567) Discrimination Act as holding a special potential in relation to multiple discrimination claims. Generally speaking, the Act has been criticised for its subtle way of banning discrimination on all grounds in a 'tacit' ban, for example of discrimination 'in working life', covering not only all grounds of discrimination but also different situations such as pregnancy, pay , etc. This makes for very 'obscure' rights of non-discrimination. However, tacitly covering all grounds and requiring only that a specific differential treatment is related to any discrimination grounds may at least in theory seem to purport claims on multiple grounds. In practice we have seen nothing or very little of this yet, though.

[32] Compare Christensen (2001).

[33] G Moore, The principle of equal treatment: from market unifier to fundamental rights' in P Craig and de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press 1999).

Treaty was that France was anxious to protect its textile industry from the low wages of women in the Benelux countries. The prohibition of nationality discrimination was also there from the beginning. It is, of course, closely connected to the whole idea of a European Community and an internal market. We can thus say that the rules on non-discrimination in the original treaty were basically 'market rights'. – Gradually, as we all know, the principle of equal treatment between men and women has gained a more general standing, and so has the social dimension from an overall perspective. With this evolution follows a human-rights discourse support for the equal treatment principle, and we can also refer to the deepening/constitutionalising aspects of anti-discrimination law.

These two sides of the origin of non-discrimination law make up what has been called the double bind in non-discrimination law.[34] As regards sex discrimination the background thus implies a double aim, and to some extent this is still inherent in EU sex equality law, one linked with (internal) market arguments and one with the discourse of fundamental rights.[35] And, the double bind may be even more obvious in relation to some other grounds.

Age is an extreme example. On the one hand, there is the aim to establish a principle of non-discrimination on the basis of age based on a fundamental-rights approach to the equal treatment principle. On the other hand, the fundamental organising role of age in our societies is also exceptionally well reflected in age-discrimination law and case law. In premise 25 of the Employment Equality Directive, it is stated that '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 MS. 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 statement is then followed up by article 6.1 in the Employment Equality Directive, justifying differential treatment on the grounds of age within a broad range of employment policy objectives. Add to this numerous and more recent strategy statements referring to active ageing, which make the instrumental goals behind the ban on age discrimination and its exceptions contradictory and conflictive.

Regarding age, the double bind thus reflects the combination of the process of the progressive constitutionalisation – or the deepening of EU Equality Law –and the socio-economic collective interests typically informing these non-discrimination rules both in terms of tradition and future strategic goals concerning active ageing.

There are also the treaty provisions deepening the equal ereatment principle in terms of age. The ban on discrimination in Article 21 of the Charter thus bans differential treatment on the grounds of age.

Intergenerational conflict is one of the threats that may well be an outcome of population ageing; economic unsustainability is another. It is only natural that a key is to support active ageing

[34] F Hendrickx, Age and European Employment Discrimination Law in: F Hendrikx (ed), *Active Ageing and Labour Law, Contributions in honour of Roger Blanpain* (Intersentia, 2012).

[35] The Court has stated that 'the economic aim is secondary to the social aim' in its case law; see cases C-270/97 *Sievers* [2000] ECR I-933 and C-50/96 *Schröder* [2000] ECR I-774, para 57 of both judgments. The instrumental/market interest or collective interests are still apparent in the formulations concerning gender-inclusive labour markets in the EU 2020 Strategy and the Integrated Employment Guidelines.

across all aspects of life. The EU declared 2012 'The Year of Active Ageing'.[36] The overall purpose was to 'promote active ageing and to better mobilize the potential of the rapidly growing population in their late 50s and above'. Active ageing means not only creating better opportunities and working conditions for the participation of older workers in the labour market, but also to combat social exclusion more generally through fostering active participation in society and encouraging healthy ageing. These ambitions are reflected in Article 25 TFEU, where it is stated that the Union Member States 'acknowledge and respect the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'. It is also reflected in the Europe 2020 strategy and the Employment Guidelines of 2010. The Europe 2020 strategy thus focuses on meeting the challenge of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. A goal is set to have an employment rate of 75% for all 20 to 64-year-olds in 2020 and at least 20 million fewer people in or at risk of poverty and social exclusion. According to Employment Guidelines 7 and 8, Member States are urged to increase labour-market participation of individuals 50 and older by introducing policies of active ageing based on new forms of work organisation and lifelong learning, whereas guideline 10 underlines the importance of effective social security and integration policies to empower individuals and prevent social exclusion. At the same time, in its extensive recognition of direct differential treatment on the grounds of age, the directive itself reflects the conflict of interest as regards the collective interest approach.[37]

At application level the double bind reflects the difficult balance to be struck between the individual approach – so important in discrimination law, and built on individual rights within a liberal, individual claim-based design – and a more collective-interest approach linking age discrimination to a larger policy context concerning not only the functioning of labour markets (with age as a traditional social stratifier), but also pension schemes and overall social welfare in an economic and political perspective. [38] However, the overall concern should be intergenerational solidarity and sustainable societies.

Up to now, the CJEU has decided upon some twenty cases on age discrimination – close to half of them dealing specifically with the issue of compulsory retirement[39] and a few others with issues linked to premature retirement[40].

The Employment Equality Directive does not apply to rules on retirement age in social security pension schemes and the like (cf. recital 14). However, it does apply to the termination of

[36] Decision No 940/2011/EU, 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012), OJ 23.09.2011, No. L 246/5.

[37] H Meenan, Reflecting on age discrimination in the European Union – the search for clarity and food for thought, *ERA Forum* (2009) 10: 107, 109.

[38] Compare Hendrickx 2012.

[39] See *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05 [2007] ECR I-8531, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07 [2009] ECR I-01569, *Rosenbladt v. Oellerking Gebaudereinigungsges mbH*, C-45/09 [2010] ECR I-09391, *Georgiev v. Technicheski Universitet, Sofia*, C-250/09 and C-268/09 [2010] I-11869, *Fuchs and Köhler v. Land Hessen*, C-159/10 and C-160/10 [2011] ECR I-00000, *Torsten Hörnfeldt v Posten Meddelande AB*, C-141/11, [2012] ECR I-00000, and, the somewhat later case the *European Commission v. Hungary*, C-286/12 [2013] ECR I-00000.

[40] See *Petersen v. Beerufungsausschuss fur Zahnärzte fur den Bezirk Westfalen-Lippe*, C-341/08 [2010] ECR I-00047, *Ole Andersen v. Region Syddanmark*, C-499/08 [2010] ECR I-09343, *Prigge v. Deutsche Lufthansa AB*, C-447/09 [2011] ECR I-00000, and, *Johann Odar v. Baxter Deutschland GmbH*, C-152/11 [2013] ECR I-00000.

employment contracts.[41] One would therefore think at first that rules on compulsory retirement at a certain age should be contrary to the ban on age discrimination. As reflected in case law, however, this is far from the truth. A general background motive for this, as already mentioned above, is stated in recital 25 and reflected in Article 6.1 of the Employment Equality Directive concerning the justification of such treatment, thus confirming the rather ambiguous position of the Directive. According to this Article, Member States may provide that differences of treatment on the grounds of age shall not constitute discrimination if they are 'objectively and reasonably justified by a legitimate aim, including legitimate employments policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.

The issue of compulsory retirement will be illustrated here using the Swedish *Hörnfeldt* case.[42] Mr Hörnfeldt was working on a part-time basis for the Swedish Postverket since 1989. When he reached the age of 67 on 15 May 2009, his employment contract was terminated on the last day of that month, according to the Swedish '67-year rule' and the collective agreement covering the contract. His monthly retirement pension amounted to SEK 5,847 net (approx. EUR 680) – quite a low pension according to Swedish standards. Mr Hörnfeldt claimed that this constituted unlawful discrimination on grounds of age.

At the centre of the *Hörnfeldt* case is the Swedish rule in Sec. 33 of the (1982:80) Employment Protection Act (EPA, *Anställningsskyddslagen*) on the right of an employer to freely terminate an employment contract at the end of the month in which the employee reaches the age of 67. In this case the employer only has to provide the employee at least one month's written notice, and the 'normal' requirement for just cause, or objective grounds, does not apply.[43] At the same time, according to Sec. 32a EPA there is an unconditional right to work until the age of 67. Sections 32a and 33 EPA together form the 67-year rule.[44] The Framework Directive's provisions on age-related discrimination were as such transposed into Swedish law by the (2008:567) Discrimination Act (*Diskrimineringslagen*).

The core question in the *Hörnfeldt* case is whether the Swedish 67-year rule is compatible with Art. 6 of the Employment Equality Directive. It is clear that terminating an employment contract on the basis of an employee reaching retirement age amounts to differential treatment based on age.[45] The question is whether that difference of treatment can be regarded as objectively and reasonably justified by legitimate aims, and whether it is appropriate and necessary in order to achieve those aims.

According to the referring court, the 67-year rule was established to give individuals the right to work longer and increase the amount of their retirement pension, and it reflects a balance

[41] Compare *Palacios de la Villa* and *Age Concern England.*

[42] For a more comprehensive presentation of the Hörnfeldt case, see A Numhauser-Henning and M Rönnmar (forthcoming).

[43] If the employer does not make use of this possibility to terminate the employment contract, the permanent employment relationship continues; however, it does so with limited employment protection (the employee has, for example, only one month's notice, and is given no right of priority in accordance with the seniority rules or rules on re-employment in redundancy situations, Sec. 33 EPA). Moreover, when an employee turns 67, fixed-term contracts may be freely entered into, Sec. 5 EPA.

[44] This rule was introduced as of 31 December 2002 – before that another retirement age could be introduced by collective agreement. This is thus no longer the case; the 67-year rule is unconditional.

[45] The judgment p. 20. Compare *Palacios de la Villa* and *Age Concern England.*

between considerations relating to budgetary matters, employment policy and labour-market policy. No such explicit aims were expressed in the EPA itself though, nor in the *traveaux préparatoires*. Not surprisingly,[46] the CJEU stated that a lack of expressive aim is not decisive – what is important is 'that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of that measure for the purposes of review by the courts as to whether it is legitimate and as to whether the means put in place to achieve it are appropriate and necessary' (p. 24). The Swedish Government introduced multifaceted arguments for the 67-year rule[47], and these aims were acceptable to the CJEU, because '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. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement' (p. 28). The 'distribution between generations' argument has long been an accepted argument. The CJEU also finds the 67-year rule to be appropriate for achieving the aims set out; the rule was established expressly to avoid humiliating situations for elderly workers, and make it easier for young people to enter and/or remain in the labour market (p. 34). The question whether the means were also necessary to achieve the aims was answered in relation to the second question, referring to the importance of financial compensation in the form of payment of a 'reasonable' retirement pension. In the early case *Palacios de la Villa* the CJEU seemingly implied that the fact that the individual in question was provided a pension which was not unreasonable was an important part of assessing whether the legislation at hand met the conditions of being 'appropriate and necessary'.[48] In the subsequent *Rosenbladt* case, however, the CJEU made no reference to the level of the retirement pension received by the person concerned, despite the small amount received following upon a part-time position as a cleaner. In the *Hörnfeldt* case the CJEU makes it clear that despite referring to Art.15.1 of the EU Charter of Fundamental Rights and the right (also for the elderly) to engage in work, the considerations must not be made at individual level but rather at systems level.[49] What is evaluated is rather the Swedish system as such, which means offering an unconditional right to work until 67 years of age, further work possibilities in the form of fixed-term employment, and a multifaceted pension scheme including basic coverage from the age of 65 years in terms of a guaranteed pension, housing benefits and/or old-age support.

In the *Hörnfeldt* case the CJEU thus concluded that the Employment Equality Directive does not preclude 'a national measure, such as the Swedish 67-year rule, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached

[46] Compare cases *Fuchs and Köhler* p. 39 and the case-law cited there. Compare also *Commission v. Hungary*.

[47] It seeks, firstly, to avoid termination of employment contracts in situations which are humiliating for workers by reason of their advanced age; secondly, to enable retirement pension regimes to be adjusted on the basis of the principle that income received over the full course of a career must be taken into account; thirdly, to reduce obstacles for those who wish to work beyond their 65th birthday; fourthly, to adapt to demographic developments and to anticipate the risk of labour shortages; and, fifthly, to establish a right, and not an obligation, to work until the age of 67, in the sense that an employment relationship may continue beyond the age of 65. Setting a compulsory retirement age also makes it easier for young people to enter the labour market (p 26).

[48] The judgment p 73.

[49] This was clear also from the *Rosenbladt* case.

the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as the measure is objectively and reasonably justified … and constitutes an appropriate and necessary means by which to achieve that aim'.[50]

'It's all about justification' was the characterisation of EU non-discrimination law made by Brian Bercusson at a Stockholm conference back in 2002.[51] This was as a reflection upon the widening process that had only just come about with the introduction of labour law equal treatment and the flexible work directives, as well as the Article 13 Directives. A common ground for the flexible work directives and the case of age discrimination is that these are grounds of discrimination deemed less 'suspicious'[52] than many others. With regard to flexible work and age, this is directly reflected in the regulation allowing the justification of direct discrimination. Monika Schlachter has described the CJEU's case law regarding compulsory retirement, stating 'there are almost no limits to the discretion of the MS in adopting mandatory retirement rules', nevertheless distinguishing two separate standards. One is a 'control standard' arguing for more general systems for compulsory retirement, such as in the *Rosenbladt* case, and another is a considerably stricter standard when it comes to specific professional groups, such as those in the *Petersen, Georgiev, Fuchs and Köhler* cases and, now recently, *Commission v Hungary*.[53] Claire Kilpatrick has also pointed to the fact that in these cases, the CJEU has developed quite another framework for analysis than that hitherto applied in sex discrimination cases – 'a new EU Discrimination Law Architecture' applying a looser proportionality test.[54]

The trend towards 'it's all about justification' leaves us with an increasingly unpredictable application of non-discrimination law, as it is about a difficult balancing of individual and collective interests on a case-by case-basis; this is thus especially true with regard to age.

A general conclusion concerning the double bind and the socio-economic/collective side of non-discrimination law is that, when it enforces the need for non-discriminative behaviour, typically speaking**,** the double bind and socioeconomic/collective aspect work to emphasise the transformative aspect of anti-discrimination law. The stronger the socio-economic needs, the stronger the impetus of a pro-active approach to non-discrimination, even positive action! It brings to the fore the classic issue of formal v. substantive equality. However, as is the case with age discrimination, the collective interest side may also result in an expanded scope for exceptions or justification of differential treatment.

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[50] Hendrickx has commented that the CJEU here struck a balance between the individual argument and the collective, but tilted the result in favour of the collective, Hendrickx (2012) p. 21.

[51] Compare R Blanpain (ed) , Collective Bargaining, Discrimination, Social Security and European Integration, European Congress, Stockholm, September 2002, in: *Bulletin of Comparative Labour Relations* (the Hague, Kluwer, 2003). In her report on sex discrimination to the very same Stockholm congress, Tamara Hervey had already made the argument that before the widening of discrimination law to include new grounds, the justifications for sex discrimination could really be pictured as justifications on a continuous scale. T Hervey, EC Law on Justification for Sex Discrimination in Working Life, in: Blanpain (ed) (2003).

[52] A suspicious ground of discrimination – such as sex, ethnicity or sexual orientation – is considered to have no link whatsoever with someone's ability to contribute to society.

[53] M Schlachter, Mandatory Retirement and Age Discrimination under EU Law, in: *The International Journal of Comparative Labour Law and Industrial Relations* 27, no. 3 (2011) 290.

[54] C Kilpatrick, The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture, In: *Industrial Law Journal* Vol. 40, No.3, September 2011.

4. Potentials

The outcome of the *Hörnfeldt* case may in many ways seem evident if we contemplate previous case-law developments.[55] The two questions referred to here had already been given an answer in cases such as *Palacios de la Villa*, *Age Concern England* and *Rosenbladt.*

However, neither from a Swedish law perspective[56] nor from an EU law perspective is it obvious that the 67-year rule – or compulsory retirement as such – should be considered consistent with the ban on age discrimination. From an EU law perspective, it is the overall assessment of compulsory retirement in relation to the collective public interest approach that makes one question the acceptance of compulsory retirement. Increased labour-market participation of people aged 55+ in terms of active ageing is thus an important part of EU employment strategies.

There are substantial as well as attitudinal obstacles to increased labour-market participation of people aged 55+. The traditional approach for organisation of labour markets represents an impediment in many ways, both in terms of regulation and factual operation. Working life is thus traditionally restricted by rules on – more or less – compulsory retirement at a certain age, related to public as well as occupational pension systems. However, working-life practices in terms of working conditions, working-time arrangements and knowledge turnover have also tended to marginalise older workers, including those who have not yet reached pensionable age, thus creating unemployment and costly pre-retirement schemes. These practices are accompanied by social norms that support the functioning of such a system both in terms of 'pension norms' and discriminatory perceptions and behaviour on behalf of, among others, employers. The hitherto prevailing 'pension norm' – understood as general perceptions of when to leave working life – says that there is 'a right and a duty to retire at a certain age'. And, should a worker be laid off before reaching the 'normal' pensionable age, this may well be conceived as a social good. Such normative conceptions are, of course, a major challenge to to contemporary society's ability to foster active ageing. The ban on age discrimination is among the essential tools designed to counteract these realities.

From an EU perspective it is true that ensuring that people work until they reach the 'normal' pensionable age, thus preventing early retirement and other forms of premature resigning, seems to be the most important factor in making active ageing a reality. According to the 2012 Ageing Report, the average labour market exit age in the EU-27 was 61.4 years in 2009 and the predicted exit age for 2060 is 'only' 64.3 years. However, this future overall scenario makes it

[55] This may also be the reason why the CJEU decided – after hearing Advocate General Bot – to proceed to judgment without an opinion.

[56] The rule can be questioned in relation to the disproportionate scope for arbitrariness that it provides on behalf of the employer– the employer can freely chose to 'retire' one employee, whereas others seemingly in the same situation are kept on. In *Rosenbladt* (p. 51) the CJEU pointed to the fact that a system of automatic termination of employment contracts does not authorise employers to terminate an employment contract unilaterally when employees reach the age at which they are eligible for payment of a pension. This is, however, precisely what the Swedish 67-year rule permits. In *Hörnfeldt* the CJEU is apparently conscious of this character of the Swedish law, though, and makes no point of it (the judgment p 40). Another argument could have been the compatibility with the Swedish pension system as such - strictly speaking, there is no fixed pensionable age. Pension can be taken from the age of 61 and the system is based on lifelong average earnings, making work beyond 'normal' pension age economically very advantageous. Compulsory retirement at a set age is not really compatible with such a system. In the cases of *Ole Andersen* and *Prigge* the termination of employment contracts at pre-normal retirement age was seen as a disproportionate measure considering the individual's economic interests; see also the case *Commission v. Hungary.*

only more important to make people today work beyond their normal pensionable age, whenever this is possible. In addition, generally speaking, there is 'room' for a longer working life. Service society entails other demands than industrial society and older generations are only becoming healthier. There are good – also economic – reasons to adapt the current perception of work and of a 'good worker' to the human scale from a lifespan perspective, if the traditional pattern of the three clear-cut phases of life – pre-work life, work life and 'after-life' – is to be replaced, as is also reflected in the ILO strategy 'decent work for all'.[57]

Thus, from an EU law perspective, it is not obvious that rules on compulsory retirement should be seen as consistent with the ban on age discrimination. In order to make people work beyond 'normal' pensionable age, they must have both the practical and the legal possibility to do so, and here, of course, the acceptance of compulsory retirement is a key issue. The CJEU in its case law seems to have given a lot of consideration to Member States' traditions, because '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'.[58][59] So far, the application of the collective interest approach in case law regarding compulsory retirement post pensionable age has rather been to the detriment of active ageing and the potential of the ban on age-discrimination.

In relation to pre-retirement related issues, the CJEU has thus been considerably stricter in its judgments, though. One way to promote active ageing – and thus social sustainability as the dependency ratio increases – is to successively increase the 'normal' retirement age, making people work longer, while still accepting compulsory retirement. The issue of what the 'appropriate' pensionable age is currently lies at the core of many delicate reform processes across Europe, *inter alia* in the wake of the economic crisis, and these reforms are leading to political strikes and upheaval. An important reason behind these reactions is that pension rights are not only perceived of as social, political rights but also as property rights in the form of postponed income.[60] Such perceptions are reflected in the first part of the traditional pension norm; there is *a right* and a duty to retire at a certain age.

5. Pitfalls

At the core of this contribution lies the issue whether there (still) should be a (more or less) set pensionable age, and whether this also implies the acceptance of compulsory retirement. Or, should the prevailing pension norm be modified to assert that 'you have both a right and a duty

[57] www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm. Compare also the Commission's Communication 'Decent work for all', COM(2006) 249 final.

[58] *Hörnfeldt*, the judgment p 28.

[59] According to a 2011 report, based on the situation as at 31 December 2009, 24 out of 29 Member States did have a set age of for automatic termination (compulsory retirement) concerning specific professions and/or public employees. However, 23 out of 29 Member States *did not* have a general rule on compulsory retirement applicable to the private sector. 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.

[60] Compare, for instance, Eliasson, Nils, *Protection of Accrued Pension Rights, An Inquiry into Reforms of Staturory and Occupational Pension Schemes in a German, Norwegian and Swedish Context* (Lund, Juristförlaget i Lund, 2001). Compare also the case the *Commission v Hungary* where the CJEU obiter dictum accepted a general increase in pensionable age from 62 to 65 years of age in Hungary, thus meeting reasonable demands on gradual transposition rules, the judgment p. 73.

to work according to your abilities', and that 'to retire is a personal/individual choice' rather than a social order?

In such a case at least the practice of compulsory retirement needs to be abandoned. There is also a need for a general 'reconceptualisation' of work during working life in order to adapt to a more diversified and 'greying' work force. Working life today tends to require workers to be more productive, well-educated, lenient and flexible than ever before. In new branches such as the IT world there is a romantic vision of enthusiastic employees working around the clock and eating at their desks, in a state of total commitment to their activity. This ideal has hitherto mostly been discussed as being detrimental to the reconciliation of work and family life and other caring responsibilities. However, it is also incompatible with a working life well beyond pensionable age. Such a working life requires a reconceptualisation throughout working life, as the quality of working conditions affect workers' future ability to work. There are good – also economic - reasons to adapt the current perception of work and of a 'good worker' to the human scale from a lifespan perspective, if the traditional pattern of the three clear-cut phases of life – pre-work life, work life and 'after-life' – is to be replaced.

Thus far, the double bind behind age-discrimination rules and the relative weight given to the collective interest approach as regards compulsory retirement has mainly been applied to the detriment of active ageing policies. On the other hand, what would a ban on compulsory retirement imply?

An adaptation of pension norms and labour law in line with what has hitherto been argued – the elimination of compulsory retirement and reconceptualising work – also implies threats. It may well have detrimental effects on employment protection as we know it.

One accepted argument in favour of compulsory retirement is thus to avoid a practice where working-life termination, as a general rule, is based on the 'disqualification' of the older worker[61] – a less satisfying order.[62]

Such an abolition also risks diminishing employment protection before actual retirement age is reached. If retirement practices are to become more diffuse or more individualised, there is no possibility to uphold a practice such as that found in Sweden where, as a general rule, 'normal ageing' does not compensate for just-cause dismissal, and incentives for age management may weaken.[63]

Moreover, there is an elitist element to non-discrimination law, requiring a comparator in 'a similar situation', for instance, as regards merits and abilities. This makes non-discrimination claims a weak defence in real life, especially for the disabled and people growing older.[64] At the same time there is currently a trend where employment protection is levelled down, and claims

[61] *Hörnfeldt*. Compare also *Rosenbladt, Georgiev* and *Fuchs and Köhler*.

[62] Compare J Suk, From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe, 60 *Am. J. Comp. L* 75 2012.

[63] Compare also Suk 2012 93 with reference to the economist Edward Lazear and his life-cycle theory of mandatory retirement as regards wagesetting as building on an implicit contract model stating that 'employers pay employees a wage premium towards the end of their careers on the assumption that the employment relationshsip will come to an end at a predictable fixed point in time'.

[64] As Somek says: discrimination law itself 'discriminates systematically against those who simply fail or who do not conceive life as a career based on their own responsibililty', see A Somek, *Engineering Equality, An Essay on European Anti-Discrimination Law* (Oxford, Oxford University Press, 2011) 13.

argued in terms of discrimination tend to grow in importance in relation to employment protection; this leaves non-discrimination as a minimum common denominator for employment protection law as well – substituting employment protection, so to speak.

This relation between employment protection law and discrimination law is particularly interesting with regard to workers coming of age and the application or non-application of the ban on age-discrimination. The weakening of employment protection and an anti-discrimination law approach can thus be expected often enough to go hand in hand and to be mutually reinforcing. The acceptance of compulsory retirement can be critised for hollowing out the ban on age discrimination. At the same time, to uphold the ban on age discrimination and thus, as a rule, require just cause for dismissal at any age would lead to an increased emphasis on 'capability' as an employment requirement.

There may thus be a risk that setting no upper limit to employment will bring about a decrease in the number of people aged 55+ who work, hence undermining both employment protection and 'good quality work' from within. The question is whether, for instance, potentially increased requirements on reasonable accommodation also in relation to age will be enough to come to terms with such a trend.

6. Concluding Remarks – Future Challenges

EU non-discrimination law was here thus illustrated as widening and deepening. This stands in sharp contrast to American non-discrimination law, which according to de Búrca[65] has been significantly weakened after decades of social and political backlash, encountering ideological conflict and strong political and social opposition. According to de Búrca the future of EU antidiscrimination law is said to face equally daunting challenges as the that of the US – as the EU moves on, it will reach the state of affairs current in the US – decades ahead as regards antidiscrimination law advancement. However, she also points to some 'pro's' in the European context related to a difference in culture and ideology in terms of social welfare and the responsibilities of the State, or in this case the EU –reflected in the Lisbon Treaty and its rule on a social market economy, and now forming the transformative character of EU non-discrimination law. This is something which may well make all the difference!

However, regulating a growing number of groups in a parallel way, despite these groups' significantly different needs for protection, leads to a worry regarding the erosion of key concepts as a consequence of overall harmonisation. A special concern here is the possibility direct discrimination can be justified. This has thus turned out to be an absolutely crucial element as regards age discrimination. Future influences from the human rights approach may also lead in this direction, as the European Court of Human Rights permits justifications in cases of direct gender discrimination.

I was long convinced that a considerable risk existed: that the protection of so many different groups would reinforce the formal equal treatment concept as a common minor-denominator. However, I find the cases of *Coleman* and *Feryn*, not least in the light of the Lisbon Treaty provisions, really promising. There are possibilities, even within the prevailing legal model, that by referring not only to the overall aims of the different non-discrimination directives but also to

[65] C de Burca in Paul Craig and C de Burca (2011).

the more intricately interwoven aims of the Union and multi-level fundamental rights, future equality law can develop a more pro-active approach built not just on guilt, but on making use of the 'dominance approach' – creating legal responsibilities for key actors such as employers, because they have the power to institutionalise change. Coordinated political actions built on the new perceptions of the social market economy must also not be underestimated. There is thus considerable hope for the future that the developments of equality law will be truly transformative.

However, we cannot neglect the fact that European non-discrimination law is characterised by an increasing complementarity of hard regulation and soft policy coordination – and thus hybridity – as Somek points out.[66] Regulation is normatively deficient – it needs equality management. This is not only true in situations where the double bind and the conflict between individual rights of equal treatment and eventually even contradictory collective policy interests clash, as is often the case when it comes to age discrimination.

And, the abolishment of compulsory retirement is arguably not an answer to all problems. Case law shows that age discrimination law as such is full of dilemmas – it is about weighing individual rights against public interests of a more collective character, such as intergenerational solidarity and pension systems. To balance these opposite approaches, the CJEU makes wide use of the proportionality principle making outcomes often highly unpredictable. Add to this the adverse effects an abolishment of compulsory retirement might have on labour law in general in terms of employment protection and good quality work.

In the doctrine it has been found less likely that the CJEU in the near future would be willing to challenge the Member States' traditions regarding compulsory employment practices.[67] At the same time, we have seen that a great majority of Member States do not have a general rule on compulsory retirement in place, and in the UK for example, the statutory compulsory retirement scheme has been repealed, despite its long-standing tradition and principal acceptance by the CJEU.[68]

No doubt, economic crisis and high unemployment – especially among younger people – have made the achievement of active ageing policies increasingly difficult. The question is, though, how this conflict as regards the right to work will play out as the increased dependency ratio and unsustainable pension costs become more prevalent. There are reasons to unite with Kasneci when stating: We are in need of a completely new approach 'based on a multidimensional policy approach on "active ageing" which can change outdated paradigms, remove a number of older workers related-myths, and convert the process of population and workforce ageing into an opportunity for society and older workers themselves'.[69] The question for the future is this: can demands for decent work, non-discrimination, equal treatment and reasonable accommodation suffice to counteract the risks implied by both the acceptance and the abandonment of age as a social stratifier?

[66] Somek (2011).
[67] Schlachter (2011) and Kilpatrick (2011).
[68] Compare also the Swedish Governmental Pensionable Age Inquiry which recently put forward a proposal to make the Swedish '67-year rule' a '69-year rule', SOU 2013:25.
[69] D Kasneci, *Active Ageing: the EU Policy Response to the Challenge of Population Ageing* (Cadmus European Papers on the New Welfare, Paper No. 8, the Risk Institute, September 2007.