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### **Adding a Little Gold to the Golden Years: Should the European Union Prohibit Compulsory Retirement as Aged-Based Discrimination in Employment?**

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# ADDING A LITTLE GOLD TO THE GOLDEN YEARS: SHOULD THE EUROPEAN UNION PROHIBIT COMPULSORY RETIREMENT AS AGE-BASED DISCRIMINATION IN EMPLOYMENT?

*Professor Roger J. Goebel\**

## Abstract

*On October 2, 1997, the Member States of the European Union signed the Treaty of Amsterdam which amended the European Community Treaty (ECT). Among the Amsterdam Treaty's most important new provisions was ECT Article 13, which authorized the Council of Ministers, acting unanimously, to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." The Council acted with surprising rapidity to adopt Directive 2000/78, which prohibits discrimination in employment on all the listed bases (except for "racial or ethnic origin," which is covered by Directive 2000/43).*

*Since December 2, 2003, the end of the period for Member State implementation of Directive 2000/78, the Court of Justice has issued numerous judgments interpreting and applying the Directive's provisions. By far the largest number have concerned the Directive's prohibition of discrimination in employment based on age. To date there has been relatively little American (or indeed EU) academic commentary upon the Court's judgments.*

*This article is accordingly timely in its presentation of the terms of Directive 2000/78, and its critical examination of the Court judgments concerning the prohibition of discrimination in employment based on age. Moreover, the article compares the impact of the Directive and the Court judgments with the prohibition of discrimination in employment based on age through the U.S. Age Discrimination in Employment Act (ADEA), initially adopted in 1969. As amended in 1984, the ADEA totally prohibits employers from setting a compulsory retirement date, except where advanced age tends to impair an employee's occupational qualifications essential for performance in a particular profession or job.*

*In Part I, the article describes the operational provisions of Directive 2000/78 relevant to the prohibition of age-based discrimination. The principal focus of the article, in Part II, is a description and critical examination of the four Court judgments reviewing national rules that authorize employers to set an age (usually sixty-five) for the compulsory retirement of employees. Part III supplements this with a description and critical examination of*

*national compulsory retirement rules for certain specific professions or occupations (e.g., airline pilots, policemen, firemen, judges, prosecutors).*

*Because the Court of Justice's judgments have held that national rules authorizing employers to set a compulsory retirement age do not violate Directive 2000/78, a natural question is whether this judicial conclusion can be considered to be appropriate, as compared to the total prohibition of compulsory retirement in the U.S. After considering the significant difference between the limited social impact of the prohibition of compulsory retirement in the U.S., as contrasted with the significant adverse social impact of prohibiting compulsory retirement in many EU Member States, the article concludes that substantially higher unemployment rates among young people under thirty in some EU States justify their governments' rules that authorize employers to set a compulsory retirement age. Accordingly, the Court's judgments that permit national rules to authorize compulsory retirement in order to open employment opportunities for younger workers can be evaluated as appropriate and justified.*

INTRODUCTION .....	307
I. COUNCIL DIRECTIVE 2000/78 ON A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION .....	310
A. <i>The Treaty Basis for Antidiscrimination Legislation</i> .....	310
B. <i>The Operational Provisions of the Council Directive 2000/78</i> .....	314
II. DIRECTIVE 2000/78'S APPLICATION TO A STATE'S AUTHORIZATION OR ENDORSEMENT OF A STANDARD RETIREMENT AGE.....	317
A. <i>The Leading Precedent: Palacios de la Villa</i> .....	318
1. Review of the Judgment .....	318
2. Reflections on Palacios de la Villa .....	321
B. <i>Age Concern England</i> .....	324
1. Review of the Judgment and Its Stimulus for the Subsequent Elimination of a Standard Retirement Age in the U.K.....	324
2. Reflections on <i>Age Concern England</i> and the U.K.'s Elimination of a Standard Retirement Age .....	326
C. <i>Later Judgments: Rosenbladt and Hornfeldt</i> .....	327
1. Reflections on <i>Rosenbladt</i> and <i>Hornfeldt</i> .....	330
D. <i>Comparisons with the Age Discrimination in Employment Act</i> .....	333
1. The ADEA's Adoption and Evolution .....	333
2. The Contrast with the European Union .....	338
E. <i>The Future Impact of the Demographic Evolution of the EU</i> .....	339
III. IS A COMPULSORY RETIREMENT AGE, OR ANOTHER AGE-BASED LIMIT ON SERVICE, PERMISSIBLE FOR A SPECIFIC PROFESSION OR FIELD OF EMPLOYMENT? .....	341
A. <i>Judgments Concerning the Occupational Activities Exception of Article 4(1)</i> .....	342

1. Review of <i>Prigge v. Deutsche Lufthansa</i> .....	342
2. Reflections on <i>Prigge's</i> Application of Directive Article 4(1) .....	344
<i>B. Court Judgments Concerning the Justification Provisions of Article 6(1)</i> ..	345
1. Review of <i>Petersen, Georgiev, and Fuchs and Kohler</i> .....	345
2. Reflections on <i>Petersen, Georgiev, and Fuchs and Kohler</i> .....	349
3. <i>Commission v. Hungary: A Treaty Infringement Proceeding</i> .....	352
4. Reflections on <i>Commission v. Hungary</i> .....	355
<i>C. Contrasts with U.S. Law – Specific Professions, Fields and Occupational Roles</i> .....	356
CONCLUSION .....	365

## INTRODUCTION

Discrimination in employment based on age may conceivably affect everyone at one stage or another in their lives. In contrast, discrimination based on other factors, e.g., race, sex, religion, disability, or sexual orientation, only affects certain individuals, even if the discrimination is pervasive and seriously reprehensible. Most Americans are accustomed to a social lifestyle in which most people choose voluntarily to retire in their early sixties, or a few years later when eligible for full social security retirement benefits. However, some Americans prefer to continue their usual employment or occupation, or commence a new one, in their late sixties, seventies, or even eighties. This is regarded as quite normal, a feature of the modern American lifestyle. Fortunately, Congress has provided solid protection for older Americans who want to continue in their employment or occupation through its virtual elimination of compulsory retirement in 1986.

Congress commenced its protection of employees above the age of 40 from age-based discrimination through provisions of its Age Discrimination in Employment Act of 1967 (1967 ADEA), which generally forbid age-based discriminatory practices in employment, up to the age of sixty-five.<sup>1</sup> This effectively included the prohibition of compulsory retirement prior to sixty-five. Subsequently in 1978, Congress amended the ADEA (1978 ADEA) to prohibit age-based discrimination in employment prior to the age of seventy, which implicitly prohibited compulsory retirement prior to that age.<sup>2</sup> In 1986, Congress significantly amended the ADEA (1986 ADEA) to eliminate

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<sup>\*</sup>Alpin J. Cameron Professor of Law, Fordham Law School. In the interest of full disclosure, I should indicate that I am eighty years old. I am grateful to Alison Shea, Fordham's librarian specialist in European Union law, for her invaluable research assistance.

<sup>1</sup>Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90–202, 81 Stat. 602 (1967) (codified with later amendments in 29 U.S.C. §§ 621–34 (2016)). Section 4 of the 1967 ADEA Public Law prohibited numerous types of age-based discrimination (e.g., in hiring, discharge, compensation, terms or conditions of employment), but § 12 ended the prohibition at age 65, thus permitting employers to compel employees to retire at that age. Also, § 4(f) (now 29 U.S.C. § 632) permitted employers to adopt discriminatory policies or take discriminatory action based upon an employee's age when "age is a bona fide occupational requirement necessary to the normal operation of the particular business."

<sup>2</sup>The 1967 ADEA was amended on Apr. 6, 1978 by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 189 (1978), which extended the ADEA's prohibition of age discrimination until age seventy, instead of sixty-five. The 1978 ADEA added an exception that authorized employers to compel senior management exercising a policymaking role to retire at sixty-five.

the compulsory retirement of employees at an employer-set, prescribed age, with one significant exception: termination based upon an employee's age when "age is a bona fide occupational qualification"<sup>3</sup> (BFOQ).

In contrast, in the European Union discrimination in employment based on age became a concern relatively recently. The Council of Ministers took legislative action to prohibit such discrimination through Council Directive 2000/78<sup>4</sup> establishing a general framework for equal treatment in employment and occupation, adopted on November 27, 2000, and in effect since December 2, 2003.<sup>5</sup> Subsequently, over twenty EU Court of Justice judgments have interpreted and applied Directive 2000/78's prohibition of discrimination in employment based on age in a variety of contexts.

In striking contrast to the American scene, compulsory retirement of employees is both common and generally considered to be appropriate in the EU. Why some Member State governments authorize or endorse compulsory retirement, and why the Court of Justice has interpreted Directive 2000/78's provisions to permit this, is little known in the United States. The present Article is accordingly timely, both through its description of the legal status of compulsory retirement in the EU, and in its consideration of the substantially different social and economic circumstances of the EU and the United States that may justify these different policies.

Part I of this Article describes the Treaty basis for antidiscrimination legislation, and then review and analyze the operational provisions of Council Directive 2000/78. Such discrimination has its greatest impact when employers terminate the employment of older persons solely based on age, especially if legislative or regulatory acts of Member States authorize employer-set standard retirement ages in all forms of employment.

Accordingly, the most important topic in this Article is discussed in Part II, which reviews four Court of Justice judgments examining governmental authorization for employer-set standard retirement ages in all forms of employment, in order to determine whether this is consonant with the Directive. Part II also critically appraises

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<sup>3</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986), effective January 1, 1987, generally forbid employers to require the mandatory retirement of an employee at any age. The 1986 ADEA amendment retained the exception for age-based discrimination based on bona fide occupational qualifications for the particular employment field or position. The 1986 amendment also provided an exception that enabled states and local governments to require mandatory retirement at fifty-five for two specific professions: firefighters and law enforcement officers. See the coverage of these two exceptions *infra* Part III.C.

<sup>4</sup> Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

<sup>5</sup> A directive is a form of legislation that is unique to the European Union, as a means of achieving legally binding rules in all of the EU's Member States while still providing each State with considerable discretion in applying the rules. Article 189 of the initial European Economic Community Treaty (EEC Treaty) stated that a directive was binding on any State to which it is addressed, but "shall leave to the national authorities the choice of form and methods." See the Treaty Establishing the European Economic Community, art. 128, Mar. 25, 1957, and effective Jan. 1, 1958. This text was never changed in later Treaties and now appears in the Treaty on the Functioning of the European Union, art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU], which is annexed to the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. For a description of directives, see DAVID EDWARD & ROBERT LANE, EDWARD & LANE ON EUROPEAN UNION LAW, §§ 6.63-6.66 (2013).

each of the Court judgments.

Part II.D reviews the evolution in American law from the initial 1967 ADEA to the 1986 amendment that virtually eliminated compulsory retirement. This enables an examination of the policy reasons for the Court of Justice's acceptance of national standard compulsory retirement ages, in contrast to the policy motivations for the ADEA's virtual elimination of compulsory retirement. Part II.D's conclusion is that significantly different legal, social, and economic circumstances in the EU and the United States justify their different policies.

The key pragmatic factor justifying the EU's policy approach is socioeconomic: all of the leading Court precedents have concluded that Member State governments may appropriately promote an "inter-generational balance" between the interests of younger, mid-career, and older employees when determining whether to adopt or endorse a compulsory retirement age. This is partly due to the fact that some Member States currently have, or have had, unusually high levels of unemployment of young people under twenty-five, which tends to motivate governments to endorse the compulsory retirement of older workers, or to set other limits on employment based on age.

Part II.E contains some reflections concerning the impact of future demographic developments. In general, neither the Member State governments, nor the Court of Justice have paid much attention to the future demographic evolution, particularly the steadily growing percentage of older persons in the total population. To the extent that older persons are no longer employed, or self-employed, they are unlikely to provide revenues through income taxation and are apt to be increasingly dependent on state old-age pensions or other social benefits. In view of longer life expectancies, this is certain to pose serious economic problems for governments. Part II.E concludes by urging that governments that currently endorse or authorize a standard retirement age set at sixty-five or sixty-seven should seriously consider moving it to seventy, as the U.S. Congress did in 1978, and perhaps later eliminating altogether an endorsement of a compulsory retirement age.

Related to the principal topic examined in Part II is a second one: whether Directive 2000/78's provisions should permit Member State rules that set or endorse employer-set retirement ages, or other age-based limits, for various professions and fields of employment. Part III examines this topic. Part III.A and B analyzes several relevant Court judgments and critically appraises them. Part III.C compares the Court case-law with pertinent U.S. court judgments that evaluated whether employer-set retirement ages for specific professions or fields of employment could be justified as bona-fide occupational qualification requirements under the ADEA, or under other ADEA exceptions. This enables some interesting parallels and contrasts.

For the sake of concision, this Article will not cover Court judgments concerning discrimination based on age in employee pay, benefits or other work conditions.

Two final observations are due. First, the Court of Justice judgments examined in this Article have usually provided great deference to the EU Member State rules that endorsed compulsory retirement due to age in all forms of employment, as well as compulsory retirement or other age-based limits in specific professions or fields of employment. Whether such judicial deference is justified, or excessive certainly

requires critical examination. The Court's view that governments should legitimately be able to craft rules aimed at achieving an inter-generational balance in the workforce may well be valid in principle, but not necessarily appropriate in certain contexts. Second, customary stereotypes concerning the allegedly inevitable deterioration of mental and physical capacity of older people have tended to justify governments' acceptance of employer-imposed limits on employment based on age, especially in regard to specific professions or fields of work.

Viewed as an ensemble, Directive 2000/78 and the Court judgments that have interpreted and applied its provisions have been beneficial to many employees. Nonetheless, as we shall see, whether EU Member State rules regarding compulsory retirement, and Court judgments assessing them, appropriately represent desirable social policy is sometimes questionable, especially when contrasted with those in the United States.

## I. COUNCIL DIRECTIVE 2000/78 ON A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

### *A. The Treaty Basis for Antidiscrimination Legislation*

As is common in the history of the European Union, the story of the effort to protect employees from discrimination based on age began with an initiative of the Commission, the EU's central administrative body. On July 7, 1994, the Commission Directorate-General on Social Policy and Employment,<sup>6</sup> headed by the Irish Commissioner Pádraig Flynn,<sup>7</sup> issued a White Paper on European Social Policy, setting out a comprehensive program of proposed legislation and other action in the employment sector. The White Paper included a little-noticed paragraph near the end of the text which declared that "the Commission ... believes that, at the next opportunity to revise the Treaties, serious consideration must be given to the introduction of a specific reference to combating discrimination on the grounds of race, religion, age, and disability."<sup>8</sup>

The Irish government clearly viewed Commissioner Flynn's suggestion favorably, because during the Irish government's Presidency<sup>9</sup> of the European

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<sup>6</sup> Since the Commission's creation in 1958, it has operated through administrative divisions called Directorates-General, each headed by a Director-General under the supervision of a Commissioner. See DESMOND DINAN, *EUROPE RECAST—A HISTORY OF EUROPEAN UNION* 89 (2nd ed., 2014). In each successive Commission, around twenty to twenty-five Directorates-general are designated, adopting policy decisions and proposing legislation in each one's sector. See David Spence, *The Directorates-General and the Services: Structures, Functions and Procedures*, in *THE EUROPEAN COMMISSION*, 128–55 (David Spence ed., 2006).

<sup>7</sup> Commissioner Flynn not only headed the Social Policy and Employment Directorate-General in the last Commission under the Presidency of Jacques Delors (1993–94), but continued as its Director-General in the Commission under President Jacques Santer (1995–99).

<sup>8</sup> *Commission White Paper on European Social Policy—A Way Forward for the Union*, Part VI ¶ 27, COM (1994) 333 final (July 27, 1994). The term, "White Paper," borrowed from English administrative terminology, indicates a Commission document outlining a policy program. The White Paper's legislative proposals included measures to promote worker health and safety, information and consultation of workers, and the protection of temporary and part-time workers. All were subsequently adopted as directives.

<sup>9</sup> The European Council is composed of the Prime Ministers of all the Member States (except for

Council, it prepared the initial text of proposed Treaty amendments in a December 1996 Dublin draft,<sup>10</sup> which included text enabling the Council of Ministers to authorize anti-discrimination measures. Nonetheless, the text's inclusion in the proposed Treaty amendments was not guaranteed, because the Conservative UK government of Prime Minister John Major was likely to oppose it. After the Labour party won the UK's May 1997 election, Tony Blair became the Prime Minister. Then the Socialist Lionel Jospin became Prime Minister of France in June 1997, replacing a conservative government. These two Prime Ministers joined with Chancellor Helmut Kohl of Germany and other liberal and socialist leaders to advance the proposal of a general anti-discrimination provision in the Treaty.

After the successful conclusion of the Intergovernmental Conference in Amsterdam in July 1997, the Member States signed the Treaty of Amsterdam, which became effective May 1, 1999.<sup>11</sup> The new Treaty introduced Article 13 into the European Community Treaty (ECT), authorizing the Council "acting unanimously on a proposal from the Commission and after consulting the European Parliament [to] take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."<sup>12</sup>

The introduction of ECT Article 13 did not, however, ensure that the Council of Ministers would adopt effective legislative measures to prohibit various forms of

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France, which sends both its President and its Prime Minister to European Council meetings), together with the President of the Commission as a non-voting member. In contrast to the traditional political institutions of the EU, the role and operations of the European Council are still not well understood today. For a useful description, see Roger J. Goebel, *The European Council After the Treaty of Lisbon*, 34 *FORDHAM INT'L L.J.* 1251 (2011). Treaty on European Union, art. 15, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU], as amended by the Treaty of Lisbon, describes the European Council's basic role as defining the EU's "general political directions and priorities," and provides that it shall elect a President for one or two successive two and a half year terms. Prior to the Lisbon TEU, the Presidency of the European Council rotated among Member State governments on a semi-annual basis. For an authoritative description of the background, structure and most significant provisions of the Lisbon Treaty, see JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* (2010). For an overview, see DINAN, *supra* note 6, at 305–16.

For a description of the other E.U. political and judicial institutions, namely, the European Parliament, the Council of Ministers, the Commission, and the Court of Justice, see *THE INSTITUTIONS OF THE EUROPEAN UNION* (John Peterson & Michael Shackleton eds., 3rd ed. 2012); Edward & Lane, *supra* note 5, ch. 3, 5; TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* ch. 1, 2 (7th ed. 2010). More summary descriptions are in ROGER J. GOEBEL ET AL., *EUROPEAN UNION LAW* ch. 2 (4th ed. 2015) and ALAN DASHWOOD, ET AL., *WYATT & DASHWOOD'S EUROPEAN UNION LAW* ch. 3 (6th ed. 2011).

<sup>10</sup> *Conference of the Representatives of the Governments of the Member States, A General Outline for a Draft Revision of the Treaties*, REF CONF 2500/96 COR I (Dec. 5, 1996).

<sup>11</sup> The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam], signed Oct. 2, 1997, effective May 1, 1999, amended the Maastricht Treaty Establishing the European Community, Jul. 29, 1992, 1992 O.J. (C 191) [hereinafter ECT]. The Treaty of Amsterdam renumbered most of the ECT articles.

<sup>12</sup> ECT, art. 13(1). Article 13(2) authorized the Council of Ministers and the Parliament to adopt "incentive measures," through their now customary cooperative legislative process known as the "ordinary legislative procedure." In this complex legislative procedure, the Commission proposes an initial legislative text, which the Council and Parliament separately review (and usually amend), before ultimately jointly adopting the legislation. For a recent description of the "ordinary legislative procedure," see GOEBEL ET AL., *supra* note 9, at 160–62; HARTLEY, *supra* note 9, at 36–39.



discrimination, because the Council was obliged to act unanimously.<sup>13</sup> Accordingly, in July 2000 the Council adopted Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>14</sup> Action to combat discrimination in employment based on sex was essentially superfluous, in view of the beneficial impact of the well-known Council Directive 76/207 on equal treatment for men and women in employment and working conditions,<sup>15</sup> adopted on February 9, 1976. In contrast, only some Member States had legislation prohibiting discrimination based on “disability, age or sexual orientation,” so that Council unanimity on legislation with regard to them was by no means assured. The newly-installed Commission headed by President Romano Prodi (1999-2004) proposed in October 1999 legislation based on ECT Article 13,<sup>16</sup> together with an action program intended to supplement the legislation with ‘best practices,’ and then proposed a revised directive text on June 27, 2000.

Acting with surprising rapidity, on November 27, 2000 the Council managed to achieve unanimity to adopt Directive 2000/78 establishing a general framework for equal treatment in employment and occupation<sup>17</sup> to combat “discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.”<sup>18</sup> Immediately worth emphasis is that Council Directive 2000/78’s scope is limited to employment and occupation, in contrast to Council Directive 2000/43, which prohibits discrimination based on “racial or ethnic origin” whenever the EC Treaty is applicable (for example, whenever EC or EU rules apply in healthcare, education, or access to or supply of goods and services).

Since December 2, 2003, the end of the initial period within which the Member States were obligated to adopt legislation or other rules in order to implement Directive 2000/78, the Court of Justice has had occasion to issue many judgments interpreting and applying the Directive. In order to keep this Article within reasonable parameters, this Article will deal solely with judgments concerning discrimination based on age—by far the most numerous type and the subject of a substantial body of academic commentary.<sup>19</sup>

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<sup>13</sup> The requirement that the Council act unanimously certainly posed no barrier to measures to combat discrimination based on “racial or ethnic origin,” because all Member States already had constitutional provisions and/or legislation intended to achieve this.

<sup>14</sup> Council Directive 2000/43/EC, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 80) 22.

<sup>15</sup> Council Directive 76/207/EEC, On the Implementation of the Principle of Equal Treatment for Men and Women, 1976 O.J. (L 39) 40.

<sup>16</sup> *Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Certain Community Measures to Combat Discrimination*, COM (1999) 564 final (Nov. 25, 1999). The Commission issued a revised proposal for Council Directive 2000/78 on June 27, 2000. *Commission Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation*, COM (2000) 42 final (June 27, 2000).

<sup>17</sup> Council Directive 2000/78, *supra* note 4. P. WATSON, E.U. SOCIAL AND EMPLOYMENT LAW ch. 29 (2nd ed. 2014) provides a summary review of the Directive’s provisions.

<sup>18</sup> Council Directive 2000/78, *supra* note 4, art. 1.

<sup>19</sup> Helen Meehan, *Age Discrimination in the E.U. and the Framework Directive*, in *THE LAW ON AGE DISCRIMINATION IN THE E.U.* 9 (Malcolm Sargeant ed., 2008) [hereinafter Meehan, *Age Discrimination*] provides a valuable review of the Directive. The Directive’s implementation (and prior law) in Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, and the United Kingdom is discussed in other

One further introductory point: the Treaty of Amsterdam preceded the June 1999 decision of the European Council at Cologne<sup>20</sup> to call for the drafting of a human rights charter, as well as the subsequent October 1999 decision of the European Council at Tampere, Finland,<sup>21</sup> to authorize a special Convention to draft the Charter. The Convention was composed of representatives of the Member State governments, the Commission, the European Parliament, and national parliaments. The former President of Germany, Roman Herzog, served as its Chairman. The special Convention's drafting of the Charter of Fundamental Rights of the European Union<sup>22</sup> during 1999-2000 coincided with the Council of Ministers' consideration of Directive 2000/78.

Although the Charter achieved moral influence through its formal proclamation by the Presidents of the Parliament, Council, and Commission at Nice in December 2001, it did not have immediate legal force. Until the Lisbon Treaty on European Union (the Lisbon TEU) asserted in Article 6(1) that the Charter "shall have the same legal value as the Treaties,"<sup>23</sup> Court judgments interpreting Directive 2000/78 were not obligated to refer to the Charter, although they occasionally did so.

Since November 1, 2009, the effective date of the Lisbon TEU, Court judgments concerning Directive 2000/78 do sometimes refer to the Charter's Article 21 on Non-Discrimination, which sets out a long list of prohibited bases of discrimination.<sup>24</sup> However, the Charter's listing of "age" as a prohibited basis of discrimination does not appear to have had any decisive impact on the Court judgments, although it has buttressed the Court's conclusions in particular cases.<sup>25</sup> The Charter also contains

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chapters of THE LAW ON AGE DISCRIMINATION IN THE E.U. (Malcolm Sargeant ed., 2008). Valuable articles include: Elaine Dewhurst, *The Development of E.U. Case-Law on Age Discrimination on Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Seventy-four,'* 19 EUR. L. J. 517 (2013); Elaine 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 MKT. L. REV. 1333 (2013) [hereinafter Dewhurst, *Intergenerational Balance*]; Helen Meehan, *Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe*, 14 MAASTRICHT J. EUR. & COMP. L. 39 (2007); Elise Muir, *Of Ages In-and Edges of - E.U. Law*, 48 COMMON MKT. L. REV. 39 (2011); Dagmar Schiek, *Age Discrimination Before the ECJ - Conceptual and Theoretical Issues*, 48 COMMON MKT. L. REV. 777 (2011); Lisa Waddington, *Comment, Palacios de la Villa*, 45 COMMON MKT. L. REV. 895 (2008); Philippa Watson, *Equality Between Europe's Citizens: Where Does The Union Now Stand?*, 35 FORDHAM INT'L L.J. 1 (2012).

<sup>20</sup> The June 1999 European Council, chaired by Germany's Chancellor Gerhard Schroeder, specified that the Charter should consolidate the "fundamental rights applicable at the Union level." EUROPEAN COMMISSION, *Bulletin of the European Union*, No. 6/10, at 13 (1999).

<sup>21</sup> The October 1999 European Council, chaired by Prime Minister Paavo Lipponen of Finland, set the composition of the special drafting Convention. EUROPEAN COMMISSION, *Bulletin of the European Union*, No. 10/10, at 7 (1999).

<sup>22</sup> Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter Charter]. Gráinne de Burca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001) provides a valuable study of the drafting process. For a current, detailed examination of the Charter's role and its provisions, see THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., 2014).

<sup>23</sup> Treaty of Lisbon, art. 6(1).

<sup>24</sup> Charter, art. 21 on non-discrimination supplements the list of prohibited bases of discrimination in Directive 2000/78 (e.g., adding "colour, ethnic or social origin, genetic features, language, ... members of a national minority"), but does not add to the identification of "age" as a prohibited base of discrimination.

<sup>25</sup> See Charter, art. 21.

Article 25, The Rights of the Elderly, which states that the EU “respects the rights of the elderly to lead a life of dignity and independence,” but this has not appeared to influence any of the relevant Court judgments.<sup>26</sup>

Finally, it should be noted that the 2009 Treaty of Lisbon’s accessory Treaty on the Functioning of the European Union (TFEU)<sup>27</sup> has replaced ECT Article 13 with a new Article 19. TFEU Article 19 has retained ECT Article 13’s list of the types of discrimination prohibited. However, TFEU Article 19 has modified the mode of legislative action. The Council must continue to act unanimously, but since Nov. 1, 2009, the Parliament shares in the process of adopting legislation because it must provide its consent to any Council measure.<sup>28</sup> To date, TFEU Article 19 has not been employed to adopt any modification to Directive 2000/78.

### *B. The Operational Provisions of the Council Directive 2000/78*

The basic provisions of Council Directive 2000/78 are clearly based on analogous text in the well-known Council Directive 76/207 on equal treatment for men and women in employment and working conditions,<sup>29</sup> setting out provisions that were easily carried over from a sex-discrimination context to other bases of employment discrimination. However, experience since 1976, buttressed by relevant Court judgments, showed the need for the more precise text and supplementary provisions of Directive 2000/78. The Directive’s title, “a general framework for equal treatment in employment and occupation,” indicates that it is not intended to cover the field comprehensively, as some directives do, but is intended to provide the basic structure for Member State implementing legislation. The following description of the directive’s provisions concentrates on those relevant to discrimination based on age, rather than other factors.

As is customary, Directive 2000/78 commences with a list of thirty-seven recitals, which often provide the motivation for Directive provisions, or facilitate the interpretation of Directive articles.<sup>30</sup> Immediately worthy of note are Recital 6, which cites the 1989 European Community Charter of the Fundamental Social Rights of Workers as recognizing “the need to take appropriate action for the social and economic integration of elderly and disabled people,”<sup>31</sup> and Recital 8, which cites the December 1999 Helsinki European Council Employment Guidelines for 2000, which had stated “the need to pay particular attention to supporting ... older workers, in order to increase their participation in the labour force.”<sup>32</sup>

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<sup>26</sup> See Charter, art. 25.

<sup>27</sup> The TFEU, annexed to the Treaty of Lisbon, amends and replaces the Treaty of Amsterdam’s ECT.

<sup>28</sup> TFEU, art. 19(1). TFEU, art. 289(2) authorizes a “special legislative procedure” for the joint adoption of certain EU legislative acts by the Council and the Parliament, instead of the usual “ordinary legislative procedure.” Frequently a “special legislative procedure” set in a specific TFEU provision requires the Council to act unanimously. When the Parliament must give its consent, the Parliament may approve or veto the Council measure, but it cannot amend it.

<sup>29</sup> Council Directive 2000/43, *supra* note 14; Council Directive 76/207, *supra* note 15.

<sup>30</sup> Council Directive 2000/78, *supra* note 4.

<sup>31</sup> *Id.* rec. 6.

<sup>32</sup> *Id.* rec. 8. See Council Decision 2000/228/EC, On Guidelines for Member States’ Employment Policies for the Year 2000, 2000 O.J. (L 72) 15.

Note that in addition to this European Council recommendation, the Commission has frequently issued studies and recommendations urging action to promote employment for older workers.<sup>33</sup> Particularly pertinent is the Commission Communication, “Increasing the Employment of Older Workers and Delaying the Exit from the Labour Market,”<sup>34</sup> issued in 2004. The Commission essentially urged that government policies should encourage older workers to continue working, especially in view of longer life expectancies, in order to sustain economic growth, to provide tax revenues, and to reduce the burden on state old-age pensions.

Article 1 on the Directive’s purpose states that it is intended to establish a “general framework for combatting discrimination” on any of the bases of discrimination listed in ECT Article 13 (other than sex and racial or ethnic origin, already covered in Council Directives 76/207 and 2000/43).<sup>35</sup> Noteworthy is that both the title of Directive 2000/78 and its Article 1 indicate that its scope includes “employment and occupation.” The inclusion of “occupation” means that self-employed persons in professional or technical fields (e.g., doctors and other medical professionals, accountants, architects, engineers, lawyers) are encompassed by the Directive’s provisions.

Article 2 on the concept of discrimination has great importance. Article 2(a) prohibits direct discrimination (discrimination between persons in a comparable situation). This is supplemented by Article 2(b), which prohibits indirect discrimination, defined as “where an apparently neutral provision, criterion or practice” would place persons having a “particular age” (or other basis of discrimination) “at a particular disadvantage.”<sup>36</sup> The Directive’s definition of indirect discrimination is essentially based on Court judgments applying the concept in sex discrimination judgments.<sup>37</sup> Article 2(b) immediately enables an exception from prohibition for a “provision, criterion or practice... objectively justified by a legitimate aim” achieved in an “appropriate and necessary” fashion. Article 2(b)(5) specifically authorizes “measures [necessary] in a democratic society... for public security, for the maintenance of public order... [and] for the protection of health...”<sup>38</sup>

Article 3 indicates that the Directive encompasses “both the public and the private sectors,” so that both civil service and private sector employment are covered. Article 3 then provides a valuable list of conditions and circumstances covered by the Directive, several of which have already been the subject of recent Court judgments on the prohibition of age discrimination in specific professions or fields of employment, reviewed in Part III. The list includes “conditions for access to employment, to self-employment or to occupation,” as well as “employment and

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<sup>33</sup> For pertinent Commission studies and reports, see Meehan, *Age Discrimination*, *supra* note 19, at 15–17; Dewhurst, *Intergenerational Balance*, *supra* note 19, at 1338–42.

<sup>34</sup> *Commission Communication on Increasing the Employment of Older Workers and Delaying the Exit from the Labour Market*, COM (2004) 146 final (Mar. 3, 2004).

<sup>35</sup> Council Directive 2000/78, *supra* note 4, art. 1.

<sup>36</sup> *Id.* art. 2.

<sup>37</sup> See *Bilka Kaufhaus GmbH v. Von Hartz*, Case C-170/84, EU:C:1986:204; *Jenkins v. Kingsgate (Clothing Productions)*, Case C-96/80, EU:C:1981:80.

<sup>38</sup> Council Directive 2000/78, *supra* note 4, art. 2.

working conditions, including dismissals and pay.”<sup>39</sup>

Article 4 on occupational requirements is modeled on Article 1(2) of Directive 76/207 on equal treatment for men and women in employment. Article 4 authorizes States to set rules that treat employees differently based upon age when “the nature of the particular occupational activities concerned...constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”<sup>40</sup> Article 4(1) states categorically that “occupational requirements” which satisfy its terms “shall not constitute discrimination.”<sup>41</sup> The Court of Justice has had occasion to apply Article 4 in recent judgments examined in Part III. Relevant to Article 4 is Recital 17, which declares that the “Directive does not require the recruitment, promotion, or maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned.”<sup>42</sup>

Article 6 on the justification of differences in treatment on grounds of age is manifestly of crucial importance in our later examination of Court judgments in both Parts II and III. Essentially, Article 6 permits differences of treatment on grounds of age provided they are “objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives,” and are achieved by “appropriate and necessary means.”<sup>43</sup> Relevant to Article 6 is Recital 14, which states that the Directive is “without prejudice to national provisions laying down retirement ages.”<sup>44</sup> In addition, Recital 25 declares that “differences in treatment in connection with age may be justified” in particular on the basis of “legitimate employment policy, labor market and vocational training objects” that may vary in different Member States.<sup>45</sup>

The other Directive 2000/78 provisions can be reviewed summarily. Article 7 authorizes appropriate positive action (affirmative action), which thus far has not been relevant to any Court judgment.<sup>46</sup> Article 8 permits States to “introduce or maintain provisions more favorable” than those stated in the Directive.<sup>47</sup> Article 9 obligates States to ensure effective administrative and/or judicial recourse for victims of discrimination, and is supplemented by Article 17, which requires “effective, proportionate and dissuasive sanctions.”<sup>48</sup> Article 10 provides that when a court or

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<sup>39</sup> *Id.* art. 3(1). However, Article 3(3) specifically excludes the Directive’s coverage of “payments of any kind” in state social security or social protection schemes, and Article 3(4) excludes the armed forces from the prohibition of discrimination based on age. *Id.* arts. 3(3)–(4).

<sup>40</sup> *Id.* art. 4(1).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* art. 4 & rec. 17.

<sup>43</sup> *Id.* art. 6(1). The text continues with a description of certain permissible differences of treatment based on age that the Court of Justice has cited in recent judgments.

<sup>44</sup> *Id.* art. 6(1) & rec. 14.

<sup>45</sup> *Id.* rec. 25. This Recital became especially important in the initial Court judgments reviewed in Part II.

<sup>46</sup> *Id.* art. 7.

<sup>47</sup> *Id.* art. 8(1). Accordingly, States may go further in protecting persons from discrimination based on age than the Directive’s provisions specifically require.

<sup>48</sup> *Id.* arts. 9 & 17. The language traces back to the well-known precedent, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, Case C-14/83, EU:C:1984:153.

administrative authority concludes that there exists prima facie evidence of direct or indirect discrimination, the burden of proof is shifted to the defendant to rebut this.<sup>49</sup> Finally, Article 18 provides that Member States must implement the Directive by appropriate national rules by Dec. 2, 2003, but grants an option to States to extend the implementation period to Dec. 2, 2006.<sup>50</sup>

In July 2008, the Commission proposed a new directive that would expand, beyond the field of employment, the prohibition of discrimination based on religion or belief, disability, age, or sexual orientation.<sup>51</sup> The proposed directive's Article 3 on its scope indicates that the prohibition would then be effective in social security, health care, education, and the access to and supply of goods and other services, including housing, to the extent that EU law is applicable. The Council of Ministers and Parliament have reviewed the proposal for several years, pursuant to TFEU Article 19, which replaced ECT Article 13 on Nov. 1, 2009.<sup>52</sup>

On June 15, 2015, the Council of Ministers distributed to all Member States a substantially revised proposed directive text, but the Council noted that Germany opposed it as a violation of the principle of subsidiarity<sup>53</sup> and a failure to carry out a significant cost/benefit analysis. Most States supported the proposal in principle, but had some reservations. Final legislative action is not likely in the near future, if ever.

## II. DIRECTIVE 2000/78'S APPLICATION TO A STATE'S AUTHORIZATION OR ENDORSEMENT OF A STANDARD RETIREMENT AGE

By far the most important issue concerning possible discrimination in employment based on age is whether a Member State may authorize employers to oblige their employees in all forms of employment to retire at a specific age. Even though some employees opt to take early retirement, in the EU many employees prefer to work until the specific age set on a national basis for all employees.

National governments do not themselves oblige employees to retire at a given

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<sup>49</sup> Council Directive 2000/78, *supra* note 4, art. 10(1). The approach traces back to a leading precedent in sex-based discrimination in employment, *Bilka Kaufhaus*, EU:C:1986:204. The approach was later adopted legislatively in Council Directive 97/80/EC On the Burden of Proof in Cases of Discrimination Based on Sex, 1998 O.J. (L 14) 6, as amended in Council Directive 98/52/EC, On the Extension of Directive 97/80/EC On the Burden of Proof in Cases of Discrimination Based on Sex to the United Kingdom of Great Britain and Northern Ireland, 1998 O.J. (L 205) 66.

<sup>50</sup> Council Directive 2000/78, *supra* note 4, art. 18. (permitting States to delay the Directive's implementation with regard to age discrimination for a further three years). Belgium, Denmark, Germany, the Netherlands, and the U.K. all requested an implementation delay. *See* WATSON, *supra* note 17, at 420.

<sup>51</sup> *Commission 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 (July 2, 2008).

<sup>52</sup> *See supra* note 28.

<sup>53</sup> *Council Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age, or Sexual Orientation*, 9009/15 SOC 328 ANTIDISCRIM 4 JAI 336 MI 324 FREMP 112 (June 15, 2015). Parliament's opinion, endorsing a substantially revised Commission proposal, is at EUR. PARL. DOC. A6-0149/2009 (Mar. 20, 2009). The Treaty of Maastricht introduced the principle of subsidiarity in a new EEC Treaty Article 3b. The successor provision is the Treaty of Lisbon's TEU Article 5(3). For a brief description of the principle of subsidiarity, see GOEBEL ET AL., *supra* note 9, at 171–75.

age, but they may authorize employers to set a general standard retirement age, and authorize associations of employers and employees (commonly called the *social partners*) to set such a retirement age in collective national or sectoral agreements. The standard retirement age is customarily set at sixty-five, and occasionally at sixty-seven or sixty-eight.

Inevitably, the Court of Justice has been called upon to consider whether standard retirement for all employees at a stated age authorized by a Member State constituted direct discrimination based on age in violation of Article 2(2)(a) of Directive 2000/78, and, if so, whether the terms of Article 6(1) could enable governments to authorize employers, or collective bargaining agreements, to set a standard retirement age that is “objectively and reasonably justified by a legitimate aim.”<sup>54</sup>

*A. The Leading Precedent: Palacios de la Villa*<sup>55</sup>

1. Review of the Judgment

*Palacios de la Villa* is the Court of Justice’s principal precedent concerning the issue of whether a national compulsory retirement age is compatible with Directive 2000/78. The Court’s conclusions were in response to specific questions referred by a Spanish court in a preliminary reference proceeding pursuant to ECT Article 234 (now TFEU Article 267):<sup>56</sup> whether the plaintiff was the subject of unlawful discrimination based on age when he had been compulsorily retired at age sixty-five. The Spanish Court referring the questions manifestly had “serious doubts” concerning the compatibility of the 2005 law with the Directive.<sup>57</sup> Although essentially limited to the scope of the referred questions, the Court’s conclusions are authoritatively binding.

Because of the importance of this issue, presented for the first time to the Court

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<sup>54</sup> The Court of Justice’s first judgment concerning age-based discrimination in employment was *Mangold v. Helm*, Case C-144/04, EU:C:2005:709, published in December 2005. The Grand Chamber concluded that an employer’s use of rather unusual successive fixed-term employment contracts for older employees could violate the Council Directive 1999/70 on fixed term work, and would also violate Directive 2000/78. Because Germany had delayed the implementation of Directive 2000/78 to Dec. 2, 2006, pursuant to the Directive’s Article 18, the Directive was not yet applicable in Germany. Nonetheless, in the course of its analysis the Grand Chamber stated that “the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law,” an assertion that has obvious jurisprudential significance. *Mangold*, EU:C:2005:709, ¶ 75. Judgments discussed in this article have occasionally cited *Mangold*, but have analyzed the relevant legal issues through an application of the provisions of Directive 2000/78, not in terms of any “general principle.” For academic commentary critical of *Mangold*, see Waddington, *supra* note 19, at 904; see also *Editorial Comments*, 45 COMMON MKT. L. REV. 1571, 1575 (2008).

<sup>55</sup> *Palacios de la Villa v. Cortefiel Servicios*, Case C-411/05, EU:C:2007:604. *Palacios de la Villa* has become the Court’s leading precedent, not *Mangold*. Advocate General Mazak vigorously rejected the *Mangold* judgment’s “general principle” approach as unjustified, arguing that the provisions of Directive 2000/78 should be the source of the prohibition of age-based discrimination in employment. See Opinion of Advocate General Mazak, *Palacios de la Villa v. Cortefiel Servicios*, Case C-411/05, EU:C:2007:106, ¶¶ 79–99. For a useful analysis of the judgment and Advocate General Mazak’s Opinion, see the case comment by Prof. Lisa Waddington, *supra* note 19.

<sup>56</sup> For a description of the nature and impact of preliminary reference proceedings, always the principal source of Court judgments, see GOEBEL ET AL., *supra* note 9, ch. 3; see also A. ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE, ch. 4 (2nd ed. 2006); HARTLEY, *supra* note 9, ch. 9.

<sup>57</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 33.

of Justice, a Grand Chamber provided the preliminary reference ruling. Since February 1, 2003, when the Treaty of Nice entered into force, the Court of Justice has been authorized to issue important judgments by a Grand Chamber,<sup>58</sup> currently composed of fifteen Judges. Although all judgments of the Court of Justice have equal authority in principle, the examination of novel issues by a Grand Chamber obviously enables the deliberative participation of more Judges than in a usual five- or three-Judge Chamber. As is frequently the case when the Court of Justice must examine a highly significant, novel issue, the Court received valuable assistance through the preliminary Opinion of an Advocate General.<sup>59</sup> The Court's October 16, 2007 judgment in *Palacios de la Villa* benefitted from the views of Advocate General Jan Mazak in his Opinion.<sup>60</sup>

Cortefiel, *Palacios de la Villa*'s employer, had retired him at age sixty-five based on a clause in an applicable textile trade collective agreement. The 2005 Spanish law<sup>61</sup> authorized collective agreements to set a retirement age "consistent with employment policy [such as] increased stability in employment, ...the recruitment of new workers," and so on.<sup>62</sup> The referring court noted as a relevant factor that Spain's national social security system permitted *Palacios de la Villa* to draw a retirement pension at the age of sixty-five, set at 100% of his contribution base.<sup>63</sup>

The Grand Chamber held that the Spanish law, when properly interpreted, did not violate Directive 2000/78. Because national standard retirement provisions impact "employment and working conditions, including dismissals," which the Directive expressly includes within its scope under Article 3(1)(c), the Court concluded that judicial review was warranted,<sup>64</sup> rejecting the contrary view of Advocate General Mazak.

The Grand Chamber held easily that obliging an employee to retire only because

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<sup>58</sup> The Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1, effective February 1, 2003, amended ECT, art. 221(now replaced by TFEU, art. 251) to authorize the Court of Justice to employ a Grand Chamber, instead of a plenary session of all Judges, to decide the more important cases. This was motivated by the pending increase in Member States (and hence Judges) from fifteen to twenty-five, due to the accession of the Central European nations in 2004, which would make the taking of decisions by the entire Court cumbersome. The Grand Chamber initially was composed of eleven Judges, later raised to thirteen, and presently fifteen. The Grand Chamber currently decides about 10% of the Court's docket of cases, while five Judge Chambers decide over 50%, and three Judge Chambers decide the remainder.

<sup>59</sup> N. BURROWS & R. GREAVES, *THE ADVOCATE GENERAL AND EC LAW* (2007) (examining the status and role of Advocates General, and their influence on the Court's judgments and doctrinal development). As Professor Anthony Arnall has observed, "it is hard to gauge empirically the influence of the Advocate General on the development of the case law," due to the secrecy of Court deliberations, and the fact that a Court judgment sometimes parallels and sometimes disagrees with the views of the Advocate General. ARNULL, *supra* note 56, at 15. The Court's modern practice of citing Advocate General Opinions frequently, as well as the published views of former Judges, makes the utility of these Opinions evident. *Id.* See also BURROWS & GREAVES, *supra* note 59, at 30.

<sup>60</sup> Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106.

<sup>61</sup> The former 1980 Spanish law had permitted employers to set sixty-nine as a standard retirement age, but this was repealed in 2001.

<sup>62</sup> Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106, ¶ 16.

<sup>63</sup> *Id.* ¶ 24.

<sup>64</sup> *Id.* ¶¶ 44–47. In the view of Advocate General Mazak, Recital 14 foreclosed any judicial review of a "national provision providing for the setting of a compulsory retirement age." *Id.* ¶¶ 63–67 (quoting him at ¶ 67).



the employee reaches a standard retirement age constituted direct discrimination in violation of Article 2(2)(a).<sup>65</sup> Accordingly, the crucial issue became whether the direct discrimination could be “objectively and reasonably justified by a legitimate aim” under the Directive’s Article 6(1).<sup>66</sup>

Because the 2005 law authorized collective agreements to set a specific standard retirement age, but did not require the agreements to specify any social or employment policy aim that would justify the retirement age, the referring court questioned whether the Spanish law complied with the Directive’s requirement of a proper justification. Absent a proper justification, the compulsory retirement could be considered arbitrary. How, then, could the Court determine what policy motives might justify the 2005 Spanish law? Following the views of Advocate General Mazak,<sup>67</sup> the Grand Chamber concluded that “the general context” of the law made up for its “lack of precision, and enabled “the underlying aim . . . to be identified for [its] judicial review.”<sup>68</sup>

The Grand Chamber found that Spain’s national policy, urged by the *social partners* (that is, bodies representing the employers and the employees), was to “promote better access to employment, by means of better distribution of work between the generations.”<sup>69</sup> The Court cited Advocate General Mazak, who coined the phrase, “a policy promoting inter-generational employment.”<sup>70</sup> Tracing the origin of Spain’s 2005 law back to earlier 1980 legislation and to a 2004 Declaration for Social Dialogue signed by the government and by employer and union organizations, the Grand Chamber held that the law’s setting of a standard retirement age was fundamentally intended to “create opportunities in the labour market” for persons seeking employment, and to enable “the recruitment of new workers.”<sup>71</sup> Although rather vague, this certainly fell within the “employment policy and labour market” justification for age discrimination under Article 6(1).<sup>72</sup> In effect, the Court said that if a State considered it necessary to compel the retirement of older employees solely to enable access to employment positions for young people, this constituted a justifiable employment policy.

This did not end the judgment, because Article 6(1) also requires that when a State measure is intended to achieve a policy goal that justifies age-based discrimination, the measure must be “appropriate and necessary.”<sup>73</sup> The Court’s examination of this issue has provided crucial doctrinal conclusions followed in later judgments. The Grand Chamber decided that the 2005 Spanish law satisfied this proportionality review, because the Member States and the “social partners at national level enjoy broad discretion” in determining the measures intended to implement social and employment policy.<sup>74</sup> In support of this conclusion, the Court cited Recital 25’s

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<sup>65</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 51.

<sup>66</sup> Council Directive 2000/78, *supra* note 4, art. 6(1).

<sup>67</sup> Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106, ¶ 72.

<sup>68</sup> *Palacios de la Villa*, EU:C:2007:604, ¶¶ 56–57.

<sup>69</sup> *Id.* ¶ 53.

<sup>70</sup> Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106, ¶ 71.

<sup>71</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 60.

<sup>72</sup> *Id.* ¶¶ 63–66.

<sup>73</sup> Council Directive 2000/78, *supra* note 4, art. 6(1).

<sup>74</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 68. *See also* ¶ 74; Op. Advoc. Gen., *Palacios de la Villa*,

statement that “specific provisions...may vary in accordance with the situation in Member States.”<sup>75</sup> In crucial language, the Court elaborated on Recital 25, holding that “political, economic, social, demographic, and/or budgetary considerations” might lead to different retirement ages in different States.<sup>76</sup> Moreover, the Court noted that national provisions might evolve over time to adapt to “changing circumstances in the employment situation.”<sup>77</sup>

The Court’s ultimate conclusion was that “[i]t does not appear unreasonable for the authorities of a Member State” to consider a standard compulsory retirement age to be “appropriate and necessary” to further “the promotion of full employment.”<sup>78</sup> The Court ended its proportionality review with a significant comment: “the relevant legislation is not based only on a specific age,” but also takes account of the fact that “the [retired employees] are entitled to financial compensation by way of a retirement pension ... the level of which cannot be regarded as unreasonable.”<sup>79</sup> As noted above, the relevant collective agreement set the standard retirement age at sixty-five, identical with the age at which a retired employee could receive a full state retirement pension.

The judgment in *Palacios de la Villa* is unquestionably the most significant precedent in the field of age discrimination in employment. The Grand Chamber accepted in principle that Member States could authorize employers and social partners to set standard retirement ages, and then enunciated the key standards for reviewing their justification pursuant to Article 6(1) of Directive 2000/78. Unquestionably, a crucial motive for this conclusion was the Court’s view that State governments should be entitled to “broad discretion” in determining specific measures in the fields of social and employment policy, with only limited judicial review.

## 2. Reflections on *Palacios de la Villa*

Whether governments could authorize or endorse standard retirement ages for all forms of employment despite the prohibition of discrimination based on age in Directive 2000/78 was a novel topic for the Court of Justice. It is not surprising that the Court would have occasion to examine whether a government’s endorsement of a compulsory retirement age was compatible with Directive 2000/78, because several States had rules that either endorsed or authorized employers to retire employees at a set age. Naturally, some employees would want to challenge their compulsory retirement. A national court confronted with the issue would be quite likely to seek guidance from the Court of Justice in a preliminary reference proceeding.

The Court of Justice’s responses to a national court’s questions are directly intended to provide guidance to that court’s resolution of the issues before it. Nonetheless the Court is always aware that its replies will provide over time authoritative precedents in other national proceedings. Commentators must exercise considerable caution when attempting to derive authoritative doctrinal conclusions

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EU:C:2007:106, ¶¶ 73–76. He emphasized at ¶ 74 that the Court “should not substitute its own assessment” for that adopted by the national authorities or social partners.

<sup>75</sup> Council Directive 2000/78, *supra* note 4, rec. 25.

<sup>76</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 69.

<sup>77</sup> *Id.* ¶ 70.

<sup>78</sup> *Id.* ¶ 72.

<sup>79</sup> *Id.* ¶¶ 73, 77.

from specific preliminary reference judgments.

The Grand Chamber judgment in *Palacios de la Villa* has provided a number of authoritative conclusions with regard to national rules authorizing or endorsing compulsory retirement. The Court's first significant doctrinal conclusion is that Directive 2000/78's Recital 14 does not foreclose judicial review of a national rule establishing or endorsing a standard retirement age enabling employers to end a worker's employment at that age. The Grand Chamber specifically held this in *Palacios de la Villa*,<sup>80</sup> rejecting the contrary view of Advocate General Mazak, and the later judgments have followed this determination. This holding has the consequence that national rules establishing or endorsing a standard retirement age constitute direct discrimination based on age.

Second, the Grand Chamber held in *Palacios de la Villa* that Directive 2000/78's requirement in Article 6(1) that State rules constituting direct discrimination must be "objectively and reasonably justified by a legitimate [employment policy and labour market] aim" did not mean that the State's justifications had to be set forth expressly, but could be derived from the legislative background.<sup>81</sup> This appears to be pragmatically sensible, inasmuch as the text of legislation concerning a standard retirement age frequently provides little or no indication of the precise motive for the legislation, referring only vaguely to social policy. The Grand Chamber was able to trace the origin of the 2005 Spanish law back to the 2004 Declaration for Social Dialogue, and thereby ascertain an adequate basis for the social policy intended to justify the law.

A crucial substantive feature of *Palacios de la Villa* is its manifestation of the Court's deference toward the "broad discretion" permitted to national governments in setting national social and employment policy.<sup>82</sup> This is not surprising. Directive 2000/78's title states that it is a "General Framework." The Court has traditionally been deferential toward Member States in their implementation of directives which by their nature are intended to be frameworks for national rules. This is bound to be the case especially when the Court first begins to interpret and apply a directive in a new field of EU law.

Moreover, the Court of Justice is not politically insensitive. If, in *Palacios de la Villa*, the Court had invalidated Spain's standard retirement age when it had been endorsed in a collective agreement by national associations representing both employers and employees, the Court judgment would have caused grave problems for the Spanish government. It is worth noting that Advocate General Mazak observed that the Court of Justice should not "substitute its own assessment" for that of a government or of the social partners in determining social and employment policy, and that "only a manifestly disproportionate national measure should be censured."<sup>83</sup> When the national government effectively delegates the determination of a standard retirement age to the social partners (national bodies representing employers and employees), as Spain did in *Palacios de la Villa*, the Court's deference is undoubtedly enhanced. Presumably the Court expects national associations representing employees

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<sup>80</sup> *Id.* ¶ 44.

<sup>81</sup> *Id.* ¶ 57.

<sup>82</sup> *Id.* ¶¶ 68–69.

<sup>83</sup> Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106, ¶ 72.

to negotiate effectively and protect the interests of employees adequately.

In its application of Directive 2000/78's Article 6(1) on justification, the Court's ultimate conclusion was that Spain could authorize its *social partners* to set a compulsory retirement age in order to achieve an "intergenerational balance," obliging some older workers to retire in order to open employment access for younger people. The justification for an "inter-generational balance" policy is quite strong when the rate of unemployment among younger workers is far higher than the average unemployment rate, as frequently happens in recessions. This was the case in 2007 in Spain. Eurostat statistics indicate that the unemployment rate of persons under twenty-five was eighteen percent, more than double the general unemployment rate.<sup>84</sup> Because later judgments have frequently cited, and elaborated upon, this policy, we examine this employment policy view frequently throughout this Article.

The final part of the Grand Chamber's judgment was devoted to an examination of the proportionality of compulsory retirement at a stated age as Spain's chosen measure to achieve its employment policy goals. In this context, the Grand Chamber in *Palacios de la Villa* emphasized the national government's "broad discretion" in setting policy in the employment sector, which is obviously a very sensitive one. The Court stated that the government's discretion is State-specific, and might well differ among States, due to the great variety of "political, economic, social, demographic, and/or budgetary considerations."<sup>85</sup> Such generous Court deference towards different State policies can be considered to be pragmatically prudent, because it permits flexibility and variety in State approaches. However, it does create the risk that in some cases the Court might accept Member State policies that are based on generalizations, and even stereotypes, rather than on factually-founded assessments. Professor Elaine Dewhurst has criticized the Court judgments as rarely requiring more than "meagre evidence" from Member State governments to justify compulsory retirement ages.<sup>86</sup>

It is worth noting that the Grand Chamber in *Palacios de la Villa* concluded that "it does not appear unreasonable" for a Member State to endorse a compulsory retirement age within its discretionary determination of employment policy.<sup>87</sup> This level of judicial deference is decidedly permissive—certainly not an illustration of the strict scrutiny often exercised by the Court in gender discrimination judgments.<sup>88</sup>

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<sup>84</sup> Eurostat, *Unemployment by sex and age - monthly average* (Nov. 2016), [appsso.eurostat.ec.europa.eu/nui/show.do?dataset=une\\_rt\\_m&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=une_rt_m&lang=en). The employment situation in many EU States has since deteriorated. Eurostat statistics for 2015 indicate that the average unemployment rate for all 28 Member States was 9.4%, but much higher (20.3%) for young people aged fifteen to twenty-four. Spain's statistics were among the worst: its average unemployment rate was twenty-two percent, and its youth unemployment rate was forty-eight percent.

<sup>85</sup> *Palacios de la Villa*, EU:C:2007:604, ¶¶ 68–69. See also Op. Advoc. Gen., *Palacios de la Villa*, EU:C:2007:106, ¶ 73.

<sup>86</sup> Dewhurst, *supra* note 19, at 532.

<sup>87</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 72.

<sup>88</sup> See, e.g., *Kreil v. Germany*, Case C-285/98, EU:C:2000:2 (Germany cannot totally prohibit women from serving in German army posts that involve the use of arms); *Ministere Public v. Stoeckel*, Case C-345/89, EU:C:1991:324 (the French Labor Code cannot totally prohibit the employment of women in work at night time).

### *B. Age Concern England*<sup>89</sup>

#### 1. Review of the Judgment and Its Stimulus for the Subsequent Elimination of a Standard Retirement Age in the U.K.

In *Age Concern England* (2009), the Court's Third Chamber of five judges replied to a preliminary reference concerning a challenge to the United Kingdom's Employment Equality (Age) Regulations 2006. The Regulations expressly authorized employers to retire employees at age sixty-five (or earlier, if the employer had set a "normal retirement age"), and also authorized employers to refuse employment to persons over sixty-five.<sup>90</sup> Naturally, the Third Chamber's conclusions treated the Grand Chamber's 2007 judgment in *Palacios de la Villa* as a binding precedent, but they provided some supplementary observations, which have proved to be quite influential. As in *Palacios de la Villa*, Advocate General Jan Mazak's Opinion clearly helped the Third Chamber reach its conclusions.

The Third Chamber held easily that the 2006 Regulation's provisions constituted direct discrimination based on age.<sup>91</sup> Whether the Regulations could be objectively justified in terms of the criteria set in the Directive's Article 6(1) became then the only issue. Although the Court followed *Palacios* and customary case law in holding that each Member State has "a broad discretion" in implementing a directive, it stated a crucial caveat: the national rules must be "sufficiently precise and clear and the persons concerned [must be able to] ascertain the full extent of their rights and...rely upon them before the national courts."<sup>92</sup> Significantly, even though the Third Chamber recognized that the referring court has the responsibility for ultimately determining whether the U.K. Regulations can be objectively justified pursuant to Article 6(1), it decided to offer some "clarification designed to give the national court guidance."<sup>93</sup>

The Third Chamber informed the U.K. court that although Member States "enjoy broad discretion" in implementing their social policy, Member States cannot "[frustrate] the implementation of the principle of non-discrimination on grounds of age.... [M]ere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough."<sup>94</sup> The Court finally declared that a State had "the burden of establishing to a high standard of proof the legitimacy of the [social policy] aim relied on as a justification."<sup>95</sup> Thus, without challenging the Grand Chamber's basic conclusions in *Palacios de la Villa*, the Third Chamber's "clarification" effectively pressed the referring court to exercise *strict scrutiny* in evaluating whether the U.K.'s endorsement

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<sup>89</sup> R (Age Concern England) v. Secretary of State for Business, Enterprise, and Regulatory Reform, Case C-388/07, EU:C:2009:128 [hereinafter *Age Concern England*].

<sup>90</sup> Opinion of Advocate General Mazak, R (Age Concern England) v. Secretary of State for Business, Enterprise, and Regulatory Reform, Case C-388/07, EU:C:2008:518, ¶ 13.

<sup>91</sup> *Age Concern England*, EU:C:2009:128, ¶¶ 33–34.

<sup>92</sup> *Id.* ¶¶ 41–42. Advocate General Mazak reached the same conclusions at greater length in ¶¶ 44–51 of his Opinion. Op. Advoc. Gen., *Age Concern England*, EU:C:2008:518, ¶¶ 44–51.

<sup>93</sup> *Age Concern England*, EU:C:2009:128, ¶ 48.

<sup>94</sup> *Id.* ¶ 51. The Third Chamber cited *Regina v. Secretary of State for Employment*, Case C-167/97, EU:C:1999:60 (a judgment in the field of sex-based employment discrimination).

<sup>95</sup> *Age Concern England*, EU:C:2009:128, ¶ 67.

of a standard retirement age could be considered to be justifiable and appropriate.

The Third Chamber's admonitions in its "clarification" certainly suggested that the referring national court, the High Court, would have an arduous task in examining complex employment policy factors. Justice Blake, however, delivered his judgment rapidly in *The Queen on the Application of Age U.K.* on Sept. 25, 2009,<sup>96</sup> only six months after the Court of Justice judgment. His detailed judgment followed hearings which presented the views of the plaintiff charitable association that had challenged the U.K.'s 2006 Regulations, those of the U.K. Department of Trade and Industry, those of employer and employee organizations, and other interested parties. He followed the guidelines provided by the Court of Justice carefully, observing that the Court grants "a wide margin of appreciation to national authorities [because they are] closest to vital forces and particular social issues."<sup>97</sup>

After a detailed review of the testimony and studies, Justice Blake concluded that the U.K. government's adoption of the 2006 regulations was properly based upon sufficient social policy concerns for the protection of the labor market, and the interests of both employers and employees.<sup>98</sup> Notable is his comment that there exists "an acute policy tension," because "the government's interest in promoting employment, . . . [in obtaining] revenues from people [employed] after 65, reducing the burden on the state pension, and ensuring that as people live longer they work longer [with] socially and economically productive lives," must be balanced by "the need for reassurance, clarity and flexibility to reduce the social cost of regulations, . . . and ensure availability of jobs . . . to workers of different ages."<sup>99</sup> He ultimately concluded that the U.K.'s "concerns as to the integrity of the labour market and its short-term competitiveness are social policy aims of a general public interest," and accordingly did indeed justify the 2006 Regulations.<sup>100</sup> However, even though he reached this crucial conclusion, he raised a serious question concerning the proportionality of the U.K.'s choice of sixty-five as its standard retirement age.

Justice Blake expressed the view that there were "powerful reasons" for raising the standard retirement age in view of longer life expectancies and the government's gradual increase of the age for receipt of state old age pensions up to sixty-eight.<sup>101</sup> He noted that seven other Member States (Austria, Denmark, Ireland, Italy, Luxembourg, the Netherlands and Poland, as well as the European commission itself) also set sixty-five as the standard retirement age, that Sweden, Finland and Portugal used sixty-seven, sixty-eight, and seventy respectively, and that six others had no standard retirement age.<sup>102</sup> Ultimately, he accepted provisionally the U.K. government's setting of the standard retirement age at sixty-five as proportionate only

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<sup>96</sup> *R (on the Application of Age U.K.) v. Secretary of State for Business, Innovation & Skills*, [2009] EWHC 2236 (Admin). For a review of the U.K.'s 2006 Regulations, and the U.K. government's policy views leading to the regulations, see M. Sargeant, *United Kingdom*, in *THE LAW ON AGE DISCRIMINATION IN THE E.U.* (Malcolm Sargeant ed., 2008).

<sup>97</sup> *On the Application of Age U.K.*, [2009] EWHC 2236 (Admin), ¶ 36.

<sup>98</sup> *Id.* ¶ 90.

<sup>99</sup> *Id.* ¶ 95.

<sup>100</sup> *Id.* ¶ 105.

<sup>101</sup> *Id.* ¶¶ 117–118.

<sup>102</sup> *Id.* ¶ 125 (based upon the information available to Justice Blake).

because the government intended a serious review in 2010 of the currently appropriate standard retirement age, with a good prospect of raising the age.<sup>103</sup>

In 2010, the newly-elected Conservative government of Prime Minister David Cameron reviewed the standard retirement age of sixty-five as set in the 2006 Regulations, and decided to eliminate any default retirement age. The U.K.'s Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011<sup>104</sup> became effective on October 1, 2011. U.K. employers may no longer rely on the 2006 Regulations to set a compulsory standard retirement age. Employers may, however, continue to use sixty-five, or the age for receipt of state old-age pensions, to commence the granting of insurance or financial benefits (presumably an employer pension) to an employee.<sup>105</sup>

## 2. Reflections on *Age Concern England* and the U.K.'s Elimination of a Standard Retirement Age

As we have observed, in *Palacios de la Villa* the Grand Chamber took a highly deferential attitude toward a Member State's rules authorizing social partners and/or employers to set a standard retirement age. Although necessarily agreeing that Member States should be considered to have "broad discretion" in establishing or endorsing a standard retirement age, the Third Chamber in *Age Concern England* prudently observed that Member States cannot rely on "mere generalizations" when adopting employment policy measures, and had to meet a high burden of proof when attempting to justify discrimination in employment based on age.

The Third Chamber's helpful "clarification" can be applauded as urging a measure of stricter scrutiny in the examination of any policy justification alleged to support a compulsory retirement age. Although the Grand Chamber's judgment in *Palacios de la Villa* must certainly be regarded as the most authoritative precedent, the Court's conclusion that national governments should enjoy a "broad discretion" in adopting measures in the sector of employment may well be too generous. Accordingly, it may be hoped that in the future when the Court of Justice or national courts have occasion to examine the justification for any government-endorsed standard retirement age, they will be influenced by the cautious "clarification" of the Third Chamber and exercise a degree of strict scrutiny.

Justice Blake of the U.K. High Court took careful note of the Third Chamber's admonitions both in his thorough examination of the views of the government, employers, and employees, and in his thoughtful appraisal of the U.K.'s standard retirement age. He is to be praised for his pragmatic conclusion that the U.K.'s then-standard retirement age of sixty-five was no longer appropriate in view of longer life expectancies and the government's gradual increase of the initial age for receipt of the state old-age pension. His judgment provided the impetus for the review of the issue by Prime Minister Cameron's government and its somewhat surprising total

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<sup>103</sup> *Id.* ¶¶ 126–130.

<sup>104</sup> Employment Equality (Repeal of Retirement Age Provisions) Regulations, 2011, S.I. 2011/1069 (U.K.).

<sup>105</sup> *Id.* art. 2(4).

elimination of any standard retirement age. The U.K. government's action may in turn influence other governments in the future, especially in the light of the demographic developments discussed below in Part II.E.

*C. Later Judgments: Rosenblatt<sup>106</sup> and Hornfeldt<sup>107</sup>*

Subsequently, in 2010, the Grand Chamber judgment in *Rosenblatt* responded to questions referred by the Hamburg Labor Court (Arbeitsgericht) that essentially inquired whether a collective agreement in a specific sector permitting employers to end an employment contract at sixty-five could be justified under the Directive's Article 6(1). The referred questions raised several issues that had not been addressed in *Palacios de la Villa*: notably, whether compulsory retirement can be considered justifiable even when it results in severe financial hardship for some employees. The Grand Chamber's judgment in *Rosenblatt* naturally applied on an analogous basis the doctrinal approach taken in *Palacios de la Villa*, but it added several new judicial conclusions. The Court had the benefit of a detailed Opinion provided by Advocate General Verica Trstenjak.

The 1987 collective agreement for employees in the building cleaning sector in Germany provided that employment ended at sixty-five, unless specifically provided otherwise. The Labor Court's referred questions clearly indicated that the relevant collective agreement conformed to an "established practice in place for several decades," even though this took no account of "the economic, social and demographic situation and the situation actually prevailing on the employment market."<sup>108</sup> In 2008, Mrs. Rosenblatt, the plaintiff, was retired by her employer when she reached the age of sixty-five. She then challenged the 1987 collective agreement as a violation of the Directive. A 2006 German law intended to carry out Directive 2000/78 essentially replicated the Directive's provisions, specifically permitting age discrimination compatible with Article 6(1).<sup>109</sup> Although entitled to a state old-age pension, her pension only amounted to a relatively modest €253 monthly—about five-sixths of her former monthly salary.<sup>110</sup> The referring court expressed its concern that "the statutory old age pension [was] not sufficient to meet the basic need of workers" in a poorly-paid sector, such as workers in the commercial cleaning sector.<sup>111</sup> Since her retirement was based solely on age, clearly direct discrimination, the issue became whether it could be justified under Article 6(1). Citing *Palacios de la Villa* and *Age Concern England*, the Grand Chamber emphasized the broad discretion enjoyed by a Member State and the social partners in a specific sector when carrying out the Directive, observing that this enabled them to make policy determinations flexibly, taking into account "the overall situation in the labour market" and "the specific features of [particular] jobs."<sup>112</sup> The Grand Chamber particularly noted the German

<sup>106</sup> *Rosenblatt v. Oellerking Gebäudereinigungsges MbH*, Case C-45/09, EU:C:2010:601.

<sup>107</sup> *Hornfeldt v. Posten Meddelande*, Case C-141/11, EU:C:2012:421.

<sup>108</sup> *Rosenblatt*, EU:C:2010:601, ¶ 28.

<sup>109</sup> *Id.* ¶¶ 8–11.

<sup>110</sup> *Id.* ¶¶ 20–26.

<sup>111</sup> *Id.* ¶ 71.

<sup>112</sup> *Id.* ¶¶ 41, 49. See also Opinion of Advocate General Trstenjak, *Rosenblatt v. Oellerking Gebäudereinigungsges MbH*, Case C-45/09, EU:C:2010:227, ¶¶ 87–89. The Advocate General noted that



Government's contention that the 1987 collective agreement reflected a "political and social consensus which has endured for many years in Germany."<sup>113</sup> The motivating policy was one promoting inter-generational employment, "based primarily on the notion of sharing employment between the generations," and the facilitation of the employment of younger workers, especially during periods of chronic employment.<sup>114</sup> The Court further noted that Germany's 2006 law took into consideration the fact that retired employees would receive "replacement income" through the state pension system.<sup>115</sup> The Grand Chamber's ultimate conclusion reinforced that in *Palacios de la Villa*: the "automatic termination of employment contracts" at a specific age could be considered a long-standing "feature of employment law in many Member States based on the balance . . . between political, economic, social, demographic and / or budgetary considerations . . ."<sup>116</sup> Accordingly, the compulsory retirement provision could be considered justified, presumably determined in a highly complex governmental political process.<sup>117</sup> After determining whether a law or collective agreement can be evaluated as "justified" in terms of Article 6(1), the Court invariably applies the principle of proportionality to determine whether its provisions are appropriate and necessary in the specific context of the referred questions. The Grand Chamber emphasized that the retired employees would receive "replacement income in the form of a retirement pension,"<sup>118</sup> a crucial factor cited in *Palacios de la Villa*. The Court also emphasized that the compulsory retirement was based upon a provision in a Collective Agreement concluded by the "social partners," and not based upon a unilateral decision of an employer.<sup>119</sup> Ultimately, the Grand Chamber concluded, as it had in *Palacios de la Villa*, that "it does not appear unreasonable" for the German government to consider that the compulsory retirement provision constituted an appropriate measure within its national employment policy.<sup>120</sup>

The Grand Chamber then briefly provided its views in response to other related questions referred, essentially repeating the analysis summarized above.<sup>121</sup> In this context the Court dealt with the key new issue that differentiates *Rosenbladt* from *Palacios de la Villa*. The referring court had expressed its serious concern about the impact of automatic termination of employment upon persons who might, like Mrs. Rosenbladt, suffer significant financial hardship.<sup>122</sup> The Grand Chamber emphasized the Member State's need to balance individual versus societal interests, claiming

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when a Member State entrusted social partners with the power to set a standard retirement age, the government must ensure that the age fulfills the conditions of the Directive's Article 7(1), and is specific to the sector for which the social partners are competent. *Id.* ¶¶ 99, 101.

<sup>113</sup> *Rosenbladt*, EU:C:2010:601, ¶ 43. The Court had just noted the referring court's observation that collective agreement clauses providing for compulsory retirement at the retirement age had been used for decades, without regard to "social and demographic conditions." *Id.* ¶ 42.

<sup>114</sup> *Id.* ¶ 43.

<sup>115</sup> *Id.* ¶¶ 43, 48. The Grand Chamber also cited the German Government's view that an automatic retirement at age sixty-five avoided the risk of the "humiliation" of employees who are terminated because they are "no longer capable of working." *Id.* ¶ 43.

<sup>116</sup> *Id.* ¶ 44.

<sup>117</sup> *Id.* ¶¶ 45, 53.

<sup>118</sup> *Id.* ¶ 48.

<sup>119</sup> *Rosenbladt*, EU:C:2010:601, ¶ 49.

<sup>120</sup> *Id.* ¶ 51.

<sup>121</sup> *Id.* ¶¶ 54–69.

<sup>122</sup> *Id.* ¶ 71.

“account must be taken both of the hardship [that automatic termination of employment contracts may cause] the persons concerned and of the benefits derived from it by society in general . . .”<sup>123</sup> In this context, the Grand Chamber did not address the issue of particularly serious financial hardship to individual workers. The Court did observe that the termination of the employment contract did not in itself constitute “a mandatory scheme of automatic retirement” and did not compel Mrs. Rosenblatt to “withdraw definitively from the labour market.”<sup>124</sup> She could continue to seek employment on other terms from her employer or other possible employers, and any denial of employment could not be based on her age.<sup>125</sup>

When the Grand Chamber refrained from considering the financial hardship circumstances of individual employees, it may have been influenced by Advocate General Trstenjak, who took the view that the Court’s review of the standard retirement age set by a State or its social partners should not be affected by the unfortunate circumstances of individual workers.<sup>126</sup>

The final directly relevant judgment is *Hornfeldt v. Posten Meddelande*,<sup>127</sup> the Court’s Second Chamber reply in 2012 to a preliminary reference from a Swedish court inquiring about the compatibility of a 2008 Swedish Law with Directive 2000/78. The 2008 Law, intended to implement the Directive, authorized employers to set a standard retirement age of sixty-seven, but not less than sixty-seven. The Swedish court noted that Sweden’s prior standard retirement age of sixty-five had been raised to sixty-seven in 1991. Because Hornfeldt, the plaintiff in the Swedish proceedings, had only worked part-time for the Swedish postal service from 1989 to 2009, his retirement pension, financed by contributions during employment, was relatively modest when he was retired in May 2009 on reaching the age of sixty-seven.

The Swedish court inquired whether the 2008 law’s failure to provide a precise “legitimate aim” for its provisions violated Article 6(1) of the Directive. In responding to this question, the Second Chamber followed *Palacios de la Villa*, although it cited *Rosenblatt* instead of *Palacios*. The Court initially stated that the legislation need not state its aim precisely, if this can be appropriately determined otherwise. The Court then noted that the “preparatory documents” for the 2008 law did provide employment policy and labor policy justifications for its provisions, and observed that the referring court had indicated that one motive was to open “posts for younger workers on the labour market.”<sup>128</sup> The Second Chamber concluded that the Swedish government’s objectives did justify the compulsory retirement provisions. Citing *Rosenblatt*, the court noted that the compulsory retirement of older workers had long been a feature of employment in many States, justified by “political, economic, social, demographic and/or budgetary considerations.”<sup>129</sup> The Court also noted the government view that

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<sup>123</sup> *Id.* ¶ 73. See also Op. Advoc. Gen., *Rosenblatt*, EU:C:2010:227, ¶¶ 160–165.

<sup>124</sup> *Rosenblatt*, EU:C:2010:601, ¶ 75.

<sup>125</sup> *Id.* ¶ 74.

<sup>126</sup> See Op. Advoc. Gen., *Rosenblatt*, EU:C:2010:227, ¶¶ 160–165.

<sup>127</sup> *Hornfeldt*, EU:C:2012:421.

<sup>128</sup> *Id.* ¶¶ 25–26.

<sup>129</sup> *Id.* ¶ 28.

the “age limit reflects the political and social consensus [of the social partners].”<sup>130</sup>

After concluding that Sweden’s 2008 law authorizing employers to retire their employees at sixty-seven was justified in terms of Article 6(1) of Directive 2000/78, the Second Chamber considered whether the 2008 law could be qualified as “appropriate and necessary.” The Court held that it did qualify, observing that it enabled adaptation to demographic developments and the anticipation of the risk of labor shortages, and avoided terminating employment contracts “in situations which are humiliating for elderly workers.”<sup>131</sup>

The Second Chamber then turned to the Swedish court’s basic question concerning whether the Swedish law satisfied the principle of proportionality when it enabled employers to retire employees at sixty-seven when they, like Hornfeldt, would not receive a substantial contribution-based retirement pension. The Court first noted that the 2008 law does not authorize employers or collective agreements to set an automatic termination of employment prior to sixty-seven, thus ensuring an employee’s “unconditional right to continue his professional activity until his 67th birthday.”<sup>132</sup> As it had in *Rosenbladt*, the Court further noted that an employer’s retirement of an employee at sixty-seven did not constitute “a mandatory scheme of automatic retirement,” because the employer and employee remain free to enter into a fixed-term employment contract after the employee becomes sixty-seven.<sup>133</sup>

The Second Chamber noted that the *Rosenbladt* judgment had emphasized that an employer-set retirement age should take into account the retiree’s ability to obtain “replacement income in the form of a retirement pension.”<sup>134</sup> The Court then observed that if the earnings-related pension is low, it could be supplemented by a government retirement pension, housing benefit, and/or old-age benefit.<sup>135</sup> The Second Chamber left it to the referring court to make the ultimate determination as to whether these possibilities of supplemental income for Hornfeldt satisfied the criterion set in *Rosenbladt*.<sup>136</sup>

### 1. Reflections on *Rosenbladt* and *Hornfeldt*

Although the Grand Chamber judgment in *Rosenbladt* and that of the Second Chamber in *Hornfeldt* provide a useful supplement to *Palacios de la Villa*, they are somewhat disappointing when contrasted with the Third Chamber’s exercise of stricter scrutiny in its judgment in *Age Concern England*.

Citing *Palacios de la Villa*, the Grand Chamber in *Rosenbladt* laid great emphasis on the “broad discretion” enjoyed by Member States and their “social partners” in the determination of specific measures in the field of employment policy.<sup>137</sup> In

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<sup>130</sup> *Id.* ¶ 27.

<sup>131</sup> *Id.* ¶¶ 33–34. Presumably the Court considered that requiring an employer to determine that an employee was not physically or mentally capable of performing the employment functions would be “humiliating” for the employee.

<sup>132</sup> *Id.* ¶ 39.

<sup>133</sup> *Id.* ¶¶ 40–41.

<sup>134</sup> *Id.* ¶ 42.

<sup>135</sup> *Id.* ¶¶ 43–44.

<sup>136</sup> *Id.* ¶ 46.

<sup>137</sup> *Rosenbladt*, EU:C:2010:601, ¶ 41.

*Rosenblatt*, as in *Palacios de la Villa*, the compulsory retirement age of sixty-five had been set by the appropriate “social partners”—in this instance, those in the building cleaning sector. As previously noted with regard to *Palacios de la Villa*, the Court’s deference to employment policy measures adopted by the “social partners” is not surprising, in light of the continental European view that associations representing employees can be trusted to protect adequately the interests of all employees.

More questionable is the Court’s acceptance of Germany’s contention that the mandatory retirement provisions of the 1987 collective agreement examined in *Rosenblatt* reflected a “political and social consensus which endured for many years in Germany.”<sup>138</sup> Although that historical perspective is certainly accurate, one might wonder why the Court of Justice did not scrutinize the policy issues concerned more rigorously, when considering for the first time whether this specific mandatory retirement age can be considered justified under the recent Directive 2000/78.

The Grand Chamber’s ultimate conclusion that “it does not appear unreasonable” for the German government to endorse the compulsory retirement age<sup>139</sup> certainly manifests a rather loose standard of scrutiny. The value provided by a strict scrutiny approach would appear to be particularly warranted in *Rosenblatt*, where the motive for the reference was the national court’s clearly expressed concern for the likelihood that a retired cleaner would receive an inadequate pension, and in *Hornfeldt*, based on the parallel concern by the referring Swedish Court with regard to the retired part-time postal worker,<sup>140</sup> as there are manifestly important human rights concerns. What, then, constituted the policy that the Court accepted to justify the endorsement of the compulsory retirement at sixty-five by the German government in *Rosenblatt*, and at sixty-seven by the Swedish government in *Hornfeldt*?

In *Palacios de la Villa*, the Court accepted that a crucial motive for the government’s setting or endorsing a standard retirement age was to achieve an inter-generational balance between the interests of younger, mid-career, and older workers, and specifically to promote the recruitment of young workers.<sup>141</sup> *Rosenblatt* presented this justification for a compulsory retirement age as one based upon a longstanding “political and social consensus,”<sup>142</sup> while *Hornfeldt* stressed the policy goal of promoting employment opportunities for younger workers.<sup>143</sup> Seeking to achieve a balance among the interests of younger, mid-career, and older workers is manifestly a valid feature of a State’s employment policy. There is solid evidence that supports treating it as an appropriate policy concern. We previously noted that Eurostat statistics indicated that the unemployment rate of persons under twenty-five in Spain in 2007, the date of *Palacios de la Villa*, was eighteen percent, more than double the general unemployment rate. In Sweden, the rate of unemployment among persons under twenty-five was twenty-five percent, three times the general unemployment rate, at the time of the *Hornfeldt* judgment, providing support for the Court’s deference to the

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<sup>138</sup> *Id.* ¶ 43.

<sup>139</sup> *Id.* ¶ 51.

<sup>140</sup> *Id.* ¶ 71; see also *Hornfeldt*, EU:C:2012:421, ¶¶ 18, 36.

<sup>141</sup> *Palacios de la Villa*, EU:C:2007:106, ¶ 53.

<sup>142</sup> *Rosenblatt*, EU:C:2010:601, ¶ 43.

<sup>143</sup> *Hornfeldt*, EU:C:2012:421, ¶¶ 25–26.

Swedish employment policy. In contrast, in Germany, there existed only a minor difference in the youth unemployment rate as compared with the average unemployment rate at the time of the *Rosenbladt* judgment.<sup>144</sup>

Both the Grand Chamber in *Rosenbladt* and the Second Chamber in *Hornfeldt* stressed that a State's determination or endorsement of a standard retirement age could not be construed as achieving mandatory retirement at that age.<sup>145</sup> A retired employee must be able to seek alternative employment on a fixed-term basis with the same or a different employer. Unfortunately, this judicial conclusion is unlikely to benefit older employees with limited skills who are apt to find few remunerative employment opportunities in sectors such as cleaning, clerical work, or work in restaurants after being terminated at a standard retirement age.<sup>146</sup>

It would seem unquestionable that the standard retirement age ought to be one at which the retired person is eligible for "replacement income" provided by the state pension system. The judgments in *Palacios de la Villa*, *Rosenbladt*, and *Hornfeldt* all make reference to this,<sup>147</sup> without stating that it is an essential condition. To put it bluntly, older workers are being required to sacrifice their jobs when reaching compulsory retirement age in order to open employment positions for younger workers. Accordingly, linking a standard retirement age to the age of initial receipt of a state old-age pension certainly represents sound public policy—most retired individuals are apt to need the assurance of economic support from the state at the time of any compulsory retirement. Arguably, such a link also represents *fair play*. It is likely that the Court considers that the compulsory retirement of an employee can be found justifiable even when the state pension benefit, based on prior employee contributions, is so modest as to leave the retired individual in financial distress. In *Rosenbladt*, Advocate General Trstenjak took the view that the concern for the financial distress of individuals is irrelevant, best left as a concern in the context of a State's social welfare policies.<sup>148</sup> The Grand Chamber never directly addressed the issue. The issue is certainly significant. As Professor Dewhurst has observed, "there is substantial evidence . . . that older workers, despite reasonable pension levels, are amongst the most impoverished group in the EU."<sup>149</sup> Accordingly, it is unfortunate that the Grand Chamber failed to adopt any formal conclusions concerning the issue.

It is somewhat surprising, and regrettable, that the only reference to the Charter of Fundamental Rights of the European Union<sup>150</sup> occurs in the Second Chamber's judgment in *Hornfeldt*. As previously noted, Article 6 of the Lisbon TEU accorded the Charter "the same legal value as the Treaties."<sup>151</sup> After the TEU entered into force on

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<sup>144</sup> See Eurostat, *supra* note 84. Germany does not usually have a great disparity between the average unemployment rate and that for young workers. In 2010, the date of the *Rosenbladt* judgment, average unemployment was seven percent, and the youth unemployment rate was 9.8%.

<sup>145</sup> *Rosenbladt*, EU:C:2010:601, ¶¶ 74–77; *Hornfeldt*, EU:C:2012:421, ¶ 40.

<sup>146</sup> Dewhurst, *supra* note 19, at 538.

<sup>147</sup> *Palacios de la Villa*, EU:C:2007:106, ¶ 73; *Rosenbladt*, EU:C:2010:601, ¶ 48; *Hornfeldt*, EU:C:2012:421, ¶ 42.

<sup>148</sup> Op. Advoc. Gen., *Rosenbladt*, EU:C:2010:227, ¶ 163.

<sup>149</sup> Dewhurst, *supra* note 19, at 537.

<sup>150</sup> *Hornfeldt*, EU:C:2012:421.

<sup>151</sup> TEU, art. 6.

December 1, 2009, Court judgments ought to refer to any relevant Charter provisions. Although the Second Chamber did this in *Hornfeldt*, the Grand Chamber in *Rosenbladt* did not. Obviously relevant is the Charter's Article 25 on the rights of the elderly, which requires the EU to respect "the rights of the elderly to lead a life of dignity and independence."<sup>152</sup> Although one might have hoped that the Court in *Rosenbladt* would have made reference to the Charter's admonition that older employees should have the financial means to enjoy "dignity and independence" when retired, it is true that Article 25 is more of an aspiration than a specific right.

More plausibly relevant is Article 15 on the freedom to choose an occupation and the right to engage in work, which declares paragraph (1) that "[e]veryone has the right to engage in work."<sup>153</sup> The Second Chamber in *Hornfeldt* stated that Directive 2000/78's prohibition of age-based discrimination in employment ought to be "read in the light of the right to engage in work recognized in Article 15(1)."<sup>154</sup> The Second Chamber then cited several of Directive 2000/78's recitals, notably with regard to the need "to increase [older workers'] participation in the labour force" and to promote "the standard of living and the quality of life."<sup>155</sup> Although the Second Chamber in *Hornfeldt* cited Charter's Article 15(1) and the recitals in Directive 2000/78, the Court ultimately concluded that the Swedish law authorizing employers and social partners to set a standard retirement age of sixty-seven was not unreasonable and fell within their margin of discretion in determining employment policy.<sup>156</sup> The Second Chamber may have felt obliged to reach this conclusion in view of the parallel conclusion of the Grand Chamber in *Rosenbladt*.

Whether Articles 15(1) and 25 of the Charter of Fundamental Rights, which now has Treaty force, ought to influence the determination of the validity of alleged justifications for compulsory retirement is a serious question that the Court of Justice ought to address. Let us hope that the Court will have occasion to do so in the near future.

#### *D. Comparisons with the Age Discrimination in Employment Act*

##### 1. The ADEA's Adoption and Evolution

Up to this point, we have critically examined *Palacios de la Villa* and the other three EU Court judgments that concluded that national rules authorizing or endorsing compulsory retirement are compatible with Directive 2000/78. We can now make some worthwhile comparisons with the U.S. rules set out in the Age Discrimination in Employment Act (ADEA). The evolution of U.S. law concerning employer-set compulsory retirement ages is a remarkable story. Within the span of 19 years, from 1967 to 1986, the federal law shifted from endorsing a compulsory retirement age set at sixty-five, to age seventy, and then to the almost total elimination of an employer's

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<sup>152</sup> Charter, art. 25.

<sup>153</sup> Charter, art. 15(1). Professor Dewhurst argues that the right to work in Charter art. 15(1) should be considered relevant in some contexts of age-based discrimination in employment. Dewhurst, *supra* note 19, 539–42.

<sup>154</sup> *Hornfeldt*, EU:C:2012:421, ¶ 37.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* ¶¶ 38–44.

power to set a compulsory retirement age for employees—each time without significant controversy.

When Congress adopted the Civil Rights Act (1964), which prohibited discrimination based upon race, color, sex, religion, or national origin in employment,<sup>157</sup> they also directed the Secretary of Labor to provide a report on whether specific legislation was necessary to deal with discrimination in employment based on age. The June 1965 Report, “The Older American Worker - Age Discrimination in Employment,”<sup>158</sup> presented by Secretary of Labor W. Willard Wirtz, provided a comprehensive study with evidence of discrimination against older employees, based in large part on stereotypes. The Report found that arbitrary age discrimination not only prevented individual workers from engaging in productive and satisfying employment, it also deprived the national economy of tax resources. The Report’s recommendation of corrective legislative action ultimately led to the adoption by Congress of the 1967 ADEA,<sup>159</sup> currently codified as amended in 29 U.S.C. §§ 621–32. The Congressional Statement of Findings and Purpose for the 1967 ADEA merits quotation:

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice... ; (3) the incidence of unemployment, especially long-term unemployment ... is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.<sup>160</sup>

The first three of the Statements of Findings and Purpose provide general illustrations of age-based discrimination, but all are also clearly relevant to compulsory retirement. The findings all draw attention to the harmful economic and social impact of compulsory retirement on older workers. The fourth finding presumably was intended to establish that Congress had the power to legislate under the interstate commerce clause.<sup>161</sup>

The focus of the 1967 ADEA and its subsequent amendments is stated in Section 4(a) as being to protect all persons over the age of forty from any form of discrimination in employment in hiring, promotion, dismissal, pay and benefits, and

<sup>157</sup> Title VII of the Civil Rights Act, 42 U.S.C. § 703 (2016).

<sup>158</sup> U.S. SEC’Y OF LABOR, REPORT ON THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).

<sup>159</sup> Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90–202, 81 Stat. 602 (1967). For a general review of the ADEA, see SAMUEL ESTREICHER & MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 413–486 (4th ed. 2012); HAROLD LEWIS JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 424–468 (2d ed. 2004); BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW ch. 12 (5th ed. 2012).

<sup>160</sup> 29 U.S.C. § 621(a) (2016).

<sup>161</sup> U.S. Const. art. I, § 8, cl 3.

any other conditions of employment.<sup>162</sup> Although *compulsory retirement* is not specifically mentioned in the list, “dismissal” would certainly include dismissal through compulsory retirement. Because this Article only concerns compulsory retirement, most of the provisions of the ADEA are not relevant. Section 12 of the 1967 ADEA provided its scope: it protected older employees only until they reached the age of sixty-five.<sup>163</sup> In 1967, sixty-five was the age of eligibility for full federal social security pension benefits, which made sixty-five a plausible retirement age. Employers customarily set sixty-five as the retirement age whether or not they provided old age retirement pensions. The ADEA’s limitation of its protective scope in Section 12 to persons over forty means that there is no prohibition of any age discrimination against younger workers and therefore no parallel to Directive 2000/78’s inclusion of younger workers among those protected against age-based discrimination.<sup>164</sup> Furthermore, the 1967 ADEA’s scope was limited by a *de minimis* exception—employers employing fewer than twenty-five employees for twenty or more weeks in a calendar year are not covered.<sup>165</sup> Directive 2000/78, of course, has no parallel *de minimis* provision. Finally, the 1967 ADEA contained a general exception in Section 4(f), currently found in 29 U.S.C. § 631: employers may discriminate based on age when objectively justified by essential job performance criteria—the “bona-fide occupational qualification”<sup>166</sup> provision. Part III.C below contrasts some of the Court of Justice judgments concerning specific professions or fields of employment reviewed in Part III.A with the application of this “bona-fide occupational qualification” provision and other relevant legislative exceptions to the ADEA’s prohibition of compulsory retirement. Only ten years after the initial ADEA’s entry into force, a Democratic Congress during the administration of President Jimmy Carter adopted the 1978 ADEA,<sup>167</sup> which amended Section 12 to provide for the protection of older employees until the age of seventy (not sixty-five). Based on committee reports, the Congress found that a significant number of older employees desired to continue employment after the age of sixty-five and were physically and mentally capable of carrying out employment requirements. This finding motivated the raising of the ADEA’s protective provisions to the age of seventy, which prevented employers from imposing compulsory retirement on older workers before that age.<sup>168</sup> Moreover, Section 5 of the 1978 ADEA essentially eliminated any mandatory retirement age for federal government employees, except in a few limited sectors.<sup>169</sup> Finally, Section 6 mandated the Secretary of Labor to study whether the seventy year age limit should be eliminated.<sup>170</sup> In a 1983 opinion authored by Justice Brennan in

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<sup>162</sup> See § 4, 81 Stat. at 603.

<sup>163</sup> *Id.* § 12.

<sup>164</sup> For Court judgments protecting young workers from age-based discrimination, see, e.g., Hutter v. Technische Universität Graz, Case C-88/08, EU:C:2009:381; Felber v. Bundesministerin für Unterricht, Case C-529/13, EU:C:2015:20.

<sup>165</sup> § 11(b), 81 Stat. at 605 (amended on April 8, 1974 to reduce the *de minimis* number of employees from 25 to 20).

<sup>166</sup> *Id.* § 4(f) (currently 29 U.S.C. § 623(f) (2016)).

<sup>167</sup> Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978) (amending the 1967 ADEA).

<sup>168</sup> *Id.* § 3. See ESTREICHER & HARPER, *supra* note 159, at 470.

<sup>169</sup> § 5, 92 Stat. 189, 190–91.

<sup>170</sup> *Id.* § 6.



*Equal Employment Opportunity Commission v. Wyoming*,<sup>171</sup> the Supreme Court upheld the power of Congress to adopt the ADEA under its constitutional power to regulate interstate commerce. In his concurring opinion, Justice Stevens contended strongly that Congress had the power to adopt the ADEA pursuant to the interstate commerce clause, declaring that “Congress has ample power to regulate the terms and conditions of employment throughout the economy.”<sup>172</sup> The Court’s further holding that the ADEA’s coverage of the employees of state governments was constitutionally permissible is discussed below in Part III.C.

Ultimately, after several years of hearings, studies, and reports, Congress adopted and President Ronald Reagan signed the 1986 ADEA,<sup>173</sup> whose Section 12 took the radical step of eliminating any federally-authorized compulsory retirement age, although with certain limited exceptions discussed in Part III.C. Congressional committee reports and hearings indicated a variety of motives for the elimination of any compulsory retirement age, none clearly decisive, but persuasive in combination.<sup>174</sup> Certainly a highly relevant consideration was demographic—the steadily increasing longevity of older persons, many physically and mentally capable of employment past seventy. To the extent that the elimination of a mandatory retirement age would enable some older persons to continue employment, or to obtain new full or part-time employment, their earnings would provide added tax and social security revenues, as well as enabling them to maintain their customary life styles.

A May 17, 1984 statement of the influential American Association of Retired Persons (AARP)<sup>175</sup> provides a good description of compelling motives for the 1986 ADEA. The statement strongly advocated the removal of the seventy-year cutoff of ADEA protection for older persons, arguing that it permitted employment discrimination against qualified persons and that employment should be based solely on ability, without regard to arbitrary age limits. The statement also emphasized that many older persons had limited financial resources and needed revenue from employment. The bill, which the AARP advocated, did not get to a vote in that session of Congress, but the next 99th Congress acted on a similar bill.

The Report of the House Committee on Education and Labor,<sup>176</sup> provides valuable background on the motivation for the elimination of any endorsed mandatory retirement age. The report noted that thirteen states had already eliminated mandatory retirement for both public and private sector employees. The Report also cited a 1982 Labor Department study that indicated that elimination of mandatory retirement would

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<sup>171</sup> EEOC v. Wyoming, 460 U.S. 226, 234-43 (1983). The Equal Employment Opportunity Commission, which enforced the 1964 Civil Rights Act in the employment sector, obtained the jurisdiction to enforce the ADEA in 1978 through Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (1978).

<sup>172</sup> EEOC v. Wyoming, 460 U.S. at 248.

<sup>173</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, §§ 620-31, 100 Stat. 3342 (1986).

<sup>174</sup> *The Removal of the Age Ceiling Cap Under the Age Discrimination in Employment Act: Joint Hearing Before the H. Subcomm. on Employment Opportunities of the Comm. on Education and Labor & H. Subcomm. on Health and Long-term Care of the Selection Comm. on Ageing*, 99th Cong. (1986).

<sup>175</sup> *Hearing before the H. Subcomm. on Employment Opportunities of the Comm. of Education and Labor*, 98th Cong. 216 (2d Sess. 1984).

<sup>176</sup> H.R. Rep. No. 99-756 (1986).

add approximately 200,000 individuals to the labor force by 2000.<sup>177</sup> Numerous national associations supported the bill, including the AARP, the American Federation of Teachers, the National Council of Senior Citizens, the National Council on the Aging, and the AFL/CIO Department on Occupational Safety, Health and Social Security. Studies indicated that large majorities of people surveyed on the issue supported an end to mandatory retirement.<sup>178</sup>

Florida Congressman Claude Pepper, chairman of the Subcommittee on Health and Long-term Care, and the sponsor of what ultimately became the 1986 ADEA, provided a valuable Subcommittee Report, "Eliminating Mandatory Retirement,"<sup>179</sup> in support of the bill. The Report initially noted a relevant demographic factor: the average life expectancy was 61.7 years when the Social Security pension eligibility age was adopted in 1935, but had risen to 74.2 in 1981.<sup>180</sup> The Report also noted an "increasing interest in the philosophy that ageism is as unconscionable a form of discrimination as sexism."<sup>181</sup> The Subcommittee Report cited Labor Department data which estimated that 195,000 older men would be compelled to retire by the year 2000 if seventy continued as the acceptable retirement age.<sup>182</sup> A major factor in the Report was its forecast that there would be a substantial economic benefit from enabling employees to continue work past the age of seventy, citing a 1985 actuarial study that estimated that these employees would generate over \$3 billion in added social security and other governmental revenues.<sup>183</sup> This would be the case even though most workers opted to retire before the age of sixty-five.

Although the 1986 ADEA was based on the bill sponsored by Congressman Claude Pepper (incidentally, at age eighty-six, the oldest member of Congress), crucial bi-partisan support was provided in the Senate by Democratic Senator Howard Metzenbaum and Republican Senator John Heinz. As previously noted, the hearing and reports on the bill which become the ADEA indicated almost no opposition to the total elimination of any federal endorsement of an employer-set compulsory retirement age, except from some business organizations. The principal critical comments concerned the various specific exceptions that authorized compulsory retirement in specific sectors. Part III.C provides a description of these exceptions in contrast to the Court of Justice judgments.

The Congressional adoption of the 1986 ADEA, effectively prohibiting any standard employer-set compulsory retirement age, achieved a highly significant modification of U.S. employment policy. Even though relatively few employees choose to remain in their occupations past the age of seventy, their civil right to do so has been recognized. Although undoubtedly relatively minor in economic importance, the elimination of virtually all compulsory retirement provides a great social benefit to those older employees who prefer to continue in employment, or find it financially

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<sup>177</sup> *Id.* at 3.

<sup>178</sup> *Id.* at 4.

<sup>179</sup> CLAUDE PEPPER, ELIMINATING MANDATORY RETIREMENT, H.R. DOC. NO. 99-561, at 3 (2d Sess. 1986).

<sup>180</sup> *Id.* at 5.

<sup>181</sup> *Id.* at 6.

<sup>182</sup> *Id.* at 7 (there was no comparable data concerning women employees).

<sup>183</sup> *Id.* at 13.

advantageous, or both. This promotes their dignity and independence.<sup>184</sup>

## 2. The Contrast with the European Union

The prohibition of almost all compulsory retirement in the United States is in sharp contrast to the situation in the EU, based on national rules in some Member States that authorize or endorse employer-set compulsory retirement. Does the U.S. approach provide a basis for serious criticism of that in the EU? There are two reasons why that should not be the case. The first is that the European Union is not a state (and never will be). Even though the EU has a Treaty-based constitutional structure, its Member States have autonomy except insofar as they have conferred powers on the EU's political and judicial institutions, or limited their sovereign rights by Treaty provisions.<sup>185</sup>

The Treaty of Lisbon's TFEU states in Article 149 of the Title on Employment that the Parliament and Council are only authorized to adopt "incentive measures designed to encourage cooperation between Member States" in the employment sector, and not to adopt measures for the harmonization of national law.<sup>186</sup> The prior ECT Article 129, in effect since the Employment Title was added by the Treaty of Amsterdam on May 1, 1999, made the same stipulations with regard to the Council,<sup>187</sup> the only institution then authorized to adopt measures concerning employment. Accordingly, the EU political institutions do not appear to have any legislative power to harmonize national rules on employment with regard to a stated or compulsory retirement age, either to set sixty-five or any other age, or to eliminate any national endorsement of a compulsory retirement age. This is in sharp contrast to the United States, where, as noted, the Supreme Court in *Equal Employment Opportunity Commission v. Wyoming* held that Congress had the power to regulate the terms and conditions of employment, including compulsory retirement, under its constitutional power to regulate interstate commerce.

Directive 2000/78 cannot be read to require implicitly any common standard retirement age throughout the EU, or to eliminate all national standard retirement ages, because, as previously emphasized, the Court of Justice has authoritatively recognized the "broad discretion" of Member States in determining their fundamental social and employment policy autonomously.<sup>188</sup> The Court might at most follow the approach taken in *Age Concern England*, and require national governments to determine, or eliminate, a standard, employer-set retirement age only on the basis of an objective and proportionate political process.<sup>189</sup>

The second reason is pragmatic. The social and economic circumstances of many EU Member States during the last decade contrast sharply with the stable economic growth and relatively healthy employment conditions of the United States during the

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<sup>184</sup> See Charter art. 25.

<sup>185</sup> See EDWARD & LANE, *supra* note 5, § 7.05–09; GOEBEL ET AL., *supra* note 9, at 153–54.

<sup>186</sup> TFEU, art. 149. See CATHERINE BARNARD, *E.U. EMPLOYMENT LAW*, 91–94 (4th ed. 2012).

<sup>187</sup> ECT, art. 129.

<sup>188</sup> *Palacios de la Villa*, EU:C:2007:106; *Age Concern England*, EU:C:2009:128; *Rosenblatt*, EU:C:2010:601.

<sup>189</sup> *Palacios de la Villa*, EU:C:2007:106; *Age Concern England*, EU:C:2009:128.

1967-86 evolution of the ADEA.<sup>190</sup> The concern for an inter-generational approach in setting national employment policy, especially the fostering of the employment of younger workers when their unemployment rates are particularly high, would appear to justify those Member States that have adopted a policy of authorizing or endorsing standard, compulsory retirement ages.<sup>191</sup> When the national *social partners* urge or approve such a policy, its justification is undeniably reinforced.

Accordingly, there is no reason to consider that the U.S. experience in progressing from a standard compulsory retirement age of sixty-five in 1967 to a total elimination of compulsory retirement in 1986 should provide a basis for serious criticism of the Court's view that Member States should have "broad discretion" in setting an employment policy which endorses a compulsory retirement age.

#### *E. The Future Impact of the Demographic Evolution of the EU*

This Part can appropriately end with a glimpse of the future. The progressive demographic evolution of Member States raises a crucial question concerning the proportionality of any age selected by a Member State for its standard retirement age. Justice Blake's detailed opinion in the High Court proceeding reviewing the U.K.'s standard retirement age ultimately concluded that setting the age at sixty-five was not a proportionate determination in view of longer life expectancies and the U.K.'s consequent gradual raising of its age of eligibility for state pensions. Unquestionably the Member States must confront the challenge of an increasing proportion of older people in the total population, due to the steady progress of longevity, which occasions a consequent growing burden on the national retirement pension funds. Plausibly the Court of Justice ought to take this vital factor into consideration in its judicial review of standard compulsory retirement ages, just as Justice Blake did.

In 2004, the Commission issued an influential Communication, "Increasing the Employment of Older Workers and Delaying the Exit from the Labour Market,"<sup>192</sup> which is still highly relevant. The Communication commences by declaring that a "sustained growth in longevity means that people have greater opportunities to fulfil their potential over a longer life-span."<sup>193</sup> This has great economic importance because it is "crucial [to use] the full potential of labour supply to sustain economic growth, tax revenues and social protection systems, including adequate pensions, in the face of expected reductions in the population of working age."<sup>194</sup> The Communication urged that "Member States must take drastic action" in order to sustain the employment of older workers, including the use of financial incentives, promotion of "good working conditions conducive to job retention,... flexible working

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<sup>190</sup> The U.S. Bureau of Labor Statistics indicates that the average U.S. unemployment rates in 1967, 1978 and 1986 were 3.8%, 6.1% and 7% respectively. *Databases, Tables & Calculators by Subject*, U.S. Dep't of Labor, Bureau of Labor Stat., [https://data.bls.gov/timeseries/LNU04000000?years\\_option=all\\_years&periods\\_option=specific\\_periods&periods=Annual+Data](https://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_periods&periods=Annual+Data)

<sup>191</sup> See *supra* text accompanying notes 69, and 127-130.

<sup>192</sup> *Commission Communication for Increasing the Employment of Older Workers and Delaying the Exit from the Labour Market* COM (2004) 146 final (Feb. 18, 2005).

<sup>193</sup> *Id.* at 3.

<sup>194</sup> *Id.* at 3.

arrangements,”<sup>195</sup> etc. The Communication cited the “[r]ecognition of demographic changes and the need to preserve skills and experience” which warranted governmental action to remove incentives for early retirement, and to provide higher pension entitlements for people to stay in work longer, together with the adoption of flexible retirement schemes combining gradual retirement with part-time work.<sup>196</sup> The Communication later declared that “[t]he low employment of older workers in Europe represents a waste of individuals life opportunities and societal potential.”<sup>197</sup>

The Commission Communication’s principal concern was that the average age at which older workers left the labor force was 60.4 in 2001 and 60.8 in 2002.<sup>198</sup> Accordingly, its proposals centered on taking measures to delay this early “exit” of older workers. The Communication made no reference to any modification in the national standard retirement ages, but its comments would seem to point in the direction of raising national standard retirement ages.

Since 2009, the Commission has published periodically an extensive report prepared by experts on the future demographic, economic, and budgetary evolution of the EU. The most recent is the 2015 Ageing Report,<sup>199</sup> almost 400 pages of text and annexes. Its conclusions are sobering. The Report’s Executive Summary projects that the proportion of people aged under sixty-five to those over sixty-five will steadily decline from the present four working age persons (aged fifteen to sixty-four) to one over sixty-five, down to only two working age persons to one over sixty-five in 2060.<sup>200</sup> Naturally, this will result in a steady increase in public spending due to the aging population, notably for old age pensions and health care.

After reviewing the 2015 Ageing Report, the Council adopted “Conclusions on the Sustainability of Public Finances in Light of Ageing Populations,” which affirmed the need for States to undertake “pension, health and long-term care reforms,” and specifically “to raise the effective retirement age . . . by avoiding early exit from the labour market and by linking the retirement age or pension benefits to life expectancy.”<sup>201</sup> The U.K. government’s decision in 2011 to abandon the policy of setting a standard retirement age upon which employers could rely may be the forerunner of similar action in other Member States. Recognition of the demographic impact of longer life expectancies, with an inevitable increase in the number of retired, older people as compared to that of the working population, clearly points in the direction of raising any standard retirement age, or perhaps even to eliminating it altogether.

Admittedly, this demographic factor may be balanced by a government’s concern for high unemployment among younger individuals in the work force (usually based

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<sup>195</sup> *Id.* at 3–4.

<sup>196</sup> *Id.* at 4.

<sup>197</sup> *Id.* at 5.

<sup>198</sup> *Id.* at 7. An annexed Table 2 indicated that in 2002 the average exit rate from the labor force in the then fifteen Member States ranged from 58.5 years in Belgium up to 63.2 years in Sweden. *Id.* at 19.

<sup>199</sup> EUROPEAN COMMISSION, *The 2015 Ageing Report: Economic and Budgetary Projections for the 28 E.U. Member States (2013-2060)*, 3 EUR. ECON. (2015).

<sup>200</sup> *Id.* at 1.

<sup>201</sup> Council Conclusions, Sustainability of Public Finances in Light of Ageing Populations, ¶¶ 4–5 (May, 15, 2012).

on the unemployment rate of persons under twenty-five), which is certainly a major concern in many EU States at the present time. Nonetheless, inasmuch as most older employees voluntarily choose to retire at the age at which they are eligible for state old-age pensions, or even earlier, it seems unlikely that raising a State's endorsed, employer-set compulsory retirement age would retain a large number of older employees in the workforce or create a substantial barrier to hiring young employees. For States that currently endorse a compulsory retirement age of sixty-five, sixty-seven, or sixty-eight, it is likely to be more politically feasible to raise the State's endorsement of any employer-set compulsory retirement age to seventy, as Denmark did in 2008<sup>202</sup> (and as the U.S. Congress did in 1978), than to provide for the outright elimination of any standard retirement age.

The Court of Justice may well receive in the future questions from a national court concerning the justification of a State-authorized or endorsed standard retirement age. In view of the Court of Justice's well-established judicial deference to fundamental State social or employment policy determinations, the Court itself will certainly not hold that a State-endorsed standard retirement age is not justified under the Directive's Article 6. Nonetheless, it may be hoped that the Court would follow the approach of the Third Chamber in *Age Concern England*, informing the national court that it should not accept "mere generalizations" in support of the State's policy, but should assess carefully whether the State-endorsed standard age is presently appropriate.<sup>203</sup> As we have seen, this enabled Justice Blake to carry out his careful review in the U.K. High Court proceedings that ultimately led to the U.K. government's elimination of its endorsement of a standard retirement age.

The steady increase in the proportion of older people in the overall population may motivate Member States that currently authorize or endorse a standard retirement age to seriously consider retarding that age to seventy, as the United States did in 1978,<sup>204</sup> even if eliminating a standard retirement age altogether is still *a bridge too far*.

### III. IS A COMPULSORY RETIREMENT AGE, OR ANOTHER AGE-BASED LIMIT ON SERVICE, PERMISSIBLE FOR A SPECIFIC PROFESSION OR FIELD OF EMPLOYMENT?

Not surprisingly, national, regional and local governments of Member States often set a compulsory retirement age, or some other form of age limit on service, with regard to certain professions or fields of employment. The motive is often based upon a concern that older individuals engaged in the profession or field may no longer be able to fulfill particularly high physical and mental requirements in order to ensure public health or security, or upon a policy view that there should be an appropriate inter-generational mix of persons engaged in the profession or fields, or both. Governments may also set maximum age limits for entry into a particular profession, or promotion within it.

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<sup>202</sup> Consolidation Act on Prohibition of Discrimination on the Labour Market, No. 1349, Dec. 16, 2008 (Den.).

<sup>203</sup> *Age Concern England*, EU:C:2009:128, ¶ 48.

<sup>204</sup> See discussion *supra* at note 167.

Questions referred by national courts concerning these rules have raised novel issues for the Court of Justice in its application of provisions of Directive 2000/78. The Court judgments are obviously less consequential than those reviewed in Part II, but still have considerable importance.

*A. Judgments Concerning the Occupational Activities Exception of Article 4(1)*

1. Review of *Prigge v. Deutsche Lufthansa*<sup>205</sup>

In this part of the article, we encounter for the first time a new issue: whether a state regulation can be considered not to be discriminatory at all pursuant to the Directive's Article 4(1). That Article states that differential treatment in employment shall not be considered discriminatory at all when, "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out [the differential treatment is justified by] a genuine and determining occupational requirement."<sup>206</sup> Article 4(1) parallels the BFOQ exception of the ADEA, noted in Part II.D above. When Article 4(1) is relevant in a case presented to the Court, determining whether State rules can be considered not to discriminate at all should precede any examination of whether the State rules, although discriminatory, can be justified pursuant to Article 6(1).

The Grand Chamber's September 2011 judgment in *Prigge v. Deutsche Lufthansa* is the only one that directly concerns compulsory retirement. The Court invalidated a rule requiring commercial air pilots to retire at age sixty.

Two other Court judgments concerned rules that set age limits for service in a profession. In January 2010, in *Wolf v. Stadt Frankfurt am Main*,<sup>207</sup> the Grand Chamber accepted government rules which set a maximum age after which firefighters could not commence service in an intermediate career level. Subsequently, the Second Chamber's 2014 judgment in *Vital Perez*<sup>208</sup> invalidated another age-based limitation on service: a condition that candidates for entry into a local police force could not be older than thirty. Because neither judgment concerns compulsory retirement rules, they are reviewed in Part III.C among other judgments that parallel or contrast with U.S. court cases concerning the ADEA.

In *Prigge v. Deutsche Lufthansa*,<sup>209</sup> Prigge and other pilots were compulsorily retired at the age of sixty by their employer, the German airline Lufthansa. Lufthansa acted pursuant to a 2005 Collective Agreement governing the employment conditions for its flight crews that required pilots to retire at age sixty.<sup>210</sup> However, in 2003 Germany had accepted the international rules on air transport set by a multinational cooperative body, the Joint Aviation Authorities,<sup>211</sup> whose rules included a 2003 provision concerning flight crews that required the "curtailment" of a pilot's

<sup>205</sup> *Prigge v. Deutsche Lufthansa*, Case C-447/09, EU:C:2011:573.

<sup>206</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

<sup>207</sup> *Wolf v. Stadt Frankfurt am Main*, Case C-229/08, EU:C:2010:3.

<sup>208</sup> *Vital Perez v. Ayuntamiento de Oviedo*, Case C-416/13, EU:C:2014:2371.

<sup>209</sup> *Prigge*, EU:C:2011:573.

<sup>210</sup> *Id.* ¶¶ 18–19.

<sup>211</sup> *Id.* ¶ 12.

employment in “commercial air transport operations”<sup>212</sup> at sixty, but only required retirement at age sixty-five.<sup>213</sup> The principal limitation set by the Joint Aviation Authorities rules upon the activities of pilots aged sixty to sixty-four was to require that they only act as a member of a multi-pilot crew.<sup>214</sup> Prigge lost his challenge to his dismissal at age sixty in lower courts. When he appealed to the German Supreme Labor Court, that court was clearly inclined to affirm, taking the view that a pilot’s diminishing physical capacity with advancing age presented a definite risk to the “life and health of crew members, passengers and persons in the areas over which aircraft fly.”<sup>215</sup> The Supreme Labor Court nonetheless decided to refer questions to the Court of Justice.

The Grand Chamber commenced its judgment by observing that “non-discrimination on grounds of age” constituted a “general principle of E.U. law,”<sup>216</sup> and is specifically referenced in Article 21 of the Charter of Fundamental Rights, which acquired Treaty force when the Treaty of Lisbon went into effect on November 1, 2009.<sup>217</sup> The Court easily concluded that compulsory retirement at age 60 constituted direct discrimination on the basis of age.<sup>218</sup> The Grand Chamber also held that a collective agreement could not compel discrimination based on age any more than a national law or regulation could.<sup>219</sup>

Noting that Directive 2000/78’s Article 2(5) expressly declared that appropriate measures to protect health and public security are permissible, the Court then concluded, not surprisingly, that “measures that aim to avoid aeronautical accidents by monitoring pilots’ aptitude and physical capacities” do aim at achieving public security.<sup>220</sup> Nonetheless, in view of the fact that the Joint Aviation Authorities rules only curtailed pilots’ activities between sixty and sixty-five, the Court held that compulsory retirement at age sixty was not proportionate to the goal of achieving public security, pursuant to Article 2(5).<sup>221</sup>

With regard to the application of the Directive’s Article 4(1), the Grand Chamber considered it “undeniable” that pilots’ physical capacities diminish with age.<sup>222</sup> However, the Court held that as a derogation from the principle of non-discrimination, Article 4(1) is to be strictly construed.<sup>223</sup> The Grand Chamber specifically cited

<sup>212</sup> *Id.* See Opinion of Advocate General Cruz Villalon, *Reinhard Prigge v. Deutsche Lufthansa AG*, EU:C:2011:321, ¶ 14 (“Commercial air transport operations” involves the transport of passengers, mail or freight).

<sup>213</sup> *Prigge*, EU:C:2011:573, ¶ 14.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* ¶ 28.

<sup>216</sup> See *Kucukdevici v. Swedex*, Case C-555/07, EU:C:2010:21 (citing *Mangold*, EU:C:2005:709).

<sup>217</sup> See Charter, art. 21; de Burca, *supra* note 22; and THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY *supra* note 22.

<sup>218</sup> *Prigge*, EU:C:2011:573, ¶¶ 44–45.

<sup>219</sup> *Id.* ¶¶ 47–49.

<sup>220</sup> *Id.* ¶ 58.

<sup>221</sup> *Id.* ¶ 63.

<sup>222</sup> *Id.* ¶ 67.

<sup>223</sup> *Id.* ¶ 72 (citing two judgments applying this strict scrutiny approach in the context of sex-based discrimination in employment, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case C-222/84, EU:C:1986:206 and *Sirdar v. The Army Board*, Case C-273/97, EU:C:1999:523).



Directive 2000/78's Recital 23, which states that a difference in treatment based on age should occur only in "limited circumstances" when a "characteristic related . . . to age constitutes a genuine and determining occupational requirement."<sup>224</sup> In view of the international rules' sanction for pilots to carry out their activities on a curtailed basis between sixty and sixty-five, the Court held that compulsory retirement at sixty is not authorized by Article 4(1).<sup>225</sup>

Although Part III.C provides illustrations of the U.S. approach to the compulsory retirement of employees in specific professions or types of employment, it is worth noting immediately that specific U.S. legislation adopted in 2007 prohibited employers of commercial airlines from requiring mandatory retirement of pilots before the age of sixty-five.<sup>226</sup>

## 2. Reflections on *Prigge*'s Application of Directive Article 4(1)

The novel issues that the Grand Chamber confronted in *Prigge* center on Article 4(1) of Directive 2000/78, which enables State regulations to be considered not to be discriminatory at all, when the rules are appropriate "by reason of the nature of the particular occupational activities concerned," and are based upon a "genuine and determining occupational requirement."<sup>227</sup>

The Grand Chamber's most important doctrinal conclusion was that Article 4(1) should be strictly construed as a derogation from the fundamental principle of non-discrimination in employment on the basis of age whenever a State claims Article 4(1) to justify a specific compulsory retirement or maximum service age.<sup>228</sup> The Court and Advocate General Cruz Villalon emphasized that Recital 23, which commented on Article 4(1), began with the caveat, "in very limited circumstances," indicating that the Article's application should be relatively rare.<sup>229</sup>

Long-standing precedents applying the analogous Article 1(2) of Directive 76/207 in equal treatment for men and women in employment take the same view, emphasizing that sex-based discrimination in employment should be permitted only rarely when a government alleges that it is justified by a "genuine and determining occupational requirement."<sup>230</sup> Unquestionably, pilots' ability to fly safely is essential to protect public security, one of the public interests specified in the Directive's Article 2(5).<sup>231</sup> This public interest factor makes more sensitive the issue of determining when the average pilot's gradually diminishing physical capacity should properly lead to the setting of a specific maximum age after which a pilot should no longer be engaged in

<sup>224</sup> *Id.* ¶ 71. See Advocate General Cruz Villalon's emphasis on this at ¶¶ 60–61 of his Opinion.

<sup>225</sup> *Prigge*, EU:C:2011:573, ¶¶ 74–77. See Op. Advoc. Gen., *Prigge*, EU:C:2011:321, ¶¶ 65–68.

<sup>226</sup> The Fair Treatment for Experienced Pilots Act, 49 U.S.C. § 44729 (2012).

<sup>227</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

<sup>228</sup> *Prigge*, EU:C:2011:573, ¶ 72.

<sup>229</sup> *Id.* ¶ 71; See also Op. Advoc. Gen., *Prigge*, EU:C:2011:321, ¶ 60.

<sup>230</sup> See *Johnston v. Royal Ulster Constabulary*, Case C-222/84, EU:C:1986:206 (the Constabulary can restrict the employment of women in its armed police force based on public safety concerns); *Kreil v. Germany*, Case C-285/98, EU:C:2000:2 (the German army cannot exclude women from military service that involved the use of arms).

<sup>231</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

commercial air transport.

Because it is “undeniable” that pilots’ capacities diminish with age, the Grand Chamber might have simply deferred to the German rule mandating an end to pilots’ commercial air transport service at sixty.<sup>232</sup> Instead the Grand Chamber exercised a strict scrutiny approach, and held that the maximum service age for pilots should be sixty-five, not sixty, relying on the Joint Aviation Authorities’ acceptance of that retirement age, together with the imposition of certain limitations on a pilot’s operational service between sixty and sixty-four.<sup>233</sup>

The Court’s strict scrutiny approach to the application of Article 4(1) is to be applauded. The Article’s language, permitting its application only for a “genuine and determining occupational requirement,” suggests the need for strict scrutiny, and Recital 23’s limitation of Article 4(1)’s use to “very limited circumstances” is a clear-cut admonition.<sup>234</sup>

### *B. Court Judgments Concerning the Justification Provisions of Article 6(1)*

#### 1. Review of *Petersen*, *Georgiev*, and *Fuchs and Kohler*

We turn now to the judgments centered on the Directive’s Article 6(1) on possible justifications for age-based discrimination in employment. The Grand Chamber decided the first, *Petersen v. Berufungsausschuss für Zahnärzte*, in January 2010.<sup>235</sup>

In addition to *Petersen*, three five-judge Chambers issued judgments centered on the justification provisions of Article 6(1) of Directive 2000/78: *Georgiev*,<sup>236</sup> *Fuchs and Kohler*,<sup>237</sup> and *Commission v. Hungary*.<sup>238</sup> All merit careful examination, because they deal with issues considerably more consequential than those involved in *Petersen*.

In *Petersen*, the Dortmund Social Court referred several questions to the Court of Justice concerning Article 6(1). The Grand Chamber examined a German regulation within its statutory health insurance scheme that set sixty-eight as the maximum age for a dentist (or doctor) engaged in providing insurance-reimbursed services to patients (such dentists being referred to as panel dentists). A dentist, Mrs. Petersen, challenged the rule, which obviously constituted direct discrimination based on age. Mrs. Petersen was not an employee, but claimed that the age limitation severely restricted her ability to practice her occupational profession, inasmuch as only ten percent of potential patients were not covered by health insurance.<sup>239</sup> The judgment is a rare example of the effect of including the exercise of an “occupation” along with employment in the Directive’s Article 1 on its scope. Conceivably, the sixty-eight-year

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<sup>232</sup> As we saw in *Palacios de la Villa* and other judgments reviewed in Part II, the Court tends to follow a policy of great deference to national rules in the sector of employment.

<sup>233</sup> *Prigge*, EU:C:2011:573, ¶¶ 73–76.

<sup>234</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

<sup>235</sup> *Petersen v. Berufungsausschuss für Zahnärzte*, Case C-341/08, EU:C:2010:4.

<sup>236</sup> *Georgiev v. Tehnicheski Universitet—Sofia*, Joined Cases C-250/09 & C-268/09, EU:C:2010:699.

<sup>237</sup> *Fuchs & Köhler v. Land Hessen*, Joined Cases C-159/10 & C-160/10, EU:C:2011:508.

<sup>238</sup> *Comm’n v. Hungary*, Case C-286/12, EU:C:2012:687.

<sup>239</sup> *Petersen*, EU:C:2010:4, ¶ 33.

age limit is tantamount to compulsory retirement, if Mrs. Petersen can no longer provide services to enough patients to make it worthwhile to continue in practice.<sup>240</sup> The Court's judgment suggested strongly that the German health insurance reimbursement rule might be questionable, but left the ultimate determination to the Social Court.

Germany contended that its age limit could be justified for the protection of public health, a justification expressly authorized in the Directive's Article 2(5). Although the Court accepted that Germany could set an appropriate maximum age limit for dentists, it then reached the rather obvious conclusion that the age limit for panel dentists could not protect public health directly, because it had no relation to assuring the professional competence of dentists, who were in no way barred from providing services to private patients.<sup>241</sup> The Court did accept, in principle, the German government's contention that an excessive supply of panel dentists might occasion excessive public health costs, which is not surprising in view of the Court's customary deference towards a government's determination of the proper organization of its medical services and social security system.<sup>242</sup> As a general rule, the Court of Justice does not accept that financial, economic, or administrative considerations can justify a government's limitation on Treaty-based rights,<sup>243</sup> but it has recognized an exception in the sector of public health care when the limitation is essential to avert "the risk of serious harm to the financial balance of the social security system."<sup>244</sup> As usual, the Court of Justice left it to the referring court to determine whether Germany's concern was justified.<sup>245</sup>

The Grand Chamber then turned to the second possible justification for the age limit—one accepted by the German Federal Social Court—that such age limits for practice enabled a "balanced sharing ... between the generations" and facilitated "employment opportunities of young panel dentists."<sup>246</sup> Again, the Court accepted this rationale in principle,<sup>247</sup> but left the referring court with the task of determining whether in this instance it was justifiable, observing that if there are not an excessively

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<sup>240</sup> Advocate General Bot observed that inability to serve ninety percent of potential patients might make it unprofitable for a dentist to continue practicing. See Opinion of Advocate General Bot, *Petersen v. Berufungsausschuss für Zahnärzte*, Case C-341/08, EU:C:2009:513, ¶ 36.

<sup>241</sup> *Petersen*, EU:C:2010:4, ¶ 61. The Court implicitly rejected the view of the German Federal Constitutional Court, which had held in 2007 that the age limit might be justified to protect against risks posed by older panel dentists whose capacity might have deteriorated. *Id.* ¶ 23.

<sup>242</sup> *Id.* ¶¶ 51–53, 63.

<sup>243</sup> See, e.g., *Comm'n v. France*, Case C-265/95, EU:C:1997:595, ¶ 62 (stating that France's economic concerns do not justify barriers to imports of produce from Spain); *Comm'n v. Ireland*, Case C-39/88, EU:C:1990:430 (rejecting Ireland's claim that administrative costs justified its failure to comply with a fisheries regulation).

<sup>244</sup> *Petersen*, EU:C:2010:4, ¶¶ 45, 51–52, 63. See Op. Advoc. Gen., *Petersen*, EU:C:2009:513, ¶¶ 52–59. See also *Watts v. Bedford Primary Care Trust*, Case C-372/04, EU:C:2006:325 (citing a prominent judgment authorizing national rules intended to control hospital costs in order to safeguard the social security health insurance system).

<sup>245</sup> *Petersen*, EU:C:2010:4, ¶¶ 42, 64. It would seem highly unlikely that even reimbursing the total annual bills of a few panel dentists over the age of 65 could present a "risk of serious harm to the financial balance of the social security system."

<sup>246</sup> *Id.* ¶¶ 22, 65.

<sup>247</sup> *Id.* ¶ 70. See Op. Advoc. Gen., *Petersen*, EU:C:2009:513, ¶¶ 69–74.

large number of panel dentists, young practitioners should be able to enter the field.<sup>248</sup>

We turn now to *Georgiev*,<sup>249</sup> a 2010 Second Chamber judgment likely to be of particular interest to academics and students. The principal issue was whether a Bulgarian state university could require the compulsory retirement of professors at age sixty-five, based upon the justification provisions of Article 6(1) of Directive 2000/78. Advocate General Yves Bot's Opinion strongly influenced the Court.

After teaching as a Lecturer at the Sofia Technical University since 1985, Georgiev was retired at age sixty-five in 2006. The University then granted him three successive one year contracts until 2009, and promoted him to Professor in 2007. When Georgiev sued to contest both his initial retirement at age sixty-five, and the cessation of the annual contracts at age sixty-eight, the Bulgarian court essentially asked the Court of Justice whether both could be justified pursuant to Article 6(1). Note that although the Court's judgment only concerned the retirement rules of a state university, there is no reason to consider that the Court's conclusions would not be applied likewise to mandatory retirement rules of a private university. Neither Bulgaria nor the University clearly specified any legitimate aim intended to be achieved by the compulsory termination of Georgiev's employment, rather vaguely citing social policy and labor market policy.<sup>250</sup> However, the Commission, Germany and Slovakia provided interventions which suggested that the "employment of younger professors" could be a justification.<sup>251</sup> The Second Chamber agreed, concluding that the "encouragement of recruitment in higher education by [providing] posts as professors to younger people" may constitute a legitimate aim.<sup>252</sup> More importantly, in terms of doctrinal development, the Second Chamber followed the suggestion of Advocate General Bot and held that "the mix of different generations of teaching staff and researchers is such as to promote an exchange of experiences and innovation and thereby the development of the quality of teaching and research at universities."<sup>253</sup>

Georgiev had contended that the University and Bulgaria had merely made "assertions" unsupported by the "reality of the [university] labor market" where not many young people were interested in a career in teaching.<sup>254</sup> The Second Chamber took this contention seriously enough that it instructed the national court to examine it,<sup>255</sup> but later observed that in principle the limited number of university professors and the customary university policy of filling vacant posts only with "people who have attained the highest qualifications" made it appropriate for a State to set a compulsory retirement age for professors in order to make room for younger ones.<sup>256</sup> The Second Chamber also concluded that the University's grant of three annual teaching contracts

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<sup>248</sup> *Petersen*, EU:C:2010:4, ¶¶ 71, 77.

<sup>249</sup> *Georgiev*, EU:C:2010:699.

<sup>250</sup> *Id.* ¶¶ 41, 43.

<sup>251</sup> *Id.* ¶ 42.

<sup>252</sup> *Id.* ¶ 45 (citing *Palacios de la Villa*, EU:C:2007:604, ¶ 65). See also Opinion of Advocate General Bot, *Georgiev v. Tehnicheski Universitet—Sofia*, Joined Cases C-250/09 & C-268/09, EU:C:2010:487, ¶ 31.

<sup>253</sup> *Georgiev*, EU:C:2010:699, ¶ 46. See Op. Advoc. Gen., *Georgiev*, EU:C:2010:487, ¶ 34.

<sup>254</sup> *Georgiev*, EU:C:2010:699, ¶ 47.

<sup>255</sup> *Id.* ¶ 48.

<sup>256</sup> *Id.* ¶ 52. See Op. Advoc. Gen., *Georgiev*, EU:C:2010:487, ¶ 34.

to Georgiev did not cast any doubt on the appropriate nature of compulsory retirement at sixty-five. As Advocate General Bot observed, the annual contracts only achieved greater occupational flexibility to the benefit of both the university and professors.<sup>257</sup> Finally, as in *Palacios de la Villa*,<sup>258</sup> the Court considered that the retired professors' access to "financial compensation by way of a retirement pension at the end of their working life" meant that they were not economically prejudiced by the compulsory retirement age,<sup>259</sup> noting that Bulgaria's right to a state old age pension commences at age sixty-three.

The Second Chamber's 2011 judgment in *Fuchs and Kohler*,<sup>260</sup> issued shortly after its judgment in *Georgiev*, did not contain any significant doctrinal developments, but may well have a practical impact on state civil service employment in general. The specific issue addressed was whether the German state of Hessen could require its permanent civil servants (including the plaintiff prosecutors) to retire at sixty-five, but the judgment's conclusions could be applied analogously to the German federal government rules that require the compulsory retirement of all German Government civil servants at age sixty-seven.

A 2008 German federal law required the civil servants of its federal states to retire on attaining a retirement age which would be set by each state for its civil servants. Hessen set the age at sixty-five, although authorizing responsible administrators to postpone retirement until sixty-eight through successive annual arrangements. Fuchs and a colleague, Kohler, were retired at sixty-five in 2009, but permitted to serve as prosecutors one further year.

When Fuchs and Kohler sued to challenge their retirement, the Frankfurt administrative court considered that the compulsory retirement constituted unjustified age discrimination based on a stereotype view that older employees have a declining "fitness for work."<sup>261</sup> The Frankfurt court observed that Hessen's compulsory retirement of its civil servants at sixty-five contrasted with the German federal legislation, which set sixty-seven as the retirement age for civil servants of the federal government, and delayed their entitlement to pensions until the age of sixty-seven.<sup>262</sup> Accordingly, the Frankfurt court queried Hessen's adoption of sixty-five as its standard retirement age in several questions referred to the Court of Justice.

Because compulsory retirement constitutes direct discrimination based on age, the Second Chamber concentrated on whether the retirement age could be justified under the Directive's Article 6(1). Both Hessen and Germany accepted that the original justification of Hessen's retirement age, a presumption that persons over the age of sixty-five were no longer fit at all for work, was untenable.<sup>263</sup>

The principal justification relied upon by Hessen, supported by Germany, was

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<sup>257</sup> See Op. Advoc. Gen., *Georgiev*, EU:C:2010:487, ¶ 40.

<sup>258</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 73.

<sup>259</sup> *Georgiev*, EU:C:2010:699, ¶ 54. See Op. Advoc. Gen., *Georgiev*, EU:C:2010:487, ¶ 36.

<sup>260</sup> *Fuchs & Köhler*, EU:C:2011:508. Somewhat surprisingly, there is no Opinion of an Advocate

General.

<sup>261</sup> *Id.* ¶ 24.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* ¶ 40.

that retirement at age sixty-five was intended to achieve a “favorable age structure,” with a “balance between the generations,” and the encouragement of “the recruitment and promotion of young people.”<sup>264</sup> Citing *Georgiev*, which the Second Chamber had decided only a few months previously, the Second Chamber endorsed both the “promotion of access of young people” and “the mix of different generations” as valid justifications in order to achieve a “high-quality justice service.”<sup>265</sup>

The Second Chamber also endorsed Germany’s authorization for each federal state to set the retirement age for its own civil servants as a flexible approach that better adapted the retirement age to the circumstances in that state, citing *Palacios de la Villa*.<sup>266</sup>

With regard specifically to the profession of prosecutors, the Court observed that their number is limited at senior levels, particularly in view of “budgetary constraints,” because they are “appointed permanently and only rarely resign,” so that setting a compulsory retirement age is essential to achieve a fair inter-generational distribution.<sup>267</sup>

Although the Second Chamber observed that “keeping older workers in the labour force promotes diversity in the work force,” citing Recital 25 of Council Directive 2000/78, it then concluded that this could be balanced by the interest of promoting “the entry of young workers into the labour force.”<sup>268</sup>

Ever since *Palacios de la Villa*, the Court has linked the determination of a compulsory retirement age to the date of access to pensions at a not “unreasonable” level. In *Fuchs*, the Second Chamber noted that prosecutors usually retire with a pension equivalent to seventy-two percent of their prior salary.<sup>269</sup> Moreover, the Court observed that prosecutors could still engage in private legal practice,<sup>270</sup> presumably either as independent legal practitioners or as members of a law firm.

## 2. Reflections on *Petersen*, *Georgiev*, and *Fuchs and Kohler*

We previously noted in *Palacios de la Villa* and other judgments in Part II.A-C that the Court of Justice accorded almost total deference to the Member State governments when the Court had occasion to examine Member State rules that authorized or endorsed employer-set standard retirement ages on a national basis.

The Court was obviously motivated by the view that Member State governments, not courts, should set fundamental social and employment policies. The Court presumably considered that the issue of whether standard retirement ages (usually

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<sup>264</sup> *Id.* ¶¶ 47–48.

<sup>265</sup> *Id.* ¶¶ 49–50. The Court later described a “high-quality justice service” as a “public interest.” *Id.* ¶ 53.

<sup>266</sup> *Fuchs & Köhler*, EU:C:2011:508, ¶¶ 54–56, 65.

<sup>267</sup> *Id.* ¶ 57. The Court later held that Hessen could properly consider budgetary factors, as well as political, social or demographic concerns, in determining its employment policies, provided that they continue to “observe the general principle of the prohibition of age discrimination.” *Id.* ¶ 73.

<sup>268</sup> *Id.* ¶¶ 63–64.

<sup>269</sup> *Id.* ¶ 67.

<sup>270</sup> *Id.*

sixty-five, sixty-seven, or sixty-eight) should be set or endorsed at all, was best resolved through the political process in each Member State. In its key judgment, *Palacios de la Villa*, the Court emphasized that this could lead to considerable diversity among the States (as indeed it has) due to political, economic, social, demographic, and budgetary factors specific to each State.<sup>271</sup>

In contrast, when the Court has had occasion in its judgments since 2010 to examine State rules setting or endorsing maximum ages for the exercise of specific professions or sectors of employment, the Court may have felt that it had greater latitude, because these State rules encompass a limited number of individuals, not the entire employed population. In some judgments applying the justification provisions of Directive 2000/78's Article 6(1), the Court has continued to show considerable deference towards State political determinations, while in others the Court has exercised the strict scrutiny appropriate for rules that derogate from the fundamental principle of non-discrimination based on age.

In its 2010 judgment in *Petersen*, the Grand Chamber exhibited considerable skepticism toward Germany's justifications for setting sixty-eight as the final year for a dentist's occupation as a panel dentist entitled to provide services to patients that the state insurance system would reimburse.<sup>272</sup> The skepticism was certainly warranted. Thus, early in its judgment, the Court concluded that a public health concern could not justify the sixty-eight-year limit for panel dentist service, because dentists were permitted to continue to serve private patients after reaching that age.<sup>273</sup>

The Grand Chamber did accept that Germany could justify the sixty-eight-year limitation on panel dentists if necessary to "prevent a risk of serious harm to the financial balance of the social security system," giving, as usual, the national court the responsibility to "ascertain" whether such a risk would exist.<sup>274</sup> However, it would seem implausible that a national court could properly conclude that that risk existed, inasmuch as the volume of dental services, and hence their total cost, would essentially depend on patients' needs, not the number of panel dentists serving the patients.<sup>275</sup>

The Grand Chamber was also skeptical of Germany's contention that the sixty-eight-year maximum age for panel dentists was necessary to promote the employment of younger dentists. Although the Court in *Palacios de la Villa* had held that the encouragement of employment of younger employees is an appropriate State justification for its employment policy,<sup>276</sup> the Grand Chamber in *Petersen* considered it unlikely that a sixty-eight-year maximum age limit was necessary to enable young dentists to engage in that practice.<sup>277</sup> Ultimately, it seems unlikely that the referring court would accept the sixty-eight-year maximum service limit in view of the Court's skeptical comments.

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<sup>271</sup> *Palacios de la Villa*, EU:C:2007:604, ¶ 69.

<sup>272</sup> *Petersen*, EU:C:2010:4, ¶¶ 11–13.

<sup>273</sup> *Id.* ¶ 61. See also Op. Advoc. Gen., *Petersen*, EU:C:2009:513, ¶ 50.

<sup>274</sup> *Fuchs & Köhler*, EU:C:2011:508, ¶ 64.

<sup>275</sup> Op. Advoc. Gen., *Petersen*, EU:C:2009:513, ¶¶ 59, 66.

<sup>276</sup> *Palacios de la Villa*, EU:C:2007:604, ¶¶ 60, 65.

<sup>277</sup> *Petersen*, EU:C:2010:4, ¶ 71.

The Second Chamber's 2010 judgment in *Georgiev*<sup>278</sup> presents a stronger doctrinal justification for a Member State rule or policy that compels mandatory retirement of older persons in a particular profession, in this instance, that of university professors. The Second Chamber endorsed the view of Advocate General Yves Bot that a Member State may set an age limit in order to promote "a balanced mix of ages . . . within the body of university professors" which will thereby enhance "the quality of teaching and research at universities."<sup>279</sup>

Although there is considerable variance in academic career structure and titles, in essentially all Member States the academics engaged in university teaching and research posts rise from low-level instructors through assistant professors, then associate professors, ultimately to a relatively small group of full, or chaired, professors. The academic career pattern thus takes a pyramid shape. It is also true that higher level academic posts are invariably limited in number and are achieved through high qualifications, whether achieved competitively, or by seniority.

There is good reason to endorse the Court's strong emphasis on the value of an inter-generational mix, evident in a university context, but also applicable in other professions or fields of employment. However, whether compulsory retirement at sixty-five, or even sixty-eight, is appropriate in a modern university context is certainly open to question.

In *Commission v. Hungary*,<sup>280</sup> discussed below in Part II.B.3 as the sole Court judgment concerning an infringement or violation of the Treaty, Advocate General Juliane Kokott questioned the inter-generational mix doctrine. With reference to judges and lawyers, the Advocate General cogently observed that "past experience and the enhanced natural authority that often comes with age are of great practical use in the legal profession."<sup>281</sup> One may quite plausibly contend that this should be true for university professors as well.

Especially, in view of the modern demographic factor of a steady increase in longevity with concomitant mental and physical capacity, should not professors be permitted to serve at least until seventy? Arguably, the older professors aged sixty-five to sixty-nine who opt to continue their service rather than retiring are apt to continue contributing to academic research and writing in addition to teaching, providing in each their accumulated experience and knowledge. Unless universities have unusually serious budgetary problems, it would seem unlikely that permitting a few professors to continue their service until the age of seventy would make it necessary to reduce significantly the hiring of entry level academics.

Turning to *Fuchs and Kohler*,<sup>282</sup> the Second Chamber largely followed its prior judgment in *Georgiev* with regard to the value provided by an inter-generational mix in determining that a compulsory retirement age is justified, pursuant to Directive 2000/78's Article 6(1). What merits emphasis is that Hessen's compulsory retirement age of sixty-five applied to all of its permanent civil servants, not just the prosecutors

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<sup>278</sup> *Georgiev*, EU:C:2010:699.

<sup>279</sup> Op. Advoc. Gen., *Georgiev*, EU:C:2010:699, ¶ 46.

<sup>280</sup> Comm'n v. Hungary, Case C-286/12, EU:C:2012:687.

<sup>281</sup> Opinion of Advocate General Kokott, Comm'n v. Hungary, Case C-286/12, EU:C:2012:602, ¶ 52.

<sup>282</sup> *Fuchs & Kohler*, EU:C:2011:508.



concerned in the referring court's proceedings. Moreover, the Court's acceptance of this inter-generational mix justification would analogously apply to Germany's compulsory retirement of all of its permanent civil servants at sixty-seven (and conceivably to any compulsory retirement age set for its civil servants by any other Member State).

As just observed with regard to *Georgiev*, one may plausibly wonder whether compulsory retirement at sixty-five or sixty-seven disregards the value provided by older civil servants based upon their greater experience and "enhanced natural authority," and whether it should still be considered appropriate today in view of the demographic impact of greater longevity. Moving back compulsory retirement to, perhaps, seventy would also enable some older civil servants to continue to pay income taxes, offsetting to some degree the added budgetary costs of their employment.

### 3. *Commission v. Hungary*:<sup>283</sup> A Treaty Infringement Proceeding

*Commission v. Hungary* is unique among age discrimination cases. This First Chamber judgment in 2012 is the sole instance of a Treaty infringement proceeding<sup>284</sup> brought against a Member State for a deliberate violation of the principle of equal treatment in Article 1 of Directive 2000/78. Indeed, the challenged Hungarian legislation, which significantly lowered the compulsory retirement age for judges, prosecutors, and notaries, was undoubtedly intended to achieve the political goals of the government without regard for the principles of judicial independence and democratic governance.<sup>285</sup>

After Prime Minister Viktor Orban's Conservative Fidesz party obtained a two-third majority of the Hungarian parliament in 2010, his government began to adopt measures which can plausibly be described as authoritarian. The government adopted a new Basic Law or Constitution, effective in 2012. Its Articles 27(2) and 29(2) specified that the government should appoint all professional judges and prosecutors.<sup>286</sup> Simultaneously, Parliament adopted a law that prescribed that all judges, prosecutors, and notaries were subject to compulsory retirement at the age of sixty-two, instead of the prior age of seventy.<sup>287</sup> The law had the immediate effect of requiring 194 judges and 79 prosecutors to retire on June 30, 2012.<sup>288</sup> The Hungarian

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<sup>283</sup> *Comm'n v. Hungary*, EU:C:2012:687.

<sup>284</sup> Ever since the creation of the European Economic Community in 1958, Treaty infringement proceedings brought by the Commission against Member States in the Court of Justice have been a powerful weapon to achieve compliance with Treaty provisions and secondary legislation. Article 169 of the initial EEC Treaty, currently replicated in TFEU, art. 258, set out the procedure for the Commission's instigation of an infringement action against a State, and stated that the Court's judgment was binding on the State. For a description of Treaty infringement proceedings, see GOEBEL ET AL., *supra* note 9, ch. 3; ARNULL, *supra* note 9, at 34–51; HARTLEY, *supra* note 9, ch.10.

<sup>285</sup> See Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50 COMMON MKT. L. REV. 1145, 1150–52 (2013).

<sup>286</sup> MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, arts. 27(2) & 29(2); see also Belavusau, *supra* note 285 at 1146.

<sup>287</sup> *Comm'n v. Hungary*, EU:C:2012:687, ¶¶ 1, 6–16.

<sup>288</sup> Op. Advoc. Gen., *Comm'n v. Hungary*, EU:C:2012:602, ¶17. Moreover, thirty-seven judges and twenty prosecutors were scheduled to retire on Dec. 31, 2012. Thus, about eight percent of all judges and

Constitutional Court promptly held on July 16, 2012 that the reduction in the retirement age of judges was unconstitutional as a violation of the principle of irremovability of judges, an aspect of judicial independence, but this did not have the effect of reinstating in office the retired judges.<sup>289</sup> Moreover, the Constitutional Court judgment did not make any reference to the lowered retirement age for prosecutors or notaries, and accordingly had no application to them.

On June 7, 2012, the Commission filed its Treaty infringement proceeding against Hungary pursuant to TFEU Article 258, and requested an accelerated Court procedure pursuant to Article 133 of the Court Rules of Procedure.<sup>290</sup> The Court accepted the accelerated procedure request. Advocate General Juliane Kokott provided her Opinion on October 2, 2012, and the First Chamber of five Judges issued its judgment on November 6, 2012, largely agreeing with the views of the Advocate General.

An initial procedural issue raised by Hungary was whether the infringement proceeding could be regarded as moot in view of its acceptance of the Hungarian Constitutional Court judgment. The Court of Justice followed its traditional doctrine that the treaty infringement proceeding was based upon the state of affairs in June when the Commission sent Hungary a “reasoned opinion” challenging the alleged infringement.<sup>291</sup> The First Chamber also observed that the Constitutional Court judgment of July 16 did not reinstate the judges and prosecutors removed from office on June 30, 2012, so that the government was able to replace them.<sup>292</sup>

On reaching the merits, the First Chamber easily held that the compulsory retirement of judges, prosecutors and notaries constituted direct discrimination based on age, citing *Palacios de la Villa*.<sup>293</sup> The Court then dealt with two issues: the possible justification of the compulsory retirement pursuant to Directive 2000/78’s Article 6(2), and the proportionality of any measures considered to be conceivably justifiable.

The Court first examined Hungary’s claim that the lowered compulsory retirement age aligned the retirement of judges, prosecutors and notaries with that of other civil servants, thus promoting the viability of the pension scheme. The First Chamber accepted this as a possible justification,<sup>294</sup> but considered that the earlier retirement at sixty-two instead of seventy was so significant and abrupt that it ought to have been introduced with transitional measures.<sup>295</sup> The law requiring earlier

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six percent of all prosecutors might have been immediately replaced by the government. The Opinion also notes that sixty-one notaries, out of a total of 315, were scheduled to retire on Dec. 31, 2013, pursuant to the Hungarian legislation.

<sup>289</sup> Alkotmánybíróság (AB) [Constitutional Court] July 16, 2012, MK.VII.17 33/2012. See also Belavusau, *supra* note 285, at 1146–47. The Constitutional Court decision was supported by eight judges against seven dissents—the government had named seven judges in 2011–12. *Id.* at 1151, 1153.

<sup>290</sup> *Rules of Procedure of the Court of Justice of 25 September 2012*, art. 133, 2012 O.J (L 265) 1. The President of the Court of Justice is authorized to issue an order of Expedited Procedure.

<sup>291</sup> *Comm’n v. Hungary*, EU:C:2012:687, ¶ 41

<sup>292</sup> *Id.* ¶¶ 46–47.

<sup>293</sup> *Id.* ¶¶ 48–54.

<sup>294</sup> *Id.* ¶ 61. Advocate General Kokott observed that making the retirement age of lawyers and judges “comparable with their professional counterparts elsewhere in the civil service” should be considered to be within the discretion of the Member State government. Opinion of Advocate General, Kokott, *Comm’n v. Hungary*, Case C-286/12, EU:C:2012:602, ¶ 63.

<sup>295</sup> *Comm’n v. Hungary*, EU:C:2012:687, ¶¶ 66–71. See Op. Advoc. Gen., *Comm’n v. Hungary*,

retirement entered into effect on January 1, 2012 and immediately required the retirement of large numbers of judges and prosecutors on June 1 and December 31, 2012.<sup>296</sup> The abrupt character of the retirement age reduction meant that the retired individuals would not have the opportunity to undertake economic or financial action to try to reduce the impact of a reduction in income from their pay to their pension levels, at least thirty percent lower.<sup>297</sup> The Court also noted that a different 2010 Hungarian law would raise the general retirement age of civil servants from sixty-two to sixty-five between 2014 and 2022, but did so by means of a gradual shift over this eight-year period. The Court noted that this alternative gradual approach showed that Hungary could have, and indeed ought to have “gradually staggered” over time its reduction of the retirement age of judges, prosecutors, and notaries.<sup>298</sup>

The First Chamber then turned to Hungary’s second justification, that of achieving “a more balanced age structure facilitating access for young lawyers.”<sup>299</sup> The Court had already accepted this as a plausible justification for setting a compulsory retirement age for prosecutors in *Fuchs*, previously discussed, so the issue to be examined was whether Hungary’s abrupt and serious reduction in the compulsory retirement age could be considered proportionate. The First Chamber accepted that the resignation of so many senior judges, prosecutors, and notaries would provide opportunities for young lawyers.<sup>300</sup> However, this would only achieve a positive short-term effect, because after the immediate filling of the large number of posts of retired individuals between sixty-two and seventy, the turnover replacement of retirees would be significantly lower for several years.<sup>301</sup> The Court concluded that this would not be appropriate to achieving overall a “more balanced age structure,” and did not satisfy the principle of proportionality.<sup>302</sup>

It should be emphasized that the First Chamber judgment did not cover two significant reasons advanced by Advocate General Kokott for invalidating Hungary’s rules. She seriously questioned Hungary’s claim that the earlier retirement age would improve the quality of its justice system, observing that “lawyers can work effectively until a relatively advanced age” and that “past experience and the enhanced natural authority that often comes with age are of great practical use in the legal profession.”<sup>303</sup>

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EU:C:2012:602, ¶¶ 65–68.

<sup>296</sup> *Comm'n v. Hungary*, EU:C:2012:687, ¶ 69.

<sup>297</sup> *Id.* ¶ 70. Op. Advoc. Gen., *Comm'n v. Hungary*, EU:C:2012:602, ¶¶ 77–89 (discussing at length the obligation of States to avoid “undue adverse effects” on persons concerned by a reduction in the compulsory retirement age (*id.* ¶ 77), noting that the retirees would not only have lower pension benefits instead of a full salary (*id.* ¶ 83), but also would have difficulty in compensating for the lost income due to the abrupt retirement (*id.* ¶¶ 85–88)).

<sup>298</sup> *Comm'n v. Hungary*, EU:C:2012:687, ¶ 73.

<sup>299</sup> *Id.* ¶ 62.

<sup>300</sup> *Id.* ¶ 76. In fact, as Belavusau, *supra* note 285, at 1158 points out, the abrupt retirement of so many judges, prosecutors and notaries affords replacement opportunities only for middle-aged lawyers, not young lawyers.

<sup>301</sup> *Comm'n v. Hungary*, EU:C:2012:687, ¶ 78.

<sup>302</sup> *Id.* ¶ 79. Advocate General Kokott observed that “a balanced age structure can be achieved ... more efficiently if the new age limit is introduced progressively over a number of years.” Op. Advoc. Gen., *Comm'n v. Hungary*, EU:C:2012:602, ¶ 46.

<sup>303</sup> Op. Advoc. Gen., *Comm'n v. Hungary*, EU:C:2012:602, ¶ 52.

With specific reference to judges, the Advocate General pointed out that “their abrupt forcing into retirement may give rise to doubts as to the independence...of the courts,” citing Article 47 of the Charter of Fundamental Rights on the obligation that “courts must be independent and impartial and established by law.”<sup>304</sup> Advocate General Kokott considered that Hungary’s abrupt removal of such a large number of judges through their compulsory retirement constituted “a serious interference with the justice system, not only because it might indicate an intent to “influence the course of justice,” but also because “any semblance of the exerting of influence must be avoided.”<sup>305</sup>

#### 4. Reflections on *Commission v. Hungary*

*Commission v. Hungary* presents issues that are completely unrelated to the doctrinal ones examined in the prior judgments. The authoritarian government of Prime Minister Orbán undoubtedly sought the compulsory retirement of senior judges, prosecutors and notaries at sixty-two instead of seventy not to promote a better inter-generational mix, nor to achieve budgetary savings, but to replace the retired judicial officials with individuals more sympathetic to the government’s political and economic policies.

The First Chamber’s judgment followed the Second Chamber’s judgment in *Fuchs and Kohler*, concluding that an inter-generational mix rationale, balancing “young and older civil servants,” could justify Hungary’s lowering of the compulsory retirement age.<sup>306</sup> Inasmuch as *Fuchs and Kohler* did not question setting sixty-five as an appropriate retirement age for civil servants generally, and those concerned with the administration of justice specifically, the First Chamber would have had difficulty in contesting directly Hungary’s reduction of its compulsory retirement age for judges, prosecutors, and notaries from seventy to sixty-five (and perhaps even to sixty-two, the age set in the 2010 Hungarian legislation). The First Chamber instead invalidated the Hungarian reduction in the compulsory retirement age based upon a proportionality analysis, holding that the age reduction was too abrupt and ought to have been gradually phased in over a reasonable period of time. The abrupt nature of the compulsory retirement at a significantly lower age—sixty-two versus seventy—undeniably violated the legitimate expectations of any retired individuals, who were thereby rendered incapable of taking measures over time to protect their economic interests.<sup>307</sup>

Unfortunately, although the First Chamber judgment presumably prevented Hungary’s compulsory retirement of those judges and prosecutors scheduled to retire on Dec. 31, 2013, the judgment neither required the reinstatement in office of those retired on June 30, 2012, nor compelled any damages for their retirement. Moreover, Prime Minister Orbán’s government has partially achieved its goal, because it was able to replace a significant number of older judges and prosecutors with new ones apt to be more favorable to Fidesz party views. Also highly unfortunate is the First

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<sup>304</sup> *Id.* ¶ 54.

<sup>305</sup> *Id.* ¶ 56.

<sup>306</sup> *Comm’n v. Hungary*, EU:C:2012:687, ¶ 62.

<sup>307</sup> *Id.* ¶¶ 66–71.

Chamber's failure to make any reference to the crucial importance of judicial independence, highlighted by Advocate General Kokott in her Opinion.<sup>308</sup> This may have been prompted by the Court's desire to obtain Hungary's compliance with the judgment, but it is regrettable that such an obvious occasion was neglected to underline the obligation of Member States to adhere to the democratic values and rule of law set out in the Lisbon TEU's Article 2.<sup>309</sup>

It is worth noting that in a later 2014 Grand Chamber judgment in another Treaty infringement proceeding,<sup>310</sup> the Court upheld the Commission contention that Hungary had violated the independence of its national data protection authority as required by a "complete independence" provision of Directive 95/46 on Personal Data Protection. Manifestly, the government of Prime Minister Orban continues to be authoritarian, and might well have benefitted from an explicit Court reminder in 2012 that the government ought to adhere to democratic values and the rule of law.

### C. *Contrasts with U.S. Law—Specific Professions, Fields and Occupational Roles*

In Part II.D above, we reviewed the evolution of the ADEA from its initial 1967 text, which permitted employers to require the compulsory retirement of employees at age sixty-five, through the 1978 amendment that retarded that age to seventy, and down to the 1986 ADEA which essentially prohibited compulsory retirement. This review enabled a comparison with the Court conclusion in *Palacios de la Villa* and three other judgments that Member States could have objective justifications for their compulsory retirement ages pursuant to the terms of Article 6 of Directive 2000/78. The comparison ultimately concluded that substantially different legal, social and economic conditions in the EU and the United States made the radically different policies justifiable and appropriate. This conclusion did have a significant caveat, discussed in Part II.E: the demographic impact of a steadily increasing proportion of older persons in the EU's working population was apt to warrant a retarding of any customary compulsory retirement age to seventy, and even its ultimate elimination.

In Part III, a comparative examination of EU and U.S. rules and court judgments is also beneficial in enabling a better critical evaluation of each. When Congress adopted the 1967 ADEA, it provided a general exception from the prohibition of age-based discrimination in employment "where age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business, or where the differentiation is based on reasonable factors other than age."<sup>311</sup> An acronym, BFOQ, is commonly used to indicate the "bona fide occupational qualification" exception. The comparable provision in Directive 2000/78 is Article 4(1) on occupational requirements, which states that age-based differential treatment in employment based on a factual characteristic "shall not constitute discrimination where the characteristic constitutes a genuine and determining occupational

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<sup>308</sup> Op. Advoc. Gen., *Comm'n v. Hungary*, EU:C:2012:602, ¶¶ 54–56.

<sup>309</sup> See TEU, art. 2.

<sup>310</sup> *Comm'n v. Hungary*, EU:C:2012:687.

<sup>311</sup> The Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 4(f), 81 Stat. 602 (1967) (currently codified in 29 U.S.C. § 623(f)).

requirement,” proportionately applied.<sup>312</sup>

Enforcement of the ADEA by the EEOC, and civil suits by employees against employers, have generated numerous cases in which the BFOQ has been applied.<sup>313</sup> In contrast, only three Court of Justice judgments have thus far examined the application of the Directive’s Article 4(1), each with regard to a quite specific profession: commercial air pilots, firefighters, and police officers. The Grand Chamber’s 2011 judgment in *Prigge*,<sup>314</sup> reviewed in Part III.A above, examined Lufthansa’s compulsory retirement rule that required its commercial air pilots to retire at age sixty. The Grand Chamber did not challenge Lufthansa’s power to compel compulsory retirement for pilots, but concluded that the appropriate age should be sixty-five because that was the age set by international rules on air transport, which permitted pilots to serve in multi-pilot teams between the ages of sixty and sixty-five.<sup>315</sup>

There can be no serious doubt that public safety concerns warrant an age limit for pilots engaged in commercial air transportation.<sup>316</sup> But what should be that age? In 2007, the U.S. Congress adopted the Fair Treatment for Experienced Pilots Act, Public Law 110-135,<sup>317</sup> which set sixty-five as the age limit for commercial air pilots, provided they served in a multi-member flight deck crew. Congress acted when the Federal Aviation Administration indicated that it was considering adopting that age instead of the prior maximum age of sixty.<sup>318</sup> In view of the choice of sixty-five as the appropriate age for the compulsory retirement of commercial air pilots both by the U.S. Congress and by the Joint Aviation Authorities (as cited in *Prigge*), it would appear sensible to accept that concern for public safety warrants that compulsory retirement age, even though in other professions one might prefer the use of individual physical and mental assessments to determine fitness for service, rather than a standard retirement age.

Coincidentally, a good example of an analysis applying the “bona-fide occupational qualification” exception is the Supreme Court’s unanimous 1985 *Western Airlines v. Criswell* judgment,<sup>319</sup> in which it invalidated Western Airlines’ compulsory retirement of flight engineers at the age of sixty. In Western Airlines’ large aircraft, flight engineers joined with the pilot and the co-pilot in a three-member cabin crew. Justice Stevens’ opinion emphasized that the ADEA applied “with especial force [to] mandatory retirement provisions.”<sup>320</sup> The Court held that, even though flight engineers might provide critical assistance in emergency situations, Western Airlines

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<sup>312</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

<sup>313</sup> See ESTREICHER & HARPER, *supra* note 159, at 431–38 (providing several illustrative U.S. court judgments).

<sup>314</sup> *Prigge*, EU:C:2011:573.

<sup>315</sup> *Id.* ¶¶ 14, 73, 83.

<sup>316</sup> *Id.* ¶¶ 58, 67.

<sup>317</sup> Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007) (enacted H.R. 4343).

<sup>318</sup> The Federal Aviation Administration prior age limit of sixty was set in 14 C.F.R. § 121.383(c) (2016).

<sup>319</sup> *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).

<sup>320</sup> *Id.* at 410.

had not demonstrated that its mandatory retirement age limit was “reasonably necessary” for the safe transportation of airline passengers,<sup>321</sup> or that substantially all flight engineers over sixty could not perform their duties safely or efficiently.<sup>322</sup> Thus, unless Western Airlines could prove a safety risk, flight engineers could continue their service until the age of seventy, the 1978 ADEA’s then-authorized age for compulsory retirement.

Turning from commercial air pilots to firefighters, the Grand Chamber’s January 2010 judgment in *Wolf*<sup>323</sup> concerned a regulation of the German state of Hessen that governed the careers of persons employed in the professional firefighting service.<sup>324</sup> The issues referred by an administrative court all concerned a significant age-based service limitation: whether the Hessen regulation could bar a junior level firefighter from applying for recruitment into an intermediate-level post after attaining the age of thirty. Preventing junior firefighters thirty-years-old or older from progressing in their careers might well induce some to leave the firefighting service, with the same effective result as compulsory retirement. Note initially that although employment in a professional firefighting service constitutes employment by a state agency, Directive 2000/78’s Article 3(1) states that the Directive’s scope covers “the public and private sectors,” making it applicable.<sup>325</sup>

Although the administrative court’s referred questions concerned the application of the Directive’s Article 6(1) on the possible justification for the rules, the Grand Chamber took a different approach, reformulating the issues.<sup>326</sup> Following the suggestion of Advocate General Yves Bot,<sup>327</sup> the Grand Chamber chose instead to review the Hessen rules under Article 4(1). The Grand Chamber easily concluded that firefighters must have a high physical capacity in order to ensure that the professional firefighting service can “guarantee [its] operational capacity and proper functioning,”<sup>328</sup> citing the Directive’s Recital 18, which included “emergency services” among those forms of employment that could legitimately require a special occupational capacity.<sup>329</sup> The Grand Chamber also easily concluded that firefighters at the intermediate service level who were actively involved in “fighting fires, rescuing persons, environment protection tasks, helping animals, and dealing with dangerous animals” needed “exceptionally high physical capabilities” which are rare after the age of forty-five for firefighting, or after the age of fifty for rescuing persons.<sup>330</sup>

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<sup>321</sup> *Id.* at 419.

<sup>322</sup> *Id.* at 422–23.

<sup>323</sup> *Wolf*, EU:C:2010:3.

<sup>324</sup> *Id.* ¶¶ 17–20.

<sup>325</sup> Council Directive 2000/78/EC, *supra* note 4, art. 3(1).

<sup>326</sup> The Court of Justice often reformulates questions referred by national courts in its role of providing “all the elements of interpretation of Community law which may be of assistance.” *Wolf*, EU:C:2010:3, ¶ 32.

<sup>327</sup> Opinion of Advocate General Bot, *Wolf v. Stadt Frankfurt am Main*, Case C-229/08, EU:C:2009:509. Advocate General Bot has frequently provided Opinions in age discrimination cases.

<sup>328</sup> *Wolf*, EU:C:2010:3, ¶¶ 37–39 (paralleling Advocate General Bot’s Opinion at ¶ 37).

<sup>329</sup> Council Directive 2000/78/EC, *supra* note 4, rec. 18.

<sup>330</sup> *Wolf*, EU:C:2010:3, ¶¶ 40–41. The Court noted in ¶ 41 that firefighters could continue to serve the important role of “rescuing persons” up to the age of fifty. The German government provided the Court with scientific data from industrial and sports medicine studies to justify the contention that “respiratory capacity,

The crucial issue then became whether Hessen could bar anyone over thirty from recruitment into the intermediate-level service based upon a “genuine and determining occupational requirement.”<sup>331</sup> The Court noted that firefighters older than forty-five or fifty, who lacked the physical capacity to fight fires or rescue persons, performed management and other functions.<sup>332</sup> The Grand Chamber then accepted the German government’s contention that “the rational organization of the professional [firefighting] service” required the maximum age limit of thirty for admission to the intermediate level of service.<sup>333</sup> Individuals recruited before the age of thirty into the intermediate level could fulfill the crucial roles of firefighting or rescuing persons for fifteen to twenty years before their diminished physical capacity would require them to shift to management or other duties. Permitting individuals to join the intermediate level at a later age would not allow them to serve for a “sufficiently long period.”<sup>334</sup> Then, without giving any guidance on how many years would constitute a “sufficiently long period,” the Court simply accepted that setting a maximum age of thirty for recruitment was proportionate to the goal of “ensuring the operational capacity” of the professional firefighting service.<sup>335</sup>

That firefighters require “exceptionally high physical capabilities” is unquestionable. The Grand Chamber’s acceptance of Germany’s contention that individuals over forty-five are unlikely to possess those capabilities for service as firefighters is, however, open to question. The Grand Chamber cited the German government’s contention that persons past the age of forty-five (for firefighters) to fifty (for saving persons) no longer possess greater physical abilities, citing “studies in industrial and sports medicine” in support of this.<sup>336</sup> However, as observed above in note 330, the German studies apparently did not include any based solely on firefighters. As Professor Dagmar Schiek has usefully observed, the Court approach can be criticized as stereotyping, concluding that “older people will always become incapable of performing physically demanding tasks,”<sup>337</sup> instead of requiring that individual assessments be used to determine a firefighter’s physical capabilities.<sup>338</sup> Individual firefighters between the ages of forty and fifty may significantly differ in their physical capabilities.

We turn now from firefighters to police officers. The Second Chamber’s 2014 judgment in *Vital Perez*,<sup>339</sup> the most recent relevant judgment, provides a useful contrast to *Wolf*. The judgment invalidated another age-based limitation on service: a maximum thirty-year age limit for entry into membership in a local police force.

A 1986 Spanish Law set out the principal functions of “State security forces”: the

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musculature and endurance diminishes with age,” but apparently did not provide specific studies concerning firefighters.

<sup>331</sup> *Id.* ¶ 31.

<sup>332</sup> *Id.* ¶ 40.

<sup>333</sup> *Id.* ¶¶ 43–44. See also Op. Advoc. Gen., *Wolf*, EU:C:2009:509, ¶¶ 25–35.

<sup>334</sup> *Wolf*, EU:C:2010:3, ¶ 43.

<sup>335</sup> *Id.* ¶ 44. See also Op. Advoc. Gen., *Wolf*, EU:C:2009:509, ¶ 38.

<sup>336</sup> *Wolf*, EU:C:2010:3, ¶ 41.

<sup>337</sup> Schiek, *supra* note 19, at 793.

<sup>338</sup> *Id.*

<sup>339</sup> *Vital Perez*, EU:C:2014:2371.



assurance of public security, the protection of people and property, the prevention of crime and the arrest of presumed criminals.<sup>340</sup> The Spanish Law's Article 53(1) defined the duties of local police forces to be to act as auxiliaries of the State security forces.<sup>341</sup> Spain's seventeen regions then adopted rules governing the membership and operations of their local police. In a 2007 regional law, the Asturia region specified the duties of its local police as "protecting persons and property, the arrest and custody of offenders, conducting crime prevention patrols, traffic control," etc.<sup>342</sup> When Vital Perez challenged Asturia's requirement that candidates for entry into its local police forces must be no more than thirty years old,<sup>343</sup> the Administrative Court asked the Court of Justice whether the maximum age limit of thirty could be justified under either Article 4(1) or 6(1) of Directive 2000/78. Obviously, setting a maximum age for recruitment into the local forces constituted direct discrimination based on age.<sup>344</sup>

The Second Chamber initially examined whether the maximum age limit could be considered to be based upon "a genuine and determining occupational requirement," pursuant to the Directive's Article 4(1).<sup>345</sup> The Court concluded that some of the duties of local police (e.g., the arrest and custody of criminal offenders) might require physical force, which would be an occupational requirement necessary for "the operational capacity and proper functioning of the police service."<sup>346</sup> Nonetheless, observing that Article 4(1) must be strictly interpreted, because it is a derogation from the principle of non-discrimination (citing *Prigge*),<sup>347</sup> the Second Chamber held that the Asturian maximum entry age limit could not be considered to be essential to the execution of many tasks of the local police. The Court observed that Asturia's stringent physical capacity tests in the recruitment process assured that a candidate for recruitment would have the physical ability to carry out the local police duties.<sup>348</sup> The Court distinguished the role of local police from that of the firefighters in *Wolf*, who required "exceptionally high physical capacities" for their principal occupational role of firefighting.<sup>349</sup> The Second Chamber also observed that Spain had abolished its maximum age limit of thirty for entry into the national police force, and that other regions had either no maximum age recruitment level, or set it at an age between thirty-five and forty.<sup>350</sup> This obviously cast doubt on Asturia's requirement

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<sup>340</sup> Organic law on security forces and services art. 11(1) (B.O.E. 1986, 2); see *Vital Perez*, EU:C:2014:2371, ¶ 13.

<sup>341</sup> Organic law on security forces and services art. 53(1); see *Vital Perez*, EU:C:2014:2371, ¶ 14.

<sup>342</sup> *Id.* ¶ 10.

<sup>343</sup> *Id.* ¶ 16.

<sup>344</sup> *Id.* ¶¶ 32–33.

<sup>345</sup> Council Directive 2000/78, *supra* note 4, art. 4(1).

<sup>346</sup> *Vital Perez*, EU:C:2014:2371, ¶¶ 39–44.

<sup>347</sup> *Id.* ¶ 47 (citing *Prigge*, EU:C:2011:573, ¶ 72).

<sup>348</sup> *Id.* ¶ 55.

<sup>349</sup> *Id.* ¶¶ 52–57. See also Opinion of the Advocate General Mengozzi, *Vital Perez v. Ayuntamiento de Oviedo*, Case C-416/13, EU:C:2014:2109, ¶¶ 13, 17–26. Advocate General Paolo Mengozzi reaches the same conclusion but notes that although the Commission took the same view, Spain, France, Germany, and Italy all supported Asturias in intervening briefs.

<sup>350</sup> *Vital Perez*, EU:C:2014:2371, ¶¶ 50–51. Advocate General Mengozzi observed that the disparity in regional rules not only cast doubt on the rules set by Asturias, but manifested the absence of the consistency which the principle of proportionality requires for government rules intended to achieve the operational capacity of the local police service. Op. Advoc. Gen., *Vital Perez*, EU:C:2014:2109, ¶¶ 62–64.

that a candidate for recruitment be under thirty years old.

With regard to any possible justification of Asturia's rule pursuant to Article 6(1) of the Directive, the Second Chamber held that no evidence indicated that the maximum age limit would further the employment of younger candidates for recruitment, or appropriate training.<sup>351</sup> In contrast to *Wolf*, the Second Chamber observed that there was no reason to require entry into the local police before the age of thirty in order to ensure an adequate number of police below Asturia's mandatory retirement age of sixty-five.<sup>352</sup> Overall, the Second Chamber's 2014 judgment in *Vital Perez* can be appraised as sensibly and pragmatically applying Directive 2000/78's Article 4(1). In contrast to *Wolf*, the Second Chamber specifically observed that Article 4(1) should be strictly construed, citing Recital 23 and *Prigge*.<sup>353</sup> In its judgment, the Court concluded that Asturia's "stringent" individual physical assessment tests for local police officers could satisfactorily determine an applicant's capacity, making a mandatory maximum recruitment age unnecessary.<sup>354</sup> Why shouldn't firefighters' continued service in their forties likewise be determined by individual physical assessment tests, rather than a mandatory age limit?

It is worth noting that in *Wolf*, the Hessen court never referred to the Court of Justice any question concerning Hessen's compulsory retirement of firefighters at sixty. Inasmuch as Hessen indicated that its firefighters over forty-five provide only management and other services, it is odd that they should be required to retire at sixty, not sixty-five, inasmuch as some firefighters might want to undertake management and other less physically-demanding service functions until sixty-five. In *Fuchs and Kohler*,<sup>355</sup> the referring court indicated that Hessen's compulsory retirement age for civil servants was sixty-five. Moreover, as we just observed, in *Vital Perez* the retirement age for local police officers was sixty-five.

On a comparative note, somewhat complicated provisions of the 1986 ADEA permit state and local governmental authorities to engage in age-based discrimination in hiring and to compel mandatory retirement for firefighters and law enforcement officers.<sup>356</sup> As amended in 1996, the rules forbid mandatory retirement before the age of fifty-five, but generally permit it after that age.<sup>357</sup> Respect for proper protection against age-based discrimination points to enabling individuals who want to continue in service, and are physically and mentally capable of doing so, to be employed after fifty-five. Fortunately, a 1996 amendment, Public Law 104-208, requires state and local governments to afford firefighters and law enforcement officers aged fifty-five

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<sup>351</sup> *Vital Perez*, EU:C:2014:2371, ¶¶ 63, 70.

<sup>352</sup> *Id.* ¶¶ 64–73. Advocate General Mengozzi observed that police officers recruited after thirty, but at an age relatively close to thirty (like the plaintiff *Vital Perez*) would have "a normal professional career ... able to serve for a reasonable period, even in the most demanding duties" before reaching the retirement age. Op. Advoc. Gen., *Vital Perez*, EU:C:2014:2109, ¶ 59.

<sup>353</sup> *Vital Perez*, EU:C:2014:2371, ¶¶ 46–47.

<sup>354</sup> *Id.* ¶ 55.

<sup>355</sup> *Fuchs & Kohler*, EU:C:2011:508.

<sup>356</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, §§ 3-4, 100 Stat. 3342, 3324-43 (1986) (currently codified in 29 U.S.C. § 623(j)).

<sup>357</sup> Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, 110 Stat. 3009-23 (1996) (currently codified at 29 U.S.C. § 623(j)(1)(b)).

or older an “annual opportunity to demonstrate physical and mental fitness” to carry out their “public safety tasks.”<sup>358</sup>

Turning from the occupational requirements context, in Part III.B we reviewed several Court judgments that held that a national rule constituted direct discrimination in employment based on age with regard to a specific profession or field, but then examined whether the rule could be considered justified under Directive 2000/78’s Article 6. The Second Chamber judgment in *Georgiev*<sup>359</sup> accepted the compulsory retirement of university professors at age sixty-five, on the basis of a key doctrinal justification for such mandatory retirement, namely, the promotion of an inter-generational mix among university professors.<sup>360</sup>

Somewhat surprisingly, the ADEA formerly provided specific coverage for university professors. The 1986 ADEA provided an exception authorizing the compulsory retirement of university professors, “serving under a contract of unlimited tenure,” up to December 31, 1993.<sup>361</sup> However the 1986 ADEA legislative exception required the Equal Employment Opportunity Commission to contract with the National Academy of Science (NAS) to carry out a study on “the potential consequences of the elimination of mandatory retirement on institutions of higher education.”<sup>362</sup> The NAS study concluded that universities should cease to be authorized to set a mandatory retirement age for tenured university professors, predicting that few professors would opt to continue their academic career after seventy, and that there would be no substantial adverse impact on younger professors.<sup>363</sup>

Following the NAS study, Congress did not act to remove the termination date of December 31, 1993 set in the ADEA exception. Accordingly, since that date tenured university professors cannot be compelled to retire (except, of course, if they are unable to satisfy a bona-fide occupational qualification), although universities are permitted to provide benefits and other economic incentives to induce professors to retire.<sup>364</sup>

Does the ADEA’s abolition of compulsory retirement for tenured university professors provide a basis for criticism of the Second Chamber judgment in *Georgiev* (particularly the “inter-generational mix” justification)? The desirability of an “inter-generational mix” among university professors in the United States is obvious, yet that concern did not prevent the abolition of compulsory retirement. Moreover, in the United States, many universities have policies that motivate older professors to retire through the grant of economic benefits. This approach appears to be quite satisfactory, reducing the risk of blocking the hiring of a significant number of entry-level, young

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<sup>358</sup> § 119(2)(d)(2), 110 Stat. at 3009-25.

<sup>359</sup> *Georgiev*, EU:C:2010:699.

<sup>360</sup> See *supra* text accompanying notes 251–253.

<sup>361</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99–592, § 5, 100 Stat. 3342 (1986).

<sup>362</sup> *Id.* § 6(c).

<sup>363</sup> NATIONAL RESEARCH COUNCIL, ENDING MANDATORY RETIREMENT FOR TENURED FACULTY: THE CONSEQUENCES FOR HIGHER EDUCATION 103 (P. Brett Hammond & Harriet Morgan eds., 1991).

<sup>364</sup> 29 U.S.C. § 623(m).

academics. University administrations in the EU should consider adopting similar policies.

In any event, as suggested in the critical review of *Georgiev* in Part III.B, Member States should consider raising any compulsory retirement age for university professors to seventy, to benefit from their experience and competence, and in view of the demographic factor of increasing longevity.

We turn now to a final comparative examination: that of compulsory retirement of state and local civil service employees. *Fuchs and Kohler*<sup>365</sup> concerned a compulsory retirement age of sixty-five for public prosecutors, but the issue in the questions referred could analogously relate to Germany's compulsory retirement age of sixty-seven for federal civil servants. Because Article 3(1) of Directive 2000/78 states expressly that its protective scope covers "both the public and the private sectors," the two plaintiffs were able to challenge their compulsory retirement by a German federal state. The Second Chamber concluded that the compulsory retirement was justified, based upon its doctrine of an "inter-generational mix" and the "promotion of access of young people."<sup>366</sup> The critical review of *Fuchs and Kohler* in Part III.B above suggested that nonetheless, any compulsory retirement age for civil servants should be moved back to seventy in view of the demographic impact of greater longevity and in order to gain the value of the greater experience of the relatively small number who might choose to work beyond sixty-five or sixty-seven.

In contrast, Section 5 of the 1978 ADEA amendment eliminated compulsory retirement for federal employees, except in a few sensitive categories.<sup>367</sup> Another amendment of the ADEA in 1974 provided protective coverage for employees of state and local governments against age-based discrimination, doing so simply by including state and local governments within the definition of the term, "employer."<sup>368</sup>

As previously noted, in 1983 the Supreme Court upheld Congress' extension of the ADEA's protective coverage to state employees in *Equal Employment Opportunity Commission v. Wyoming*.<sup>369</sup> Justice Brennan, speaking for a majority of five justices, concluded that application of the ADEA to states, thus protecting state employees from age-based discrimination, did not "directly impair" a state's ability to "structure integral operations in areas of traditional governmental functions," and accordingly did not significantly limit state sovereignty in the federal system.<sup>370</sup> The precise issue in the case was whether Wyoming could compel the retirement of a state employee, a fish and game warden, at the age of fifty-five. Justice Brennan's opinion held specifically that the ADEA prohibited "the discharge of employees based on their

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<sup>365</sup> *Fuchs & Kohler*, EU:C:2011:508.

<sup>366</sup> *Id.* ¶¶ 7, 49.

<sup>367</sup> Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5, 92 Stat. 189 (1978). Obviously, the ADEA does not apply to military personnel serving in the armed forces. *Spain v. Ball*, 928 F. 2d. 61 (2d Cir. 1991).

<sup>368</sup> 29 U.S.C. § 630(b) (2016) (including state and local governments in the term "employer").

<sup>369</sup> *EEOC v. Wyoming*, 460 U.S. 226 (1983).

<sup>370</sup> *Id.* at 239. Chief Justice Burger's dissent for four Justices contended vigorously that application of the ADEA could substantially increase states' employment costs and would have a serious adverse economic impact. *Id.* at 255-58. Justice Brennan specifically rejected this argument, maintaining that it was not certain whether the ADEA would have "either a direct or an obvious negative effect on state finances." *Id.* at 241.

age,<sup>371</sup> and then held that Wyoming could only terminate an employee on the basis of age after an individualized review pursuant to the ADEA's "bona fide occupational qualification" (BFOQ) exception.<sup>372</sup>

Although not challenging as such the ADEA's application to states on the basis of *EEOC v. Wyoming*, in 2000 the Supreme Court in *Kimel v. Florida Board of Regents*<sup>373</sup> held that states as employers were shielded by sovereign immunity from liability in civil damage actions, pursuant to language in the Fourteenth Amendment. Because Justice O' Connor's opinion for a majority of five justices dealt only with the civil damage issue, it did not affect the power of the EEOC to take enforcement actions occasioned by age-based discrimination claims of state employees, such as measures for injunctive relief or conciliation proceedings.<sup>374</sup> Moreover, subsequent decisions of federal courts have held that cities and other local governmental authorities do not enjoy the sovereign immunity of states and are accordingly fully subject to the ADEA's prohibition of age-based discrimination with regard to their employees.<sup>375</sup>

Arguably, Congress' elimination of age discrimination for federal, state, and local government employees, upheld by the Supreme Court with regard to states, provides support for the view that those EU Member States that require the compulsory retirement of their civil service employees at a specific age (usually sixty-five or sixty-seven), should seriously consider raising that age to seventy, especially in consideration of the progressive demographic impact of greater longevity.

One final exception to the ADEA should be mentioned. In 1978, when Congress amended the 1967 ADEA to protect employees from age-based discrimination up to the age of seventy, it added an exception enabling employers to retire persons "employed in a bona fide executive or a high policymaking position" during the two-year period preceding retirement.<sup>376</sup> The Equal Employment Opportunity Commission (EEOC), which enforces the ADEA, has narrowly construed this text, limiting the exception "only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."<sup>377</sup> Whether a large corporate entity could compel the retirement of a senior executive or policy maker has not been presented to the Court of Justice to date, but if the issue were to be included in a referring court's questions, the Court would certainly apply its customary approach under Directive 2000/78's Article 6, and examine whether the employer would have an objective and proportionate basis for requiring retirement.

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<sup>371</sup> *Id.* at 232.

<sup>372</sup> *Id.* at 240.

<sup>373</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). Justice Stevens issued a strong dissent on behalf of four Justices.

<sup>374</sup> See *EEOC v. Bd. of Regents*, 288 F. 3d 296 (7<sup>th</sup> Cir. 2002); *EEOC v. Bd. of Supervision*, 559 F. 3d 270 (5<sup>th</sup> Cir. 2009).

<sup>375</sup> See e.g. *Evans v. City of Bishop*, 238 F. 3d 586 (5<sup>th</sup> Cir. 2000); *Williams v. Dallas Area Rapid Transit*, 242 F. 3d 315 (5<sup>th</sup> Cir. 2001); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. Of Educ.*, 466 F. 3d 232 (2d Cir. 2006).

<sup>376</sup> Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, § 12(c)(1), 81 Stat. 602 (1967) (currently codified in U.S.C. § 631(b)).

<sup>377</sup> EEOC Regulations, 29 C.F.R. § 1625.12 (2016). See *Whittlesey v. Union Carbide Corp.*, 742 F. 2d 724 (2d Cir. 1984) (chief labor counsel did not qualify).

## CONCLUSION

Although most Americans choose to retire voluntarily in their early sixties, or when eligible for retirement benefits, it is not uncommon for some to continue their usual employment or occupation, or commence a new one, in their late sixties, seventies, or even eighties. This is viewed as quite normal and part of the modern American lifestyle. When Congress amended the Age Discrimination in Employment Act in 1986, it provided solid legal protection for such employment of older individuals, and eliminated compulsory retirement at any age, with a few exceptions. Accordingly, Americans are apt to be surprised to learn that employees in the European Union do not enjoy parallel protection against compulsory retirement, even though the EU Directive 2000/78 (effective in November 2003) forbid age-based discrimination in employment. The principal goal of this Article has been to indicate why some Member State governments authorize or endorse compulsory retirement ages, and why the Court of Justice has not held that this violated Directive 2000/78.

In Part II.A-C, this Article examined the Court of Justice judgments in *Palacios de la Villa*, *Age Concern England*, *Rosenbladt* and *Hornfeldt* with regard to the Court's conclusion that State measures authorizing or endorsing compulsory retirement ages could be considered compatible with the Directive. The Court had two motives for this conclusion. The first motive was the Court's acceptance that the States that set or endorsed compulsory retirement ages are appropriately impelled to do so in order to achieve the policy goal of an inter-generational balance in employment, especially for younger workers who are often subject to high unemployment rates.<sup>378</sup> The second motive was the traditional deference manifested by the Court to Member State governments' political decisions in the highly sensitive field of employment policy. The goal of achieving an inter-generational balance between the interests of younger, mid-career, and older workers, constituted a valid motive for national compulsory retirement ages. With regard to the Court's decidedly high level of judicial deference toward the governmental policies, although pragmatically prudent in the sensitive sectors of social and employment policy, such deference could create a risk that the Court would too easily accept generalizations or stereotypes without adequately probing into the basis for the policy. In any event, it is clear that the Court is unlikely to challenge Member State rules adopted by an appropriate political process.

Part II.D presented the evolution in the ADEA with regard to compulsory retirement, from the 1965 initial text that permitted employers to discharge (or retire) employees at age sixty-five, through the 1978 amendment that delayed compulsory retirement to age seventy, and then to the 1986 amendment, which eliminated any compulsory retirement, with few exceptions. Although this presentation showed a radical contrast with the rules of EU Member States, and the deferential judgments of Court of Justice, the text concluded that the substantially different legal, social and economic circumstances in the United States and the EU justified the different policy approaches.

Part II.E discussed the impact of the progressive growth in longevity, which will gradually produce a significant decrease in the working versus the non-working

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<sup>378</sup> See *supra* text accompanying notes 69, and 128–130.

population in the EU. In view of this on-going development, it was suggested that European States should seriously consider raising any compulsory retirement age to seventy, as the United States did in the 1978 amendment to the ADEA. Relatively few employees are apt to continue working up to the age of seventy. The impact on governmental budgets may actually be positive, due to tax collection from those continuing in employment, while their number is unlikely to be so large as to significantly increase the unemployment of younger workers.

The Article's Part III examined seven Court judgments concerning compulsory retirement ages, or limits on service, in specific professions or fields of employment. Part III.A introduced a novel topic: Directive 2000/78's acceptance, in Article 4, of age-based discrimination in particular occupations when it is due to "a genuine and determining occupational requirement." The Court's 2011 judgment in *Prigge* presented an excellent illustration. The Court invalidated Lufthansa's compulsory retirement of commercial air pilots at age sixty, holding that Lufthansa's retirement age could not be considered to be based on Article 4(1) in view of Germany's acceptance of international rules on age transport that permitted pilots to continue employment in multi-pilot crews until sixty-five.

In the four Court judgments reviewed in Part III.B, the issue was whether a clear instance of age-based discrimination could be considered justified pursuant to Article 6 of Directive 2000/78. For American academics and students, *Georgiev* is the most consequential judgment. In *Georgiev*, the Court replied to the questions referred and upheld the compulsory retirement age of sixty-five for a university professor, based upon the policy justification of the desire to achieve an inter-generational balance within the academic profession. Subsequently, in *Fuchs and Kohler* the Court accepted the same inter-generational balance policy justification for a retirement age of sixty-five for prosecutors, and implicitly for all government civil servants. The critical review in Part III.B accepted the validity of the inter-generational balance policy, but questioned whether setting the maximum service age at sixty-five failed to recognize the high value provided by the professional experience and natural authority of older academics, prosecutors, and other civil servants. A plausible argument can be made for retarding the retirement age to seventy.

*Commission v. Hungary* requires little comment in this conclusion. The Grand Chamber easily concluded that the authoritarian Hungarian government of Prime Minister Orbán was unjustified in its sudden reduction of the retirement age of judges, prosecutors and notaries from seventy to sixty-two. Clearly the reduction was too abrupt, and failed to enable the individuals affected to take appropriate action to protect their economic interests. What is unfortunate is the Grand Chamber's failure to criticize the earlier retirement as prejudicial to judicial independence.

Finally, Part III.C presented a series of interesting contrasts with U.S. legislation and court judgements under specific exceptions to the 1986 ADEA's overall elimination of a compulsory retirement age. Perhaps the most striking one is with regard to university professors. The 1986 ADEA initially created an exception that permitted compulsory retirement of tenured university professors until 1993, but subject to an authoritative review by the National Academy of Science. Fortunately for U.S. academics (and the present author), the NAS study concluded that mandatory retirement for university professors should be eliminated, a happy note upon which to

end this Article.



