

EU Age Discrimination Law: a Curse or a Blessing for EU Youth Policy?

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I. INTRODUCTION

There are many occasions when society differentiates based on age. For example, setting a minimum age to drive a car,¹ to buy and drink alcohol,² to vote, or to become a constitutional judge.³ Many of such distinctions are generally accepted as common sense.⁴ Differentiation based on age is also made in employment and occupation, including, for example, working time as well as health and safety measures at the workplace. The fact that these issues have been regulated by a specific EU directive⁵ confirms the common acceptance of such differential treatment of young people in the EU. It is similarly accepted that specific policy efforts are needed to support young people in finding their place in society and labour market.

At the same time, it is widely acknowledged that not all distinctions based on age are acceptable, particularly when the difference in treatment is based on stereotypes that affect human dignity,⁶ e.g. presuming that young people are inexperienced, less reliable or loyal than older workers.⁷ Additionally, measures targeting one age group such as young workers may negatively affect another age group. Furthermore, some means for protecting or improving the opportunities of a particular age group may turn out to be not as effective as expected. In these situations, it is good, or even necessary, to be able to challenge the legality of such a measure.⁸

The EU Framework Directive on Equal Treatment in Employment and Occupation (Framework

¹ E.g. In the Netherlands the age for driving a car is set at 18.

² For Europe the alcohol age of 18 is widely accepted; cf Dutch Institute for Alcohol Policy (STAP), 'New European overview shows that alcohol age limit of 18 is widely accepted, but lacks compliance in many countries' (October 2013).

³ cf U Belavusau, 'On Age Discrimination and Beating Dead Dog: *Commission v. Hungary*' (2013) 50 *Common Market Law Review* 1145.

⁴ cf M Sargeant, 'Young People and Age Discrimination' (2013) 2 *E-Journal of International and Comparative Labour Studies*.

⁵ Council Directive 94/33/EC on the Protection of Young People at Work [1994] OJ L216/12.

⁶ For an elaboration on this point in relation to age discrimination, see the chapter by Horton in this volume.

⁷ cf Sargeant (n 4).

⁸ Case C-88/08 *David Hütter v Technische Universität Graz* EU:C:2009:381 discussed in section IV is a nice example.

Equality Directive, or FED)⁹ offers a legal basis to challenge such measures. Article 1 FED enlists age as one of the discrimination grounds, and Article 2 prohibits direct and indirect discrimination on the grounds defined in Article 1,. However, Article 6 FED allows for explicit justification of indirect as well as direct discriminatory measures on the grounds of age when the measure serves a legitimate aim and the measure is necessary and proportionate to achieve that aim. Legitimate aims are rather open and include employment policy as well as labour market and vocational training objectives.

Over the course of fifteen years, the Court of Justice of the European Union (CJEU) has developed a considerable body of jurisprudence on age discrimination. Approximately thirty cases is indeed notable, especially when compared with other discrimination grounds enlisted in Article 1 FED.¹⁰ The vast majority of these cases deal with measures affecting older workers, particularly regarding the retirement age or pension schemes.¹¹ A significantly smaller number of cases – only five – concern measures affecting younger workers.¹² Research analysing these cases indicate that the CJEU has been rather lenient in accepting measures regarding older workers and more strict in accepting measures targeting younger workers.¹³ However, this approach potentially puts EU Youth Policy under pressure. Moreover, it raises the question of whether the Framework Equality Directive is not in fact hampering measures to improve the situation of young people. In other words, it should be determined whether the FED is a curse or a blessing for EU Youth Policy.

The aim of this contribution is therefore to analyse the effect of the Framework Equality Directive, in particular Article 6 thereof, on EU Youth Policy. To that end, the contribution is structured as follows. In section II EU Youth Policy is described, with a focus on youth employment policy. Section III will briefly discuss age as discrimination grounds and elaborate on Article 6 FED. Section IV analyses the CJEU's case law dealing with measures targeting or affecting young people. More specifically, it will critically discuss the following cases: *Hütter* (2009),¹⁴ *Küçükdeveci* (2010),¹⁵ *O* (2015),¹⁶ *De Lange* (2016),¹⁷ and *Abercrombie & Fitch*

⁹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Equality Directive).

¹⁰ See for an overview of cases till 2014: BP ter Haar and M Rönmar, 'Intergenerational Bargaining, EU Age Discrimination Law and EU Policies—an Integrated Analysis', Report for the project 'Intergenerational Bargaining: towards integrated bargaining for younger and older workers in EU countries' (2014) 18; D Schiek, 'Age Discrimination before the CJEU – Conceptual and Theoretical Issues (2011) 48 *Common Market Law Review* 777.

¹¹ eg Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler v. Land Hessen* EU:C:2011:508; Case C- 190/16 *Werner Fries v Lufthansa CityLine GmbH* EU:C:2017:513; Case C-447/09 *Prigge & Others* EU:C:2011:573.

¹² See footnotes 14-18.

¹³ eg Ter Haar and Rönmar (n 10).

¹⁴ Case C-88/08 *David Hütter v Technische Universität Graz* EU:C:2009:381.

¹⁵ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co* EU:C:2010:21.

¹⁶ Case C-432/14 *O v Bio Philippe Auguste SARL* EU:C:2015:643.

¹⁷ Case C-548/15 *J.J. de Lange v Staatssecretaris van Financiën* EU:C:2016:850.

(2017)¹⁸. In section V, the contribution concludes with an analysis of the findings in the three parts in light of the central question of whether EU age-discrimination law is a curse or a blessing for EU Youth Policy.

II. EU YOUTH POLICY

This section explores three relevant aspects of EU Youth Policy. First, it looks into the legal basis for the EU to adopt measures in the field of youth policy (section II.A), defining the competence of the EU to deal with youth matters. Second, it explores why youth has become such a prominent target group for EU policies (section II.B). Third, it delves into the governance regime and the changing approach of EU youth policies over the course of time, unfolding some examples of national measures for young people (section II.C).

A. Legal Basis for EU Youth Policy

In the EU legal doctrine, the field of youth policy is relatively underexplored. That in itself is not surprising, since the EU Treaties do not include youth policy as an independent policy field, unlike for example employment (Title IX TFEU) or social policy (Title X TFEU). Indeed, only two provisions mention youth as specific target group. The first is Article 47 TFEU, which states that ‘Member States shall, within the framework of a joint programme, encourage the exchange of young workers’. This provision was already part of the chapter on the free movement of workers in the Treaty on the European Economic Community (EEC) adopted in 1957.¹⁹ The second provision, now Article 165 TFEU, was introduced in 1992 in the Treaty of Maastricht²⁰ and provides the EU with the competence to adopt supportive measures to encourage ‘the development of youth exchanges and of exchanges of socio-educational instructions, and encouraging the participation of young people in democratic life in Europe’.²¹

The legal basis for fostering a specific EU youth policy is, thus, limited. Firstly, the material scope is restricted to the context of the free movement of workers, education and participation in democratic life in Europe. Secondly, the EU’s competence is narrowed down to coordination and support.²² Moreover, paragraph 4 of Article 165 TFEU explicitly excludes any harmonizing effect of measures adopted on the legal basis of this provision.²³ This implies that measures cannot be adopted by instruments such as directives and regulations, since by definition their purpose is to harmonise laws and policies of the Member States.²⁴

¹⁸ Case C-143/16 *Abercrombie & Fitch Italia Srl v Antonino Bordonaro* EU:C:2017:566.

¹⁹ Art 50 EEC Treaty.

²⁰ Art 126 Consolidated Version of the Treaty on European Union, Treaty of Maastricht [1992] OJ C 325/5.

²¹ Art 165(2) TFEU.

²² cf Art 6(e) TFEU, which enlists education, vocational training, youth and sport.

²³ Art 165(4) TFEU concludes with ‘excluding any harmonisation of the law and regulations of the Member States’.

²⁴ See Art 288 TFEU for their definitions.

Despite these limitations, the EU has developed a comprehensive youth policy, also addressed as EU Youth Strategy,²⁵ which comprises the following eight action fields: (1) education and training; (2) employment and entrepreneurship; (3) health and wellbeing; (4) participation; (5) voluntary activities; (6) social inclusion; (7) youth and the world; and (9) creativity and culture.²⁶ These action fields aim to achieve two objectives: a) more and equal opportunities for young people in education and in the labour market; and b) active citizenship, social inclusion and solidarity of young people.²⁷ These objectives target an overarching goal, namely 'to enable all young women and men to make the best of their potential'.²⁸ The regulatory mechanism of the Youth Strategy is that of the Open Method of Coordination (OMC).²⁹

B. Why Youth as a Target Group for EU Policy?

Why is the EU so concerned with youth as a specific target group for policy? What differentiates the position of young people from that of others? It is not merely because they are of a certain age. Moreover, the EU youth policy measures do not define youth by a specific age. Nevertheless, it is generally considered to cover persons between the age of 15 and 24, sometimes up to the age of 29,³⁰ and in statistical data even up to the age of 34.³¹ Yet the more important feature of this group is its possible disadvantage, particularly in the labour market. As Sargeant points out, such disadvantage comes in different forms.³² There is, for example, disadvantage related to the type of jobs that young people enter the labour market with, which are often temporary jobs, e.g. fixed-term contracts, on-call work, zero-hour contracts, etc.³³

Other forms of disadvantage, or vulnerability, result from long term unemployment, low levels of qualifications and educational achievements, health problems and disabilities, and ethnic

²⁵ For an overview, see European Commission, 'EU Youth Strategy' available at <ec.europa.eu/youth/policy/youth-strategy_en>.

²⁶ Council Resolution on a Renewed Framework for European Cooperation in the Youth Field (2010-2018) [2009] OJ C311/1.

²⁷ Ibid, para 1 ACCORDINGLY AGREES.

²⁸ Ibid, recital 5 preamble.

²⁹ cf B Laffan and C Shaw, 'Classifying and Mapping OMC in Different Policy Areas' (2005) *NEW GOV Working Paper* 02/D09; more specifically, Commission Communication, *An EU Strategy for Youth – Investing and Empowering A renewed open method of coordination to address youth challenges and opportunities*, COM(2009) 200 final.

³⁰ European Commission, *EU youth report. An EU strategy for youth – Investing and empowering*, SEC (2009) 549 final, 17.

³¹ cf the data on young people who are neither in employment, education nor training (NEETs) available at <ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_young_people_neither_in_employment_nor_in_education_or_training>.

³² Sargeant (n 4) 6

³³ For precarious contracts through the lens of EU anti-discrimination law, see chapter by M Bell in the present volume. In this context, see also Sargeant (n 4) 6, who refers to research that identified twelve different forms of flexible work; S Dex and A McCulloch, *Flexible employment in Britain: A Statistical Analysis* (Manchester, Equal Opportunities Commission, 1995). See also Eurofound, *NEETs. Young People not in Employment, Education or Training: Characteristics, Costs and Policy Responses in Europe*. (Luxembourg, Publications Office of the European Union, 2012) 2.

background.³⁴ Research indicates that young people are more often at risk to be subjected to one or more of these disadvantages than workers above 25.³⁵ This is reflected in the higher levels of unemployment among young people. For example, in 2013 the general unemployment rate in the twenty-eight EU Member States was 11%, whereas for young people this was more than double at 24%.³⁶ In some countries, the difference is not that drastic. For instance in 2014, the general unemployment rate in Germany was 5,2% and for young people 7,7. In other countries both levels are relatively low. For example, in the Netherlands the general level of unemployment was 7,4% and for young people 12,4%. Nevertheless, in most of the Member States, the difference between the general unemployment rate and that of young people is considerable. In Greece, the general unemployment rate was 26% and for young people 52%, in Spain it was 24,5% versus 53,2%, and in Italy the general unemployment rate was 12,7% compared to the nearly four times higher rate of 42,7% for young people.³⁷

The risk of becoming unemployed is particularly high for young people, since they have to transition from education into the labour market. Statistical data from the EU Labour Force Survey (LFS) shows a connection between the time young people need to enter the labour market on the one hand, and the level of education, on the other. In general, the time required for this transition is significantly longer for young people with a low level or a poor quality of education (10 months on average) than it is for young people with a high level or a good quality of education (5 months on average).³⁸ Unfortunately, 'young people who face unemployment or a slow transition may experience long-term adverse effects in terms of future labour market success, earnings or family formation'.³⁹ The importance of obtaining a good educational qualification is further emphasised, since statistical data also indicate a correlation between unemployment rates and the attained level of education. The data

³⁴ Sargeant (n 4) 4. See also J O'Reilly et al, 'Five Characteristics of Youth Unemployment in Europe: Flexibility, Education, Migration, Family Legacies, and EU Policy' (2015) *SAGE Open* 1.

³⁵ *ibid.* See on this also M Sargeant and E Tucker, 'Health and Safety of Vulnerable Workers: Case Studies from Canada and the UK' (2009) 7 *Policy and Practice in Health and Safety* 51. Although this study is on migrant workers, Sargeant argues that the idea of 'layers of vulnerability' applies *mutatis mutandis* also to young people.

³⁶ Eurostat defines youth unemployment as 'all the youth (i.e. people between the ages of 15 and 24, inclusive) who are unemployed' and the youth unemployment rate as 'the percentage of the unemployed in the age group 15 to 24 years old compared to the total labour force (both employed and unemployed) in that age group'. See <ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Youth_unemployment_rate>.

³⁷ Check for these data at <ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics>. For other data substantiating the same conclusions, see Sargeant (n 4) 5.

³⁸ *cf* 'Figure 2 - Average length of transition from school to work by education attainment level, 2009' (*Eurostat*, 5 February 2013) <ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure_2-Average_length_of_transition_from_school_to_work_by_educational_attainment_level,_2009.png>. Note that a transition is considered successful after obtaining a first job of at least three months.

³⁹ Council conclusions on the employability of graduates from education and training, 3164th EDUCATION, YOUTH, CULTURE and SPORT Council meeting, Brussels, 10 and 11 May 2012.

distinguish three levels of educational attainment⁴⁰ and three age groups.⁴¹ On average, in all three age groups, the rate for young people neither in employment nor in education or training (NEET) was the highest among young persons with a low educational attainment level and the lowest among young persons with the highest educational attainment level.⁴²

C. EU Youth Strategy

Young people have been a target group of EU measures not only since the economic and financial crisis in 2008, but from the early days of the European Economic Community (EEC).⁴³ For example, in 1963 the Council adopted a decision on a common vocational training policy in which young people are one of the target groups,⁴⁴ and in 1974 a mixed resolution was adopted 'concerning measures to be taken to improve the preparation of young people for work and to facilitate their transition from education to working life'.⁴⁵ Youth policy has been on the top of the EU's political agenda since the 1980s when the core of the baby-boom generation entered the labour market.⁴⁶ By 2010, the EU had adopted approximately 100 measures within all eight action fields identified in the 2009 Framework Resolution,⁴⁷ collectively referred to as the EU Youth Strategy (EUYs).

The culmination of Europe's youth measures in the EUYS did not happen overnight. The first step can be traced back to the 2001 Commission White Paper 'New Impetus for European Youth'⁴⁸ which mainly dealt with active citizenship of young people.⁴⁹ In this context, employment constitutes an essential resource for the autonomy of young people since it enables them to fulfil their role in society.⁵⁰ Another important step towards the EUYS was the 2005 Youth Pact.⁵¹ In that pact, the policy discourse shifts slightly from the emphasis on the role and importance of young persons in society to the recognition of the vulnerability of

⁴⁰ These are: (1) less than primary, primary, lower secondary; (2) upper secondary or post-secondary non-tertiary education; and (3) tertiary education.

⁴¹ These are: 20-24 years; 25-29 years; and 30-34 years.

⁴² Statistics on young people neither in employment nor in education or training (*Eurostat*, 27 July 2015) <ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_young_people_neither_in_employment_nor_in_education_or_training>.

⁴³ See more elaborately about this P Copeland and BP ter Haar, 'The Open Methods of Coordination as Amplifier for EU Soft Law: The case of EU Youth Policy' (2015) *Acta Juridica Hungarica* 14.

⁴⁴ 63/266/EEC Council Decision laying down general principles for implementing a common vocational training policy [1963] OJ 63/1338.

⁴⁵ [1976] OJ C308/1.

⁴⁶ Eurofound (n 29) 4.

⁴⁷ Council Resolution (n 26). cf BP ter Haar, *Open Method of Coordination. An analysis of its meaning for the development of a social Europe*, Dissertation Leiden University (2012), 189-193 (Annex 7.1).

⁴⁸ COM(2001) 681 final.

⁴⁹ For an elaboration on this, see T Barber, 'Choice, Voice and Engagement'. An Exploration of Models and Methods which promote active Youth Citizenship in the new Europe', Seminar Young People and Active European Citizenship, 2006.

⁵⁰ COM(2001) 681 final, 4. For an elaboration on the historical development of content of the EUYS, see BP ter Haar, 'Youth OMC: Coordination of Governance to Deal With the NEET's Needs', Ius Commune conference - OMC workshop, 2016.

⁵¹ European Council, *Presidency Conclusions*, Brussels, 22 and 23 March 2005 (7619/05), Annex 1.

young people in society.⁵² Since 2009, when the first signs of the impact of the economic and financial crisis on youth employment emerged, the policy discourse has been shifting towards investment in young people in order to improve their circumstances, especially on the labour market.⁵³ Hence the focus of the first policy cycle of the EUYS was on youth employment.⁵⁴ Thereto, Annex I to the Framework Resolution lists eleven possible policy initiatives, inter alia, the option to take the special situation of young people into account when devising flexicurity strategies.⁵⁵ The policy focus of the Framework Resolution is amplified by one of the flagship initiatives of Europe 2020,⁵⁶ namely Youth on the Move.⁵⁷ The aim of Youth on the Move has been to improve the education and employability of young people, to reduce high youth unemployment and to increase the youth-employment rate in line with the wider EU target of achieving a 75% employment rate for the working-age population (20-64 years).⁵⁸

In 2011, the Commission launched the Youth Opportunities Initiative.⁵⁹ Within that initiative, the Commission identified the following factors as challenges and root causes for youth unemployment: leaving school early without qualifications; lack of relevant skills and work experience; precarious employment followed by spells of unemployment; limited training opportunities; and insufficient/inappropriate active labour market policies.⁶⁰ To address these factors, the Commission encouraged Member States to take decisive measures to prevent early school leaving, to develop skills relevant for the labour market, to support a first work experience and on-the-job training, and to improve access to the labour market.⁶¹ The latter includes measures to reform employment protection legislation, to reduce excessive rigidities of permanent contracts, and to ease labour market access for those left outside.⁶²

The EU supports the Member States in their activities with financial assistance and policy guidance. The latter focuses on the promotion of innovative approaches facilitating the transition from school into work.⁶³ Over the course of time, the Commission has launched

⁵² cf Commission Communication, *Addressing the concerns of young people in Europe - implementing the European Youth Pact and promoting active citizenship*, COM(2005) 206 final, 2-3.

⁵³ COM(2009) 200 final (n 29), 5.

⁵⁴ *ibid*, Annex 1.

⁵⁵ *ibid*.

⁵⁶ Europe 2020 is the successor of the Lisbon Strategy and is ‘the EU’s agenda for growth and jobs for the current decade. It emphasises smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe’s economy, improve its competitiveness and productivity and underpin a sustainable social market economy. cf Europe 2020 Strategy available at <ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en>.

⁵⁷ Commission Communication, *Youth on the Move. An initiative to unleash the potential of young people to achieve smart, sustainable and inclusive growth in the European Union*, COM(2010) 477 final.

⁵⁸ *ibid*, 3.

⁵⁹ Commission Communication, *Youth Opportunities Initiative*, COM(2011) 933.

⁶⁰ *ibid*, 6.

⁶¹ *ibid*, 7-8.

⁶² *ibid*, 8.

⁶³ *ibid*, 9-10.

various initiatives.⁶⁴ The 2016 Youth Package brings these initiatives together in three strands of action, with the latter two extending beyond employment: 1) better opportunities to access employment; 2) better opportunities through education and training; and 3) better opportunities for solidarity, learning mobility, and participation.⁶⁵ The first strand of action includes Youth Guarantee,⁶⁶ which is financially supported by the Youth Employment Initiative.⁶⁷ Youth Guarantee is a political commitment of the Member States to give every young person under the age of 25 an offer of employment of good quality, continual education, an apprenticeship or a traineeship within a period of four months after becoming unemployed or having left formal education.⁶⁸

Measures promoted by the EUYS encourage Member States to undertake activities that entail differential treatment on grounds of age, or at least distinguishing young people (roughly aged between 18 and 29) from all other age groups. For instance, as part of the Youth Guarantee, France adopted the *Emplois d'avenir*-scheme aiming to deliver subsidised jobs for low-skilled young people residing in disadvantaged areas,⁶⁹ and Croatia established eleven Centres for Lifelong Career Guidance to all citizens, with a focus on young people.⁷⁰ In other Member States, this has resulted in the adoption of measures specifically distinguishing on the basis of age. For example, the Latvian *Know and Do*-project aims to identify, motivate and activate non-registered young people aged 15-29 to return to education, employment or training.⁷¹ The Dutch Work-Study Right entitles young people between the age 18 and 27, who are not in employment, education or training (NEET), to receive an offer for a personalised plan guiding them to employment or back to education or training.⁷²

The EUYS thus explicitly invites Member States to differentiate between age groups, which is potentially at odds with EU non-discrimination law on the grounds of age. At times, EU age-discrimination law can be considered a blessing for EUYS, for instance when it enables the justification of a measure favouring young people and similarly, when it does not allow for the justification of a measure protecting another age-group at the disadvantage of young people. In both situations young people benefit since they provide from the protection the FED offers. The FED could also be a blessing when a measure serves a legitimate aim but is ill-

⁶⁴ For a full overview, see Copeland and ter Haar (n 43).

⁶⁵ Commission Communication, *Investing in Europe's Youth*, COM(2016) 940 final.

⁶⁶ Council Recommendation on establishing a Youth Guarantee [2013] OJ C120/01; Commission Communication, *Working together for Europe's young people: A call to action on youth unemployment*, COM(2013) 447 final; Commission Communication, *The Youth Guarantee and Youth Employment Initiative three years on*, COM(2016) 646 final.

⁶⁷ Commission Communication, *Youth Employment Initiative* COM(2013) 144 final.

⁶⁸ *ibid.*, 5.

⁶⁹ *ibid.*, 5.

⁷⁰ *ibid.*, 6.

⁷¹ *Ibid.*, 6.

⁷² Ter Haar (n 50).

designed, and consequently fails the test of appropriateness and necessity. However, at other times, EU non-discrimination law can turn into a curse, e.g. when a measure favouring young people cannot be justified due to the negative impact on another age-group. The extent to which EU non-discrimination law is a blessing or a curse will be analysed in the following sections. Section III provides a short description of the approach the Framework Equality Directive takes regarding age discrimination and Section IV provides a description of five cases of the CJEU on age discrimination regarding young people.⁷³ Section V analyses the case law of the CJEU and draws conclusions about the utility of EU non-discrimination law for EU youth employment policies.

III. EU AGE-DISCRIMINATION LAW

The inclusion of age amongst the protected grounds in the FED is not as self-evident as it may appear at first sight. Therefore, this section starts with an exploration of age as a protected ground (section III.A). Section III.B then discusses how age as discrimination ground is treated in the Framework Equality Directive.

A. Age as a Protected Ground

The chapter by Horton in this volume elaborately discusses the two most dominant arguments that justify the inclusion of age as a protected ground.⁷⁴ In brief, the first is the ‘complete life view’, which argues that when age is taken as a criterion to determine access to goods, resources, work, etc., this does not create inequality because over the course of a lifetime everyone will be eligible for the same benefits and subject to the same burdens, provided the criterion is used consistently.⁷⁵ The second is the ‘fair innings argument’, which refers to the fact that discrimination on the grounds of age is sometimes necessary in order to avoid inequality or to achieve substantive equality between generations.⁷⁶ Both arguments consider age discrimination not in terms of protection against discrimination of a particular group, but as a necessity generated by the passage of time.⁷⁷ Both arguments have also been criticised for their reliance on false presumptions. For example, the fair innings argument presumes that mandatory retirement is an effective way of improving youth employment.⁷⁸ The complete life argument builds on the presumption that everybody will have the same opportunities in life, which is generally not the case. Consequently, not everyone is able to gain the same

⁷³ Namely Case C-88/08 *Hütter* (n 14), Case C-555/07 *Küçükdeveci* (n 15), Case C-432/14 *O* (n 16), Case C-548/15 *De Lange* (n 17), Case C-143/16 *Abercrombie & Fitch* (n 18).

⁷⁴ See also A Numhauser-Henning, ‘The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls’ (2013) 29 *The International Journal of Comparative Labour Law and Industrial Relations* 391.

⁷⁵ See chapter by R Horton in the present volume, where she also refers to D McKerlie, ‘Equality and Time’ (1989) 99 *Ethics* 475; G Cupit, ‘Justice, Age, and Veneration’ (1998) 108 *Ethics* 702.

⁷⁶ See the chapter by Horton in the present volume.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* See on this presumption, among many others R Böheim, ‘The effect of early retirement schemes on youth employment’ (2014) *IZA World of Labor*.

advantages and benefits.⁷⁹ Moreover, excluding people from access to valuable resources today may result in a lifetime of inequality because of the impact on a person's dignity or autonomy among other things. Exactly these types of interests are often regarded as the fundamental aims to be protected by non-discrimination law.⁸⁰

It is unclear which argument underpins the EU's prohibition of discrimination on grounds of age.⁸¹ However, it should be noted that at the time the negotiations for the Framework Equality Directive took place, there were serious concerns about the ageing workforce of Europe.⁸² The ageing workforce creates serious challenges for employment, pensions, health care, social cohesion and intergenerational solidarity, among others.⁸³ This has resulted in for example a policy on active aging⁸⁴ and the elderly as specific target group in the European Employment Strategy.⁸⁵ The prohibition of age discrimination is considered an essential tool for achieving these goals.⁸⁶

Nevertheless, the Framework Equality Directive also protects young people.⁸⁷ Recital 25 of its Preamble refers to the guidelines of the European Employment Strategy, which encompass specific policy guidelines addressing young people.⁸⁸ Article 6(1)(a) FED refers to young people (and older workers) who may be treated differently in certain aspects of employment.⁸⁹ Furthermore, 'age' also includes 'relative age',⁹⁰ which refers to a differentiation based on a period of time that is related to the age of another person. An example of such a distinction is an 'age-gap clause' in a survivor's pensions scheme stipulating that if the surviving partner is more than fifteen years younger than the deceased employee, (s)he will not be entitled to the pension.⁹¹

B. Article 6 of the Framework Equality Directive

⁷⁹ Horton in the present volume.

⁸⁰ Ibid. See also Framework Equality Directive, Preamble recital 11.

⁸¹ For an analysis of the approach of the CJEU, see the chapter by Horton in the present volume.

⁸² Framework Equality Directive, Preamble recital 8. See also C Barnard, *EU Employment Law* (Oxford, Oxford University Press, 2012) 343.

⁸³ cf S Bisom-Rapp and M Sargeant, 'Increasing the Employment Rate of Older Workers' (2011) 27 *The International Journal of Comparative Labour Law and Industrial Relations* 301.

⁸⁴ Active Ageing (*European Commission*) <ec.europa.eu/social/main.jsp?catId=1062>. See also Ter Haar and Rönömar (n 7).

⁸⁵ cf D Kasneci, 'Active Ageing: the EU Policy Response to the Challenge of Population Ageing' (2007) 8 *European Papers On The New Welfare* 1.

⁸⁶ Framework Equality Directive, Preamble recitals 8 and 25.

⁸⁷ K Riesenhuber, *European Employment Law: A Systematic Exposition* (Antwerp, Intersentia, 2012) 332; C O'Conneide, 'Age Discrimination and European Law', European Commission, 2005.

⁸⁸ eg Council Resolution on the 1999 Employment Guidelines [1999] OJ C62/02, Guidelines 1 and 7.

⁸⁹ See below section III. B.

⁹⁰ Riesenhuber (n 86) 332.

⁹¹ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* EU:C:2008:517. On this case, see also C Kilpatrick, 'The CJEU and Labour Law: A 2008 Retrospective' (2009) 38 *Industrial Law Journal* 180.

Due to its specific nature, age as a discriminatory ground is treated differently from other protected categories. In addition to the general derogations in Article 5(2) (indirect discrimination) and Article 4 (genuine job requirement), Article 6 FED provides a special regime for objectively justifying both direct and indirect differential treatment based on age.⁹² More specifically, Article 6 FED provides a list of reasons related to employment policies, labour market policies and vocational training, which could be accepted as a legitimate aim to justify direct as well as indirect age discrimination. However, this list is not exhaustive, leaving it to the CJEU to clarify what could further be accepted as a legitimate aim. Objectives that have been accepted so far include policies based on intergenerational solidarity,⁹³ wage policies including measures to reward experience⁹⁴ and measures to protect established rights during a transitional period^{95, 96}

As regards this list of accepted objectives, it is remarkable that they all serve a public interest rather than that of an individual employer.⁹⁷ In its judgement in the Joined Cases *Fuchs and Köhler* (2011), the CJEU explicitly stated that aims which may be considered 'legitimate' must have a public interest nature distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness.⁹⁸ Nevertheless, Member States may be entitled to raise cost reduction as an aim in pursuit of public interest aims such as (labour) cost reduction.⁹⁹

Article 6 FED lays down four criteria that need to be strictly complied with for a differentiation on grounds of age not to amount to a prohibited discrimination¹⁰⁰ These are:

- (1) Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if
- (2) within the context of the law,
- (3) they are objectively and reasonably justified by a legitimate aim, and
- (4) if the means of achieving that aim are proportionate and necessary.

⁹² Cf Framework Equality Directive, Preamble recital 25. For an elaborate description of Article 2(5) and Article 4 FED as derogations, see Barnard (n 81) 369-371.

⁹³ cf Riesenhuber (n 87) 334 with reference to Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* EU:C:2010:4, paras 65 sqq; Case C-250/09 *Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* EU:C:2010:699; Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* (n 11) para 50.

⁹⁴ *ibid*, with reference to Joined Cases C-297/10 and C-198/10 *Sabine Hennigs v Eisenbahn-Bundesamt and Land Berlin v Alexander Mai* EU:C:2011:560, para 71; Case C-17/05 *B. F. Cadman v Health & Safety Executive* EU:C:2006:633, para 34; and Case C-88/08 *Hütter* (n 14) para 47.

⁹⁵ *ibid*, with reference to Joined Cases C-297/10 and C-198/10 *Hennigs* (n 94), paras 88 ff; C-456/05 *Commission of the European Communities v Federal Republic of Germany* EU:C:2007:755, paras 63 and 65.

⁹⁶ See also Barnard (n 82) 371-372.

⁹⁷ cf Riesenhuber (n 87) 334.

⁹⁸ Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* (n 11) para 52.

⁹⁹ *ibid*.

¹⁰⁰ See further: Barnard (n 82) 372, with reference to Case C-388/07 *Age Concern* EU:C:2009:128, para 62.

With respect to the third criteria, the CJEU has held that Member States have a broad discretion in their choice of legitimate aims and the definition of measures to achieve it.¹⁰¹ However, the means to pursue such policies are subject to a proportionality test requiring that the measures are both appropriate and necessary. Analysis of the CJEU's case law concerning older workers indicates that the appropriateness of the national measure is rather easily accepted by the Court as long as it does not appear to be manifestly inappropriate to attain the legitimate aim.¹⁰² The necessity of the measure seems to be assessed in greater detail. However, with a case-by-case approach, it is not possible to draw a general conclusion about this.¹⁰³ Nevertheless, the CJEU seems to apply a more lenient 'control' standard with regard to more general systems of mandatory retirement, while employing a stricter standard for early mandatory retirement of specific professional groups.¹⁰⁴ The strictest standards seem to be applied to cases related to collective dismissals and discrimination of younger workers.¹⁰⁵ If the latter is the case, this would potentially put EU Youth Policy even more at odds with EU non-discrimination law than, for example, the EU's Active Ageing Policy. However, the indication needs to be nuanced, because it is based on merely two cases – *Hütter* (2009)¹⁰⁶ and *Kücükdeveci* (2010).¹⁰⁷ Recently, the CJEU ruled on three more cases dealing with age discrimination and young people – *O* (2015),¹⁰⁸ *De Lange* (2016),¹⁰⁹ and *Abercrombie* (2017).¹¹⁰ The next section analyses the strictness of the review adopted by the CJEU in these five cases.

IV. AGE DISCRIMINATION OF YOUNG PEOPLE IN CJEU'S CASE LAW

The five cases of *Hütter*, *Kücükdeveci*, *O*, *De Lange*, and *Abercrombie* will be analysed in chronological order. Central to the analysis is the Court's assessment of what amounts to a legitimate aim, and the appropriateness and necessity of the measure to achieve that aim. Other issues, such as the exclusionary effect of EU general principles of law, among which the right not to be discriminated on the grounds of age,¹¹¹ will not be addressed.

A. *Hütter*

The case of *Hütter* tested an Austrian provision of the Law on Contractual Public Servants (*Vertragsbedienstetengesetz VBG*). The provision states that only persons above the age of fifteen can be recruited as public servants. Furthermore, it excludes periods of service

¹⁰¹ Case C-411/05 *Palacios de la Villa* EU:C:2007:604, para 68.

¹⁰² *Ter Haar and Rönnmar* (n 10).

¹⁰³ *cf* Barnard (n 82) 374.

¹⁰⁴ *Ter Haar and Rönnmar* (n 10).

¹⁰⁵ *ibid*.

¹⁰⁶ Case C-88/08 *Hütter* (n 14).

¹⁰⁷ Case C-555/07 *Kücükdeveci* (n 15).

¹⁰⁸ Case C-432/14 *O* (n 16).

¹⁰⁹ Case C-548/15 *J.J. de Lange* (n 17).

¹¹⁰ Case C-143/16 *Abercrombie & Fitch* (n 18).

¹¹¹ On this in relation to the *Kücükdeveci* case, see eg M. de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 *Maastricht Journal of European and Comparative Law* 109.

completed before the age of eighteen from entitlements related to the length of service or professional experience. This includes periods of service completed by way of vocational training at a university or college.¹¹²

The case was initiated by Mr. Hütter (born in 1986), who together with a colleague completed an apprenticeship from September 2001 to March 2005 as a laboratory technician with a public body (TUG). After his apprenticeship, he and his colleague were recruited for an additional period of three months. However, Hütter's colleague was placed in a higher incremental wage step than he. For Hütter, only 6,5 months of the apprenticeship were taken into account, i.e. the months after he turned eighteen, whereas 28,5 months were taken into account for his colleague. Hütter brought an action before the Graz Regional Court for Civil Matters and sought payment of compensation equivalent to the difference in treatment he received due to his age, because he considered that treatment to be unjustified and in breach of both the Austrian and EU anti-discrimination laws.¹¹³

In regards to the legitimacy of the aim pursued by the legislation, the CJEU acknowledged two objectives. First, it encourages pupils to pursue a general secondary education rather than vocational education; and second, it seeks to promote the recruitment of persons who have had a vocational education rather than of persons with a general secondary education.¹¹⁴ The CJEU considered that such a measure could serve a legitimate aim within the meaning of Article 6 FED.¹¹⁵

With respect to the appropriateness and the necessity of the measure, the Court noted that Member States unarguably enjoy broad discretion in their choice of measures capable of attaining the pursued objectives.¹¹⁶ However, at first glance, the measure at hand appears contradictory: it aims to promote general secondary education over vocational training, but then seems to favour vocational training over general secondary education.¹¹⁷ Because of this inconsistency the Court ruled that the measure cannot be appropriate or necessary.¹¹⁸ Regarding the content of the measure, the CJEU considered that using criteria of previous professional experience for the determination of the pay scale can be proportionate and necessary to serve such aim. However, the additional requirement linking the accreditation of experience to a certain age in this measure, results into an unequal award of experience.¹¹⁹

¹¹² Case C-88/08 *Hütter* (n 14) paras 9-11.

¹¹³ Paras 13-15.

¹¹⁴ Paras 40 and 46.

¹¹⁵ Paras 39-41.

¹¹⁶ Para 45.

¹¹⁷ Para 46.

¹¹⁸ *ibid.*

¹¹⁹ Para 47.

Thus, additional to the inconsistency of the aim of the measure, the explicit condition of the age of eighteen renders the measure also inappropriate to achieve the aim.¹²⁰

Furthermore, the CJEU pointed out that ‘non-accreditation of experience acquired before the age of 18 applies without distinction to all contractual public servants, whatever the age at which they are recruited’.¹²¹ Thus, this criterion does not single out a group of persons defined by their young age in order to promote their integration into the labour market by granting special conditions of recruitment.¹²² Hence, the Court did not deem the measure at hand appropriate for the purpose of promoting the entry into the labour market of a category of workers defined by their (young) age.¹²³ Implying that the measure constitutes unjustified prohibited discrimination on grounds of age.

B. *Kücükdeveci*

The *Kücükdeveci* case challenged a German measure on notice periods, where ‘[i]n calculating the length of employment, periods prior to the completion of the employee’s 25th year of age are not taken into account’.¹²⁴ The case was initiated by Ms. Kücükdeveci, who was employed by Swedex since June 1996. In December 2016, Swedex dismissed her with effective date of 31 January 2007, taking into account the statutory notice period. In accordance with the national legislation, the statutory notice period was calculated as if the employee had three years of service, i.e. from the age of twenty-five to twenty-eight. However, Kücükdeveci had been working for Swedex for ten years, namely since the age of eighteen.¹²⁵ Kücükdeveci contested her dismissal, claiming that her notice period should have been four months – a period that corresponds to ten years of service.¹²⁶ She argued that the measure stipulating that years served before the age of twenty-five are not to be calculated are discriminatory on the grounds of age, contrary to EU law, and should therefore be disapplied.¹²⁷

The CJEU held that the national measure disadvantages younger workers in comparison to older workers. The effect of the measure is to exclude young workers from benefiting from the progressive extension of notice periods (in the case of dismissal according to the length of the employment relationship), whereas older workers with comparable seniority will, by contrast, be able to benefit from it.¹²⁸ Therefore, the CJEU concluded that the measure constitutes discrimination on grounds of age, and went on to assess the objective justification for the measure.¹²⁹

¹²⁰ Para 48.

¹²¹ Para 49.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ Case C-555/07 *Kücükdeveci* (n 15).

¹²⁵ Paras 12-13.

¹²⁶ Para 14.

¹²⁷ Para 15.

¹²⁸ Para 30.

¹²⁹ Paras 31-32.

As for the legitimate aim of this measure, the CJEU accepted the following arguments of the German government: 'The law, which originated in 1926 and sets the threshold at twenty-five,

was the outcome of a compromise between, first, the government of the time, which wanted a uniform extension by three months of the notice period for the dismissal of workers aged over 40, second, the supporters of a progressive extension of that period for all workers, and, third, the supporters of a progressive extension of the notice period without taking the period of employment into account, the purpose of the rule being to give employers partial relief from lengthy periods of notice for workers aged under 25.¹³⁰

The underlying idea of the legislation was that young workers generally react more easily and more rapidly to the loss of their jobs, hence, greater flexibility can be demanded from them.¹³¹ Furthermore, it was reasoned that a shorter notice period for younger workers facilitates their recruitment by increasing the flexibility of personnel management.¹³² More specifically, the legitimate aim is 'to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers'.¹³³

Based on these arguments, the CJEU concluded that the objectives mentioned clearly belong to employment and labour market policy within the meaning of Article 6(1) FED.¹³⁴ When ascertaining whether the measure is also appropriate and necessary, the Court opined that the extension of the notice period is not appropriate for achieving the legitimate aim, because it applies to all employees who start working before the age of twenty-five, whatever their age at the time of dismissal.¹³⁵ Additionally, the CJEU considered that the measure affects young people unequally due to its impact on those who enter the labour market early in life, often after little or no vocational training, and not workers who enter the labour market after a long period of training.¹³⁶ The measure challenged in this case thus results into unequal treatment of young workers, especially of those who enter the labour market at an early age. Consequently, the measure constitutes unjustified prohibited discrimination on grounds of age.

C. O

¹³⁰ Para 34.

¹³¹ Para 35.

¹³² *ibid.*

¹³³ Para 39.

¹³⁴ Para 36.

¹³⁵ Paras 40-41.

¹³⁶ Para 42.

The case of *O* challenged the French dismissal legislation, more specifically the provision which stipulated as follows:¹³⁷

The end-of-contact payment shall not be payable:

[...]

2 Where the contract is entered into with a young person for a period falling within the school holidays or university vacations

[...]

During the university Christmas break, Mr. O, a student, was recruited by Bio Philippe Auguste SARL under a fixed term contract for a period from 21 December 2010 to 24 December 2010. On the expiry of his contract, pursuant to the French legislation, Mr. O was not paid the end-of-contract payment. Mr. O brought an action before the Court claiming that the legislative provision concerned was contrary to the provisions of the French Constitution guaranteeing the principle of equal treatment and the principle of non-discrimination on the grounds of age.¹³⁸

The main question in this case is not whether the national provision can be justified under Article 6(1) FED, but rather if the provision is discriminatory under Article 2 FED. Therefore, the CJEU examined whether the situation of a student like Mr. O employed under a fixed-term employment contract during his university holidays is objectively comparable to that of workers who are entitled to the end-of-contract payment under that provision.¹³⁹ The aim of the end-of-contract payment is to compensate for the insecurity of the employee's situation when the contractual relationship is not continued.¹⁴⁰ However, employees like Mr. O do not experience job insecurity after the expiry of their contract since they return to school or university.¹⁴¹ Additionally, the CJEU considered that other categories of employees in situations comparable to that of Mr. O also do not receive end-of-contract payment, e.g. replacements for seasonal workers.¹⁴² Therefore, the Court concluded that Mr. O is not in a situation objectively comparable to that of workers who are entitled to the end-of-contract payment, and thus the measure does not constitute discrimination on the grounds of age.¹⁴³

D. De Lange

¹³⁷ Case C-432/14 *O* (n 16) para 6.

¹³⁸ Paras 9-10. An interesting detail in this case is that Mr. O was related to one of the managers of defendant and that the dispute had been provoked solely and exclusively in order to challenge the provisions at issue (para 15).

¹³⁹ Para 33.

¹⁴⁰ Para 34.

¹⁴¹ Paras 34-35.

¹⁴² Para 38.

¹⁴³ Para 39.

The case of *De Lange* tested a Dutch tax measure. The latter reads as follows:¹⁴⁴

Training expenditure is deductible if the combined amount exceeds EUR 500 and [for training undertaken] beyond the standard period of study, if the combined amount does not exceed EUR 15 000.

The standard period of study is the period not exceeding 16 calendar quarters [...] during which, after reaching the age of 18 but before reaching the age of 30, he devotes the time available for work largely to a training course with a total workload of such a magnitude that [, in addition to the training,] full-time employment is not possible.

The consequence of this measure is that, under certain conditions, persons under the age of thirty are allowed to deduct the full costs of vocational training from their taxable income, whereas this is limited to an amount of EUR 15 000 for persons who have reached the age of thirty.¹⁴⁵

Mr. De Lange started his training as a commercial airline pilot at the age of thirty-two. Therefore, the Netherlands tax authorities limited his rights to tax reduction to EUR 15.000 instead of the full amount of EUR 44.057.¹⁴⁶ In the reference for a preliminary ruling, the Supreme Court of the Netherlands first asked whether a tax scheme, such as the one at issue in the main proceedings, falls within the material scope of Article 3 FED. According to the CJEU, the aim of the measure is to promote the access of young people to training and to improve their position on the labour market. The right to deduct from income tax is, thus, designed to help young people by offering them tax concessions that will make it easier for them to study during the defined period and, therefore, gain a firm position on the labour market.¹⁴⁷ Accordingly, the tax scheme falls within the material scope of Article 3(1)(b) FED.¹⁴⁸

The aim of the tax scheme, i.e. promoting the position of young people on the labour market in order to advance their vocational integration or to ensure their protection, can be regarded as legitimate for the purpose of Article 6(1) FED.¹⁴⁹ With regard to appropriateness and necessity, the CJEU considered it common ground that such a tax scheme 'is capable of improving the position of young people on the labour market', functioning as 'an incentive to pursue vocational training'.¹⁵⁰ Furthermore, the CJEU found that given the broad discretion

¹⁴⁴ Case C-548/15 *De Lange* (n 17) para 8.

¹⁴⁵ Para 10.

¹⁴⁶ Para 11.

¹⁴⁷ Para 19.

¹⁴⁸ Para 20.

¹⁴⁹ Para 27.

¹⁵⁰ Para 29.

enjoyed by the Member States, the taxation scheme did not go beyond what is necessary to attain the objective.¹⁵¹ Decisive to this conclusion was the clarification provided by the Dutch government that persons over the age of thirty generally have ‘had the opportunity to undertake prior training and to pursue a professional activity, with the result that, being in a better financial position than young people who have recently left the school system, they are able to bear at least in part the financial burden of new training’.¹⁵²

E. *Abercrombie*

Central to the *Abercrombie* case is the Italian legislation on on-call contracts, i.e. – flexible employment contracts whereby an employee makes her/himself available to the needs of the employer.¹⁵³ In general, such a contract is subject to objective conditions related to the intermittent nature of the services and requirements specified in collective agreements. However, the same contract may be offered in all circumstance to workers up to the age of twenty-five and over the age of forty-five.¹⁵⁴ Mr. Bordonaro was employed by Abercrombie under such an on-call contract for over a year and a half. When he turned twenty-five, his employment contract was automatically terminated due to the fact that the age condition ceased to be fulfilled.¹⁵⁵ Bordonaro brought an action before the Italian Court seeking a ruling that both his fixed-term on-call contract and his dismissal were unlawful due to age discrimination.¹⁵⁶

Firstly, the CJEU examined whether Bordonaro had been treated differently because of his age. Thereto, the Court held that the Italian measure established two regimes: one concerned with the access to and conditions of employment; the other with the dismissal of on-call workers. Both regimes are conditioned by the age category to which those workers belong.¹⁵⁷ Thus, on-call contracts for workers aged twenty-five years or more and up to forty-five years are only allowed under certain conditions. On-call contracts with workers aged under twenty-five years or over forty-five years are not subjected to such conditions..¹⁵⁸ Therefore, the CJEU held that young workers are comparable to other workers, meaning that the contested measure constitutes a difference in treatment on the grounds of age.¹⁵⁹

Secondly, the CJEU examined whether the difference in treatment can be justified. With regard to the legitimate aim, the Court noted that the provision forms a part of a legal

¹⁵¹ Para 34.

¹⁵² Para 33.

¹⁵³ Case C-143/16 *Abercrombie* (n 18) para 6.

¹⁵⁴ *ibid.*

¹⁵⁵ Para 11.

¹⁵⁶ Para 12. Note that the CJEU first considers whether Bordonaro is a worker within the meaning of Article 45 TFEU, concluding that he is (paras 19-23).

¹⁵⁷ Para 26.

¹⁵⁸ *ibid.*

¹⁵⁹ Paras 27-28.

framework intended to make the employment market more flexible in order to increase employment levels.¹⁶⁰ The measures facilitates the entry of young people to the labour market.¹⁶¹ Especially in a labour market as difficult as in Italy, the lack of professional experience is a factor that hampers young people. Gaining experience, even if it is through flexible work and for a limited time, could constitute a springboard towards new employment opportunities.¹⁶² The measure thus serves the aim of creating special conditions for access to employment, i.e. encouraging recruitment. This falls within a legitimate aim covered by Article 6 FED.¹⁶³ Therefore, it is necessary to examine whether the measure is appropriate and necessary to achieve that aim.¹⁶⁴

The CJEU considered the measure appropriate, since this less onerous and costly instrument (i.e. on-call contract) may indeed encourage employers to respond more to job applications of young people.¹⁶⁵ As regards the necessity of the provision, the CJEU observed that in the context of a persistent economic crisis and weak growth, the situation of a worker aged under twenty-five years, who can access the labour market thanks to a flexible and temporary employment contract, is preferable to the situation of someone without such a possibility who is unemployed as a result.¹⁶⁶ Additionally, the Italian Government explained that the measure is necessary because it provides access to the labour market for people at risk of social exclusion and helps to eliminate forms of illegal work.¹⁶⁷ It also clarified that on-call workers enjoy a number of guarantees, for example they are protected against less favourable treatment than other workers at equivalent level.¹⁶⁸ Hence, the CJEU held it reasonable for the Italian Government to regard the measure as necessary.¹⁶⁹

V. ANALYSIS OF EU AGE-DISCRIMINATION CASE LAW: ITS IMPLICATIONS FOR EU YOUTH POLICY

The outcome of the cases described in section IV are summarised in Table 1.

Table 1. Outcome of the five cases on age discrimination involving young people

Case	Discrimination	Discriminatory effect of the measure	Justifiable
<i>Hütter</i>	Yes	Distinction by age results in unequal treatment between young people with similar work experience	No
<i>Küçükdeveci</i>	Yes	Distinction by age results in unequal treatment between young people who enter the labour market	No

¹⁶⁰ Para 32.

¹⁶¹ Para 33.

¹⁶² *ibid*, and similar para 34.

¹⁶³ Para 37, with reference to Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* (n 11).

¹⁶⁴ Paras 39-40.

¹⁶⁵ Para 41.

¹⁶⁶ Para 42.

¹⁶⁷ Para 43.

¹⁶⁸ Para 45.

¹⁶⁹ Para 46.

		after a short period of education and young people who enter the labour market after a long(er) period of education.	
<i>O</i>	No	Different treatment is not based on age but on the need of protection against insecurity of income after the loss of employment.	n.a.
<i>De Lange</i>	Yes	Different treatment based on age in order to promote educational opportunity for young people, which people above thirty have already enjoyed.	Yes
<i>Abercrombie</i>	Yes	Different treatment based on age to gain work experience in order to improve opportunities for regular employment.	Yes

In four of the five cases, the CJEU found that the measure constituted a difference in treatment on grounds of age. Only in *O* was no differentiation found, obviating the need to assess the measure further. With respect to the four cases, the CJEU repeated that Member States enjoy a broad discretion in their choice to pursue a particular aim, and in the definition of measures capable of achieving it.¹⁷⁰ Even in *Hütter*, the Court accepted the legitimate aim despite its inconsistency, i.e. promotion of secondary education in favour of vocation training, while the effect of the measure is that vocational training favours over secondary training. . Unsurprisingly, the CJEU did consider the inconsistent measure in *Hütter* inappropriate for achieving the legitimate aim. Furthermore, the CJEU confirmed that the reward of experience can be appropriate to determine the wage scale. Nonetheless, the Court concluded that the measure could not be justified, because the additional age threshold of twenty-five resulted in unequal treatment between two persons with similar experience. A similar conclusion was reached in *Kücükdeveci* – the years of service can be appropriate as a condition for establishing notice periods; however, the additional condition of age cannot, because that would affect young people who enter the labour market early and not those who enter the labour market after a long period of education.

In the remaining two cases, *De Lange* and *Abercrombie*, the CJEU concluded that the measures at stake were appropriate and necessary to achieve the legitimate aim. In *De Lange*, the Court considered the tax scheme appropriate for improving the position of young people in the labour market and providing an incentive to pursue vocational training. Furthermore, the measure was deemed necessary, since persons over the age of thirty years (who are excluded from the scheme) already had the opportunity to undertake prior training and to pursue a professional activity. They are therefore in a better financial position and able to bear the financial burden of new training. In *Abercrombie*, the CJEU held the measure appropriate since the on-call contracts may indeed encourage employers to hire young people. It seems that

¹⁷⁰ The CJEU held this for the first time in Case C-144/04 *Mangold* EU:C:2005:709; and Case C-411/05 *Palacios de la Villa* (n 101).

the fact that on-call work is in principle a form of precarious work was not an issue for the CJEU. Its conclusion is most likely influenced by the temporary nature of the on-call contract, available only until the age of twenty-five, and because it is intended for providing work experience which could constitute a springboard towards new employment, and thus a steady entry in the labour market. Furthermore, misgivings about precariousness are mitigated, since the young persons concerned are protected against being treated less favourably than other workers at the same level. In the assessment of the necessity, the CJEU took into account the Italian economic and social situation, especially the risk of social exclusion of young people unable to enter the labour market, and the objective of eliminating illegal work.

The measures in *De Lange* and *Abercrombie* fit perfectly with the EUYS. The tax scheme in *De Lange* is clearly designed to ease the access of young people to vocational training in order to facilitate their transition into the labour market. The on-call contract in *Abercrombie* is an example utilising flexible forms of employment to improve the position of young people in the labour market. These are the only two measures the CJEU accepted as being appropriate and necessary to achieve the legitimate aim pursued. As such, the Framework Equality Directive confirms the legality of differentiating rules which favour young people.

The legislation in *Hütter* could in principle have fitted within the EUYS, since it aims to encourage young people to achieve an educational level that will improve their opportunities to enter the labour market. However, due to its inconsistency, it is an ill-designed measure, and its benefits for young people should be questioned. It can thus be concluded that the Framework Equality Directive protects young people against poorly designed measures that may hamper their situation rather than benefitting them.

In *Kücükdeveci*, the rule primarily favoured older workers over younger workers by granting a longer notice period for workers above the age of forty-five. The fact that younger workers also benefit from the measure is incidental. Since the years of service before the age of twenty-five were not considered in calculating the notice period, young workers were cheaper to dismiss. This enabled employers to increase the flexibility in personnel management, encouraging the recruitment of young workers. In line with previous judgements, the Court held that the length of service as a condition for differential treatment can be appropriate and necessary. It is the condition of age that makes the measure unjustifiable. The fact that the years of service between the age of eighteen and twenty-five are not calculated for the notice period results in a difference in treatment, not between older workers (forty-five plus) and younger workers, but between young workers aged twenty-five plus and eighteen till twenty-four. The age distinction puts young people who enter the labour market at a young age and consequently have limited education, in a less favourable position compared to young people who stay in education for longer and therefore enter the labour market at a later age. Thus, while the Framework Equality Directive allows for a difference in treatment between older

workers (forty-five plus) and younger workers based on the length of service, it protects young people against unnecessary further disadvantage based on age.

The *O* case differed from the others as there was no situation of unequal treatment. Nonetheless, the relevant measure affects young people, since the termination of work engaged in during holidays is treated differently from regular work. An interesting aspect of this case is the Court's conclusion that the challenged measure is acceptable because the aim of the end-of-contract payment is to compensate for the insecurity of the employee's situation when the contractual relationship discontinues. Yet employees like Mr. O will go back to school or university and are thus not in a situation of job insecurity after the expiry of their contract. In this reasoning, a similarity can be found with the CJEU's judgements on mandatory retirement which is considered acceptable because of the consequences following from the termination of the employment contract, *namely* alternative income.

With regard to the claim that the CJEU is more lenient in accepting discrimination against older workers than against younger workers the following can be observed based on the five cases discussed in this study. The measures that affected young people negatively, as was the situation in *Hütter* and *Küçükdeveci*, could not stand the proportionality test and were found inappropriate and unnecessary. The measures that affect young people positively, but older people negatively, such as in *De Lange* and *Abercrombie*, could stand the proportionality test and were found appropriate and necessary. The commonality between the four cases is that the position of young people is protected. The CJEU shows consistency in its approach to be more sympathetic to the situation of young people than older workers.

Although the CJEU seems sympathetic to the situation of young people, one point of critique can be made. In *Abercrombie* the Court could have been more strict in applying the proportionality test. In this case the Italian government argued that on-call contracts were essential for young people to get professional experience which would significantly improve the chances for a regular job. This leads to the question why an age criterium is needed? Like in *Hütter*, the Court could have reasoned that the age requirement was unnecessary to achieve the aim, since it could be achieved by allowing the use of on-call contracts for a certain period after completion of education. Such would do more justice to young people who enter the labour market after a long(er) period of education. With a more strict application of the proportionality test, the CJEU could offer an even better protection for young people against discrimination on the grounds of age.

With respect to the main question of this study, embraced in its title, it can be concluded that the Framework Equality Directive provides the needed protection (*De Lange* and *Abercrombie*) and prohibits measures that negatively affect young people (*Hütter* and

Kücükdeveci). Hence, from the perspective of EU Youth Policy, the Framework Equality Directive has been rather a support than a hinder.