

Managing age in EU employment law: between non-discrimination and intergenerational solidarity

Matilde Biagiotti*

1. *Age* in European labour markets. 2. Managing age in employment: the EU framework. 2.1. Soft law measures supporting youth and older workers' employment. 3. Directive 2000/78/EC and the protection against age discrimination. 4. Non-discrimination on grounds of age in the case law of the CJEU. 4.1. Interpreting the general derogation under art. 2(5) of Directive 2000/78/EC. 4.2. Interpreting the general derogation under art. 4(1) of Directive 2000/78/EC. 5. The specific derogation under art. 6(1) of Directive 2000/78/EC: main features. 5.1. Practical applications of the derogation in the CJEU case law. 5.2. Assessing the Court of Justice's interpretation of art. 6(1). 6. Concluding remarks.

Abstract

This article examines the management of age in EU employment law, analysing the structural tension between individual rights to non-discrimination and collective socio-economic interests. Adopting a diachronic perspective, it shows how EU soft law has gradually moved from a generational trade-off model to a more holistic approach based on intergenerational solidarity and workplace coexistence. The article then critically reviews the Court of Justice's case law on age-related derogations under Directive 2000/78/EC, showing that the Court grants Member States a wide margin of discretion when employment policy goals are invoked, often in tension with EU institutional soft law. The essay argues that anti-discrimination law offers only limited protection in this field, due to the heterogeneity of age as a protected ground and the continued primacy of economic considerations.

Keywords: Age Discrimination; Directive 2000/78/EC; Intergenerational Solidarity; Labour Market; CJEU.

1. *Age* in European labour markets.

Age is a unique factor within European labour law, especially because of certain characteristics that define it from both a social and an economic-political standpoint. Socially, age is a factor shared by the entire population throughout every stage of life; from an

* Research Fellow in Labour Law at the University of Piemonte Orientale (Eastern Piedmont). This essay has been submitted to a double-blind peer review.

economic and political perspective, by contrast, age is frequently used as a pivotal element for structuring both the labour market and a state's social security system.¹

This results in a “particular” legal treatment of age, especially with regard to the balancing of the collective interests pursued through state employment policies, often in tension with the individual interests and needs of workers who may potentially be subject to unfavourable treatment in a given context. In this regard, managing the age factor in the framework of the adoption of strategic guidelines and instruments of social policy and labour law should require the examination and consideration of different, albeit complementary, dimensions of age as a qualitative attribute of the individual: it is indeed possible to distinguish between *chronological age*, linked to a person's date of birth; *biological age*, related to an individual's physical and pathological condition; and *psychological age*, referring to the subject's mental and psychological condition, including their personal perception of their own chronological age.²

Within the European employment context, the study of the provisions governing the age factor can only be undertaken after reviewing the characteristics of the current labour market, as affected by the digital, green and demographic transitions. The intersection of these phenomena produces an overall picture which, taking into account age, may be summarised as follows: demographic change, and population ageing above all, is leading to an increase in the average age of the workforce, as well as to the progressive extension of older workers' participation in the labour market, primarily as a result of legislative choices aimed at raising the statutory retirement age; on the other hand, the growing decline in birth rates recorded across Europe in recent years is contributing to a reduction in the number of young workers with prospects of entering the labour market.³ Associated with these two main demographic trends are a series of characteristics relating to employment affecting both categories of workers considered.⁴ On the one hand, the continued participation of older workers is hindered by the obsolescence of their skills and the need for further training to keep pace with digital transformation in the labour market. On the other hand, young people tend to

¹ Bozzao P., *Anzianità, lavori e diritti*, Editoriale Scientifica, Naples, 2017, 41-45, refers to age as an “organisational parameter”, functionalised in pursuit of national employment objectives. Similarly, Doron I., Numhauser-Henning A., Spanier B., Georgantzi N., Mantovani E., *Ageism and Anti-Ageism in the Legal System: A Review of Key Themes*, in Ayalon L., Tesch-Römer C. (eds), *Contemporary Perspectives on Ageism*, International Perspectives on Aging, 19, Springer, Berlin, 2018, 307-310.

² On the topic, Kaya R., *Reasonable accommodation for age*, in *Canadian Journal of Law & Jurisprudence*, XXXIII, 1, February 2020, 125-130; FRA, *Shifting perceptions: towards a rights-based approach to ageing*, Publication Office of the EU, Luxembourg, 2018, 5-7.

³ See Draghi M., *The future of European competitiveness. Part B – In-depth analysis and recommendations*, European Commission, 9 September 2024, 263. The *Draghi Report* highlights the projected decline in the EU working-age population due to ageing and demographic contraction, estimated at 41 million people between 2023 and 2070 (over 15%), with a corresponding reduction in labour supply (-12%) and hours worked (-9%). It also identifies significant untapped labour reserves, particularly among young people, women and older persons.

⁴ *Ex multis*, Brollo M., *Lavoro agile: prima gli anziani?*, in Fili V. (ed), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, ADAPT University Press, Modena, 2022, 67-69; De Falco M., *Invecchiamento e tutela della professionalità, quando la forza (lavoro) viene meno*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023, 1-3; Drydakis N., Paraskevopoulou A., Bozani V., *A field study of age discrimination in the workplace: the importance of gender and race-pay the gap*, in *Employee Relations: The International Journal*, 45, 2, 2023, 305-307; Garofalo C., *Età e incentivi: il rimedio allo svantaggio*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023, 67-69; Migliavacca M., *Quantità o qualità? Le sfide del lavoro per i giovani europei*, in *Quaderni di Rassegna Sindacale – Lavori*, 1, 2022, 116.

extend their participation in education in order to reach higher levels of qualification, but subsequently enter a labour market that often fails to fully utilise their skills and tends to offer them *non-standard* contracts, precarious and low-quality positions, as well as mainly discontinuous employment opportunities.⁵ In this context, it is increasingly essential to ensure a fair balance between the needs of the different generations involved in the labour market, thereby mitigating the risk of intergenerational competition and promoting organisational solutions capable of reconciling the trends outlined above and achieving a functional intergenerational balance or solidarity.⁶

Building on the foregoing analysis, the study of strategies for the inclusion of young and older workers in the European labour market can be shown to be effective only if at least two distinct levels of intervention are taken into account. While it is implicit that ageism, operating at the individual (*micro*) level, has a concrete impact on workers, it is also necessary to examine the tools implemented to counter processes of exclusion and discrimination affecting these groups and to promote their inclusion in the workplace at both the *macro* (institutional and multi-level regulatory) and *meso* (company level, concerning the management of interpersonal relations and the application of labour law instruments within the workplace) levels.

This essay will analyse the *macro* dimension governing age in employment, with specific attention to the European legal framework. It will focus on EU primary law, soft law instruments and secondary legislation, considering especially anti-discrimination law and the Court of Justice's jurisprudence, to assess how far *intergenerational solidarity* – in the management of younger and older workers – is articulated and promoted across these levels.

2. Managing age in employment: the EU framework.

The inclusion in the labour market of individuals whose vulnerability is linked to age is closely connected to a number of values that lie at the core of the European Union's legal framework. Among its objectives, the EU seeks to promote and respect "solidarity between generations",⁷ thereby highlighting the importance of taking age into account in the formulation and implementation of its policies. Likewise, age is expressly identified as one of the prohibited grounds of discrimination that the EU is committed to combating in the definition of its policies and activities,⁸ including through the specific competence conferred upon it by art. 19 TFEU. Finally, the EU Charter of Fundamental Rights (from now on "the Charter") contains a series of provisions that are particularly relevant to the issues examined in this article. These include, in particular, art. 15, which guarantees the freedom to choose

⁵ De Falco M., *Invecchiamento, lavoro agile e competenze digitali*, in Fili V. (ed), nt. (4), 82-85.

⁶ See Dal Maso G., *Invecchiamento attivo e mercato del lavoro: la crisi demografica sotto una nuova luce*, in Mostarda A., Zanella E., Zilio Grandi G. (eds), *Lavoro, sicurezza sociale e relazioni industriali nel prisma del fattore demografico*, Giappichelli, Turin, 2024, 188-192; Garofalo C., nt. (4), 8-11; Sonnati S., *Age thresholds and the definition of the 'older worker' in EU and Italian employment law: Intergenerational justice from a legal perspective*, in *European Labour Law Journal*, 17, 2, 2026, 147.

⁷ Art. 3(3) TEU.

⁸ Art. 10 TFEU.

an occupation and the right to work; art. 21, which enshrines the principle of non-discrimination; art. 25,⁹ which recognises the rights of older persons; and art. 32, concerning the prohibition of child labour and the protection of young people at work.

Despite the framework established by primary law, awareness of the need to ensure fair treatment of young and older workers has developed only progressively and in a rather uneven manner within European policy-making. In this respect, the first significant attempt can be identified in the adoption of the *Community Charter of Fundamental Social Rights of Workers* (1989), which contains general references to the right of every individual to pursue an occupation,¹⁰ as well as more specific provisions concerning the regulation of employment relationships involving young individuals: art. 21 provides for the recognition of fair remuneration, while arts. 22 and 23 establish the adoption of labour law measures aimed at promoting and ensuring the personal development of young workers, their vocational training and their access to employment.

2.1. Soft law measures supporting youth and older workers' employment.

The analysis of the *soft law* instruments adopted by the European institutions to guide Member States' actions in relation to the employment of young and older workers reveals a scenario characterised by a continuous change in policy objectives, which are cyclically reshaped in response to the economic priorities defined by political actors and Member States. This section provides an overview of the main initiatives which illustrate this trend.

The 1997 *European Employment Strategy* (EES)¹¹ identified the prevention of youth and long-term unemployment as its main objective. To this end, it required Member States to implement active labour market policies – rather than passive support measures – in favour of disadvantaged groups. In this context, youth unemployment was to be addressed by ensuring that young unemployed people were offered, within a maximum period of six months, either training or vocational retraining opportunities. The Strategy also focused on the transition from education to employment, underlining structural shortcomings in educational system that failed to equip young people with the skills required by the labour market. The apprenticeship system, where further developed and adequately strengthened, was identified as a potential tool to address this challenge. By contrast, specific employment guidelines targeting older workers were absent from the Strategy.

⁹ O' Cinneide C., *Article 25 – The right of the elderly*, in Peers S., Hervey T., Kenner J., Ward A. (eds), *The EU Charter of Fundamental Rights. A commentary*, Hart Publishing, Oxford, second edition, 2021, 734-735. Art. 25 of the Charter is an “innovative provision” recognising older persons' right to a life of dignity, autonomy and social and cultural participation. Although it cannot be directly invoked by individuals, it may serve as an interpretative principle of EU law. Its lack of a definition of “elderly” allows for a broad scope of application, although its extension to employment remains uncertain. While the CJEU has not yet directly applied art. 25, landmark judgments such as *Mangold* and *Kücükdeveci* have established a link between dignity, autonomy and non-discrimination, including in employment. Art. 25 may therefore reinforce and complement art. 21 of the Charter.

¹⁰ Art. 4, *Community Charter of Fundamental Social Rights of Workers*, 1989.

¹¹ European Employment Strategy (EES), launched on 20-21 November 1997, paras. 23, 50, 51, 58 and 60.

At the Cologne European Council in 1999,¹² during the evaluation of the 1997 EES, concerns regarding the high rate of youth unemployment were reiterated, but this time the focus was shifted towards the development of a long-term strategy based on the promotion of lifelong learning for all individuals. On the same occasion, the German Presidency presented a draft memorandum entitled “*Youth and Europe – Our future*”,¹³ aimed at improving the employment prospects of young Europeans through the identification of good practices to be disseminated at national level, the organisation of training initiatives and the provision of cross-border employment opportunities. Finally, the Council emphasised the need to ensure the stable participation of older workers in employment through, inter alia, the introduction of more flexible arrangements.

In this vein, the development of European education and training systems adapted to the demands of the emerging knowledge-based society was identified as a key objective both in the *Lisbon Strategy* of 2000 and in the *European Social Agenda* adopted in the same year.¹⁴ The focus was placed on enhancing opportunities for the acquisition of new skills and the upskilling of existing competences, with the long-term aim of improving employability and working conditions, while reducing the risk of unemployment for both young and older workers. In addition, within these policy frameworks, Member States were called upon to identify and address potential instances of discrimination in the labour market, with particular reference to unfavourable treatments based on age.

A first sign of a shift in the approach adopted by the European institutions towards demographic challenges can be identified in the Green Paper of 2005 entitled “*Confronting demographic change: a new solidarity between the generations*”.¹⁵ With regard to employment, the document outlined two main policy directions: first, increasing labour market participation among groups whose involvement had traditionally been limited or unstable, including women, young people and older workers; second, developing new forms of intergenerational solidarity based on mutual support and the transfer of knowledge, skills and experience, with a view to fostering the participation of workers of different ages and enhancing their integration in the workplace.¹⁶ The data presented by the Commission indicated that Member States had primarily focused on the employment of women and older workers, while measures targeting young workers remained insufficient. In this respect, a paradox emerged: although young Europeans were, on average, more highly educated than previous generations, they appeared to face a significantly higher risk of precariousness, unemployment and poverty compared to previous generations. Among the causes identified

¹² Presidency Conclusions, *Annex I – Resolution of the European Council on the European Employment Pact: Closer cooperation to boost employment and economic reforms in Europe*, Cologne, 3-4 June 1999, 7-8. Report on the European Employment Pact, 8705/99. See also Commission of the European Communities, *Towards a Europe for All Ages – Promoting prosperity and Intergenerational Solidarity*, 21 May 1999, which emphasised the importance of skills, lifelong learning and the use of flexible working arrangements.

¹³ Draft memorandum of the Presidency “*Youth and Europe – Our future*”, 8288/99 + COR 1 (d).

¹⁴ *Lisbon Strategy*, launched at the extraordinary European Council on employment held in Lisbon on 23-24 March 2000, paras. 25 and 26; *European Social Agenda*, adopted at the European Council held in Nice on 7-10 December 2000.

¹⁵ Commission of the European Communities, *Green Paper: “Confronting demographic change: a new solidarity between the generations”*, 16 March 2005, COM(2005) 94.

¹⁶ *Ibidem*, 6.

by the Commission, inadequate preparation provided by education and training systems for the transition to employment was highlighted, in line with previous policy documents. Conversely, with regard to older workers, their continued participation in the labour market was closely linked to the quality of working conditions, including adequate health and safety standards and measures aimed at preventing discriminatory treatment. In this context, the emergence of renewed individual transitional phases between different stages of life was envisaged, departing from the “traditional” linear model of the life cycle of European workers.¹⁷ From this perspective, intergenerational solidarity was conceived as a “balance between the generations, in the sharing of time throughout life, in the distribution of the benefits of growth, and in that of funding needs stemming from pensions and health-related expenditure”.¹⁸

However, the approach to intergenerational solidarity outlined above was not reflected in the *Europe 2020* strategy.¹⁹ In this context, the European Commission refocused on the development of advanced European education and training systems, notably through two flagship initiatives: the *Youth on the move*²⁰ package of measures and the *Agenda for new skills and jobs*.²¹ In this regard, the Commission promoted the development of new forms of work-life balance, the parallel strengthening of active ageing policies and the establishment of partnerships between school education, vocational training and employment systems. Notably, limited priority was given to the employment of older workers, targeted only in terms of the overall level of employment to be achieved.

Further evidence of the fluctuating approach outlined above can be found in the renewed attention devoted to the employment of older workers in 2012, when the *European Year for Active Ageing and Solidarity between Generations* was proclaimed.²² Its objective was to promote the dissemination of active ageing practices along three main dimensions: employment, participation in society and independent living. More broadly, the initiative envisaged the development and implementation of a range of measures – regulatory interventions, data analysis, awareness-raising activities and information campaigns – aimed at fostering the active and prolonged participation of older persons in society. The European approach to active ageing was based on a series of interventions intended to promote health, participation and security for older persons, aiming at optimising their physical, social and political wellbeing.²³ Within the employment sphere, such an approach involved the adoption of *ad hoc* measures designed to ensure the continued development of workers’ skills throughout

¹⁷ Young people increasingly extend their education, delaying labour market entry, while parenthood occurs later in life and may require periods of family leave. Conversely, improved health conditions allow older workers to remain in employment beyond the retirement age established by national pension systems.

¹⁸ Commission of the European Communities, nt. (15), 10.

¹⁹ European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3 March 2010, COM(2010) 2020.

²⁰ *Youth on the Move*, https://ec.europa.eu/youthonthemove/about/index_en.htm.

²¹ European Commission, *An Agenda for new skills and jobs: A European contribution towards full employment*, 23 November 2010, COM(2010) 682.

²² Decision No 940/2011/EU of the European Parliament and of the Council of 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012).

²³ Fili V., nt. (4), XV-XVII; Dal Maso G., nt. (6), 178-180; Pezzini G., *Il lavoratore anziano: un personaggio in cerca di autore*, in Fili V. (ed.), nt. (4), 31.

their working life and at every stage of the employment relationship.²⁴ From this perspective, active ageing strategies operated at three distinct levels: the individual level, through interventions relating to lifestyles and personal choices; the organisational level, through age-conscious management of work and human resources; and the societal level, through public policies and regulatory interventions.²⁵ At the same time, by favouring a rights-based approach, active ageing policies sought to improve job quality and preserve or enhance older persons' work ability. In practical terms, this required the implementation of measures to encourage older workers to remain in the labour market for longer, while preventing the loss of human capital and skills necessary to keep being productive throughout the different transitions of working life.

Overall, the European approach to active ageing has also revealed a number of shortcomings: first, it appears to pay insufficient attention to older persons whose vulnerability was worsened by other discriminatory criteria; second, the European institutions have shown a "dangerous" propensity to emphasise the individual responsibility of older persons to remain active and participate in society, while almost shifting responsibility away from States for providing them with the instruments to do so. This dynamic reflects a broader systematic risk in policies aimed at addressing the vulnerability of an entire group: on the one hand, efforts to counter stereotypes and promote the capabilities of protected groups may give rise to paternalistic forms of intervention; on the other hand, they may generate exclusionary dynamics towards individuals who do not correspond to the paradigm of vulnerability underlying the policy framework, whether because they enjoy comparatively more favourable conditions or because they experience multiple and intersecting forms of disadvantage.²⁶ To a certain extent, this phase reveals an approach on the part of the European Union that appears to be driven primarily by the economic implications of active ageing and by an emphasis on individual responsibility, rather than by a commitment to the effective protection of individuals' fundamental rights.²⁷

Following the parenthesis dedicated to active ageing, the European Commission renewed its focus on youths with the launch of the *European Union Youth Strategy 2019-2027* in 2018.²⁸

²⁴ On the topic, see Pezzini G., nt. (23), 38-39; Bozzao P., nt. (1), 19-25; Beazley A., Ball C., Vernon K., *Workplace Age Diversity: The Employers' Perspectives*, in Flynn M., Chiva A., Li Y. (eds), *Managing the Ageing Workforce in the East and the West*, Emerald Publishing Limited, United Kingdom, 2018, 243-246.

²⁵ European Commission, *European Employment Observatory Review: Employment Policies to Promote Active Ageing 2012*, Directorate-General for Employment, Social Affairs and Inclusion (Unit C1), Publications Office of the EU, Luxembourg, 2012, 5-8.

²⁶ According to Chenal R., *La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali*, in *Ars Interpretandi*, 2, 2018, 39-43, from a legislative perspective, defining vulnerability first requires identifying the individuals who qualify as vulnerable. This exercise entails three main risks: *under-inclusion*, which may leave deserving individuals without adequate protection of their fundamental rights; *over-inclusion*, which may reinforce stereotypes by treating heterogeneous groups as uniformly vulnerable; and overly vague criteria, which may ultimately undermine the effective application of the legal provision.

²⁷ Georgantzi N., *The European Union's Approach towards Ageism*, in Ayalon L., Tesch-Römer C. (eds), nt. (1), 354-356, identifies a "paradox" in the EU approach to active ageing: while older people are sometimes portrayed as a societal "burden", the EU simultaneously promotes their continued participation in the labour market (356-358).

²⁸ Resolution of the Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council on a framework for European cooperation in the youth field: *The European Union Youth Strategy 2019-2027*, 2018/C 456/01. Established in 2013 (2013/C 120/01), the *Youth*

The Strategy adopts a cross-sectoral approach to achieve a range of objectives in different policy areas, including employment. Equality, non-discrimination and inclusion constitute the guiding principles: *equality* is to be promoted by preventing unfavourable treatment and discriminatory behaviours affecting young people on the grounds of age, including where age intersects with other vulnerability factors; *inclusion*, in turn, requires the design and implementation of *ad hoc* measures capable of responding to the diverse needs of young people as a heterogeneous group. The ultimate objective of the Strategy is to foster quality employment for young people by ensuring fair working conditions, adequate remuneration, equal opportunities between peers and between different age groups, smoother transitions from education to employment, equal access to training opportunities and full recognition of skills acquired through both formal and non-formal learning.

The European Union subsequently reinforced its commitment to young people by designating 2022 as the *European Year of Youth*.²⁹ The measures and initiatives developed under this framework were aligned with several principles set out in the European Pillar of Social Rights, in particular *principle 1* on the right to education, training and lifelong learning and *principle 3* on equal opportunities. In the field of employment, most interventions focused on promoting the labour market inclusion of young people in situations of particular vulnerability, as well as fostering regulatory progress concerning internships and the fair treatment of young people engaged under such contracts.

The *Green Paper on Ageing: Fostering solidarity and responsibility between generations*³⁰ published in 2021 reflected instead the European Union's renewed emphasis on intergenerational solidarity and on a holistic approach to age-related issues. Active ageing and lifelong learning constitute the cornerstone concepts through which intergenerational solidarity is to be pursued in the European social and employment context.³¹ On the one hand, active ageing is conceived as a form of individual responsibility, however – unlike in earlier policy approaches – it is explicitly acknowledged that it “depends heavily on the environment in which people live, work and socialise”.³² In this perspective, “public policies can play a significant supporting role”, thereby reaffirming the shared responsibility of both individuals and public authorities in the active ageing process. On the other hand, lifelong learning plays a key function on at least two levels: first, in safeguarding the workers' employability in the context of labour market transitions; and second, in supporting both personal and professional growth trajectories, as well as facilitating career progression.³³ With respect to

Guarantee aimed to ensure that young people aged 18-24 received an offer of employment, education, apprenticeship or traineeship within four months of leaving education or becoming unemployed. The *reinforced Youth Guarantee*, introduced in 2020 (2020/C 372/01), extended its scope to young people up to the age of 29. Opinion of the EESC, *The equal treatment of young people in the labour market*, SOC/721, 15 June 2023, para. 3.10.

²⁹ Decision (EU) 2021/2316 of the European Parliament and of the Council of 22 December 2021 on a European Year of Youth (2022).

³⁰ European Commission, *Green Paper on Ageing: Fostering solidarity and responsibility between generations*, 27 January 2021, COM(2021) 50 final.

³¹ According to the EESC, SOC/721, nt. (28), paras. 3.5 and 3.6, *intergenerational solidarity* entails striking a balance between the distinct needs of professional and private life. The economic consequences of a lack of intergenerational solidarity often result in lower productivity at company level, as well as a lack of innovation in production processes and a tendency towards a lower level of professionalism among employees.

³² European Commission, nt. (30), 4.

³³ European Commission, *ibidem*, 3-5.

European demographic trends, and in response to the decline in the working-age population recorded in recent decades, the Commission has reiterated strategies already adopted in the past, such as the increased integration into the labour market of disadvantaged groups, including people with disabilities, migrants and ethnic minorities. At the same time, measures to extend the labour market participation of older persons have been encouraged, including improvements in working conditions in terms of ergonomics and accessibility, as well as greater organisational flexibility. In this context, the Commission has also called on Member States to explore new inclusion strategies, including the use of digital technologies and the promotion of entrepreneurship among older workers, with a view of fostering multigenerational workplaces characterised by the mutual exchange of knowledge and professional experience across generations.³⁴

As a whole, the foregoing analysis has shown that the European Union's approach to the employment of young and older workers has alternated between targeted interventions and, at times, a more holistic vision based on intergenerational solidarity. However, the prevailing emphasis has remained economic, as has often been emphasised in the literature on the European institutions' intervention in the field of social policy.³⁵ This has produced a fluctuating and fragmented form of protection, shaped selectively by political rather than egalitarian logics and often neglecting its implications for equal opportunities.³⁶

The analysis now turns to the hard law measures adopted at EU level to promote the inclusion of young and older persons in European social and employment processes, with particular attention to anti-discrimination law as a tool to combat unequal treatments.

3. Directive 2000/78/EC and the protection against age discrimination.

The first regulatory breakthrough at European level in the protection of workers against discrimination on grounds of age was marked by the adoption of Directive 2000/78/EC (from now on, also, "the Directive"), which was introduced to ensure minimum standards of protection against discrimination based on multiple factors, including age.³⁷ The level of protection guaranteed by EU anti-discrimination law has progressively developed over time,

³⁴ European Commission, *ibidem*, 6-12.

³⁵ On the topic, *ex multis*, Ales E., *Lo sviluppo della dimensione sociale comunitaria: un'analisi "genealogica"*, in *Rivista del Diritto della Sicurezza Sociale*, 3, 2009, 527-531; Barnard C., *EU Employment Law and the European Social Model: The Past, the Present and the Future*, in *Current Legal Problems*, 67, 2014, 199 ff.; Cinelli M., Siotto F., *La politica sociale europea*, in Cosio R., Curcuruto F., Di Cerbo V. E Mammone G. (eds), *Il diritto del lavoro dell'Unione Europea*, Giuffrè, Milan, 2023, 37-91.

³⁶ Fudge J., Zbyszewska A., *An intersectional approach to age discrimination in the European Union: bridging dignity and distribution?*, in Numhauser-Henning A., Rönmar M. (eds), *Age Discrimination and Labour Law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2015, 144-147. The A. draws an interesting comparison between a human rights-based and an economic approach to addressing discrimination. See also Georgantzi N., nt. (27), 348-350; Bernardini M.G., *Vite di scarto. Vecchiaia, strutturale emergenza e invisibile crisi dei diritti umani*, in Gioffredi G., Lorubbio V., Pisanò A. (eds), *Diritti umani in crisi? Emergenze, disuguaglianze, esclusioni*, Pacini Giuridica, Pisa, 2021, 172-173; Bozzao P., nt. (1), 45-47.

³⁷ Directive 2000/78/EC, art. 1. The Directive does not apply to social security and social protection schemes (art. 3(3)); national provisions on retirement age (art. 6(2)); or national measures necessary to safeguard public security, prevent crime and protect health or the rights and freedoms of others (art. 2(5)).

especially through a series of landmark judgments of the Court of Justice, which have recognized the prohibition of age discrimination as a general principle of EU law capable of producing both vertical and horizontal direct effects.³⁸

Nevertheless, with respect to this factor of discrimination, the Directive provides a rather “fluctuating” level of protection. On the one hand, it adopts a broad scope of protection – without precisely defining which age is to be considered as a carrier of vulnerability –³⁹ thus allowing protection to extend to both young and older workers. On the other hand, it permits significant derogations from the principle of non-discrimination on grounds of age, contrary to what is provided for the other protected factors covered by the same legal instrument.⁴⁰ Age is also regarded as a “non-classical” discriminatory criterion and, in some respects, as more “acceptable” than the others, particularly in light of its commonality to all individuals and its perceived relevance to the sustainability of European national economies.⁴¹

The “gradation of protections” that appears to emerge from the anti-discrimination framework established by Directive 2000/78/EC is not intended to imply any hierarchy among the grounds giving rise to unfavourable treatment, but rather reflects a differentiated assessment of the social interests associated with each factor of discrimination.⁴² In this sense, a potential tension arises between the individual interest – aimed at safeguarding freedom of choice and personal dignity – and the collective interest – oriented towards rationalization and efficient socio-economic planning at national level.⁴³

³⁸ The following judgments fall within this category: CJEU, Case C-144/04, *Mangold v Helm*, 22 November 2005, paras. 74-75; CJEU, Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co KG*, 19 January 2010, para. 22; CJEU, Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, 19 April 2016.

³⁹ Regarding the definition of “older worker”, see FRA, nt. (2), 5-7; Pezzini G., nt. (23), 38-39; Pasquili R., *Persone anziane e fragili: verso nuovi modelli di gestione dell'età*, in Fili V. (ed.), nt. (4), 3-5; Bozzao P., nt. (1), 10-14; Fili V., nt. (4), XI-XIII; Fili V., *I lavoratori anziani tra esclusione e inclusione*, in *Argomenti di Diritto del Lavoro*, 2, 2020, 369-372; O' Cinneide C., nt. (9), 736-738; Sonnati, nt. (6), 148-151. Academic debate recognises the multifaceted and evolving nature of the concept of “older worker”, understood as a “social construct” and associated with various terms (e.g. “mature”, “senior” or “late-career worker”). The threshold is often linked to the national statutory retirement age, which varies among Member States. Relevant criteria include chronological age, length of service with a specific employer and contribution history.

⁴⁰ Age is often described in the literature as the “Cinderella” or the “tail-end” factor of EU anti-discrimination law. See Izzi D., *Eguaglianza e differenze nei rapporti di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Jovene, Naples, 2005, 14; Militello M., Strazzari D., *I fattori di discriminazione*, in Barbera M., Guariso A. (eds), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Giappichelli, Turin, 2019, 140.

⁴¹ Kaya R., nt. (2), 115-116; Pezzini G., nt. (23), 33-34; Doron I. *et al.*, nt. (1), 303-305; Tobler C., *EU age discrimination law and older and younger workers: Court of Justice of the European Union case law development*, in Numhauser-Henning A., Rönnsmar M. (eds), nt. (36), 93-95; Bozzao P., nt. (1), 89-91; Sargeant M., *Age Discrimination in Employment*, Gower Publishing, Aldershot, 2006, 4; Hendrickx F., *Setting the Scene: Development of the CJEU Jurisprudence on Age Discrimination in Employment*, in Manfredi S., Vickers L. (eds), *Challenges of Active Ageing. Equality Law and the Workplace*, Palgrave Macmillan, London, 2016, 17-18. According to Fudge J., Zbyszewska A., nt. (36), 142-145, age discrimination differs from other grounds in that it does not derive from historical experiences of segregation or persecution (as with race) and is characterised by fluidity, as it may affect different groups of individuals over time.

⁴² Bozzao P., nt. (1), 52-57.

⁴³ On the topic, Hendrickx F., *Age and European employment discrimination law*, in Hendrickx F., (ed.), *Active ageing and labour law. Contributions in honour of Professor Roger Blanpain*, Social Europe Series 31, Intersentia, Cambridge, 2012, 3-30; Hendrickx F., nt. (41), 3-4.

Against this background, it is possible to identify two distinct rationales underlying the development of the prohibition of discrimination on grounds of age.⁴⁴ First, there is the general logic of anti-discrimination law common to many protected factors, which is based both on the requirement to refrain from treating comparable situations differently and on the concomitant need to recognise and preserve individual diversity and capabilities. Second, there is a socio-economic rationale reflected in a range of policy objectives, responding both to the need of ensuring a prolonged stay of older workers in the labour market (preventing them from being subjected to forms of discrimination), and to a growing awareness of the inadequacy of traditional conceptions of the employment relationship and the working life cycle, which often fail to correspond to the expectations and needs of younger generations. From this second perspective, age is sometimes conceived as a *functionalised factor* or a *social stratifier*.⁴⁵

Of central importance is the fact that the Directive provides for certain exceptions to the prohibition of age discrimination based on both general and specific justifications. The general exceptions include: the possibility of applying occupational requirements that are essential and determining for the performance of a given activity, thus permitting differences in treatment based on characteristics linked to one of the protected factors set out in the Directive;⁴⁶ second – in cases of indirect discrimination – measures, criteria or practices which, although placing particular groups at a disadvantage, pursue a legitimate aim and are appropriate and necessary for achieving that objective;⁴⁷ finally, national provisions adopted to ensure public order and security.⁴⁸

By contrast, specific derogations from the principle of non-discrimination on grounds of age are provided for by both art. 3(4), which allows Member States to exclude the application of the Directive in relation to armed forces, and by art. 6(1), titled “*Justification of differences of treatment on grounds of age*”. Under the latter provision, differences of treatment on grounds of age – including direct discrimination – may be justified where they are objectively and reasonably motivated by legitimate aims, such as objectives of employment policy, labour market and vocational training.⁴⁹ In addition, art. 6(1) provides a non-exhaustive list of measures that may constitute legitimate grounds for differences of treatment, including: the *setting of special conditions on access to employment and vocational training* for both young and older workers; the *fixing of minimum conditions of age, professional experience or seniority in service for access to*

⁴⁴ Schiek D., *Proportionality in age discrimination cases: towards a model suitable for socially embedded rights*, in Numhauser-Henning A., Rönmar M. (eds), nt. (36), 82-86.

⁴⁵ Numhauser-Henning A., *Labour law, pension norms and the Eu ban on age discrimination: towards ultimate flexibilization?*, in Numhauser-Henning A., Rönmar M. (eds), nt. (36), 115-118; Bozzao P., nt. (1), 52-57.

⁴⁶ Art. 4(1), Directive 2000/78/EC.

⁴⁷ Art. 2(b)(i), Directive 2000/78/EC.

⁴⁸ Art. 2(5), Directive 2000/78/EC.

⁴⁹ Recital (25) of Directive 2000/78/EC clarifies that the prohibition of age discrimination is essential to the aims of the Employment Guidelines and to promoting workforce diversity, while acknowledging that age-related differences in treatment may be justified where grounded in legitimate employment policy, labour market or vocational training objectives, as opposed to unjustified discrimination. According to Doron I. *et al.*, nt. (1), 307-310, the prohibition of age discrimination under Directive 2000/78 constitutes a key anti-ageist provision. However, its effectiveness is limited by the broad scope for derogations provided by art. 6(1). Pursuant to art. 6(2), Member States may set specific ages for access to pension and disability benefits under occupational social security schemes without this amounting to age discrimination.

*employment or to certain advantages linked to it; and the fixing of a maximum age for recruitment or a reasonable period of employment before retirement.*⁵⁰

The broad range of derogations provided for in the directive has been the subject of extensive and ongoing academic debate, which has called into question the effectiveness of the EU anti-discrimination framework as it applies to age.⁵¹ For instance, Macnicol defines art. 6(1) as an “*accepted expression of statistical discrimination*”,⁵² referring to the use of age as an economic proxy to make rapid and standardised decisions in employment and social policy contexts based on assumptions derived from perceived “average” characteristics. Certainly, the adoption of this *modus operandi* entails a significant risk of causing injustices in all those cases that deviate from such assumed averages – a particularly high likelihood, given the considerable heterogeneity of the age factor.⁵³

The age criterion appears to occupy an intermediate position not only between the two facets of the principle of equality – understood both as a foundational value underpinning the employment relationships and, at the same time, in its redistributive function in terms of access to opportunities in the labour market – but also between that principle and the differential treatment measures provided for under anti-discrimination law.⁵⁴ Such measures may be broadly classified as either restrictive or promotional, the regulatory legitimacy of which, when contested, depends on judicial interpretation and on the application of a proportionality test. In this respect, reference must be made to the case law of the Court of Justice, which has on several occasions addressed the justification of exceptions to the principle of non-discrimination on grounds of age.⁵⁵

⁵⁰ Art. 6(1), letters *a*, *b* and *c*.

⁵¹ On the topic, see Marino D., *Il principio di non discriminazione per età nella giurisprudenza della Corte di Giustizia*, in *il Lavoro nella Giurisprudenza*, 4, 2017, 406; Hendrickx F., nt. (41), 16-20. According to the AA., the Court of Justice has acted as a “guide” for Member States by providing criteria to ensure compliance with the principle of non-discrimination when applying derogations.

⁵² The expression is used by Macnicol J., *Age discrimination, an historical and contemporary analysis*, Cambridge University Press, Cambridge, 2006, 11.

⁵³ Doron I. *et al.*, nt. (1), 307-310; Drydak N., Paraskevopoulou A., Bozani V., nt. (4), 305-307; Kaya R., nt. (2), 130-134; Fudge J., Zbyszewska A., nt. (36), 141-142; Naegel L., De Tavernier W., Hess M., *Work Environment and the Origin of Ageism*, in Ayalon L., Tesch-Römer C. (eds), nt. (1), 83-84. On the theory of statistical discrimination, see Arrow K.J., *The theory of discrimination*, in Orley A., Albert R. (eds), *Discrimination in Labor Markets*, Princeton University Press, NJ, 1973, 3-33; Arrow K.J., *What has economics to say about racial discrimination?*, in *Journal of Economic Perspectives*, 12, 2, 1998, 91-100.

⁵⁴ Bozzao P., nt. (1), 41-45 and 89-91; Schiek D., nt. (44).

⁵⁵ On the topic, *ex multis*, O’ Cinneide C., *Age discrimination and the European Court of Justice: EU equality law comes of age*, 2009; O’ Dempsey D., *Age Discrimination in the light of CJEU case law*, in *European Equality Law Review*, 1, 2016; Marino D., nt. (51); Swinnen W., *The economic Perspective in the Reasoning of the ECJ in Age discrimination Cases*, in *European Labour Law Journal*, 1, 2, 2010; Hendrickx F., nt. (41); Cosio R., *La discriminazione per ragioni di età. La figlia di un dio minore si prende la scena*, in *Lavoro Diritti Europa*, 2, 2019; Montanari A., *Il divieto di discriminazione per età nella giurisprudenza europea e le sue ricadute nell’ordinamento interno*, in *Argomenti di Diritto del Lavoro*, 1, 2019; Zilli A., “Non ho l’età”: ageismo e gestione delle (diversità e) generazioni nel lavoro privato e pubblico, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023, 1-3.

4. Non-discrimination on grounds of age in the case law of the CJEU.

Determining the scope of application of Directive 2000/78/EC with regard to protection against discrimination on grounds of age requires an analysis of the main rulings of the Court of Justice in this field. Immediately, the copious volume of case law recorded in this area – compared to the relative limited number of judgements relating to other protected factors – suggests both the continuing relevance of disputes concerning age-based discrimination and the recurring need felt by national courts to seek clarification from the Court as to the scope and limits of the prohibition of age discrimination. For this reason, much of the Court's case law has centred on the interpretation of the derogations provided for by the Directive.

At the outset, it is useful to outline the procedural model that characterises most of the Luxembourg Court's judgments concerning the interpretation of the derogations from the principle of non-discrimination.⁵⁶ At an initial stage, the Court identifies the provisions of EU law applicable to the dispute, taking into account both primary and secondary legislation. It then determines whether the national measure referred for in a preliminary ruling falls within the scope of the relevant EU law rule identified. The next stage consists in assessing whether the measure gives rise to a difference in treatment on grounds of age: such a disparity may be directly or indirectly linked to the factor, or it may originate from a combination of criteria, including age. Finally, where a difference in treatment is established, the Court examines whether it may be justified under one of the derogations provided for in the Directive: in this respect, it is not sufficient to prove the existence of a legitimate aim; the Court must also assess the proportionality of the measure, following *modi operandi* that vary depending on the derogation invoked.⁵⁷

The following analysis presents the main findings emerging from the examination of the Court's case law with the aim of identifying the overall approach adopted in the interpretation of the exceptions to the principle of non-discrimination on grounds of age. The analysis follows a diachronic methodology: in particular, it considers firstly the landmark judgments that have shaped the Court's jurisprudence in this field and then examines more recent cases to identify the current state of the law. This approach makes it possible to assess whether, and if so to what extent, the Court's interpretation of the relevant derogations has evolved over time, particularly in light of the changing political and economic objectives pursued by the European Union in the field of employment policy for young and older workers, as discussed in Section 2.1.

⁵⁶ On the topic, *cf.* Tobler C., nt. (41), 95-103; O' Dempsey D., nt. (55), 35-36; Marino D., nt. (51), 404-405; Bergamini E., *Il principio di non discriminazione basata sull'età nella giurisprudenza della Corte di Giustizia*, in Fili V. (ed.), nt. (4), 50-51; Bozzao P., nt. (1), 57-68.

⁵⁷ The derogation under art. 6(2) of Directive 2000/78/EC – relating to national provisions on retirement age – is not examined here.

4.1. Interpreting the general derogation under art. 2(5) of Directive 2000/78/EC.

The first derogation to be examined is that provided for in art. 2(5). Consistently with the general procedural model outlined (*supra*, para. 4), its application requires the fulfilment of two further cumulative conditions: first, the unfavourable treatment must be based on a provision of national law; second, the measure must be necessary for the attainment of one of the legitimate objectives expressly identified in art. 2(5), namely the protection of public security, the maintenance of public order, the prevention of criminal offences, the protection of health, or of the rights and freedoms of others.

The judgments that have had the greatest impact on the interpretation of the scope of this derogation are, in particular, *Prigge and Others v Deutsche Lufthansa AG* (C-447/09) and *Domnica Petersen* (C-341/08).⁵⁸

In the first case, the Court of Justice was called upon to assess the compatibility with EU law of a provision contained in a German collective agreement establishing a maximum age limit of 60 years for the exercise of the profession of airline pilot, justified on grounds of air traffic safety and the protection of public health.⁵⁹ While acknowledging that the objective pursued by the national measure was legitimate, the Court nevertheless found the measure to be disproportionate, given the existence of other national and international rules permitting pilots to continue their professional activity beyond that age limit under certain conditions.⁶⁰ A similar line of reasoning can be observed in *Domnica Petersen* (C-341/08), in which the Court held that a German rule setting a maximum age of 68 years for the practice of dentistry within the statutory health insurance system pursued a legitimate aim, namely the protection of patients' health and the sustainability of the public health system.⁶¹ However, the measure was again considered not to satisfy the requirements of art. 2(5), in particular because the same provision provided for exceptions allowing the continuation of professional activity beyond the age limit, thereby undermining the necessity of the restriction.⁶²

More recent case law of particular relevance to the interpretation of the derogation under consideration includes *Gennaro Cafaro v DQ* (C-396/18) and *J.M.P. v AP Assistenzprofis GmbH* (C-518/22).⁶³

In *Gennaro Cafaro v DQ*, the Court of Justice revisited the approach already adopted in *Prigge and Others* in the context of an Italian measure providing for the termination, at the age of 60, of the employment relationship of aircraft pilots engaged in activities relating to safeguarding of national security. As in *Prigge and Others*, the objective pursued by the national provision – namely the protection of aviation safety and national security – was considered

⁵⁸ Respectively: CJEU, Case C-447/09, *Prigge and Others v Deutsche Lufthansa AG*, 13 September 2011; CJEU, Case C-341/08, *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, 12 January 2010.

⁵⁹ CJEU, *Prigge and Others*, nt. (58), para. 28: “age is objectively linked to the reduction of physical capabilities”.

⁶⁰ CJEU, *Prigge and Others*, nt. (58), paras. 62-63.

⁶¹ CJEU, *Domnica Petersen*, nt. (58), para. 52.

⁶² CJEU, *Domnica Petersen*, nt. (58), paras. 61-62.

⁶³ Respectively: CJEU, Case C-396/18, *Gennaro Cafaro v DQ*, 7 November 2019; CJEU, Case C-518/22, *J.M.P. v AP Assistenzprofis GmbH*, 7 December 2023. For a commentary on *Gennaro Cafaro v DQ*, see Tufo M., *Il divieto di discriminazione in base all'età nel settore aereo: la sicurezza nazionale prima di tutto*, in *GiustiziaCivile.com*, 25 May 2020.

legitimate.⁶⁴ However, unlike in *Prigge and Others*, the Court found that the measure satisfied the requirements of necessity and proportionality, having regard to the specific operational conditions of the aircraft in question, which were considered to involve risks not comparable to those associated with commercial aviation.⁶⁵ Although the judgement appears to constitute a logical continuation of the Court's established case law, of particular interest is the Opinion of Advocate General Szpunar:⁶⁶ the AG took the view that art. 2(5) could not be relied upon in the case at hand, on the ground that the first condition for its application was not met. In his view, the national measure at issue did not represent "national law" within the meaning of art. 2(5), since it did not constitute "a law in the formal sense, insofar it was not adopted by a legislative body".⁶⁷

Finally, the most recent judgment examined with respect to the interpretation of art. 2(5) is *J.M.P. v AP Assistenzprofis GmbH* (C-518/22). In the reference for a preliminary ruling, the Luxembourg's Court was asked, in essence, whether art. 2(5), art. 4(1), art. 6(1) and/or art. 7 of the Directive, read in the light of the Charter and art. 19 of the *UN Convention on the Rights of Persons with Disabilities*, must be interpreted as precluding national legislation which makes the recruitment of a person providing personal assistance subject to an age requirement, where that legislation provides that the individual wishes of persons entitled to receive personal assistance services due to disability must be taken into account.⁶⁸ In assessing the compatibility of such a measure with art. 2(5), the Court of Justice held that the protection of the right to self-determination of persons with disabilities falls within the objectives covered by the Directive, in particular under the formula "protection of the rights and freedoms of others".⁶⁹ With regard to the assessment of necessity and proportionality, the Court considered that the preferences expressed by the young person with a disability were reasonable, in particular in so far as the preference for a young assistant was closely linked to her own age and to the fact that the assistant was expected to be integrated into the community in which she developed her daily life and social relationships. On this basis, the Court excluded the existence of any unlawful discriminatory intent underlying the measure at issue.⁷⁰

Overall, the picture emerging from the analysis of the Court of Justice's case law on the interpretation of the derogation from the principle of equality laid down in art. 2(5) may be summarised as follows. First, it can be observed that the Court has developed a generally consistent and coherent interpretation of this exception over time. What emerges, in particular, is the Court's constant attention to the need to ensure the full consistency of the derogation with the other rules forming part of the legal framework of the Member State concerned. This interpretative approach serves a dual purpose: on the one hand, it ensures the effective protection of the principle of equality; on the other hand, it preserves a strict and narrow construction of the derogation and of the conditions governing its lawfulness.

⁶⁴ CJEU, *Gennaro Cafaro v DQ*, nt. (63), paras. 46-47.

⁶⁵ CJEU, *Gennaro Cafaro v DQ*, nt. (63), paras. 53-55.

⁶⁶ Opinion of Advocate General Maciej Szpunar delivered on 26 June 2019, in CJEU, *Gennaro Cafaro v DQ*.

⁶⁷ *Ibidem*, paras. 84-87. Specific reference to para. 85.

⁶⁸ CJEU, *J.M.P. v AP Assistenzprofis GmbH*, nt. (63), para. 47.

⁶⁹ CJEU, *J.M.P. v AP Assistenzprofis GmbH*, nt. (63), paras. 55-57.

⁷⁰ CJEU, *J.M.P. v AP Assistenzprofis GmbH*, nt. (63), paras. 63-65.

Finally, art. 2(5) also operates as a mechanism through which the protection of the rights and freedoms of others may be ensured, subject to a careful balancing exercise between the competing rights and interests at stake in the application of the derogation.

4.2. Interpreting the general derogation under art. 4(1) of Directive 2000/78/EC.

The second derogation to be examined is that provided for in art. 4(1). Building on the general procedural model already outlined (*supra*, para. 4), In order for it to be considered validly applicable, the Court's assessment is further specified by the introduction of an additional and distinctive step: after establishing the existence of a difference in treatment linked to an age-related characteristic,⁷¹ the Court must verify whether that characteristic may constitute a genuine and determining occupational requirement for the performance of the activity at issue, before proceeding – as in the other derogations examined – to assess the legitimacy of the objective pursued and the proportionality of the measure

The leading judgments shaping the Luxembourg Court's approach to the interpretation of the general derogation provided for in art. 4(1) in the field of age discrimination are *Colin Wolf v Stadt Frankfurt am Main* (C-229/08), *Prigge and Others* (C-447/09) and *Mario Vital Pérez v Ayuntamiento de Oviedo* (C-416/13).⁷²

In *Wolf* (C-229/08), the Court of Justice was called upon to assess a provision in force in the German Land of Hesse, which set a maximum age limit of 30 years for recruitment to the intermediate technical service of the fire brigade. According to the German authorities, the measure pursued the objective of ensuring the “operational capacity and proper functioning of the professional fire service”, by guaranteeing that recruits would have a sufficiently long period of activity before retirement and by securing a regular generational turnover in the performance of the most physically demanding rescue operations.⁷³ The Court held that such an objective was legitimate pursuant to art. 4(1). It further accepted that the possession of high physical capacities constituted a genuine and determining occupational requirement, given the especially demanding and dangerous nature of the duties performed by intermediate-level fire service personnel. The Court also found a sufficiently direct link between the requirement in question and age, taking into account the scientific and statistical evidence submitted by the German Government, which was used to delineate the scenario that the derogation was intended to prevent.⁷⁴ Finally, the Court also upheld the proportionality of the measure, finding no alternative means capable of achieving the set of objectives pursued by the national provision.⁷⁵

The judgment in *Prigge and Others*, already examined in the context of the legality of the derogation under art. 2(5), departs from the conclusions reached by the Court in *Wolf* (C-

⁷¹ See CJEU, Case C-229/08, *Colin Wolf v Stadt Frankfurt am Main*, 12 January 2010, para. 35.

⁷² Respectively: CJEU, *Prigge and Others*, nt. (58); CJEU, *Wolf*, nt. (71); CJEU, Case C-416/13, *Mario Vital Pérez v Ayuntamiento de Oviedo*, 13 November 2014.

⁷³ CJEU, *Wolf*, nt. (71), para. 37 (citation), para. 24 and paras. 33-39.

⁷⁴ CJEU, *Wolf*, nt. (71), para. 41.

⁷⁵ CJEU, *Wolf*, nt. (71), paras. 42-44.

229/08) as regards the proportionality of the genuine and determining occupational requirement identified for the performance of the activity at issue, while remaining fully consistent with the underlying structure of the Court's reasoning. In this context, the Court reiterated that physical fitness – understood as the possession of high physical capacities – is not only a characteristic linked to age, insofar as it tends to deteriorate with advancing years, but may, for that very reason, be included among the genuine and determining occupational requirements for the performance of the profession of aircraft pilot.⁷⁶ Furthermore, the Court recognised the legitimacy of the objective pursued by the contested measure, namely the safeguarding of air traffic safety.⁷⁷ Finally, with regard to proportionality – and in line with the assessment already conducted under art. 2(5) – the Court reached the same conclusion, holding that a genuine and determining occupational requirement cannot be regarded as proportionate where, as in the case at hand, the applicable national and international regulatory framework already permits the performance of the same activity beyond the age limit established by the measure under review.⁷⁸

The approach developed by the Court of Justice regarding the interpretation of the derogation provided for in art. 4(1) was further consolidated in *Vital Pérez* (C-416/13), delivered in 2014. In that case, the referring court sought clarification on the correct interpretation of art. 4(1) in relation to a provision in force in a Spanish Autonomous Community establishing a maximum recruitment age of 30 years for local police officers. Building on the reasoning developed in *Wolf* and *Prigge and Others*, the Court reiterated that physical capacity constitutes an age-related characteristic and may therefore, in principle, be regarded as a genuine and determining occupational requirement for the performance of the activity concerned.⁷⁹ Likewise, the objective pursued by such a requirement was considered legitimate, since it was intended to ensure the proper functioning of the police service.⁸⁰ Conversely, the Court found the measure to be disproportionate, thus departing from the outcome reached in *Wolf*, while remaining consistent with the underlying logical reasoning. As emphasised by the Court: “according to the findings of the referring court, given the tasks assigned to local police officers, [...] not all of the capacities those officers must possess in order to be able to perform some of their duties are comparable to the ‘exceptionally high’ physical capacities which are regularly required of officials in the fire service, most notably in fighting fires”. In addition, the existence of rigorous physical selection tests during the recruitment procedure was considered, in agreement with the referring court, to constitute a less restrictive means capable of achieving the objective pursued by the national legislation, thereby rendering the imposition of a maximum age limit unnecessary.⁸¹

The analysis of the most recent case law concerning the interpretation of art. 4(1) reveals a substantial degree of continuity with the approach developed by the Court in the three judgments discussed above.

⁷⁶ CJEU, *Prigge and Others*, nt. (58), para. 67.

⁷⁷ CJEU, *Prigge and Others*, nt. (58), paras. 68-69.

⁷⁸ CJEU, *Prigge and Others*, nt. (58), paras. 73-76.

⁷⁹ CJEU, *Vital Pérez*, nt. (72), para. 41.

⁸⁰ CJEU, *Vital Pérez*, nt. (72), para. 44.

⁸¹ CJEU, *Vital Pérez*, nt. (72), paras. 54-58.

In *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias* (C-258/15),⁸² decided in 2016, the Court was asked to interpret art. 4(1) in relation to legislation of the Basque Autonomous Community establishing a maximum recruitment age of 35 years for local police officers. Relying on its earlier case law, the Court once again confirmed that physical fitness may constitute a genuine and determining occupational requirement for the performance of police duties.⁸³ Likewise, it held that the objective pursued by the national measure – namely the effective functioning of the police service – was legitimate. As in its previous judgments, the Court devoted particular attention to the assessment of proportionality. On this occasion, however, its reasoning led to a conclusion more closely aligned with *Wolff*: the statistical and demographic evidence relating to the age structure and operational needs of the Basque police force demonstrated that the maximum age requirement was appropriate and necessary for achieving the legitimate objective pursued by the national legislation.⁸⁴

The judgment in *Gennaro Cafaro v DQ* (C-396/18),⁸⁵ already examined in relation to art. 2(5), also afforded the Luxembourg Court the opportunity to clarify the interpretation of the derogation established by art. 4(1) of Directive 2000/78. In assessing the proportionality of the measure, while acknowledging the legitimacy of imposing more stringent occupational requirements on aircraft pilots engaged in safeguarding national security, it emphasised that the ultimate decision falls within the jurisdiction of the national court.⁸⁶ While this more cautious approach on the part of the Court appears to depart, to some extent, from the clear analytical framework developed in its earlier case law, Advocate General Szpunar adopted a more explicit position: “it is indeed ultimately for the national court, which has sole jurisdiction to assess the facts and interpret national legislation, to determine whether and to what extent the legislation at issue in the main proceedings meets those requirements. Nevertheless, in order to provide an answer of use to the national court, the Court of Justice may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case pending before it”.⁸⁷ The Advocate General’s analysis further suggested that no less restrictive measure appeared capable of achieving the objective pursued by the national legislation.⁸⁸

Finally, the analysis of this group of judgments concludes with the examination of *VT v Ministero dell’Interno* (C-304/21) and *Ministero dell’Interno, Presidenza del Consiglio dei ministri v PF* (C-569/21),⁸⁹ closely aligned both in content and in the logical structure of the Court’s

⁸² CJEU, Case C-258/15, *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, 15 November 2016.

⁸³ CJEU, *Salaberria Sorondo*, nt. (82), paras. 34-36.

⁸⁴ CJEU, *Salaberria Sorondo*, nt. (82), paras. 43-47.

⁸⁵ CJEU, *Gennaro Cafaro v DQ*, nt. (63).

⁸⁶ CJEU, *Gennaro Cafaro v DQ*, nt. (63), para. 70.

⁸⁷ Opinion of Advocate General Maciej Szpunar delivered on 26 June 2019, in CJEU, *Gennaro Cafaro v DQ*, para. 102.

⁸⁸ *Ibidem*, paras. 104-109.

⁸⁹ Respectively: CJEU, Case C-304/21, *VT v Ministero dell’Interno*, 17 November 2022; CJEU, Case C-569/21, *Ministero dell’Interno, Presidenza del Consiglio dei Ministri v PF*, 17 November 2022. For a commentary on the first judgement, see Fericola A., *La prevedibile illegittimità del filtro anagrafico nel concorso per commissari di Polizia*, in

reasoning. In the first reference for a preliminary ruling, the Italian referring court submitted to the Court a national provision excluding candidates from participation in the competition for the position of police commissioner once they had reached the maximum age of 30. In the second case, the Court was called upon to assess a similar provision precluding participation in the competition for the role of technical psychologist within the State Police upon reaching the same age threshold. The Court's reasoning may be summarised as follows: first, it confirmed the legitimacy of a genuine and determining occupational requirement linked to physical fitness; it further accepted that the objective of ensuring the effective functioning of the police service constituted a legitimate aim capable of justifying such a requirement.⁹⁰ However, in both cases, the Court held that the requirement at issue was not consistent with the actual nature of the duties performed, in light of the tasks involved – primarily managerial and administrative in the case of police commissioners, and of a technical-scientific nature in the case of technical psychologists – which led the Court to conclude that the requirement was disproportionate to the objective pursued.⁹¹

Overall, the picture emerging from the analysis of the main judgments of the Court of Justice concerning the interpretation of the derogation provided for in art. 4(1) of Directive 2000/78 may be summarised as follows. First, all the cases examined concern disputes arising at the stage of access to the labour market: it is in this circumstance, indeed, that the identification of a genuine and determining occupational requirement assumes particular importance.⁹² Second, in all the rulings considered, the age-related characteristic at issue concerns the possession of specific physical capacities or, more generally, of physical fitness to carry out the profession. In this regard, the Court has shown a high degree of consistency in its assessment of the legality of requirements linked to such physical capacities. Conversely, the Court's approach to proportionality confirms the importance of ensuring the internal coherence of measures that restrict the principle of equal treatment, thereby reaffirming the need for a strict interpretation of derogations. In this sense, it is only a contextual assessment of the measure within the regulatory framework in which it is embedded that ensures an objective evaluation of the lawfulness of a genuine and determining occupational requirement for the performance of a profession. This assessment may also be substantiated through the use of data and statistics, the interpretation and analysis of which further reinforces the central role of the national court in the outcome of the dispute.

Argomenti di Diritto del Lavoro, 1, 2023; Scarponi S., *Un nuovo tassello nell'interpretazione della discriminazione per età: il caso dei posti di commissario nella Polizia di Stato*, in *Lavoro Diritti Europa*, 1, 2022.

⁹⁰ CJEU, *VT v Ministero dell'Interno*, nt. (89), paras. 54-57; CJEU, *Ministero dell'Interno, Presidenza del Consiglio dei Ministri v PF*, nt. (89), paras. 53-54.

⁹¹ CJEU, *VT v Ministero dell'Interno*, nt. (89), paras. 65-71; CJEU, *Ministero dell'Interno, Presidenza del Consiglio dei Ministri v PF*, nt. (89), paras. 55-59.

⁹² This does not exclude the possibility that an essential and relevant requirement may emerge in the practice of a profession. Tobler C., nt. (41), 101-103, notes that knowledge of specific technological tools may become an essential and decisive requirement for certain professions. It would nevertheless be necessary to assess how such a requirement could be justified as a characteristic related to a protected ground, including age.

5. The specific derogation under art. 6(1) of Directive 2000/78/EC: main features.

The third derogation to be examined is that provided for by art. 6(1). Its assessment follows the same general analytical sequence already described (*supra*, para. 4): identification of the objective, verification of its legitimacy under art. 6(1) and assessment of the proportionality of the means employed.

This section identifies the general parameters governing the derogation and the manner in which Member States define the legitimate aims and means employed; the following section then examines the Court's interpretative trends on art. 6(1).

The general principles governing the operation of the derogation have been progressively developed through an extensive body of case law. As a general rule, the derogation provided for in art. 6(1) must be interpreted strictly, so as to avoid undermining the principle of equality.⁹³ From this point of view, there are no differences with what was defined for the two derogations analysed above.

As regards the definition of legitimate aims by the Member States, the Luxembourg Court has progressively clarified both their scope and the conditions governing their lawfulness. In particular, it has consistently held that the employment policy and labour market objectives referred to in art. 6(1) must pursue aims of public interests – and not those of individual employers – in order to constitute legitimate grounds for derogation. Accordingly, considerations such as reducing labour costs or enhancing the competitiveness of a particular undertaking cannot, in themselves, constitute legitimate aims.⁹⁴ Moreover, the list of examples contained in art. 6(1) is illustrative rather than exhaustive. Consequently, Member States enjoy discretion to extend it, without being required to establish or publish an exhaustive catalogue of such aims within their employment or social policy framework.⁹⁵ The Court has further clarified that Member States are not under an obligation expressly to state the objective pursued by a particular measure, provided that the legitimate aim can be inferred from the context in which the measure operates.⁹⁶ At the same time, however, it has made clear that a derogation cannot be justified by mere general assertions.⁹⁷ The objective pursued must therefore be identified with sufficient precision to enable a meaningful assessment of whether the means adopted are appropriate and necessary.⁹⁸ Likewise, the existence of multiple legitimate aims does not, in itself, affect either the legality of the

⁹³ CJEU, Case C-388/07, R (*Age Concern England*) v Secretary of State for Business, Enterprise and Regulatory Reform, 5 March 2009, para. 51; of the same opinion, see CJEU, Case C-499/08, *Ingeniørforeningen i Danmark v Region Syddanmark*, 12 October 2010, para. 33.

⁹⁴ CJEU, *Age Concern England*, nt. (93).

⁹⁵ See the judgments: CJEU, *Age Concern England*, nt. (93), para. 43; CJEU, Case C-45/09, *Gisela Rosenblatt v Oellerking GmbH*, 12 October 2010, paras. 40 and 53.

⁹⁶ In this regard, see the judgments of the Court of Justice: CJEU, Case C-411/05, *F. Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007, paras. 56-57; CJEU, *Domnica Petersen*, nt. (58), para. 40; CJEU, *Vital Pérez*, nt. (72), para. 62; CJEU, Case C-914/19, *Ministero della Giustizia v GN*, 3 June 2021, para. 32; CJEU, *Age Concern England*, nt. (93), para. 45. On the topic, see Tobler C., nt. (41), 103-110; Schiek D., nt. (44), 80-82.

⁹⁷ *Cfr.* CJEU, *Age Concern England*, nt. (93), para. 51.

⁹⁸ According to Advocate General Bobek, in his Opinion on the *Abercrombie* case, para. 83: “assess[ing] the appropriateness of the means chosen is impossible without clarity about the aims. Metaphorically speaking, it is difficult to discuss whether one is on the right track if it is not stated where one is actually travelling”.

measure or the assessment of its proportionality, provided that those aims are clearly identified.⁹⁹

With regard to the means employed to achieve those objectives, the Court has consistently recognised that Member States enjoy a broad margin of discretion.¹⁰⁰ Moreover, national legislators remain free to modify the means adopted whenever they consider this necessary in light of changing employment and social policy circumstances.¹⁰¹

5.1. Practical applications of the derogation in the CJEU case law.

The analysis begins with a first group of judgments addressing maximum age limits for access to employment, termination of employment relationships, and compulsory retirement upon reaching statutory age thresholds.

Among the first cases addressing this issue was *F. Palacios de la Villa v Cortefiel Servicios SA*¹⁰² (C-411/05). The Court of Justice was requested by the national court to clarify the interpretation of a provision contained in a Spanish collective agreement which provided for the termination of the individual employment relationship upon the employee reaching the mandatory retirement age of 65. According to the national legislator, the objective pursued was to promote employment in a national context of high unemployment, including by fostering a better distribution of employment opportunities across generations.¹⁰³ The Court held that such an objective could fall within the employment policy aims set out in art. 6(1).¹⁰⁴ It likewise considered that the means adopted could be regarded as proportionate.

Similarly, in the already mentioned *Petersen* case,¹⁰⁵ the Court of Justice was called upon to interpret a German provision requiring the termination of the employment relationship of dentists in the compulsory public insurance scheme upon reaching the age of 68. Among the various objectives pursued by the provision, the Court identified one which was particularly connected with national employment policy: ensuring a fair distribution of employment opportunities between different generations, with particular emphasis on facilitating access to employment for younger workers.¹⁰⁶ In this case as well, the objective pursued was

⁹⁹ See CJEU, joined Cases C-159/10 and C-160/10, *Gerhard Fuchs (C-159/10), Peter Köhler (C-160/10) v Land Hessen*, paras. 39, 44 and 46; CJEU, 2 April 2020, Case C-670/18, *CO v Comune di Gesturi*, para. 33.

¹⁰⁰ CJEU, *Mangold*, nt. (38), para. 63; CJEU, *F. Palacios de la Villa*, nt. (96), paras. 68-69; CJEU, *Fuchs and Köhler*, nt. (99), para. 80; CJEU, *Rosenbladt*, nt. (95), para. 69; CJEU, Case C-548/15, *J.J. de Lange v Staatssecretaris van Financiën*, 10 November 2016, para. 34; CJEU, Case C-143/16, *Abercrombie & Fitch Italia Srl c. Antonino Bordonaro*, 19 July 2017, para. 46; CJEU, joined Cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski Universitet Sofia, Filial Plodiv*, 18 November 2010, para. 50.

¹⁰¹ See CJEU, *F. Palacios de la Villa*, nt. (96), para. 70.

¹⁰² CJEU, *F. Palacios de la Villa*, nt. (96). On the judgement, see Temming F., *The Palacios Case: Turning Point in Age Discrimination Law?*, in *European Law Reporter*, 11, 2007, 38 ff.; Bredt S., *Compulsory Retirement as an Instrument to Strengthen Labour Market Opportunities for Young Employment Seekers? An Annotation to the European Court of Justice's Decision C-411/05 – Palacios de la Villa*, in *European Journal of Social Security*, 2, 2008, 1 ff.

¹⁰³ CJEU, *F. Palacios de la Villa*, nt. (96), para. 53.

¹⁰⁴ CJEU, *F. Palacios de la Villa*, nt. (96), para. 66.

¹⁰⁵ CJEU, *Domnica Petersen*, nt. (58). On the judgement, see Papa V., *Il fattore new-comer di discriminazione e il suo contemperamento con le politiche sociali nazionali. A proposito di tre recenti sentenze della Corte di giustizia*, in *WP C.S.D.L.E. "Massimo D'Antona"*.INT, 2, 2010.

¹⁰⁶ CJEU, *Domnica Petersen*, nt. (58), para. 38.

regarded as legitimate by the Court, whereas the proportionality of the means chosen was found to depend on the fulfilment of certain specific conditions, the verification of which was ultimately left to the national court.¹⁰⁷

In the case *Vasil Ivanov Georgiev v Tehnicheski Universitet Sofia, Filial Plovdiv* (joined cases C-250/09 and C-268/09),¹⁰⁸ the Court of Justice was called upon to rule on the correct interpretation of national legislation providing for the automatic retirement of university professors who have reached the age of 68 and the possibility for them to continue their activity beyond the age of 65 only by means of fixed-term contracts concluded for a period of one year and renewable a maximum of two times.¹⁰⁹ Having established that the contested provision gave rise to differential treatment on grounds of age and having confirmed the applicability of Directive 2000/78 to the dispute, the Court proceeded to examine whether that difference in treatment could be justified under art. 6(1). Since the Bulgarian Government had not expressly identified the purposes of the provision at issue, the Court inferred them from the broader context and from the observations submitted by other Member States. It ultimately identified the relevant objective as the promotion of youth employment within the university sector. According to Advocate General Bot, this objective also represented a valuable opportunity to foster the coexistence of different generations in the workplace, thereby encouraging the “exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities”.¹¹⁰ Against this background, the Court reiterated that the promotion of youth employment constitutes a legitimate objective in the light of art. 6(1). However, it did not engage in an extensive assessment of the intergenerational dimension of the measure. Similarly, the Court refrained from undertaking a more detailed assessment of the objective pursued by the measure, leaving it to the national court to verify the actual purpose of the provision and to assess whether the means adopted were proportionate.¹¹¹

In *Gisela Rosenblatt v Oellerking GmbH* (C-45/09),¹¹² the provision examined by the Court of Justice was a clause contained in a German collective agreement which allowed for the automatic termination of employment relationships with workers who had fulfilled the conditions for entitlement to a pension or who had, alternatively, reached the statutory retirement age of 65. According to the German Government, the provision pursued objectives such as the fair distribution of employment opportunities between generations, and the facilitation of recruitment planning and the effective management of undertakings and their workforce.¹¹³ The Court considered these objectives to be legitimate and further held that the means adopted were proportionate for the purposes of art. 6(1), observing that: “by guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus the

¹⁰⁷ CJEU, *Domnica Petersen*, nt. (58), paras. 68 and 76-77.

¹⁰⁸ CJEU, *Georgiev*, nt. (100).

¹⁰⁹ CJEU, *Georgiev*, nt. (100), para. 25.

¹¹⁰ CJEU, *Georgiev*, nt. (100), para. 46 citing para. 34 of Advocate General Bot’s Opinion.

¹¹¹ CJEU, *Georgiev*, nt. (100), paras. 52-56.

¹¹² CJEU, *Rosenblatt*, nt. (95).

¹¹³ CJEU, *Rosenblatt*, nt. (95), paras. 59 e 60.

reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment”.¹¹⁴

In the joined cases *Gerhard Fuchs and Peter Köhler v Land Hessen* (C-159/10 and C-160/10),¹¹⁵ the Court was called upon to assess the compatibility with Directive 2000/78 of a provision requiring the retirement of prosecutors appointed for life upon reaching the age of 65, while allowing them to continue working until the age of 68. According to the German Government and the Land Hessen, the provision was intended to “to establish a balance between the generations, in addition to which the national court refers to three further aims: efficient planning of the departure and recruitment of staff, encouraging the recruitment and promotion of young people, and avoiding disputes relating to employees’ ability to perform their duties beyond the age of 65”.¹¹⁶ In this respect, and consistently with the reasoning developed in *Georgiev*, the coexistence of different generations in the workplace was identified as a factor capable of promoting the mutual exchange of knowledge and skills between older and younger workers.¹¹⁷ Once again, the Court regarded the objectives as legitimate employment policy aims. As regards the assessment of the appropriateness and necessity of the measure, the Court underlined the importance of interpreting the restriction imposed by the provision in the light of the right to work recognised in art. 15 of the Charter: it is essential to take into account the interests of all individuals affected by the provision at issue, in order to ensure effective protection also for categories of workers who tend to be less valued – such as older workers – but whose role is essential in ensuring *diversity* in employment.¹¹⁸

In *European Commission v Hungary*¹¹⁹ (C-286/12), concerning the interpretation of a Hungarian provision requiring judges, prosecutors and notaries to retire upon reaching the age of 62, the Court of Justice was once again called upon to assess the compatibility of an age-based difference in treatment with the principle of equal treatment. The national legislature justified the measure on two grounds: “first, the standardisation, in the context of professions in the public sector, of the age-limit for compulsory retirement, while ensuring the viability of the pension scheme, a high level of employment and the improvement of the quality and efficiency of the activities involved in the administration of justice”, and secondly, the introduction of a “*more balanced age structure* facilitating access for young lawyers to the professions of judge, prosecutor and notary and guaranteeing them an accelerated career”.¹²⁰ In its assessment, the Court of Justice acknowledged the legitimacy of the objectives pursued by the Hungarian provision but held that the means adopted were disproportionate. On the one hand, it could not be ruled out that less restrictive measures might have been available to achieve the first objective; on the other hand, the measure could not be regarded as capable

¹¹⁴ CJEU, *Rosenbladt*, nt. (95), paras. 62 and 68 (citation).

¹¹⁵ CJEU, *Fuchs and Köhler*, nt. (99).

¹¹⁶ CJEU, *Fuchs and Köhler*, nt. (99), para. 47.

¹¹⁷ CJEU, *Fuchs and Köhler*, nt. (99), paras. 48-50.

¹¹⁸ CJEU, *Fuchs and Köhler*, nt. (99), paras. 62-65.

¹¹⁹ CJEU, Case C-286/12, *European Commission v Hungary*, 6 November 2012.

¹²⁰ CJEU, *European Commission v Hungary*, nt. (119), para. 59.

of producing, in the long term, the positive effects allegedly arising from the redistribution of employment opportunities between generations pursued by the provision at issue.¹²¹

The final observation emerging from this first line of cases derives from the analysis of the most recent judgment in *Hubertus John v Freie Hansestadt Bremen* (C-46/17).¹²² In that case, the Court of Justice was called upon to interpret the derogation provided for in art. 6(1) in the context of a German provision which permitted the parties to an employment contract, without imposing any further conditions or time limits, to postpone the agreed date of termination of the employment relationship, even several times and by means of an agreement concluded during the employment relationship, once the ordinary retirement age is reached, solely because the worker is entitled to an old-age pension upon reaching that age.¹²³ The particular relevance of this judgment does not lie so much in the assessment of the legitimacy of the derogation – which, in any event, was held not to be applicable in the case at issue, since the Court found that no difference in treatment formed the basis of the dispute – but rather in the reflection concerning the potential role of contractual flexibility as a means of encouraging the continued employment of older workers beyond retirement age. According to the German Government, through the provision, the legislature sought to provide workers who had reached retirement age with the possibility of continuing their employment while benefiting from effective contractual safeguards. The possibility for both parties to the employment contract to modify the date of termination of the employment relationship had to be understood in the same light: namely, as a mechanism aimed at preserving the flexibility inherent in that particular contractual arrangement while ensuring an appropriate balance between the various individual and collective interests involved.¹²⁴

Having concluded the analysis of the main cases in which the derogation pursuant to art. 6(1) has been interpreted in the context of maximum working ages and the automatic termination of employment relationships, it is now appropriate to turn to a second line of case law, in which the Court of Justice has addressed the use of age-based criteria as tools for promoting youth employment, through instruments such as flexible contractual arrangements or targeted financial support.

One of the most controversial judgments discussed in the legal literature is *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*¹²⁵ (C-143/16). The subject matter of the preliminary reference concerned a provision allowing an employer to terminate an on-call employment contract concluded with a worker under the age of 25 precisely when that age threshold was

¹²¹ CJEU, *European Commission v Hungary*, nt. (119), paras. 71 and 77.

¹²² CJEU, Case C-46/17, *Hubertus John v Freie Hansestadt Bremen*, 28 February 2018.

¹²³ CJEU, *Hubertus John*, nt. (122), para. 18.

¹²⁴ CJEU, *Hubertus John*, nt. (122), paras. 26-31.

¹²⁵ CJEU, *Abercrombie*, nt. (100). On the judgement, *ex multis*: Bonardi O., *Il divieto di discriminazione per età alla deriva: note sul caso Abercrombie*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 4, 2017, 557 ff.; Calafà L., *Teoria e pratica del diritto antidiscriminatorio del lavoro nel caso Abercrombie Fitch*, in Bonardi O. (ed.), *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile*, Ediesse, Rome, 2017, 337 ff.; Cosio R., *Le discriminazioni per ragioni di età. La saga Abercrombie*, in *Lavoro Diritti Europa*, 1, 2018; Nunin R., *Where do we go from here? Lavoro intermittente e discriminazione in base all'età nella sentenza della Corte di giustizia sul caso Abercrombie & Fitch*, in *Argomenti di Diritto del Lavoro*, 6, 2017, 1486 ff.; Peruzzi M., *Giovani, carini e inoccupati: il caso Abercrombie alle battute finali. Oppure no?*, in *Rivista Italiana di Diritto del Lavoro*, 2, II, 2018, 431 ff.; Piccone V., *Principio di non discriminazione e lavoro intermittente: la vicenda Abercrombie & Fitch*, in *Lavoro Diritti Europa*, 1, 2017.

reached. According to the Italian Government, the purpose of the provision was to enhance flexibility in the labour market and promote youth employment, in particular by providing young people with an initial employment opportunity enabling them to acquire the professional experience necessary for the continuation of their careers.¹²⁶ Consistently with its previous case law, the Court of Justice held that those objectives could legitimately fall within the aims covered by the derogation provided for in art. 6(1).¹²⁷ Likewise, having regard to the broad discretion enjoyed by Member States in this field, the Court considered the means adopted to achieve those labour market objectives to be proportionate.¹²⁸

In his Opinion on the case,¹²⁹ Advocate General Michal Bobek expressed reservations regarding several aspects of the dispute. First, with regard to the assessment process of whether a difference in treatment existed, the AG emphasised the need to consider the broader context in which a provision operates, acknowledging that the application of measures of this kind within a specific labour market is unlikely to produce exclusively negative or positive effects.¹³⁰ As regards the assessment of the legitimacy of the objective pursued, AG Bobek's concern did not stem from the absence of a legitimate aim underlying the provision, but rather from the considerable "abundance" of objectives invoked by the Italian Government: this resulted in a situation in which there was a risk that each of those objectives would point "in a somewhat different direction" from the others, thereby weakening the link between the aims pursued and the means adopted to achieve them.¹³¹ Finally, concerning the proportionality of the measure introduced by the Italian legislature, the AG expressed concern that the measure could undermine the principle of equality by allowing political considerations to prevail in a manner that risked disrupting the necessary and intrinsic relationship between the objective pursued and the means chosen in the context of a derogation from that principle.

Advocate General Bobek thus provided a "compass" to guide the national court in carrying out a proper assessment of the consistency between the objectives pursued and the means adopted. With regard to the objective of organisational flexibility, it was essential for the referring court to understand why, for example, "the burden of realising that aim should be borne only by specific age groups", particularly in view of the considerable risk that such an approach could result in an entire category of workers remaining in precarious working conditions even in the long term.¹³² As regards the objective of promoting youth employment, AG Bobek considered it essential that a Member State – called upon to justify a difference of treatment on grounds of age – should not rely on such a broad objective without demonstrating a coherent link between the aim and the means chosen to achieve it.¹³³ Finally, concerning the objective of providing young individuals with a first employment

¹²⁶ CJEU, *Abercrombie*, nt. (100), paras. 32-34.

¹²⁷ CJEU, *Abercrombie*, nt. (100), paras. 37-40.

¹²⁸ CJEU, *Abercrombie*, nt. (100), paras. 41-45.

¹²⁹ Opinion of Advocate General Michal Bobek delivered on 23 March 2017, in CJEU, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*.

¹³⁰ *Ibidem*, para. 71.

¹³¹ *Ibidem*, para. 82.

¹³² *Ibidem*, paras. 89-90.

¹³³ *Ibidem*, paras. 92-95.

opportunity, the AG identified several aspects which the national court was required to examine. First, it was necessary to determine the rationale underlying the choice of the age of 25 as the threshold for requiring termination of the contract. Alternatively, if that age threshold was intended to reflect a lack of professional experience, it was necessary to explain why the provision made no reference to criteria relating to the workers' previous experience. Secondly, if the objective was to be understood as facilitating the participation of the largest possible number of young people in the labour market – thereby explaining the automatic termination of contracts at the age of 25 as a mechanism to ensure such turnover – AG Bobek questioned the very *egalitarian rationale* underpinning such a provision. In his view, imposing the termination of an intermittent employment relationship upon reaching the age of 25 introduced a difference in treatment within the very category that the legislature sought to support, since the rule applied equally to young workers employed for both longer and shorter periods.¹³⁴

The analysis continues with the examination of the judgment in *J.J. de Lange v Staatssecretaris van Financiën* (C-548/15),¹³⁵ which provides a further perspective on the issue of promoting youth employment. In that case, the Court of Justice was asked to assess a Dutch provision establishing a system whereby young people could deduct in full the costs incurred for vocational training only until they reached the age of 30. Unlike the approach adopted by the Italian Government in the previous case, the measure at issue sought to promote youth employment by encouraging investment in the professional development of young people and by improving their position in the labour market.¹³⁶ Consistently with its previous case law, the Court of Justice considered both the objectives pursued by the legislature and the proportionality of the measure to be justified.

The final group of judgments analysed concerns the interpretation of the derogation under art. 6(1) in relation to national rules setting age limits for recruitment to, or access to, specific professions.

The judgement *CO v Comune di Gesturi* (C-670/18)¹³⁷ provides an interesting perspective on this issue. The request for a preliminary ruling concerned the interpretation of an Italian provision prohibiting public administrations from assigning consultancy and study tasks to retired persons. While the Court considered that the objective of reducing public expenditure could not justify the measure within the scope of the derogation provided for in art. 6(1), it reached a different conclusion with regard to the objective pursued by the provision of ensuring staff renewal within the sector.¹³⁸ In this context, the Court considered it essential to adopt a labour law perspective when assessing the competing interests at stake: in particular, it emphasised the need to preserve the possibility of continued professional activity for older workers, in accordance with the general principle of respecting everyone's right to engage in work, as recognised in art. 15 of the Charter.¹³⁹ Furthermore, when

¹³⁴ *Ibidem*, paras. 98-101 and specifically para. 103, identifying the underlying objective of the legislature's intervention as the aim of "offering a slice of the cake to everybody".

¹³⁵ CJEU, *J.J. de Lange*, nt. (100).

¹³⁶ CJEU, *J.J. de Lange*, nt. (100), para. 19.

¹³⁷ CJEU, *CO v Comune di Gesturi*, nt. (99).

¹³⁸ CJEU, *CO v Comune di Gesturi*, nt. (99), paras. 32-39.

¹³⁹ CJEU, *CO v Comune di Gesturi*, nt. (99), para. 44.

assessing the proportionality of the measure adopted by the Italian legislature, the Court questioned whether it could be regarded as appropriate in light of two considerations. First, the recruitment of older workers may also benefit younger workers by fostering professional growth within the sector through the intergenerational exchange of knowledge and skills. Secondly, the provision appeared to sacrifice, potentially to an excessive extent, the interests and rights of older workers.¹⁴⁰

The analysis concludes with the examination of two recent judgments *Ministero della Giustizia v GN* (C-914/19) and *Rechtsanwältin und Notarin v Präsidentin des Oberlandesgerichts Hamm* (C-408/23),¹⁴¹ in which the Luxembourg Court was called upon to interpret the derogation provided for in art. 6(1) in the context of two national provisions – the first Italian and the second German – establishing maximum age limits for participation in competitions for access to the profession of notary and notary-lawyer (respectively). In *Ministero della Giustizia v GN*, the imposition of a maximum age limit of 50 years was justified by the Italian legislature on the grounds of ensuring the stability of the profession, safeguarding its proper functioning and promoting the renewal of the sector. Similarly, the German legislature justified the imposition of a 60-year limit for recruitments in order to ensure continuity within the profession, maintain the quality of notarial services and fostering generational renewal.¹⁴² However, while the Court considered the aims pursued by both legislatures to be legitimate, it reached different conclusions as regards the proportionality of the means adopted in the two cases. In *Ministero della Giustizia v GN*, the Court found that the national provision at issue did not even appear suitable for attaining the objectives relied upon and, accordingly, that the difference in treatment which it entailed could not be justified under art. 6(1);¹⁴³ conversely, in *Rechtsanwältin und Notarin*, the Court found that the measure was proportionate in light of the specific legal, economic and demographic context in which the two provisions operated.¹⁴⁴ Consistently with the reasoning developed in *CO v Comune di Gesturi* (C-670/18), the Court reiterated the importance of interpreting the prohibition of age discrimination in the light of the right to work enshrined in art. 15 of the Charter, paying particular attention to the situation of older workers and to the benefits associated with their continued participation in the labour market.¹⁴⁵ In the same vein, the Court also referred to the 1989 *Community Charter of Fundamental Social Rights of Workers*, which “recognises the need to take appropriate action for the social and economic integration of elderly people”.¹⁴⁶

¹⁴⁰ CJEU, *CO v Comune di Gesturi*, nt. (99), para. 47.

¹⁴¹ Respectively: CJEU, *Ministero della Giustizia v GN*, nt. (96); CJEU, Case C-408/23, *Rechtsanwältin und Notarin v Präsidentin des Oberlandesgerichts Hamm*, 17 October 2024.

¹⁴² Respectively: CJEU, *Ministero della Giustizia v GN*, nt. (96), para. 31; CJEU, *Rechtsanwältin und Notarin*, nt. (141), para. 25.

¹⁴³ CJEU, *Ministero della Giustizia v GN*, nt. (96), para. 51.

¹⁴⁴ CJEU, *Rechtsanwältin und Notarin*, nt. (141), paras. 37-42.

¹⁴⁵ CJEU, *Ministero della Giustizia v GN*, nt. (96), para. 44.

¹⁴⁶ CJEU, *Ministero della Giustizia v GN*, nt. (96), para. 48.

5.2. Assessing the Court of Justice's interpretation of art. 6(1).

A few final observations may be drawn from the Court's interpretation of art. 6(1).

Given the specific nature of the derogation – which permits differences in treatment on grounds of age provided that they are justified by legitimate objectives relating to employment policy, the labour market or vocational training – the analysis has also shed light on the broader regulatory strategies adopted by national legislatures in governing the role of age within their respective employment law systems.

First, as regards the employment and social policy grounds capable of justifying recourse to the derogation, the Court of Justice has consistently afforded Member States a broad margin of discretion and has accepted most of the aims put forward before it. The case law thus makes it possible to identify the main policy objectives relied on by Member States when invoking the derogation from the principle of non-discrimination on grounds of age provided for in art. 6(1). The most frequently invoked concern the promotion of youth employment, understood more broadly as increasing employment opportunities for younger people, and a fairer intergenerational distribution of employment opportunities. Less frequently, the Court has also accepted considerations relating to workforce planning, including recruitment and retirement planning, as well as the effective functioning of the labour market.

Objectives of this kind also appear consistent with the broader policy orientations developed by the European institutions over the last thirty years through the numerous soft law instruments examined in the first part of this article.

The analysis has further made it possible to identify the measures adopted by Member States in order to pursue the objectives outlined above. Once again, the case law reveals that national legislatures enjoy a broad margin of discretion in selecting the means through which differences in treatment on grounds of age may be justified. However, the Court's proportionality review has often revealed shortcomings in the link between the objectives pursued and the means adopted, leading the Court to reiterate the need for a coherent and logical relationship between the two. In the majority of the cases examined, national legislatures have resorted to measures such as the automatic termination of employment relationships upon reaching a certain age threshold, compulsory retirement at a predetermined age, and the establishment of maximum age limits for access to recruitment procedures to achieve their employment policy goals.

This dynamic raises broader questions concerning the concept of *intergenerational solidarity* repeatedly referred to by the European institutions in their employment policy guidelines. Indeed, the re-allocation of job opportunities invoked as an objective in many of the disputes examined, describes a dynamic whereby older and younger workers appear to “divide” their time within the labour market, according to a *trade-off* between the two categories of workers. This perspective undoubtedly reflects the understanding of *intergenerational solidarity* that

developed within European social policy at the beginning of the 2000s and remained largely unchanged for at least the following decade.¹⁴⁷

However, a number of judgments of the Court of Justice, as well as some Opinions of Advocates General, reveal a certain shift in the understanding of this concept. A first example is provided by the *Georgiev* judgment (2010), in which the AG identified the potential for a different understanding of *intergenerational solidarity*, no longer based primarily on a *trade-off* between younger and older workers, but rather on their coexistence within the labour market and on the mutual exchange of knowledge, skills and experience. Similarly, in *Fuchs and Köhler* (2011), the Court returned to the idea of sharing the workplace between different generations, stressing the need to take into account the interests of all categories of workers affected by a given policy measure, with particular regard to the right to work of older workers, as recognised in art. 15 of the Charter. Subsequently, *CO v Comune di Gesturi* (2021) marked the completion of this evolution by extending the understanding of *intergenerational solidarity* developed in *Georgiev* to encompass the idea of coexistence between several generations in the workplace. Within this renewed perspective, older workers acquired a new central role, as their recruitment came to be perceived as a factor capable of contributing to the successful integration of younger workers into the labour market.

However, these interpretations developed occasionally by the Court in relation to employment and social policy issues – and, in particular, with regard to the adoption of an intergenerational approach to the management of age in the labour market – have remained merely confined to specific cases. Indeed, given the broad margin of discretion enjoyed by Member States in relation to age as a ground of discrimination, the Court has rarely positioned itself in a position to prevent national legislatures from pursuing policies which place certain age groups at risk of discrimination and in a situation of mutual competition.

6. Concluding remarks.

Looking back at the different levels of EU labour law examined in this article – from soft law to anti-discrimination case law – *intergenerational solidarity* appears less as an objective consciously pursued by EU institutions than as a reading key imposed by the large breadth of age as a protected ground, one that structurally links the treatment of younger and older workers within a single, if fragmented, legal category. From this perspective, a few concluding reflections may be drawn.

First, the treatment of age as a policy concern in EU employment policy has followed an uneven trajectory, as demonstrated by the diachronic analysis of the employment guidelines adopted by the European institutions. Over time, they have alternated between measures designed to promote the labour market inclusion of younger and older workers, reflecting the changing economic and employment priorities and needs of the Member States; while

¹⁴⁷ This refers, for example, to the concept of *intergenerational solidarity* set out in the *Green Paper “Confronting demographic change: a new solidarity between the generations”*, 16 March 2005, COM(2005) 94. On this subject, see O’Dempsey D., nt. (55), 23-26; Hendrickx F., nt. (41), 16-20.

consistently reaffirming the importance of an approach grounded on intergenerational solidarity as the most appropriate strategy for reconciling and enhancing both dimensions.

Secondly, the analysis of the supranational legal framework, and in particular of the EU anti-discrimination regime as regards age, has revealed the inherent limitations of the protection afforded in this field. In this respect, the prohibition of age discrimination has proved comparatively weak, primarily because the relevant legislative framework itself permits derogations from the principle of equal treatment where differences of treatment on grounds of age are objectively and reasonably justified by legitimate national employment policy, labour market, or vocational training objectives. Two further observations follow from this analysis. First, age constitutes a ground of discrimination that is uniquely shaped by broader social and economic interests. This is due, on the one hand, to the implications associated with the employment and retirement costs of older workers – which are closely intertwined with the organisation and financial sustainability of national pension systems – and, on the other hand, to the persistence of cultural assumptions rooted in a conception of the life-course and employment relationship that no longer reflects contemporary labour market realities, yet continues to underpin significant aspects of the existing legal framework. Secondly, it is noteworthy that the Court of Justice, despite its well-established role as a driving force in the development of EU anti-discrimination law, has consistently endorsed this approach. As the analysis of its case law has shown, the Court has generally recognised that the Member States enjoy a broad margin of discretion in determining the legitimate objectives capable of justifying derogations from the principle of equal treatment on grounds of age, even where those aims appear difficult to reconcile with the employment guidelines issued by the European institutions.

The broad scope of the derogations permitted by Directive 2000/78/EC in relation to age undoubtedly constitutes the principal reason why anti-discrimination law affords comparatively weak protection against age-based discrimination. Nevertheless, interpreting the relevant provisions through the lens of the vulnerability paradigm¹⁴⁸ reveals a further, more fundamental limitation: namely, the excessive breadth of age as a protected characteristic itself. The protection afforded is, in fact, weakened by its extension to an excessively broad category of workers. As age encompasses an extremely heterogeneous and potentially very large group of individuals, the application of a uniform standard of protection risks, from the outset, perpetuating substantive inequalities by subjecting fundamentally different situations to identical treatment. This phenomenon is further compounded by the inherently dynamic and subjective relationship between an individual's chronological, biological and psychological age. This circumstance may, in turn, contribute to exclusionary processes affecting those who do not fully identify with the age group to which they formally belong.¹⁴⁹

¹⁴⁸ See Chenal R., nt. (26), 39-43.

¹⁴⁹ The reference here is to the concept of age as an established manifestation of “statistical discrimination”, which arises whenever age is used as a *proxy* for decision-making in social and economic matters on the basis of a subjective perception of age, derived from the average characteristics assumed to be shared by individuals belonging to a particular age group. See Macnicol J., nt. (52), 11.

In light of the findings emerging from the analysis of the regulatory framework, it is apparent that the current anti-discrimination framework is not capable of providing sufficiently effective protection to vulnerable workers in relation to age discrimination, either in terms of its scope or in terms of the consistency of its application. This inadequacy stems both from the continuing prominence afforded to economic considerations in the application of anti-discrimination law in this field and from the structural configuration of age as a protected ground within the existing legal framework, which therefore requires more fundamental reconsideration.

Bibliography

- Ales E., *Lo sviluppo della dimensione sociale comunitaria: un'analisi "genealogica"*, in *Rivista del Diritto della Sicurezza Sociale*, 3, 2009;
- Arrow K.J., *The theory of discrimination*, in Orley A., Albert R. (eds), *Discrimination in Labor Markets*, Princeton University Press, NJ, 1973;
- Arrow K.J., *What has economics to say about racial discrimination?*, in *Journal of Economic Perspectives*, 12, 2, 1998;
- Barnard C., *EU Employment Law and the European Social Model: The Past, the Present and the Future*, in *Current Legal Problems*, 67, 2014;
- Beazley A., Ball C., Vernon K., *Workplace Age Diversity: The Employers' Perspectives*, in Flynn M., Chiva A., Li Y. (eds), *Managing the Ageing Workforce in the East and the West*, Emerald Publishing Limited, United Kingdom, 2018;
- Bergamini E., *Il principio di non discriminazione basata sull'età nella giurisprudenza della Corte di Giustizia*, in Fili V. (ed.), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Bernardini M.G., *Vite di scarto. Vecchiaia, strutturale emergenza e invisibile crisi dei diritti umani*, in Gioffredi G., Lorubbio V., Pisanò A. (eds), *Diritti umani in crisi? Emergenze, disuguaglianze, esclusioni*, Pacini Giuridica, Pisa, 2021;
- Bonardi O., *Il divieto di discriminazione per età alla deriva: note sul caso Abercrombie*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 4, 2017;
- Bozzao P., *Anzianità, lavori e diritti*, Editoriale Scientifica, Naples, 2017;
- Bredt S., *Compulsory Retirement as an Instrument to Strengthen Labour Market Opportunities for Young Employment Seekers? An Annotation to the European Court of Justice's Decision C-411/05 – Palacios de la Villa*, in *European Journal of Social Security*, 2, 2008;
- Brollo M., *Lavoro agile: prima gli anziani?*, in Fili V. (ed.), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Calafà L., *Teoria e pratica del diritto antidiscriminatorio del lavoro nel caso Abercrombie Fitch*, in Bonardi O. (ed.), *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile*, Ediesse, Rome, 2017;

- Chenal R., *La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali*, in *Ars Interpretandi*, 2, 2018;
- Cinelli M., Siotto F., *La politica sociale europea*, in Cosio R., Curcuruto F., Di Cerbo V. E Mammone G. (eds), *Il diritto del lavoro dell'Unione Europea*, Giuffrè, Milan, 2023;
- Cosio R., *La discriminazione per ragioni di età. La figlia di un dio minore si prende la scena*, in *Lavoro Diritti Europa*, 2, 2019;
- Cosio R., *Le discriminazioni per ragioni di età. La saga Abercrombie*, in *Lavoro Diritti Europa*, 1, 2018;
- Dal Maso G., *Invecchiamento attivo e mercato del lavoro: la crisi demografica sotto una nuova luce*, in Mostarda A., Zanella E., Zilio Grandi G. (eds), *Lavoro, sicurezza sociale e relazioni industriali nel prisma del fattore demografico*, Giappichelli, Turin, 2024;
- De Falco M., *Invecchiamento e tutela della professionalità, quando la forza (lavoro) viene meno*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023;
- De Falco M., *Invecchiamento, lavoro agile e competenze digitali*, in Fili V. (ed), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Doron I., Numhauser-Henning A., Spanier B., Georgantzi N., Mantovani E., *Ageism and Anti-Ageism in the Legal System: A Review of Key Themes*, in Ayalon L., Tesch-Römer C. (eds), *Contemporary Perspectives on Ageism*, International Perspectives on Aging, 19, Springer, Berlin, 2018;
- Draghi M., *The future of European competitiveness. Part B – In-depth analysis and recommendations*, European Commission, 9 September 2024;
- Drydakakis N., Paraskevopoulou A., Bozani V., *A field study of age discrimination in the workplace: the importance of gender and race—pay the gap*, in *Employee Relations: The International Journal*, 45, 2, 2023;
- Fernicola A., *La prevedibile illegittimità del filtro anagrafico nel concorso per commissari di Polizia*, in *Argomenti di Diritto del Lavoro*, 1, 2023;
- Fili V. (ed), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Fili V., *I lavoratori anziani tra esclusione e inclusione*, in *Argomenti di Diritto del Lavoro*, 2, 2020;
- FRA, *Shifting perceptions: towards a rights based approach to ageing*, Publication Office of the EU, Luxembourg, 2018;
- Fudge J., Zbyszewska A., *An intersectional approach to age discrimination in the European Union: bridging dignity and distribution?*, in Numhauser-Henning A., Rönömar M. (eds), *Age Discrimination and Labour Law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2015;
- Garofalo C., *Età e incentivi: il rimedio allo svantaggio*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023;
- Georgantzi N., *The European Union's Approach towards Ageism*, in Ayalon L., Tesch-Römer C. (eds), *Contemporary Perspectives on Ageism*, International Perspectives on Aging, 19, Springer, Berlin, 2018;
- Hendrickx F., *Age and European employment discrimination law*, in Hendrickx F., (ed.), *Active ageing and labour law. Contributions in honour of Professor Roger Blanpain*, Social Europe Series 31, Intersentia, Cambridge, 2012;

- Hendrickx F., *Setting the Scene: Development of the CJEU Jurisprudence on Age Discrimination in Employment*, in Manfredi S., Vickers L. (eds), *Challenges of Active Ageing. Equality Law and the Workplace*, Palgrave Macmillan, London, 2016;
- Izzi D., *Eguaglianza e differenze nei rapporti di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Jovene, Naples, 2005;
- Kaya R., *Reasonable accommodation for age*, in *Canadian Journal of Law & Jurisprudence*, XXXIII, 1, February 2020;
- Macnicol J., *Age discrimination, an historical and contemporary analysis*, Cambridge University Press, Cambridge, 2006;
- Marino D., *Il principio di non discriminazione per età nella giurisprudenza della Corte di Giustizia*, in *il Lavoro nella Giurisprudenza*, 4, 2017;
- Migliavacca M., *Quantità o qualità? Le sfide del lavoro per i giovani europei*, in *Quaderni di Rassegna Sindacale – Lavori*, 1, 2022;
- Militello M., Strazzari D., *I fattori di discriminazione*, in Barbera M., Guariso A. (eds), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Giappichelli, Turin, 2019;
- Montanari A., *Il divieto di discriminazione per età nella giurisprudenza europea e le sue ricadute nell'ordinamento interno*, in *Argomenti di Diritto del Lavoro*, 1, 2019;
- Naegele L., De Tavernier W., Hess M., *Work Environment and the Origin of Ageism*, in Ayalon L., Tesch-Römer C. (eds.), *Contemporary Perspectives on Ageism*, International Perspectives on Aging, 19, Springer, Berlin, 2018;
- Numhauser-Henning A., *Labour law, pension norms and the Eu ban on age discrimination: towards ultimate flexibilization?*, in Numhauser-Henning A., Rönmar M. (eds), *Age Discrimination and Labour Law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2015;
- Nunin R., *Where do we go from here? Lavoro intermittente e discriminazione in base all'età nella sentenza della Corte di giustizia sul caso Abercrombie & Fitch*, in *Argomenti di Diritto del Lavoro*, 6, 2017;
- O' Cinneide C., *Age discrimination and the European Court of Justice: EU equality law comes of age*, 2009;
- O' Cinneide C., *Article 25 - The right of the elderly*, in Peers S., Hervey T., Kenner J., Ward A. (eds), *The EU Charter of Fundamental Rights. A commentary*, Hart Publishing, Oxford, second edition, 2021;
- O' Dempsey D., *Age Discrimination in the light of CJEU case law*, in *European Equality Law Review*, 1, 2016;
- Papa V., *Il fattore new-comer di discriminazione e il suo temperamento con le politiche sociali nazionali. A proposito di tre recenti sentenze della Corte di giustizia*, in WP C.S.D.L.E. "Massimo D'Antona" .INT, 2, 2010;
- Pasquili R., *Persone anziane e fragili: verso nuovi modelli di gestione dell'età*, in Fili V. (ed), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Peruzzi M., *Giovani, carini e innocuati: il caso Abercrombie alle battute finali. Oppure no?*, in *Rivista Italiana di Diritto del Lavoro*, 2, II, 2018;

- Pezzini G., *Il lavoratore anziano: un personaggio in cerca di autore*, in Filì V. (ed), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Modena, 2022;
- Piccone V., *Principio di non discriminazione e lavoro intermittente: la vicenda Abercrombie & Fitch*, in *Lavoro Diritti Europa*, 1, 2017;
- Sargeant M., *Age Discrimination in Employment*, Gower Publishing, Aldershot, 2006;
- Scarponi S., *Un nuovo tassello nell'interpretazione della discriminazione per età: il caso dei posti di commissario nella Polizia di Stato*, in *Lavoro Diritti Europa*, 1, 2022;
- Schiek D., *Proportionality in age discrimination cases: towards a model suitable for socially embedded rights*, in Numhauser-Henning A., Rönmar M. (eds), *Age Discrimination and Labour Law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2015;
- Sonnati S., *Age thresholds and the definition of the 'older worker' in EU and Italian employment law: Intergenerational justice from a legal perspective*, in *European Labour Law Journal*, 17, 2, 2026;
- Swinnen W., *The economic Perspective in the Reasoning of the ECJ in Age discrimination Cases*, in *European Labour Law Journal*, 1, 2, 2010;
- Temming F., *The Palacios Case: Turning Point in Age Discrimination Law?*, in *European Law Reporter*, 11, 2007;
- Tobler C., *EU age discrimination law and older and younger workers: Court of Justice of the European Union case law development*, in Numhauser-Henning A., Rönmar M. (eds), *Age Discrimination and Labour Law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2015;
- Tufo M., *Il divieto di discriminazione in base all'età nel settore aereo: la sicurezza nazionale prima di tutto*, in *GiustiziaCivile.com*, 25 May 2020;
- Zilli A., *"Non ho l'età": ageismo e gestione delle (diversità e) generazioni nel lavoro privato e pubblico*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2023.

Copyright © 2026 Matilde Biagiotti. This article is released under a Creative Commons Attribution 4.0 International License