

**DOES THE ABILITY OF MEMBER STATES TO JUSTIFY DIRECT AND INDIRECT AGE DISCRIMINATION MEANS THAT THE WORKFORCE IS INADEQUATELY PROTECTED UNDER EU LAW ? FROM THE PERSPECTIVE OF THE CASE LAW UNDER THE EUROPEAN COURT OF JUSTICE****\*Zhengyang Fan**

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**Received 25<sup>th</sup> June 2021; Accepted 20<sup>th</sup> July 2021; Published online 30<sup>th</sup> August 2021**

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**Abstract**

Age discrimination refers to unreasonable differential treatment of a person or a group of people based on their age, and it has been mainly manifested in the field of employment. It occurs in various stages of employment and occupation, which is an act that infringes upon the equality right of workers. According to the manifestations of age discrimination, they can be divided into direct discrimination and indirect discrimination. Between them, the former can be observed or experienced directly. For example, employers use age as the sole criterion for hiring workers. However, indirect discrimination on the basis of age in employment and occupation is relatively difficult to distinguish. It means that the measures or decisions made by employers are apparently neutral and objective, but the results could adversely affect workers of a certain age. For instance, in the advertisement for hiring a porter, it is stated that employees must be proficient in using computers. Although it seems that there is no requirement for the age of the workers, most older workers do not have this skill. In order to fundamentally maintain the equal treatment in employment and occupation of workers, the legislative basis and judicial protection in related fields have become crucial. The first part of this essay will focus on the efforts of the EU in the anti-discrimination legislation. The following part will introduce the different approaches of justification of age discrimination under the relevant Directive of the EU. The third part will discuss the positive effect of EU law and the relevant precedent of the European Court of Justice on the protection of equal employment rights of workers. The last part of this essay will state that although the ability of Member States to justify age discrimination reveals certain deficiencies in relevant EU law and the European Court of Justice, it does not negate the protection of workers in employment and occupation at the EU level. Therefore, in order to ensure that workers are not discriminated against in the employment and occupation process, especially age discrimination, it requires not only the efforts of the EU legislature and the European Court of Justice but also the cooperation and supplementation of the legislature and the national court of Member States.

**Keywords:** Age discrimination, EU Council Directive 2000/78, employment discrimination

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**I. Age Discrimination Legislation at the EU Level**

The legal source of the existing anti-discrimination legislation of EU is Article 19 TFEU (ex Article 13 TEC) introduced by the Treaty of Amsterdam,<sup>1</sup> which provides that the European Council could take appropriate action to combat discrimination on seven grounds, including sex, race and age.<sup>2</sup> This constitutes the legislative basis for the EU anti-discrimination legal system. In addition, the EU Charter of Fundamental Rights defines equality as a separate fundamental right,<sup>3</sup> with a special statement prohibiting any discrimination based on gender, race, age, etc.<sup>4</sup> This represents a significant effort by European countries to clarify a common set of values in combating discrimination.<sup>5</sup> On 27 November 2000, the Council of the European Union issued the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

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<sup>1</sup> Treaty of Amsterdam 1997, art 13<sup>2</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 263<sup>3</sup> EU Charter of Fundamental Rights 2000, art 21 (1)<sup>4</sup> Helen Meenan, 'Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe' (2007) 14 *Maastricht J Eur & Comp L* 39<sup>5</sup> Edit Kajtar and Franz Marhold, 'The Principle of Equality in the EU Charter of Fundamental Rights and Age Discrimination: Hungarian and Austrian Experiences' (2015) 6 *Eur Lab LJ* 321

This Directive is one of the most important legislation at the EU level to combat discrimination in the field of employment and occupation, in which prohibition of age discrimination is one of the main aspects. It developed a basic framework to combat discrimination in employment and occupation based on religion, age, etc., for the purpose of implementing the principle of equal treatment in Member States.<sup>6</sup> In addition, the Council Directive 2000/78 clearly defines the principle of equal treatment in Articles 2, that is, there should be no direct or indirect discrimination in the aspects mentioned in Article 1.<sup>7</sup> In Article 3 of this Directive, the scope of application of the equal treatment principle is clearly enumerated, including all aspects of employment and occupation, such as selection criteria, recruitment conditions, promotion and dismissal.<sup>8</sup> Moreover, in order to prevent the scope of application of the equal treatment principle from being infinitely expanded, the Council Directive 2000/78 provides further guidance on the application of this principle to Member States in Article 6.<sup>9</sup> It states that Member States may provide differences in employment and occupation on grounds of age through national laws, but such differential treatment must not constitute discrimination.<sup>10</sup> It is a primary feature of the

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<sup>6</sup> Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Equality Framework Directive), art 1<sup>7</sup> Equality Framework Directive 2000/78, art 2<sup>8</sup> Equality Framework Directive 2000/78, art 3<sup>9</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 368<sup>10</sup> Equality Framework Directive 2000/78, art 6

Council Directive 2000/78 to distinguish legitimate justification from age discrimination.<sup>11</sup> However, this Article not only gives Member States the power to justify direct and indirect age discrimination through national laws, but also provides restrictions that the justifications established by Member States must have an “objective and reasonable” legislative purpose, and the means to achieve that legislative purpose must be “appropriate and necessary”. It confirms the legitimacy of certain age-based differential treatments in Member States that comply with the requirements of the Council Directive 2000/78. In other words, Member States could provide for certain legitimate differential treatments on the grounds of age in their domestic laws, but the objectives and means of these differential treatments must comply with the requirements of this directive, for example, the minimum age of employment for the protection of minors. Furthermore, Article 9 of the Council Directive 2000/78 specifically provides detailed judicial and administrative remedies to assist employees in seeking protection for age discrimination.<sup>12</sup> This means that the EU law not only establishes a legal basis for workers to obtain the protection of equal treatment in employment and occupation but also clarifies specific guidance in judicial practice through the Directive.<sup>13</sup> Consequently, in protecting the equal employment rights of workers, the Council Directive 2000/78 has played a fundamental role and has provided a necessary guarantee at the supranational level.

## II. The Different Approaches of Justification of Age Discrimination under EU Law

### A. The General Justification of Age Discrimination

Article 6 (1) of the Council Directive 2000/78 mentioned above provides the unique justification for age discrimination,<sup>14</sup> which is most frequently applied by the court to judging whether an act constitutes age discrimination in judicial practice.<sup>15</sup> Age discrimination, especially indirect age discrimination, is regarded as a kind of discrimination that is complicated and difficult to judge. Its complexity is mainly reflected in the use of justification which is an essential factor in determining age discrimination.<sup>16</sup> Justification refers to that the differential treatment has the legitimate objective and the necessity for implementation, and its means and purpose are in accordance with the principle of proportionality.<sup>17</sup> In other words, the justification of age discrimination has two defining characteristics. One is that it should have a legitimate objective. Article 6 of the Council Directive 2000/78 mentioned above does not define a specific concept of legitimate objectives, but rather refers to a scope, that is, legitimate employment policy, labour market and vocational

training objectives in the national laws of Member States.<sup>18</sup> Another one is that the differential treatment must be achieved through appropriate and necessary means. Therefore, although the Council Directive 2000/78 empower Member States to justify direct and indirect age discrimination through domestic legislation, the legality of objective and the appropriateness of means must be complied with simultaneously. This was manifested in *Mangold*,<sup>19</sup> where the plaintiff argued that the relevant provisions of the German law on age restrictions violated the principle of equal treatment of EU law.<sup>20</sup> In this case, the European Court of Justice stated that the justification for age discrimination provided in the domestic laws of Member States must comply with both the legality of purpose and the appropriateness of means.<sup>21</sup> Consequently, this case shows that in judging whether an act constitutes age discrimination in employment and occupation, it is necessary to examine not only whether such differential treatment has a legitimate purpose, but also whether its means are necessary and appropriate.

### B. The Genuine Occupational Requirement

According to Article 4 (1) of the Council Directive 2000/78,<sup>22</sup> the genuine occupational requirement is another justification to exclude age discrimination in employment and occupation,<sup>23</sup> which is also known as “bona fide occupational qualifications”.<sup>24</sup> This Article clearly provides that where the purpose is legitimate and the means are appropriate, if the age constitutes a genuine and determining occupational requirement based on the nature of the particular occupational activities, the differences of treatment on grounds of age should not be considered discrimination.<sup>25</sup> In other words, if the content and nature of a job is intrinsically linked to a particular age group, the age factor is a legitimate requirement of the occupation. In this situation, employers who hire workers based on a particular age should not be considered discriminatory. For example, it does not constitute age discrimination against older women if a girl-targeted clothing brand employed young women as models for a show. Similarly, the objective of implementing differential treatment should also be legitimate, and the measures taken should be consistent with the principle of proportionality. To be more specific, this justification is usually reflected in the minimum and maximum employment age standards that exist in certain occupations, since age is one of the most critical factors in determining the physical ability of workers.<sup>26</sup> In some specific occupations, their professional activities are closely related to the physical and mental capabilities of workers, which is largely affected by the age. Consequently, in order to meet the objective and practical requirements of certain occupations, it is necessary to set a minimum or maximum standard for the age of workers, such as police and firemen. In addition, as some special occupations are related to the protection of third

<sup>11</sup> Malcolm Sargeant, 'Age Discrimination: Equal Treatment with Exceptions' (2005) 6 *Int'l J Discrimination & L* 251

<sup>12</sup> Equality Framework Directive 2000/78, art 9

<sup>13</sup> Tom Osborne, 'Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment' (2004) 38 *Int'l Law* 867

<sup>14</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 368

<sup>15</sup> Susan Bisom-Rapp and Malcolm Sargeant, 'Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States' (2013) 44 *Loy U Chi LJ* 717

<sup>16</sup> Gozde Kaya, 'EU Age Discrimination in Light of EU's Demographic Challenges and ECJ Case Law' (2015) 17 *Dokuz Eylul U L Rev* 79

<sup>17</sup> Michael Connolly, 'Compulsory Retirement and Age Discrimination: A New Deference to Derogation' (2008) 9 *Int'l J Discrimination & L* 181

<sup>18</sup> Equality Framework Directive 2000/78, art 6

<sup>19</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43

<sup>20</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 3

<sup>21</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, paras 7-8

<sup>22</sup> Equality Framework Directive 2000/78, art 4 (1)

<sup>23</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 370

<sup>24</sup> Susan Bisom-Rapp and Malcolm Sargeant, 'Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States' (2013) 44 *Loy U Chi LJ* 717

<sup>25</sup> Equality Framework Directive 2000/78, art 4 (1)

<sup>26</sup> Gozde Kaya, 'EU Age Discrimination in Light of EU's Demographic Challenges and ECJ Case Law' (2015) 17 *Dokuz Eylul U L Rev* 79

parties, there must also be special requirements for their age, such as pilots.<sup>27</sup> Therefore, the reason why EU law does not completely negate the maximum or minimum employment age standards is that in some specific occupations, the content and nature of professional activities are directly related to the physical ability of employees.

The European Court of Justice has made a representative judgment on the possible employment age discrimination and corresponding special justification in the above particular occupations. For instance, in *Wolf*,<sup>28</sup> the German government rejected Wolf's application for a firefighter because he was over the age required for the job.<sup>29</sup> The European Court of Justice held that such a requirement for physical ability is necessary only if the requirement has a substantial and determining influence on the professional activities.<sup>30</sup> In addition, the European Court of Justice accepted the evidence submitted by the German government, which indicates that very few people over 45 would have the exceptionally high physical capability matching with firefighting work.<sup>31</sup> In this case, the European Court of Justice stated that the German law to be lawful under the occupational requirement defence in Article 4 (1),<sup>32</sup> and the appropriate age restrictions of firefighters are allowed by EU law.<sup>33</sup>

This case was a landmark in considering the genuine occupational requirement as a justification for age discrimination, since the European Court of Justice recognized that a decline in performance and ability due to age is capable of justifying direct age discrimination.

### C. The Public Policy Exclusion

In *Wolf*,<sup>34</sup> the European Court of Justice justified age discrimination in employment and occupation on the basis of the genuine occupational requirements, but in *Petersen*,<sup>35</sup> the justification became public policy.<sup>36</sup> In the latter case, the European Court of Justice considered the protection of public health under Article 2 (5) of the Council Directive 2000/78,<sup>37</sup> as it is generally believed that after reaching a certain age, such as 68 years old, the ability and performance of doctors will decrease with age, which would be detrimental to the health of patients.<sup>38</sup>

Petersen worked as a dentist for the German national health service, and she was part of a panel.<sup>39</sup> In accordance with German law, she was banned to practice as a panel dentist after the age of 68, but there is no similar age restriction for private dentists who do not work on the panel.<sup>40</sup> The European Court

of Justice identified two legitimate objectives: the protection of public health, and the financial balance of the German health system.<sup>41</sup> After that, the European Court of Justice assessed these aims from Article 2(5) of the Council Directive 2000/78 and stated that if the objective is to protect patients from the incompetent dentists, the law would be unnecessary and disproportionate as it only applied to dentists in the public health care system, not the private sector.<sup>42</sup> On the other hand, if the purpose is to maintain the financial balance of the German health system, the age restriction may be necessary as it limits the number of dentists employed in the national health system and saves cost.<sup>43</sup> Therefore, although both the genuine occupational requirement and the public policy exclusion could be regarded as the independent justification for age discrimination, they must comply with the basic requirements of purpose and means provided in Article 6 of the Council Directive 2000/78.

Although the ability to justify direct and indirect age discrimination of Member States is conferred by the Council Directive 2000/78, the positive effects of the EU at the legislative and judicial levels cannot be denied accordingly. The following part will give further discussion based on the legislation of Member States and the precedent of the European Court of Justice.

### III. The Positive Effect of Legislation and Justice at the EU Level on the Protection of Equal Treatment for Workers

The continuous enactment and amendment of anti-discrimination laws in Member States might be mainly driven by relevant legislation in the EU, especially the Council Directive 2000/78.<sup>44</sup> Moreover, the relevant Precedents of the European Court of Justice also plays an important guiding role in the judicial practice of Member States.<sup>45</sup> The following section will begin with a discussion of the positive effect of EU law in promoting the enactment of relevant laws in Member States regulating age discrimination.

#### A. The Positive Effect of EU Law

In 2000, the Council Directive 2000/78 was promulgated by the Council of the European Union, which prohibits unfair treatment in employment and occupation, including age discrimination.<sup>46</sup> This Directive requires Member States to enact relevant legislation for a three-year period.<sup>47</sup> Since then, the Netherlands has reacted by enacting the Equal Treatment in Employment (Age Discrimination) Act at the end of 2003,<sup>48</sup> which provides for equal treatment of the age in the field of

<sup>27</sup> *Ibid.*

<sup>28</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32

<sup>29</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32, para 3

<sup>30</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32, para 13

<sup>31</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32, para 14

<sup>32</sup> Equality Framework Directive 2000/78, art 4 (1)

<sup>33</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32, para 3

<sup>34</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] 2 CMLR 32

<sup>35</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31

<sup>36</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 369

<sup>37</sup> Equality Framework Directive 2000/78, art 2 (5)

<sup>38</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 369

<sup>39</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31, para 3

<sup>40</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31, para 1

<sup>41</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31, para 10

<sup>42</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31, para 20

<sup>43</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31, paras 20-21

<sup>44</sup> Tom Osborne, 'Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment' (2004) 38 *Int'l Law* 867

<sup>45</sup> Gozde Kaya, 'EU Age Discrimination in Light of EU's Demographic Challenges and ECJ Case Law' (2015) 17 *Dokuz Eylül U L Rev* 79

<sup>46</sup> Tom Osborne, 'Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment' (2004) 38 *Int'l Law* 867

<sup>47</sup> Equality Framework Directive 2000/78, art 18

<sup>48</sup> Netherlands Equal Treatment in Employment (Age Discrimination) Act 2003 (NL)

employment in accordance with the EU Directive.<sup>49</sup> Moreover, the Employment Equality (Age) Regulations,<sup>50</sup> enacted in the UK in 2006 to combat direct and indirect discrimination on the basis of age, was subsequently replaced by the Equality Act 2010.<sup>51</sup> In Germany, the Equal Treatment Act 2006,<sup>52</sup> marked the completion of the transposition of the Council Directive 2000/78.<sup>53</sup> In addition, Member States have also transposed the justification for age discrimination provided in the Council Directive 2000/78 into domestic law.<sup>54</sup> For example, Article 13 of the Equality Act 2010 of the UK states that if the employer is acting for the purpose of protecting workers and can prove that the differential treatment is an appropriate approach to pursue the legitimate purpose, it does not constitute age discrimination.<sup>55</sup> In effect, the EU law for equal treatment in employment and occupation has two functions. First, the governments of Member States must formulate and adjust their domestic legislations in accordance with the requirements of the EU law, and subject to the indirect effects of the latter. Moreover, the relevant equal treatment principle reflected in the EU law can be directly applied to domestic court proceedings. Consequently, the EU law has the direct influence and effective protection on the rights of workers, which will be further discussed in the next part. It can also be said that the EU law has established a comprehensive framework for the legislation of Member States against discrimination in employment and occupation, which has effectively promoted the relevant legislation of Member States. This strongly proves the positive effect of EU law on the protection of equal employment rights of workers.

## B. The Positive Effect of the Precedent of the European Court of Justice

### 1. The Direct Positive Effect of the Precedent of the European Court of Justice

The European Court of Justice is the judicial organ of the European Union. It is responsible for interpreting EU law to make sure it is applied in the same way in all Member States.<sup>56</sup> The national court may seek clarification if they have doubts about the interpretation of EU law. Meanwhile, it is in charge of ensuring that the national laws of Member States are compatible with EU law, guiding and assisting Member States to implement EU laws and regulations.<sup>57</sup> In judicial practice, the European Court of Justice can transform the general principles of EU law into enforceable legal rules through the interpretation of EU law in the preliminary ruling, which is reflected in *Mangold*.<sup>58</sup> In *Mangold*, the European Court of

Justice recognized the prohibition of age discrimination in employment and occupation as a specific application of the general principle of equal treatment.<sup>59</sup> In order to promote the employment of older workers, the German law originally provided that employment protection for employees over 52 years old, including medical and social insurance benefits, could be appropriately reduced. Besides, the German law also allows employers to sign fixed-term contracts with older employees.<sup>60</sup> As older employees have limited competitiveness in the job market, the legislative intent of this provision was to relax the requirement for employers to hire older employees, which may increase their employment rate.<sup>61</sup> In 2005, Mangold filed a lawsuit against this provision, and the issue was eventually submitted to the European Court of Justice.<sup>62</sup> The European Court of Justice found that German law did not comply with the requirements of the Council Directive 2000/78 and lead to discrimination against older workers.<sup>63</sup> An important issue related to this case is the time limit for Member States to transpose the Council Directive 2000/78. In accordance with paragraph 2 of Article 18 of this Directive,<sup>64</sup> Germany declared that it had decided to postpone the implement of the Directive by three years.<sup>65</sup> In other words, before 31 December 2006, the transposition period of the Council Directive 2000/78 had not expired, and the German government was under no obligation to apply the Directive immediately. In order to avoid the objective fact that the Council Directive 2000/78 has not yet entered into force in Germany, as well as to maintain the authority of EU law, the European Court of Justice considers prohibition of age discrimination as a specific application of the principle of equal treatment,<sup>66</sup> so that it could apply directly to German citizens. The European Court of Justice held that the principle of equal treatment in employment and occupation was not created by the Council Directive 2000/78.<sup>67</sup> In fact, prohibiting all forms of discrimination as a legal principle has long been recognized by the constitutional principle of Member States, and it has also been provided in relevant EU laws.<sup>68</sup> Therefore, the prohibition of age discrimination should be regarded as a fundamental principle of EU law. Although the provisions of the Council Directive 2000/78 have not taken effect in Germany, any national law of Member States that violates the prohibition of age discrimination should be set aside.

Generally, EU Directives mainly require Member States to achieve the results in related fields, and they cannot have the legal effect directly on the citizens of Member States.<sup>69</sup> Citizens of Member States are bound by the Directive only when the contents of the Directive are transposed into national law through legislation.<sup>70</sup> However, in this case,<sup>71</sup> the judgment

<sup>49</sup> Tom Osborne, 'Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment' (2004) 38 Int'l Law 867

<sup>50</sup> Employment Equality (Age) Regulations 2006, SI 2006/1031

<sup>51</sup> Alysia Blackham, 'Defining Discrimination in UK and Australian Age Discrimination Law' (2017) 43 Monash U L Rev 760

<sup>52</sup> German Equal Treatment Act (FRG)

<sup>53</sup> Helen Meenan, 'Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe' (2007) 14 Maastricht J Eur & Comp L 39

<sup>54</sup> Alysia Blackham, 'Defining Discrimination in UK and Australian Age Discrimination Law' (2017) 43 Monash U L Rev 760

<sup>55</sup> Equality Act 2010, art 13

<sup>56</sup> Mark Dawson, 'How Does the European Court of Justice Reason: A Review Essay on the Legal Reasoning of the European Court of Justice' (2014) 20 Eur LJ 423

<sup>57</sup> *Ibid.*

<sup>58</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43

<sup>59</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 14

<sup>60</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 3

<sup>61</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 8

<sup>62</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43

<sup>63</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 9

<sup>64</sup> Equality Framework Directive 2000/78, art 18

<sup>65</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 11

<sup>66</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 14

<sup>67</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, paras 14-15

<sup>68</sup> Dagmar Schiek, 'The European Court of Justice Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 60

<sup>69</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 61

<sup>70</sup> Helen Meenan, 'Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe' (2007) 14 Maastricht J Eur & Comp L 39

<sup>71</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43

of the European Court of Justice seems to have given the Council Directive 2000/78 a direct application to the citizens of Member States. As a result, the preliminary ruling of the European Court of Justice has expanded the direct effect of this Directive to some extent. In this way, the Council Directive 2000/78 can be directly applied not only to the legislatures of Member States, but also to the workers of Member States through the principle established by the European Court of Justice in this case. This reflects the efforts of the European Court of Justice to protect the legal rights of employees at the judicial level, which is of substantial significance for workers in Member States seeking for equal treatment in employment and occupation.

In addition, the European Court of Justice also clarified the specific application of the general justification for age discrimination in Article 6 of the Council Directive 2000/78 in this case,<sup>72</sup> which provided guidance for the judiciary in determining whether a differential treatment constitutes a justification.<sup>73</sup> Whether the age restriction in the German law violates the principle of prohibiting direct or indirect age discrimination in Article 2 of the Council Directive 2000/78,<sup>74</sup> or whether it can be justified by Article 6 of this Directive,<sup>75</sup> is another issue in this case. The focus of the review by the European Court of Justice is whether the provisions of German law on age restrictions have the objective and reasonable legislative purpose and appropriate and necessary means required by Article 6 of the Council Directive 2000/78.<sup>76</sup> The European Court of Justice held that although the law adopted disparate treatment based on age, its legislative purpose of the German law was to enable them to obtain more employment opportunities, because older workers in Germany often faced difficulties in re-employment.<sup>77</sup> Consequently, the legislative purpose was objective and reasonable. However, while pursuing the legislative objective, the provisions of the Germany law have exceeded the limits of appropriate and necessary.<sup>78</sup> As a result of the application of this law, almost all workers will face the termination of the existing labour contract when they reach the age of 52, and it will be replaced by unsecured fixed-term contracts.<sup>79</sup> For workers, their age becomes the only determining factor, and their legitimate rights and interests will face unprecedented damage. Therefore, although German law has the legislative objective, it does not indicate whether the fixed age threshold is an irreplaceable way to achieve the purpose of promoting employment. The German law does not comply with the appropriate and necessary means required in Article 6 of the Council Directive 2000/78 and thus constitutes age discrimination provided in Article 2 of this directive. From this case, it can be seen that although the Council Directive 2000/78 authorizes Member States to justify direct and indirect age discrimination, the European Court of Justice still reserves the power to judge whether the law of Member States conforms to the legislative intention of this Directive. Such

constraints are essential to maintain the equal treatment of workers in employment and occupation at the EU level.

## 2. The Indirect Positive Effect of the Precedent of the European Court of Justice

In *mangold*,<sup>80</sup> the German court sought legal interpretation about the Council Directive 2000/78 from the European Court of Justice which provided legal guidance directly to the domestic court through a preliminary ruling.<sup>81</sup> This reflects the direct judicial effect of the European Court of Justice on the protection of the equal rights of workers. Moreover, the precedents of the European Court of Justice also make a huge difference on providing indirect guiding for the national court. This is reflected in *Seldon*,<sup>82</sup> where the English court summarized the principles embodied in the precedents of the European Court of Justice and then applied them into its judicial practice. A series of retirement age discrimination cases ruled by the European Court of Justice have become an important basis and reference for the English court to judge *Seldon*.<sup>83</sup> The judges of the Supreme Court have drawn from these precedents the principles and rules for age discrimination cases, which are used to determine *Seldon*. For example, the purposes of justifying direct age discrimination must be social policy objectives, such as related to employment policy.<sup>84</sup> They are of the public interest, which should be different from individual considerations of employers, such as reducing costs and improving competitiveness.<sup>85</sup> It can be seen that at the EU level, the European Court of Justice has interpreted and clarified the content of EU law on prohibiting age discrimination through its continuous judicial practice. This reflects the positive and effective impact of the European Court of Justice in maintaining the equal employment rights of workers. In particular, through specific judicial activities, it provides a supranational protect mechanism for workers whose equal employment right has been violated.

## IV. The Limitation of Legislation and Justice at EU Level on the Protection of Equal Treatment for Workers

Apparently, the positive effect of European laws and the European Court of Justice in protecting equal employment rights for workers cannot be ignored. However, in order to achieve comprehensive and effective protection of workers, the active participation of Member States is also required besides the EU-level efforts.

### A. The Limitation of EU law

First, EU law does not set clear and specific criteria for determining age discrimination, which may give the national court of Member States a considerable degree of discretion in judicial practice.<sup>86</sup> Consequently, from *Seldon*,<sup>87</sup> it can be seen

<sup>72</sup>*Ibid.*

<sup>73</sup> Dagmar Schiek, 'The European Court of Justice Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 60

<sup>74</sup> Equality Framework Directive 2000/78, art 2

<sup>75</sup> Equality Framework Directive 2000/78, art 6

<sup>76</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, paras 8-9

<sup>77</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 8

<sup>78</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 9

<sup>79</sup> Dagmar Schiek, 'The European Court of Justice Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 60

<sup>80</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43

<sup>81</sup> Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, para 3

<sup>82</sup> *Seldon v Clarkson Wright & Jakes (a partnership)* [2012] UKSC 16

<sup>83</sup> Elaine Dewhurst, 'Proportionality Assessments of Mandatory Retirement Measures: Uncovering Guidance for National Courts in Age Discrimination Cases' (2016) 45 ILJ 60

<sup>84</sup> *Seldon v Clarkson Wright & Jakes (a partnership)* [2012] UKSC 16, para 4

<sup>85</sup> *Seldon v Clarkson Wright & Jakes (a partnership)* [2012] UKSC 16, paras 4-5

<sup>86</sup> Helen Meenan, 'Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe' (2007) 14 Maastricht J Eur & Comp L 39

<sup>87</sup> *Seldon v Clarkson Wright & Jakes (a partnership)* [2012] UKSC 16

that the English Court should follow the precedent of the European Court of Justice to determine whether the British government has correctly implemented the Council Directive 2000/78. However, compared to the Employment Equality (Age) Regulations,<sup>88</sup> due to the lack of rigid provisions, the EU law does not effectively restrict the national court from determining age discrimination.

In addition, since the differences between Member States, EU law cannot provide specific standards for age discrimination in employment and occupation.<sup>89</sup> The EU has adopted the form of the Directive against age discrimination in employment and occupation, namely the Framework Directive 2000/78 mentioned above. The Directive is a special form of EU law, which is characterized by the fact that the EU only sets the legislative objective and does not restrict the ways and means adopted by Member States to achieve the purpose. Unlike Regulations that are directly regarded as part of the domestic law of Member States, the provisions in the Directive are more general and are not directly binding on workers and employers in Member States.<sup>90</sup> After the Directive is issued, it must be transposed into domestic legislation by Member States within a prescribed period. Therefore, the Council Directive 2000/78 mainly provides minimum protection limits, preventing it from having the full force to achieve its stated objectives.

## B. The Limitation of the European Court of Justice

The European Court of Justice is primarily responsible for interpreting EU law or determining whether a national law is compatible with EU law. In some cases, the national courts remain much of the discretion left by the European Court of Justice.<sup>91</sup> In *Bordonaro*,<sup>92</sup> the Italian law allowed flexible forms of employment similar to zero-hours contracts for workers under 25 years of age and over 55 years of age.<sup>93</sup> *Bordonaro*, who was employed under such contracts, claimed it was discrimination based on age.<sup>94</sup> The European Court of Justice stated that the Council Directive 2000/78 had been transposed into national law and refused to decide whether such contracts under Italian law constituted age discrimination.<sup>95</sup> In addition, the European Court of Justice held that the decision on the appropriateness and necessity of national law should be determined by the national court of Member States, as it required detailed knowledge of the overall legislative environment.<sup>96</sup> Similarly, in *Peterson* referred to in Part Two, the European Court of Justice held that there might be age discrimination, but this depends on which of the two objectives identified were being pursued by the German government.<sup>97</sup> The European Court of Justice stated that it was

for the German national courts to determine the objective pursued by German law and the appropriateness of the measures to achieve the purpose, and then the case was returned to the national court.<sup>98</sup> From the two cases mentioned above, it can be seen that the national court of Member States has an inherent advantage over the European Court of Justice in determining the merits of cases, since it has a more comprehensive understanding of the social policies and the legislative intention of domestic laws. Consequently, in contrast with the European Court of Justice, domestic courts have a more direct impact on the protection of equal treatment of workers in employment and occupation.

## Conclusion

The EU Council Directive 2000/78 has played a fundamental role in protecting equal right of workers, which has also promoted the positive response of Member States against employment discrimination at the legislative level. Moreover, the European Court of Justice has also created a general legal principle prohibiting age discrimination through case law, so that it could be directly applied to workers of Member States. The legal interpretation in the precedent of the European Court of Justice also constantly and actively guides the judicial practice of the courts of Member States on the determination of age discrimination. All these have reflected the positive effect of the protection of equal employment rights for workers at the EU level on the legislation and the judiciary. In addition, in order to clarify the scope of application of the principle of equal treatment and to avoid its abuse, the Council Directive 2000/78 empower Member States with the ability to justify direct and indirect age discrimination. But this does not negate the protection provided by EU law and the European Court of Justice for equal treatment of workers at the EU level. Therefore, in order to ensure that workers are not discriminated against in employment and occupation, especially age discrimination, it not only depends on the positive effect of the EU legislature and the European Court of Justice at the supranational level but also requires the active cooperation and supplementation of the legislature as well as the national court of Member States. In this way, the rights of workers can be fully and substantially protected.

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<sup>89</sup> Gozde Kaya, 'EU Age Discrimination in Light of EU's Demographic Challenges and ECJ Case Law' (2015) 17 *Dokuz Eylül U L Rev* 79

<sup>90</sup> Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 61

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