

Age Discrimination in financial services. A comparative study between Italy, UK and Austria

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I hereby acknowledge that this thesis is my own work.

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Abstract

This thesis considers age discrimination in financial services, focusing on a comparative analysis between Italy, Austria and United Kingdom. It does this by first examining Directive 2000/78/EC which is the first and the only European legislation existing on age discrimination in the employment field. Additionally, relevant case law is analysed to create a theoretical framework. By this approach, it is possible to see that, although equality is a fundamental principle of European law, both direct and indirect age discrimination can be justified. Therefore, this analysis focuses on Article 6 of the Directive as it allows the Member States to objectively justify age discrimination for the benefit of public economic interests. This conflict between economic interest and equality is evident also in the financial services field, where a European legislation does not exist yet. In this way, in each country, the assessment of risk is strongly linked to domestic law and financial stability. The study focuses on the implication of age justifications on the economy and its relation to population ageing.

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AC	Appeal Cases
AGG	<i>Allgemeines Gleichbehandlungsgesetz</i> (General Equal Treatment Act)
AKHB	<i>Allgemeine Bedingungen für die Kraftfahrzeughaftpflicht-Versicherung</i> (General Conditions for car insurance)
All E.R	All England Law Reports
ArbVG	<i>Arbeitsverfassungsgesetz</i> (Austrian Labour Constitution Act)
ASVG	<i>Allgemeines Sozialversicherungsgesetz</i> (General Social Insurance Act)
BGBI	<i>Das Bundesgesetzblatt (Republik Österreich)</i> (Federal Law Gazette)
BMASK	<i>Bundesministerium für Arbeit, Sozial und Konsumentenschutz</i> (Federal Ministry of Labour, Social Affairs and Consumer Protection)
CA	Court of Appeal
Can. J.L. & Soc	Canadian Journal of Law and Society
CAP	<i>Codice delle Assicurazioni private</i> (Code of Private Insurance)
CC	<i>Codice Civile</i> (Italian Civil Code)
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports
CMLR	Common Market Law Review
EC	European Community
ECHR	European Convention of Human Rights
ECR	European Court Reports
EES	European Employment Strategy
EHVB	<i>Ergänzenden Allgemeinen Bedingungen für die Haftpflichtversicherung</i> (Supplementary General Conditions for Liability Insurance)
ESM	European Social Model
ETD	Equal Treatment Directive
FMA	<i>Österreichische Finanzmarktaufsicht</i> (Austrian Financial Market Authority)
FMABG	<i>Finanzmarktaufsichtsbehördengesetz</i> (Financial Market Authority Act)
FMSB	Austrian Financial Market Stability Board
GehG	<i>Gehaltsgesetz</i> (law of salary)
GlbG	<i>Gleichbehandlungsgesetz</i> (Equal Treatment Act)

IRLR	Industrial Relations Law Reports
ISVAP	<i>Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo</i> (Institute for the supervision of private insurance)
IVASS	<i>Istituto per la Vigilanza sulle Assicurazioni</i> (Institute for insurance supervision)
KHVG	<i>Kraftfahrzeug-Haftpflichtversicherungsgesetz</i> (Motor Vehicle Liability Insurance Act)
OBV	<i>Österreichische Beamtenversicherung</i> (Austrian Civil Service Insurance)
STP	Single Transitional Provision
TEU	Treaty on European Union
TFEU	Treaty of the functioning of the European Union
TUG	<i>Technische Universität Graz</i> (University of Graz)
TzBfG	<i>Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen</i> (part-time and temporary employment law)
UKHL	House of Lords
VAG	<i>Versicherungsaufsichtsgesetz</i> (the Austrian Insurance Supervision Act)
VBG	<i>Vertragsbedienstetengesetz</i> (Contract Employees Act)
VersVG	<i>Versi-cherungsvertragsgesetz</i> , (the Austrian Insurance Contract Act)
VIG	Vienna Insurance Group
VVO	<i>Verband der Versicherungsunternehmen Österreichs</i> , (Austrian Insurance Association)

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Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1991] ECR I-7321

Case C-283/83 *Racke v. Hauptzollamt Mainz* [1984] ECR 3791

Case C-347/96 *Solred SA v Administración General del Estado*. [1998] ECR I-937

Case C-381/99 *Brunnhofner v. Bank Der Österreichischen Postsparkasse Ag* [2001] ECR I-4961

Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158

Case C-43/75 *Defrenne v. SABENA*, [1976] ECR 455

Case C-432/14 *O v Bio Philippe Auguste SARL* [2015] ECJ

Case C-530/13 *Schmitzer v Bundesministerin für Inneres* [2015] IRLR 331

Case C-127/07 *Société Arcelor Atlantique and Lorraine and Others v. Premier Ministre and Others* [2008] ECR I-989

Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981

Case C-227/04 *Lindorfer v Council of the European Union* [2007] ECR I-6767

Case C- 229/08 *Colin Wolf v Stadt Frankfurt am Main* [2010] ECR

Case C-246/06 *Josefa Velasco Navarro v Fondo de Garantía Salarial (Fogasa)* [2008] ECR I-

Case C-267/06 *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757

Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] EUECJ

Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603

Case C- 321/03 *Dyson Ltd v Registrar of Trade Marks* [2007] ECR I- 68

Case C-341/05 *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767

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

Case C-371/12 *Petillo and Petillo v Unipol Assicurazioni SpA* [2014] All ER (D) 161

Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569

Case C- 392/05 *Georgios Alevizos. v. Ypourgos Oikonomikon* [2007] ECR I- 3505

Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531

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Case C- 532/06 *Lianakis and Others* [2008] ECR I- 251

Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

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Case C-13/05 *Sonia Chacon Navas v Eurest Colectividades SA* [2006] ECR I-6467

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Fuji Finance Ltd v Aetna Life Insurance Co Ltd [1994] 4 All E.R. 608

Lewis v Norwich Union Fire Insurance Co [1916] A.C. 509 at 519

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Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364)

Council Resolution of February 2007, DOC 6216/1/07

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive')

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')

Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Text with EEA relevance)

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast).

Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, (Capital Requirements Directive (CRD) IV);

Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (MCD)

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final

Regulation (EU) No. 575/2013 (Capital Requirements Regulation 'CRR')

Treaty establishing the European Economic Community, EEC Treaty

Treaty on the European Union (TEU)

Italy

Codice Assicurazione Private

Codice Civile Italiano

Corte d'Appello di Roma, Sez. II del 24 settembre 2002, in Foro it. 2003, I,332

Decreto Legislativo No. 74 del 12 Maggio 2015

Legge No. 990, 24 Dicembre 1969, Article 122 CAP (Codice delle Assicurazioni Private)

Regolamento ISVAP n.35 del 26 Maggio 2010: Disciplina degli obblighi di informazione e della pubblicità dei prodotti Assicurativi (Regulation on the Information Obligations and The Advertising Of Insurance Products)

Regolamento ISVAP n.38 del 3 giugno 2011: nuove disposizioni concernenti la costituzione e l'amministrazione delle gestioni separate (Isvap Regulation N. 38 Of 3Rd June 2011 by Ivass Order N. 7 Of 16 July 2013)

Sentenza Consiglio di Stato, Sez. V, Sent. 20 agosto 2001, n. 4466

Tribunale di Roma del 21 gennaio 2000, in Foro it., 2000, I, 2045

UK

Deregulation Act 2015 CHAPTER 20

Conduct of Business Sourcebook (COBS)

Employment Rights Act 1996

Financial Services Act 2012

Road Traffic Act 1988

The Equality Act 2010

Social Law 2009

Austria

Allgemeines Sozialversicherungsgesetzes, (ASVG) BGBl. Nr. 189/1955

Allgemeines Gleichbehandlungsgesetz of 14 August 2006 (the AGG) BGBl. I S. 1897

Bundesgesetz vom 2. Dezember 1958 über den Versicherungsvertrag (Versicherungsvertragsgesetz - VersVG) BGBl. Nr. 2/1959 (NR: GP VIII RV 102 AB 547 S. 68. BR: S. 140.)

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Gleichbehandlungsgesetz, BGBI I Nr. 66/2004

Recital 14(3), *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen*, (the TzBfG) of 21 December 2000 on part-time working and fixed-term contracts

Kraftfahrzeug-Haftpflichtversicherungsgesetz, KHVG

Versicherungsaufsichtsgesetz, VAG 2016

Versicherungsvertragsgesetz, VersVG

Spain

Ley de Coordinación de las Policías Locales de la Comunidad Autónoma del Principado de Asturias (BOE No 169 of 16 July 2007)

Germany

Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen, (TzBfG) of 21 December 2000, BGBI. I S. 2854, 2923

Introduction

The introduction is structured so as to provide the reader with an outline of the hypothesis employed in the thesis and an understanding of the principal issues to be examined. Therefore, it addresses age discrimination in the employment field and in financial services. Nevertheless, while age discrimination in employment field has been codified by Directive 2000/78/EC, financial services have not.

The thesis is organised into four chapters. The first chapter concerns methodology and research techniques. It considers the appropriate forms of analysis, explaining the particular approach taken. This research project uses a mixed method, combining a case study and comparative research, which is supported by statistical secondary sources. The case study on Directive 2000/78/EC establishes a general framework for equal treatment and develops a grounded theory on age discrimination from the employment field. Thus, while the case study frames the research question, the grounded theory is the general strategy for conducting qualitative research. The comparison between three European countries focuses on demographic trends, political choices and economic variations in relation to the financial sector. Ultimately, the comparison verifies the grounded theory on financial services. The hypothesis, and its contribution to knowledge, is evidenced in this chapter and it is outlined by the research question.

The second chapter is a literature review, which highlights the social aspects of age discrimination. In this way, ageist behaviour can be seen as “inaccurate negative attitudes and beliefs about ageing or older adults, or as a clear harmful impact on other adults.”¹ Thus, the negative impact on an individual’s life is undisputed: ageism reflects the fear of being powerless and useless.² Nevertheless, the problem of ageing has become a matter of public interest since demographic transition projections highlighted a demographic ageing trend in the European population. In this way, “societies progress from a pre-modern regime of high fertility and high mortality to a post-modern regime of low fertility and low mortality.”³ Consequently, because the population age structure is changing, legislators and economists agree over the need to minimize this demographic ageing effect, adjusting to changes in living conditions. In this way, the employment field is the first area to have been reformed. For the first time at European level, Directive 2000/78/EC in accessing financial services explicitly prohibits age discrimination in the

¹ Psupathi Monisha, Loeckenhoff Corinna, ‘Ageist Behaviour’, in Todd D. Nelson (Ed.) *Ageism: Stereotyping and Prejudice Against Older Persons*, (MIT Press, 2002), p. 201-202

² Butler Robert, ‘Ageism, another form of bigotry’, [1969] *The Gerontologist* vol.9, p.243

³ Dudley Kirk ‘Demographic transition theory’ [1996] *Population Studies*, Vol. 50, N.3, p. 361-387

workplace. Nevertheless, one of the main difficulties encountered by Directive 2000/78/EC is its own implementation as each Member State deals with the problem of age discrimination in a different way. Furthermore, according to the Demographic Transition Model,⁴ Member States potentially face different demographic ageing problems.⁵ The most evident variable influencing the impact of ageing on a nation's economy is population size. In this way, higher fertility and life expectancy can contribute to determining different ageing problems and different sets of opportunities.

The third chapter starts with a brief history on how the principle of equality developed at European level. The European Social Model is a common vision of European Member States on society. It combines economic growth with high living standards and good working conditions. Accordingly, in the last two decades new social policies have been introduced to reshape the European goals of economic growth and social inclusion. Nevertheless, economists still consider that within the EU there exist different social models. In this way, Austria is part of the Continental model (with Belgium, France, Germany and Luxembourg), the United Kingdom represents the Anglo-Saxon model (with Ireland), and Italy represents the Mediterranean model (with Greece, Portugal and Spain).⁶ Consequently, the demographic/economic influence on age discrimination can be conceptualised in two distinct ways. Dealing with age discrimination in employment, there are two approaches to this issue: functional and non-functional. The functional approach reveals a weakening of the principle of equal treatment for the advantage of better business, while the non-functional approach represents the conviction that discriminatory treatment is wrong, and therefore cannot be justified.

The difficulties encountered by Directive 2000/78/EC focus on the interpretation of Article 6. In fact, this article permits the justification of age discrimination under certain conditions. In particular, it allows both direct and indirect age discrimination when a national legitimate aim is provided, and the means chosen to achieve that aim are proportionate and necessary. This leads to a series of interpretive problems, especially regarding what a legitimate aim is and under what 'appropriate and necessary' circumstances age can be justified. To guarantee consistency with the European provision, Member States have often referred to the Court of Justice of the European Union (CJEU) for preliminary rulings. The decisions of the CJEU, which are secondary sources of law, have focused on the difficult interpretation of age as a fundamental right, on direct effect of the principle of equality and on proportionality test. A deeper analysis of the roots of European Law

⁴ Thompson Warren, 'Population', [1929] *American Journal of Sociology*, Vol. 34, pp. 959-975.

⁵ Commission, *Demography Report 2008: Meeting Social Needs in an Ageing Society*, (Commission Staff Working Document, 2008) SEC(2008) 2911

⁶ Boeri Tito 'Let Social Policy Models Compete and Europe Will. Win', (Conference Paper, 2002) Conference in the John F. Kennedy School of Government, Harvard University, 11-12 April 2002.

reveals the historical evolution of the principle of equality. Therefore, from Article 13 EC (introduced by the Amsterdam Treaty in 1999) to the current Article 19 TFEU, the interpretation of discrimination has developed from a formal, into a substantive equality. Accordingly, substantive equality recognises that policies and practices that may appear to be non-discriminatory may not really address the specific needs of certain groups of people. On the other hand, creating equal opportunities by differential forms of treatment and/or positive action can be considered a form of substantive equality. This means that differences are taken into account and are used to create an equality of outcome. Consequently, Article 6 refers to an appropriate and necessary justification directed at protecting national interests when they are at risk of being compromised by a too-rigid application of the principle of equality. Arguably, Article 6 leaves to Member States the power to decide when age discrimination can be justified in a given national context. This has been critically defined as the Sword of Damocles hanging over all national provisions.⁷ Thus, while the interpretation of age discrimination in Directive 2000/78/EC inevitably leads Member States to different approaches, these are still subjected to judicial scrutiny.

The case law analysis provides an overview of how age discrimination has been interpreted in different contexts. This analysis is divided into the following categories: evolution of age discrimination as a legal concept; age justification and the principle of proportionality; health and safety justifications; public policies in vocational training; proving age discrimination by using a ‘comparator’;⁸ and age and sex discrimination. In cases *Mangold*,⁹ *Palacios de la Villa*¹⁰ and *Age Concern*,¹¹ judgements regarding the prohibition of age discrimination were applied with more rigour, such that age was considered at the same level as other forms of discrimination. Nevertheless, it was only after *Küçükdeveci*¹² that the Court gave prominence to the principle of proportionality. Thus, the proportionality test has been applied to age justification influencing the concept of ‘legitimate aim.’ This means that a legitimate aim must still be supported by appropriate and necessary means, but that issues relevant to the public interest are valued in relation to the discriminatory conditions. This development led to a re-evaluation of age discrimination, progressively transforming it into a ‘silent protected ground’. Additionally, age discrimination was considered justifiable in relation to public policies in vocational training (*Hütter*)¹³ and retirement

⁷ Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák, para 64

⁸ The role of comparator is explained in Chapter 3

⁹ Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981

¹⁰ Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531

¹¹ Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569

¹² Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

¹³ Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325

(*Petersen*,¹⁴ *Palacios*¹⁵). Furthermore, in cases *Pérez*,¹⁶ *Prigge*¹⁷ and *Wolf*¹⁸, the Court agreed on the link between 'physical capacity' and 'chronological age'. Thus, as initially revealed by *Bartsch*,¹⁹ age as a prohibited ground confirmed its 'borderline' position. Finally, cases such as *Lindorfer*,²⁰ revealed how age and sex are seen as two very different grounds of discrimination. In particular, the impossibility of applying the role of comparator to age seems to be justified by the fact that it is considered a 'graduated' ground. Furthermore, Directive 2004/113/EC, which implements the principle of equal treatment between men and women with regard to access to, and the supply of, goods and services, proves these differences in protection: a similar legislation for age discrimination does not yet exist.

Chapter four starts from the problem of demographic ageing and economic exclusion as they intensify when age discrimination occurs in accessing financial services. This thesis compares and contrasts three European countries and their regulation and policies in financial services. In this field, because financial providers differentiate their products on the basis of an assessment of risk it is not unusual for people to experience discrimination because of their age. Therefore, using age bands in financial services might result in an inferior service, or in having a product restricted, or in not being treated in the same way as other age groups when receiving a service. The question is whether such restrictions have a negative impact on economic trends as a result of having part of the population outside the market. Accordingly, "half of the population growth between 2005 and 2050 in Europe will be due not to births, but rather the fact that increasingly more people are living longer."²¹ In this way, financial services differ from country to country, and they do not accurately represent the demographic trend. The countries taken as a sample represent three different political and socio-legal realities. In each country the link between age discrimination in financial services and social exclusion is particularly evident. Nevertheless, while financial services should be free from barriers in their costs and structure, difficulties arise when a financial product is not accessible for people over a certain age or when it has a disproportionate price. Accordingly, "financial exclusion" refers to a process whereby people encounter difficulties accessing and/or using financial services and products in the mainstream market that are appropriate to their needs and

¹⁴ Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31

¹⁵ Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531

¹⁶ Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158

¹⁷ Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG* [2011] IRLR 1052

¹⁸ Case C- 229/08 *Colin Wolf v Stadt Frankfurt am Main* [2010] ECR

¹⁹ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245

²⁰ Case C-227/04 *Lindorfer v Council of the European Union* [2007] ECR I-6767

²¹ Linz Kathrin, Stula Sabrina 'Demographic change in Europe - An Overview', (2010) Working paper no. 4 of the Observatory for Socio-political Developments in Europe, Institute for Social Work and Social Education

<[http://www.sociopolitical-](http://www.sociopolitical-observatory.eu/uploads/tx_aebgppublications/Working_Paper_no_4_Observatory_Demographic_change_in_Europe_O)

[observatory.eu/uploads/tx_aebgppublications/Working_Paper_no_4_Observatory_Demographic_change_in_Europe_O](http://www.sociopolitical-observatory.eu/uploads/tx_aebgppublications/Working_Paper_no_4_Observatory_Demographic_change_in_Europe_O)
view.pdf> accessed 17.11.2012

enable them to lead a normal social life.²² For comparative purposes, this analysis is split between insurance and banking. In the insurance sector, the use of age as a basis of assessing risk is particularly interesting. The study distinguishes between life and non-life insurance, analysing how each country has different strategies when it comes to the insurance market, which do not always reflect the ageing of their population. It is observed that some countries adopt a highly competitive strategy (UK), especially in life insurance, while others (Italy) seem to allow less strict policies, despite their increasing population ageing. The comparison focuses also on the overall legislative structure and on the supervisory bodies. The aim is to provide a picture of each country, and to consider how the explicit provisions against age discrimination affect the financial sector. The analysis continues with a reference to age as a factor of risk and competitiveness. In this way, the cost and profitability of age regulations in the financial field represent the proportionality test introduced by Article 6 of Directive 2000/78/EC. Eventually, a reflection on the Proposal for a Council Directive on implementing the principle of equal treatment²³ concludes this research.

²² Commission, *Financial service provision and prevention of Financial Exclusion*, (Report, 2008) p. 9

²³ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, < <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52008PC0426>> accessed 12.02.17

CHAPTER 1: RESEARCH DESIGN AND METHODOLOGY

Introduction

In the present study methodology develops a research design and it links to the theories and the analytical models addressed in the next chapter on literature review. Accordingly, the “research designs are plans and procedures for research that span the decisions from broad assumptions to detailed methods of data collection and analysis.”¹ The aim is to demonstrate how demographic ageing affects both equality and economy. Therefore, this research combines a socio-legal research with a financial services analysis, following an interdisciplinary methodology. It underlines the relevance of those factors as demographic changes and economic trends which influence age discrimination. The sociological analysis takes the step from the assumption that an attitude to discriminate against age reflects socio-cultural and political differences among countries. On the other hand, external factors, such as demographic ageing, undermine the economic stability of the countries, still with different intensity on the basis of the characteristics of each population. Consequently, this investigation considers the outcomes of the same problem across three European countries. The analysis balances the economic impact of age discrimination with the principle of equality. The starting point is considering that age discrimination is a problem involving the whole community, while the comparison among nations shows the effects of the different policies on the demographic age structure.

On methodology and research techniques this chapter considers the appropriate form of analysis, explaining why determinate choices are more suitable than others. This research combines a case study and comparative research to build a theory on age discrimination in financial services. The case study on the Directive 2000/78/EC, which establishes a general framework for equal treatment, develops a theory on age discrimination from the employment field. The comparison between three European countries verifies this basic theory on financial services, having regard to demographic trends, political choices and economic variations. Hence, age discrimination in accessing financial services is connected with the current economic crisis and downturn.

¹ Creswell John, *Research design: qualitative, quantitative and mixed methods approaches* (Sage Publication 2009), p.3

1. Legal research

This paragraph is an overview on the legal research conducted on age discrimination. The law often deals with discriminatory phenomena with a strong social connotation. The ‘law in context’ approach² underlines how although law might provide the solution to a social problem, other non-law solutions, such as political and social arrangements, might be more convenient. This approach sheds a light on the link between age discrimination as a legal concept and age discrimination as a social phenomenon. Where it is undoubted that legislations provide theoretical solutions for practical problems, it is questioned whether they are in line with the complexity of a social problem. Thus, extra dimensions need to be taken into account as age discrimination can be studied in different fields: sociology, economy or health care.

The major types of legal research can be distinguished in: empirical, international, comparative and doctrinal. Nevertheless, choosing the most suitable method of investigation cannot be an objective estimation process. This choice is inevitably influenced by the aim of the research and the researcher’s experiences. In fact, the researcher’s background has a relevant impact on the research itself, as the nature of social reality is shaped by the different perspectives: “a person’s thoughts about the nature of research”³ represent the philosophical worldview.

Worldviews are distinguished in two traditional philosophical research guidelines: epistemology and ontology. Epistemology guides the process of cognition and knowledge typically characterised on “the nature of knowledge and justification.”⁴ However, attaining the nature and scope of knowledge, and justifying belief, is a method of investigation that recalls the natural sciences. Instead, epistemology questions what constitutes valid knowledge and how we can obtain it. Ontology questions “the nature of reality”⁵ intended as both physical and social reality. It questions what constitutes reality and how we can understand existence. Ontology describes a method that deals with the nature of being.⁶ Consequently, ontology is what exists, epistemology is where knowledge is and methodology is the rule of inquiry. Approaching one philosophy instead of another influences the outcome of the research and, for this reason, disclosing the philosophical framework clarifies the process of doing research and the outcome of the investigation. In this research ontology leads to the question: “what is age discrimination?” The answer recalls that age discrimination is both a social phenomenon and one of the subjects of Directive 2000/78/EC, which

² McConville Mike, Chui Wing Hong, *Research Methods for Law* (Edinburgh University press, 2010) P.1

³ Morgan L. David, ‘Paradigms Lost and Pragmatism regained: methodological implications of combining qualitative and quantitative methods’, [2007] *Journal of Mixed Methods Research* Vol 1, p. 48

⁴ Schwandt Thomas, *Dictionary of qualitative inquiry*, (Thousand Oaks, Sage 2001) p. 71

⁵ Blackburn Simon, *Essays in quasi-realism*, (Oxford University Press 1993) p.59

⁶ Bryman Alan, Bell Emma, *Business Research methods*, (Oxford University press, 2007). p.66

protects against age discrimination in the employment field. In this way, the literature review provides an insight into age discrimination and ageism as a social phenomenon, showing how the doctrine adopted heterogenic definitions. Age discrimination is then introduced as a legal concept. With Directive 2000/78/EC the European legislator opened up an ongoing debate, both in doctrine and jurisprudence, on the prohibition of such discrimination. The amount of case law indicates how the European Court of Justice adopted different interpretations on age discrimination. Thus, this heterogenic nature further affects the validity of age discrimination as a unique legal concept. Consequently, different nations apply and interpret it on the basis of their own policies and culture. These multiple realities are better understood through the philosophical approach known as 'pragmatism'.⁷ Pragmatism is associated with the mixed method of research and rejects the dualism of epistemology. It leads this research towards the use of both constructivism (result of 'mental construction') and objectivism (reality is objective and external to the mind)⁸ in order to develop a practical approach. The chart below shows the Research Onion Diagram which leads to a better understanding of the role of this research philosophy.

⁷ Denscombe Marty, 'Communities of practice: a research paradigm for the Mixed Methods approach' [2008] Journal of Mixed Methods Research, Volume 2 Number 3, '.

⁸ Johnson Burke, Onwuegbuzie Anthony, 'Mixed Methods Research: A Research Paradigm Whose Time Has Come', [2004] Educational Researcher, Vol. 33, No. 7, pp. 14–26

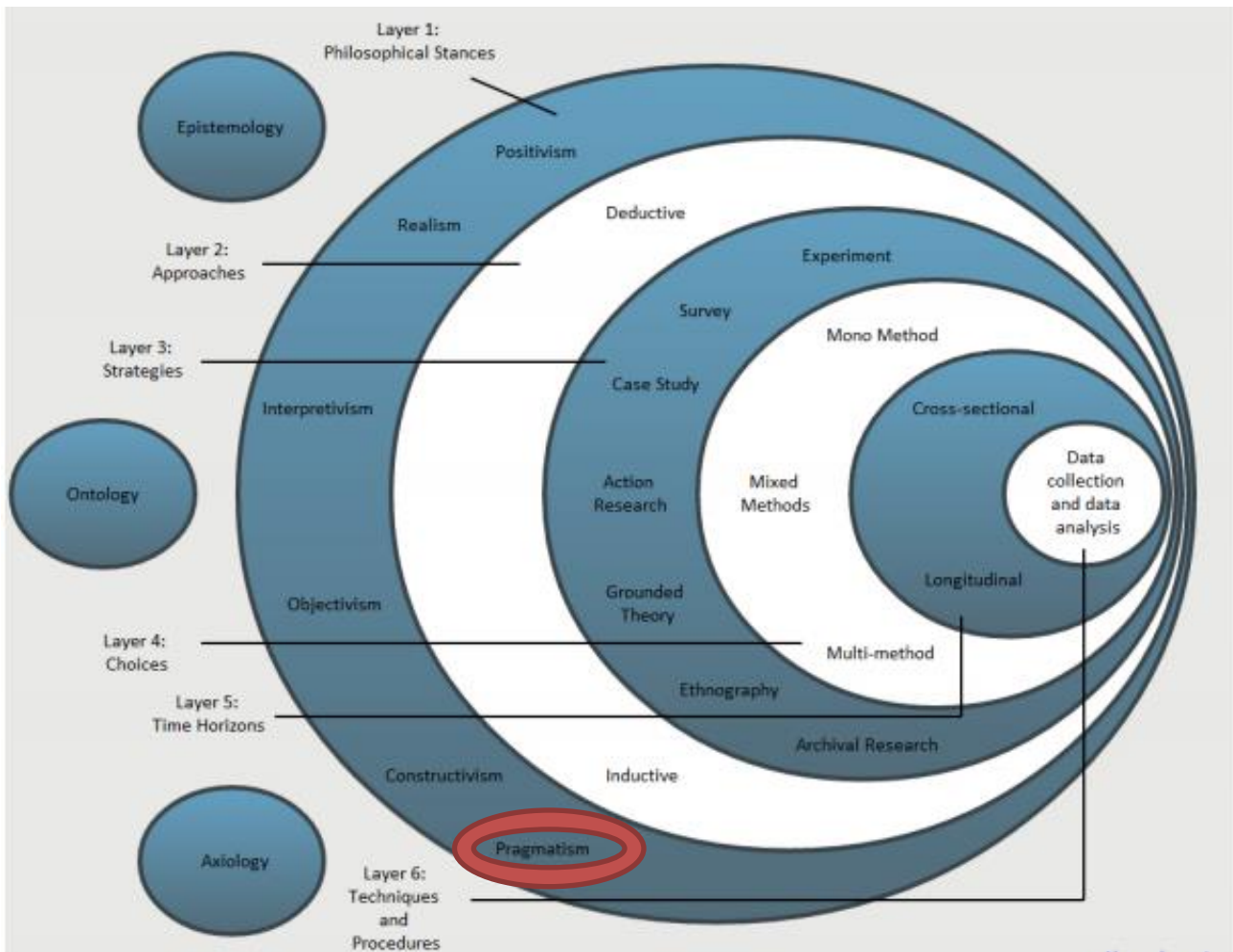


Figure 1 Based on Saunders, et al diagram 2009⁹

This philosophical stance expands this investigation by encouraging “reflections about the limits of legal scholarship as an academic discipline and its relationship with other disciplines.”¹⁰ Thus, the study on age discrimination opens to more political, sociological and economic conjectures. In these terms pragmatism explains how this research supports a multidisciplinary approach using a mixed method of research.

1.1. Pragmatism, legal positivism and constructionism

Pragmatism “focuses on continuity and ongoing processes of inquiry, not *a priori* quests terminating in immutable truths.”¹¹ In the classical pragmatism Peirce¹², Dewey¹³ and Mead¹⁴

⁹ Saunders Mark, Lewis Philip, Thornhill Adrian, *Research methods for business students*, (Pearson, 2009), p. 108

¹⁰ Gunnarsson Åsa, Svensson Eva-Maria, Davies Margaret, ‘Reflecting the Epistemology of Law - Exploiting Boundaries’, in Gunnarsson Åsa, Svensson, Eva-Maria and Davies Margaret (eds.) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, (Ashgate, 2007), p.1

¹¹ Webb James, ‘Pragmatism(s) Plural, Part II: From Classical Pragmatism to Neo-Pragmatism’, [2012] *Journal of Economic Issues*, Vol. XLV I No. 1

sustain that the process of effective inquiry is a constructive habit that leads to results based on beliefs. Thus, pragmatism is particularly suitable when the aim is to compare different legal contexts. It allows individuality between qualitative and quantitative research, being a suitable approach in mixed method legal research.

Pragmatism assumes that the world is not a united entity with a unique truth, but it is featured by different cultures, history and politics that need to be considered by the investigation process. In this way, pragmatism enhances the social process that produces both consensus and conflict.¹⁵ Similarly, Creswell suggests that pragmatism is a “theoretical lens reflective of social justice and political aims.”¹⁶ Nevertheless, it is distinguished from legal positivism, which is an epistemological position that considers law as a social construction¹⁷ and which strictly depends on what social standards officially recognize as authoritative.¹⁸ Therefore, the analysis on age discrimination cannot be reduced to a legal construction. Age discrimination implies an analysis of the social actors, being older people at the centre of the demographic change. In this way, constructionism sustains that “social phenomena and their meaning are continually being accomplished by social actors.”¹⁹ However, constructionism cannot sufficiently address the problem by itself. There are too many factors that influence age discrimination which vary from country to country, i.e. population size, demographic shifts and age friendly policies. These variations, determined by national contingent needs, show how age discrimination is an easy fitting concept within society. Consequently, pragmatism demonstrates a dynamism able to overcome these different approaches. It emphasizes the research problem opening to multiple methods that “allows the researcher different assumptions as well as different forms of data collection and analysis.”²⁰

2. The Research Problem

The gap in research is a lack of legislation in the field of age discrimination outside employment. Thus, starting from the employment field, the study is restricted to the financial services, which are

¹² Peirce Charles, ‘Some Consequences of Four Incapacities’ [1868] *Journal of Speculative Philosophy* Vol 2, p. 140-157.

¹³ Dewey John, ‘What Pragmatism Means by Practical’ [1908] *Journal of Philosophy, Psychology and Scientific Methods* 5, p.85-99

¹⁴ Mead George Herbert, *Mind, Self and Society: From the Standpoint of a Social Behaviourist*, (University of Chicago Press, 1934)

¹⁵ Morgan (n.3), p.66

¹⁶ Creswell (n.1), p. 12

¹⁷ Green Leslie, ‘Legal Positivism’, Edward N. Zalta (ed.) in *The Stanford Encyclopaedia of Philosophy* (2003 Edition), accessed 14 June 2013 < <http://plato.stanford.edu/entries/legal-positivism/>>

¹⁸ See for example: legislative enactments, judicial decisions or social customs.

¹⁹ Bryman Alan, Bell Emma (n.6), p. 33

²⁰ Creswell (n.1), p.12

heavily influenced by age related policies and economic implications. The research question identifies a research issue. Accordingly, what needs to be questioned is:

How does age discrimination in access to financial services impact upon older people, destabilising the principle of equality, and what are the effects of age discrimination on the economy? What is the legacy of Directive 2000/78/EC on age discrimination in employment and how does it apply to the financial services sector? Considering economic, social and demographic variables, in which way does age discrimination in financial services impact upon the UK, Austria and Italy?

3. The mixed method

The modern academic practice in social research uses mixed methods; it is a method of research which combines both quantitative and qualitative techniques. A qualitative research is defined as:

[A] social research in which the researcher relies on text data rather than numerical data, analyses those data in their textual form rather than converting them to numbers for analysis, aims to understand the meaning of human action and asks open questions about phenomena as they occur in context rather than setting out to test predetermined hypotheses.²¹

Quantitative research is “a means for testing objective theories by examining the relationship among variables. These variables can be measured, typically on instruments, so that numbered data can be analysed using statistical procedures.”²² While epistemology and ontology are associated with fixed research methods, the mixed method permits to counterbalance the weakness and the strength of each method, being “much more free-floating”²³ and lacking in absolute determinism. A quantitative research “relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them”.²⁴

The interpretative qualitative analysis requires by the doctrinal research “is concerned with the formulation of legal ‘doctrines’ through the analysis of legal rules”.²⁵ A doctrinal research (or

²¹ Schwandt (n.4), p. 121

²² Creswell (n.1), p. 17

²³ Bryman, Bell (n.6), p. 36

²⁴ Chynoweth Paul, ‘Legal Research’, in Knight Andrew, Ruddock Les (ed.) *Advanced Research Methods in the Built Environment*, (Blackwell Publishing 2008), P. 28

²⁵ Ibid. p.28

black letter law) is a “research of law” that seeks answers through the existing body of rules. It can lead to external inquiry, evaluating the effectiveness of the legislation in achieving the social goal of combating age discrimination. In fact, “the law seems to exist for disputes which appear in the social world.”²⁶ It is argued that there is a separation between law and everyday life or social situations, implying that the rules of law runs parallel to the social world, without being the perfect representation of it. Consequently, “for a dispute to become legal, the social problem must be transformed into a legal problem.”²⁷ The mixed method of research attempts to overcome this gap, fitting together the insights provided by a qualitative and quantitative research into a workable solution.²⁸ The qualitative research focuses on the legal problem: age discrimination in the employment field, as introduced by Directive 2000/78/EC. Consequently, induction, discovery, exploration theory/hypothesis generation, and qualitative analysis characterise the first part of research. On the other hand, quantitative study focuses on deduction, confirmation, theory/hypothesis testing, explanation and prediction. In this way, standardized data collection and statistical data analysis characterise the second part of research.²⁹ The reasons for using mixed method design derive from the exigence of an interdisciplinary approach. Accordingly, a purely doctrinal or ‘black letter’ approach would not consider the social, cultural and demographic contexts where age discrimination occurs. The chart below shows how the present investigation (represented by the red dot) is contextualised within the legal research panorama:

²⁶ Mansell Wade, Meteyard Belinda, Thomson Alan, *A Critical Introduction to Law* (London: Cavendish, 2004), p 4.

²⁷ *ibid*

²⁸ Johnson, Onwuegbuzie (n.8) p. 16

²⁹ *Ibid.* p.18

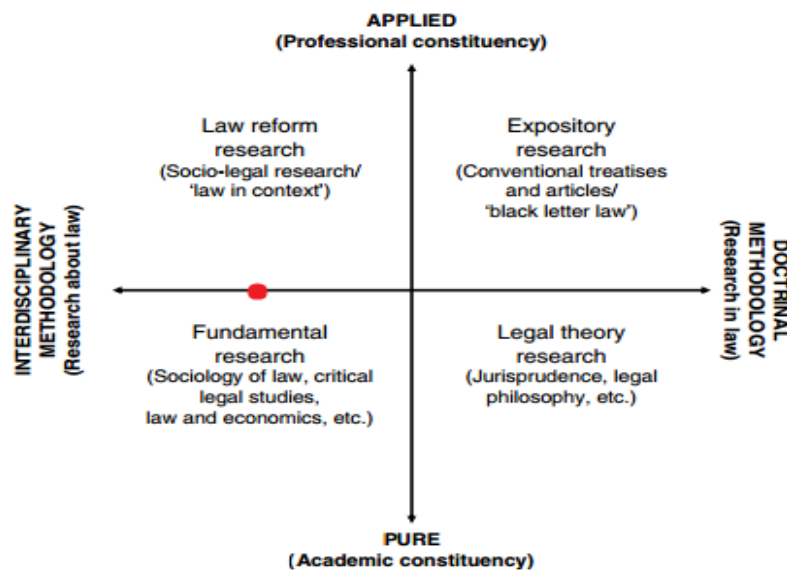


Figure 2 Source: *Legal research styles* (Arthurs, 1983)³⁰

This research lies between ‘the law in context’ and a fundamental research. The ‘law in context’ leads to the comparative law view which considers that often legal rules may appear to be similar whereas the social context is different.³¹ On the other hand, fundamental research makes generalizations about the phenomenon, as its purpose is to result in universal principles relating to the process and its relationship to outcomes.³²

3.3 Quantitative and qualitative analysis

A mixed methods research is “an approach to knowledge (theory and practice) that attempts to consider multiple viewpoints, perspectives, positions, and standpoints (always including the standpoints of qualitative and quantitative research).”³³ The literature review introduces age discrimination as a social phenomenon in order to further explore its “social relations and reality experience”³⁴. For that purpose, observing age discrimination only as a social phenomenon would not be sufficient. Consequently, the legal research develops the theory by analysing age discrimination in the employment field, in particular Directive 2000/78/EC. The theory creates a

³⁰ Arthurs Harry William, ‘Law and Learning: Report to the Social Sciences and Humanities Research’, [1983] *Information Division, Social Sciences and Humanities Research Council of Canada*, P. 186.

³¹ Casals-Martin Miquel, *The Development of Liability in Relation to Technological Change* (Cambridge University Press, 2014), p. 108. The combination of controls and liability differs on the base of the countries.

³² Dudowskiy John, ‘Fundamental Research’, (*Research methodology*, 2016) < <http://research-methodology.net/research-methodology/research-types/fundamental-research/>> accessed 12.06.2016

³³ Johnson R. Burke, Onwuegbuzie Anthony J., Turner Lisa A., ‘Toward a Definition of Mixed Methods Research’, [2007] *Journal of Mixed Methods Research*, Sage Vol. 1, p. 112

³⁴ Hutchinson Terry, *Researching and Writing Law* (Pyrmont, NSW: Lawbook Co., 2006) p.87

paradigmatic framework of legal doctrine. In this way, the case study on Directive 2000/73/EC introduces a framework of concepts, rules and principles. Nevertheless, the weakness of theories is that they do not consider the natural order of societies and cultures.³⁵ Therefore, the qualitative study on Directive 2000/78/EC and its case law are followed by a quantitative approach. They aim to create a “law-like explanation” for age discrimination in financial services considering the link with the economic interests and justification for age bands.³⁶ In this way, the theory developed provides an important framework in which age discrimination in financial services is a condition which needs to deal with economic reasons.

The comparative study involves three European countries (Italy, UK and Austria) and is directed to understand the political, economic and cultural variances that influence age discrimination in financial services. In fact, age discrimination cannot be confined to a study on a legislative text. Thus, the comparative legal research reveals the differences among nations by comparing quantitative data collected under the guidelines of a theoretical lens.

According to Creswell “a researcher might collect both quantitative and qualitative data concurrently and integrate or merge the two databases by transforming the qualitative themes into counts and comparing these counts with descriptive quantitative data.”³⁷ Eventually, the data collected are mixed appropriately. Nevertheless, for the purpose of this investigation, Creswell's position would not be ideal as data do not need to be collected “concurrently”. To collect data concurrently means that both qualitative and quantitative data are gathered at the same time while in this case a different timing is determined by explanatory exigencies. Therefore, the ‘Sequential Explanatory Design’ reported in the chart below needs to be preferred. It shows a flowing logical and consequential way to combine quantitative and qualitative methods.

³⁵ Unger Mangabeira Roberto, *Social Theory: Its situation and its task*, (Cambridge University Press, 1987) p. 1.

³⁶ Delanty Gerard, ‘Social theory in Europe today’, in Gerard Delanty (eds.) *Handbook of Contemporary European Social Theory*, (Routledge, 2006), p.266

³⁷ Creswell John, ‘Mixed Methods Designs’ in John W. Creswell (ed.), *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, (SAGE Publications, 2013) p.14



Figure 3 Sequential Explanatory Design. Adopted from Creswell et al (2003)³⁸

4. The Case Study

A case study is “an intensive analysis of an individual unit stressing developmental factors in relation to environment”.³⁹ An intensive analysis implies a study on a specific phenomenon, while the individual unit has been described as “functioning specific”, intended as a specific topic.⁴⁰ However, case studies are not restricted to observation. Accordingly, a “case study is the study of the particularity and complexity of a single case, coming to understand its activity within important circumstances.”⁴¹ Consequently, the detailed examination of single examples builds the theory.⁴² The aim is to provide an in-depth understanding of the interaction between phenomenon and context. Therefore, the relationship between variables demonstrates their changes across countries.

In this investigation, case law as qualitative study is the first research approach adopted. While this latter one is a source of theoretical innovation, the quantitative study (i.e. survey) controls the empirical scope of the theoretical concept.⁴³ Therefore, the quantitative study follows the qualitative one because the statistical generalization needs to follow the analysis of case law. In other words, the case study highlights a “descriptive-interpretative”⁴⁴ relationship and the quantitative survey focuses on its causal relationship. Therefore, from the case law, “it is possible to draw causal inferences through cross-case comparisons.”⁴⁵ Furthermore, a case study analyses a

³⁸ Creswell John, Plano Clarck Vicki, Gutmann, Michael, Hanson William, ‘Advanced mixed methods design’, In Abbas Tashakkori and Charles Teddlie (Eds.), *Handbook of mixed method research in social and behavioural sciences*, (Thousand Oaks, CA Sage, 2003) p. 204-209

³⁹ Merriam-Webster Online Dictionary. ‘Case study’ (*Merriam-Webster*, 2009) <<http://www.merriam-webster.com/dictionary/case%20study>> accessed 12.04.2014

⁴⁰ Stake Robert, ‘Qualitative case studies’ in Norman K. Denzin and Yvonna S. Lincoln (eds.), *Strategies of qualitative inquiry* (Sage, 2008). p 119–120

⁴¹ Stake Robert, *The Art of Case Study Research*, (Sage, 1995), p.134

⁴² Flyvbjerg Bent, ‘Case Study’ in Norman K. Denzin and Yvonna S. Lincoln (Eds.), *The Sage Handbook of Qualitative Research*, (Thousand Oaks, 2011) Chapter 17, pp. 301-316

⁴³ Blatter Joachim K., “Case Study” in Lisa M. Given (Ed.), *The SAGE Encyclopaedia of Qualitative Research Methods*, (Sage, 2008) p. 68

⁴⁴ Ibid p.69

⁴⁵ Ibid p.70

subject in depth, while a survey would be extremely limited.⁴⁶ In fact, the conceptual richness and theoretical consistency provided by the case study ensures internal validity. Internal validity refers to “whether an instrument used in a study actually measures what it purports to measure”.⁴⁷ On the other hand, a statistical approach means allowing a variety of information reduced in specificity and ensuring external validity. In this case, external validity (or generalizability) is, “the likelihood that a study’s findings will apply to the larger population.”⁴⁸ The benefits that derive from combining survey with case studies are largely demonstrated in research.⁴⁹ Nevertheless, some researchers underline that “it is wrong to see the case study as a pilot method to be used only in preparing the real study’s larger surveys, systematic hypotheses testing, and theory building.”⁵⁰ In this research, the case study generates a theory to be applied to the financial services field which leads to the comparative process. Furthermore, the use of a case study is justified by the absence of legal sources in financial services, and it delimits the boundaries of the research.

The two main elements that construct a case study are: the theoretical basis and the practical unit.⁵¹ They are respectively represented by the Directive 2000/78/EC, which provides a protection against age discrimination at European level⁵² and the case law.

The Directive 2000/78/EC on equal treatment in employment and occupation is a legislation that, for the first time at European level, refers to age as a protected ground. The empirical research is conducted in order to understand how this legislation impacts on the social world. Therefore, a study on this Directive provides a theory for age discrimination, analysing its complexity and how the implementations in the Member States ensure the same protection. The analysis is formed by a qualitative doctrinal process of selecting and weighing materials taking into account the authority of the European Court of Justice (CJEU).⁵³ In this way, the qualitative research develops “a theory to provide a more useful understanding of the phenomenon.”⁵⁴ This framework addresses the relationships⁵⁵ between age discrimination as a legal concept and the interpretations of the

⁴⁶ Yin Robert, *Case Study Research: Design and Methods*, (Sage, 2009), p.186-199

⁴⁷ Donmoyer Robert, ‘Quantitative Research’ in Lisa M. Given (Ed.), *The SAGE Encyclopaedia of Qualitative Research Methods*, (Sage, 2008) p.714

⁴⁸ *ibid*

⁴⁹ Gable Guy, ‘Integrating Case Study and Survey Research Methods: An Example in Information Systems’ [1994] *European Journal of Information Systems*, Vol 3, N. 2, pp.112-126.

⁵⁰ Flyvbjerg (n.42), p. 301- 316

⁵¹ Wieviorka Michel, ‘Case Studies: history or sociology?’ in Charles Ragin and Howard Saul Becker (Eds.), *What is a case? Exploring the foundations of social inquiry* (Cambridge University Press,1992) p. 159

⁵² Sargeant Malcolm, *Age Discrimination: Ageism in Employment and Service Provision*, (Gower, 2011); Whittle Richard, ‘The framework directive for equal treatment in employment and occupation, an analysis from disability rights perspective’, [2002] *European Law Review*, vol. 27 n.3, p. 303-26

⁵³ Mcconville Mike, Chui Wing Hong, *Research Methods for Law*, (Edinburgh University Press, 2010) p.21

⁵⁴ Ezzy Douglas, *Qualitative Analysis: Practice and Innovation*, (Allen & Unwin, 2002) p.2

⁵⁵ Thomas Gary, *How to do your case study: a guide for students and researchers*, (Sage Publications, 2011) p. 14

European Court of Justice which form the case law body. In this way, the case study serves the purpose of the comparison.⁵⁶

The study analyses the meaning of age discrimination through a set of judicial decisions which build the theory.⁵⁷ Therefore, different case law discusses the evolution of the jurisprudence on age discrimination. Particular attention is given to ‘objective justification’ as provided by Article 6 of the Directive. On the basis of this article, different treatments are permissible when they are objectively and reasonably justified, appropriate and necessary to the achievement of a legitimate aim. In this way, Article 6 represents an important ground for discussion. In fact, compared to the other grounds of protection (such as direct sex or race discrimination), age is the only ground which allows justifications for both direct and indirect discrimination. Direct discrimination is defined as “a differential treatment based on a specific characteristic”,⁵⁸ while indirect discrimination is, “any provision, criterion or practice which is neutral on its face but is liable to adversely affect one or more specific individuals or incite discrimination.”⁵⁹ Nevertheless, during the evolution of age discrimination as a legal concept, the CJEU’s interpretations did not always receive positive feedback. The suspected nature of age as a discriminatory ground and the need to apply the proportionality test in age cases created the basis for different interpretations across Member States. The problem is that “a prohibition on age discrimination cannot be justified on traditional distributive or rights-based grounds, but can be justified on the grounds of fairness and social policy.”⁶⁰ In this way, the Court enhanced two types of legitimate aim. The first one is “intergenerational fairness”, which has a potential variety of meanings, depending upon the particular circumstances. The second type is “dignity”, which discusses whether older people can be involved in incapacity or underperformance processes. Hence, this study focuses on a shared understanding of the objective justification concept. This leads to question “why” such age justification exists, “how” it has been implemented by the Member States and “with what” result.⁶¹ Additionally, case law demonstrates that age discrimination as a legal concept has changed over the years on the basis of the social progress. Nowadays, the problem is embedded within the wider problem of the demographic ageing and the ongoing economic crisis.

⁵⁶ Stake Robert, ‘Qualitative case studies’, in Norman K. Denzin and Yvonna S. Lincoln (eds), *The Sage handbook of Qualitative Research* (Thousand Oaks, CA: Sage, 2005) p.28

⁵⁷ Eisenhardt Kathleen, Graebner Melissa, ‘Theory building from cases: opportunities and challenges’ [2007], *Academy of Management Journal*, Vol. 50 No. 1, p. 25-32

⁵⁸ Equal treatment in employment and occupation, ‘Summaries of EU legislation’ (*Europa.eu*, 2016) <http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c10823_en.htm> accessed on 2.07.2013

⁵⁹ *ibid*

⁶⁰ Jolls Christine, ‘Hands-Tying and the Age Discrimination in Employment Act’, [1996] Faculty Scholarship Series. Paper 1390.

⁶¹ Schramm, Wilbur, ‘Notes on case studies of instructional media projects’, (1971) Working paper for the Academy for Educational Development, <http://pdf.usaid.gov/pdf_docs/PNAAD824.pdf> accessed on 3.06.2013

5. The comparative research

A comparative research aims to increase the knowledge about different legal systems considering that “law is reasoned and not found”.⁶² In this way, a comparative research is necessary as it detects interesting connections between countries without adopting a bird’s eye view or a too narrow perspective. The aim of comparative law is to acquire knowledge from the plurality of the legal institutions, in order to establish to what extent the Member States are identical or different. Thus, we can understand social phenomena better when they are compared.⁶³

Legal anthropology is usually the science adopted for comparative legal research. It focuses on legal systems, law and law-like social phenomena across cultures. Nevertheless, legal anthropology is here considered a too positivist approach of investigation. In fact, it considers law as a prerequisite for the creation of a state. Instead, European law derives from the union of existing states which still keep their national laws and identities. In the spirit of a legal positivism, John Austin (1790-1859) formulated that: “the existence of law is one thing, its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”⁶⁴ According to Austin, the legal validity of a norm is not necessarily dependant on a morality. On the other hand, the source of law can be empirically verifiable as social facts, linking to an understanding of social reality which may vary among countries.

In this study the comparative research determines a direct comparison among different countries through a cross-national research.⁶⁵ A cross-national research (also known as cross-cultural), “occurs when researchers set out to examine phenomena in two or more countries (or regions) with the intention of comparing their manifestations in different socio-cultural settings, whatever they might be.”⁶⁶ It includes institutions, customs, traditions, value systems, lifestyles or language. From this first interpretation, comparing two or more legal systems might result in a purely descriptive exercise, mainly based on a socio-political analysis here represented by the law. However, while law can be descriptive it holds also a practical nature. Accordingly, the aim behind a comparative study is to understand the purpose of the law and its functions. In order to test the developed theory on age discrimination at a nation-level this study relies on a certain degree of pragmatism. Generally, in cross-national research, differences are attributed to cultural

⁶² McConville et al (n.53), p. 200

⁶³ Bryman, Bell (n.6), p. 72

⁶⁴ Bix Brian, ‘John Austin’, in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Spring, 2014) <<http://plato.stanford.edu/archives/spr2014/entries/austin-john/>> accessed 3.08.2014

⁶⁵ Bryman, Bell (n.6), p. 74

⁶⁶ Thorpe Richard, Holt Robin, *The SAGE Dictionary of Qualitative Management Research*, (Sage, 2008), p.68

variables.⁶⁷ Following a pragmatic approach, this process removes the nation-level variables from a culture theoretical model, providing more stability for the model developed by the case study. Therefore, each country's culture is not explicitly included in this comparative research, although it may be identified as a potential cause of the observed differences.⁶⁸ However, this might be a subject for future research.

This research questions the effect of the law and how it relates to other social and economic variables. Eventually, this cross-national research focuses on country legal identity, with involves economic and political implications within the country.

5.1 Country classification

In this research the three selected countries are compared on the basis of age discrimination in financial services. The countries involved are: United Kingdom, Italy and Austria. In choosing the countries for the comparison, several factors have been taken into account. Firstly, they are linked to the personal experience and the nationality of the researcher, who holds both Italian and Austrian citizenship, being able to speak their respective official languages. Secondly, these three countries differ considerably from each other on the grounds of population size, demographic ageing and the actual prohibition of age discrimination.

This study focuses on small number of countries as this allows a deep insight into nation-level factors. However, the disadvantage of having a small number of countries is a precluded generalization to all of Europe. Nevertheless, a comparison between just three countries can be defined as a “springboard for theoretical reflections about contrasting findings.”⁶⁹ Thus, a closer analysis of each legal system leads to questions about the justifiability of age discrimination in financial services. In fact, the research questions the consequences of equality goals⁷⁰ on economic trends and *vice versa*. In particular, the sample serves for testing the differences in financial services. For this reason the surveys of the different countries use the demographic ageing, the population size, age dependency ratio and the financial service provisions as units of analysis. Furthermore, the statistic underlines how part of the population is at risk of being economically inactive and possibly socially isolated. This links to the legitimate aim for justifying discriminatory practices in financial services.

⁶⁷ De Conick Julie, ‘Comparison in private patrimonial law: towards a bottom-up approach using (cross-cultural) behavioural economics’, in Maurice Adams and Jacco Bomhoff (Eds.) *Practice and theory in Comparative law*, (Cambridge University Press, 2012), p.258

⁶⁸ Cadogan John, ‘Comparative, cross-cultural, and cross-national research. A comment on good and bad practice’ [2010] *International Marketing Review*. Vol. 27 No. 6, pp. 601-605

⁶⁹ Bryman, Bell (n.6), p. 73

⁷⁰ Bell John, ‘Legal Research and Comparative Law’, in Mark Van Hoecke (Ed.), *Methodologies of Legal Research: which kind of method for what kind of discipline?*, (Hart Publishing, 2013) p. 158

The case study on Directive 2000/78/EC introduces to the difficult relationship between age discrimination and economic goals. In fact, while European law is interpreted as *super partes* in achieving equality, each Member States is responsible for fitting an equality goal within the economic and political balances. For this reason, the comparative approach serves the purpose of researching into the different relationships between politics and society. Instead, differences in culture are not considered as, “a cultural understanding is neither a precondition for undertaking comparative legal research nor necessarily the correct approach under all circumstances.”⁷¹ Overall, the difference between political positions and demographic developments are explained by a comparison which empirically investigates this relationship⁷². In this way, the analysis focuses on this variability applied to each political, economic and demographic context. Eventually, the goal is to determine the impact and the consequences of justifying age discrimination in financial services. In this way, similarities and differences between the three Member States are displayed at a macro sociological level.

5.2 Comparability and variables

Comparability is not a given concept, but it must be constructed. This study analyses a set of three cases within the European system to see how different sets of variables relate to each other. In this way, cases whose contexts are similar can be compared. The cases considered are three different national systems (United Kingdom, Italy and Austria) in the context of the European Union. Being members of the European Union, the three countries implemented Directive 2000/78/EC which protects against age discrimination in the employment field. Therefore, this study moves from the definition of age discrimination developed by the European Court of Justice (CJEU), applying it at national level in financial services.

As previously introduced, the data collected from the three countries are not used to generalize on age discrimination. Instead, the comparison lead to a critical function of national approaches challenging their national legal prejudices. Therefore, the goal is to interpret national policies or law on age discrimination in financial services, leading to quantification of age discrimination through a series of variables analysed in each country.

The independent variables are defined as those factors “influencing the behaviour of some other (dependent) factors.”⁷³ Independent variables are categorised as demographic changes, population size and age dependency ratio. The demographic variable is restricted to ‘age’ and in

⁷¹ Öricü Esin, Nelken David, *Comparative Law: A Handbook*, (Oxford: Hart Publishing, 2007). p.469

⁷² Pennings Paul, Keman Hans, Kleinnijenhuis Jan, *Doing Research in Political Science: An Introduction to Comparative Methods and Statistics* (SAGE, 2006) p. 33

⁷³ Chandler Daniel, Munday Rod, *A Dictionary of Media and Communication* (Oxford University Press, 2016), p.97

particular to people over 65 as this is the average retirement age in the three countries.⁷⁴ The population size is considered in terms of population structure and links to the ‘age dependency ratio’ concept. The latter is defined as the ration of dependents (people younger than 15 and older than 64) to the working age population (ages 15-64).⁷⁵

The dependent variables are found at national or institutional level and are related to those factors determining age discrimination. These variables are linked to age as a risk factor for financial providers. In this field age-based differentiations, age-limits and age-related measures are widespread.⁷⁶ Whether age discriminations can or cannot be justified for economic reasons is still under discussion. Contrasts are present where the economic interest of financial providers clashes with more age-friendly approaches. Nevertheless, these variables are not defined as a cause and effect relationship. In fact, the direction of causality cannot be assumed.

Finally, the comparison among variables leads to the question of whether a compromise on age discrimination can really be a vantage for national economies. In fact, it can be argued that government restrictions on the banking system impede the process of financial development, reducing economic growth.⁷⁷ On the other hand, age bands are explained by risk considerations and transaction costs. In these cases, age is used to lower transaction costs while preserving a pricing structure that reflect risks.⁷⁸ The comparative research answers this question comparing national management systems and local business customs in various countries, highlighting advantages and disadvantages of each system in the light of demographic ageing and population size. The main financial sectors of interest are insurance (both life and non-life) and banking, in relation to their closer link to ‘age as a factor of risk.’

5.3 Statistical methods

Statistical studies refer to a research method which permits to use quantitative analysis to generalise on demographic and economic trends. Data on the three countries are from a secondary source and in particular from national and European statistical offices. In this way, this approach highlights relationships, providing generalizable statements about the object of study. Nevertheless, the data

⁷⁴ United Kingdom: 65 for men; 62y 4 months for women; Italy: 66 for men; 66 for women; Austria: 65 for men; 60 for women; Commission, ‘Ageing Report: Economic and budgetary projections for the EU-27 Member States (2008–2060)’ Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG), p. 78

⁷⁵ See Council Resolution of February 2007, DOC 6216/1/07.

⁷⁶ O’Cinneide Colm, ‘Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age’, [2010] *Revue des Affaires Européennes*, Vol. 2 p. 253-276.

⁷⁷ Fry Maxwell ‘Financial repression and economic growth’ (1993) International Finance Group Working Paper No. 93/07 < http://www.asecu.gr/files/proceedings_10th_conference.pdf> accessed 20.03.2015

⁷⁸ Government Equalities Office, *The use of age-based practices in financial services*, (Oxera report, 2009) p. iii

derived from statistical studies reveal either a "snapshot" of the situation or possible predictions. It is therefore important to add meaning to these data.

As introduced above, cross-sectional studies offer weak evidence of a cause and effect relationship. This restricts the range of the variables measurable by this method. Instead, statistical methods can link to the amount of population. On the other hand, the case study provides a high conceptual validity of age discrimination although the statistical significance of the phenomenon is often unknown. Therefore, it can be assumed that the weaknesses of the case study are counterbalanced by adopting also a quantitative approach.

Case Studies

Strengths:

- Depth
- High conceptual validity
- Understanding of context and process
- Understanding of what causes a phenomenon, linking causes and outcomes
- Fostering new hypotheses and new research questions

Weaknesses:

- Selection bias may overstate or understate relationships
- Weak understanding of occurrence in population of phenomena under study
- Statistical significance often unknown or unclear

Statistical Methods

Strengths

- Breadth
- Understanding how widespread a phenomenon is across a population
- Measures of correlation for populations of cases
- Establishment of probabilistic levels of confidence

Weaknesses:

- Conceptual stretching, by grouping together dissimilar cases to get larger samples

- Weak understanding of context, process, and causal mechanisms
- Correlation does not imply causation
- Weak mechanisms for fostering new hypotheses

*Table 1 and 2: Flybjerg Bent (2011) p.314*⁷⁹

The validity and reliability of mixing quantitative and qualitative research is respectively given by “the consistency of a measure”⁸⁰ and the deep understanding of the concept. This approach can be linked to the ‘commonsensical’ view provided by Flybjerg. Accordingly, common sense leads to avoid the contrasts between quantitative and qualitative methods. In this way, case studies and statistical methods are not conflicting but complementary. In fact, in order to understand a phenomenon in any degree of thoroughness, as well as aspects such as cause and prevention, case studies are necessary. On the other hand, in order to understand how widespread the phenomenon is, how it correlates with other phenomena and varies across different populations, statistical studies are required.⁸¹ Consequently, the use of both is advisable in order to have a full understanding of the phenomenon of age discrimination.

The geographical area of this study involves three different populations and for this reason necessitates the use of secondary analyses and official statistics. The main advantage of a secondary analysis is the high quality of the data obtained, which assures a high degree of validity and reliability. Another advantage is the saving of cost and time in obtaining a range of good quality data. In fact, barriers to conducting comparative research are the cost and practical difficulties of doing research in different countries. Consequently, apart from autonomous statistical services at sub-national level, the following national official statistics will be used: “World Development Indicators”⁸² (WDI) which is the primary World Bank collection of development indicators, compiled from officially-recognized international sources; “EuroStat”⁸³ which is the statistical office of the European Union, “Office for National Statistics (ONS)”⁸⁴ which is the executive office of the UK Statistics Authority; “Istat”⁸⁵ the Italian National Statistical Institute; and “Statistik Austria”⁸⁶ the Austrian statistical office (*Statistisches Amt*).

⁷⁹ Flybjerg Bent, ‘Case Study’ in Norman K. Denzin and Yvonna S. Lincoln (Eds.), *The Sage Handbook of Qualitative Research*, (Thousand Oaks, 2011) Chapter 17, pp. 301-3016

⁸⁰ O’Cinneide (n.76), p.181

⁸¹ Flybjerg (n.79), p.313

⁸² The World Bank official website: < <http://www.worldbank.org/>>

⁸³ Eurostat official website: <<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home>>

⁸⁴ Office for National Statistics official website: < <http://www.ons.gov.uk/ons/index.html>>

⁸⁵ Istat official website: <<http://www.istat.it/en/>>

⁸⁶ Statistik Austria official website: < http://www.statistik.at/web_en/>

EuroStat, which is one of the most used resources, collects data from the National Statistical Institutes of the countries concerned. Subsequently, “all data are checked by *EuroStat*, compiled in the required form and, where applicable, harmonised with European Statistical System standards.”⁸⁷ Consequently, *EuroStat* provides a high level of reliability and consistency.

The reason that a statistical analysis on age discrimination has not been conducted by this research is explained by the need to understand its economic effects. In particular, secondary statistical sources provides an overview of the contexts where age discrimination occurs, addressing a deducibility otherwise not reachable only by case study. In particular, the advantage of statistical evidence is to add objectivity to the deeper understanding of age discrimination conducted by the case study. Accordingly, traditional survey research usually serves as a methodology of verification rather than discovery.⁸⁸

6. The interpretation of the analysis

The study concludes with an interpretation of the comparative analysis and the case study. From one hand, because long term economic growth occurs through increased capital (e.g. new investments), increase in working population, (e.g. through immigration, higher birth rate), and increase in labour productivity, government restrictions on the financial system might be an impediment in the process of financial development which might affect the economic growth.⁸⁹ On the other hand, more equality in financial services means financial inclusion for older customers, which in turn determines an enlarged market for the providers. In this way, the interpretation of the analysis connects the outcomes with the research question. Therefore, the qualitative findings of the case study and the quantitative results of the European framework of age discrimination in the employment field complete the investigation on age discrimination in financial services. It can be seen that the countries involved in the comparison demonstrate a fragmentation of age discrimination protection, especially in financial services, a field that plays an important economic role in current societies.

⁸⁷ Eurostat, *EU Labour Force Survey Database User Guide*, (Report, 2015) Volume 9: EuroStat & EuroStat Derived Variables. P. 2

⁸⁸ Bikson Tora K., ‘A Response to Attewell and Rule’ In Ken Kraemer (Ed.) *The Information Systems Research Challenge: Survey Research Methods* (Harvard Business School Press, 1991), pp.323-334

⁸⁹ Fry Maxwell, ‘Financial repression and economic growth’ (1993) International Finance Group Working Paper No. 93/07 < http://www.asecu.gr/files/proceedings_10th_conference.pdf> accessed 20.03.2015

Conclusion

This chapter discusses the research design of the study on age discrimination. It involves a mixed methods approach to be applied to an interdisciplinary methodology of legal research. It starts with a discussion of the philosophical worldview, adopting a pragmatic approach. Accordingly, the investigation addresses a rule of law about age discrimination in employment which is expected to develop also in financial services. The general rule of law about age discrimination in employment, derived from the European Directive 2000/78/EC, leading the researcher to question on the problem of justifying direct age discrimination in financial services. In fact, in this field the justification is found to be quite arbitrary. Moreover, accessing financial services involves important economic consequences especially in the light of demographic ageing. The aim is to understand whether the legal approach used in age discrimination in the employment field can be useful for understanding age discrimination in financial services and for lately encouraging an economic upturn. Therefore, the study includes a case study for the qualitative research, and the cross-sectional analysis in which quantitative research is included. The countries taken as a sample for the purpose of comparison are representative of three different political and socio-legal realities in which an age discrimination have a different impact. However, it seems important to underline that despite awareness of the law, its effects are not necessarily predictable. Thus, this research can also be a starting point for further developments, without the presumption to provide a definitive solution. Finally, taking into account the nature of age discrimination the aim is to provide a framework where the research can be directed without falling into a wider generalization of the phenomena.

CHAPTER 2: LITERATURE REVIEW

Introduction

Age discrimination is a complex concept. Discrimination based on age can be directed against all age groups and perceived ages, although more often it affects the young and the elderly, and it has both a social and a political dimension. Following the implementation of Directive 2000/78/EC on equal treatment in employment, age discrimination has become an increasingly important issue, and legislators have come to reconsider its legislative protection and the impact that such discrimination has on our society. Age discrimination has developed over time. Nevertheless, it is still linked to the principle of equality as a fundamental principle of the European Union. Consequently, the lack of legislation on age discrimination outside the employment field has raised a series of problems, especially in relation to its relationship with Directive 2000/78/EC. In these terms, while the proposal of the Directive¹ on equity is still a draft, demographic ageing is increasingly pushing economies towards reconsidering their structure. Accordingly, as will be demonstrated in the next chapters, negative stereotypes are not limited to the employment field. Instead, both stereotype and prejudice show their negative effects also in accessing goods and services. Therefore, the fact that older people in financial services are less desirable customers is pushing legislators to rethink their approach from both an economic and a demographic perspective.

This chapter is a literature review on age discrimination from a social perspective. It starts with an introduction followed by a review of terminology and of the distinction between “ageism” and “age discrimination” from a sociological perspective. This approach reinforces the connection between law and sociology, two disciplines that are inherently linked to each other. Nevertheless, the legal interpretation is expected to depart from a social definition of age discrimination. Accordingly, age discrimination is firstly identified as a sociological issue. Therefore, age stereotypes determine the age groups used for age bands in financial services. This chapter focuses on the social and historical background, which impacts on what is today understood as age discrimination. Therefore, the chapter introduces Directive 2000/78/EC, explaining the roots of age discrimination in the employment field. Consequently, it opens the discussion on the gap in legislation in relation to access to goods and services. Finally, the chapter introduces the reader to the related problems on a wider scale.

¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final

1. Age discrimination: overview

‘Age’ is considered to be a protected characteristic. Accordingly, European Directive 2000/78/EC on employment and occupation sets out

[A] general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment (Article 1).²

This Directive is particularly relevant to age discrimination, as it is the first European policy that explicitly prohibits discrimination on the grounds of age. Therefore, it is an important reference for the process of harmonizing age discrimination laws within Member States. Although age is considered alongside other characteristics, like gender, sexual orientation and disability, in reality protecting against age discrimination meets strong resistance. In addition to the normal difficulties of achieving equality aims, age discrimination links to policies, cultural habits and economic interests that tend to use age as a criterion for differentiating among the population. In this way, Directive 2000/78/EC sheds light on the strengths and weaknesses of such age-friendly legislation (on this point see Chapter 3). Nevertheless, thanks to this Directive, the debate regarding age discrimination has improved. Doctrines, leading cases and NGO papers continue to contribute to the discussion on unjustifiable treatment based on age. However, Directive 2000/78/EC focuses only on the employment field, covering age discrimination only partially. For this reason, in 2008 a legal proposal was developed that includes measures against age discrimination also beyond the workplace. This has been interpreted by many as an important step towards a completion of the age discrimination project, although the draft is still under discussion. The aim of Equal Treatment Directive (ETD) 2008³ is to implement the Principle of Equal Treatment of people irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426), extending in this way the material scope of Directive 2000/78/EC. The limits of its realisation have been identified in the difficulty of determining the limits of justifiable age discrimination, as introduced by Directive 2000/78/EC. In fact, such age-friendly policies raise questions regarding the effects of the principle of equality, especially within a European Social System that considers equality as one of its

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 1

³ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM (2008) 426, 2008/0140/APP.
<http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196> accessed 12.04.2014

priorities. In addition, the observed problem reveals that national and European laws, while in many cases overlapping, often contrast with one another because of the economic interests of individual nations. On the one hand, justifying age discrimination allows Member States a certain freedom in regulating the matter at issue. On the other, the limits dictated by human rights and fundamental principles are expected to impede Member States when it comes to developing their own tailor-made policies. However, this intervention by the EU in the affairs of individual nations will inevitably impact upon national economies. Thus, equality limitations due to economic developments are the main barrier to effectively tackling age discrimination.

Because of a widespread lack of awareness, it is not fully understood if the effects of prohibition can negatively affect national economies in the long term. In this way, it is important to underline how a general awareness is usually a consequential step to a legal intervention. For this reason, the Council of Europe responded to this request for awareness, designating 2012 as the European Year of Active Ageing, on the back of an expected new equality directive that will be capable of completing protections against age discrimination (for a detailed analysis of the Draft Directive, see Chapter 4 on age discrimination in financial services).

In order to understand age discrimination as a phenomenon, an analysis of the relevant European legislation is not the only interpretative key. Because the main case for justifying age discrimination is generally understood as a system based on a business view, then human rights positions tend to demonstrate that this reasoning is valid only in the short term. Beyond human rights policies and sociological positions often aim to protect individuals, despite economic interests, on the assumption that in the long term they will prevail. Approaches against age discrimination aim to reveal how a real awareness of the harmfulness of this phenomenon may also influence economic decisions. In the next chapters, it will be demonstrated that an older workforce, for example, is a valuable resource for the labour market, even though older workers at present tend to be marginalised. For this reason, the role of European policy is interpreted as extremely important.

“Unlawful age discrimination happens when someone is treated unfavourably because of their age, without justification, or is harassed or victimised because of their age.”⁴ This quote is a definition of age discrimination that reveals the extent of the problem under discussion. Nowadays, such discrimination is considered to be particularly severe because of widespread demographic ageing. Analysing the words of the quote, ‘unlawful’ implies that there exist both lawful and unlawful forms of age discrimination, the boundary between which is represented by economic

⁴ Definition available in Equality and Human Rights Commission (EHRC) official web site, under guidance regarding ‘Age’: < <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/age/>> EHRC is a non-departmental public body in Great Britain which was established by the Equality Act 2006 and came into being on 1 October 2007

justifications, as provided by Article 6 of Directive 2000/78/EC. In fact, ‘justification’ is at the heart of current doctrinal and political debates, which lead to questions regarding what the economic factors capable of justifying age discrimination might be. ‘Harassed or victimised’ describes those behavioural elements included in Directive 2000/78/EC⁵ that are not simply labelled as lawful or unlawful forms of discrimination, but that identify a series of shades around it. Starting from these definitions, the aim of this chapter is to introduce the existing infringements of older people’s rights through a review of what age discrimination and ageism mean. In this context, meaning is given by what a community understands age discrimination to be, taking as a starting point its sociological definition

2. Ageism and age discrimination

The purpose of this section is to define and understand the concepts of ageism and age discrimination, as complementary and not symmetrical terms. From an initial analysis it is possible to identify different views regarding their meaning. ‘Ageism’ was coined in 1968 by Robert N. Butler – a physician, gerontologist and psychiatrist – who identified it as “a stereotype to which people are subjected when they grow old”⁶. Moreover, he stated that “Ageism reflects a deep seated uneasiness on the part of the young and middle-aged – a personal revulsion to and distaste for growing old, disease, disability; and a fear of powerlessness, ‘uselessness’, and death.”⁷ Butler’s view of ageism is based on a mixture of elements such as age, class and race, which he placed at the basis of prejudice. Although the concept of ageism has subsequently been developed by other experts, the picture that Butler initially gave has the merit of considering and embracing many facets of ageism, standing as an embryonic discussion of multiple forms of discrimination.

More recently, Macnicol argued that ageism is a kind of discrimination involving respectively stereotypes and prejudice that are “directed against people of any age, although it is perhaps most egregious when directed at older people.”⁸ Subsequently, Thompson⁹ suggested that ageism is a sub-type of discrimination, whereby victims experience oppression purely on the grounds of age as a measure of competence. However, the definition of ageism that is most applicable to the present analysis is that proposed by the gerontologist, Bytheway. He differs from

⁵Council Directive 2000/78/EC which establish a general framework for equal treatment in employment and occupation. Text of the directive: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>>accessed 9.08.2015

⁶ Palmore Erdman, Branch Laurence, Harris Diana, *Encyclopaedia of ageism*, (Routledge, 2005), p. xv

⁷ Butler Robert, ‘Ageism, another form of bigotry’, [1969] *The Gerontologist*, vol.9, p.243

⁸ Macnicol John, *Ageism and Age Discrimination Some Analytical Issues*, (ILC-U, 2010), p.3-5

⁹ Thompson Sue, *Age Discrimination (Theory into Practice)* (Russell Housing Publishing, 2005), p. 77

the previous authors, believing that ageism encompasses both age prejudice and age discrimination.¹⁰ In fact, Bytheway considers age discrimination to be a denial of resources or opportunities as a result of being judged old, and age prejudice a stereotypical and negative view of people by the social community.¹¹ Specifically, it is the issue of lack of opportunities that is considered in the present investigation. Moreover, Bytheway contrasts with Butler's view, considering that ageism is not discrimination by dominant groups in society against one particular minority group.¹² In support of this theory, he considers ageism to be a denigration of the ageing process and stereotypical assumptions regarding competences and the need for protection. In an earlier book, Bytheway explained the basis of such stereotypical assumptions, commenting on the concept of chronological age, considered in this way to be an element that marks out classes of people who suffer the consequences of such denigration.¹³

If Bytheway considers stereotyping to be a formative element of age prejudice, which is a relevant logical progression, other authors, such as Breckler¹⁴, Eagly and Chaiken¹⁵ consider that it is possible to distinguish ageist attitudes through three distinct mechanisms, these being: prejudice (involving effects and emotions), discrimination (involving behaviour) and stereotyping (involving cognition). Following this theory, Cuddy and Fiske define stereotyping as "the cognitive structures that store our belief and expectations about the characteristics of members of social groups, and stereotyping the process of applying stereotypic information."¹⁶ Still, Cuddy and Fiske add that a social group affected by age discrimination is often subjected to stereotyped approaches; as explained by Macnicol¹⁷, this is due to their chronological age rather than their real personal growth and physical capacity. In fact, in Macnicol's view, ageism is "the application of assumed age-based characteristics to an individual, regardless of the individual's actual personal characteristics."¹⁸ Overall, it could be argued that although Bytheway's definition of ageism represents what this analysis assumes for age discrimination, the contribution of Macnicol, Cuddy and Fiske is essential

¹⁰ Bytheway Bill, *Ageism*, (Open University Press, 1995), p.142; Palmore Erdman, *Ageism: Negative and Positive*, (Springer Publications, 1999) p. 240

¹¹ Bytheway Bill, 'Age prejudice and discrimination', in George Ritzer (ed) *Encyclopedia of Sociology* (Blackwells, 2005), p.3

¹² Ibid p.1

¹³ Bytheway Bill, Johnson Julia, 'On defining ageism' [1990] *Critical Social Policy*, vol. 27, P. 27-39

¹⁴ Breckler Steven, 'Empirical validation of affect, behavior and cognition as distinct components of attitude', [1984] *Journal of Personality and Social psychology*, vol. 41, p. 656-670

¹⁵ Eagly Alice, Chaiken Shelly, 'Attitude structure and function' in Daniel Gilbert, Susan Fiske, and Gardner Lindzey (Eds.), *The handbook of social psychology* (McGraw-Hill, 1998), pp. 269-322

¹⁶ Cuddy Amy, Fiske Susan. 'Doddering, but Dear: Process, Content, and Function in Stereotyping of Older Persons', in Todd Nelson (Ed.) *Ageism: Stereotyping and Prejudice Against Older Persons*, (MIT Press, 2002) P. 3 - 26

¹⁷ Macnicol area of interest: ageing and social policy, age discrimination, the history of retirement; the rise of neoliberalism and its influence on social policy; the concepts of 'underclass' and 'social exclusion', particularly their historical dimensions.

¹⁸ Macnicol John, *Age Discrimination: An Historical and Contemporary Analysis*, (Cambridge University Press, 2006) P.6

for understanding the role of stereotyping and prejudice from a sociological perspective. Nevertheless, over the years a more negative perception of older people has developed. This is emphasized in Macnicol's recent works, where he argues that older people are frequently portrayed as a fiscal 'burden' with regard to their increased pension, and health and social care costs. It could be argued that this is a classical stereotypical perception, not based on personal characteristics, which are often underestimated.

An important question is that of how to measure age in order to identify a possible case of ageism. Bytheway and Macnicol both consider 'chronological age' to be an important element of ageism. According to an interesting study on longevity, and in agreement with the position of Cuddy and Fiske, self-perceptions of ageing can vary through an internalization of age stereotypes,¹⁹ avoiding their original connection with chronological age. In contrast with this theory, Macnicol's view clearly distinguishes between chronological age and an individual's actual personal characteristics. In the same way, Jenkins distinguishes between the concepts of individual and collective identity.²⁰ In the end, it could be argued that chronological age is the key to the problem of ageism as it has been traduced in 'age-identity' terms. This can be explained on the basis that age-identity is a kind of categorization to which people often feel they do not belong.²¹ On the other hand, many researchers, such as Midwinter, accept that "chronological age creates an identity that facilitates the organisation of their enquiries, even though they recognise that it may promote ageist stereotypes."²² Nevertheless, Midwinter's position has encouraged other authors, such as Andrews,²³ who disagrees with Midwinter, holding a different view as regards what chronological age represents. Eventually, in order to clarify the real extent of age discrimination, in 2007 the association 'Help the Aged' (now Age UK), aiming to assess age discrimination and promote age equality,²⁴ delivered a model that would help older people to start thinking about if and how they might have been discriminated against, whether directly or indirectly. Having identified how ageism and age discrimination can be defined, it is essential to focus on what forms of behaviour are prohibited.

¹⁹ Levy Becca, Slade Martin, Kunkel Suzanne, Kasl Stanislav, 'Longevity Increased by Positive Self-Perceptions of Aging' [2002] *Journal of Personality and Social Psychology*, Vol. 83, No. 2, 261–270

²⁰ Jenkins Richard, *Social Identity*, (Routledge, 1996) p. 3

²¹ Bytheway Bill, 'Age-identities and the celebration of birthdays', [2005] *Ageing & Society* Vol. 25.4, p.463-77

²² Midwinter Eric, 'How many people are there in the third age?' [2005] *Ageing & Society*, Vol. 2.1, P. 9–18.

²³ Andrews Molly, 'The seductiveness of agelessness' [1999] *Ageing & Society*, Vol.17.3, P. 301–18.

²⁴ Help the Aged, *How to age-proof: A model to assess age discrimination and promote age equality*, (Growing Older in Wales Initiative, 2007). <<http://www.ageuk.org.uk/pagefiles/7547/hta%20how%20to%20age%20proof%20eng.pdf>> accessed 15.09.2015

3. Discriminatory behaviour: stereotyping

Ageist behaviour has been defined by Psupathi and Loeckenhoff as “inaccurate negative attitudes and beliefs about ageing or older adults.”²⁵ This discriminatory practice introduces the concept of the stereotype, which, as defined by the Collins Dictionary, is a “standardised image or conception of a type of person”²⁶ that can be manifested at interpersonal, cultural and structural levels. This definition is corroborated by scholars, such as Nelson²⁷ and Thompson²⁸. Hence, to stereotype social groups or types of individuals is to standardize and simplify conceptions of groups based on prior assumptions. An example is the general tendency to consider older people incompetent or inappropriate to carry out tasks or to learn new things simply because they are over a certain age. As underlined by Bytheway, evidence of stereotypes regarding age have been identified in many aspects of life, besides the employment field: public spaces, the consumer marketplace, expectations regarding personal appearance, sexuality, household decision-making and public services. It is important to highlight how widespread the phenomenon is, even if it varies in intensity from one context to another, as a result of cultural differences between societies.

Negative age stereotypes are thought to be closely linked to social culture. According to Levy, “casual conversation in television advertisements often present the elderly either as close to childhood or close to death.”²⁹ The culture of a society is reflected in many aspects of social life, but marketing and media are perhaps the most immediate indicators of it. In this way, television “implement and involve consumers’ market across Europe, older people find their favourite leisure activity.”³⁰ Unfortunately, in many cases television incentivizes towards a specific target. Older people are often excluded from that target, and consequently do not recognize themselves in their own social culture. Programs and advertisements target age groups more economically active, or that have a more influential role in society. It could be said, following O’Cinneide³¹, that in our culture age has become “a material factor” typical of consumerist societies. Levy’s studies suggest that such negative stereotypes may also contribute to the health problems of elderly people. The

²⁵Psupathi Monisha, Loeckenhoff Corinna, “Ageist Behaviour”, in Todd D. Nelson (Ed.) *Ageism: Stereotyping and Prejudice Against Older Persons*, (MIT Press, 2002) p. 201-202

²⁶ The Collins Dictionary and Thesaurus 1988 < <http://www.collinsdictionary.com/dictionary/english/connell>> accessed 12.04.2012

²⁷Nelson Todd, ‘Ageism: Prejudice against our feared future self’ [2005] *Journal of Social Issues: Ageism*, Issue 61, Vol. 2, P. 207–22.

²⁸ Thompson Neil, *Anti-Discriminatory Practice: Equality, Diversity and Social Justice*, (Palgrave Macmillan, 2016) p.119

²⁹ Levy Becca, Banaji Mahzarin, ‘Implicit ageism’, in Todd Nelson (Ed.), *Ageism: Stereotypes and prejudice against older persons*, (MIT Press, 2002) P. 49 –75

³⁰AGE, “Age Barriers: Older people’s experience of discrimination in access to goods, facilities and services” [2004] *The European Older People’s Platform*, p.2

³¹O’Cinneide Colm, ‘Age discrimination and European Law’, [2005] *European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities*, Unit D.3, p. 22

close relationship between ageism and health problems was already highlighted by Robert N. Butler in 1969 when he set out his definition of ageism. As underlined in his book Butler provided an articulated and combined definition of ageism, which includes social life and health, and is applied to any type of age-based discrimination operating at several levels.³²

According to Palmore et al.³³ in order to avoid age discrimination, it is necessary to focus on culture and stereotyping as determining elements to be interpreted and transformed in order to anticipate discrimination trends. The success of such an approach will depend, firstly, on the levels of education and awareness within a population, and, secondly, on the strict enforcement of the relevant laws. In this way, the role of political forces will be decisive in managing age discrimination.

4. Age discrimination in the employment field

As previously noted, the fight against age discrimination is quite advanced in the employment field. This derives from the implementation of Directive 2000/78/EC. In fact, before this Directive, a widespread reduction in the participation of older people in the job market had been identified, particularly for older worker. As Maurer argues, “rapid changes in technology and in business strategies have meant that new skills are required of workers at midlife and beyond just to continue to perform their jobs.”³⁴ Hence, older workers have to cope with the challenge of acquiring new skills, in order to be competitive in the labour market. In fact, they are more likely to be stereotyped in respect to technology skills, because older people are thought to be unable to keep up with rapid technological changes. Thus, they are generally assumed to be less trainable, especially when compared with younger colleagues. In contrast, other cases show how stereotypes can create a mixture of results. Following a study by Ringenbach and Jacobs,³⁵ it was reported that older workers are perceived to be more reliable, stable and dependable than younger workers. On the other hand, Prenda and Stahl³⁶ argued that older workers are expected to have higher rates of absence due to poor health. Overall, on the basis of these different interpretations, it appears that the age factor is in any case a variable. The advantages or disadvantages of this variable depend on a job’s priorities and on the expectations of employers. Nevertheless, it must be underlined how in

³² Loretto Wendy, Duncan Colin., White Phil, ‘Ageism and employment: Controversies, ambiguities, and younger people’s perceptions’ [2000] *Ageing & Society*, Vol. 20(3), p. 279-302.

³³ Palmore Erdman, Branch Laurence, Harris Diana, *Encyclopaedia of ageism*, (Routledge, 2005), p. 246

³⁴ Maurer Todd, ‘Career-relevant learning and development, worker age, and beliefs about self-efficacy for development’ [2001] *Journal of Management*, Vol. 27, p. 123-140.

³⁵ Ringenbach Kat, Jacobs Rick, ‘Development of age stereotypes in the workplace scale’ (Society of Industrial and Organizational Psychologists Conference, Nashville, 1994)

³⁶ Prenda Kimberly, Stahl Sidney, ‘The truth about older workers’ [2001] *Business and Health*, pp. 30-37

some circumstances it is the job type or the employer that dictates what the employee's characteristics should be. Shen and Kleiner³⁷ reported cases where older workers are discouraged by how job vacancies are advertised, or where they are told that they are 'over-qualified' or 'over-experienced.' In such cases, it is likely that the intended vacancy is aimed at workers of a certain age, and that older workers will not even apply.

In 2010, the Daily Mail Reporter³⁸ argued that the negative economic trend that characterised the last two decades was necessarily connected with older people's low income due to the 'pension gap.' Pensions have become an increasingly serious problem, especially in light of the early retirement policies that are quite widespread across Europe, and which are often justified by unemployment problems. Thus, this statement sounds more like a paradox than an explanation. In this way, early retirement is supposed to "provide a convenient way of reducing the size of the older workforce"³⁹ expecting lower levels of unemployment among the young only at the expense and benefit of more leisure time among the old. This has been justified mainly by the fact that older employees, because of their greater experience, often receive higher remuneration, which is then reduced by replacing them with younger workers, saving on the employee's total labour costs. In particular, those who encourage older workers to retire earlier overlook some distinctive traits within the same cohort, such as a worker's educational background, competence and future needs.⁴⁰

4.1 Age discrimination in access to goods and services

As Help the Aged⁴¹ reports, discriminatory situations affect the quality of life of older people when, for example, public transport services do not provide suitable structures, or when buildings and public places do not have enough seats or enough toilets, discouraging older people from using them. Both the structure of public transport systems and the availability of financial support to enable older people to use public transport are important factors, and are closely linked

³⁷Shen Gene, Kleiner Brian, 'Age Discrimination in Hiring', [2001] Equal Opportunities International, Vol. 20, p.28

³⁸Daily Mail Reporter, 'People on low income face biggest pension gap', (*Daily Mail*, 2010) <<http://www.dailymail.co.uk/news/article-1315628/People-low-income-face-biggest-pension-gap.html>> accessed 15.03.2012

³⁹ Gruber Jonathan, Wise David, *Social Security Programs and Retirement around the World: Fiscal Implications of Reform*, (University of Chicago Press, 2009) p.204

⁴⁰ OECD, 'Helping Older Workers Find and Retain Jobs', [2011] in OECD (Ed.) *Pensions at a Glance: Retirement-income Systems*, (OECD Publishing, 2011) <http://dx.doi.org/10.1787/pension_glance-2011-8-en> accessed 10.01.2013

⁴¹ Help the Aged, *Forgotten Voices: Engaged communities and active citizenship*, (Nielsen//NetRatings Report, 2007), P.4 <[http://www.ageuk.org.uk/documents/en-gb/for-professionals/research/forgotten%20voices%20\(2008\)_pro.pdf?dtrk=true](http://www.ageuk.org.uk/documents/en-gb/for-professionals/research/forgotten%20voices%20(2008)_pro.pdf?dtrk=true)> accessed 12.02.2102

with the problem of social isolation among the elderly.⁴² In fact, older people often do not have a driving license, do not feel able to drive or cannot find adequate driving insurance. There is evidence to suggest that community participation and social activities are reduced among those over the age of 74, mainly due to mobility and health problems, but also to financial resources.⁴³ Such examples underline the importance of maintaining age-friendly public facilities and financial services.

What Maurer has highlighted with regard to the role of new technologies in the employment field is also valid for problems associated with accessing goods and services. A lack of confidence towards technology can be an important obstacle for older people. Situations where inexperience in computer use (including mobile phones) or in household appliances are widespread, and can lead to social isolation. On the other hand, as demonstrated by AGE,⁴⁴ the media demonstrate a reluctance to include older people in customer targets, despite their increasingly important role in social culture. This lack of inclusion, reflected in our culture, shows how we rarely consider older people to be an “interesting” part of the population. According to Nelson this is prejudice against our future selves.⁴⁵ The social inclusion problem, aside from the lack of technological skill, is part of a series of problems associated with the ageing process, including poor health, depression, living alone in rented accommodation, childlessness and low income. In particular, it is important to underline that widows are more vulnerable because of the negative impact that losing a husband has on income and access to services. Age-related issues are not only connected to transport and social isolation. *Help the Aged* (now *Age UK*) also reports that banks and building societies have attempted to sell inappropriate and complicated products rather than products which would suit older people’s needs. The financial inclusion of older people creates barriers in accessing “all the financial institutions and services through which economic life is transacted.”⁴⁶ In some cases financial services provide age barriers, excluding customers over a certain age from bank accounts or loans at reasonable rates. The same problem of age discrimination occurs in the field of insurance, especially for motor and travel insurance, where prices are calculated on the basis of a customer’s age. In fact, because

⁴² Government Equalities Office, *The use of age-based practices in financial services* (Oxera Consulting report, 2009) <[http://sta.geo.useconnect.co.uk/pdf/The use of age-based practices in financial services Executive summary.pdf](http://sta.geo.useconnect.co.uk/pdf/The%20use%20of%20age-based%20practices%20in%20financial%20services%20Executive%20summary.pdf)> accessed 12.02.2012

⁴³ Smeaton Deborah, Vegeri Sandra, *Older people inside and outside the labour market: A review*, (Policy Studies Institute, Equality and Human Rights Commission Research Report, 2009) P.95 <https://www.equalityhumanrights.com/sites/default/files/research_report_22._older_people_inside_and_outside_the_labour_market_a_review.pdf> accessed 12.03.2012

⁴⁴ AGE, *Age Barriers: Older people’s experience of discrimination in access to goods, facilities and services* (The European Older People’s Platform Report, 2004) p.4

⁴⁵ Nelson Todd (n.27) p. 207–22.

⁴⁶ Fitzpatrick Barry, Kingston Irene, *Older people’s access to financial services* (The Equality Commission for Northern Ireland Report, 2008) <[http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/OLDERPEOPLEFinancialservices\(F\).pdf](http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/OLDERPEOPLEFinancialservices(F).pdf)> accessed 21.01.2012

providers often encourage a particular age group with offers or special prices (often older people whose reduced income does not make them a desirable customer), other groups must support the whole price in order to permit such market strategies.

Furthermore, the role of age in financial services is generally used to assess the risk of a customer. Financial providers tend to defend a wrongly-held preconception that earning expectations are incompatible with the risks associated with older customers.⁴⁷ Nevertheless, it is believed that the assessment must be done by reference to ‘relevant’ information ‘from a source on which it is reasonable to rely,’ and not only on chronological age. Snyder and Miene identified two approaches that can explain such ageist conduct. These are, respectively, the functional perspective and terror management.⁴⁸ The “functional perspective” explains the negative attitudes towards older adults as an ego-protective function for stereotyping individuals. On the other hand, “terror management” theory is based on cultural considerations, which tend to associate older people with death. This terror management theory was particularly favoured by Greenberg, Schimel and Martens in order to understand and justify age prejudice.⁴⁹ These two theories appear to be particularly fitting in the context of financial services. In particular, older customers are labelled as ‘risky’ for financial providers, not in the light of real information but by virtue of age prejudice. Eventually, the implications of age prejudice in financial services determine relevant consequences both for providers, customers and society as a whole. In other words, because of demographic ageing, age prejudice is leading to the exclusion of an increasingly large proportion of a country’s population.

5. Demographic ageing

Ageing has been defined by gerontologists as the accumulation of changes in a person over time.⁵⁰ The general trend of developing countries, and in particular of countries within the European Union, tends towards demographic/economic problems with important consequences. As expressed by Kalache, Barreto and Keller, “we are growing old before we become rich,”⁵¹ which creates

⁴⁷ Sargeant Malcolm, *Age Discrimination: Ageism in Employment and Service Provision*, (Gower Publishing, Ltd., 2011), p. 63

⁴⁸ Snyder Mark, Miene Peter ‘Stereotyping of the elderly: A functional approach’ [1994] *British Journal of Social Psychology*, vol.33, P. 63–82.

⁴⁹ Greenberg John, Schimel Jeff, Martens Andy, ‘Ageism: Denying the face of the future’, In Todd Nelson (Ed.), *Ageism: Stereotyping and prejudice against older persons* (MIT Press, 2002) pp. 27–48

⁵⁰ Bowen Richard, ‘Living and dying for sex. A theory of aging based on the modulation of cell cycle signalling by reproductive hormones’ [2004] *Gerontology*, Vol. 50 .5, P. 265–90.

⁵¹ Kalache Alexandre, Barreto Maria, Keller Ingrid ‘Global Ageing: The Demographic Revolution in All Cultures and Societies’, in M. Johnson (ed.), *The Cambridge Handbook of Age and Ageing*. (Cambridge University Press, 2005) pp. 30–47.

complicated and challenging conditions. Demographic change involves the ageing of society as a result of lower birth and mortality rates. This will help understand how a population's age structure "is adjusting to changes in living conditions."⁵² In particular, the increasing ageing of a population tends to lower both labour-force participation and savings rates which inevitably raises concerns about the "future slowing of economic growth."⁵³ In order to proceed with this demographic analysis, a theoretical consideration is needed.

The concept of "Demographic Transition" (DT) provides the theoretical basis with which to understand the magnitude of a changing population, which in the past has entailed the move from an agricultural to an industrial society. A number of theories on demographic history were initially developed in 1919, thanks to the American demographer Warren Thompson. Thompson pointed out that in previous industrialized societies, this transition was at first characterised by significant birth and death rates, which then decreased in parallel with economic and welfare improvements. Therefore, he contended that the welfare of a population was directly proportional to its demographic growth.

Furthermore, Bongaarts has distinguished between two phases that are divided by peaking birth rates, which then slow down.⁵⁴ Accordingly, 1980 was the midpoint year for this population growth, considering that the following decrease in birth rates is still under way. In Europe, this demographic shift is known as the "baby boom" phenomenon, a time-period that lasted approximately from 1946 to 1964, and which was marked by an increase in the number of births resulting from the economic upturn following World War II. Nevertheless, it must be noted that nowadays the "baby boom" generation is moving into its 60s/70s, and will soon approach retirement age. Thus, slow population growth, coupled with the ageing of the baby boomers, will produce a shift in population age structure as a whole. In summarising the theory of demographic transition, Kirk argues that it involves "society's progress from a pre-modern regime of high fertility and high mortality to a post-modern regime of low fertility and low mortality."⁵⁵

⁵² Linz Kathrin, Stula Sabrina 'Demographic change in Europe - An Overview', (2010) Working paper no. 4 of the Observatory for Sociopolitical Developments in Europe, Institute for Social Work and Social Education <http://www.sociopolitical-observatory.eu/uploads/tx_aebgppublications/Working_Paper_no_4_Observatory_Demographic_change_in_Europe_Overview.pdf> accessed 17.11.2012

⁵³ Bloom David, Canning David, Fink Günther, 'Implications of Population Aging for Economic Growth' (2011) PGDA Working Paper No. 64, <http://www.hsph.harvard.edu/pgda/WorkingPapers/2011/PGDA_WP_64.pdf> Accessed 11.11.2012

⁵⁴ Bongaarts John, 'Human population growth and the demographic transition' [2009] *Philosophical Transactions of the Royal Society: Biological Sciences*, Vol. 364, p.2985–2990

⁵⁵ Dudley Kirk, 'Demographic transition theory' [1996] *Population Studies*, Vol. 50, N.3, p. 361-387

Furthermore, the report produced by the United Nations⁵⁶ buttresses Kirk's position, arguing that the demographic shift is mainly related to national economies. Thus, if the figures in the report clearly imply that economic trends influence society in a significant way, then it could be argued that population ageing sets down new challenges for economic growth, especially in industrialized economies, where younger workers do not contribute significantly to national development. According to the UN report, the world population was more than 6.9 billion in July 2011, with 82 per cent of us living in less developed regions. This translates into a higher number of people and higher birth rates in those countries that are economically dependent upon industrialized ones. On the other hand, industrialized countries need to deal with a shrinking labour force as a result of lower birth rates and the fact that older workers have been employed in the wrong type of job. By way of comparison, in 1950 only 8 per cent of the world's population was aged 60 years and over; by 2011 that proportion had risen to 11.2 per cent, with a 22 per cent peak expected by 2050. The UN report also foresees that the number of older people – aged 60 years or over – will increase by a factor of 2.6, passing from 784 million in 2011 to more than 2 billion in 2050.

Tellingly, if lower birth rates significantly affect the age structure of a population, then this inevitably leads to a higher percentage of older people, raising the age of the active labour force. Thus, the principal factors considered by Grundy⁵⁷, as variables of demographic ageing, are: a decline in fertility rates (low birth) and life expectancy (low mortality), and a higher life expectancy among older people. Europe is facing an increasingly asymmetrical age structure that involves all the stages of life and which should be tackled by governments with due attention. On the other hand, other authors, such as Grant,⁵⁸ consider other factors to be important, such as cohabitation, marriage, divorce and childbearing, which may affect employment and economic growth. Bloom, contending that the link between population ageing and the macro-economic performance of a country is mediated by the institutional context, underlines the importance to the ageing process of the role played by governments in adjusting retirement policies, pensions and health care, financing, labour and capital markets, and the structure of regional and economic systems. This unstable balance is due to the fact that our current social system is focused on the middle-aged, rather than on a wider perspective. Then, legal intervention in matters of equality should be parallel to the on-

⁵⁶ United Nations, 'World Population Prospects: The 2010 Revision, Highlights and Advance Tables' (2011) United Nations, Department of Economic and Social Affairs, Population Division Working Paper No. ESA/P/WP.220. <http://esa.un.org/unpd/wpp/Documentation/pdf/WPP2010_Highlights.pdf> Accessed on 13.12.2012

⁵⁷ Grundy Emily, 'Population aging: causes and consequences', [2006] London School of Hygiene and Tropical Medicine, P.87 <http://www.cas.uio.no/Publications/Seminar/Complexity_Grundy.pdf> Accessed on 13.12.2012

⁵⁸ Grant Jonathan, Hoorens Stijn, Sivadasan Suja, Van Het Loo Mirjam, DaVanzo Julie, Hale Lauren, Gibson Shawna, Butz William, *Low Fertility and Population Ageing Causes, Consequences, and Policy Options*, (European Commission Report, 2004). P. 12-13. <http://www.rand.org/pubs/monographs/2004/RAND_MG206.pdf> Accessed on 13.12.2012

going demographic revolution, and be able to change the priorities of a society, in order to combat a system based on the resources of young adults or middle-aged people. However, the issues that are impacting upon productivity levels in European countries are calling for an active role to be played by older people. Encouraging new solutions, especially in light of the new challenges derived from the current economic crisis, appears to be a matter of urgency.

6. Economic policies and demographic change

The demographic/economic influence on age discrimination can be conceptualised in two distinct ways. Dealing with age discrimination in employment, Sargeant reveals a mechanism of functional and non-functional approaches to this issue.⁵⁹ In particular, “these two approaches cause confusion when considering the practical measures to be taken.”⁶⁰ The author agrees with the United Nations’ report on *World Population Ageing*⁶¹ in which it is argued that the factors causing the ageing process are: people living longer and a decline in birth rates. This report considers the ‘demographic foundation’ as the basis for evaluating further strategies. In fact, the report’s main findings reveal an ageing process that is unprecedented, and “without parallel in the history of humanity;” a process that is pervasive, “since it is affecting nearly all the countries of the world;” which is profound, “having major consequences and implications for all facets of human life;”⁶² and which is enduring: “since 1950, the proportion of older persons has been rising steadily,”⁶³ and is expected to accelerate in the near future, particularly in developing countries.

The functional approach delineated by Sargeant creates a connection between the ageing process in the workforce and the increase in unemployment among older workers. In these terms, the demographic revolution creates a gap within the older generation: the workforce is negatively stereotyped inside the labour market and, at the same time, retirement expectations are lower. Thus, the functional approach reveals a weakening of the principle of equal treatment for the advantage of ‘better businesses’. This approach leads to the question of whether the functional approach could be adapted also beyond employment law, especially in accessing financial services. An example, in this regard, is represented by the UK Government Equalities Office, which proposed that insurance

⁵⁹ Sargeant, Malcolm, *Age Discrimination in Employment*, (Gower Publishing, 2006), P. 18-19

⁶⁰ Sargeant Malcolm, ‘For Diversity: against discrimination – the contradictory approach to age discrimination in employment’ [2005] *International Journal of Comparative Labour Law and Industrial Relations* vol.21.4, P. 629 <<http://droitsocialupx.free.fr/articles/Sargeant%20Directive%20EU.pdf>> accessed 15.04.2012

⁶¹ United Nations, ‘World Population Ageing’ (2009), United Nations Department of Economic and Social Affairs Working Paper ESA/P/WP/212 P.xxv. <<http://www.un.org/esa/population/publications/WPA2009/WPA2009-report.pdf>> accessed 15.04.2012

⁶² Ibid.

⁶³ Ibid.

providers should be legally required to use age not as a 'chronological age limit' but in a way that linked to the likelihood of a person making a claim and the likely cost of that claim.

The relationship between economic policy and demographic change has been much debated. In this way, it is possible to distinguish between a "pessimist", a "neutralist" and an "optimist" view. The "pessimist" view, which has been rejected by economists since the early 1980s, considers that population growth restricts economic development. As explained by Ehrlich, demand outstrips the supply of fixed resources.⁶⁴ In this way, the rejection of such a theory is based on the fact that resources are no longer considered fixed, but have been improved by technological innovations. As cited by Bloom⁶⁵, the new "optimist" trend shows that rapid population growth can lead rapidly to positive effects on economic development. In addition, a study carried out by Healy considers that "in industrialised societies older people are active and productive rather than 'a burden' upon society and will continue to play a valuable role in the future."⁶⁶ Healy also argues that "Ageing should be viewed as a natural part of the life course and population ageing as a transition not a crisis," and that there are many benefits and new opportunities emerging from an ageing population. In support of her thesis, "the International Plan of Action on Ageing 2002" supports the enormous potential of ageing, and aims to ensure that "persons everywhere are able to age with security and dignity and to continue to participate in their societies with full rights."⁶⁷

However, on the basis of economics and the statistical analysis of population and economic growth, the "neutralist" view embraces a vision where population ageing is still an issue, but scaled down in the wider environment. This last conclusion reveals how, in the end, these different perspectives agree unanimously that economics plays an important role in social cohesion. Still, Bloom considers that "proponents of population pessimism, optimism, and neutralism can all fall back on theoretical models and more or less robust data to support their positions."⁶⁸ For Grant, this view criticised the economic indicators of the European Commission concerning poverty levels and unemployment. Grant continued, arguing that economics goes beyond poverty-stricken families and financially secure individuals, considering that those most at risk of poverty are marginalised groups, including women and minorities. In any case, legal clarity should be encouraged in order to

⁶⁴ Ehrlich Paul, Ehrlich Anna, 'The population bomb revisited', [2009] *The Electronic Journal of Sustainable Development* Vol.1.3, p. 52

⁶⁵ Bloom David, Canning David, Sevilla Jaypee, *The demographic dividend. A new perspective on the economic consequences of population change* (2003) *The Debate over the Effects of Population Change on Economic Growth* (Rand document, MR-1274), p. 15

⁶⁶ Healy Judith, 'The benefits of an ageing Population' (2004), Australian National University Discussion Paper Number 6. P.39. <http://www.tai.org.au/documents/dp_fulltext/DP63.pdf> accessed 22.04.2012

⁶⁷ Commission, 'Europe's response to World Ageing. Promoting economic and social progress in an ageing world. A contribution of the European Commission to the Second World Assembly on Ageing' (Communication) COM(2002) 143 final - <<http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=URISERV%3Ac11910>> accessed 21.05.2014

⁶⁸ Bloom (n.65) p. 16

protect older people, as an even more significant proportion of the population will depend upon the contribution they make.⁶⁹ Aside from the functional approach, Sargeant also considered the ‘non-functional approach,’ which sets out that “discriminatory treatment is wrong and such treatment cannot be justified on the grounds of age.”⁷⁰ This approach will now be analysed.

7. Equality in access to goods and services

“If age discrimination is driven to a large degree by “irrational” ageism then it may be an even more intractable problem than politicians and policy makers are willing to concede.”⁷¹ The problem is to determine whether age discrimination should be tackled using a functional or a non-functional approach. Article 1 of Directive 2000/78/EC introduces the definition of equal treatment, which is generally accepted for all the protected characteristics included in the Directive, even if its application to age issues is more complicated.

Difficulties in defining age discrimination boundaries reveal a bigger problem when age discrimination needs to be justified. In this way, the extent of a discriminatory circumstance falls within sociological presupposes and should not be hidden by too simplistic discrimination policies. The key question here is whether age discrimination should be justified in favour of other public benefits, thus directed to the whole community and not just a particular age group. An example is provided by the issues related to the field of financial services. As stated above, it is permitted to use age as a risk parameter. The non-functional approach, as identified by Sargeant, suggests that “discriminatory treatment is wrong and such treatment cannot be justified on the grounds of age.”⁷² It could be said that the non-functional approach reflects the meaning of freedom from discrimination, which, following the view of Lawrence M. Friedman, should be “plain and simple, an aspect of civil rights, of human rights.”⁷³ In contrast with this definition, Sargeant⁷⁴ reports that where a civil/human rights perspective is considered to be a too simplistic rule, harder to be implemented. Hence, if Friedman intended age discrimination and civil/human rights to be a

⁶⁹Department for Work and Pensions, *Opportunity age: meeting the challenges of ageing in the 21st century*. (2005) London: DWP. <http://www.dwp.gov.uk/opportunity_age/> accessed 22.04.2012

⁷⁰ Sargeant Malcolm (n.59) p.21

⁷¹ Carmichael Fiona, Dobson John, Ingham Barbara, Prashar Arvin, Sharifi Sudi, ‘Ageism & Age Discrimination: Some Current Workplace Issues’ (2006) Discussion Paper, *ESF Workshop Researching Ageism and Employment* Salford Business School, <http://www.mams.salford.ac.uk/PWO/Projects/Ageism-Employment/papers/pdf/ageism_age-discrimination_current-issues.pdf> accessed 12.06.2013

⁷² Sargeant Malcolm (n. 59) p.21

⁷³ Friedman Lawrence ‘Some Remarks on the American Experience’, in Sandra Fredman and Sarah Spencer (Eds.) *Age as an Equality Issue: Legal and Policy Perspectives*, (Hart Publishing, 2003) P. 223

⁷⁴ Sargeant Malcolm. ‘Book review: Age discrimination - Ageism in employment and service’ (*HRZone*, 2014) <<http://www.hrzone.com/lead/culture/book-review-age-discrimination-ageism-in-employment-and-service-provision-by-malcolm>> accessed 12.04.2105

“binomial” of the non-functional approach, then the strength of his position is that it puts age and other fields of discrimination at the same level, contrasting any possible justification in order to implement anti-discrimination laws. In support of this thesis, it could be argued that differences in the whole discriminatory field exist, where, for example, Article 6 of Directive 2000/78/EC permits or ‘justifies’ both direct and indirect age discrimination, unlike the other discriminatory fields, or where the anti-discrimination legislation covers only the employment field and not access to goods and services. As Swift underlined:

[T]he legislation targeted only at employment issues undermines any credible argument that it is aimed at removing the real inequalities resulting from age. This only serves to emphasise the paradox that the present political climate creates.⁷⁵

In this way, it was argued that the existing employment legislation on age does not identify a characteristic of a specific minority group, removing it from the decision-making process. For Swift, “the regulation seeks only to prevent reliance on it for purposes that are ‘illegitimate’ or if the consequences of doing so are disproportionate,”⁷⁶ considering that the practical application of the justification defence shapes the substantive meaning of equality in this area. Thus, the aim is to understand when, according to the justification defence, a ‘bad’, as opposed to a ‘good’, form of discrimination occurs. Nevertheless, a closer examination of the meaning of “substantive equality” is appropriate.

In the traditional approach of national legal systems, the concept of equality is associated with a system of formal rules. Academic debates and recent constitutional reforms have developed a different concept of equality, in which are considered the richness and variety of modern human relations, in addition to the subtle characteristics that can lead to discrimination and disadvantage.⁷⁷ Following Barnard and Hepple, the conception of formal equality reflects the concept of less favourable treatment or consistent treatment. As included in most of the regulations (regarding sex, race, religion or disability), this concept embodies a notion of procedural justice which does not guarantee any particular outcome. In this way, the role of a comparator that gives the extent of the discriminatory behaviour seems to be essential. Still, Barnard and Hepple support the idea that a more substantive approach to equality of opportunity requires a range of other special measures, usually referred to as "positive action", in order to compensate for disadvantages. Positive action

⁷⁵ Swift Jonathan, ‘Justifying Age Discrimination’, [2006] *Industrial Law Journal*, p. 228-244

⁷⁶ *Ibid.*

⁷⁷ Equal Rights Trust, ‘The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality’ (*Equal, Rights Trust*, 2007), <<http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf>> accessed 12.04.2013

should be distinguished from positive discrimination. “Positive action” means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. While “positive discrimination” is taken to mean “explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit.”⁷⁸

Directive 2000/78/EC confirms the possibility, both for direct and indirect forms of discrimination, of “objective justification by a legitimate aim,” and that “the means of achieving that aim are appropriate and necessary”. Hence, Article 6 of the Directive proposes three justifiable forms of treatment on the grounds of age, which, at first sight, seem to be in opposition to any principle of equality. Such a recommendation seems to be in-keeping with Sargeant’s interpretation of a ‘pragmatic’ form of equal opportunity, which allows differential treatment, usually for business and economic reasons, and which is not just about removing measures that treat one age group less favourably than another.”⁷⁹ Nevertheless, a question that still needs to be considered is that of how close age discrimination and human/civil rights concepts are to one another.

Fredman recognizes that notions of equality tend to be more open-ended in human-rights documents where, on the other hand, the functional approach tends to delimit its boundaries.⁸⁰ The human rights argument takes into account the injustice done to people who suffer disadvantages as a result of a characteristic that, in the case of age, is immutable and un-chosen. In this way, Megret,⁸¹ highlighted how justice and dignity are the main argumentations to be developed in defence of older people. In support of this view, in 2009 the Human Rights Council Advisory Committee recommended a study on the “need to protect the human rights of the older person in the context of a human rights framework,”⁸² a study that was aimed at re-addressing age discrimination within the boundaries of human rights. Moreover, the need to protect all age discrimination fields (and not only employment law) was felt to be indispensable as a result of increasing fragmentation along group lines (women, children, the disabled, migrant workers, indigenous peoples, sexual minorities, etc):⁸³ “not only functional...often qualitative, suggesting subtle but often significant

⁷⁸Department for Communities and Local Government, *Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, (2007) Consultation Paper, p.61.

⁷⁹ Ibid, P.2

⁸⁰ Fredman Sandra, ‘Age of Equality’, in Sandra Fredman and Sarah Spencer (Eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) P. 223

⁸¹ Megret Frédéric ‘The human rights of older persons: a growing challenge’ [2011], *Human Rights Law Review* Vol. 37, P.2

⁸²Chinsung Chung, ‘Implementation of Sections III and IV of the Annex to Human Rights Council Resolution 5/1 of 18 June 2007: Agenda and annual programme of work, including new priorities: The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person’ (2010) Working paper Human Rights Council Advisory Committee (‘Chinsung Chung Report’), 4 December 2009, A/HRC/AC/4/CRP.1, at para 1.

⁸³ Mégret Frédéric, ‘The Disabilities Convention Human Rights of Persons with Disabilities or Disability Rights?’ [2008] *Human Rights Quarterly* P.494.

differences in which the rights of various groups should be treated.”⁸⁴ Hence, the human rights position considers age discrimination as part of this phenomenon of fragmentation.

The political paradox, previously underlined by Swift, can be explained by using Megret’s idea of fragmentation in favour of the process of removing inequality. More specifically, it could be explained that, for example, particular genders or people with a disability have been recognized as distinct groups that require special care. In the same way, the elderly must be recognized as a distinct group requiring special attention.⁸⁵ From a human rights point of view, the first step is to conceptualise the rights of older people, defining them as a distinct population. In arguing this, Megret recognizes the difficulties of defining ‘old age’. Hence, he aims to enhance a view of a category that is formed by objective, but also subjective and relational, factors, which help to construct old age as a category. In this way, it is suspected that the problem lies on a more general and cultural ground.

To some extent, the functional approach to human rights has been seen as a way of solving a political issue, where “most elderly rights groups might object to a limited concept of societies’ duties to them, preferring instead that greater attention be given to issues of autonomy and personal liberty.”⁸⁶ In this way, the supporters of such a position hope for an international treaty against age discrimination, which, as interpreted by Megret, would “address state parties rather than the whole range of actors that might conceivably violate/promote rights.”⁸⁷

7.1 Proportionality

While the human rights position seeks a new international treaty regarding the elderly, Fredman proposes another solution, which can be applied to age discrimination in access to goods and services. She anticipates the need for an analysis on proportionality as a principle for distinguishing legitimate from illegitimate instances. It is assumed that not all distinctions are discriminatory. This principle has been considered as a valid alternative to the general aim of distinguishing between invidious discrimination and appropriate differentiation. The term “Proportionality,” as used by Fredman, becomes in this way the key for mediating against an “all-or-nothing” approach to human rights⁸⁸, encouraging a more elastic approach. The intensity of proportionality should depend upon the acceptability of a restricted view of equality, in a sense that should be examined if no other alternative or rational explanation is good enough to support it. In

⁸⁴ Megret Frédéric (n.81), P.3

⁸⁵ Chinsung Chung (n.82) para 1

⁸⁶ Fagan Aimee ‘An Analysis of the Convention on the International Protection of Adults’ [2002] *Elder Law Journal*, Vol. 10 P. 336

⁸⁷ Megret Frédéric (n.81), P.3

⁸⁸ Fredman Sandra (n.80) P.59

this way, alternative or rational motivations are often given by economic exigencies, especially in the case of age, where, according to Fredman, distinctions are not necessarily invidious.

8. Conclusion

In conclusion, employment policies and antidiscrimination law involve a conflict of two standards: one that aims to protect the dignity of older people against stereotyping and, on the other hand, economic rationale. The use of age factors for economic purposes is quite widespread, rather than challenged as it uses age as a distinctive characteristic. Issues strongly emphasized in this literature review are: the need to think about age-friendly policies in the long term; the need to maintain the relevance of older workers' skills; the need to ensure access to financial services in order to secure a good lifestyle and avoid social isolation. Accordingly, the following problems are worth considering: the justification of age-related differential treatment in employment; the leniency with which age discrimination is treated in respect to other forms of discrimination. In some cases, financial institutions exclude people over a certain age, compromising bank accounts or loans at reasonable rates. However, approaching age discrimination in financial services through the rationale of Article 6 of Directive 2000/78/EC could be dangerous, as it could be read as a purely economic approach, which, however, would not be a successful strategy in the long term due to the inequalities that would upset the balance of a whole population

CHAPTER 3: DIRECTIVE 2000/78/EC ON EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

Introduction

Age discrimination within European Union law finds its main legal reference in the Employment Equality Framework Directive 2000/78/EC (hereinafter ‘the Directive’). Thanks to this Directive, European institutions have, for the first time at European level, recognised the problem of age discrimination within the employment field. Once Directive 2000/78/EC was issued it appeared immediately necessary to understand how to balance human rights and economic interests. Age discrimination, by its nature, is in fact linked to both social and employment policies. Accordingly, the Gordian knot is represented by Article 6 of Directive 2000/78/EC, which allows justification - both direct and indirect - for age discrimination, when a legitimate aim is provided and the means chosen to achieve that aim are proportionate and necessary. Justifying age discrimination can lead to interpretive problems on what can be considered a legitimate aim and on which are the appropriate and necessary circumstances that justify it, according to the wording of Article 6. In this way, Member States have often referred to the Court of Justice of the European Union (CJEU) for requesting preliminary rulings directed to guarantee a good balance between national law and European goals through an appropriate interpretation of Directive 2000/78/EC. Through the case law the CJEU was called to assess the principle of proportionality, which requires an adequate balance between correct provision and state or public interest.

A good understanding of the jurisprudential development of the CJEU pronouncements on age discrimination and the ‘economic justification’ allowed by the Directive to Member States is the main aim of this chapter. Economic justification is also analysed in the next chapter which focuses on age discrimination in financial services and which require a full awareness of European trends on current age discrimination in employment. Thus, the European definition of equality and the principle of non-discrimination law in relation to age assume a relevant role for its further development. Accordingly, the legislation directed to prohibit age discrimination took its first steps from the principle of equal treatment which is now at the basis of the current anti-discrimination directives. Initially, the principle of non-discrimination towards individuals developed as a complement to market integration. However, while the Internal Market and Monetary Union have

succeeded beyond expectations, the social aspect remains a concern for EU institutions.¹ This harmonization process on a social scale appears an ambitious goal as difficulties relate both to a widespread lack of social awareness and to possible negative impacts in already successful contexts. For example, Schwartz underlines how in looking for transferable policy solutions, the Scandinavian system is one of the most successful cases of welfare states that, even in the face of severe macroeconomic constraints, does not generate popular dissatisfaction.²

In order to provide a better social cohesion the first challenge for European policies is to combine, in a unique 'European Social Model', different constitutional approaches to equality. The second challenge is the relationship between employment and social protection, which in this chapter is addressed through analysis of the European Employment Strategy. Thus, this chapter provides an introduction to the problem of ageing population associated with the European commitment to building a European Social Model, starting from an analysis of the previous policies. In the mid '90s, the European answer to the problem of ageing population was the European Employment Strategy. The most recent approaches were then introduced by two European strategies: the Lisbon Strategy, followed by Europe 2020, which is still in operation. The study on Directive 2000/78/EC follows this European social analysis and represents the heart of the chapter. It provides an introduction to the Directive and to its legal fundamentals. Due to the introduced changes of the Lisbon Treaty, both Article 19 of the Treaty on the Functioning of European Union and the Charter of Fundamental Rights are analysed here as the legitimising sources of the Directive. The analysis continues on the related case law. In this way, it is questioned whether age discrimination can be intended as a general principle, starting from the first leading cases: *Mangold*³, *Bartsch* and *Küçükdeveci*. They provide an interesting overview on how the CJEU developed its approach to age discrimination over the years. After the introduction to Article 6 of the Directive, which deals with the justification of age discrimination, the case law provides further examples on how the CJEU has considered age discrimination in respect to the general principle of equality and in contrast with national legislation of Member States. In this way, *Palacios de la Villa* and *Age Concern* are two important cases which are analysed by this study. Finally, the paragraph on the role of comparator aims to shed light on the existing difficulties in determining the existence of age discrimination, particularly when other areas of discrimination, like sex, are more easily identifiable.

¹ Scharp Fritz, 'The European Social Model: Coping with the Challenges of Diversity' (2002) MPIfG Working Paper 02/8, Max-Planck-Institute for the Study of Societies. <<http://www.mpifg.de/pu/workpap/wp02-8/wp02-8.html>> accessed 22.01.2014

² Schwartz Harold M. 'The Danish 'Miracle'. Luck, Pluck, or Stuck? [2001] Comparative Political Studies, Vol. 34, No. 2, p.131-155

³ Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981

1. The European Social Model

The term European Social Model (ESM) describes the European experience of promoting a high standard living together with good work conditions and economic growth. In 1994 the White Paper on Social Policy⁴ reported that the European Social Model “is a specific combination of comprehensive welfare systems and strongly institutionalised and politicised forms of industrial relations.”⁵ The pillar of the ESM is Article 8 of the Treaty of the functioning of the European Union (TFEU). It states that the Union, in all its activities ‘shall aim to eliminate inequalities, and to promote equality, between men and women’. Thus, ESM is an interpretation of the principle of non-discrimination and anticipates the protection later provided by Directive 2000/78/EC against age discrimination

The disparities existing among Member States on their own interpretation of the principle of equality have often led to further criticisms, especially in social areas likely to have a strong impact on national economies. On this point, the European Commission expressed that: “as concerns age, there are situations where treating someone differently simply because of their age can be justified in the general public interest.”⁶ Therefore, while the European Social Model combats discrimination it allows exceptions. In this way, the principle of equality is mitigated by national legislations and economic interests. Nevertheless, the period before Directives 2000/78/EC was characterised by an increasing awareness that European economic goals could be completed only with a social cohesion. This debate focused on the role played by social policies and the link with economy.

1.1 The European Employment Strategy (EES)

The Second World War was followed by a flourishing period with a raise of birth rate and wellbeing, so called the ‘baby boom’ (see the first chapter). As a consequence of this new trend, the population started to grow and a new policy order was established to redistribute the economic and human resources. Indeed, the importance of combining economic and social progress was represented by the idea that “competitiveness and solidarity have both been taken into account in

⁴ European Commission, *European Social Policy: a Way Forward for the Union* (White Paper, 1994) Office for Official Publications of the EC. <http://aei.pitt.edu/1118/1/social_policy_white_paper_COM_94_333_A.pdf> accessed 26.03.2015

⁵ Grahl John, Teague Paul ‘Is the European social model fragmenting?’ [1997] *New Political Economy*, Vol. 2, no. 3, p. 405-426.

⁶ Commission, the Council, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities: A renewed commitment (Communication) {SEC(2008) 2172} /* COM/2008/0420 final */ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0420>> accessed 14.09.2016

building a successful Europe for the future”⁷. However, despite the initial enthusiasm on this social and economic duality,⁸ it was soon discovered that it implies also a certain degree of ambiguity.⁹ Thus, it was evidenced that while economic policies were progressively Europeanized “social-protection policies remained at the national level.”¹⁰

The European Employment Strategy (EES) dates back to 1997, “when the EU Member States undertook to establish a set of common objectives and targets for employment policy.”¹¹ The introduction of the new “Employment” chapter in the Treaty on European Union and the subsequent European Employment Strategy (EES) are considered as the European responses to the structural problems and macroeconomic difficulties of the 1990s. EES was first discussed by the European Council in 1994. It was then followed by the Amsterdam Treaty (1997) that included the new chapter on the "Employment" title in the Treaty on European Union (TEU). After this inclusion, the Heads of State and Government launched EES at the Luxembourg Jobs Summit for improving four pillars: employability, entrepreneurship, adaptability and equal opportunities at the level of the European labour market. However, the EES’s developments reached a pinnacle with the Lisbon Strategy in March 2000¹² when employment, social cohesion and competitiveness were combined in terms of ‘sustainable development’. Therefore, EES was a ‘soft law’ mechanism,¹³ which is intended as a quasi-legal instrument: without any legally binding force.¹⁴ It was directed to improve employability, entrepreneurship, adaptability and equal opportunities at the European labour market level.¹⁵ Thus, the European Employment Strategy (EES) coordinated the employment policy of the Member States,¹⁶ becoming its cornerstone.

In 2004 a High Level Group, headed by Mr Wim Kok (former Prime Minister of Netherlands), discussed the inadequacy of the Lisbon Strategy in relation to the problem of ageing

⁷ Commission, *European Social Policy - a way forward for the union*, (White Paper, 1994) COM (94) 333 Final, Brussels 27.07.1994. Available online: < http://europa.eu/documentation/official-docs/white-papers/pdf/social_policy_white_paper_com_94_333_a.pdf> last access 22.01.2014

⁸ Eurofound, “European Social Model” (*EuroWork*, 2011) < <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialmodel.htm>>

⁹ Jepsen, Maria, Amparo Serrano Pascual, ‘The European Social Model: an exercise in deconstruction’ [2005] *Journal of European Social Policy*, 15, p. 231-245

¹⁰ Scharp Fritz W., (n.1), p. 5

¹¹ Commission, ‘European employment strategy’ (Employment, Social Affairs and Inclusion, 2016) < <http://ec.europa.eu/social/main.jsp?catId=101&langId=en>> accessed 14.09.2016

¹² Begg, Iain, *Lisbon II, Two Years on: An Assessment of the Partnership for Growth and Jobs* (Special CEPS Reports, 2007), available online < <http://aei.pitt.edu/11752/1/1521.pdf>> last access 15.02.2014

¹³ EurWORK (The European Observatory of Working Life), ‘European Employment Strategy’ (Eurofound, 2010) <<http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-employment-strategy>> last access 13.07.2015

¹⁴ Senden Linda, *Soft Law in European Community Law*, (Hart Publishing, 2004), p.110

¹⁵ Adnett Nick, ‘Modernizing the European Social Model: Developing Guidelines’ [2001] *Journal of Common Market Studies*, Vol. 39, No. 2, p. 353- 364

¹⁶ The European Employment Strategy Working to improve employment in Europe

population¹⁷. Due to the demographic ageing, the increasing demand for better health care and pensions combined with a reduced workforce have revealed the inefficacy of the Lisbon Strategy, which was only tangentially dealing with these long-term issues. This lack of attention to the ageing issue has determined a critical standpoint. Consequently, in 2005 EES it was re-launched by the Barroso Commission with the aim to adapt to the needs of an ageing population and to better address the employment goals¹⁸. In these terms, EES raised the problem of aging population as a priority targeting employment and social problems as fields of growth “likely to affect the sustainability of economic growth.”¹⁹ Nowadays, the European Employment Strategy constitutes part of the Europe 2020 growth strategy.

Employment policy, labour market and vocational training objectives are part of the main focus of two European strategies which have worked in the direction of a good balance between social awareness of discrimination and a desirable economic upturn. Thus, the analysis of these strategies focuses on these three fields which in turn embed the legitimate aim that justify age discrimination, which is discussed later. This analysis is directed to understand the guideline of European social progress.

2. The Lisbon Strategy

The Lisbon Strategy (hereinafter ‘the Strategy’) was introduced in 2000 as a ten-year “action and development plan”²⁰ (from 2000 to 2010) for “modernising the European social model, investing in people and combating exclusion.”²¹ Overall, by addressing social challenges it helped to improve the EU’s competitiveness and economic performance. Prior to this, employment policies, social and environmental protection were put aside in favour of other European issues, such as: internal market, entrepreneurship, fiscal consolidation and research capacity. In 2000 the Heads of State and Government of the EU decided “to make the EU the most competitive and dynamic knowledge based economy in the world capable of sustaining more and better jobs and with greater social

¹⁷ The High Level Group chaired by Wim Kok, *Facing the Challenge: the Lisbon strategy for growth and employment* (Report, 2004), ch 1. <http://europa.eu.int/comm/lisbon_strategy/index_en.htm> last access 12.03.2014

¹⁸ The Barroso Commission was the European Commission in office from 22 November 2004 until 31 October 2014.

¹⁹ Commission, ‘Employment and Social Developments in Europe 2013’, (Year’s review: Publications Office of the European Union, 2014), Directorate-General for Employment, Social Affairs and Inclusion, p.24 <<http://ec.europa.eu/social/publications>> accessed 14.09.2016

²⁰ European Council *Lisbon European Council 23-24 March 2000. Presidency conclusions.* (Summit n. 14, 2000) <http://www.europarl.europa.eu/summits/lis1_en.htm> accessed 14.09.2016

²¹ Commission, ‘Communication from the to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Social policy agenda’ (Communication) /* COM/2000/0379 final */ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52000DC0379>> accessed 14.09.2016

cohesion.”²² As consequence, the Lisbon Strategy was translated into a policy instrument. Accordingly, the European Council underlined²³ there was the need to improve the following key areas: growth, employment and social inclusion (later retained in the Lisbon Treaty)²⁴. However, these challenges required a strategy in line with the competitive pressures of a growing globalised economy. The programme endorsed in 2005, “Growth and jobs: working together for Europe's future”²⁵, reported the Commission’s disappointment in the first five years of the Lisbon Strategy, especially in the employment field. So unsatisfactory was the Lisbon Strategy considered to be that new actions were identified which required a rewrite of the Strategy, with main weaknesses being growth, jobs and the governance procedure. Consequently, this required new knowledge and an innovation process as an engine for sustainable growth. However, this new version of the Strategy was criticized as a merely redundant attempt. It was argued²⁶ that the re-launch only simplified the initial aims, leaving the same complex structure in addition to an “unclear division of responsibilities and tasks, particularly between the EU and national levels.”²⁷ This last consideration emphasizes the point that social protection and a sustainable economic growth cannot be reduced to a mainly economic matter.

The Organisation for Economic Co-Operation and Development (OECD)²⁸ enriched this discussion adding that a knowledge based economy “can raise the returns on investment, which can in turn contribute to the accumulation of knowledge”²⁹ in terms of resource of richness. Specifically, the OECD interprets social advancement as an economic richness, and thus promotes policies that will improve the economic and social well-being of people around the world. Consequently, it is understandable that the OECD expressed a negative opinion of the Lisbon Strategy, sustaining that it involves an incomplete policy mix.³⁰ Thus the OECD prepared an ‘innovation strategy’ for revisiting the Lisbon Strategy, with key challenges including social services for ageing populations directed to achieve productivity and service improvements that can

²² European Council (n. 20)

²³ Ibid.

²⁴ Rodrigues Maria João ‘Europe, Globalization and the Lisbon Agenda: An Introduction’, in Maria João Rodrigues (ed.), *Europe Globalization and the Lisbon Agenda*. (IEEI 2009) p. 1-19.

²⁵ Commission, ‘Working together for growth and jobs- A new start for the Lisbon Strategy’ (Communication To The Spring European Council) COM(2005) 24 final , 2 February 2005

²⁶ Barnard Catherine, *EC Employment Law*, (Oxford University Press, 2012), p.156

²⁷ Commission, *Lisbon Strategy evaluation document* (Commission Staff Working Document, 2010)

SEC(2010) 114 final < http://ec.europa.eu/europe2020/pdf/lisbon_strategy_evaluation_en.pdf> last accessed 22.04.2015

²⁸ OECD, *The Knowledge-Based Economy*, (OECD, 1996), p. 7

²⁹ ibid

³⁰ Padoan Pier Carlo, Speech by OECD Deputy Secretary-General INCOM (Workshop on Innovation and Growth Policy in the EU, Prague, 22-23 January 2009)

benefit society.³¹ In these terms, improving the conditions for ageing people was interpreted as a long term investment. Thus, the OECD derived from the Lisbon Strategy that managing an ageing population was considered seriously enough.

This awareness grew also among the European institutions and determined more ‘age-friendly’ judicial approaches. The *Mangold* case³² of 2005 represents one of the first interpretations of age discrimination as a general principle of EU law. Nowadays, the Lisbon Strategy is archived and overtaken by Europe 2020, but it remains an important testimony of EU progress towards equality, in which is already visible the fight on economic grounds of future anti-discrimination legislations.

3. Europe 2020

The Treaty of Lisbon (not the Lisbon Strategy, these two names can be confused) was signed in 2007 and entered into force on 1st December 2009, emphasizing the importance of the principles of non-discrimination and equality as fundamental principles of EU law.³³ The Treaty of Lisbon is, nowadays, recognised as the solid legal framework for European renovation, despite the important role played by both the Lisbon Strategy and its successor Europe 2020. These latter two strategies have, in fact, the merit of having developed the European social dimension and complement the current anti-discrimination measures. Despite the Lisbon Strategy focusing on the quality of jobs and social cohesion, it was criticised for too narrow perspectives upon employment and economic growth. Thus, the following Europe 2020³⁴ strategy aims to overcome the economic crisis³⁵ through a better promotion of growth, employment and sustainability of public finance. It was promoted by the European Commission in 2010 for the next 10 years, and is in line with the European Social Model (ESM) in promoting a greater social cohesion and a more sustainable environment.

Europe 2020 shows more awareness on the link between economic outcomes and social progresses. Accordingly, “competitiveness and solidarity have both been taken into account in

³¹ OECD, *Innovation And Growth: Rationale For An Innovation Strategy* (OECD, 2009) Available online: <<http://www.oecd.org/science/inno/39374789.pdf>> accessed 13.07.2015

³² Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981

³³ Ellis Evelyn, ‘The Impact of the Lisbon Treaty on Gender Equality’ (2010) *European Gender Equality Law Review* No. 1, 7-13.

³⁴ Commission, ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ (Communication) COM (2010) 2020 final, 3 March 2010. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>> accessed 12.01.2014

³⁵ Višnja Samardžija, Hrvoje Butković, *From the Lisbon Strategy to EUROPE 2020* (Institute for International Relations (IMO), 2010), pp.312 <http://www.dubrovnik.hr/HUPG/conference_dubrovnik2013/keydocuments/From%20the%20Lisbon%20Strategy%20to%20Europe%202020.pdf> accessed 10.01.2014

building a successful Europe for the future.”³⁶ Nevertheless, the success of Europe 2020 depends also on the level of integration and coherence between all relevant areas, with particular reference to social, employment and economy. In this way, two main concerns of Europe 2020 are: the employment rates and the accelerated demographic ageing. Therefore, thanks to Europe 2020 the general employment rate is expected to raise to at least 75% as part of the priority of restoring a solid, stable and healthy financial sector able to finance the real economy. However, this can be quite challenging. The European Commission reports that the registered employment rate in Europe is at 69% for those aged 20-64, significantly lower than in other parts of the world. In particular, only 46% of older workers (55-64) are employed compared to over 62% in the US and Japan.³⁷ These data are particularly alarming when we consider that the number of people aged over 60 is now increasing twice as fast as it did before 2007.³⁸ Therefore, the combination of a reduced working population and a higher share of retired people will, in fact, place additional strains on welfare systems, stressing the financial crisis and weakening the competitiveness of Europe. Overall, the analysis of the Lisbon Strategy and Europe 2020 explains the roots of Directive 2000/78/EC, highlighting the link between social progress and economic outcomes.

4. Directive 2000/78/EC on equal treatment in employment and occupation

The Employment Equality Framework Directive 2000/78/EC is a secondary legislation that for the first time, at European level, explicitly prohibits age discrimination in the employment field. Although it is a significant achievement for European equality, the actual protection against age discrimination is partial, and historical and economic backgrounds explains this incompleteness.

Important historical phenomena, such as post-World War II and the ‘baby boom’ reshaped both demographic and welfare balances. Since the end of the baby boom era (which has been calculated around a decade after the end of World War II) there has been a decrease in birth rates and a lengthening of life expectancy. In this way, “half of the population growth between 2005 and 2050 in Europe will be due not to births, but rather the fact that increasingly more people are living longer and longer.”³⁹ Consequently, the European economic and political settings suffered from this

³⁶ Commission, ‘European Social Policy - A Way Forward for the Union’ (A White Paper) COM (94) 333 final, 27 July 1994. < http://europa.eu/documentation/official-docs/white-papers/pdf/social_policy_white_paper_com_94_333_a.pdf> accessed 19.01.2014

³⁷ Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, (Communication) COM(2010) 2020 final

³⁸ Doling John, Elsinga Marja, *Demographic Change and Housing Wealth:: Home-owners, Pensions and Asset-based Welfare in Europe*, (Springer Science & Business Media, 2012) p.6

³⁹ Linz Kathrin, Stula Sabrina ‘Demographic change in Europe - An Overview’, (2010) Working paper no. 4 of the Observatory for Sociopolitical Developments in Europe, Institute for Social Work and Social Education

dramatic change of direction, facing a lack of working resources and an increase in public expenditure.⁴⁰

4.1 Age as a protected ground

Since life expectancy increased and the retirement period lengthened, the early exit of older workers from the labour market grew exponentially. In this way, older workers, capable and willing to work, are pushed outside the labour market by age limits, by retirement policies or by unsuitable labour conditions for the living habits of older age. Nevertheless, this discriminatory mechanism is often justified or simply accepted by virtue of economic interests.

Justifying discrimination occurs at different levels: on the grounds of widespread erroneous beliefs and on legal grounds. The “lump of labour fallacy” is an example of erroneous belief. It is the name given by economists to a widespread conviction that reducing the amount of working years for older workers in favour of the younger ones makes it possible to create jobs. Thus, it is believed that the increase of economic productivity of a country passes through the retirement of older workers and through the increment of youth and dynamic work.⁴¹ Therefore, the lump of labour theory caused an increase in the number of retired workers, determining a number of changes in the provision of pension benefits and creating serious problems in national economies. This problem is represented by the stress inflicted on retirement systems and by increased tax pressure. Therefore, the discussion focuses on whether encouraging older workers to retire would really help their younger peers in finding a job, especially given that the job left by the older workers could not be suitable for the younger ones.

Older workers are at an important stage of their life. They embody the knowledge and the richness of a life spent working. Rather than allowing them to leave the labour market, society should benefit from their experience and capitalize on their knowledge. Accordingly, the inactivity of older workers could be risky on two grounds: firstly, it can jeopardize the system of social transfers between generations. In fact, in our society there is a permanent overlap of exchange and transfers between the existing generations.⁴² Secondly, the lump of labour fallacy can reduce attention on the other mechanisms behind the youth unemployment rate. Finally, treating differently

<http://www.sociopolitical-observatory.eu/uploads/tx_aebgppublications/Working_Paper_no_4_Observatory_Demographic_change_in_Europe_Overview.pdf> accessed 17.11.2012

⁴⁰ Lahey Joanna , ‘International Comparison of Age Discrimination Laws’ [2010] *Research on Aging* vol.32, p. 679

⁴¹ Sargeant Malcolm, *Age Discrimination in Employment*, (Gower Publishing, 2006), p.114

⁴² Kessler Denise, ‘Preventing Conflicts between Generations: for an Active Management of the Allocation of Resources between Generations’ [1996] *The Geneva Papers on Risk and Insurance*, Vol.21 No. 8, p.444

those who share a protected characteristic – in this case age – can further consolidate a discriminatory attitude both in terms of employability and training opportunities.

Directive 2000/78/EC provides a legal justification which permits justification of certain discriminatory situations as long as there is a legitimate aim. Accordingly, legitimate aims are intended as “legitimate employment policy, labour market and vocational training objectives.”⁴³ Article 2 (a) of the Directive recognises that a “direct discrimination shall be taken to occur where one person is treated less favourably than another has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.”⁴⁴ However, for all the protected grounds listed in Article 1 of Directive 2000/78/EC (religion or belief, disability, sexual orientation) only indirect discriminations can be justified. Article 2(b) provides that:

[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.⁴⁵

Article 2(b)(i) reports the general exception to indirect discrimination: “that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”⁴⁶ Nevertheless, age is the only ground on which both direct and indirect discrimination can be justified. Article 6 makes explicit reference to age:

Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.⁴⁷

4.2 The Treaty on Functioning of European Union

⁴³ Art. 6(1) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Available online: < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>> last access 12.03.2014

⁴⁴ Article 2, Directive 2000/78/EC

⁴⁵ Article 2 (b), Directive 2000/78/EC

⁴⁶ Article 2 (b) (i) Directive 2000/78/EC

⁴⁷ Article 6, Directive 2000/78/EC

Directive 2000/78/EC lays its foundation in following relevant primary sources: Article 19 of the Treaty on Functioning of European Union (TFEU) and Articles 21(1) and 25 of the Charter of Fundamental Rights (CFR).⁴⁸ The relevance of these two sources is confirmed by the European Commission, which describes how Directive 2000/78/EC is only “a framework” of the general principle of equal treatment, while the fundamental principles are enclosed in the Treaties.⁴⁹ However, as EU legislation gives specific expression to fundamental rights, Articles 19 TFEU, 21(1) and 25 of CFR need to be analysed in the light of the prohibition of age discrimination. This analysis finds its rationale where antidiscrimination measures encounter a limit when social protection clashes with economic interests.

The European interests on equality were already highlighted by the Treaty of Rome in 1957, which established the European Economic Community.⁵⁰ In particular, it required equal pay between men and women. However, it was not until the 70’s that the raised cases on sex equality⁵¹ started to provide the basis for antidiscrimination legislations. In fact, the founding Treaties did not contain any specific provisions on fundamental rights. In this way, the protection against sex discrimination grew over the years thanks to new Directives and the jurisprudence of the European Court of Justice. It was only in 1997 that the Treaty of Amsterdam took appropriate actions to combat discrimination introducing Article 13 to the EC Treaty and antidiscrimination law was expanded also to racial or ethnic origin, religion or belief, disability, age and sexual orientation. Prior to this, equality was limited to Article 141 EC (ex Article 119) on the principle of non-discrimination between men and women in relation to equal pay and Article 12 EC (ex Article 6) in relation to nationality. Thus, new Article 13 introduced by the Amsterdam Treaty invited “the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament” to “take appropriate action to combat discrimination.” The opinion of Advocate General Maduro on the *Coleman* case highlights how “Article 13 EC is an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination”.⁵²

⁴⁸ Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364)

⁴⁹ Commission, ‘Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’)’ (Report from the Commission to the European Parliament and the Council, 2014) {SWD(2014) 5 final} <
http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf> accessed 14.09.2016

⁵⁰ Treaty establishing the European Economic Community, EEC Treaty - original text (non-consolidated version) <
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0023>> accessed 14.09.2016

⁵¹ On this point see: Case C-43/75 *Defrenne v. SABENA*, [1976] ECR 455, 8 April 1976. The CJEU considered it a case of sex discrimination, ECJ highlighted both the economic and social dimension of the Union, and that non-discrimination assists in progressing the EU towards these objectives.

⁵² Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, Opinion of A.G. Poiares Maduro, Paragraph 8

When the Lisbon Treaty came into force in 2009, Article 13 EC was amended and replaced by Article 19 of the TFEU. Nowadays, Article 19 does not directly prohibit discrimination but enables the Council to adopt measures to combat the closed list of discrimination: “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁵³ This list suggests a horizontal relation among the prohibited grounds.⁵⁴ Nevertheless, an assumed hierarchy among the grounds has created some conflicts both in judicial and doctrinal fields.⁵⁵ In the *Chacon Navas* case,⁵⁶ Advocate General Geelhoed sustained that the intention of the legislator was not to rank the discriminatory grounds, but to allow an identification of the prohibited formal inequalities. In *Mangold* judgement (which will be analysed in depth below) the Court of Justice of the European Union (CJEU) sustained how the principle of non-discrimination on the grounds of age must be regarded as a general principle of Community Law.⁵⁷ Therefore, it implies a horizontal relationship among the listed grounds, although age can be both directly and indirectly justified. For this reason, Article 19 has been reinterpreted in order to give rise to a protection against age discrimination more focused on a mechanism of measures directed to prevent instead of prohibit.

From Article 13 EC to Article 19 TFEU the interpretation of discrimination developed from a formal into a substantial equality. Accordingly, substantive equality recognises that policies and practices that may appear to be non-discriminatory, may not really address the specific needs of certain groups of people. In practice, creating equal opportunities by differential treatments and/or positive action is a form of substantive equality. In this study, substantive equality helps to understand indirect age discrimination and its legal justification.⁵⁸

In 2000 a whole block of EU non-discrimination directives was developed as a testimony to a substantive equality trend. Accordingly, the aim of this block is to address equality towards more

⁵³ Article 19 (ex Article 13 TEC) “1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.”

⁵⁴ Bell Mark, ‘Article 13 EC: The European Commission’s Anti-discrimination Proposals’, [2000] *Industrial Law Journal*, Vol. 29, No.1, p. 80

⁵⁵ See for example : Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981; Case C-13/05 *Sonia Chacon Navas v Eures Colectividades SA* [2006] ECR I-6467, Opinion of Advocate General Geelhoed; Kantola Johanna, Nousiainen Kevaet, ‘The European Union: Initiator of a New European Anti-Discrimination Regime?’ in Andrea Krizsan, Hege Skjeie, Judith Squires (eds.), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes*, (Palgrave Macmillan, 2012), p.52; Chalmers Damian, Davies Gareth, Monti Giorgio, *European Union Law: Cases and Materials*, (Cambridge University Press, 2010), p.540

⁵⁶ Case C-13/05 *Sonia Chacon Navas v Eures Colectividades SA* [2006] ECR I-6467, Opinion of Advocate General Geelhoed

⁵⁷ Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981 at para 75-76

⁵⁸ Anagnostou Dia, ‘Gender Constitutional Reform and Feminist Mobilization in Greece and the EU: From Formal to Substantive Equality’ [2013] 28 *Can. J.L. & Soc.*, p.134

specific grounds of protection. Apart from Directive 2000/78/EC these anti-discrimination directives are: Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (this last directive is a consolidation of previous directives notably the Directive 76/207/EEC amended by Directive 2002/73/EC). These Directives set out an equality goal to be achieved by Member States. Thus, they lead to questions on the effectiveness of the principle of equality applied on different grounds of discrimination and within different national legislations.

These Directives are structured in different ways. For example, while the Framework Directive 2000/78/EC prohibits discrimination for listed protected grounds (religion and belief, age, disability and sexual orientation) it is limited to certain fields (employment & occupation, vocational training, membership of employer and employee organisations), while the Race Directive prohibits discrimination only for race and ethnic origin, but under more circumstances. Therefore, it must be considered that these anti-discrimination legislations have also a political rationale. In particular, the urgency of adopting the Racial Equality Directive was a result of Austria's extreme right-wing government. For the first time in history, the European Union provided a diplomatic sanction on a Member State. The historical facts refer to a widely perceived racist party guided by Jörg Haider who in 2000 became part of the Austrian government. This led other Member States to protest, requiring the imposition of bilateral diplomatic sanctions. As a result, the Racial Equality Directive was adopted by the end of June 2000, with the Employment Equality Directive following in November of that year. Overall, the Court's case-law has established that the 2000 Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order: the general principle of equal treatment. This principle derives from the human right to equality and non-discrimination in international human rights law and the constitutional traditions of European Union Member States.⁵⁹

4.3 The Charter of Fundamental Rights

The concept of equality is present in Article 19 TFEU. As seen above, it has been adopted by European Union law within the series of anti-discrimination directives. For a long time Article 19

⁵⁹ O'Connell Colm, 'The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC' [2012] European Commission, P.5. < <http://www.non-discrimination.net/content/media/Evolution%20and%20Impact%20EN%20FINAL.pdf>> accessed 14.07.2015

TFEU has been the only source of primary law against discrimination. However, when in December 2009 the Charter of Fundamental Rights became binding with the entry into force of the Treaty of Lisbon, the importance of equality within the European Union was consolidated. The list of prohibited grounds provided by Article 21 of the Charter of Fundamental Rights (CFR)⁶⁰ is a non-exhaustive one, although it applies to all areas of EU law.⁶¹ In other words, the list in Article 21 contains only the most obvious examples, referring to a broader and less defined area of discrimination compared to Article 19 TFEU. While Article 21 CFR prohibits discrimination generally, Article 19 TFEU addresses discrimination towards the institutions, bodies of the Union themselves, and Member States when they are implementing Union Law.⁶²

More precisely, Article 21 provides that:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.⁶³

While Article 19 TFEU provides that:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁶⁰ Article 21 ‘Non-discrimination’: “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”

⁶¹ Bell Mark, ‘The Right to Equality and Non-Discrimination’ in Hervey Tamara, Kenner Jeff (eds.), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective*, (Hart Publishing, 2003), p. 98

⁶² Barnard Catherine, *EU Employment Law*, (OUP Oxford, 2012), p.265

⁶³ Article 21 Charter of Fundamental Rights

By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.⁶⁴

This comparison between the two articles aims to underline the importance of the principle of equality, not only as a fundamental principle of the European Union but as a fundamental right. Accordingly, the relationship between Article 21 CFR and Article 2 (1) of the Directive 2000/78/EC recalls the idea of the ‘Concentric Circles’, with two or more circles having the same centre point. Before the Lisbon Treaty, although a source of international law recognised across Europe, the Charter of Fundamental Rights was merely a political document. By incorporating the Charter into European law and giving it binding force⁶⁵ the Lisbon Treaty determined an important step forward for equality.

Article 6(1) of Treaty on the European Union (TEU)⁶⁶ mentions the Charter, stating that: “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, which shall have the same legal value as the Treaties.” In this way, the Charter represents a benchmark for substantive equality. In particular, Article 21 CFR embraces a positive task for the Member States, eliminating anything which produces unlawful distinctions in society or concrete hurdles towards achieving equality. In this way, the cases *Hennigs v Eisenbahn-Bundesamt and Land Berlin v Mai*⁶⁷ and *Prigge v Deutsche Lufthansa AG*⁶⁸ report how the prohibition of all discrimination on grounds of age are theoretically incorporated by Article 21. These cases explicitly state that the prohibition of age discrimination in primary law is provided by the Charter, while Directive 2000/78/EC is only an expression of it.

The relationship between the Charter and the Directive 2000/78/EC has been understood also as a link between ‘legitimacy’ and ‘potency’. Thanks to case law, in particular case *Küçükdeveci v Swedex GmbH & Co KG*⁶⁹ (concerning employment discrimination, this case will be further analysed below), the Court considered that under Article 21(1) CFR any discrimination based on age shall be prohibited. Consequently, the Court held that:

⁶⁴ Article 19 Treaty on the Functioning of European Union

⁶⁵ Anderson David, Murphy Cian, ‘the Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe’ (EUI Working Paper Law, 2011/08) European University Institute.<
http://cadmus.eui.eu/bitstream/handle/1814/17597/LAW_2011_08.pdf?sequence=1> accessed 12.11.2013

⁶⁶ “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

⁶⁷ Case C-297/10 *Hennigs v Eisenbahn-Bundesamt and Land Berlin v Mai* [2012] IRLR 83

⁶⁸ Case C-447/09 *Prigge and others v Deutsche Lufthansa AG* [2011] IRLR 1052

⁶⁹ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

[I]t follows that is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.⁷⁰

The concept of equality in Article 2 of Directive 2000/78/EC reports, instead, how the principle of equal treatment needs to be interpreted within the boundaries of the Directive and particularly in accordance with Article 1.⁷¹ However, the subsequent Article 6 contradicts the principle of equal treatment. According to the article, age differences can be objectively justified only by a legitimate aim and the means of achieving that aim needs to be appropriate and necessary. Thus, while Article 21 provides a broad but unequivocal legal framework for prohibiting discrimination, Articles 2 and 6 of the Directive 2000/78/EC respectively provide the grounds where discrimination is prohibited and those where age discrimination can be justified. It is believed that this contradiction encourages uncertainty within Member States, especially when they need to justify age discrimination because of national needs. Thus, Member States are in the position to distinguish between ‘good’ or ‘bad’ discrimination according to their national context. This evaluation it not necessarily a link to substantive equality but it is rather a matter of balance between public interests and formal equality.

Interestingly, Article 25 CFR is specifically dedicated to the rights of the elderly: “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.” It refers uniquely to the rights of the elderly person for a life of ‘dignity’, an autonomous existence and participation in social life like everyone else, in application of the fundamental principle of equality. Clearly, this article differs from Article 21(1) CFR as it implies an application of the principle of equality. Despite both Articles pursuing the same equality aim, Article 21 CFR covers potentially unlimited areas. On the other hand, Article 25 considers a social dimension which lacks in the wording of the other legislations. Therefore, while Directive 2000/78/EC develops Article 21 in the employment field, the age equality reported by Article 25 has not been equally developed.

⁷⁰ Ibid paragraph 27

⁷¹ Article 1 Directive 2000/78/EC “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”; Article 2 ‘Concept of discrimination’, “ 1. For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1”.

In the *Küçükdeveci* case⁷² the Court noted how the Charter have the same legal value of the Treaties, including the horizontal effect. Consequently, it could be assumed that by virtue of this persuasive role in horizontal proceedings, the Charter already represents a clear legitimation for fighting against age discrimination outside employment. At the moment, extending the material scope of Directive 2000/78/EC beyond employment is only a proposal. It is a draft for a Council Directive implementing the Principle of Equal Treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426). This will be further discussed in the next chapter.

5 Principle of equality and age discrimination

The principle of equal treatment is nowadays recognised as a fundamental norm of the EU legal order, which and by virtue of the doctrine of supremacy⁷³, prevails on national law. According to the Court of Justice of the European Union (CJEU), it precludes “comparable situations from being treated differently and different situations from being treated in the same way, unless the treatment is objectively justified.”⁷⁴ As indicated by Article 2 of Directive 2000/78/EC: “for the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.” Thus, equal treatment in Directive 2000/78/EC is intrinsically linked to the meaning of direct and indirect discrimination.

Article 2(b) (1) of Directive 2000/78/EC (which has been discussed above) defines indirect discrimination and refers to a legitimate aim as objective justification. The content of the justification itself is then decided by national law. Therefore, this approach mitigates the principle of non- discrimination by having a “legitimate aim.” Furthermore, the Article adds that the means of achieving that aim must be “appropriate and necessary”. Nevertheless, the meaning of these terms can be unclear and subject to interpretation. In fact, Member States are often challenged (Preliminary ruling procedure)⁷⁵ on the correct interpretation in practice.

⁷² *Küçükdeveci v Swedex* (n. 69)

⁷³ Craig Paul, de Búrca Gráinne, *EU Law: Text, Cases, and Materials* (OUP Oxford, 2015), p.259 ; Case C-6/64, *Falminio Costa v. ENEL* [1964] ECR 585; Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, duty to set aside provisions of national law which are incompatible with Union law; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1991] ECR I-7321, National law must be interpreted and applied, insofar as possible, so as to avoid a conflict with a Community rule.

⁷⁴ Case C-127/07 *Société Arcelor Atlantique and Lorraine and Others v. Premier Ministre and Others* [2008] ECR I-9895

⁷⁵ “The reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union. This procedure enables national courts to question the Court of Justice on the interpretation or validity of European law. The reference for a preliminary ruling therefore offers a means to guarantee legal certainty by uniform application of EU law.” Eur-lex, ‘The reference for a preliminary ruling’, (Eur-lex, 2014) < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114552>> accessed 15.09.2016

At this point, the extent of the principle of equality and its application needs further analysis. The European Court of Human Rights (ECHR) identified four categories of equality applicable in the European legal context. They are: equality as rationality; equality as protective of prized public goods; equality as preventing status-harms; and equality as a positive duty to promote equality of opportunity. These distinctions are grouped into two main forms of substantive equality: equality of opportunity and equality of outcome. Notwithstanding the difference between these two, age discrimination can possibly be grouped under both. As discussed below, chronological age does not necessarily provide certainty about the characteristics shared within the same age group. Therefore, harmonised age justification may help to contribute to the appropriate definition of equality law,⁷⁶ while its variance leads to a high level of uncertainty. Nevertheless, Article 6 reports that:

Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.⁷⁷

This Article implies the correlation: equality - rationality. More precisely, according to Article 6 the difference in treatment is rationally justified by using the wording “objectively and reasonably”. Despite that, rationality can also be affected by criteria of likeness, difference, acceptability and justification. Thus, interpretation of Article 6 can be influenced by a certain degree of subjectivity.

While defining equality plays a significant role in promoting harmonization of anti-discrimination law, its application within Member States can still differ. Although Europe is formed by democratic states and “democracy is founded on the principle that each individual has equal value”,⁷⁸ Member States can be in the position to review their legislation in order to comply with anti-discrimination directives. This can occur especially if Member States have one or more national or constitutional provisions regarding equality and/or discrimination. Indeed, differences occur also because of structural characteristics of the nation. It is however important to consider the three national contexts of this study.

⁷⁶ McCrudden Christopher, Prechal Sacha, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* (European Commission Report, 2009) European Network Of Legal Experts In The Field Of Gender Equality European Commission, p. 2

⁷⁷ Article 6, Directive 2000/78/EC

⁷⁸ *Ghaidan v Godin-Mendoza* [2004] UKHL 30

5.3 United Kingdom, Italy and Austria

The European Member States recognise equality as a fundamental right, although they often refer to it adopting a broader meaning. Most of the Member States agree on an “Aristotelian” formula, whereby like cases must be treated alike, and differently situated cases must be treated differently in accordance with their difference.⁷⁹

The legal system of the United Kingdom is characterised by an “uncodified” or unwritten Constitution, which is a sum of laws and principles. In this country, the doctrine of Parliamentary Sovereignty reveals how the Act of Parliaments dictates the relevance of certain provisions. In this way, the Equality Act 2010⁸⁰ replaced the previous anti-discrimination laws including them within a single Act. The Equality Act 2010, implementing Directive 2000/78/EC into national law, includes provisions that ban age discrimination. At the moment it is the major source of equality in the UK.

Italy, however, has a written Constitution which is so-called “rigid” due to the special provisions needed in case of amendments. Compared to the acts of the Italian Parliament the Constitution is a “superior law”. Nevertheless, Article 3 mentions equality only in general terms and only with regards to “equality of citizens”. Other mentions are exclusively related to gender equality. Age discrimination, is not indicated in the Constitution, not even as a general definition. In these terms equality is a broad constitutional concept, which content is filled by laws of lower rank. Directive 2000/78/EC was implemented in 2003 with Law no 216, an act of the Parliament.

Finally, Austria is a federal parliamentary democracy and its legal basis is the Constitution of 1920, amended several times thereafter. Contrary to Italy, its Constitution is considered “flexible”. Its core documents are the so-called “Rule of Law”⁸¹ and contain basic principles, integrated by other constitutional provisions. The latter do not contain substantive constitutional questions, but have a fairly administrative nature. In addition, each federal state (Land) has its own Constitution “*Bundesverfassungsgesetz*”, which are considered constitutional acts. Within this context, a special mention to equality has been registered only in two Land’s constitutions. However, equality in the general sense is expressively mentioned only by the Constitution of the Land of Vorarlberg, demonstrating a fragmented approach to equality within one country. Prior to ratification of Directive 2000/78/EC in Austria there was no protection against age discrimination, with the exception of general protection against unfair dismissal found in §105 of the Labour Constitution Act “*Arbeitsverfassungsgesetz*” (ArbVG) which simplified the burden of proof for older employees.

⁷⁹ Tobler Christa, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law*, (Intersentia nv, 2005) p. 19

⁸⁰ Equality Act 2010 : < <http://www.legislation.gov.uk/ukpga/2010/15/contents>>

⁸¹ Eberhard Harald, Lachmayer Konrad, ‘Constitutional Reform 2008 in Austria. Analysis and Perspectives’ [2008] Vienna Online Journal on International Constitutional Law Vol 2 2/2008, p. 112

Consequently, in 2004 the framework of the Equal Treatment Act (*Gleichbehandlungsgesetz, GlbG*) implemented the Directive into Austrian national law, although, for constitutional reasons, it can only regulate private sector labour contracts.

In conclusion, the principles of equality do not have all the same wording and content across Europe. This overview on different constitutional realities reveals a fragmentation problem within Europe. It underlines how equality is a concept subjected to different national interpretations. In this way, the supremacy of EU sources applies when the Member States act within the scope of EU law and Member States are legally bound to their national bills of rights. Here it is evident how the age discrimination prohibition in Directive 2000/78/EC inevitably leads to different approaches, encouraging the CJEU in finding the correct interpretation.

6 Case law analysis

The problem of age discrimination was addressed, for the first time, by Directive 2000/78/EC and since its implementation Member States have often referred to the Court of Justice of the European Union (CJEU) for preliminary rulings. This allowed the CJEU to develop a body of judge-made law which provides specificity and adequate interpretation of the Directive's provision. In particular, the CJEU has made significant steps forward on fundamental rights, recognising them as basic principles for age discrimination.⁸² These principles, embedded in the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights (CFR), have confirmed the principle of equality as the cornerstone against discrimination. Nevertheless, since the binding effect of the Charter was only recognised after the entry into force of the Lisbon Treaty, it is important to examine those cases which portray the evolution of the CJEU judgements on age discrimination. According to the Court, age discrimination is linked to the general principle of equal treatment. However, in the case law the possibility of invoking general principles of Community law in contractual relationships was discussed. Whether age should be treated as a fundamental right instead of a regulatory measure has been determined in the case law, which demonstrated a controversial and at some point contradicting approach.

⁸²Case C-283/83 *Racke v. Hauptzollamt Mainz* [1984] ECR 3791; Case 15/95 *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux* [1997] ECR I-1961 These cases were long before the EC/EU had provisions against age discrimination, so they cannot be used to reference what has happened in the age discrimination field. Maybe they can be used to indicate that the CJEU has recognized equality as a general principle of EU law. See my Articles referred to above.

7. The jurisprudence evolution

This analysis starts by examining the *Mangold* case,⁸³ which focuses on age discrimination as a general principle, and represents one of the first cases analysed by the CJEU. It underlines that Article 6(1) of Directive 2000/78/EC permits an objective justification on the ground of age, raising doubts on the full implementation of the general principle of non-discrimination. Consequently, *Bartsch*⁸⁴ case is analysed. As demonstrated below, it adopts an opposing position to *Mangold* and is viewed as a “step back” compared to it. Finally the *Küçükdeveci*⁸⁵ case is examined, revealing how an extensive interpretation of ‘implementation’ of EU rules can still influence the applicability of the principle of non-discrimination on grounds of age. All three judgements shed light on European protection against age discrimination and its relevance within anti-discrimination legislation.

7.1 Mangold

The facts refer to Mr Mangold, then a 56 year-old man, who had entered into a fixed term contract with Mr Helm, a lawyer, for a permanent full-time job. Article 5 of the contract between Mr Mangold and Mr Helm provided that the employment relationship shall start on 1 July 2003 and last until 28 February 2004. This kind of agreement was permitted under German law, which allowed conclusion of fixed term contracts based on the age of the worker (over 52) for promoting the vocational integration of unemployed older workers. The relevant German law (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen*, ‘the TzBfG’) of 21 December 2000 on part-time working and fixed-term contracts provided, at Recital 14(3), that “a fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where one employee replaces another.”⁸⁶ Following these facts, Mr Mangold brought a claim arguing that such a limitation contravenes Directive 2000/78/EC. Mr Helm replied that, although the TzBfG does not expressly lay down restrictions in respect of older workers, this limitation is objectively justified as it is based on the difficulties of older workers in finding work, having regard to the features of the labour market.

⁸³ Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981

⁸⁴ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245

⁸⁵ *Küçükdeveci v Swedex* (n. 64)

⁸⁶ Recital 14(3), *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen*, (the TzBfG) of 21 December 2000 on part-time working and fixed-term contracts

In this case, the Labour Court of Munich (*Arbeitsgericht München*) addressed a number of issues. Firstly, it dealt with the compatibility of the respective national legislation with the European Directive, although the period prescribed for transposing the Directive had not yet expired. Secondly, it considered the role of national courts in proceedings between individuals, particularly when a rule of domestic law is incompatible with Community law. Specifically it dealt with the question of whether Article 6 of Directive 2000/78/EC must be interpreted as precluding a provision of national law, which is contrary to the principle requiring justification on objective grounds. Subparagraph (a) of the second paragraph of Article 6(1) reports that differences in treatment may include *inter alia*:

[T]he setting of special conditions on access to employment and vocational training, employment and occupation for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.

Subparagraphs (b) and (c) contemplate the fixing of conditions of age in certain special circumstances. Nevertheless, the relevance of this case is represented by the answer given by the CJEU. It underlined that a national legislation permitting lower standards as regards to fixed-term work contracts for older workers should be set aside by the national court, on the basis that the law breached a general principle of EU law. The Court found that under Article 6(1) (a) the vocational integration of unemployed older workers constitutes a legitimate purpose, but the means employed were disproportionate to the objective pursued. Such assumption led to questions as to the real extent of age protection as a general principle of EU law. The facts in *Mangold* show a clear conflict between a not yet implemented European legislation and a national provision, tailored on national public interests. In particular, the debate focused on the fact that the period prescribed for implementing Directive 2000/78/EC into domestic law had expired both when the fixed-term employment contract was concluded and when the decision was handed down. Despite that, the Court set aside the national provision conflicting with Article 6 of the Directive.

On this issue the Court considered that the

[O]bservance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the

organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.⁸⁷

The general principle of equal treatment seems, therefore, considered as a priority in respect to procedural requirements for implementation. Nevertheless, this creates more difficulties for those Member States which want to justify differential treatments. Furthermore, giving effect to a Directive after its expiry period can raise doubts on legal certainty. The latter is a general principle of European Union law for which applying the law to a specific situation must be predictable.⁸⁸ The Court solved this dispute in the *Navarro* case⁸⁹ considering that where the rules of national law fall within the scope of the Directive, then from the time of the entry into force national courts are bound to ensure that the application of national law is consistent with EU law.

In *Mangold* the Court continued that in circumstances where national and European law conflict:

[I]t is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.⁹⁰

In this context, on the part of Mr Helm an interpretation of national law in agreement with Article 6 of the Directive was expected. Thus, if the principle of non-discrimination is intentionally compromised by Article 6, then the problem is to address the importance given to age discrimination within Europe when it conflicts with national policies. On this point, in *Mangold*, the Court gave a very wide application to the general principle of equality/non-discrimination, suggesting that contrary national legislation should be disapplied.⁹¹ Part of the doctrine⁹² welcomed this judgement. Thanks to the Court's position in *Mangold*, Directive 2000/78/EC can, nowadays,

⁸⁷ Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981, paragraph 76

⁸⁸ Schermers Henry, Waelbroeck Denise, *Judicial Protection in the European Communities*, (Deventer, Kluwer Law and Taxation Publishers, 1992), p. 52-69

⁸⁹ Case C-246/06 *Josefa Velasco Navarro v Fondo de Garantía Salarial (Fogasa)* [2008] ECR I-105, paragraphs 31-39

⁹⁰ Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981, Paragraph 76 and 77. In addition see: C-106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629, paragraph 21, and C-347/96 *Solred SA v Administración General del Estado*. [1998] ECR I-937, paragraph 30

⁹¹ Howard Erica 'ECJ advances equality in Europe by giving horizontal direct effect to directives' [2011] European Public Law, 17 (4). p. 736

⁹² Schiek Dagmar, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' [2006] Industrial Law Journal, Vol. 35, No. 3., pp. 333-334

be considered “an emanation of the Community constitutional principle of equal treatment, much as it had done regarding Directive 76/207/EEC in its case-law on gender equality.”⁹³ Thus, this case created a link between age and gender on the basis that both grounds are expression of the fundamental principle of non-discrimination. Nevertheless, such correlation does not find enough normative support within a European legislation. In fact, while the principle of equal treatment between men and women in accessing and supplying goods and service is protected by Directive 2004/113/EC, a specular Directive for age does not exist yet. Hence, to consider age discrimination as a general principle of the EU is questionable on two grounds: because of justification in Article 6 and because of this gap in legislation.

Overall, the *Mangold* judgment has been criticised on the three following grounds: the recognition of a general principle of law as regards non-discrimination on grounds of age; the insufficient link between this general principle and a substantive EU law; and the Court's apparent willingness to give to it horizontal direct effect, considering that the direct effect of Directives is a contentious issue amongst law makers of the European Community.⁹⁴ The CJEU in *Mangold* showed a strong persistence in maintaining the objective justification test to be applied with rigour in age discrimination. Most importantly, it was underlined how Directives can determine the importance of a fundamental right by national implementation. On the other hand, it was criticised that Directive can concretise fundamental rights through national implementation also in absence of a sufficient link to a substantive EU law. In *Mangold* this was eluded to by the link between age as a general principle and Directive 1999/70/EC on fixed-term workers. Further criticism was raised on the trend for individuals to look to the Court of Justice of the European Union rather than the national courts to vindicate their rights, and the subsequent Court's approach to give direct effect to Directives. On this point, it must be considered that Directives cannot have horizontal direct effect: direct effect is the capacity of the EU law to confer rights on individuals.⁹⁵ In this way, the CJEU has ruled that directives cannot impose obligations on individuals (no horizontal direct effect).⁹⁶

In the subsequent *Bartsch*⁹⁷ case AG Sharpston considered the possibility that a general principle of Community law may, in appropriate circumstances, be applied horizontally only when

⁹³ Ibid p.334

⁹⁴ Masson Antoine, Micheau Claire, ‘The Werner Mangold Case: An Example of Legal Militancy’ [2007] European Public Law, Vol. 13.4, pp. 587–593; Schiek Dagmar, ‘The CJEU Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ [2006] 35 I.L.J. 129 ; Schmidt Marlene, ‘The Principle of Non-discrimination in Respect of Age: Dimensions of the CJEU's Mangold Judgment’ [2005] Vol.7.5 German Law Journal, p. 505

⁹⁵ Craig, De Búrca (n.73), p. 184

⁹⁶ Ibid.

⁹⁷ C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245

it falls within the scope of Community law.⁹⁸ In this way, the *Bartsch* case has been considered a “step back” from *Mangold*, as the national court asked the CJEU, which replied negatively, whether the prohibition of age as provided by Directive 2000/78/EC was mandatory where the alleged discrimination contained no link with Community law.

7.2 Bartsch

The facts of the *Bartsch* case refer to a claim of Mrs Bartsch, a woman 21 years younger than her husband who was declared ineligible for a survivor’s pension on the basis that the German pension scheme denied a pension to spouses more than 15 years younger than their deceased spouse. Although Article 13 EC (now 19 TFEU) permits the Council of the European Union to take appropriate action to combat discrimination based on age, in this case the Court held that even if Directive 2000/78/EC complied with the scope of Article 13 EC (19 TFEU), an appropriate action to combat age discrimination cannot be taken because the time-limit for the transposition of Directive 2000/78/EC had not expired. This approach contradicts the view of anti-discrimination laws as superior norms. The Court, in fact, considered “the application...of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law.”⁹⁹ In addition, it was clear that this link cannot derive “either from Article 13 EC, or, in circumstances such as those at issue in the main proceedings, from Directive 2000/78/EC before the time-limit allowed to the Member State concerned for its transposition has expired.”¹⁰⁰ Thus, Article 13 EC (19 TFEU) cannot by itself guarantee protection against age discrimination as it is considered lacking direct effect. Consequently, Mrs Bartsch’s claim was rejected by the CJEU. A.G. Sharpston, in line with the CJEU’s decision, criticised the fact that in *Mangold* it was given direct effect to Directive 2000/78/EC as an expression of the principle of equality, undermining “the purpose of direct effect.”¹⁰¹ Doctrine explains this critique highlighting how ‘direct effect’ means that only fundamental rights can be used to assess private conduct and private norms.¹⁰² This contradicts the idea of age discrimination as fundamental right.

7.3 Chacón Navas

⁹⁸ Ibid, opinion of Advocate General Sharpston - Paragraph 61

⁹⁹ *Bartsch* (n.97) - Paragraph 14

¹⁰⁰ Ibid, Paragraph 25

¹⁰¹ Ibid, Paragraph 31

¹⁰² Leczykiewicz Dorota, ‘Horizontal application of the Charter of Fundamental Rights’ [2013] European Law Review, Vol.38 p. 479

*Chacón Navas*¹⁰³ is not an age discrimination case as it deals with age only indirectly. Its main focus is the interpretation of the concept of ‘disability’ for the purpose of Directive 2000/78/EC. More specifically, it analyses the possible economic and financial consequences of a claim based on the prohibitions set out in Article 13 EC. Nevertheless, Advocate General Geelhoed made a direct reference to *Mangold* while claiming for a more restrictive interpretation of Directive 2000/78/EC.¹⁰⁴ In particular, he underlined that a broad interpretation could lead to possible infinite claims for equal treatment. Geelhoed sustained that:

[T]he object of some of the prohibitions of discrimination listed in Article 13 EC, such as that based on age and disability, means that the identification of prohibited formal inequality of treatment will always entail a substantive claim to equal access to or continued employment in an occupation or business, equal conditions of employment, the availability of special training or of facilities which compensate for or alleviate the limitations due to age or disability.

Therefore, A.G. emphasized the role of national legislation as follows:

[I]n view of the potentially far-reaching consequences, economic and financial, which such prohibitions of discrimination may have in horizontal relationships among citizens and in vertical relationships between public authorities and interested citizens, national legislatures tend to provide precise definitions of such prohibitions of discrimination in terms of their scope – including justified exceptions and limitations and the provision reasonably to be made for compensatory facilities.¹⁰⁵

Such approach recalls Article 6 underlining the role of the Member States in the exercise of their powers. From this analysis it appears that when Member States justify age discrimination, both directly and indirectly, they are in reality mitigating the effects of an age discrimination prohibition. In other words, they are lowering the bar for age equality and this can be potentially harmful for age groups. From another perspective, Article 6 qualifies Member States for defending substantive equality, as discussed above.

¹⁰³ Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706

¹⁰⁴ *Ibid*, Opinion of AG Geelhoed, Paragraph 56

¹⁰⁵ *ibid*, Paragraph 50

Inasmuch as Article 13 EC (19 TFEU) cannot by itself guarantee protection on age discrimination, the same reasoning should be applied to Article 21 CFR. A horizontal application of Charter of Fundamental Rights, and in particular of Article 21 on non-discrimination, leads to tensions between a human right and a private law perspective. Doctrine agreed that the Charter can be used only as a supplementing argument against age discrimination.¹⁰⁶ Nevertheless, A.G. Sharpston concluded that, “it is not possible to rely on the general principle of equality both to create an applicable substantive rule of Community law and to determine how that substantive rule should be applied.”¹⁰⁷

Eventually, in *Bartsch* the exception to the principle of non-discrimination contained in Article 6(1) of the Directive was dismissed because the date for transposition had not passed and the measure was not connected to the implementation of EU law. The following case, *Küçükdeveci*,¹⁰⁸ reveals how an extensive interpretation of ‘implementation’ of EU rules can still influence the applicability of the principle of non-discrimination on grounds of age. In 2010, shortly after the Lisbon Treaty, when the Charter had become legally binding, in the *Küçükdeveci* case the Court returned somewhat to the *Mangold* position, treating age as equivalent to other non-discrimination grounds. However, it overcame the critics in *Mangold* in departing from its reluctance to give directive direct effect in private relationships.

7.4 Küçükdeveci

The facts in this case refer to Ms Küçükdeveci who, having worked for 10 years since the age of 18 for the company Swedex, was dismissed with only one month’s notice. The period of notice was calculated as if the employee had only three years’ length of service. This was in accordance with the German legislation which provided that periods of employment completed before the age of 25 should not to be taken into account in this calculation. Thus, Ms Küçükdeveci claimed to have been unlawfully discriminated on the ground of age on the basis of an incompatibility of the relevant German law with Directive 2000/78/EC.

Unlike *Mangold*, in this case the Court referred to the Charter of Fundamental Rights. Moreover, unlike *Bartsch*, the allegedly discrimination on the basis of the national legislation occurred after the expiry date for the transposition of Directive 2000/78/EC. According to the Court: “The Directive had the effect of bringing within the scope of European Union law the

¹⁰⁶ Peers Steve, Hervey Tamara, Kenner Jeff, Ward Angela, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) p. 58

¹⁰⁷ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR. I-7245, Opinion of Advocate General Sharpston - Paragraph 74

¹⁰⁸ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.”¹⁰⁹

The Court, therefore, considered that the national law in question contravened Article 2(a) of Directive 2000/78/EC on the basis that “periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.”¹¹⁰ Thanks to the developments provided by the entry into force of the Lisbon Treaty and because the dispute concerned the application of the general principle of EU law on grounds of age, in the *Küçükdeveci* case the conflicting national law was set aside. Consequently, the Directive was applied between private parties. This judgement was determined by the fact that the deadline for transposing the directive was passed and that the new legal status of the Charter of Fundamental Rights reinforces the legal certainty.

Mangold and *Küçükdeveci* cases took supremacy implications one stage further with respect to *Simmenthal* decision.¹¹¹ The latter broadly interpreted that a ‘conflicting provision’ of national law can be any legislative or judicial practice that might impair the effectiveness of European Union law. On the other hand, *Mangold* and *Küçükdeveci* judgements clarified that national courts must disapply national laws in the case of conflict with the general principle of equal treatment even where it can determine, in practice, a ‘horizontal’ applicability of the Directive.¹¹²

The *Küçükdeveci* case underlined another important point. It questioned whether the discrimination imposed by German law could be justified. Practically, it was in doubt whether or not taking into account the period of notice the employment completed before the age of 25 could be classified a legitimate aim in terms of Article 6 of Directive 2000/78/EC. Referring to *Mangold*, the doctrine underlined how the Court considered that there was not an evident link with the structure of the labour market in question able to determine a legitimate aim objectively necessary.¹¹³ In *Küçükdeveci* the Court considered that in order for national laws to fall within the sphere of Article 6(1) of Directive 2000/78/EC, difference of treatment on grounds of age must be “objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives.” These measures can include, *inter alia*, ‘special conditions’ relating to dismissal, for younger (or older) workers. Furthermore, according to Article 6 the means to achieve the legitimate aim, which justifies employment and labour market policy,

¹⁰⁹ Ibid. Paragraph 25

¹¹⁰ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365- Paragraph 18

¹¹¹ Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, 1978 ECR 629

¹¹² O’Cinneide Colm, ‘Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age’ [2010] *Revue des Affaires Européennes*, Vol. 2, pp. 253-276

¹¹³ Schmidt Marlene, ‘The Principle of Non-discrimination in Respect of Age: Dimensions of the CJEU’s *Mangold* Judgment’ [2005], *The German Law Journal*, Vol. 7.5

needs to be “appropriate and necessary”. Overall, the Court's view in *Küçükdeveci* was that Member States enjoy a “broad discretion” as regards employment and social policy. Nevertheless, in the specific case the national law was considered “not appropriate” for achieving the objective of giving employers greater flexibility, since it applied regardless of how old the workers were when they were dismissed.

Finally, in *Mangold, Bartsch and Küçükdeveci* the Court clarified that Directive 2000/78/EC can be interpreted as giving effect to a general principle of equal treatment only under certain conditions, which need to respect the principle of legal certainty¹¹⁴ and the prohibition of age discrimination. When one examines the trajectory of the Court’s judgments on this issue, it becomes clear that the Court has come to consider age discrimination as part of the quasi-constitutional framework of core principles that underpins the EU legal order in its entirety. Nevertheless, the growing importance of age equality led to consider the extent to which such general principle can be justified in favour of national and economic interests.

8. Age Justification and the proportionality test

Starting from *Mangold*, then *Palacios de la Villa*¹¹⁵ and moving to *Age Concern*¹¹⁶ the Court demonstrated how prohibiting age discrimination is to be applied with similar rigour as other anti-discrimination. However, Recital 25 of the Preamble of Directive 2000/78/EC provides that, “It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.”¹¹⁷ As previously introduced, Article 6 provides for two separate justifications on the grounds of age. Article 6(1) allows age discrimination that pursues ‘legitimate employment policy, labour market and vocational training objectives’ (for which the proportionality test needs to be satisfied); Article 6(2) permits age discrimination with regard to access to and benefits under occupational social security schemes (the proportionality test is irrelevant).

The concept of proportionality is a general principle of EU law. A version of it can be found in Article 5(4) TEU, which provides that the content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaty. However, proportionality in *stricto sensu*

¹¹⁴ Maxeiner James R. ‘Some realism about legal certainty in globalization of the rule of law’ [2008] *Houston Journal of International Law*, Vol.31.1

¹¹⁵ Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531

¹¹⁶ C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569

¹¹⁷ Recital 25 of the Preamble of Directive 2000/78/EC

implies that an EU measure should not impose a burden on the individual. More precisely, the relation between ‘the burden’ and ‘the objective sought to be achieved’ must not be excessive.¹¹⁸ In this way, “any generally permissible restriction [on fundamental freedoms] has to be scrutinised for fundamental rights compatibility.”¹¹⁹ In other words, in case of conflicts between two rights of equal hierarchical standing supported by EU constitutional values, proportionality must serve as a balancing tool. Therefore, the proportionality test should be preferred to a cost-benefit analysis. The seminal cases on the right to strike, *Laval*¹²⁰ and *Viking Line*¹²¹ demonstrate how the Court has to engage in the application of proportionality in order to delimit the borders of rights/values in conflict.¹²² In *Laval* the Court sustained that the positive right to strike must be exercised proportionately. Nevertheless, it can be subjected to justification if it infringes the right to freedom to provide services under Article 56 TFEU. Similarly, in *Viking Line* it was considered that the right to strike could infringe a business's freedom of establishment (Article 49 TFEU).

The next analysis provides an overview of the practice of justifying age discrimination within the Member States. It focuses on the balance between age discrimination and public interests, as embedded in Article 6, which engaged the Court into proportionality tests.

8.1 Palacios de la Villa

The CJEU had the first opportunity to consider Article 6 of Directive 2000/78/EC in *Palacios de la Villa*. This case relates to the retirement issue, which is intended as a termination of an individual's contract by reason of attaining a particular age. In *Bartsch*, A.G. Sharpston underlined how the Court in the *Palacios* case accepted that a national legislation can explicitly provide for unfavourable treatment on the grounds of age. Therefore, this case reveals a first contradiction of what was stated in the *Mangold* case: “it was the responsibility of the national court to set aside any provision of national law which conflicts with the principle of age discrimination.”¹²³

The facts concern Mr. Félix Palacios de la Villa who brought a claim against Cortefiel Servicios SA, Mr. José Maria Sanz Corral and Mr. Martin Tebar. Mr Palacios, on reaching the age

¹¹⁸ Craig Paul, de Búrca Gráinne, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2015), p.551

¹¹⁹ Ehlers Dirk, ‘General Principles’ in Dirk Ehlers (Ed.), *European Fundamental Rights and Freedoms* (De Gruyter Recht, 2007), p 376.

¹²⁰ Case C-341/05 *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767

¹²¹ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779

¹²² Dagilyte Egle, ‘Balancing workers’ social rights with employers’ commercial interests in the EU: a proposal for a more reflective proportionality test in line with the Charter’, (CES Conference, April 2016) p. 5

¹²³ *Félix Palacios de la Villa v Cortefiel Servicios SA* (n.115), Opinion of A.G. Sharpston- Paragraph 40

of 65, was notified of the automatic termination of his contract of employment on the grounds that he had reached the compulsory retirement age. This was legislatively supported by Article 19(3) of a collective agreement and the Single Transitional Provision ('STP') of Law 14/2005 pursuant to which compulsory retirement clauses in collective agreements are lawful. The collective agreement stated that in the interests of promoting employment, there would be a retirement age of 65. The sole requirements are that workers have reached normal retirement age and have fulfilled the conditions set out in the social security legislation.

Until 2001 the Spanish legislature was characterised by compulsory retirement as a mechanism for promoting intergenerational employment. Subsequently, when in 2004 Directive 2000/78/EC was transposed into Spanish law, Law 14/2005, keeping the characteristics of the old legislations, made compulsory retirement conditional upon the pursuit of objectives which are consistent with employment policy.

The main point is to distinguish between justifiable treatment and prohibited discrimination in respect of age. In this way, employment policies and antidiscrimination law conflict on two grounds: the aim of protecting the dignity of older people through an adequate pension system; and the economic rationale of the work place which aim to preserve efficiency and competitiveness. The question in *Palacios* was whether a mandatory retirement age of 65 falls within the boundaries of Article 6. On this point, the Court held that:

[T]he legislation at issue in the main proceedings, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.¹²⁴

Whether a mandatory retirement can be objectively justified was linked to the principle of equal treatment, expressed both in the Article 13 EC (now 19 TFEU) and Article 2(1) of Directive 2000/78/EC. More precisely, the Preliminary Ruling of this case focused on whether these two articles were compatible with the Single Transitional Provision of Law 14/2005.

On this point doctrine sustains that, “when the principle of non-discrimination on the grounds of age produces unwanted economic effects... then it is more possible to justify having

¹²⁴ Ibid - Paragraph 45

"economic" exceptions."¹²⁵ The same rationale is reflected in the approach adopted by the Court in the *Chacón Navas* case. In this case, financial and economic implications were considered as consequences of a formal inequality. Furthermore, in the *Chacón Navas* case, A.G. Geelhoed stated that "the implementation of the prohibitions of discrimination of relevance here [disability and age] always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question."¹²⁶ This 'weighing up' concept leads to reconsideration of the relationship between the principle of proportionality and the principle of non-discrimination and, in this context, the referring normative: Article 6 of Directive 2000/78/EC.

In the *Palacios* case, A.G. Mazák expressed that if Article 6(1) requires that the means used to achieve the legitimate objective at issue needs to be appropriate and necessary, it means that "only a manifestly disproportionate national measure should be censured at this level."¹²⁷ In this way, A.G. emphasized the broad discretion of Member States. Additionally, Mazák expressed concern over the uncertainty of this assumption. With regards to Article 6, he stated that it would be:

[V]ery problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member State.¹²⁸

In other words, A.G. sustained that it would be an unacceptable risk for a Member State to see their age related laws challenged in front of a European Court. On the other hand, the matter is determining whether a measure is "manifestly disproportionate" and it is not an analysis on uncertainty of the discretion. Nevertheless, a legitimate aim is expected to link to non-arbitrary, objectively justified or discretionary distinctions. Consequently, it could be questioned on which basis the CJEU decides when a measure is manifestly disproportionate in achieving a legitimate aim. This question is even more meaningful as the 'legitimate aim' is based on a national evaluation ground. In addition, the low scrutiny intensity of age-related forms of discrimination complicates the analysis. Accordingly, A.G. Mazák considered it a much more difficult task to determine the

¹²⁵ Sargeant Malcolm, 'Distinguishing between justifiable treatment and prohibited discrimination in respect of age' [2013] *Journal of Business Law*, Vol. 4, p. 398-416

¹²⁶ Case C-13/05 *Sonia Chacón Navas v. Eures Colectividades SA* [2006] IRLR 706

¹²⁷ Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák, paragraph

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¹²⁸ *ibid*, paragraph 64

existence of a discrimination on grounds of age rather than a discrimination on grounds of sex. Finally, Mazák clarified the CJEU position on age discrimination:

Neither Article 13 EC nor Directive 2000/78/EC necessarily reflect an already existing prohibition of all the forms of discrimination to which they refer. Rather, the underlying intention was in both cases to leave it to the Community legislature and the Member States to take appropriate action to that effect.”¹²⁹

In *Palacios de la Villa* the Court agreed with Mazák’s opinion in accepting that mandatory retirement rules had the legitimate labour market policy aim of encouraging the employment of younger workers. However, it can be criticised that the appropriateness and the necessity of such rules were very lightly reviewed: the compulsory retirement clauses were linked to the promotion of intergenerational employment. It can be deduced that age discrimination as a general principle takes the form of a tacit fight against inequalities, which, however, allows a certain degree of flexibility.

8.2 Age Concern

After the *Palacios* case, in 2009 the *Age Concern*¹³⁰ case focused on the same objective justification issues. However, it raised the question whether Article 6 needs to be interpreted as requiring specific exemptions to direct discrimination. In this case *Age Concern*¹³¹ is against the British government on supporting that a default retirement of 65 operating in the UK is an age discrimination and thus contrary to the Directive 2000/78/EC. In this case the Employment Equality (Age) Regulations 2006, which was the legislation that transposed Directive 2000/78/EC within UK (now incorporated in the Equality Act 2010), allowed the dismissal of an employee aged 65 years or over for reasons of retirement. *Age Concern* considered it an infringement of both Article 6(1) of the Directive and the principle of proportionality. In particular, *Age Concern* argued that Regulation 3 of the Employment Equality (Age) Regulations, which defined the concepts of direct and indirect age discrimination for the purposes of national law, makes no distinction between justification under Article 6 and that under Article 2(2) (b) of Directive 2000/78. In addition, it argued that the differences of treatment potentially capable of being justified were not clearly expressed. Furthermore, the Regulation did discern among the aims capable of justifying such differences of treatment. Overall, the main critique raised by *Age Concern* was directed against Article 6(1) considering that it must be construed strictly so as to limit the circumstances in which justification is permitted. In supporting that it referred to Recital 25 of the Preamble of Directive 2000/78/EC

¹²⁹ Case C-388/07 *Age Concern England v Secretary of State* [2009] E.C.R. I-1569; paragraph 95

¹³⁰ *Ibid.*

¹³¹ *Age Concern* is an NGO; now part of ‘Age UK’

which would preclude a general approach from the part of the Member State: "...differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States."¹³² The doctrine that interprets this Recital, considers that "employer's aims must coincide with state social policy rather than be based on pure business reasons."¹³³ Thus, it enhances the link between objective justification and social policy.

Transposing Article 6 into national law leads to reflection on the needed level of specificity required for justifying age discrimination. With regards to that, Mr Justice Blake, in his *Age Concern* judgement, reported that, "the aims which may be considered 'legitimate' within the meaning of that provision...are social policy objectives."¹³⁴ Because of their public interest nature, social policy objectives, "are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness."¹³⁵ The "social policy aims of the state"¹³⁶ could be found in the state's legislative background. Unfortunately, this part was not further analysed in the judgement. Instead of focusing on the roots of a legitimate aim, the CJEU provided a distinction between objective justification under Article 6 and objective justification in the general sense, as allowed under Article 2(b) (i). According to the Court, "the test for justification laid down in Article 6(1) of Directive 2000/78/EC is stricter than that under Article 2(2)."¹³⁷ On the other hand, Article 2(2)(b) concerns exclusively indirect discrimination, and the Court considered it not necessary for the resolution of the case.

Age Concern claimed that, by virtue of the *Mangold* judgement, the principle of non-discrimination on grounds of age should be treated as a general principle of Community law. Thus, any justification able to constitute direct discrimination must be subjected to a high standard of scrutiny, equivalent to the one applied by the European Court of Human Rights for discrimination on grounds of sex or race. Eventually, the CJEU rejected Age Concern's claim sustaining that Article 6 cannot be read in conjunction with Recital 25 for precluding a Member State's general defence, as long as it is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights. In support of that, the differences in treatment need to be "objectively and reasonably" justified and the means of achieving that aim need to be "appropriate and necessary". Consequently, CJEU in *Age Concern* interprets Article 6 more strictly than Article 2(2), as it deals

¹³² Directive 2000/78/EC, Recital 25

¹³³ Connolly Michael, 'Case Comment Objectively justifying compulsory retirement' [2012] Employment Law Bulletin, Vol. 109 (Jun), p. 6-8

¹³⁴ *Age Concern England* (n.129)-Paragraph 46

¹³⁵ *ibid*-Paragraph 46

¹³⁶ *ibid* -Paragraph 55

¹³⁷ *ibid* - Paragraph 54

with direct discrimination. Consequently, States must establish a high standard of legitimacy proof for justifying age discrimination under Article 6. On this point the CJEU added:

[M]ere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.¹³⁸

Finally, application of Article 6 implies an interpretation supported by the principle of proportionality. If on the one hand this must satisfy a certain level of legal certainty, on the other hand the burden of proof is all on Member States. They are asked to determine what ‘appropriate and necessary’ means, while this determination can assume different connotations on the basis of Member States’ structural differences.

8.3 Petersen

The mandatory retirement in *Palacios* and the analysis on social policy in *Age Concern* show the difficulties encountered by Member States in applying the objective justification provided by Article 6(1). In the 2010 *Petersen*¹³⁹ case the CJEU accepted the concept of legitimate aim, sustaining that: "it does not appear unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones."¹⁴⁰

In this case national law imposed a maximum age of 68 on the authorisation to practise as a panel dentist. This legitimate objective was interpreted as preserving the balance of the public healthcare system. In particular, Article 2(5) of the Directive¹⁴¹ has been interpreted as a good escape for preserving a States’ financial responsibility. Consequently, the introduction of an age limit which applies only to panel dentists, in order to control public health sector expenditure, is compatible with the objective pursued. In fact, it was not affecting the private health system, as the age limit did not apply to non-panel dentists. In this case, the Court considered that Article 6(1) of Directive 2000/78/EC must be interpreted as not precluding such a measure where its aim is to

¹³⁸ *ibid*-Paragraph 51

¹³⁹ Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 CMLR 31

¹⁴⁰ *Ibid*, Paragraph 70

¹⁴¹ Article 2(5) “This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

share employment opportunities among the generations in the profession of panel dentist if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim. On the contrary, Article 2(5) must be interpreted as precluding a national measure where the sole aim is to protect the health of patients against the decline in performance of those dentists after the age of 68. This use of age-based distinctions indicated a willingness to accommodate measures designed to advance broad considerations of public policy, such as the fairness of opportunity across different age groups.¹⁴² In other words, the objective of the national measure in *Petersen* was to share out employment opportunities among the generations, linking to a substantive equality. Finally, although the Court rejected the idea that an age limit can protect the health of the patients, at the same time it gave broader discretion to Member States, apparently accepting the link between age and decline in performance, although in this case there was no evidence of stereotypes.

To some extent, it seems that the broad discretion in protecting national public interests can be a double-edged weapon. The Court avoided taking a clear position, leaving the responsibility to the Member States. Consequently, Member States incur in a higher risk if their justification are incompatible with EU law. In this way, a substantive equality able to justify a difference of treatment should not be based on weak public interests such as contingent situations, or should not be limited to the labour market. The CJEU proposed a similar outcome in *Vasil Ivanov Georgiev v Tehnicheski Universitet*¹⁴³ with regards to university professors.

9. Health and safety justifications: Pérez, Prigge and Wolf cases

The perspective on age justification changes when age limits are determined by health and safety justification related to genuine occupational requirements. The subsequent analysis considers the definition of ‘legitimate aim’, according to Article 6.

In the recent case of *Mario Vital Pérez v Ayuntamiento de Oviedo*¹⁴⁴ Mr Pérez challenged Spanish law, and in particular the law of the Principality of Asturias, on the coordination of local police forces. Indeed, he challenged Point 3.2 of the notice of competition¹⁴⁵ which requires applicants to be no more than 30 years of age, on the basis that it violates the fundamental right of access, on equal terms, to public office, as affirmed in the Spanish Constitution and in Directive 2000/78/EC. Consequently, he sought annulment of that provision on the ground that an age barrier

¹⁴² O’Cinneide Colm, ‘Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age’, [2010] *Revue des Affaires Européennes*, Vol. 2 p. 253-276.

¹⁴³ Case C-250/09 *Georgiev v Tehnicheski Universitet - Sofia, Filial Plovdiv* [2011] 2 CMLR 7

¹⁴⁴ Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158

¹⁴⁵ The official document in which the details and conditions for the police officers’ recruitment are provided.

is not justified, inasmuch as physical fitness is ensured through the physical tests specified in the notice of the competition. In Spain, each of Spain's 17 Autonomous Communities has passed laws or regulations containing provisions relating to the rules governing the local police, which are varied so far as concerns the maximum age for access to the profession. Mr Pérez observed that the laws enacted by the other Autonomous Communities either do not set a maximum age (Andalusia, Aragon, the Balearic Islands, the Canary Islands, Castilla-La Mancha, Catalonia and Extremadura) or set it at 35 years of age (the Basque Country) or 36 (Valencia and Galicia), indicating a lack of consistency on the part of the Principality of Asturias when compared to the other Communities. Article 32(b) of the Law of the Principality of Asturias on the coordination of local police forces¹⁴⁶ specifies that one of the conditions for entry into the local police force is for the person to be at least 18 years of age and no more than 30 years of age. Relying on Article 6 of Directive 2000/78/EC, such an age limit has been justified by the Principality of Asturias in the light of the objective of ensuring that local police officers possess a particular level of physical fitness for the performance of their professional duties. Art. 6(1)(c) provides that "the fixing of a maximum age for recruitment...is based on the training requirements of the post in question...or the need for a reasonable period of employment before retirement." According to this provision, the rationale of the Principality of Asturias is that the maximum age of 30 could be justified on the basis of a physical requirement for a police officer position. On this point, prohibiting age discrimination oscillates between employment policies considerations on the one hand and the concept of legitimate restrictions on the other.¹⁴⁷

Two main questions arise on the *Pérez* case: firstly, why direct age discrimination against police officers over the age of 30 should be justified on the basis of a required level of physical fitness intended as a legitimate aim; and secondly, in what instances would the physical requirements ground be relied upon and considered as "*appropriate and necessary*." The problem is whether the age at which a police officer can be recruited allows enough time to justify the training given and enough time to do the job before the physical demands become too much. A previous case, *Colin Wolf v Stadt Frankfurt am Main*, deals with the same employment policies. Consequently, it requires a separate analysis in order to see how the Court has interpreted the age limit in the *Pérez* case.

¹⁴⁶ See: *Ley de Coordinación de las Policías Locales de la Comunidad Autónoma del Principado de Asturias* (BOE No 169 of 16 July 2007)

¹⁴⁷ Schiek, Dagmar, 'Age discrimination before the CJEU – conceptual and theoretical issues' [2011] 48 Common Market Law Review, Issue 3, pp. 777–799

In the *Wolf* case¹⁴⁸ a Preliminary Ruling was requested in order to assess whether an age limit, intended to guarantee the operational capacity and proper functioning of the professional fire service, can be considered a legitimate aim (Article 6(1)). Mr Wolf applied for an intermediate career post in the fire service (which involved physically demanding tasks such as fighting fires and rescuing people). The City of Frankfurt am Main replied to Mr Wolf that his application could not be considered, because he was older than the age limit of 30 years. The referring Court considered that it should be ascertained whether the difference of treatment on grounds of age could be justified by the German law. The German General Law on equal treatment¹⁴⁹ at Paragraph 10.3, which transposed Article 6(1) (c) of Directive 2000/78/EC, is in the same terms as the Spanish law in Article 32(b), as seen above. The Court considered that the physical fitness of an applicant for an intermediate career post in the fire service is assessed in a separate selection procedure, to which Mr Wolf was not admitted because of his age. Following this, the Court limited its question to the interpretation of Article 6(1) of the Directive, in particular focusing on a possible justification of the difference of treatment resulting from the application of the national legislation at issue in the main proceedings¹⁵⁰. In this particular case, the age barrier was held to be an appropriate objective for ensuring the operational capacity and proper functioning of the professional fire service, without going beyond what was necessary to achieve that objective. The Grand Chamber considered the physical requirements needed for the performance of fire-fighting and rescue duties which, according to the Court, are such that they can only be performed by younger officials. This requirement has been justified as a “genuine and determining occupational requirement” on the basis of art. 4(1)¹⁵¹ of Directive 2000/78/EC alone. According to the Court, it does not constitute a discrimination on the grounds of Article 1, without the need to further consider Article 6. In this way, the Court gave a very broad interpretation of the genuine occupational defence by finding that a maximum recruitment age, as well as physical fitness, was a genuine occupational requirement related to age. Finally, considering *Petersen* and *Wolf* the CJEU agreed that setting a maximum recruitment age of 30 for certain fire fighters and a retirement age of 68 for panel dentists is permissible.

¹⁴⁸ Case C- 229/08 *Colin Wolf v Stadt Frankfurt am Main* [2010] ECR

¹⁴⁹ “*Allgemeines Gleichbehandlungsgesetz*“ of 14 August 2006 ‘the AGG’ (BGBl. 2006) , p. 1897

¹⁵⁰ See also: Case C- 321/03 *Dyson Ltd v Registrar of Trade Marks* [2007] ECR I- 687, paragraph 24; Case C- 392/05 *Georgios Alevizos. v. Ypourgos Oikonomikon* [2007] ECR I- 3505, paragraph 64 and the case-law cited; and Case C- 532/06 *Lianakis and Others* [2008] ECR I- 251, paragraph 23

¹⁵¹ Article 4 (1) : “Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”

On the contrary, in *Pérez* case the Court took the view that the level of physical fitness required to work as a local police officer cannot be compared to the “exceptionally high physical capacities” required in the case of fire fighters and therefore the age barrier was not justifiable. Hence, although in *Wolf* the Court gave a broad interpretation of the genuine occupational defence for the purpose of Article 4(1), in *Pérez* the Court used the different nature and level of duties required as the core element for its interpretation and judgment. Then, the Court’s approach in considering the physical duties focused on the difference between justifiable treatment and prohibited age discrimination. In the *Wolf* case the Court considered the age limit as a means to protect the time allowed for a normal career as a fire fighter. In *Pérez* the same age limit considered as a discriminatory barrier for a police officer’s career. Thus, the different interpretation of physical capacities, as linked to the chronological age, determined whether an age limit needs to be considered a genuine occupational defence or a legitimate aim, linked to legitimate employment policy. As a consequence, the *Wolf* case was considered under Article 4(1) while *Pérez* was looked at under Article 6(1). Despite this, to justify an age barrier on the basis of physical capacity considerations deriving from a determined chronological age, contradicts the well-established principle of non-discrimination (*Mangold* case), and in the considered cases, the Court focused on interpreting the exceptions under Article 4 and Article 6 of Directive 2000/78/EC.

In the *Prigge*¹⁵² case (which on a timeline would be placed between *Wolf* and *Pérez*) a mandatory retirement age of 60 was imposed by a clause in a collective agreement on Lufthansa pilots in the interests of public safety. In this case the Court widened the scope given to the genuine occupational requirement test in *Wolf*. While in *Wolf* the possession of especially high physical capacities was regarded as a genuine and determining occupational requirement,¹⁵³ in *Prigge* the physical capabilities were recognised as an essential requirement for pilots and considered as a capability which diminishes with age. It was questioned whether possessing physical capabilities could be considered as a ‘genuine and determining occupational requirement’; and whether, the aim of guaranteeing air-traffic safety was ‘legitimate’ and ‘proportionate.’ The Court considered proportionality under Article 4(1), and underlined how this article must be strictly interpreted as it represents a derogation from the principle of non-discrimination.

In the *Wolf* case the age barrier were considered “appropriate and necessary” as “the age at which an official is recruited determines the time during which he will be able to perform physically demanding tasks.”¹⁵⁴ Thus, the “recruitment at an older age would have the consequence that too

¹⁵² Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG* [2011] IRLR 1052

¹⁵³ *Wolf* (n. 148)- Paragraphs 29, 39-41, 44, 46,

¹⁵⁴ *Ibid*- Paragraph 43

large a number of officials could not be assigned to the most physically demanding duties.”¹⁵⁵ This has been both positively accepted and broadly defined by the Court.

On the contrary, in *Prigge* the possession of the relevant capabilities related to age and the age limit of 60 were considered a disproportionate requirement within the meaning of Article 4(1). In fact, despite the collective agreement “national and international authorities consider that, until the age of 65, pilots have the physical capabilities to act as a pilot, even if, between 60 and 65, they do so only as a member of a crew in which the other pilots are younger than 60.”¹⁵⁶ In addition, for the purposes of Article 6(1), air-traffic safety was not considered a ‘legitimate aim.’

The situation of Mr. Pérez sparks reflections on the important economic consequences deriving from recruiting and training police officers characterised by short terms of employability. Nevertheless, the difference of treatment, resulting from Article 32(b) of Law No 2/2007, was not justified under Article 6(1)(c). In particular:

[A]lthough the Spanish Government referred to the need for a balanced distribution among age groups as an objective of the measure at issue, there is nothing in the evidence submitted to the Court showing that the measure is specifically aimed at encouraging new recruitment.¹⁵⁷

Through the case analysis the appreciation of the physical capability does not seem anchored to a fixed rationality. The *Pérez* case shows that interpretations not fully supported by documentations, are to be considered rejected. The Court further considered that, for the purpose of the age limit, the ‘normal’ retirement age under the general social security scheme fixed at 67 is irrelevant.

In the cases considered in this paragraph, the Court agreed that a certain level of physical capability can be linked to chronological age. Nevertheless, the acceptability of such age limit cannot be based on variables which are of difficult determination. Thus, it can be critically discussed that the reasoning in *Prigge* lacks objectivity. In fact, it cannot be taken for granted that an assumed lack of physical capacity is counterbalanced by the other members of the crew. Whether the Court agreed on the link between ‘physical capacity’ and ‘chronological age’, it should apply the same reasoning with consistency, without considering external variables. In this way, physical capacity should be evaluated as long as it is a fundamental part or a relevant criteria for the job. Differences in physical capacities have been overcome in other fields, such as in army training

¹⁵⁵ *ibid*

¹⁵⁶ Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG* [2011] IRLR 1052) – Paragraph 73

¹⁵⁷ Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158– Paragraph 63 (see on this point also the concept of “Lump of Labour fallacy”)

where, despite the significant physical fitness gap, female soldiers are recruited for gender-integrated army basic training. Eventually, more attention at national careers management, especially when a European case has determined a precedent, would encourage higher economic stability within each country and an overall legal reliability across Europe.

10. Public policies in vocational training: Hütter and Schmitzer cases

The following paragraph discusses economic and social policies as a legitimate aim. In particular, the case law is here linked to the concept of legal certainty in vocational training, analysing situations in which age discrimination can be justified.

Two notable Austrian cases, decided by the Court of Justice of the European Union (CJEU) demonstrate how Article 21 CFR and Article 6 of Directive 2000/78/EC, when dealing with public policies, are hardly combined by the principle of proportionality. While Article 6 allows differences of treatments, which may include “minimum conditions of age... for access to employment or to certain advantages linked to employment”, Article 21 CFR prohibits any discrimination on age. Overall, Article 6 permits age discrimination under the following conditions: legitimate employment policies; labour market and vocational training objectives. Nevertheless, these legitimate aims have been repeatedly interpreted by the Court. The following case law analysis shows how the application of proportionality assessment is far from uniform. In *David Hütter v Technische Universität Graz*¹⁵⁸ and *Schmitzer v Bundesministerin für Inneres*¹⁵⁹ the restriction pursuing the legitimate aim was not considered proportional to the reason behind the discrimination.

Mr Hütter, who worked as a public servant under Austrian law, was entitled to be paid in accordance with the length of his service. However, the national law prescribed that the time he had spent working or training before the age of 18 was not to be included in the calculus. Mr Hütter and his colleague (22 months older than him) completed a period of apprenticeship as a laboratory technician with *Technische Universität Graz* (TUG). Later, they were both recruited by TUG, but Mr Hütter was recruited at a lower incremental pay point compared to his colleague, who was materially in the similar circumstances, but only 22 months older. This difference was due to the fact that the period of apprentice completed by Mr Hütter after his majority was only 6.5 months, while the one of his older colleague was 28.5 months. Consequently, Mr Hütter considered that the age limit imposed by Austrian law (*Vertragsbedienstetengesetz* 'the VBG') determined an unlawful direct discrimination as “where professional experience is equal, there is no justification, under

¹⁵⁸ Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325

¹⁵⁹ Case C-530/13 *Schmitzer v Bundesministerin für Inneres* [2015] IRLR 331

Article 6(1) of Directive 2000/78/EC, to support a difference in treatment based exclusively on the age at which that experience was acquired.”¹⁶⁰ On the contrary, the TUG argued that the discrimination was justified on the grounds of two legitimate aims: firstly, to promote entry into the labour market for young people; secondly, that those who had pursued a general secondary education would not be treated less favourably than those who had pursued vocational qualifications.

Mr Hütter brought a claim before *the Landesgericht für Zivilrechtssachen Graz* (The Graz Regional Court for Civil Matters). He considered the difference in treatment to be unjustified and in breach of both Austrian Law and Directive 2000/78/EC. For this reason, he sought the payment of compensation equivalent to the difference in treatment he had received because of his age. That difference in treatment corresponded to a sum of EUR 69.60. Mr Hütter was successful at first instance and on appeal. Therefore, the TUG brought an appeal before the *Oberster Gerichtshof* (the Supreme Court) asking to ascertain whether Article 6 of Directive 2000/78/EC is to be understood as precluding the Austrian legislation from excluding the service completed before the person reached the age of 18.

The CJEU did not consider it possible to justify the discrimination suffered by Mr Hütter, raising a problem of incompatibility with Articles 1, 2 and 6 of Directive 2000/78/EC. Concerning Article 6, the Court considered the legitimacy of the aims behind the exclusion, for determining the incremental step of periods of employment completed before the age of 18. The aims provided by Austria were respectively to “not place persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education” and “to avoid making apprenticeship more costly for the public sector”¹⁶¹ and thereby to promote the integration of these younger people. The Court argued that the criterion of age does not appear appropriate for achieving these aims. The first case considered that it would have been more appropriate a criterion based on the type of studies pursued rather than age; and the second case considered that age does not single out younger people in order to give them special conditions. The Court concluded that these measures provided by the national legislation were not proportionate for achieving the aims. In the judgement the Court, recalling *Mangold*, admitted that “the Member States unarguably enjoy broad discretion.”¹⁶² As mentioned by Advocate General Mazák in his opinion on *Palacios de la Villa*¹⁶³, this broad discretion can be described as a sword of Damocles on the Member States. Indeed, the financial impact determined by the CJEU’s decision in *Hütter* was considerably relevant

¹⁶⁰ *Hütter* (n.158) - Paragraph 18

¹⁶¹ *Ibid* - Paragraph 40

¹⁶² *Ibid* - Paragraph 45

¹⁶³ Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák, para 64

for the Austrian State. In particular, the CJEU's decision was followed by an amendment of Austrian law. It modified the wording of Paragraphs 8 and 12 of the GehG (the Law on Salaries of 1956, *Gehaltsgesetz*). Consequently, all the periods worked prior to the age of 18 were reconsidered, determining a very large number of potentially admissible cases. Formally, this Amending Law solved the incompatibility with Directive 2000/78/EC with retroactive effect. Substantially, the Austrian Government was further committed to make other changes to its national law in order to mitigate such as financial impact. It introduced a three-year extension of the reference period required to progress from the first to second incremental step in each job category. In this way, the amendment recognised as full work experience also the period before the age of 18, allowing those who suffered discrimination under the previous system to switch to the new system through an application. However, it was argued that while this amendment neutralised the advantage resulting from the inclusion of periods before the age of 18, it was still impairing those civil servants who were already disadvantaged by the previous system. In fact, the extension to the periods for the advancement reference date is likely to apply to them alone. Consequently, the adverse effects of the system existing prior to the Amending Law have not ceased entirely for civil servants.

In this context, the *Schmitzer* case was brought before the CJEU for a Preliminary Ruling for clarifying how the "submission of a request by each interested party, as well as those relating to the extension of advancement periods" served "objectives of procedural economy, of respect for acquired rights and of the protection of legitimate expectations."¹⁶⁴ With regards to the facts, Mr Schmitzer brought an action before the *Verwaltungsgerichtshof* (Administrative Court), challenging the decision of the *Bundesministerin für Inneres* which turned down his request. He aimed for a review of his remuneration status under Paragraph 8 of the GehG, in the version prior to the Amending Law. Mr Schmitzer had worked as a civil servant before turning 18, thus he claimed that the Amending law was still contrary to Directive 2000/78/EC/EC, as it ingrained the effect of the original law. The CJEU focused on whether this difference in treatment could be justified in the light of Article 6.

The Austrian government argued that the legitimate aim pursued by the Amending law was a "budgetary consideration". The CJEU considered that although budgetary consideration could underpin a social policy of a Member State, it cannot constitute a self-standing legitimate aim within the meaning of Article 6. For this reason, such age-based difference in treatment is not objectively justified as appropriate and necessary.

¹⁶⁴ *Schmitzer* (n.159)- Paragraph 39

In the *Hütter* case, the Court recognized Member States' freedom to determine public measures to promote the integration of young apprentices into the labour market. This freedom is somewhat ambiguous, as it is subjected to the interpretation of the Court. The Austrian policy that did not consider that work experience before the age of 18 was not objectively justified in relation to Article 6. The CJEU decision had serious financial consequences for the State, compared to the monetary detriment suffered by Mr Hütter. In the subsequent *Schmitzer* case, the amendment of Austrian law was still considered to be unlawfully discriminatory as 'budgetary considerations' cannot justify a measure that maintains indefinitely an age-based difference in treatment which was supposed to be eliminated. For this reason, it was not considered "a proportionate means of achieving a legitimate aim", as required by Article 6 of the Directive. Thus, the economic implications deriving from 'budgetary considerations' are not considered sufficiently justifiable. Nevertheless it could be argued that their justification could be treated with less rigour on the strength of 'transitional arrangements', in order to avoid heavy economic consequences within a Member State which can possibly negatively affect other fields of occupation.

In conclusion, the two cases face the problem of legal certainty in vocational training, analysing situations in which age discrimination can be justified. Nevertheless, their meaning of legitimate aim seems to lie outside the wording of Article 6 of Directive 2000/78/EC, while referring to the broader discretion of a Member State and the judgement of the Court. For this reason, an element that is worth considering in this analysis is the role of comparator. In fact, it might be used for addressing reasonable and standard treatments in the sphere of age discrimination.

11. Proving age discrimination by comparator

Unfavourable treatments can be considered relevant only where the difference is observed in comparison to someone in a similar situation. Therefore, in applying Article 2(1) of Directive 2000/78/EC¹⁶⁵ direct discrimination is to be taken to occur where one person is treated less favourably than another in comparable situation. In this way comparability must be carried out in a specific and concrete manner in the light of the benefit concerned.¹⁶⁶ Therefore, the role of 'comparator' can provide a 'measurement' of the level of discrimination. In most cases, the comparator is a person in materially similar circumstances, where the main difference between the two persons is the 'protected ground'. Directive 2000/78/EC permits a comparison between a

¹⁶⁵ Article 2(1) of Directive 2000/78/EC "For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1"

¹⁶⁶ Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] EUECJ

complainant's situation and the situation of a person whose circumstances are similar. In other words, the judge is entitled to consider whether two or more circumstances are materially different on the base of assumed age discrimination. Nevertheless, the doctrine is sceptical about the role of comparator as there is no need for it to actually exist.¹⁶⁷ On the other hand, it could be sustained that a comparator reinforces the claim against age discrimination.

11.1 O v Bio Philippe Auguste SARL

The case of *Bio Philippe Auguste*¹⁶⁸ concerns the interpretation of the principle of non-discrimination on the ground of age, but from a younger worker perspective. It focuses on workers in a comparable situation.

The facts report that the applicant was a student who was recruited by Bio Philippe Auguste SARL under a fixed-term employment contract for the period from 21 December 2010 to 24 December 2010. In this regard, the French national law (L. 1243-10, *Code du Travail*) provided that an end-contract payment is not payable if the contract is concluded with a young person during his schools holidays or university vacation. Therefore, against the national legislation the applicant raised the problem of a compatibility with the 'principle of equal treatment' and the principle of 'non-discrimination on the ground of age.' In fact, Article 2(1) should not allow a young worker to be treated less favourably than a normal worker in a comparable situation. Nevertheless, the Court found that a student (as the applicant) employed on the basis of a fixed-term employment contract during his university vacation is not comparable to the situation of a worker who is entitled to end-of-contract payment under the French provision. The Court concluded that these two categories of workers are not comparable. In fact, the temporary and ancillary nature of these students' contract justifies a difference in of treatment, since students normally intend to continue their study at the end of that holiday or vacation. Consequently, the Court stated that the two categories of workers are not comparable.

With regards to admissibility, the applicant expressly admitted that dispute in the main proceedings had been provoked solely and exclusively to challenge the provisions at issue. Also, the applicant requested an amount in the sum of EUR 23.21, and EUR 4500 as compensation. This case recalls the *Hütter case* for the part in which the national provision aimed to give to younger persons special conditions of recruitment as a way to promote their integration into the labour market. In

¹⁶⁷ Sargeant Malcolm, *Age Discrimination: Ageism in Employment and Service Provision* (Gower Publishing, 2012)

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¹⁶⁸ Case C-432/14 *O v Bio Philippe Auguste SARL* [2015] ECJ (01 October 2015)

this way, the Austrian legislation provided that a period of service completed ‘by way of vocational training...in a...university or college’¹⁶⁹ is to be accredited for the purposes of determining the incremental step only where they were completed after the person concerned attained the age of 18. In the *Hütter* case the Court focused on Article 6 underlining how the national provision is not appropriate for the purpose of promoting youth employment. In *Bio Philippe Auguste* case Article 6 has not been considered but the Court strangely reinforced the principle of equal treatment sustaining the incomparable differences between young temporary workers and workers. What seems a contradiction is that the Court is not questioning the wording “young person” as it focuses more on the role of students. It would be interesting to question whether similar treatment would apply to a mature student.

12. Age and sex discrimination

Compared to sex discrimination, age discrimination cases are more complicated and it is not clear who the correct comparator may be. In the *Palacios* case A.G. Mazák underlined the difficulty of determining the existence of age discrimination in comparison to, for example, sex discrimination. In this way, Mazák considered that "age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated."¹⁷⁰ However, it is not entirely clear what ‘graduated’ means, it probably defines a wide extent of cases. O’Cinneide suggests that difficulties relate to “the fluid nature of a person’s age, the uncertain and shifting nature of ‘age groups’, the changing expectations that accompany changes in age, and the differences in position and expectations.”¹⁷¹ In other words, the chronological age alone is not analysed but the age-related characteristics, like ‘efficiency’ or ‘capability’ in carrying out a job. This assumption would contradict *Wolf, Prigge* and *Pérez* where the Court linked physical capacity to chronological age. However, Mazák continues: “whilst the application of the prohibition of discrimination on grounds of age requires a complex and subtle assessment, age-related distinctions are very common in social and employment policies.”¹⁷² This can probably be explained by the fact that these policies are more likely related to economic needs which differentiate between age groups. According to that, it can be questioned whether the capability linked to a chronological age is rather based on economic or financial reasoning.

¹⁶⁹ VBG, Paragraph 26 (2) (1) (b)

¹⁷⁰ *Palacios de la Villa* (n.163) Advocate General Mazák - Paragraph 61

¹⁷¹ O’Cinneide Colm, ‘Age discrimination and European Law’ (2005) European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.3. Available online: < http://www.non-discrimination.net/content/media/Age%20discrimination%20and%20European%20Law_en.pdf > accessed 22.06.2015

¹⁷² *Palacios de la Villa* (n.128) Advocate General Mazák - Paragraph 61

Mazák raises two problems: firstly he considers that age discrimination is more difficult to ascertain than sex discrimination because it is ‘graduated’; secondly he considers that in social and employment policies it is a very common form of discrimination. Although the Directive permits a flexible and nuanced approach to the comparator, the existing sex discrimination case-law provides a relevant guidance also in terms of intersectional discrimination, shedding a light on the problematic surrounding age discrimination.

12.1 Brunnhofer

The Austrian case *Brunnhofer v. Bank Der Österreichischen Postsparkasse Ag*¹⁷³ concerns sex discrimination. In particular, Ms Brunnhofer lamented a difference between the remuneration paid by the Bank to her and to one of her male colleagues for the same work. This case involves an analysis of the role of comparator, focusing on what justifies the differences under the principle of proportionality. Consequently, the main point is to understand if Ms Brunnhofer and her colleague were comparable, thus whether they were carrying on the ‘same work’. In order to confirm the existence of discrimination, or otherwise, the Court considered a series of elements as objective factors: the nature of the work, the training requirements and the working conditions. Accordingly, the CJEU decided that a personal factor such as the performance of the jobholder cannot be a part of the assessment of equal value. In particular, it even stressed that where both employees perform the same job a pay difference according to the performance of the jobholder would only be possible by assigning different tasks to this employee or changing their job.¹⁷⁴ In his opinion A.G. Geelhoed¹⁷⁵ recalled the uniform definition of ‘worker’ provided by Directive 75/117/EC: “any differences in individual levels of performance must not result in differences in pay because the same work is being done in the same job.”¹⁷⁶ Thus, to justify a difference in pay the employer needs to appeal on objective grounds, which however need to be unrelated to any discrimination based on sex. Eventually, the *Brunnhofer* case reveals how the role of comparator is particularly useful for confirming the presence of sex discrimination through an analysis of objective factors. Nevertheless, as discussed above, investigating age discrimination leads to a more difficult analysis

12.2 Lindorfer

¹⁷³ Case C-381/99 *Brunnhofer v. Bank Der Österreichischen Postsparkasse Ag* [2001] ECR I-4961

¹⁷⁴ *Ibid* - paragraph 77.

¹⁷⁵ *Ibid*- Opinion Of Advocate General Geelhoed – Paragraph 27

¹⁷⁶ *Ibid*- Paragraph 25

The *Lindorfer*¹⁷⁷ case focuses both on the scope of prohibition of sex discrimination and on age discrimination, pursuing the so called ‘intersectional discrimination’¹⁷⁸, although the Court did not make any reference to it in its judgement. *Lindorfer* is particularly relevant because of its approach, which considers multiple discrimination, something missing in other similar cases where any reference to age discrimination was omitted (i.e. *Chacón Navas*¹⁷⁹ on disability discrimination and *Maruko*¹⁸⁰ on the basis of sexual orientation).

Lindorfer has been heavily influenced by the outcome of the *Mangold* case, as the Court reopened on the scope of the principle prohibiting age discrimination. In *Lindorfer*, A.G. Sharpston negatively considered the *Mangold* decision as "identifying a hitherto unacknowledged fundamental principle of Community law ('non-discrimination on grounds of age')"¹⁸¹, while she noticed that:

[E]quality of treatment irrespective of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential.¹⁸²

Thus, Sharpston assumed a firm position sustaining that age discrimination should “be interpreted and applied less rigorously than the prohibition of sex discrimination”¹⁸³, leading to question why the comparison between age and sex discrimination should proceed on two separate grounds.

The facts refer to Ms Lindorfer, an Austrian national and Council official, who brought an action against the calculation of the length of her pensionable service. In 1999 and 2000, she asked to have her Austrian pension entitlement transferred to the Community scheme, and was later informed that, for the purposes of currency conversion, her employment was calculated as five

¹⁷⁷ Case C-227/04 *Lindorfer v Council of the European Union* [2007] ECR I-6767

¹⁷⁸ Different concepts and terms have emerged to describe the complexity of discrimination implicating more than one ground. Suggested terms include “additive,” “accumulative,” “compound,” “intersectional,” and “multiple” discrimination; terms such as “complex” bias or “multi-dimensional” inequalities have also been used. In international documents, the term “multiple discrimination” tends to be used as a broad umbrella concept to describe both additive discrimination and intersecting discrimination. See, e.g., United Nations Committee on Economic, Social, and Cultural Rights, “General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)”, E/C.12/GC/20, Article 17.

¹⁷⁹ Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706,

¹⁸⁰ Case C-267/06 *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757

¹⁸¹ *Lindorfer* (n.177), Opinion of Advocate General Sharpston - Paragraph 57

¹⁸² *ibid* - Paragraph 85

¹⁸³ *ibid* - Paragraph 51

years, five months and eight days, while she had worked and contributed to a pension scheme for 13 years and three months. This decision was contested by Ms Lindorfer, who considered it unlawful and in contrast with rights and principles under Community law. Furthermore, she considered that the actuarial values were discriminatory both on the grounds of sex as they were less favourable for women; and on the grounds of age as they were proportionally less favourable with the increase of retirement age. In this case, two opinions were issued by two different Advocate Generals. The reason is that the first opinion from A.G. Jacob was written before the *Mangold* judgment and he therefore suggested not treating age as equivalent to gender or other forms of discrimination. Since *Mangold* determined an important advancement in the recognition of age discrimination at EU level, the second opinion from A.G. Sharpston specifically focused on age discrimination and criticized *Mangold*, suggesting that the prohibition of age discrimination was instead a particular expression of the general principle of equality before the law. In his first opinion Jacob underlined how an individual concept of equality should be applied to single cases, and Sharpston continued sustaining that, “unlawful discrimination occurs when criteria which are not relevant are relied upon to override those which are relevant. It will always be necessary, therefore, to ascertain first which criteria are relevant to the choice of treatment and which are not.”¹⁸⁴ Thus, Sharpston distinguishes between relevant and irrelevant criteria. In applying this principle Sharpston considered:

[T]wo Community officials, A and B, both of the same sex, both aged (for example) 40 and both in the same grade and step. However, A has just entered the service of the Communities after 15 years of working in a Member State and contributing to a national pension scheme. B has worked for the Communities for the same period. A’s accrued pension rights are transferred to the Community scheme. B’s salary as a Community official has been subject to deductions by way of pension contributions for 15 years, and his or her accrued pension rights from that service are already within the Community scheme. Let us further assume that both will retire from the Communities at the same grade and step, at the age of 60, having followed the same career path and having been subject to the same deductions from salary in the intervening 20 years.¹⁸⁵

The appropriate comparator for this case is a single hypothetical comparator, of different age. Age is a relevant criteria as it is the characteristic upon which the difference of treatment is founded. In

¹⁸⁴ *Lindorfer* (n.177), Opinion of Advocate General Sharpston - Paragraph 24

¹⁸⁵ *Ibid*- Paragraph 25

fact, in the example above, official ‘A’ entered a Community service at a later stage of their career, but the Court did not recognise that.¹⁸⁶ Consequently these two situations were considered non-comparable. In particular, Sharpston sustained that the only two aspects which might perhaps be compared, and to which Ms Lindorfer referred, are the length of contribution period and the amount contributed. The Court rejected the second ground of appeal considering that the pension amount is determined by the final salary and the length of Community service. Consequently the Court decided the case purely on the basis of sex discrimination. As the *Palacios* case suggested, it is possible that the fault of this lack of attention on the part of the Court towards age was due to the low scrutiny intensity of an age-related form of discrimination. The risk is to treat age-based distinctions as ‘suspect’ situations. The difficulties in recognising age discrimination stem from its acceptance as relevant criteria, especially when the objective justification test under Article 6(1) needs to be applied. In the *Lindorfer* case the Court adopted a more flexible and permissible approach to age rather than to sex discrimination, demonstrating how, despite all the considerations made on the principle of proportionality or legal certainty, the recognition of age discrimination is the most difficult thing to pursue.

12.3 Rosenblatt

The *Rosenblatt v. Oellerking Gebäudereinigungsges mbH* Case¹⁸⁷ is a case relating to retirement age. It shows how the CJEU held that a German law can justify an agreement between employers and employees about retirement when employees become entitled to a pension. This justification is based on the legitimate aim of seeking to promote access to employment by means of a better distribution of work between the generations. The wide discretion of the partners in pursuing a given aim in the area of social policy and defining the measure for implementation have not been considered unreasonable by the Court. Nevertheless, doctrine underlines how the Court’s enthusiasm for collective bargaining in *Rosenblatt* contrasts with a similar approach in sex discrimination case law.¹⁸⁸ This can be highlighted where the presence of a collective agreement has never been regarded as a reason to accept a discriminatory outcome.¹⁸⁹ More precisely, in *Rosenblatt* the Court sustained that:

¹⁸⁶ Senden Linda, 'Case C-227/04 P, Maria-Luise Lindorfer v. Council of the European Union, Judgement of the Court (Grand Chamber) of 11 September 2007 [2007] ECR I-6767' [2010] Common Market Law Review, Vol. 47.2, pp. 521–535

¹⁸⁷ Case C-45/09 *Rosenblatt v Oellerking Gebäudereinigungsges mbH* [2011] 1 CMLR 32

¹⁸⁸ Kilpatrick Claire, ‘Age, Retirement and the Employment Contract’ [2007], *Industrial Law Journal*, Vol. 36. 1, pp. 119–135; Age Concern England, p. 9, cf. Sections 109 and 156 of the Employment Rights Act

¹⁸⁹ Case C-127/92 *Enderby v. Frenchay Health Authority* [1993] ECR I-5535

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 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.¹⁹⁰

12.4 Enderby

In *Enderby* the Court seems unsure about classifying retirement age as a form of discrimination. In this case, the Court sustained that:

The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes.¹⁹¹

The comparison with sex discrimination reveals how the principle of proportionality in the age discrimination field is, in some way, mitigated by the flexibility allowed to the parties. In fact, because collective bargaining is a fundamental right which includes a certain level of freedom in the decision process, the imposed age limit has been considered justified. The *Rosenbladt* and *Enderby* cases demonstrate how in the case of multiple discrimination age is considered a different ground, where it is difficult to apply the proportionality test and the role of comparator.

Conclusions

This case study investigates the problem of age discrimination under two aspects. The first part is on European strategies against age discrimination and Directive 2000/78/EC, revealing a fairly

¹⁹⁰ *Rosenbladt* (n.187) - Paragraph 68

¹⁹¹ *Enderby* (n.189)- Paragraph 22

optimistic approach in combating age discrimination. European policies are considered a benchmark for current and future anti-discrimination legislations. Indeed, from the '90s until today the problem of ageing population has evolved. While in 1994 the challenge was to maintain a high level of integration of the older population as Europe ages, today the flagship of Europe 2020 is “an Agenda for new skills and jobs: A European contribution towards full employment”.¹⁹² In this agenda the European Commission encourages: flexicurity policies; skilled workforce; investments in education and training systems; better working conditions and consideration of workers’ physical and mental health needs; stronger policies to promote job creation and demand for labour. To accomplish these objectives, an effective and secure regulatory framework seems to be the key. However, such a solution sounds too simplistic. The failure of the Lisbon strategy reveals an increasing demand for better health care and pensions, and a reduced workforce. Ageing of population as a long-term issue calls for more attention.

The second part, the case law analysis, reveals the existence of practical problems, particularly in balancing equality and public interest. Therefore, it highlights the tensions between human rights and national interests. Accordingly, when justifying age discrimination becomes legally tolerated, then compromise on equality is unavoidable. In particular, case law demonstrates how the compromise between age discrimination and public interest plays in favour of more competitive and dynamic economies but against equality. The CJEU demonstrates how individual market-based tendencies entwine with socio-political objectives. Consequently, this extensive analysis on case law has dissolved that “Aristotelian” idea of equality. Nevertheless, especially after *Küçükdeveci*, the Court gave prominence to the principle of proportionality. In this way, the relevant public interest was weighted or valued in relation to the discriminatory condition. This development leads to a reevaluation of the position of Member States and the limits of the legitimate aim, progressively transforming age into a ‘silent protected ground’. Consequently, age discrimination was considered justifiable in relation to public policies in vocational training (*Hütter*) and retirement (*Palacios, Petersen*).

In *Mangold*, *Palacios de la Villa* and *Age Concern* judgements the prohibition on age discrimination was applied with more rigour. In these cases age was considered in the same way as other anti-discrimination grounds. However, they highlighted how the Court determined whether a legitimate aim can be justified under Article 6. In *Mangold* the legitimate aim was the vocational integration of unemployed older workers, but the means to achieve this were not proportionate; in *Palacios de la Villa* the legitimate aim was to promote employment, but the means were appropriate

¹⁹² Commission, ‘An Agenda for new skills and jobs: A European contribution towards full employment’ (Communication), the European Economic and Social Committee and The Committee of the regions, (2010) Strasbourg, 23.11.2010 COM(2010) 682 final

and necessary; in *Age Concern* the Court gave to Member States the option to provide for, within the context of national law, certain kinds of differences in treatment on grounds of age; and in *Hütter* the Court confirmed that rewarding experience that enables an individual to work better is a legitimate aim, although the exclusion of experience before the age of 18 was an inappropriate blanket provision. Despite the improvements, age as a prohibited ground maintains a sort of ‘borderline’ position, as revealed by *Bartsch*.¹⁹³

The proportionality test is applied to age justification. It consequently influences the concept of ‘legitimate aim.’ It must be supported by appropriate and necessary means and the balance between legitimate aim and fundamental right has inevitably influenced the decisions of CJEU. From the *Mangold* judgement to the most recent *Pérez* case the Court has therefore re-fashioned the concept of age discrimination, reconsidering the absolutisms and emphasizing the role of age protection in national economies. Despite the improvements, age as a prohibited ground maintains a different position compared to the other protected grounds. Although jurisprudence and doctrine agree in treating age discrimination like the other grounds, a comparison with sex discrimination reveals structural differences. In *Lindorfer*, the Court analysed age and sex as two very different grounds of discrimination. Particularly, it underlined the impossibility of applying the role of comparator to age, which has additionally defined a ‘graduated’ characteristic. Furthermore, Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services proves these differences in protection, as a similar legislation for age discrimination does not exist yet. Eventually, the reason for differentiating between age discrimination and the other prohibited grounds could be in the difficulties in finding a good comparator and in defining a legitimate aim. Furthermore, the unacceptable risks for Member States deriving from the legal uncertainty of Article 6 lead to declassification of age discrimination from the other protected grounds.

¹⁹³ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245

CHAPTER 4: COMPARATIVE ANALYSIS IN FINANCIAL SERVICES: ITALY, UK AND AUSTRIA

Introduction

Employment is not the only area in which age discrimination occurs; in fact, it is quite widespread in the financial services field. Financial service is defined as “the process of acquiring the financial good”¹ and it can vary on the basis of the service conditions, which are determined by financial providers. In this scenario, insurance is the financial service which most commonly uses age bands for its product. Nevertheless, the demand/supply of insurance services and their respective influences on economies are determined by the client population and their differences in risk attitude.² Therefore, both demographic and market trends can impact on the national economy. Nowadays, falling interest rates and ageing population are threatening the European economy. In particular, the ageing of the baby boomers coupled with a slower population growth are determining a shift in the population age structure. Thus, ensuring an equal access to financial services should be considered by national policies as necessary. Accordingly, an economic upturn is possible only as a result of social progress. In this way, the existence of Directive 2000/78/EC and the Europe 2020 strategy demonstrates that the European Union is moving in this direction, although age discrimination in financial services has encountered strong legislative resistance at national level.

In this scenario the following chapter compares three different countries on age discrimination in the field of financial services. The legislative gap left by Directive 2000/78/EC, which covers age discrimination only in employment field, implies that access to financial services is regulated by national laws. These latter ones link to national variables such as population size and Gross Domestic Product (GDP).³ On this ground, financial providers argue that possible restrictions on the use of age would determine higher costs and less choice. This has been explained by the fact that insurers, for example, cannot fully assess the risk, determining less choice for consumers. Therefore, more controls on the assessment of risk is the most common solution for managing longevity. Consequently, financial service providers adopt a ‘product and supply’ strategy instead

¹ Asmundson Irena, ‘Financial Services: Getting the Goods’ (*International Monetary Fund*, 2016) <<http://www.imf.org/external/pubs/ft/fandd/basics/finserv.htm>> accessed 14.09.2016

² Haiss Peter, Sümegi Kjell, *The Relationship of Insurance and Economic Growth – A Theoretical and Empirical Analysis*, (Paper for presentation at the 2006 EcoMod Conference, Hongkong, June 28-30, 2006), Europe institute Wirtschaftsuniversität Wien University Of Economics And Business Administration Vienna, p. 24 <<http://ecomod.net/sites/default/files/document-conference/ecomod2006/1454.pdf>> accessed 02.08.2016

³ ‘Gross Domestic Product’ (*Investopedia*, 2017) <<http://www.investopedia.com/terms/g/gdp.asp>> accessed 12.03.2017

of a ‘customer driven and solution oriented’ view. While this approach have a different impact on countries, competitiveness among providers is also considered a variable.

This chapter is a comparative study on financial services between Italy, Austria and UK. In each country, it analyses the impact of age-bands in insurance and banking systems. The study considers both life insurance and non-life insurance. Furthermore, the analysis conducted on supervisory bodies completes each country picture. The section on banking, mortgages and consumer loans focus on social inclusion. This chapter concludes with a reflection on age as a risk factor and the role of competitiveness in financial services.

The impact of EU law

In chapter 3 it has been demonstrated how European law helped to understand the concept of age discrimination from a legal point of view. In this chapter the study moves from these previous assumptions for defining age discrimination in financial services.

The European single market provides, for financial services, a statutory framework focusing on banks, insurance companies, pension funds and providers of a broad range of financial products and services. Over time, harmonisation across Europe was partly due to the fact that financial market stability has been considered a key factor in the growth and employment potential of the European Union. Nowadays, the European framework in the banking sector includes: Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, (Capital Requirements Directive (CRD) IV), together with Regulation (EU) No. 575/2013 (Capital Requirements Regulation ‘CRR’)⁴ on prudential requirements for credit institutions and investment firms. CRR contains rules on the authorisation of banks and investment firms, and the prudential supervision of banks and investment firms. It also provides prudential rules on capital, liquidity and credit risk, and sets the framework for supervision by national competent authorities. Furthermore, Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property aims to minimise consumer detriment in mortgage markets. It increases the European harmonisation of mortgage regulation by setting out requirements of mortgage lenders and intermediary duties when providing or advising on a mortgage for a consumer. Directive 2009/138/EC, the so-called Solvency II Directive,⁵ codifies and harmonises EU insurance regulation consolidating the previous directives in this field. Following a

⁴ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0575>> accessed 12.03.2017

⁵ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast). Available online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:en:PDF>> accessed 20.06.2016

European Parliament vote on 11 March 2014, Solvency II (Directive 2009/138/EC) was amended by Directive 2014/51/EU ('Omnibus II').⁶ This Directive mainly concerns the freedom of establishment and the freedom of services within the EU and it does not include any social policy. On contrary, it is based on the risk profile of each individual insurance company in order to promote comparability, transparency and competitiveness. Therefore, European insurance law creates a common basis of administrative authorization for insurance companies and post-authorization supervision of insurers as well as for intermediaries. While an analysis of these aspects is beyond the scope of this investigation it must be underlined how the Solvency Directive link to a harmonised management of risk. In fact, with the purpose of “Solvency Capital Requirement”, which is defined as “the amount of funds that insurance and reinsurance undertakings are required to hold in the European Union”⁷ the Directive develops elaborate risk management systems. Therefore, its purpose is to ensure that all quantifiable risks are taken into account. In particular, this Directive refers to the need of insurers to reduce the risk that would make them unable to meet claims. Certainly, this clarifies that the financial stability is the main concern of the European legislator. Thus, it can be argued that consumer protection is a secondary and consequential. Indeed, this is demonstrated by the fact that implementing the principle of equal treatment in access to and supply of goods and services is still a proposal.⁸ While to some extent it is true that financial stability ensures also customer protection, on the other hand, concerns are raised over the arbitrary powers of financial providers.

At the moment, protection of consumers against age discrimination in financial services is represented only by the “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”⁹ (hereinafter “the Proposal”). The Proposal contains an explicit reference to the protection against age discrimination and the difficult relationship with the financial providers. In particular it states that:

The Commission received many complaints about discrimination in the insurance and banking sector. The use of age or disability by insurers and banks to assess the

⁶ Commission, “Banking and Finance” (*European Commission*, 2016) < http://ec.europa.eu/finance/insurance/solvency/solvency2/index_en.htm> accessed 2.08.2016;

⁷ Investopedia, ‘Solvency Capital Requirement’, (*Investopedia*, 2016) < <http://www.investopedia.com/terms/s/solvency-capital-requirement.asp>> accessed 20.06.2016

⁸ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008)426). < <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426>> accessed 12.06.2016

⁹ Ibid

risk profile of customers does not necessarily represent discrimination: it depends on the product.¹⁰

Convincingly, the Proposal itself suggests that the problem is the actual assessment of risk in insurance and banking. This is even more evident where the Proposal sustains that:

[I]f insurers are not allowed to take age into account at all, the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers.¹¹

Furthermore, an annex to the Joint Report on the application of Council Directive 2000/78/EC underlines the need to remove age prejudices and discrimination, while it clarifies that under certain circumstances different treatments based on age may be justified.¹² Following this rationale, it can be assumed that age discrimination in insurance and banking can be justified if the circumstances which determine an assessment of the risk are clear. Accordingly, the Proposal refers to the proportionality test and to statistical data as elements ensuring clear circumstances. In other words, financial providers are allowed to use the proportionality test and statistical/actuarial data in order to justify age discrimination. Nevertheless, this approach does not address the critics on social inclusion of older people.

1. Access to financial services and social inclusion

In the financial services field, financial providers are allowed to differentiate among customers on the basis of the assessment of risk, leading to discriminatory situations. As consequence, this might result in an inferior service, in product restriction, or in different treatment when receiving a service. Examples of age discrimination in financial services occur both in insurance and banking. Accordingly, in these fields a “financial exclusion” because of age is a common practice. This research considers the following definition of exclusion:

¹⁰ Ibid- Section 2 “Consultation of Interested Parties and Impact Assessment”, under the paragraph on “Impact assessment”

¹¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, Article 2(6). Available online: <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52008PC0426>> accessed 12.03.2016

¹² Commission, ‘Annexes to the Joint Report on the application of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC)’ (Commission Staff Working Document, 2000). Accompanying the document: Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing the general framework for equal treatment in employment and occupation (‘Employment Equality Directive’) {COM(2014) 2 final}, Brussels 17.01.2014. <http://ec.europa.eu/justice/discrimination/files/swd_2014_5_en.pdf> accessed 15.03.2016

Financial exclusion refers to a process whereby people encounter difficulties accessing and/or using financial services and products in the mainstream market that are appropriate to their needs and enable them to lead a normal social life in the society in which they belong.¹³

This definition emphasises the link between age discrimination in financial services and social exclusion. In fact, financial services are part of a social life as they permit access to a range of opportunities and freedoms. Furthermore, a facilitated access to financial services implies also an improvement in confidence and aspiration. In particular, being included in the banking system determines some psychological benefits in terms of more confidence as money managers¹⁴ with an improvement in commercial power. Overall, accessing financial services implies that financial products are free from barriers in their costs and structure. However, difficulties arise when the financial product holds certain characteristics which make it difficult to be sold to older people. Some of these difficulties may occur because of financial product structure or because of its higher price.

Price (demand side)

The cost of the financial product puts part of the population beyond its reach. An older person is often unable to buy any insurance product. Consequently, exclusion of older people arises because the supply of products and services is at an unaffordable price. For example, insurance premium price hikes at particular ages, irrespective of the particular circumstances of the individual.¹⁵ This demand and supply relationship represents the “correlation between price and how much of a good or service is supplied to the market.”¹⁶ According to microeconomics, price should be a reflection of supply and demand. Therefore, a disequilibrium occurs where the price is too high, as indicated in the figure below.

¹³ Commission, *Financial service provision and prevention of Financial Exclusion*, (Report, 2008) p. 9

¹⁴ Farrel Christopher, O’Connor William, *Low-income families and household spending* (DWP/Corporate Document Service, 2003) p.103

¹⁵ Fitzpatrick Barry, Kingston Irene, *Older People’s Access to Financial Services* (Research for the Equality Commission for Northern Ireland, 2008) p. 34. <[http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/OLDERPEOPLEFinancialservices\(F\).pdf](http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/OLDERPEOPLEFinancialservices(F).pdf)> accessed 16.07.2015

¹⁶ Heakal Reem, ‘Economics Basics: Supply and Demand’ (*Investopedia*, 2015) <<http://www.investopedia.com/university/economics/economics3.asp>> Accessed 19.06.2015

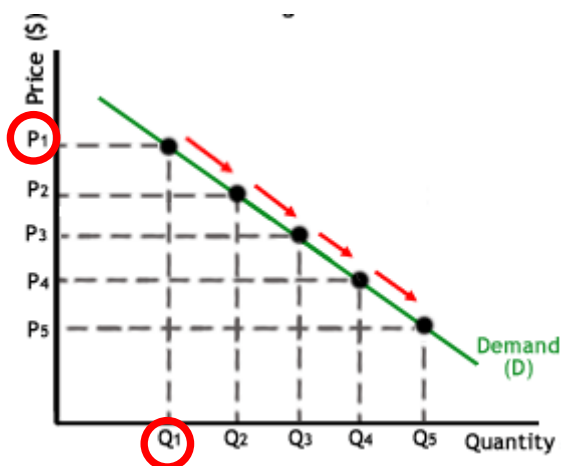


Figure 4 Movement along the demand curve. Investopedia 2003 <www.investopedia.com>

The figure above represents a scenario in which the demand of financial products on the part of older people is reduced because of the price of the product itself. In fact, where the price of a financial product is too high (P_1) the quantity that the consumer is willing to buy (Q_1) is lower. While more quantity determines a lower price. However, the demand of supply of financial products may vary from country to country. The disequilibrium caused by the higher price of insurance premiums can be influenced by economic or demographic trends. Therefore, the figure indirectly represents the exclusion of older people which links to the demand of the financial product.

Structure (supply side)

Accessing financial services can be deterred by the characteristics of the product itself and the way it is sold. Therefore, the exclusion of older people can be caused also by the features of the products itself or services, which are inappropriate to their needs. Older people might face barriers because of their less familiarity with internet banking and related products. In some cases, older people complain that lower interest rates are sold only online.¹⁷ Other difficulties might arise when the account needs to be managed electronically or when a loan is explained by incomprehensible

¹⁷ Age UK, *Age-friendly banking. What it is and how you do it*, (Report, 2016) p. 13 <http://www.ageuk.org.uk/Documents/EN-GB/For-professionals/Policy/money-matters/report_age_friendly_banking.pdf?dtrk=true> accessed 16.07.2016

technical terms.¹⁸ This exclusion might affect the “financial capability” of older people, as their knowledge, skills, attitudes and behaviours could result in an incorrect use of financial services.¹⁹

2. Insurance

The insurance sector is Europe’s largest institutional investor, providing a steady flow of long-term capital that contributes to the stability and functioning of financial markets. In particular, the insurance sector plays an important role in overall financial stability.²⁰ Furthermore, it is a significant provider of savings and pension products that contributes to financial security in old age.²¹ Therefore, insurance is a socially desirable financial service, while its products are essential for sustainable economic growth. Insurance companies receive their income through the “premium” paid by the insured. An insurance premium “represents a liability in that the insurer must provide coverage for claims being made against the policy.”²² For this reason, it is in the interest of the insurance companies to keep the premium high and the risk low. Insurance can include underwriting life, health, property, accident, liability, and legal risks in the life and non-life sectors, as well as the transfer of risk via reinsurance.²³ For the purpose of this study, protecting against age discrimination in insurance “aims to provide an affordable means of protecting against potentially large financial loss to the insured, their family (e.g. life insurance), another party (e.g. third party motor insurance) or society as a whole (e.g. medical expenses, reducing the burden on the state).”²⁴ Nevertheless, obtaining insurance after a certain age may be more expensive as prices are calculated on the basis of customer age.²⁵ Indeed, quotations for people aged 75 or over are hard to obtain.

¹⁸ Commission, (n.9) p. 10

¹⁹ Centre of Financial Inclusion, *Enabling Financial Capability Along the Road to Financial Inclusion. Financial Inclusion 2020 Financial Capability Working Group*, (Report, 2013), p. 3 <<https://centerforfinancialinclusionblog.files.wordpress.com/2013/10/financial-capability.pdf>> accessed 12.07.2015

²⁰ Bakk-Simon Klára, Borgioli Stefano, Giron Celestino, Hempell Hanna, Maddaloni Angela, Recine Fabio and Rosati Simonetta, ‘Shadow banking in the Euro area: an overview’, (2012) Occasional Paper Series 133, European Central Bank. Available online:

<<https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp133.pdf?4e7d9b9457759addc96d58dd6dcf1891>> accessed 02.08.2016

²¹ Insurance Europe, *Annual Report 2015-16*, (Report, 2015). P.19; Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs.

²² Investopedia, Insurance Premium, (*Investopedia*, 2016) <<http://www.investopedia.com/terms/i/insurance-premium.asp>> accessed 01.08.2016

²³ Eling Martin, Pankke David, *Systemic Risk in the Insurance Sector: Review and Directions for Future Research* (Working Paper on finance no. 2014/21, 2014) p. 12

²⁴ Groupe Consultatif Actuariel Européen Position, *Use of age & disability as rating factors in insurance. Why are they used and what would be the implications of restricting their use?* (Paper, 2011), p. 3 available online: <http://actuary.eu/documents/GC_Age_Disability_Underwriting_Paper_051211.pdf> accessed 12.06.2016

²⁵ See for example Barclays’ policy: For customers up to and including age 74 an Annual Multi-Trip travel cover is available. Single Trip cover is available for customers up to and including age 79. For travellers aged 80 the bank needs to be contacted directly. <<https://www.barclaystravelinsurance.co.uk>> accessed 12.06.2016

This is explained by the fact that insurers use age as a proxy for risk, raising the price of the insurance and excluding older people from accessing financial services.²⁶ In this way, older people often pay higher premiums or may not be able to access cover at all for car or travel insurance.²⁷ However, while ‘uncertainty’ is a concept necessarily implied in insurance, financial providers consider estimations more predictable in the case of older people. In this way, actuarial statistics provide a high level of reliability and the individuality of the person becomes a secondary element associated to chronological age. Although an in-depth analysis of the insurance law would be interesting, this study focuses only on those aspects that have a direct link to age discrimination. The aim of the next paragraphs is to contextualise age discrimination in financial service in the three countries. In this way, the study focuses on the legal aspect, statistical evidence and an overview on the leading companies. The analysis is divided between life and non-life insurance. Nevertheless, an overview of national legislations and an introduction on the supervisory body are also required.

2.1 Life insurance

Life insurance is a type of insurance in which an agreed sum of money is paid on the death of the life insured. It is a long term investment related to a human life. Nevertheless, the modern forms of life policies do not include only the traditional whole life policy, but are often linked to mortgages effected for house purchase, to annuities and policies linked to investment in securities or property.²⁸ Some life policies can be “with profit” which means that the insured receives a bonus above the stated sum insured.²⁹ It differentiates from “non-life insurance” on the basis that the latter is an insurance policy to protect an individual against losses or damages and is a short term investment.

Life insurance is commonly arranged by younger age groups on the basis that life insurance premiums are based on life expectancy. Thus, life insurance for older people³⁰ is rarer than for younger people as premiums increase at a fast pace every year. Another factor is that the duration of term, when combined with the insurance age, compounds the rate at which premiums will raise. In this way, older people can face many difficulties in subscribing to life insurance due to age limits or prohibitively expensive premiums (most common in non-life insurance). Financial providers explain these arrangements on the basis that older people represent a higher risk to life insurers, as

²⁶ Fitzpatrick, Kingston (n.15) p. 13

²⁷ Ibid. p. 59-64

²⁸ *Fuji Finance Ltd v Aetna Life Insurance Co Ltd* [1994] 4 All E.R. 608

²⁹ Birds John, *Birds' modern insurance law*, (Thomas Reuters, 2013), p.375

³⁰ Davies Sean, ‘Life insurance for older people’, (*Gocompare.com*, 2016) <<http://www.gocompare.com/life-insurance/older-people/>> accessed 1.08.2016

do those with pre-existing medical conditions. While on the one hand, the business oriented position of financial providers is understandable, on the other this puts an extra burden on older people who do not have easy access to financial products. In this way, life insurance determines consequences on mortgages, to annuities and policies linked to investment in securities or property.³¹ Accordingly, difficulties in obtaining life insurance can potentially block a series of other investments, creating immobility of capital. On this point, governments defend financial providers by sustaining that no age group is excluded from the market, as there are still some providers willing to supply any insurance to older people. In reality, searching for providers willing to offer cover beyond retirement age³² is a barrier itself. Normally, the maximum age generally accepted by insurers is 70.³³ Nevertheless, higher premiums for older people in insurance are socially accepted, as it is considered fair to spread the risk among age groups. What society does not consider is that financial providers hold an arbitrary power in this field. In analysing life insurance in the Italy, UK and Austria, three elements are considered in order to compare the effects of age discrimination in financial services: the ratio of premium to gross domestic product; premium rata per capita and direct gross premiums to gross domestic product.

The ratio of premium to gross domestic product is the relation of the premium to the measurement of the nation's overall economic activity.³⁴ In this study, it measures insurance penetration rate which indicates the level of development of insurance sector in a country. The Gross Domestic Product (GDP) represents the total market value of all final goods and services produced within the country.³⁵ "Ratio" means the relationship between the nation's overall economic activity and the premium that expresses how much greater one is than the other.³⁶ This data is directed to give an overview of the impact of the premium and the development of insurance sector, as discussed above, on a larger scale.

Premium is "the consideration given by the insurer in return for the insurer's undertaking to cover the risks insured against the policy of insurance."³⁷ Therefore, "premium rata per capita" is the average amount due per person for an insurance policy.³⁸ In the present study, this is an element of analysis as the premium, while reflecting the individual risk, is a competition matter for the

³¹ Birds (n.29), p.37

³² Government Equality Office, *The use of age-based practices in financial services*, (Oxera Report, 2009) p.ii

³³ Davies (n.30)

³⁴ OECD, 'Insurance spending (indicator)' (*OECD*, 2016), < <https://data.oecd.org/insurance/insurance-spending.htm> > Accessed 3.08.2016

³⁵ Investopedia, 'The Gross Domestic Product' (*Investopedia*, 2016) < <http://www.investopedia.com/terms/g/gdp.asp> > Accessed 3.08.2016

³⁶ Haiss, Sümegi (n.2) p. 24

³⁷ *Lewis v Norwich Union Fire Insurance Co* [1916] A.C. 509 at 519; Investopedia, 'Insurance Premium' (*Investopedia*, 2016) < <http://www.investopedia.com/terms/i/insurance-premium.asp> > accessed 02.08.2016

³⁸ Investopedia, 'Per Capita Definition' (*Investopedia*, 2016) < <http://www.investopedia.com/terms/p/percapita.asp> > accessed 02.08.2016

insurers. Consequently, it affects the market in terms of degree of coverage. This data links to the analysis on the exclusion of older people from the financial service market. Furthermore this data needs to be linked to the average of population over 65, indicating in this way the extent of this exclusion in a country.

Insurance spending is the relationship of “direct gross premiums” to GDP. Direct gross premium is the sum of both direct premiums written and assumed premiums written before the effect of ceded reinsurance. Through reinsurance insurance companies often reinsure themselves in order to be protected against risk. Therefore, ‘direct gross premium’ cuts out the costs of reinsurance (reinsurance premiums). The analysis of this data follows the analysis of the premium data per capita. It represents, from another perspective, the real contribution of premiums paid by individuals to GDP and their relative importance on the domestic economy.

The analysis in this field concludes with an overview of the relevant national companies and a comparison of their policies.

2.2 Non-life insurance: motor and travel

Non-life insurance can be distinguished from life insurance in that it covers property loss, and liability arising from caused damages. Therefore, it includes a wide range of cover for individuals, property and vehicles. Among its main products there are motor insurance and travel insurance. Nevertheless, travel insurance is complementary to the travel product and covers the related risks (i.e. the loss of, or damage to, luggage or life assurance or liability risks linked to travel).

This study highlights the variance of non-life insurance rate per capita, ratio of premium to gross domestic product (GDP), also known as insurance penetration, and non-life premium paid. In this way, “the GDP per capita seems to bear the most significant impact on insurance consumption, followed by interest rate and inflation rate.”³⁹ In other words, the insurance consumption is strongly influenced by the GDP, which in turn can possibly be influenced by the premium incomes. These parameters give the variance of each country in the non-life insurance market, which is then compared with each other.

In 2014, most non-life insurance classes registered growth in premiums. At the moment, motor insurance is the largest business in the market followed by health insurance, property

³⁹ Haiss, Sümegi (n.2) p. 24

insurance, and accident insurance⁴⁰. Travel insurance is another popular type of insurance which, to some extent, links to health insurance as it can cover also medical expenses. It covers also trip cancellation, lost luggage, flight accident and other losses incurred while traveling. Nevertheless, not all companies offer their product for over-65s. In fact, some policies do not cover anyone over the age of 50.⁴¹ The reason is because most insurance companies consider that older people are more likely to fall ill or have an accident while travelling. Therefore, they are more likely to make a claim. In fact, despite older travellers can be considered wiser and more experienced, the standard response from insurers is that “the higher premiums reflect an increased risk of other types of medical claim.”⁴² This pushes older people to slowly withdraw from travel as they get older, although there is evidence that older consumers are the fastest growing group of tourists and many travel companies are targeting them to increase their business.⁴³ Therefore, what emerges is also a conflict of interest between the financial and the tourist market.

Motor insurance is a type of insurance primarily used to provide financial protection against physical damage, liability, losses arising from the use of motorised land vehicles (ie. cars, trucks, and motorcycles), and injuries resulting from traffic collisions. Generally, it is a ‘comprehensive’ insurance as it covers the insured himself and it may be extended to other vehicles.⁴⁴ In this way, motor third-party liability (MTPL) is compulsory at EU level. While insurers classify the perceived risk and the consequent amount of the premium, age is considered one of the most ranking factors both for younger and older drivers. In fact, premiums are often adjusted to the insured age. The rationale is that people over a certain age are no longer considered safe drivers. However, while there is evidence that older people might incur more difficulties while driving, unlike younger people they limit their driving to local areas, reducing the numbers of accidents.⁴⁵ In the field of motor and travel insurance prices differ depending on the age of the customer. Older people pay more to cover motor and travel insurance, while the price often stays flat within other age bands. However, in motor insurance are the youngest drivers (under 25) those who tend to pay most.⁴⁶

⁴⁰ Insurance Europe, European Insurance — Key Facts, (2016) Paper, p. 10- 11 <https://www.insuranceeurope.eu/sites/default/files/attachments/European%20Insurance%20-%20Key%20Facts%20-%20August%202016.pdf>> accessed 08.04.2017

⁴¹ Lees Rebecca, ‘Senior travel insurance’ (*Gocompare.com*, 2016) <<http://www.gocompare.com/life-insurance/older-people/>> accessed 1.08.2016

⁴² Trend Nick, ‘How to find the best travel insurance for over 65s’ *The Telegraph* (London, 22 July 2016)

⁴³ Sedgley, Diane, Pritchard Annette, Morgan, Nigel ‘Tourism and Ageing: A Transformative Research Agenda’ [2011], the *Annals of Tourism Research* 38 (2), pp, 422-436.

⁴⁴ Birds John, *Birds’ modern insurance law*, (Thomas Reuters, 2013), p.408

⁴⁵ Great Britain: Parliament: House of Lords: Science and Technology Committee, *Ageing: Scientific Aspects*, (The stationery Office, 2005) 1st Report of Session 2005-06, p.313

⁴⁶ Government Equality Office (n.32) p.i

From a legal point of view, the area of insurance of contract law has been substantially affected by EU law.⁴⁷ In this way, the EU Motor Insurance Directive (Directive 2009/103/EC) mandates that all motor vehicles are covered by insurance for third-party liability. It is directed at EU residents involved in a road accident in another EU country and it has no a direct correlation with age discrimination. Nevertheless, it reveals how motor insurance premiums differ from one country to another, mainly because of differences in risk assessment and compensation schemes.⁴⁸

3. Italy

3.1 Overview

Italian Insurance law has quite a complex body of legislations, which imply the transposition of Directive 2009/138/EC (Solvency II Directive). This Directive was transposed into Legislative Decree No. 74 of 12 May 2015 amending the Insurance Code. However, following the case *Petillo and Petillo v Unipol Assicurazioni SpA*⁴⁹ the Court of Justice of the European Union established that the Private Insurance Code (*Codice delle assicurazioni private*, CAP)⁵⁰ is compatible with the relevant EU Directives. Furthermore, the coordination between the Italian Civil Code and Code of Private Insurance has been resolved by Art. 165 D.lgs. 209 7/9/2005 which provides that the Civil Code still applies for insurance contracts where not derogated by the Code of Private Insurances.

From a demographic perspective, Italian population increased as indicated by the table below:

Population 65 years and over	2004	2014
Italy	19.2%	21.4%

Table 2: Eurostat, Population age structure by major age groups, 2004 and 2014 (% of the total population), (Eurostat, 2016)

⁴⁷ Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Text with EEA relevance)

⁴⁸ Commission, 'Banking and finance: motor insurance' (*European Commission*, 2016) <http://ec.europa.eu/finance/insurance/consumer/motor/index_en.htm> Accessed 16.06.2016

⁴⁹ Case C-371/12 *Petillo and Petillo v Unipol Assicurazioni SpA* [2014] All ER (D) 161

⁵⁰ *Codice delle Assicurazioni Private* (Code of Private insurance) <http://www.ivass.it/ivass_cms/docs/F23858/CAP_annotato.pdf> accessed 10.08.2016

3.2 Supervisory body

In Italy, until 2012, the supervisory body for private insurance companies has been ISVAP (*Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo*). Subsequently, the Law Decree no. 95 of 6 July 2012 converted into Law No. 135 of 7 August 2012 has transformed ISVAP into IVASS (*Istituto per la Vigilanza sulle Assicurazioni*), the Institute for Supervision on Insurances.⁵¹ All insurance and reinsurance companies in Italy are subjected to the Institute for Insurance Supervision (IVASS). In this way, IVASS is an independent authority which ensures the stability of the insurance market and consumer protection in Italy, pursuing the insurance policy lines set by the government. While the area of competence of IVASS is defined in Article 6,⁵² Article 5 of the Code of Private Insurance reports that IVASS

[S]hall perform the activities necessary to promote an appropriate degree of consumer protection and to develop the knowledge of the insurance market, including statistical and economic surveys and the gathering of input for the formulation of insurance policy lines.

In this way, the Code of Private Insurance provides for some customer protection. In particular, Article 2 lists an exhaustive list of classes of assurance. Among the others, the only category having some relevance for older people is the one linked to health insurance, which provides protection against the risk of serious disability resulting from longevity. Therefore, in the Code of Private Insurance a direct mention of age discrimination or age bands does not exist. In this regard, Chapter III of the Code lists some rules of conduct. Among others, Article 119 prescribes “duties and liabilities to policyholders” and Article 120 “Pre-contractual information and rules of conduct”. However, the best protection for older customers is enshrined in the wording that “insurance intermediaries shall offer or recommend a product which is adequate to meet the policyholder’s

⁵¹ IVASS: < http://www.ivass.it/ivass/imprese_jsp/HomePage.jsp > accessed 01.08.2016

⁵² Art. 6 (Supervised entities): “1. ISVAP carries out supervisory functions over a) undertakings, however named and established, that exercise on the Italian territory insurance or reinsurance activity in any class and in any form, or capital redemption operations and management of group pension funds that effect payments on death or survival or in the event of discontinuance or curtailment of activity; b) insurance groups and financial conglomerates, which include insurance and reinsurance undertakings, in compliance with the specific rules applicable to them; c) subjects, entities and organisations which in any form perform functions partly included in the operational cycle of insurance or reinsurance undertakings, limited to insurance and reinsurance profiles; d) insurance and reinsurance intermediaries, insurance loss adjusters and any other insurance market participant.” Code Of Private Insurance (Legislative Decree n. 209 of 7 September 2005) < http://www.ivass.it/ivass_cms/docs/F5091/decreto_7_settembre_2005_%20english_version.pdf>

needs.”⁵³ Unfortunately, despite the latest amendments (the last one is the Legislative Decrees of 12, May, 2015 n. 74) there is no mention of the issue of older customers. This is a serious problem on the basis that the “white economy” in Italy represents 9.4% of overall national production⁵⁴ but Italian law is silent on this subject.

⁵³Codice Delle Assicurazioni Private (Decreto Legislativo 7 settembre 2005, n. 209) <https://www.ivass.it/normativa/nazionale/primaria/CAP_annotato.pdf> accessed 2.08.2016

⁵⁴ Censis, ‘Welfare: la White Economy vale 290 miliardi di euro con 3,8 milioni di occupati’, (Comunicato stampa, 2015) <http://www.censis.it/7?shadow_comunicato_stampa=121044> accessed 2.08.2016

3.3 Life insurance

The Italian Civil Code distinguishes between insurance contracts against damages (*Assicurazione Contro Danni*) and life insurance contracts (*Assicurazione Sulla Vita*). Articles from 1919 Civil Code (CC) to 1931 CC⁵⁵ refer to life insurance contracts. Furthermore, Legislative Decrees No. 174/1995 and No. 175/1995 (which implemented the European directives) introduce the division into six branches for life insurance (Article 2 of *Codice Assicurazione Private* or CAP).⁵⁶ Nevertheless, the aim of this distinction has more than a public purpose: it aims to regulate access to insurance activities; and to release the necessary authorizations.⁵⁷ Overall, for comparative purposes life insurance in Italy is distinguished by the following categories:

Ratio of premium to gross domestic product 2005-2015	Increased from 4.9% to 6.6% ⁵⁸
Premium rata per capita 2005-2015	Increased from 1,411.34 million EUR to 1,763.73 million EUR. ⁵⁹
Insurance spending 2000-2014	Increased from 5.549% to 8.860% of GDP. ⁶⁰

The Gross Domestic Product (GDP) is a broad measurement of the nation's overall economic activity. The "ratio" is the relationship between this nation's economic activity and the premium. Therefore, this data represents the level of development of insurance sector in Italy. Between 2010 and 2013, the demand for life insurance products reduced. This was mainly due to

⁵⁵ *Codice Civile Italiano* : < <http://www.altalex.com/documents/news/2015/01/02/codice-civile-ebook>> Accessed 3.08.2016

⁵⁶ Art. 2 (Classes of assurance) 1. The classes of assurance for life assurance business are the following:
I. assurance on the length of human life; II. marriage assurance, birth assurance; III. assurance referred to in classes I and II, whose main benefits are directly linked to the value of units of a UCITS (undertakings for collective investment in transferable securities) or the value of the assets in an internal fund or else to an index or other reference values; IV. health insurance and insurance against the risk of dependency that are covered by permanent health insurance contracts not subject to cancellation, against the risk of serious disability resulting from accident or sickness or longevity; V. capital redemption operations; VI. Management of group pension funds that effect payments on death or survival or in the event of discontinuance or curtailment of activity.

⁵⁷ Cerini Diana, *Insurance Law in Italy*, (Kluwer Law Intl, 2013), p. 65

⁵⁸ Swiss Re, 'Sigma World Insurance Database', (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 9.08.2016 the insurance data and estimates contained in the study originate primarily from national supervisory authorities and, in some cases, from insurance associations. Macroeconomic data was sourced from the International Financial Statistics of the IMF, Oxford Economics and IHS Data insights. Life and non-life business areas in sigma explorer are categorised according to standard EU and OECD conventions: health insurance is allocated to non-life insurance, even if it is classified differently in the individual countries

⁵⁹ Ibid.

⁶⁰ OECD, 'Insurance spending (indicator)' (OECD, 2016), < <https://data.oecd.org/insurance/insurance-spending.htm> > Accessed 3.08.2016

economic fluctuations influenced by higher premium levels,⁶¹ to poor macroeconomic environment and economic uncertainty. While this trend was officially confirmed in 2012, the decline in growth was already registered in 2011.⁶² Nowadays, Italy is experiencing a growth in life premium (+30%)⁶³ and, by comparison with the average European figures, the Italian insurance market shows high growth potential as a result of low premium rate per capita (average per person). This is significant, as the Italian life insurance market already accounts for 12.2% of the European life insurance market. Thus, insurance business develops while premium per rata increased, lowering the demand. Consequently, this scenario can be linked to a demographic change in the Italian population. Accordingly, from 2004 to 2014 the percentage of people over 65 increased from 19.2% to 21.4% (see Table I), making Italy the country with the highest percentage of older people in Europe.⁶⁴ Consequently, it is evident that the amount of older people is stressing the Italian insurance system as in the same period the demand for life insurance products reduced. This might explain why in 2012 Italy registered the highest amount of life gross claims payments in Europe.

The ‘gross claims payment’ is the claim demanded made by the insured, or the insured's beneficiary, for payment of the benefits provided by the insurance contract or for coverage of an incurred loss. Overall, it amounted to 53,868.04 Million EUR⁶⁵ which is an impressive data, especially when compared to Austria (357.81).⁶⁶ Finally, in Italy insurance spending increased, indicating the growing importance of the insurance industry in the domestic economy. Nevertheless, until 2012, Italy (6.49%) was in between Austria, which has had the lowest percentage of insurance spending (5.15%) and the UK (12.87%) which had the highest. (See Annex- Table IV)⁶⁷

*Assicurazioni Generali S.p.A.*⁶⁸ is the dominant insurance group in Italy, and one of the leading players in the global insurance and financial products market. It primarily serves individual customers and its product for life insurance is called “*Lungavita Long Term care.*”⁶⁹ Accordingly, it

⁶¹ OECD, *OECD Insurance statistics 2012*, (Report, 2013), p.17

⁶² OECD, *OECD Insurance Statistics 2013*, (Report, 2014), p.17 Available online: <http://www.oecd-ilibrary.org/finance-and-investment/oecd-insurance-statistics-2013_ins_stats-2013-en> accessed 02.08.2016

⁶³ Ania (Associazione Nazionale fra le Imprese Assicuratrici), *Italian Insurance in Figures*, (Report, 2015) p. 3 Available online: <<http://www.ania.it/export/sites/default/it/pubblicazioni/rapporti-annuali/Italian-Insurance-In-Figures/Ass-in-cifre-15x21-2015-inkl-web.pdf>> accessed 01.08.2016

⁶⁴ Eurostat, *Population age structure by major age groups, 2004 and 2014 (% of the total population)*, (Eurostat, 2016) <[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_\(%25_of_the_total_population\)_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_(%25_of_the_total_population)_YB15.png)> accessed 1.08.2016

⁶⁵ Eurostat data, *Insurance, gross claims payments by type of enterprise*, (Eurostat, 2016) Available online: <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tin00031>> accessed 2.07.2016

⁶⁶ Data from on the UK are not available as the last data available are from 2002 (137,146.04).

⁶⁷ OECD, *Insurance spending (indicator)*. (OECD, 2016), <<https://data.oecd.org/insurance/insurance-spending.htm>> Accessed 3.08.2016

⁶⁸ *Generali* Official website: <www.generali.com>

⁶⁹ Generali Italia S.p.A., ‘Lungavita long term care. Contratto di assicurazione di rendita vitalizia immediata anticipata a premio annuo rivalutabile, pagabile in caso di Perdita di autosufficienza nel compimento degli atti della vita quotidiana’

specifies that people are not allowed to subscribe to the insurance after the age of 70 or before the age of 40. Furthermore, premiums are determined by parameters which, among others (lifestyle, job, medical conditions), include age. Additionally, this insurance can be subjected to an annual increase. In this way, financial providers raise the premium in order to avoid excessive claim payments. *Poste Vita*, which is among the biggest financial providers in Italy, sells a life insurance called “*Postafuturo partecipa*”⁷⁰ where the upper age limit is 85. Furthermore, age of the insured is used for calculating the conversion of the savings into an income. A special product is “*Postafuturo partecipa special*”⁷¹ a type of life insurance with profits, which also specifies 85 as a maximum age. *Unipol Gruppo Finanziario S.p.A.*⁷² is an Italian financial provider which trades under a number of brands: *UnipolSai Assicurazioni*, *Linear Assicurazioni*, *Linear Life*, *UniSalute* and *Arca Vita*. Unipol’s product for life insurance is called “*You Vita*.”⁷³ People can subscribe for this product from 5 to 30 years but their age cannot be over 75. After this age limit the contract expires. Additional securities are allowed only until the age of 65, and payment of premiums is age based.

3.4 Non-Life insurance: motor and travel

Articles 1904–1918 of Civil Code provides the rules applicable only to contracts against damages. Nevertheless, the Private Insurance Code, derogating to the general principles of the Italian Civil Code, sets the parameters of compensations for damage to health payable by the insurer. Overall, the Italian non-life insurance regulatory framework includes the Solvency II Directive which, amending the Insurance Code, has been transposed by Legislative Decree No. 74 of 12 May 2015. Non-life policies includes automobile but also travel policies, providing payments in case of loss from a particular event. Nevertheless, this type of insurance is strongly influenced by national legislation. In fact, motor insurance is the main example of standard policies defined directly by the law, whereby the Development Ministry defines the minimum contents of these policies. In the case of travel insurance, it is ancillary to the travel product itself and covers the related risks (i.e. the loss of, or damage to, luggage or life assurance or liability risks linked to travel).

(Mod. GVLTC - ed.05/15), (Company Report, 2015) < <http://www.generalitaly.it/media/show/226422>> accessed 14.05.2016

⁷⁰ *Poste Vita*, ‘*Postafuturo partecipa*’, (life insurance: terms of condition, 2016), available online: http://www.postevita.it/resources/contenuti_editoriali/pdf/prodotti/postevita/ramo_I/postafuturo/partecipa/Fascicolo_PF_Partecipa2016.pdf accessed 02.08.2016

⁷¹ *Poste Vita*, ‘*Postafuturo partecipa special*’, (life insurance with profit, 2013). <http://www.postevita.it/resources/contenuti_editoriali/pdf/prodotti/postevita/ramo_I/postafuturo/partecipa_special/PF_Partecipa_Special_ott_2013.pdf> accessed 8.08.2016

⁷² UNIPOL Official website: < www.unipol.it>

⁷³ Unipol, ‘*You Vita*’ (life insurance, 2015) < http://www.unipol.unipolsai.it/la-tua-protezione/YOU-VITA/Documents/U20017_UnipolSai_Vita_2015_11.pdf> accessed 02.08.2016

In 2015, in Italy non-life premium growth was slower than in 2014, while in 2015 premium growth declined further. According to the OECD data, 2015 was the fifth consecutive year of declining premiums.⁷⁴ For comparison purposes, the Italian non-life insurance panorama from 2005 to 2015 is distinguished by the following categories:

The non-life insurance premiums rata per capita 2005-2015	Decreased from 657,170 EUR to 548,644 EUR. ⁷⁵ (-16.51%)
The ratio of premium to gross domestic product (GDP) 2005-2015	Decreased from 2.3% into 2.1%

In 2013 the non- life premium paid amounted to 24,241.00 million EUR, lower than the UK (45,980.57) and higher than Austria (6,631.00).⁷⁶ Accordingly, the Western European markets slowed marginally despite moderate rate increases in the UK. Nevertheless, in Italy the ratio of premiums of both non-life and life insurance raised in relation to the gross domestic product (GDP), although in 2015 non-life premiums increased by less than life. The figure below represents this

⁷⁴ OECD, *OECD Insurance Statistics 2015* (OECD Publishing, 2016), p.17

⁷⁵ Swiss Re, 'Sigma World Insurance Database', (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 9.08.2016 the insurance data and estimates contained in the study originate primarily from national supervisory authorities and, in some cases, from insurance associations. Macroeconomic data was sourced from the International Financial Statistics of the IMF, Oxford Economics and IHS Data insights. Life and non-life business areas in sigma explorer are categorised according to standard EU and OECD conventions: health insurance is allocated to non-life insurance, even if it is classified differently in the individual countries. Converted from USD to EUR 1 USD = 0,896476 EUR on 02.09.2016

⁷⁶ Insurance Europe <www.insuranceurope.eu> accessed 01.08.2016

Italian discrepancy and compares it with Austria and the UK.

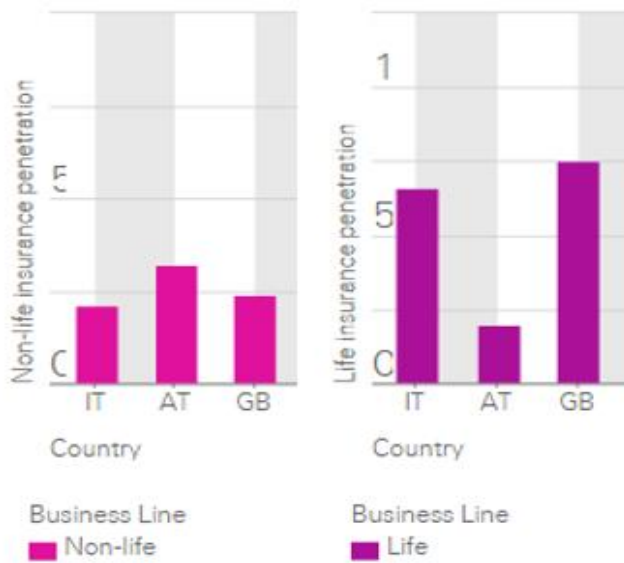


Table 3: Non-life and life insurance penetration in Italy (IT), Austria (AT) and Great Britain (GB).
Source: sigma world insurance database

Therefore, the graph represents the ‘penetration rate’ which indicates the level of development of the insurance sector in a country. This rate is therefore measured as the ratio of premium underwritten in 2015 to the GDP.⁷⁷ It is relevant information as this volume links insurance to the nation’s overall economic activity. In other words, this measurement represents a direct link of insurance to national economy. Consequently, it can work as a monitor on the effects of age discrimination in insurance.

According to the European Automobile Manufacturers’ Association, the six years of decline of motor insurance reversed in 2014. From 2013 to 2014 passenger cars in use increased by 0.3%.⁷⁸ Despite that, the demand for motor insurance is still shrinking as the premium income has fallen sharply. Accordingly, motor business, which represents almost 54% of the overall non-life business, decreased of 5.8%.⁷⁹

In 2013, motor claims in Italy amounted to 14,073.00 million EUR. Compared to the United Kingdom (6,084.92) and Austria (2,135.00)⁸⁰ it is the highest amount of claims.

⁷⁷ The Economic Times, ‘Definition of ‘Penetration Rate’ (*The economic times*, 2016) <<http://economictimes.indiatimes.com/definition/penetration-rate>> accessed 02.08.2016

⁷⁸ European Automobile Manufacturers’ Association (ACEA), *European Motor Vehicle Parc 2014* (Report, 2014), p.3 <http://www.acea.be/uploads/statistic_documents/ACEA_PARC_2014_v3.pdf> accessed 09.08.2016

⁷⁹ PwC, ‘The Italian Insurance Market’ (*PwC analysis on Insurance Europe data*, 2015) <<https://www.pwc.com/it/it/publications/assets/docs/italian-insurance-market.pdf>> accessed 01.08.2016

⁸⁰ Insurance Europe n.(76)

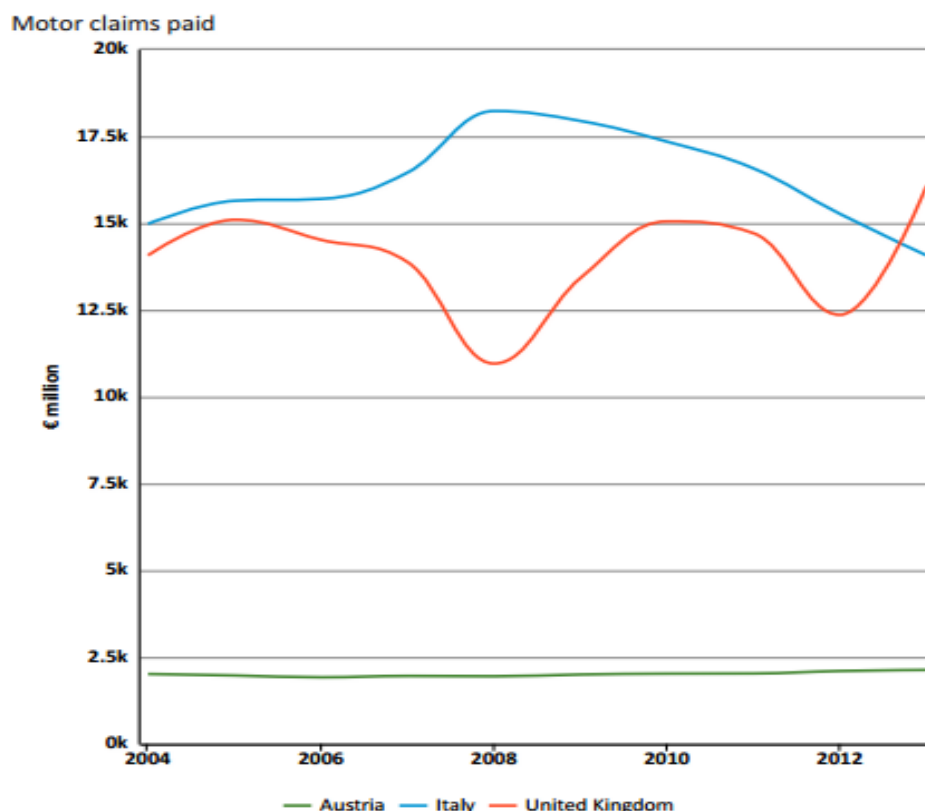


Figure 5 Motor claims paid until 2013, source: Insurance Europe (www.insuranceeurope.eu)

It is interesting to underline how while the motor claims are high the demand is low, even though motor insurance is compulsory. In fact, Article 132 of Code of Private Insurance (*Codice delle assicurazioni private*, Dlgs 209/2005) introduces “*Obbligo a contrarre*” which means that insurance providers are obliged to accept all insurance proposals that they may receive from potential insured persons. Furthermore, Law 990/1969 requires that each motor vehicle on a public road must have third party insurance (*Responsabilità civile per gli autoveicoli*, RCA). The so called “kasko” policy can include also damage to the vehicle causing the accident or injuries. Overall, the Italian legal system, (Article 2054 Civil Code) establishes a joint and strict liability between the owner of the car and the driver for any damage caused by the circulation of vehicles. For this reason a ‘twin system’ imposes compulsory insurance for all motor vehicles circulating on public roads.⁸¹

While it is not uncommon for travel insurance premium to increase with the age of the insured, Italian law does not make any explicit reference to it. The only legal protection existing against age discrimination is the application of the more general “unfair contract terms” (*clausole*

⁸¹ Legge N. 990 del 24 Dicembre 1969, new rule Article 122 CAP (Codice delle Assicurazioni Private)

vessatorie),⁸² whereby although age-based travel policies are not considered unfair, imposing terms which prescribe an age limit after which the contract terminates is not permitted. IVASS unwraps this problem in *Circolare* n.417/D (Circular).⁸³ It clarifies that if the insurance policy terms allow for an age limit this should not be used for terminating the contract. In fact, ageing, as a foreseeable event, cannot be used as a prejudice against consumers.⁸⁴ The same concept has been recalled by Article 47 (Place of arbitration and insurable age) of Regulation N° 35 of 26 May 2010.⁸⁵ Nevertheless, this provision is restricted to accident and sickness insurance. The main problem is that insurance contracts concluded by persons of 67/70 years old are too risky for insurance companies. Thus, in most cases they discourage older customers by adopting higher premiums. Nevertheless, each company strategy is secret, implying that companies arbitrarily decide on their customers.

Assicurazioni Generali S.p.A offers a motor insurance called “*Generali sei in auto autovetture*”⁸⁶ for which no upper age limit is specified. In travel insurance, its product is called “*Generali sei in viaggio Contratto di Assicurazione per la copertura dei rischi inerenti i viaggi e le vacanze*”⁸⁷ and also here there is no particular mention to age. In comparison, another insurance provider, Columbus Travel Insurance Services Ltd⁸⁸ (Part of the Collinson Group) operating in Italy but headquartered in the UK specifies 69 as a maximum age. Furthermore, it provides that for people between 65 and 74 travel insurance can be valid only for 31 days. For those below 64 it is valid for 365 days. Furthermore, they do not offer winter sports insurance for people over 64. Another leading Italian company, *Unipol Gruppo Finanziario S.p.A.*, offers a travel insurance product called “*Unipolsai Viaggi*”⁸⁹ in which people over 80⁹⁰ are not included. *Poste Italiane*

⁸² On this point see: Tribunale di Roma del 21 gennaio 2000, in *Foro it.*, 2000, I, 2045; Corte d’Appello di Roma, Sez. II del 24 settembre 2002, in *Foro it.* 2003, I,332 on transparency;

⁸³ In some civil law countries, “*circolare*” (Italian) consists of a text intended for the members of a service, of an enterprise, or of an administration. Their validity is limited to the organization and cannot be applied to externals. On this point see: Sentenza Consiglio di Stato, Sez. V, Sent. 20 agosto 2001, n. 4466 where it is sustained that the Government may in general differ from the information contained in a circular, justifying the decision.

⁸⁴ Mariotti Paolo, Serpetti Antonio, *Le clausole vessatorie nei contratti di assicurazione*, (Giuffrè Editore, 2011), p. 5

⁸⁵ Regulation N. 35 Of 26 May 2010 Regulation On The Information Obligations And The Advertising Of Insurance Products, Referred To Under Title Xiii Of Legislative Decree N. 209 Of 7 September 2005 – Code Of Private Insurance. As Amended By Isvap Order N. 2880 Of 25 February 2011, By Isvap Regulation N. 38 Of 3 Rd June 2011 And By Ivass Order N. 7 Of 16 July 2013. Accessed 12.08.2016
<http://www.ivass.it/ivass_cms/docs/F26396/Reg.%20n.%20%2035%20amended.pdf>

⁸⁶ Generali Ialia S.p.A., ‘Generali sei in auto autovetture. Contratto di assicurazione di Responsabilità Civile Auto e dei Rami Danni’ (Motor insurance: terms of conditions, 2015) <<https://www.generali.it/media/show/225429>> accessed 2.08.2016

⁸⁷ Generali Ialia S.p.A., “Generali sei in viaggio Contratto di Assicurazione per la copertura dei rischi inerenti i viaggi e le vacanze” (Travel Insurance :terms of conditions, 2015) <<http://www.generali.it/generaliit/media/show/225650>>

⁸⁸ “Columbus Travel Insurance Services” :<<http://www.columbusdirect.com/travel/>> accessed 2.08.2016

⁸⁹ Unipol, “Unipolsai Viaggi”, (Travel insurance: terms of conditions, 2014) Available online: <https://www.unipolsai.it/la_tua_mobilita/viaggi/Documents/viaggi_unipol.pdf> accessed 04.08.2016

⁹⁰ Article 1.3 of the Insurance General Conditions Available online: <http://unipol.unipolsai.it/il-tuo-risparmio/YOU-PREVIDENZA/Documents/PIP%20UNI_Condizioni_3-2014.pdf> accessed 04.08.2016

Group (Poste Vita) sells motor insurance called “*postaprotezione multiRC*”⁹¹, where there is no mention of upper age limits. Furthermore, *Poste Vita* sells a specific product for seniors. In this way, people between 69 and 79 can purchase insurance against injury;⁹² after 80 this insurance expires.

4. Austria

4.1 Overview

The Austrian insurance sector is regulated by the Insurance Supervision Act 1978 (*Versicherungsaufsichtsgesetz*, VAG) and the Insurance Contract Act 1958 (*Versicherungsvertragsgesetz*, VersVG). However, discriminations against both younger and older person are prohibited by the Austrian Equality Treatment Act.⁹³ Nevertheless, general exceptions with regard to age can be found in § 13b (3)-(5) of the Federal-Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*)⁹⁴ and in § 20 (3)-(5) of the Equal Treatment Act (*Gleichbehandlungsgesetz*).⁹⁵ More specifically, these legislations prescribe that in the financial services field age criteria can be used in actuarial valuations relating to statistical calculation of life expectancy and assessment of risk. At a first glance, these actuarial approaches seems in contradiction with another Austrian legislation: the innovative Federal Act on Senior Citizens “*das Bundes seniorenengesetz*” which, however, has no link to financial services.⁹⁶ In fact, it embraces provisions which aim is to advise and support senior citizens, towards a better quality of life. This

⁹¹ Poste Vita, Postaprotezione multiRC’, (Motor insurance: terms of conditions, 2016) Available online: <http://www.postevita.it/resources/contenuti_editoriali/pdf/prodotti/posteassicura/persona/Postaprotezione%20MultiRC/PProt_MultiRC_lug_2014.pdf> accessed 05.08.2016

⁹² Posta Vita, ‘Postaprotezione infortuni senior’, (insurance against injuries: terms of condition, 2016) Available online: <http://www.postevita.it/resources/contenuti_editoriali/pdf/prodotti/posteassicura/persona/postaprotezione_InfortuniSenior/Fascicolo_PPInfortuniSenior.pdf> accessed 05.08.2016

⁹³ Explanatory Notes to the Austrian Equality Treatment Act, *307 der Beilagen XXII.GP, Regierungsvorlage, Materialien*, at 15; Schindlauer Dieter, *Austrian Country Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC*, (European Commission Paper,2007) <http://www.migpolgroup.com/archive/public/docs/125.AustriaDiscriminationCountryReport_EN_08.01.07.pdf> accessed 09.08.2016

⁹⁴ *Das Bundes-Gleichbehandlungsgesetz*, BGBl. Nr. 100/1993, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 65/2004 (Federal-Equal Treatment Act, Federal Law Gazette Nr. 100/1993, as last amended by Federal Law Gazette I Nr. 65/2004)

⁹⁵ *Gleichbehandlungsgesetz*, BGBl I Nr. 66/2004 [Federal Law Gazette 66/2004]

⁹⁶ *Bundesgesetzblatt Teil I*, 2012-11-14, vol. 94, pp. 1-3 (Federal Act to amend Federal Senior Citizens Act No. 84 1998-07-21(AUT-1998-L-50164)

<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93632&p_country=AUT&p_count=1186> accessed 09.08.2016. The development of a long-term Plan for Senior Citizens is the task of the Federal Senior Citizens’ Advisory Committee “*der Bundes seniorenbeirat*”

legislation determined a broader, long-term plan introduced in 2013 with, “Aging and future. Federal Plan for Elderly.”⁹⁷ It is the first paper that specifically aims to preserve and improve the quality of life of elderly people, interpreted as the objective circumstances of life and subjective evaluation of satisfaction and well-being. In particular, this plan aims to reduce inequalities by rendering older people socially active. It highlights how economic situations, health conditions, stages in the life cycle, social contacts and mobility are “tightly interwoven factors, forming a densely-knit system of reciprocal dependency and creating different levels of quality of life.”⁹⁸ From a demographic perspective, Austrian population increased as indicated by the table below:

Population 65 years and over	2004	2014
Austria	15.5%	18.3%

Table 4: Eurostat, Population age structure by major age groups, 2004 and 2014 (% of the total population), (Eurostat, 2016)

Since 2007, in line with this outlined Austrian age policy, an initiative called “Disability in Transition” (“*Invalidität im Wandel*“) aims to reform the disability pension system, relating to the topics of disability, health and work, focusing also on who is disadvantaged by the labour market because of their age (age management). In response to this project, representatives of the social partners, the insurance institutions and a group of experts chaired by the Federal Ministry of Labour, Social Affairs and Consumer Protection (“*Bundesministerium für Arbeit, Sozial und Kinsumentenschutz*“, BMASK) made numerous analyses and proposals to reduce the financial risks of the community insured under the General Social Insurance Act (ASVG).⁹⁹ Thus, the Austrian Government aim is to improve older people’s condition while focusing on reducing the risk of those programs which provide money to people who are unable to work due to old age. Accordingly, between 2007 and 2011 the Government introduced several reforms of the social insurance system, long-term care, old-age pension systems, and policies for the elderly. Nevertheless, it must be noted

⁹⁷ *Altern und Zukunft Bundesplan Für Seniorinnen und Senioren*, (Bundesministerium für Arbeit, Sozial und Kinsumentenschutz, 2013) Available online: <https://www.sozialministerium.at/cms/site/attachments/4/7/6/CH2229/CMS1218014040042/bundesseniorenplan_kompl.pdf> accessed 09.08.2016

⁹⁸ UNECE, *National Report on the Implementation of the UN-ECE Regional Implementation Strategy (RIS) for the Madrid International Plan of Action on Ageing (MIPAA) 2007-2012* (BMASK Report, 2011), p.3 <https://www.unece.org/fileadmin/DAM/pau/age/country_rpts/AUT_report.pdf> accessed 09.08.2016

⁹⁹ ASVG, “*Allgemeines Sozialversicherungsgesetzes*“, (BGBl. No. 189/1955).<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=35898>accessed 09.08.2016

that despite the improvement of later life by reforming social insurance, the access to financial services has not been considered as part of these plans. Hence, it could be deduced that the risk linked to the ageing process has been lowered by improving older people's condition but without directly affecting their access to financial services.

Historically, the Austrian insurance industry has always made adequate profits. Nowadays, it is among the countries that experiences the most positive real growth in gross premiums both in the life and non-life insurance sectors (see tables VI and VII). The Austrian insurance industry employs 26,521 people and is one of the largest investors in the country. Conversely, Italy and the UK are not included among these countries.¹⁰⁰ From a European perspective, Austrian law implemented¹⁰¹ the provisions of European Directive 2009/138/EC (Solvency II) without changing them. Therefore, not only is Austrian law completely harmonised with European law but it also introduces a new approach for the supervision of insurance companies: the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, VAG 2016).¹⁰² While the Insurance Contract Law of 2nd December 1958 (*Versicherungsvertragsgesetz*, VersVG)¹⁰³ defines the obligation of the insurers, the new federal law on contractual insurance focuses on professional risk management and provides a system for calculating the required capital for insurance companies. In other words, this legislation is specifically directed to insurance companies and their assessment of risks. Furthermore, the VAG introduces the Austrian Financial Market Authority (*Österreichische Finanzmarktaufsicht*) (FMA) which is the competent authority that supervises insurers in Austria. The FMA, which in turn is regulated by the Austrian Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz* into force from 1st April 2002), supervises the Austrian financial market in order to monitor the position and behaviour of individual firms.

4.2 Supervisory Body

The Austrian Financial Market Authority (*Finanzmarktaufsicht*, FMA) was established in 2002, as an integrated financial supervisory authority. FMA is, therefore, the independent supervisory

¹⁰⁰ OECD, *Global Insurance Market Trends 2015*, (OECD, 2016) < <https://www.oecd.org/daf/fin/insurance/Global-Insurance-Market-Trends-2015.pdf>> accessed 11.08.2016

¹⁰¹ BMF *Bundesministerium für Finanzen*, “Solvency II” (BMF, 2016), < <https://english.bmf.gv.at/financial-sector/solvency-II.html>> accessed 05.08.2016

¹⁰² Published in the Federal Law Gazette : *Bundesgesetzblatt* Nr. 34/2015, in force from the 1st of January 2016. https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2015_I_34> accessed 05.08.2016

¹⁰³ *Bundesgesetz vom 2. Dezember 1958 über den Versicherungsvertrag (Versicherungsvertragsgesetz - VersVG)* BGBl. Nr. 2/1959 (NR: GP VIII RV 102 AB 547 S. 68. BR: S. 140.)< <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001979>> accessed 10.08.2016

authority for the financial market and is responsible for supervising credit institutions, insurance undertakings, pension funds, severance payment funds, investment service providers, and the Vienna Stock Exchange. Although the FMA is a young organization it has already faced its responsibilities in the courts as it has to maintain the consistency of liability insurance coverage.¹⁰⁴ Its supervisory tasks and resources are transferred from the Federal Ministry of Finance (banking, insurance and pension funds) and the Austrian Securities Authority (*Bundes-Wertpapieraufsicht*, securities supervision). Its legal reference is the Financial Market Authority Act “*Finanzmarktaufsichtsbehördengesetz*” (FMABG) BGBI. I Nr. 97/2001, amended by BGBI. I Nr. 73/2016.¹⁰⁵ FMA supervises the insurance companies authorized to conduct insurance business and the licensed insurance classes. In fact, the FMA grants licence to insurance companies for conducting contractual insurance business. The licences are distinguished on the basis of insurance classes, and insurance companies are divided into insurance classes as follows: domestic insurance; EEA insurers and third-country insurers. Therefore, even the domestic companies (the companies headquartered in Austria) need a license from FMA. Furthermore, FMA is committed to consumer protection, while insurance companies are monitored with regard to their financial situation. In fact, FMA ensures that companies fulfil their obligations towards consumers, while consumer protection is guaranteed by the boards of arbitration and the national courts. The FMA ultimately decides on the applicability of the VAG in relation to single enterprises. In this scenario, the Austrian Insurance Association (*Verband der Versicherungsunternehmen Österreichs*, VVO) represents the interest of private insurance companies, currently 141 member companies. Therefore, it covers virtually the complete insurance market in Austria, which consists of around 61 insurance companies and 55 insurance mutual, and 25 insurance companies based in the European Union have a licensed Austrian branch.¹⁰⁶ For this reason, VVO has developed a number of non-binding model contracts in the fields of life insurance, property insurance and motor insurance. These offer a reliable overview on the Austrian insurance contract.

4.3 Life insurance

¹⁰⁴ International Monetary Fund, *Austria: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Securities Regulation, Insurance Regulation, and Anti-Money Laundering and Combating the Financing of Terrorism*, (International Monetary Fund, 2004), p. 31

¹⁰⁵ *Bundesgesetz: SFT-Vollzugsgesetz sowie Änderung des Finanzmarktaufsichtsbehördengesetzes, des Investmentfondsgesetzes 2011, des Alternativen Investmentfonds Manager-Gesetzes und des Betrieblichen Mitarbeiter- und Selbständigenvorsorgegesetzes*

<https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_73/BGBLA_2016_I_73.pdf> accessed 7.08.2016

¹⁰⁶ WWL (Who's who legal), *Austria: Insurance & Reinsurance Analysis 2015*, (WWL, 2015) <

<http://whoswholegal.com/news/analysis/Article/32382/austria-insurance-reinsurance-analysis-2015/>> accessed 06.08.2016

In the last two decades life insurance in Austria has seen a significant reduction in safety margins. The decline of life premiums started in 2011, when they were negatively affected by “a change in the tax treatment for single premium business.”¹⁰⁷ Austrian life insurance products are highly influenced by the German model, leading Austrian insurers to adopt a relatively conservative investment policy. Despite that, the economic crisis of the last decade affected the life insurance market trends. Nevertheless, the life segment's industry share fell from 45.1% in 2009 to 39.0% in 2013.¹⁰⁸ From a different point of view, low penetration of life segment (which indicates a low level of development of insurance sector in the country) provides significant business opportunities for insurers to gain new business and market share by offering improved products and services. Contrary to Italy, Austria does not experience a high amount of life gross claims payments,¹⁰⁹ 357.81(see Annex-Table II). In fact, the Austrian population is not experiencing a conflict between generations: from 2004 to 2014 the amount of people aged over 65 raised only from 15.5 % to 18.3%¹¹⁰ (see Annex-Table I). Overall, for the purpose of direct comparison the situation of life insurance in Austria is distinguished into the following categories:

Ratio of premium to gross domestic product 2005-2015	Decreased from 2.8% to 2% ¹¹¹
Premium rata per capita 2005-2015	Decreased from 970,315 million EUR to 789,873 million EUR. ¹¹²
Insurance spending 2005-2014	Decreased from 5.447% to 5.188%, between the higher increase in Italy and the decrease in the UK. ¹¹³

¹⁰⁷ OECD 2013, (n.62), p. 18

¹⁰⁸ Wood Laura, ‘Life Insurance in Austria, Key Trends and Opportunities to 2019’, (*Research and Markets*, 2015) <<http://www.businesswire.com/news/home/20141106006506/en/Research-Markets-Life-Insurance-Austria-Key-Trends>> accessed 10.08.2016

¹⁰⁹ Investopedia, ‘Insurance Claim Definition’, (*Investopedia*, 2016) <http://www.investopedia.com/terms/i/insurance_claim.asp#ixzz4GwB9Y7lc> accessed 10.08.2016 “An insurance claim is a formal request to an insurance company asking for a payment based on the terms of the insurance policy.”

¹¹⁰ Eurostat (n.65)

¹¹¹ Swiss Re, ‘Sigma World Insurance Database’, (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 9.08.2016, the insurance data and estimates contained in the study originate primarily from national supervisory authorities and, in some cases, from insurance associations. Macroeconomic data was sourced from the International Financial Statistics of the IMF, Oxford Economics and IHS Data insights. Life and non-life business areas in sigma explorer are categorised according to standard EU and OECD conventions: health insurance is allocated to non-life insurance, even if it is classified differently in the individual countries

¹¹² Ibid.

¹¹³ OECD Data 2016 (n.67)

In all three categories Austria experienced a decrease. This means that, firstly, the relationship between this nation's overall economic activity and the premium decreased, determining a lower impact of the premium on a larger scale. Secondly, the average amount per person due for an insurance policy has lowered, reflecting a contained individual risk, thus a minor exclusion of older people from the insurance market. Furthermore this data is linked to the average population over 65. Compared to Italy, in Austria there is less discrepancy between older and younger people.¹¹⁴ However, it is clarified by the Regulation of the Financial Market Authority (FMA) on life insurance (Actuarial Foundation Regulation)¹¹⁵ that the Austrian actuarial system uses age limits (through mortality tables) in order to calculate the premium. This is done through what is called “*Alterskappungen*” (§ 5.6) which can be translated as “age-capping”. To some extent, this approach is in contradiction to the one adopted in social insurance. In fact, in the social insurance field Austria assumes the full cost of the continued insurance or self-insurance of care-giving family members for an unlimited period of time.¹¹⁶ Furthermore, in May 2011 the government adopted a decision to set up a Long-Term Care Fund to support the federal provinces and municipalities in covering care-related expenditure. Thirdly, as insurance spending decreases, the relative importance of the insurance industry in the domestic economy has lowered. Until 2012, Austria had the lowest percentage of insurance spending (5.15%) compared to Italy (6.49%) and UK (12.87%) which is the highest.¹¹⁷ (See Annex- Table IV)

As introduced above, in Austria the VVO provides some non-binding standard conditions for life insurance (*Versicherungsbedingungen der Er- und Ablebensversicherung 2008*). This document makes reference to age discrimination where it specifies how the cost of the risk of death depends either on the age or the sex of the insured.¹¹⁸ Contrary to what has been underlined in the Italian context, the Austrian system demonstrates multiple discrimination (age and sex). In fact, in the hypothesis of an insurance contract it is foreseeable that the insurance company puts at a disadvantage an old man rather than a young woman, in the light of a lower risk of the latter. In fact, statistically women live longer than men, so even if ages are the same, women could be a potentially cheaper customer than men.

¹¹⁴ Hörnl Josef, *National Report on Elder Abuse in Austria*, (Paper, 2014) World Health Organization. <http://www.who.int/ageing/projects/elder_abuse/alc_ea_aut.pdf> accessed 06.08.2016

¹¹⁵ BGBl. II Nr. 296/2015 “*Lebensversicherung Versicherungsmathematische Grundlagen-Verordnung*”. <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2015_II_296> accessed 07.08.2016

¹¹⁶ See the 2nd Act Amending the Social Law 2009

¹¹⁷ OECD 2016 (n.67)

¹¹⁸ *Versicherungsverband Österreich (VVO), Versicherungsbedingungen der Er- Und Ablebensversicherung (2008)* <http://www.loewi.at/wp-content/uploads/2012/08/Bedingungen-Er-und-Ablebensversicherung_1.pdf> accessed 08.09.2016

Following the VVO pattern (*Versicherungsbedingungen der Er- und Ablebensversicherung*), the Austrian Civil Service Insurance (*Österreichische Beamtenversicherung*, OBV) describes the standard conditions for life insurance.¹¹⁹ Consequently, at § 5 “Costs and Fees” it makes it clear that the cost to cover the risk will depend on the age of the insured. For this purpose, age is calculated as the difference between the calendar year when the insurance started and the chronological age of the insured person. Risk costs are calculated annually with the support of the Austrian mortality tables.¹²⁰

Vienna Insurance Group (VIG) is the dominant insurance group in Austria and one of the largest international insurance groups in Central and Eastern Europe.¹²¹ It is headquartered in Vienna, operates around 50 insurance companies in 25 countries and has approximately 23,000 employees. In life insurance, the VIG offers a variety of risk (such as classic life insurance products), savings and pension products (annuity insurance, endowment insurance policies and various forms of unit- and index-linked products).¹²² *Donau Versicherung* AG Vienna Insurance Group is one of the top ten insurance companies in Austria.¹²³ Similarly to OBV, *Donau Versicherung* provides that the costs for life insurance depend on the age of the insured and the actuarial value of the contract, in addition to the mortality tables.¹²⁴ *UNIQA Österreich Versicherungen* AG is an Austrian insurance company with 2.6 million customers and around 7.5 million insurance policies.¹²⁵ The company offers a product called “FlexSolution” which is a unit-

¹¹⁹ Österreichische Beamtenversicherung (OBV), *Versicherungsbedingungen der Er- und Ablebensversicherung* nr. 008 <http://www.oebv.com/downloads/bedingungen/L008_AVB_Er-und_Ablebensversicherung.pdf> accessed 08.08.2016

¹²⁰ “A mortality table is a table that shows the rate of deaths occurring in a defined population during a selected time interval, or survival from birth to any given age. Statistics included in the mortality table show the probability a person's death before their next birthday, based on their age. Death-rate data help determine prices paid by people who have recently purchased life insurance. A mortality table is also known as a “life table,” an “actuarial table” or a “morbidity table.” From Investopedia, *Definition of 'Mortality Table'* (Investopedia, 2016)

<<http://www.investopedia.com/terms/m/mortality-table.asp#ixzz4GwJWni4F>> accessed 10.08.2016

¹²¹ Vienna Insurance Group, official website: <<http://www.vig.com/en/home.html>>

¹²² Wiener Staedtsche Versicherung Ag Vienna Insurance Group (a joint stock corporation organized under the laws of Austria), Offering of up to 23,000,000 Shares Admission of up to 23,000,000 Shares to the Official Market of the Vienna Stock Exchange and to the Main Market of the Prague Stock Exchange, (Prospectus, 2008) <http://www.csas.cz/static_internet/cs/Obecne_informace/Erste_Group/Erste_Group/Prilohy/Wilma1.pdf> accessed 01.08.2016

¹²³ Donau Versicherung, official website: <<https://www.donauversicherung.at/>>

¹²⁴ Anhang § 176 Abs. 5 VersVG Versicherungsbedingungen Der Erlebensversicherung und Er- Und Ablebensversicherung < <https://www.donauversicherung.at/fileadmin/donau/Dokumente/klauseln/LV/740.pdf>> ; Anhang 731 53.Zk.731 (05.2011) Versicherungsbedingungen der Erlebensversicherung Und Er- Und Ablebensversicherung < <https://www.donauversicherung.at/fileadmin/donau/Dokumente/klauseln/LV/731.pdf>>; Anhang 701 Seite 1 Von 6 53.Zk.701 (08.05) Versicherungsbedingungen der Erlebensversicherung Und Er- Und Ablebensversicherung < <https://www.donauversicherung.at/fileadmin/donau/Dokumente/klauseln/LV/701.pdf>> accessed 09.08.2016

¹²⁵ UNIQA Österreich Versicherungen, official website: < <http://www.uniqagroup.com/gruppe/versicherung/uniqa-group/uniqa-in-europa/oesterreich/Austria.en.html>> accessed 10.08.2016

linked endowment¹²⁶ and life insurance. In this way, it is further demonstrated how Austrian companies link life insurance to mortgage effects and to investment in securities or property.

4.4 Non-life insurance: motor and travel

Compared to other insurance markets (in particular the Western Europe market), Austria's share of total premium volume for non-life insurance is relatively high (over 60%).¹²⁷ In 2013 the non-life premium paid amounted to 6,631.00 million EUR. Compared to Italy and the UK, Austria is the country with the lowest amount of non-life premium paid.¹²⁸ However, in 2015 premiums income slightly increased by 1.8%.¹²⁹ This growth has been explained as the consequence of the country's favourable regulatory environment, including the implementation of mandatory liability insurance norms.¹³⁰ Nevertheless, for comparative purposes, the Austrian non-life insurance context is organised in the following categories:

The non-life premium per capita 2005-2015	Increased from 1,105.48 million EUR to 1,242.05 million EUR. ¹³¹ (+12.42%)
The ratio of non-life premium to gross domestic product (GDP) 2005-2015	Remained stable at 3.2%. ¹³²

The non-life premium per capita, compare to the life one, shows a big increment. In 2013 the non-life premium paid amounted to 6,631.00 million EUR, lower than the UK (45,980.57) and Italy (24,241.00).¹³³ Between Italy and the UK, Austria had the highest ratio of premium underwritten in

¹²⁶ "Unit-linked endowment policy is one method of paying off the capital element of the mortgage, using the proceeds of the endowment policy. These types of policy usually including life cover, and are designed to provide high investment performance, but they are speculative in that they provide little or no guarantee of achieving the value required to pay off the mortgage." From Finance Investment Business Glossary, 'Unit-linked endowment policy', (*Finance Investment Business Glossary*, 2016) <http://www.finance-investment-business-glossary.com/definitions/unit_linked_endowment_policy.shtml> accessed 10.08.2016

¹²⁷ Vienna Insurance Group (VIG), *Group Annual Report 2015*, (Group Management report, 2015), <<http://annual-report.vig.com/2015/group-management-report/development-by-region/austria.html>> accessed 08.08.2016

¹²⁸ Insurance Europe (n.39) Italy 24,241.00; the UK 45,980.57 million EUR

¹²⁹ Vienna Insurance Group (VIG) (n.104)

¹³⁰ Wood Laura, 'Research and Markets: Trends and Opportunities in the Austrian Non-Life Insurance Industry to 2016: Market Profile' (*Business Wire*, 2013) <<http://www.businesswire.com/news/home/20130718005490/en/Research-Markets-Trends-Opportunities-Austrian-Non-Life-Insurance>> accessed 12.08.2016

¹³¹ Swiss Re, "Sigma World Insurance Database", (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 9.08.2016 Converted from USD to EUR, 1 USD = 0,896423 EUR on 02.09.2016

¹³² Ibid.

¹³³ Insurance Europe <www.insuranceeurope.eu> accessed 01.08.2016

2015 to the GDP¹³⁴ (also known by the term “insurance penetration”). This data reveals a high level of development of insurance sector in a country. Compared to the other two countries Austria has the highest development level of insurance. Therefore, the insurance industry makes a significant contribution to the Austrian GDP. Eventually, it demonstrates how age discrimination in insurance can have an influence on national economy.

In Austria third-party car insurance (*Haftpflichtversicherung*) is compulsory and can be arranged via an insurance broker (*Vericherungsmakler*) or an insurance company (*Versicherungsunternehmen*). The regulatory framework is the Motor Vehicle Liability Insurance Act (*Kraftfahrzeug-Haftpflichtversicherungsgesetz, KHVG*)¹³⁵ which applies to the liability insurance of vehicles. According to this Act, the claims can be levied on the basis of the legal liability provisions against the policyholder or the co-insurance person, and the insurance companies follow the occurrence system.¹³⁶ Interestingly, in 2013 Austrian motor claims amounted to 2,135.00 million EUR, is lower than the UK and Italy. Therefore, the lower demand on insurance companies for payment reflects a certain success in terms of income and economic growth. At the same time, from 2012 to 2014 the motor third party liability insurance premium increased from 1,698 bn. EUR to 1,721 bn. EUR.¹³⁷ Furthermore, according to the European Automobile Manufacturers’ Association, from 2013 to 2014 Austria registered a growth of passenger cars in use of +1.2% (see Annex- Table III).

Overall, the successes in Austrian motor insurance requires further consideration. In the Austrian Act there is no mention of age limits, although § 14b of the Act prescribes a premium adjustment clause in correlation with the national statistic trends. Therefore, although age is not explicitly mentioned, it can still be claimed as a proxy of risk according to statistics. In this way, while the risk is considered predictable, age is perceived as an ‘unfair’ factor of risk as diversity within an age group is quite wide. However, Germanic actuarial studies sustain: “It is not necessary that a risk characteristic applies equally...as long as the group of policyholders defined by the risk

¹³⁴ The Economic Times, ‘Definition of ‘Penetration Rate’ (*The Economic Times*, 2016)
<<http://economictimes.indiatimes.com/definition/penetration-rate>> accessed 02.08.2016

¹³⁵ Original version: Federal Law Gazette no. 651/1994 (NR: GP XVIII RV 1681 AB 1809 Page 172. BR: AB 4847 Page 589.); last amendment Federal Law Gazette I no. 138/2011 (NR: GP XXIV RV 1524 AB 1538 Page 135. BR: AB 8626 Page 803.)

¹³⁶ ‘Occurrence Policy’: an insurance policy that will cover claims made for injuries sustained during the life of the policy, even if the claim is filed after the policy has been cancelled. An occurrence is an event that can result in the filing of an insurance claim. From ‘Investopedia’ <<http://www.investopedia.com/terms/o/occurrence-policy.asp#ixzz4Izo0D881>> accessed 01.08.2016

¹³⁷ Versicherungsverband Österreich (VVO), *Key figures 2014. Austrian Insurance Association*, (VVO, 2015)
<[http://www.vvo.at/vvo/vvo.nsf/sysPages/xF43611AC605B64C7C1257E4C0024797D/\\$file/VVO_Ministatistik_2014_EN.pdf](http://www.vvo.at/vvo/vvo.nsf/sysPages/xF43611AC605B64C7C1257E4C0024797D/$file/VVO_Ministatistik_2014_EN.pdf)> accessed 09.08.2016

determinant differ significantly from other groups with respect to loss expectation.”¹³⁸ Therefore, it is the difference from the other groups and not the difference within the age group itself that renders older customers more risky.

In the “*Allgemeine Bedingungen für die Kraftfahrzeughaftpflicht-Versicherung*” (AKHB 2015) the Association of Austrian Insurance VVO provides some non-binding standard conditions for motor insurance. According to the text, these general conditions shall apply insofar as there are no special arrangements provided by the Supplementary General Conditions for Liability Insurance (*Kraftfahrzeug-Haftpflichtversicherungsgesetz, KHVG*). However, in the document there is no specific mention of the age of the insured. Although Article 10, entitled, “what circumstances are to be regarded as increasing the risk?” is linked to §§ 23 Abs. 1¹³⁹ and 27 Abs. 1 of the VersVG (which defines the obligation of insurers), there is no explicit link to age as an increment of risk. Nevertheless, these provisions seem to leave insurance companies free to end the contract whenever it is considered too risky. In this way, insurance companies are entitled to treat different situations in a different way, which leaves room for potentially arbitrary decisions. Finally, Article 12 of AKHB provides for a premium adjustment, which must be clear and understandable. However, also in this case there is a high level of subjectivity. Indeed, the premium adjustment is not uniquely based on the statistical data provided by *Bundesanstalt Statistik Austria* consumer price but rather considers the whole context.

Older consumers often complain that they cannot get travel insurance, or that it is exorbitantly priced. Nevertheless, Austrian law does not provide any particular regulation in relation to travel insurance. On this point, the analysis of single companies complete this framework. The Austrian Insurance Association (VVO) provides for some travel insurance non-binding standard conditions. In this way, illness, accident at the resort or loss of travel luggage, cancellation insurance, rebooking needs and trip interruption can be covered by the insurance. While VVO does not refer to any particular age of the insured, other insurance companies increase the price for persons over 65.¹⁴⁰ UNIQA health insurance for foreign guests offers assistance for

¹³⁸ Schwarze Reimund, Wein Thomas, *Is the Market Classification of Risk Always Efficient? Evidence from German Third Party Motor Insurance*, (LSE Discussion Paper, 2005) ESRC Centre for Analysis of Risk and Regulation, p.5 <<http://eprints.lse.ac.uk/36104/1/Disspaper32.pdf>> accessed 12.08.2016

¹³⁹ “(1) Nach Abschluß des Vertrages darf der Versicherungsnehmer ohne Einwilligung des Versicherers weder eine Erhöhung der Gefahr vornehmen noch ihre Vornahme durch einen Dritten gestatten.” After the conclusion of the contract, the policyholder may not increase the risk or to authorize its carrying out by a third party without the consent of the insurer; “(1) Tritt nach dem Abschluß des Vertrages unabhängig vom Willen des Versicherungsnehmers eine Erhöhung der Gefahr ein, so ist der Versicherer berechtigt, das Versicherungsverhältnis unter Einhaltung einer Kündigungsfrist von einem Monat zu kündigen. [...]” After the conclusion of the contract, in case of an increase of the risk, the insurer is entitled to terminate the insurance contract regardless of the wishes of the policyholder with a notice period of one month.

¹⁴⁰ Overseas health insurance “Auslands-Krankenversicherung bis 365 Tage” (2016) <http://www.reiseversicherungsbuchen.at/de/langzeitreisen-bis-5-jahre/krankenversicherung-bis-max-365-tage/> accessed 11.09.2016

medical treatment costs, rescue costs and emergency transport to the home country. For all these categories a maximum reimbursement applies, while no age limits are prescribed.¹⁴¹

5. United Kingdom

5.1 Overview

Compared to the previous countries, in the United Kingdom “there is no general insurance code governing the law applying to the insurance contract.”¹⁴² Over the years, the insurance industry has worked on proposal forms and policies developing insurance law through insurance contracts. Therefore, the roots of the English insurance law derive from insurance practice. This voluminous legislation concerns the regulation of insurance business and the selling of insurance. In this way, the Financial Services and Markets Act 2000, amended in 2012¹⁴³, and the rules made under that Act regulates insurance business in the UK. In other words, this Act represents a broad structure under which the financial services industry is regulated.

In the UK age discrimination is provided by the Equality Act 2010, which is part of the current national strategy directed to combat demographic ageing, keeping older workers active. More precisely, the Equality Act 2010 is an Act of Parliament in the United Kingdom which implements Directive 2000/78/EC. It protects people from discrimination, harassment and victimisation in a range of situations. Age is among these protected grounds. In fact, the Equality Act bans age discrimination against employees, job seekers and trainees, although accessing financial services is excluded. The Act defines a financial service as banking, credit, insurance, personal pension, investment or payment nature.¹⁴⁴ Thus, all actions or omissions by any financial service provider relating to age thresholds or age bands are justified, victimisation or harassment are, however, an exception.¹⁴⁵

At the time of the publication of the Act (2009), the Association of British Insurers (ABI) warned that imposing any restrictions on the use of age by insurers would only mean higher

¹⁴¹ Reise-Krankenversicherung für ausländische Gäste (2016)

<<https://www.uniqa.at/versicherung/cms/privatkunden/reise/Eura.de.html>> accessed 14.08.2016

¹⁴² Birds John, *Insurance Law in the United Kingdom*, (Kluwer Law International, 2010), p.16-18

¹⁴³ Financial Services Act 2012, legislative text: < <http://www.legislation.gov.uk/ukpga/2012/21/contents>> accessed 15.09.2016

¹⁴⁴ The Equality Act 2010, Sch. 3, Part 5 para. 20A (3). Mortgages, annuities, current accounts, savings accounts, cheque cashing services, loans, bank overdrafts, credit cards, charge cards, debt advice, debt management services, e-money services, equity release, fraud and credit scoring used by financial services companies, spread betting services and investment advice all fall within the exception. This is not an exhaustive list. Available online: < <http://www.legislation.gov.uk/ukpga/2010/15/schedule/3>> Accessed 10.06.2016

¹⁴⁵ The Equality Act 2010, Sch. 3, Part 5 para. 20A (1)

insurance costs and less choice “as insurers would have insufficient information to fully assess the risk, and less choice for consumers”.¹⁴⁶ In 2014, the Equality and Human Rights Commission¹⁴⁷ consulted on a draft of ‘Age Supplement to the Code of Practice on Services, Public Functions and Associations’.¹⁴⁸ The draft was submitted to the Government in June 2014 for approval and laid before Parliament to come into force as a Code of Practice. Nowadays, it has been published as this technical guidance to the Equality Act 2010 but is not yet in force. It represents a new clear orientation in the field of age discrimination in financial services. Nevertheless, the guidance pays more attention to controls in the assessment of risk¹⁴⁹ and on voluntary agreements in case of travel and motor insurance.¹⁵⁰

While the age exceptions contained in the Equality Act allow age to be used as a risk factor, it is considered a legitimate practice only when “carried out by reference to relevant information from a source on which it is reasonable to rely.”¹⁵¹ In this way, this reliable source has often been identified in actuarial statistics. However, actuarial studies are not an exact mathematical science which guarantees an absolute precision in its results. Therefore, transparency in accessing insurance for older people is still a priority for the Government. Accordingly, it has recently concluded a non-statutory agreement with the relevant insurance associations in the field of motor and travel insurance. However, these voluntary agreements are secondary to English insurance law and its supervisory bodies. From a demographic perspective, compared to Austria and Italy, UK has the lowest amount of older people (See Annex- Table 1)

Population 65 years and over	2004	2014
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¹⁴⁶ Association of British Insurers (ABI), “Equality Bill must focus on genuine discrimination not on insurance says the ABI” (ABI, 2009). Available online: < <https://www.abi.org.uk/News/News-releases/2009/04/Equality-Bill-must-focus-on-genuine-discrimination-not-on-insurance-says-the-ABI>> accessed 13.06.2016

¹⁴⁷ The Equality and Human Rights Commission is Great Britain’s national equality body and has been awarded an ‘A’ status as a National Human Rights Institution (NHRI) by the United Nations. Official website: < <https://www.equalityhumanrights.com/en/about-us/who-we-are>> accessed 10.06.2016

¹⁴⁸ Codes of Practice and guidance: Statutory Code of Practice; The non-statutory guidance. Two separate forms that give individuals, businesses, employers and public authorities the information they need to understand the Equality Act 2010, exercise their rights and meet their obligations. Statutory Code of Practice available online: < <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>> accessed 10.06.2016

¹⁴⁹ The Equality Act 2010 Sch. 3, Part 5 para. 20A (2)

¹⁵⁰ Association of British Insurers (ABI), Is your home underinsured? A guide to buildings and contents insurance, Available online: < https://www.abi.org.uk/~/_/media/Files/Documents/Publications/Public/Migrated/Home/Is%20your%20home%20underinsured.pdf> accessed 10.06.2016

¹⁵¹ ABI, BIBA, HR Government, “Transparency and Access in Motor and Travel Insurance for Older People. An Agreement on Age and Insurance” [2016] Version 2.1., p 2 < https://www.abi.org.uk/~/_/media/Files/Documents/Publications/Public/2016/Age%20and%20Insurance/Agreement%20on%20Age%20and%20Insurance.pdf> accessed 12.09.2016

UK	15.9%	17.5%
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Table 5: Eurostat, Population age structure by major age groups, 2004 and 2014 (% of the total population), (Eurostat, 2016)

5.2 Supervisory Body

From the Financial Services and Markets Act 2012 three new bodies have been formed: the Financial Policy Committee (FPC), the Prudential Regulatory Authority (PRA) and the Financial Conduct Authority (FCA). Overall, the Financial Services Act 2012 brought major reforms creating a regulatory framework which focuses on financial stability. Following this new legislation in 2013 an independent Financial Policy Committee (FPC) was established. Its primary objectives are to “identify, monitor and take action to remove or reduce systemic risks with a view to protecting and enhancing the resilience of the UK financial system.”¹⁵² The FPC has a secondary objective to support the economic policy of the Government. The body that regulates the insurance business is the Prudential Regulation Authority (PRA)¹⁵³ and is the financial services regulatory body. In this way, the activities of insurers must be closely supervised by the PRA.

The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) are the principal regulators of the financial services industry, but the FCA is the body whose activities have the most relevance for this study. Indeed, its aim is to protect consumers, ensure the industry remains stable and promote healthy competition between financial services providers.¹⁵⁴ The FCA is a non- governmental financial regulatory body which together with the PRA replaced the Financial Services Authority following the 2012 amendments. Nowadays, the FCA regulates financial firms providing services to consumers and maintains the integrity of the UK’s financial markets.¹⁵⁵ Interestingly, the FCA is entirely funded by financial services firms, recalling the close link with the practiced insurance law. Despite that, transparency is guaranteed only by the fact that every year the FCA needs to report on their progress to the Treasury and the Parliament.

The FCA supervises banks to ensure they treat customers fairly in providing financial services. These include: banking and savings accounts, investment products, mortgages, insurance

¹⁵² Bank of England, *Financial Policy Committee*, (Bank of England, 2016) < <http://www.bankofengland.co.uk/financialstability/pages/fpc/default.aspx>> accessed 15.09.2016

¹⁵³The Prudential Regulation Authority (PRA) Official website: < <http://www.bankofengland.co.uk/pr/Pages/default.aspx>> accessed 15.09.2016

¹⁵⁴ The Financial Conduct Authority (FCA) official website: <https://www.fca.org.uk/> accessed 15.09.2016

¹⁵⁵ Vina Gonzalo, ‘U.K. Scraps FSA in Biggest Bank Regulation Overhaul since 1997’ [2010] Businessweek (Bloomberg).

and some pension schemes. Additionally, the FCA is also in charge of researching on consumer behaviour in retail markets, aiming to make the latter more competitive so that consumers can get a fair deal when buying financial services products. However, it can be argued that ‘competitiveness’ and ‘equal treatment’ are two concepts that can hardly be combined by the market. In fact, financial service providers target consumer groups by using their different characteristics. Linda Woodall, Director of Life Insurance and Financial Advice and Sponsor of Ageing Population Project Financial Conduct Authority, sustains that “regulators and firms need to adapt to make sure that financial services are still fit for purpose, and are able to meet the wide range of needs of today’s older consumers”.¹⁵⁶ On the other hand, financial providers defend the preconception that competitiveness and earning expectations are incompatible with the risks embedded in older customers. Accordingly, a UK Government consultation clarified that differences between customers on the grounds of age can continue, although “they will need to show, if challenged, that there is a good reason (“objective justification”) for that different treatment.”¹⁵⁷

5.3 Life insurance

While life insurance are not contracts of indemnity, they are often referred to as contingency insurances. Contingency issues are defined as occurring automatically when certain conditions are met.¹⁵⁸ By the effect of these contracts insurance companies are committed to pay an agreed sum on the happening of the event insured against. In UK, life insurance is closely regulated by or on behalf of government.¹⁵⁹ However, for a number of years, the sale and marketing was regulated together with other types of investment, separately from the general insurance.¹⁶⁰ Nowadays, life insurance is regulated by the general Conduct of Business Sourcebook (COBS)¹⁶¹ made by the FSA (now the Financial Conduct Authority), while general insurance is governed by the Insurance Conduct Business of Sourcebook. What differentiates life insurance from other types of insurance is that most life insurance contracts can be sold by ‘cold-calling’ (with cancellation rights) and only through tied agents, or independent intermediaries. Therefore, while life insurance contracts are characterised by high dynamism, the fact that they must be sold only by a ‘tied agent’ means that

¹⁵⁶ Financial Conduct Authority, *Ageing population and financial services*, (Discussion Paper 16/1, 2016), p. 8

¹⁵⁷ Government Equalities Office, “Equality Act 2010: Banning age discrimination in services, public functions and associations Government response to the consultation on exceptions”, [2012], p. 2
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/84987/government-consultation-response.pdf> accessed 10.06.2016

¹⁵⁸ Farlex Financial Dictionary. (Farlex, 2012) <<http://www.thefreedictionary.com/>> accessed 10.06.2016

¹⁵⁹ Birds (n.29), p.5

¹⁶⁰ *ibid*, p.303-304

¹⁶¹ Conduct of Business Sourcebook (CBSB) <<https://www.handbook.fca.org.uk/handbook/COBS.pdf>> accessed 10.09.2016

the adviser can only advise or sell that products offered by the company that employs him. This means that a better alternative, if existing, cannot be revealed. Furthermore, there is a distinction between ‘pure life insurance’, where a fixed sum of money will be paid only on the death of the life insured, and ‘linked life insurance’, which is instead linked to the investment. Nevertheless, while the insurance industry is committed to treating people fairly, usually premiums reflect individual risk. In this way, age, as a factor of risk, “helps to ensure a wide range of products at competitive price.”¹⁶²

The Equality Act 2010 (the “Act”) makes it unlawful for a service provider to discriminate in the provision of services to the public. “Services” includes goods and facilities. By comparison with the average European figures, the UK life insurance market accounts for 27% of the European life insurance market.¹⁶³ The table below offers an overview of this life insurance market in the UK:

Ratio of premium to gross domestic product 2005-2015	Decreased from 6.0% to 5.3%. ¹⁶⁴
Premium rata per capita 2005-2015	Decreased from 3,700.98 million EUR to 2,950.19 million EUR. ¹⁶⁵
Insurance spending 2005-2014	Decreased from 15.550% to 11.018% ¹⁶⁶

From 2004 to 2014 the population in the UK aged over 65 increased from 15.9% to 17.5%¹⁶⁷ and in comparison with Austria and Italy, UK became the country with the greatest decrease in insurance spending: a decrease in the real contribution of premium paid by individuals to GDP. Thus, less contributions are supported by a significant decrease in the amount due per person for an insurance policy rate per capita (premium data per capita). This latter data, while representing a lower ‘price’ for the individual risk, is interpreted as higher competition among firms. Accordingly, as opposed to Austria and Italy, the UK was the only country which achieved a real growth in life premium in

¹⁶² Starling Nick, ‘ABI Age restriction would lead to higher insurance costs and less choice’ (ABI, 2009) Starling Nick is the ABI’s Director of General Insurance and Health in < <https://www.abi.org.uk/News/News-releases/2009/03/ABI-Age-restriction-would-lead-to-higher-insurance-costs-and-less-choice>> accessed 10.09.2016

¹⁶³ MarketLine Industry Profile, Life Insurance in Italy, (Report, 2014), p. 7

¹⁶⁴ Insurance Europe (n.133)

¹⁶⁵ Swiss Re, “Sigma World Insurance Database”, (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 2.08.2016 Converted from USD to EUR, 1 USD = 0,896423 EUR on 02.09.2016

¹⁶⁶ OECD Data 2016 (n.67)

¹⁶⁷ Eurostat (n.65)

2011¹⁶⁸, although it experienced the highest decrease of ratio of premium to gross domestic product. A low ratio of premium to gross domestic product is certainly a negative indicator: it represents a national market which is not sufficiently developed.

5.4 Non-Life insurance: motor and travel

At the present the law requires that anyone who uses or causes or permits another to use a motor vehicle on a road (or other public place) must be insured against liability to pay damages for death or bodily injury or property damage cause by or arising out of the use of the vehicle.¹⁶⁹ A recent non-statutory Agreement¹⁷⁰ (effects start from August 2016) between the Government, the Association of British Insurers (ABI) and the British Insurance Brokers' Association (BIBA) protects the interests of both consumers and insurers when age is used in risk assessment, product offer and pricing. Essentially, this follows a previous Agreement that came into force in 2012¹⁷¹ which was directed to improve transparency and access to insurance for older customers. When assessing risk, this Agreement applies maximum age limits to motor and travel insurance contracts. The reason for the limits in these two sectors has been explained by James Dalton, ABI Director of General Insurance Policy, who underlines how competitiveness in these fields is particularly high. Consequently, "if an insurer or insurance broker is unable to offer cover to an older motorist or traveller because of their age...then they will automatically refer the customer to an alternative provider who can meet their needs or to a dedicated signposting service such as the 'Find-A-Broker' service."¹⁷² Overall, the scenario of non-life insurance in UK is represented by the table below:

¹⁶⁸ OECD 2013 (n.62), p, 19

¹⁶⁹ Road Traffic Act 1988 ss. 143 and 145. At the moment there are outstanding changes not made yet. See the Deregulation Act 2015 CHAPTER 20: s. 143(1) excluded by 1988 c. 52 s. 12E (as inserted) by 2015 c. 20 s. 73(3); s. 143(2) excluded by 1988 c. 52 s. 12E (as inserted) by 2015 c. 20 s. 73(3) <http://www.legislation.gov.uk/ukpga/2015/20/pdfs/ukpga_20150020_en.pdf> accessed 14.08.2016

¹⁷⁰ ABI, 'Voluntary agreement on age and insurance continues; ensuring older people can access insurance' (Association of British Insurers, 2016) <<https://www.abi.org.uk/News/News-releases/2016/01/Voluntary-agreement-on-age-and-insurance-continues-ensuring-older-people-can-access-insurance>> accessed 14.08.2016; Collard Sharon, Coppack Martin, Lowe Jonquil, Sarkar Simon, *Access to Financial Services in the UK*, (Occasional Paper 17, 2016) <<https://www.fca.org.uk/publication/occasional-papers/occasional-paper-17.pdf>> accessed 14.08.2016

¹⁷¹ ABI, BIBA, HR Government, "Transparency and Access in Motor and Travel Insurance for Older People. An Agreement on Age and Insurance" [2016] Version 2.1., p 2 <<https://www.abi.org.uk/~media/Files/Documents/Publications/Public/2016/Age%20and%20Insurance/Agreement%20on%20Age%20and%20Insurance.pdf>> accessed 12.09.2016

¹⁷² ABI, 'Voluntary agreement on age and insurance continues; ensuring older people can access insurance' (Association British Insurers, 2016) <<https://www.abi.org.uk/News/News-releases/2016/01/Voluntary-agreement-on-age-and-insurance-continues-ensuring-older-people-can-access-insurance>> accessed 14.08.2016

The non-life premium per capita 2005-2015	Decreased from 1,176.29 million EUR to 956,484 million EUR (-14.9%) ¹⁷³
Ratio of premium to gross domestic product 2005-2015	Decreased from 3.3% to 2.5% ¹⁷⁴

In 2013 the non-life premium paid amounted to 45,980.57 million EUR, the highest amount in respect to Italy and Austria.¹⁷⁵ On the other hand, in 2013 motor claims in the United Kingdom were 6,084.92 million EUR, much lower than Italy (14,073.00) and slightly higher than Austria (2,135.00).¹⁷⁶ Although the study on age discrimination in insurance shows some similarities between Italy and Austria, the UK places far greater emphasis on the problem of age bands. This seems to be a consequence of a much more competitive market where older customers in the UK are not necessarily placed in an advantaged position. Thus, it is not unreasonable to sustain that more consideration for older clients is instead justified by a need to contain widespread age discrimination due to higher competitiveness which, however, stresses the system and has no advantage for the gross domestic product. This is demonstrated by the higher amount of non-life premium paid in the UK. What is alarming is that in the UK 97% of annual travel insurance policies impose an upper age limit for new customers.¹⁷⁷

According to the European Automobile Manufacturers' Association, from 2013 to 2014 the UK registered substantial growth of +2.4% in passenger cars in use.¹⁷⁸ The Association of British Insurers (ABI) reinterprets this evaluation considering that using age as a risk factor could even benefit older consumers. Consequently, age bands help to ensure that the customer pays a fair price for their risk. Thus, this should incentivise older people to purchase an appropriate level of insurance.¹⁷⁹ In this context, the non-statutory Agreement above-mentioned aims to ensure fair rights of access to information for consumers to improve transparency, to improve access to private

¹⁷³ Swiss Re, "Sigma World Insurance Database", (Swiss Re, 2016) <<http://www.sigma-explorer.com/>> accessed 2.08.2016 Converted from USD to EUR, 1 USD = 0,896423 EUR on 02.09.2016

¹⁷⁴ Ibid.

¹⁷⁵ Insurance Europe (n.39) Italy 24,241.00; Austria 6,631.00

¹⁷⁶ Insurance Europe n.(39)

¹⁷⁷ Age UK, 'Later Life in the United Kingdom' (December 2015) <www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true>

¹⁷⁸ European Automobile Manufacturers' Association (ACEA), *European Motor Vehicle Parc 2014* (Report, 2014) p. 3 <http://www.acea.be/uploads/statistic_documents/ACEA_PARC_2014_v3.pdf> accessed 09.08.2016

¹⁷⁹ Association of British Insurers (ABI), *Age and Insurance: Helping older customers find the cover they need* (ABI, 2009). Available online: https://www.abi.org.uk/~/_media/Files/Documents/Publications/Public/Migrated/Age%20and%20Insurance/Age%20and%20Insurance%20Helping%20older%20customers%20find%20the%20cover%20they%20need.pdf accessed 14.06.2016; Oxera, *Agenda: Advancing economics in business. 'Equality' in insurance pricing: the effect of the gender ban* (Oxera, 2013) available online: <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Risk-based-pricing.pdf?ext=.pdf> accessed 14.06.2016

motor or travel insurance where maximum age limits are used.¹⁸⁰ Renewal is always possible as motor insurers do not apply maximum age limits for their existing customers, although an 85 year-old will pay three or four times what a 45 year-old might be charged. On the other hand, age friendly insurance companies like *Saga*, *Age UK* and *RIAS* have no upper age limit, and specialise in looking after older policyholders. This demonstrates how age friendly companies can raise their profile in competitive markets such as that of the UK. Nevertheless, having dedicated firms for older costumers still recall discriminatory mechanisms.

In UK, when booking a train ticket on-line, the only insurance available is for people under 75 years old. Most policies only go up to 75, although a couple will run until 85, particularly if bought with home insurance. Some of the major insurance companies such as the *Co-Op*, *NFU*, *Yorkshire Building Society* and *Quotemehappy* ban the over 75s. *Globelink*¹⁸¹, which provides travel insurance to people up to 85 years of age; *WorldWideInsure* only provides insurance to 74, while limiting the maximum travel period to a month; and *WorldNomads* guarantees only up to 66 years of age, being more oriented to the backpacker market.

Although age-based practices in motor and travel insurance vary, financial services providers share some common points. Older people pay more than other age groups for similar insurance as age is strongly correlated with the costs of provision. Nevertheless, there is no evidence of a systematic overcharging of certain age groups although the prejudice against older customers is higher.¹⁸² Accordingly, the use of broad age bands and significant price increases between the ages bands appear arbitrary.

7. Banking, mortgages and consumer loans: social inclusion

Financial services comprise a heterogeneous group of services. With the term “banking” is intended the business of a bank. Like insurance, also banking activity promotes economic growth, allocating resources “more efficiently than individual investors or other financial institutions.”¹⁸³ The crucial point of this analysis is that banks tend to discriminate among different qualities of borrowers. In this way, mortgage and bank loan practices adversely affect older people’s rights to housing. This can be explained by the fact that “more accurate discrimination between types of borrower eases

¹⁸⁰ ABI, BIBA, HR Government, “Transparency and Access in Motor and Travel Insurance for Older People. An Agreement on Age and Insurance” [2016] Version 2.1., p 2 <
https://www.abi.org.uk/~/_media/Files/Documents/Publications/Public/2016/Age%20and%20Insurance/Agreement%20on%20Age%20and%20Insurance.pdf> accessed 12.09.2016

¹⁸¹ Globalink website: < <http://www.globelink.co.uk/policy-options/eu-residents.html>> accessed 02.08.2016

¹⁸² Government Equality Office, *The use of age-based practices in financial services*, (Oxera, report, 2009) p. ii

¹⁸³ Silipo Damiano Bruno, *The Banks and the Italian Economy*, (Springer Science & Business Media, 2009), p.2

individuals' and firms' access to the credit market."¹⁸⁴ So age limits in the banking system, mortgages and consumer loans can make more difficult to access for older people.¹⁸⁵ Indeed, these are the most common areas where age discrimination occurs. The prejudice against older customers is that by the time the loan finishes they will not be able to repay it.¹⁸⁶ Basically, this prejudice is based on the assumption that age is a factor of risk related to the death of the borrower or to his financial capability.

A mortgage is a debt instrument, secured by the collateral of specified real estate property. It is used by individuals "to make large real estate purchases without paying the entire value of the purchase up front."¹⁸⁷ The deal consists of the borrower repaying the loan, plus interest, over a period of many years. Mortgages are also known as "claims on property" and imply that the borrower can dispose of the amount over the years necessary for repaying the loan. For this reason, most of the providers refuse loans to borrowers over 70.¹⁸⁸

Consumer loans or personal loans are defined as an amount of money lent to an individual for personal, family, or household purposes.¹⁸⁹ They are often considered unsecured, where insecurity means that if the borrower fails to pay, nothing is being specially assigned as collateral to be seized by the bank. In this field age discrimination is quite widespread, although for other reasons than for insurance. Indeed, banks can refuse credit to an older person who might even have considerable resources. This is mainly due to their chronological age. According to statistical data, just under half of all lifetime lending is to borrowers aged between 55 and 69.¹⁹⁰ Credit enables an increase in the monthly budget and it can have a significant impact on the economic decisions of individuals.

The Banking system is also associated with cashless transactions. This affects social inclusion on the basis that it disturbs market access, creating opportunities for unfair provisions to grow. An example of this is online discounts. The risk of poverty is the most predictable consequence of a banking system which prevents access to possible customers.¹⁹¹ This is confirmed

¹⁸⁴ Ibid.

¹⁸⁵ Fitzpatrick, Kingston (n.15), p.64

¹⁸⁶ Altmann Ros, 'Enabling people over 50 into employment could boost the economy by up to £25 billion a year', (*Department for Work and Pensions and The Rt Hon Steve Webb*, 2015) < <https://www.gov.uk/government/news/new-report-from-dr-ros-altmann-calls-for-greater-support-for-over-50s-in-employment>> accessed 22.08.2016

¹⁸⁷ Investopedia, 'Mortgage', (*Investopedia*, 2016) < <http://www.investopedia.com/terms/m/mortgage.asp>> accessed 16.09.2016

¹⁸⁸ Hazell Tony, 'Did Lloyds stop me having a credit card because I'm over 75?' (*Thisismoney.co.uk*, 2016) < <http://www.thisismoney.co.uk/money/experts/Article-2701805/Did-Lloyds-stop-having-credit-card-Im-75.html#ixzz4FioJhsDY>> accessed 16.09.2016

¹⁸⁹ The Business Dictionary, 'Consumer loan', (*Businessdictionary.com*, 2016) < <http://www.businessdictionary.com/definition/consumer-loan.html>> accessed 16.09.2016

¹⁹⁰ Overton Louise, O'Mahony Lorna Fox, *Consumer Demand for Retirement Borrowing*, (Report for the Council of Mortgage Lenders (CML), 2015) p.6

¹⁹¹ European Commission, (n.6) p. 11

by the fact that people who can only pay in cash are more exposed to scams. In this way, older people are in a vulnerable position as they are less likely to feel confident using online banking systems or the internet to make payments. The incriminated transactions are: receiving electronic payments; paying for goods and services other than cash; paying bills electronically.¹⁹²

Savings have not been considered in this analysis. In fact, this implies access to a simple deposit, without affecting older customers, and so cannot be related to social exclusion. Thus, the banking products considered here are only those which can determine social exclusion for older people.

Despite European harmonisation, ‘securitization’ is the field where major discrepancy among the three countries is apparent. Securitization is the financial practice of pooling various types of contractual debt (mortgages, loans or credit card debt obligations) and selling their related cash flows to third party investors as securities. For example, “by combining mortgages into one large pool, the issuer can divide the large pool into smaller pieces based on each individual mortgage's inherent risk of default and then sell those smaller pieces to investors”.¹⁹³ Securitisation supports credit growth, especially for mortgage loans. In this field, supervisory rules differ widely across the three EU countries. While Italy has a supervisory authority, in the United Kingdom supervision occurs only if securities were issued to the public, and Austria has no supervisory authority. This leads to consideration of the different rationale to banking adopted by the countries.

7.1 Italy

The Italian financial system underwent profound normative, institutional and structural changes during the ‘90s.¹⁹⁴ Despite that, Italy is characterised by an underdeveloped stock market and corporate bond market that make this industry dependent on bank credit.¹⁹⁵ According to pessimistic observers, Italian banks do not have enough capital.¹⁹⁶ It is reported that the country’s banks are weighed down by €360 billion of bad loans, of which €200bn are deemed insolvent.¹⁹⁷

¹⁹² Ibid.

¹⁹³ Bakk-Simon Klára, Borgioli Stefano, Giron Celestino, Hempell Hannah, Maddaloni Angela, Recine Fabio, Rosati Simonetta, *Shadow Banking in the Euro Area. An Overview* (European Central Bank Occasional Paper, 2012) No 133, p.13 < <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp133.pdf?4e7d9b9457759addc96d58dd6dcf1891> > accessed 16.08.2016

¹⁹⁴ Silipo (n.183), p.2

¹⁹⁵ De Bonis Riccardo, Pozzolo Alberto Franco, Stacchin Massimiliano, *The Italian banking system: Facts and interpretations* (Economics & Statistics Discussion Paper, 2012) No. 068/12, p.1

¹⁹⁶ Gordon Sarah, ‘Problems with Italy’s banking system a threat to its neighbours’ *Financial Times* (London, 2016) < <https://www.ft.com/content/f5355f50-061e-11e6-9b51-0fb5e65703ce> >

¹⁹⁷ Fazi Thomas, ‘Italy is imploding in slow-motion — and it could signal the end of the euro’ (*Business Insider*, 2016) < http://uk.businessinsider.com/italy-is-imploding-in-slow-motion-and-it-could-signal-the-end-of-the-euro-2016-7?pundits_only=0&get_all_comments=1&no_reply_filter=1 > accessed 13.09.2016

Nevertheless, in 2015 the housing market saw good performance, resulting in increases in mortgages and home lending. Even consumer lending performed positively due to the increased trust of Italian consumers in the future. Simultaneously, Italy experienced a progressive tightening of lending criteria. Thus, financial institutions preferred older borrowers and less risky borrowers.¹⁹⁸ At first glance, this has negative implications for the younger generation (below 35 years old) due to high youth unemployment rate. However, problems may arise for some older borrowers also.

The price of consumer loans is barely connected to the basic household risk as delinquency or default. Instead, other proxies determine the access to a consumer loan, the most influential being the age of the household head. Furthermore, household income and the number of income recipients are also considered. In this scenario banks tend to generalise in treatment of customers, offering the same standard contract by excluding from the market the riskiest household.¹⁹⁹ However, according to the most optimistic observers, consumer lending is expected to grow, thanks to the increased trust of Italian consumers.²⁰⁰ Considering the previous analysis, this is a blind assumption.

Italian mortgage lenders have more conservative lending policies than UK lenders. Mortgages will typically be over a 15 year term, rather than the 25+ years UK lenders expect. Furthermore, most lenders are required to completely repay the mortgage by their 70th birthday. Overall, lending decisions are based on affordability, and the mortgage is calculated to be no more than 30% of the net monthly income.²⁰¹

Fixed-rate loans are the norm in Italy, which often results in quite competitive long-term interest rates. However, a Legislative Decree of 22nd December 2015, n.226 introduced ‘the life mortgage for older people’. It takes initiative from the Anglo-Saxon model of ‘reverse mortgage’ for the over 60s. No age limit is stipulated, and the loan will pass to the heirs after death. Alternatively, the bank can sell the house.²⁰²

7.2 Austria

¹⁹⁸ Euromonitor, ‘Consumer Lending in Italy’, (*Country Report*, 2015) <<http://www.euromonitor.com/consumer-lending-in-italy/report>> accessed 13.09.2016

¹⁹⁹ Magri Silvia, ‘Italian Consumer Loan Market: Are Lenders Using Risk- Based Pricing?’ (Conference paper Southwestern Finance Association, 2013), p.28

²⁰⁰ Euromonitor, ‘Consumer Lending in Italy’, (*Country Report*, 2015) <<http://www.euromonitor.com/consumer-lending-in-italy/report>> accessed 13.09.2016

²⁰¹ Mortgagesorter, ‘Should I Get A UK or Italian Mortgage?’ (*Mortgagesorter*, 2016) <http://www.mortgagesorter.co.uk/property_buying_italy2.html> accessed 13.09.2016

²⁰² Busani Angelo, Ottavio Mannella Giuseppe, Dezza Paola, ‘Tutti i rischi del prestito vitalizio ipotecario: da oggi le nuove regole’ *Il Sole 24 Ore* (2016) <http://www.ilsole24ore.com/art/norme-e-tributi/2016-03-02/tutti-rischi-prestito-vitalizio-ipotecario-oggi-nuove-regole-175517.shtml?uud=ACc6o8fC&refresh_ce=1> accessed 13.09.2016

The Austrian banking system is a so-called ‘universal’ system, as it implies an offer of a wide variety of financial services, including commercial and investment services. This allows a high degree of risk mitigation and a flexible adaptation to changes in the financial environment. Furthermore, it is characterized by a large number of Credit Institutions: 822 registered in 2012 “mostly due to the prominent role of the decentralized sectors, i.e. local cooperative banks.”²⁰³

Austrian banks are organized in trade associations according to sectors. The sectoral structure refers to joint stock banks, housing construction banks and specialized credit institutions as well as the mortgage sector. Thus, mortgage lending is regarded as a banking activity and is defined by Section 1, para 1, lit 3, of the Austrian Banking Act. It includes entering into money loan contracts and the granting of money loans if conducted on a commercial basis.²⁰⁴ Similarly to Italy and the UK, Austria runs also a programme for older people called “reverse mortgage” for which the owner of the property receives a loan and this can be paid only after his death. Therefore, for retired people Austria allows mortgage without interest and repayment. However, this approach has created some insecurity regarding market stability. In February 2016, the Austrian Financial Market Stability Board (FMSB) discussed measures to create the legal basis for addressing risks arising from real estate financing. In this field, the *Oesterreichische Nationalbank* (OeNB) has conducted a survey among Austrian banks. It has considered that unsustainable mortgage lending in combination with a surge in real estate prices often give rise to substantial systemic risks.²⁰⁵ The latter is then linked to low interest rates which make it cheaper to borrow.

In 2015, consumer lending developed very moderately, while card lending registered a growth. Compared to the other countries it remains at a relatively low level due to the traditional availability of overdraft facilities.²⁰⁶

Overall, Austrian banks successfully lead the market with contracts shrinking to EUR 32.9 billion in January 2016. The largest share of this amount were loans to households. However, *Volksbank* AG reports²⁰⁷ that the approach used in banking is still an analytical calculation based on actuarial estimations. Therefore, while there are no specific references to age in the Austrian

²⁰³ International Monetary Fund. Monetary and Capital Markets Department, *Austria: Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Basel Core Principles for Effective Banking Supervision* (International Monetary Fund, 2014) p.5

²⁰⁴ Zahradnik Andreas, ‘Banking and Securities: Overview and Implementation of EC Directives in Austria’ (*Dorda, Brugger, Jordis Rechtsanwaelte*, 2016) <<http://www.dbj.at/publications/banking-and-securities-overview-and-implementation-ec-directives-austria>> accessed 13.08.2016

²⁰⁵ Oesterreichische Nationalbank (ONB), ‘Facts on Austria and its Banks’ (Stability and Security Report, 2016) <http://www.advantageaustria.org/zentral/business-guide-oesterreich/importieren-aus-oesterreich/branchen/banken-und-versicherungen/Facts_on_Austria_and_Its_Banks_April_2016_EN.pdf> accessed 18.08.2016

²⁰⁶ Euromonitor, ‘Consumer Lending in Austria’, (*Country Report*, 2015) <<http://www.euromonitor.com/consumer-lending-in-austria/report>> accessed 13.09.2016

²⁰⁷ Volksbank, Annual Report 2012 (Volksbank, 2012) <

http://en.immigon.com/m101/volksbank/m874_immig/downloads/geschaeftsberichte/2012/vbag_gb_2012_e_gesamt_fi nal.pdf> accessed 13.08.2016

system, it is based on internal requirements used for modelling the default risk. More specifically, the capital needed for the credit risk is calculated breaking down the market into individual segments and customers. As discussed above, this type of risk assessment is called ‘individualisation’.

7.3 United Kingdom

The Bank of England is deeply involved in the structure of the financial system of the country. This affects financial stability by influencing the cost and availability of financial services. For this reason, UK banks are also major players in financial markets outside UK. For instance, recent market surveys place three UK banks among the top ten worldwide in several markets.²⁰⁸ This success is related to risk diversification. Studies show that UK efficiencies arise from “spreading fixed costs over a larger volume of output and risk diversification through capital pooling.”²⁰⁹ Nevertheless, the UK housing market remains precarious, with many young buyers locked out of the market. For this reason, the UK government has directed its attention towards ‘first-time buyers’ with the extension of the “help-to-buy” scheme and the launch of the “rent-to-buy” scheme. However, in 2015 mortgage gross lending fell despite the significant growth seen in previous years.²¹⁰ This leads to consider that there could be structural problems, and not only related to younger customers.

In the UK older people are a substantial part of the economy and essential customers for the banking industry. In 2013, those aged over 65 accounted for household spending of £145 billion.²¹¹ Consumer loans can reach £25,000 and are usually repayable within five years. Nevertheless, banks tend to deny mortgages and loans to older borrowers. Age limits are beyond age 65, while some extend the limit to 75.²¹² Loans secured on property are typically repaid over 20-25 years and generally carry a lower rate of interest than consumer loans because of the lower risk of the bank. In this way, banking can be considered a source of indirect discrimination as credit cards do not impose a maximum age criterion (since they are designed as short-term credit), but usually have

²⁰⁸ Davies Richard, Richardson Peter, Katinaite Vaiva, Manning Mark, ‘Evolution of the UK banking system’ [2010] Bank of England Quarterly Bulletin, Winter, Vol.50(4), p.324

²⁰⁹ Ibid, p.325

²¹⁰ Euromonitor, ‘Consumer Lending in the United Kingdom’, (*Country Report*, 2015)

<<http://www.euromonitor.com/consumer-lending-in-the-united-kingdom/report>> accessed 13.09.2016

²¹¹ Age UK, ‘Agenda for Later Life 2015’ (Age UK Report, 2015) <<http://www.ageuk.org.uk/professional-resources-home/policy/agenda-for-later-life/>>, p 7.

²¹² Arnold Glen (n.20) p. 49

minimum income requirements, which could exclude many older people who rely only on pensions income.²¹³

The National Counties Building Society²¹⁴ is a mutual UK building society known among brokers for being more willing to take on older borrowers than its competitors. They welcome lending to people in retirement, providing them with the information they need thanks to an independent mortgage adviser, a professional financial adviser who addresses risk through individual assessment of loan applications by experienced underwriters.²¹⁵

Finally, protecting against age discrimination in financial services requires a careful negotiation of a range of risks and uncertainties “from personal life events over which consumers have limited control (including health and disability risks, longevity risks), to the market risks associated with financial transactions, especially in respect of complex, non-discrete products.”²¹⁶

8. Conclusion: risk factor and competitiveness

Financial service providers use age as a “risk factor.” This process of segmenting into different risk groups is commonly referred to as ‘underwriting’. Where risk rating is applied risks are spread into different risk groups (distinguished by the risk factors) and different premiums are consequently calculated. Accordingly, risk-based pricing is a spectrum of insurance models, which can be distinguished in “individualisation” where there is full risk-based pricing and the price is paid on the basis of an own risk profile; and “mutualisation” where there is no risk-based pricing and everyone pays the same premium, regardless of their risk profile.²¹⁷ Age, as a factor of risk, determines that most financial products are designated for young adults and middle aged people. This means that prices for insurance and banking products differ depending on the age of the customer.

As investigated in this study, both in Italy, Austria and the UK insurance is based on the risk profile of the insured, and actuarial statistics. The disadvantage of a system based on individualization is that older people - and also people under 25 - pay more for the same financial services.²¹⁸ From the perspective of financial providers, the risk factor determines the frequency and the costs of the claims, and the likely risk of default in relation to a bank loan or mortgage. In fact,

²¹³ Overton, O’Mahony (n.190), p.6

²¹⁴The National Counties Building Society, official website <<http://www.ncbs.co.uk/>>

²¹⁵ The Family building Society and National Counties Building Society, *Annual Report & Accounts 2014* (Report, 2014) < <http://docplayer.net/21505463-Annual-report-accounts-2014.html>> accessed 14.09.2015

²¹⁶ Overton, O’Mahony (n.190), P. 7

²¹⁷ Oxera, ‘*Equality in insurance pricing: the effect of the gender ban*, (Agenda Advancing economics in business, 2013) < <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Risk-based-pricing.pdf?ext=.pdf>> p. 1

²¹⁸ Government Equalities Office, *The use of age-based practices in financial services* (Paper,2009) Oxera, p. i

risk relates to the probability of future events: as people get older there is an increased risk of adverse health conditions, which could affect a person's ability to work and therefore to repay a loan. In addition, actuarial statistics report that an increase of medical treatment being needed is also foreseeable, which increase the cost of travel insurance.²¹⁹ Therefore, targeting specific age groups is justified by the fact that age is considered as information about the customer: it is a filter to determine how risk is assessed.

Statistical techniques translate information about the insured person and the insured event into an estimate of the likelihood (and size) of a claim. As a result, prices reflect the expected claims cost. From an economic point of view, such cost-reflective pricing is what is researched by financial providers.²²⁰ Nevertheless, a further element must be considered. Age prejudice is an element directed to negatively predict older age group performances. This has been verified in employment fields where performance and productivity are linked to age. However, to explain the age prejudice genesis in financial services, two social theories are recalled: the functional perspective and 'the terror management'. In particular, the functional perspective sustains that negative attitudes toward older adults are "an ego-protective function for the stereotyping individual."²²¹ The fact that older customers are labelled as 'risky' is most commonly interpreted by statistical evidence. Pricing must be based on demonstrable evidence rather than unsubstantiated assumptions or prejudice and statistical studies apparently satisfy this reliability requirement. Nevertheless, assessing the risk is still in the power of financial providers and cannot be fully delegated to statistics. Especially in the UK, the financial service field is driven by a high degree of competitiveness and to be competitive the providers need to drop the price, which occurs only if the risk has been lowered. Therefore, the assessment of risk is weakened by market expectations. Hence, to guarantee their income, financial providers still rely on age prejudice, simply deciding not to cover people over 75 in order to avoid any risk. Finally, this aspect reopens the discussion on the limits for justifying age discrimination.

The European Court of Justice (CJEU) in the *Age Concern* case demonstrates how prohibiting age discrimination is to be applied with a certain rigor in order to protect against vulnerability. In this case, Age Concern challenged the Employment Equality (Age) Regulations 2006 (now Equality Act 2010) because it allowed the dismissal of an employee aged 65 years or over for reasons of retirement on the basis of the justification allowed by Article 6 of Directive

²¹⁹ Government Equalities Office, *Equality Act 2010 and age discrimination: What do I need to know? A quick start guide for financial services*, (Paper, 2012)

²²⁰ Rees Ray, Wambach Achim, "The Microeconomics of Insurance", [2008] *Foundations and Trends in Microeconomics*, v. 4, pp. 1–163

²²¹ Nelson Todd, "Ageism: Prejudice Against Our Feared Future Self", [2005] *Journal of Social Issues*, Vol. 61, No. 2, p.213

2000/78/EC. Consequently, the CJEU interpreted Article 6 in a strict way, restricting the room for age justification. At this point the CJEU added:

[M]ere generalisations [...] are not enough to show that the aim of that measure is capable of justifying derogation from that principle (non-discrimination principle) and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.²²²

Finally, Article 6 of Directive 2000/78/EC allows an interpretation of justified age discrimination which do not have the prerogative of ensuring legal certainty. Member States are asked to determine what ‘appropriate and necessary’ means, although this determination can assume different connotations on the basis of Member States’ structural differences. It is, however, important that justifications fall within a social policy area and not within mere economic rationales. So far, this interpretation given in the employment field is running in the opposite direction of the practice in financial services.

The public debate on risk classification focuses on the equity dimension, here represented by harmful age discrimination. On the other hand, economists focus more on the effects of this risk classification on economic efficiency.²²³ What arises from this scenario is an asymmetric perspective of the real risk and the actuarial one.

An insurance company must price its contracts on the basis of an actuarial estimation on the nature and probability of the risk.²²⁴ For this reason firms that absorb risk set the prices of their products, services and contracts in order to cover operating costs, to reflect risk, remunerate the suppliers of risk capital and to generate internal capital.²²⁵ From a closer perspective, risk-based pricing translates information about the insured person and the insured event into an estimate claim.²²⁶ On the other hand, it has been sustained that risk-based pricing benefits consumers by incentivising them to purchase an appropriate level of insurance, and by improving the economic efficiency of insurance provision.²²⁷

8.1 Future cost and profitability: the Proposal for a Directive

²²² Ibid- Paragraph 51

²²³ Schwarze Reimund, Wein Thomas, *Is the Market Classification of Risk Always Efficient? Evidence from German Third Party Motor Insurance*, (LSE Discussion Paper, 2005) ESRC Centre for Analysis of Risk and Regulation <<http://eprints.lse.ac.uk/36104/1/Disspaper32.pdf>> accessed 12.08.2016

²²⁴ Write Mike, Watkins Trevor, *Marketing Financial Services*, (Routledge, 2010), p.147

²²⁵ Ibid.

²²⁶ Oxera, ‘Equality’ in insurance pricing: the effect of the gender ban’ [2012] Agenda advancing economics in business, p. 1 <<http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Risk-based-pricing.pdf?ext=.pdf>> accessed: 06.08.2016

²²⁷ Ibid, p.5

The fact that the financial services industry is extremely competitive leads this study to highlight how de-regulation (together with globalization and technological improvements) is considered an element able to improve competitiveness.²²⁸ On this point, a reflection on the real cost and profitability is needed.

It has been demonstrated how motor and travel insurance, while open to older customers, leave premiums to a risk assessment evaluation. Therefore, the barrier is mainly left to actuarial statistics which estimate the cost of the financial product. In the Proposal for a Directive on age discrimination in financial services,²²⁹ the Commission argued that ‘the use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.’²³⁰ Therefore, a competitive insurance market could see some groups getting better coverage: for example, long-established age limits on travel insurance could be removed by new competitors which offer specialised products. From this perspective, abolition of risk factors is not to be considered a remedy for fighting exclusion of older people from insurance. Instead, it is believed that better consumer information would allow them to find fair and proportionate premiums. In other words, it is assumed that higher costs for older customers would either push them towards more appropriate financial products or would increase the profitability of the providers. This argument was extensively developed in a report on the use by the financial services industry of all the ‘discrimination grounds’ listed in Article 13 (now 19) produced for the Commission.²³¹

[W]here insurers and banks use age as an actuarial factor to assess the risk profile of customers, this does not necessarily amount to discrimination, though this factor should only be used where relevant and where based on objective evidence. Similar considerations apply in relation to disability. The Commission intends to initiate a dialogue with financial service providers, together with other relevant stakeholders, in order to exchange and encourage best practice.²³²

²²⁸ Claessens Stijn, ‘Competition in the Financial Sector: Overview of Competition Policies’ (2009) IMF Working Paper WP/09/45, p.3

²²⁹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}. Adopted by the Commission in July 2008 and currently under negotiation. < <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426>> accessed 12.08.2015

²³⁰ *ibid*

²³¹ Mabbett Deborah, *A Rights Revolution in Europe? Regulatory and judicial approaches to non-discrimination in insurance*, (LSE ‘Europe in question’ Discussion Paper series, 2011) <<http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper38.pdf>> accessed 12.08.2016

²³² COM(2008) 420 final (n.1)

Article 2.7 of the Explanatory Memorandum (in the Proposal for the Directive) provides the following guidance: “Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.”²³³ Arguably, the assessment must refer to ‘relevant’ and reliable information. On the other hand, the disadvantage of this high reliability is that any unreasonable refusal or disproportionate detriment based on age can be potentially justified.

The Proposal sustains that difference of treatment might be allowed if they pass the double test of justified aim and proportionate way of reaching it. In particular for insurance and banking services it is recognised that age can be an essential element of the assessment of risk for certain products, and therefore of price. This leads to two possible scenarios for the future. The first one: if age is not taken into account at all, the additional costs will have to be supported by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. The second one: the use of age in the assessment of risk is allowed but based on accurate data and statistics, which however determines the consequences described above (such as isolation of older customers and generalization). Nevertheless, it can be argued that greater transparency, whatever it means, minimises the risk action against discriminatory financial provisions.²³⁴ While the actuarial profession should upgrade its role to cover not only chronological statistical data but also financial participation and social life, the principle of proportionality should work as guidance for competitiveness among financial providers.

A final remark completes this analysis. The concept of customer lifetime value²³⁵ is a relatively new discipline which emphasizes the role of the customer. In particular, the idea that has been developed is to have a customer-centric view rather than a product-centric view. In this way, it is believed that the relationship between customers and financial service firms can evolve over time. Therefore, following a marketing interpretation, the customer becomes a fixed and reliable element, like ‘an asset’ of the firm.²³⁶ From this perspective, older customers are treated as a resource rather than a ‘problem to be solved’.

²³³ Ibid Article 2.7

²³⁴ International Monetary Fund, *Austria: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Securities Regulation, Insurance Regulation, and Anti-Money Laundering and Combating the Financing of Terrorism*, (International Monetary Fund, 2004), p. 31

²³⁵ Günter Bernd, Helm Sabrina, *Kundenwert: Grundlagen - Innovative Konzepte - Praktische Umsetzungen*, (Spring, 2012), p. 714

²³⁶ Kundisch Dennis, *New Strategies for Financial Services Firms: The Life-Cycle-Solution Approach*, (Springer Science & Business Media, 2012), p. 84

8.2 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

The current Proposal for a Council Directive²³⁷ aims to further implement the principle of equal treatment and age is among the protected grounds. More precisely, it sets out a framework for the prohibition of age discrimination outside the labour market by establishing a uniform minimum level of protection within the European Union. This Proposal takes step from existing provisions in this area including Directive 2000/78/EC. Like Directive 2000/78/EC, this Proposal develops equality goals from Article 13 EC (Now 19 TFEU) as introduced by the Amsterdam Treaty. In these terms Article 13 EC has been described as “an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination”.²³⁸ Therefore, as Proposal builds upon Directive 2000/78/EC it is likely that it inherits the same implementation problems. This foreseeable consequence determines that since the legislative Proposal has been published in 2008 no legislation has been adopted, yet. Accordingly, the proposed Directive was tabled in 2008 by the Commission and subsequently presented to the Parliament and the Council where it has been subjected to several evaluations, comments and amendments.²³⁹ As a result of negotiations in the Council and the opinion submitted by the European Parliament, the draft Directive has undergone numerous changes. They concern respectively: the proposed Directive’s scope (Article 3); the equal treatment of persons with disabilities (Article 4); the purpose of the proposed Directive (Article 1); the concept of discrimination (Article 2) and the implementation of the proposed Directive (Article 15).²⁴⁰

In 2014, during the last debate in the Council, a large majority of delegations welcomed the Proposal as they acknowledged that a Directive in this field would complete the existing legal framework on equality. Nevertheless, reservations on its adoption still persisted. This Proposal, named ‘Horizontal Directive,’ aims to harmonise equality provisions across protected groups by addressing discrimination through a horizontal approach. However, this would possibly imply costs

²³⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final - CNS 2008/0140 */ <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52008PC0426>> accessed 02.04.2017

²³⁸ C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, Opinion of A.G. Poiares Maduro, Paragraph 8

²³⁹ European Parliament / Legislative Observatory, ‘Equal treatment: implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’ (Procedural file 2008/0140(APP))

<[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2008/0140\(APP\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2008/0140(APP))> accessed 1.04.2017

²⁴⁰ Milieu Ltd, *Implementing the principle of equal treatment between persons* (Research paper EPRS ‘European Parliamentary Research Service’, 2014) p. 38 <

[http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/514088/IPOL-JOIN_ET\(2014\)514088_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/514088/IPOL-JOIN_ET(2014)514088_EN.pdf)> accessed 02.03.2017

for Small and Medium Sized Enterprises (SMEs) and public service providers²⁴¹ as they would be horizontally responsible. In this way, the German Delegation has maintained a general reservation considering that the proposed measures would impose an excessive burden on businesses leading to a lack of legal certainty as a critical issue. The Maltese delegation has similarly called for a clear delineation of national competences and respect for the principles of subsidiarity and proportionality to be ensured. The Dutch delegation has raised concerns in respect of the financial implications. On this point, it would be desirable from the future Directive on Equality to guarantee more legal certainty²⁴² among Member States, and thereby to avoid the ‘sword of Damocles’ effect of Article 6 - Directive 2000/78/EC. Nevertheless, as expressed by the Proposal itself complaints occurred specifically on discrimination in the insurance and banking sector. In the current version, the Proposal makes clear that “the use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.”²⁴³ Therefore, in respect of the principle of proportionality the Commission considers essential to build a better understanding of the areas where age is a relevant factor for the design and pricing of the products offered in these sectors. For this purpose, the Proposal stresses that a special rule for insurance and banking services should serve as objective justification for the assessment of risk for certain products, and therefore of price.²⁴⁴ Thus, the Commission already acknowledges that not taking age into account at all would imply that the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. For this purpose, the use of age and disability in the assessment of risk must be based on accurate data and statistics.²⁴⁵ With this openness the Commission moves away from the stricter position of the European Economic and Social Committee (EESC) which, despite accepting that a differential treatment based on a protected ground may be appropriate and necessary, rejects the introduction of a general justification for direct discrimination.²⁴⁶ It considers that differential treatment should be permitted only where it serves to promote and enhance equality and human dignity.

As for Directive 2000/78/EC the discussion turns around the concept of legitimate aim questioning which differential treatment should be legally tolerated and which should not. On this

²⁴¹ Ibid. p. 313

²⁴² C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

²⁴³ Proposal for a Council Directive (n. 233) Explanatory Memorandum: 2. Consultation of interested parties and impact assessment

²⁴⁴ Proposal for a Council Directive (n. 233), Article 2 (6)

²⁴⁵ Ibid.

²⁴⁶ Opinion of the European Economic and Social Committee on Extending anti-discrimination measures for areas outside employment and the case for a single comprehensive anti-discrimination directive (2009/C 77/24) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.077.01.0102.01.ENG&toc=OJ:C:2009:077:TOC> accessed 10.03.2017

point, the Council demonstrates awareness of how the effects of the Directive 2000/78/EC are still an issue. In 2013, the Council's works under the Irish Presidency focused on the concept of 'Preferential pricing' (Article 2(6)²⁴⁷, Article 5²⁴⁸ and Recital 14a²⁴⁹). More precisely, the Presidency suggested including a specific exemption for legitimate commercial practices concerning age-specific pricing. However, certain delegations warned against a general exemption covering a wide range of commercial practices. Thus, it was given preference to the possible general criteria of objective justification and a legitimate aim (Article 2(6)(a)). The Presidency pointed to the difficulty of applying the concepts of "objective justification" and "legitimate aim". Accordingly, these aspects are associated more with matters of public policy and administration and not to the purely profit-oriented activities of enterprises.

From the subsequent discussions of the Working Party on Social Questions²⁵⁰ emerged a clear disagreement on Recital 15 which was initially drafted as follow:

Risk factors related to age are used in the provision of insurance, banking and other financial services, to assess the individual risk and to determine premiums and benefits. In certain financial services, persons of different ages are not in a comparable situation for the assessment of risk. Proportionate differences of treatment on the grounds of age therefore do not constitute discrimination if the person's age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable

²⁴⁷Proposal for a Council Directive (n.233), Article 2(6): "A special rule is added for insurance and banking services, in recognition of the fact that age and disability can be an essential element of the assessment of risk for certain products, and therefore of price. If insurers are not allowed to take age and disability into account at all, the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. The use of age and disability in the assessment of risk must be based on accurate data and statistics."

²⁴⁸ Proposal for a Council Directive (n.233) Article 5: Positive action. "This provision is common to all Article 13 directives. It is clear that in many cases, formal equality does not lead to equality in practice. It may be necessary to put in place specific measures to prevent and correct situations of inequality. The Member States have different traditions and practices regarding positive action, and this article lets Member States provide for positive action but does not make this an obligation."

²⁴⁹ Ibid. Recital 14: "the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the national judicial or other competent bodies in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence."

²⁵⁰ Council Preparatory bodies: the Working Party on Social Questions deals with all legislative work related to employment and social policy, including financing instruments in these policy areas. Official website < <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-social-questions/>> accessed 1.04.2017; Council of European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report 1018/13 Available online: < <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010186%202013%20INIT>> accessed 03.05.2017

statistical data. Age limits and age bands in financial services can be proportionate differences of treatment on grounds of age if they are set in a reasonable manner.²⁵¹

Nevertheless, several amendments modified the terms and the extent of this Recital. Generally, Recital 15 allows for insurance to be based on actuarial risk thus permitting justified discrimination. Consequently, such forms of discrimination are the most significant in terms of costs to address. From mid- February 2013 until mid-April 2013 a consultation has been carried out by Milieu.²⁵² Its purpose was to receive additional information provided to the Commission in 2007/2008. Therefore the focus was on receiving feedback on the proposed approach and data on costs and benefits. This investigation discovered that some stakeholders like The European Association of Craft, Small and Medium-sized Enterprises and Business Europe feel the Directive could lead to greater legal uncertainty. Therefore, they are in favour of non-binding and supportive measures to promote non-discrimination matters. On the other hand, other stakeholders including ILGA-Europe, AGE-Platform, and the European Network for Accessible Tourism believe that non-binding measures would not be effective in many Member States whereas a horizontal Directive would allow for consistency and legal certainty across the EU.²⁵³ Further concerns focuses on the division of competences between actors.²⁵⁴

Despite these ongoing conflicts between stakeholders, the Parliament urges the Member States to unblock the negotiations emphasizing the importance of the proposed Directive as an economic instrument to achieve the goals of the 2020 strategy. The next Debate in Council will be on the 16th of June 2016 and some Member States, like Germany, have already expressed concerns in relation to the potential costs of the proposed Directive, its lack of legal certainty and the lack of assessment of the costs and benefits that its implementation would place on service providers. The paradox created by this impasse is well explained by Christine Luders, director of Germany's Federal Anti-Discrimination Agency (FADA): "Germany is blocking any negotiation on the directive out of principle, without even engaging in talks about its content. Germany has opposed extending rights to all Europeans that they were willing to give to their own citizens, thereby creating an unfair patchwork of protection."²⁵⁵

²⁵¹ Council of European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report 1018/13. Available online: < <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010186%202013%20INIT>> accessed 2.04.2017

²⁵² Milieu (n. 236),

²⁵³ Ibid, p. 332

²⁵⁴ Ibid., p. 14

²⁵⁵ Hugendubel Katrin, 'Germany's equality paradox' (*EU Observer*, 2017) <<https://euobserver.com/lgbti/129747>> accessed 3.04.2017

Eventually, this analysis demonstrates how the effects of age discrimination on the economy are not considered by the financial providers which support age restrictions. In fact, restrictions positively impact upon the overall cost of their service. Unfortunately, the legacy of Directive 2000/78/EC leads to bias against an active approach in combating age discrimination in the financial services sector. Member States are too reluctant in adopting a binding legislation, which has already demonstrated its weaknesses and which is capable to limit their business. Therefore, the current impasse in adopting the Proposal reflects these problems and the fear of Member States to lose their sovereignty on business matters. Nevertheless, a certain priority in financial stability has been demonstrated by the European legislator as well (see in chapter 4 the analysis on insurance law). Nevertheless, it could be still argued that these fears reflect a short terms analysis which does not fully consider the problem of demographic ageing.

Conclusion

The problem of an ageing population is said to be “likely to affect the sustainability of economic growth.”¹ The ageing of the “baby boomers,” coupled with slower population growth, is determining a shift in the age structure of European populations. In this scenario, while some age-based distinctions are not, or at least not fundamentally, disputed (e.g. age restrictions regarding smoking, drinking and driving, or relating to the right to participate in elections),² other forms of age discrimination lead the debate on equality and economic priorities. Therefore, the stakeholders of this study are people of retirement age and older, who are the first direct victims of age discrimination, but also the community as a whole. Accordingly, the aim is to achieve a more active role for older people – identified as the “silver and white economy”³ – which should benefit the overall economy.

Age is an important variable, both from a human rights and an economic perspective. Despite that, it is subjected to different interpretations on the part of Academic doctrine and jurisprudence. While age-related distinctions are very common in social and employment policies,⁴ the question is whether reduced physical and mental capabilities can be straightforwardly linked to chronological age, as has been the case with regard to limiting access to employment and financial services on the basis of age. Directive 2000/78/EC, which protects against age discrimination in the workplace, was primarily motivated by the desire to increase the participation of senior workers in employment. Encouraging social inclusion, it ultimately supports the welfare state.⁵ Nevertheless, while the Directive considers older people to be vulnerable workers, older customers are rarely considered vulnerable. In this way, financial providers support age restrictions because they positively impact upon the overall cost of their service. Controlling the assessment of risk is the most common solution adopted by financial providers for managing longevity. For this reason, their

¹ European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Employment and Social Developments in Europe 2013*, (Year’s review: Publications Office of the European Union, 2014), p.24 available online: < <http://ec.europa.eu/social/publications>> accessed 10.06.2015

² This is also stated in the preamble to the Employment Equality Directive: in consideration 25, it is stipulated that it is essential to distinguish between situations of justified unequal treatment based on age, and actual age discrimination

³ ‘Silver Economy in Europe’ Conference (Germany, Bonn February 2005), < http://www.silvereconomy-europe.org/events/2005/conference_en.htm> accessed 10.06.2016 a declaration was drafted, which describes the “silver economy” ,”as an opportunity for quality of life, economic growth and competitiveness in Europe”. It is defined as the industry/sector focusing on producing/providing the aged population oriented products/services. “White economy” refers to those products, services, and activities related to health care and care including dependent, disabled and the elderly.

⁴ *Palacios de la Villa* (n.153) Advocate General Mazák - Paragraph 61

⁵ Schiek Dagmar, Waddington Lisa, Bell Mark, *Non-discrimination law: cases material and text*, (Hart publishing, 2007), p.150

strategy is one of ‘product and supply’, rather than being ‘customer driven and solution oriented’. This position is further supported by the European legislator, who identifies financial stability as a primary European goal.⁶ Accordingly, one of the last European interventions highlighted the risk profile of each individual insurance company in order to promote comparability, transparency and competitiveness.⁷ The aim was to reduce any risks that might make them unable to meet claims. From this perspective, we are living in consumerist societies where age is a material factor that can develop into prejudice and stereotyping, leading to the social exclusion of older people. Consequently, in justifying age discrimination, the legislator did not seek to establish a substantive equality, but rather to balance public economic interests with formal equality. While, the ageing process can involve a reduced physical and mental capacity, age discrimination should be graduated and rely on more subtle generalisations.⁸ Age defines a grey area of unspecified factors, while the ageing process varies across individuals. Despite that, ageing appears to be a burden when it comes to financial stability, as financial providers argue that ‘it is just a matter of time’. Therefore, age is used as ‘a factor of risk’ where proportionality tests and statistical data become measures for justifying age discrimination.

In the *Palacios*⁹ case the Court accepted that national legislation can explicitly provide for unfavourable treatment on the grounds of age. Consequently, objective justification was linked to the principle of equal treatment¹⁰ and considered harmful only if disproportionate. This position was reinforced by Academic doctrine, according to which it was argued that “when the principle of non-discrimination on the grounds of age produces unwanted economic effects... then it is more possible to justify having "economic" exceptions.”¹¹ On the other hand, in the *Schmitzer*¹² case, the CJEU imposed a limit when it considered that economic implications deriving from ‘budgetary considerations’ could not be justified. More precisely, the Court argued that although budgetary considerations could underpin the social policies of a Member State, they could not constitute a self-standing legitimate aim. On this point, it can be argued that financial providers differentiate among customers on the basis of an assessment of risk. While this might not be a ‘budgetary

⁶ Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, (Capital Requirements Directive (CRD) IV); Regulation (EU) No. 575/2013 (Capital Requirements Regulation ‘CRR’); Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (MCD)

⁷ Directive 2009/138/EC, Solvency II Directive as amended by Directive 2014/51/EU (‘Omnibus II’)

⁸ Case C-227/04 *Lindorfer v Council of the European Union* [2007] ECR I-6767, Opinion of Mr Advocate General Jacobs- paragraph 84

⁹ Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531

¹⁰ Article 13 EC (now 19 TFEU) and Article 2(1) of Directive 2000/78/EC

¹¹ Sargeant Malcolm, ‘Distinguishing between justifiable treatment and prohibited discrimination in respect of age’ [2013] *Journal of Business Law* 4, 398-416

¹² C-530/13 *Schmitzer v Bundesministerin für Inneres* [2015] IRLR 331

consideration', it is still arbitrary and linked to a business strategy. In *Age Concern*,¹³ the Court linked an objective justification to social policy, still condemning pure business reasons. For example, while insurance is a socially desirable financial service, it is also essential for sustainable economic growth. A fair market would underpin a reciprocal trust between providers and consumers; in reality, however, this relationship is often driven by an economic rationale. Essentially, financial providers are more likely to follow market trends, lowering their price for those who represent a lower risk. In this way, insurance premiums reflect the risk posed by an individual, but also take into account the need of the insurer to be competitive. The competitiveness among providers is encouraged by national legislation that in many cases is patchy and weak, which gives to statistical and actuarial evaluations the power to set the age at which someone can be discriminated against. Financial providers explain these arrangements on the basis that older people represent a higher risk than do those with pre-existing medical conditions. In the *Pérez*,¹⁴ *Prigge*¹⁵ and *Wolf*¹⁶ cases, the Court agreed on this logical correlation between 'physical capacity' and 'chronological age.' Arguably, also in non-life insurance, providers assume a reduced physical capacity when imposing higher premiums on older people. Therefore, age as a prohibited ground maintains a sort of 'borderline' position,¹⁷ and its link to physical capacity is difficult to define. Although legislators have to make painful, sometimes tragic, choices, and weigh up the interests in question, the power to make decisions in the case of age discrimination in financial services is often left to providers, and this can lead to a conflict of interests. Consequently, while the CJEU accepted the concept of legitimate aim,¹⁸ its practical determination cannot be left to those who have no respect for the public interest.

Compared with the United Kingdom and Austria, Italy certainly has a less competitive insurance market, which is due to its lower premium rates. Therefore, it shows a high growth potential. Nevertheless, in the last decade the demand for life insurance products has decreased, and Italy has registered the largest number of life gross claims payments in Europe. This is linked to the fact that a large proportion of Italy's population – larger than that of the other two countries – is aged 65 or over. Therefore, age barriers are putting stress on the Italian insurance system and on national laws, which in turn are a long way from considering age as a matter of regulation. This is further demonstrated by the fact that an increase in the number of passenger cars has not been accompanied by an increase in the demand for motor insurance. An attempt to regulate the non-life

¹³ C-388/07 *Age Concern England v Secretary of State* [2009] ECR I-1569

¹⁴ Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158

¹⁵ Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG* [2011] IRLR 1052

¹⁶ Case C- 229/08 *Colin Wolf v Stadt Frankfurt am Main* [2010] ECR

¹⁷ Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] E.C.R. I-7245

¹⁸ Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 C.M.L.R. 31

insurance market is represented by a weak form of customer protection, which is certainly not adequate to manage the demographic ageing of the Italian population.

Austria's system is quite straightforward in specifying how the cost of the risk of death depends either on the age or the sex of the insured. This leads to a form of multiple discrimination, Austria being the only country to have this type of provision. Additionally, Austrian legislation clearly prescribes that in the financial services field age can be used in actuarial valuations relating to statistical calculations of assessments of risk. Furthermore, Austrian age policy highlights a parallelism between chronological age and physical capacity, despite the recognition that physical capability cannot be anchored to a fixed rationality.¹⁹ In fact, the problem of legal certainty was again highlighted by the Austrian cases *Hütter*²⁰ and *Schmitzer*.²¹ The proportion of Austria's population that is aged 65 and over is much smaller than of Italy, and slightly larger than that of the UK, but is the fastest growing. Therefore, at the moment Austria is not experiencing a major conflict between the generations. The Austrian government has tight control over its insurance market, as even domestic companies have to apply for a licence. On the other hand, it is the Insurance Association (VVO) that determines the terms of insurance contracts. In this scenario, despite the fact that the Austrian government seems to have a decision-making role, firms enjoy great independence. Contrary to Italy, Austria has not experienced a large number of life gross claims payments. Nevertheless, it has experienced a decrease in life insurance. This means that the relationship between Austria's overall economic activity and the premium decreased, determining a lower impact of the premium on a larger scale. The average cost per person of an insurance policy has lowered, reflecting a contained individual risk, and thus a minor exclusion of older people from the insurance market. Nevertheless, Austria has the highest development level when it comes to non-life insurance. This leads us to consider how age bands are used to effectively contain risk in those areas where a financial loss is more likely to occur. Despite that, the premium adjustment is not uniquely based on the statistical data but it rather considers the whole context. Consequently, a risk characteristic applies equally, as long as it determines significant differences. Therefore, Austrian insurance companies are free to end a contract whenever it is considered to be too risky. In this way, Austria seems to follow the principle of proportionality that was developed by the Court for the employment field. In fact, despite the fact that risk is considered to be predictable, age is perceived to be an 'unfair' factor of risk, since diversity within an age group is quite wide. According to the data, this arrangement has positive consequences for the Gross Domestic Product of the country.

¹⁹ *Pérez* (n.14) – Paragraph 63 (see on this point also the concept of “Lump of Labour fallacy”)

²⁰ Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325

²¹ Case C-530/13 *Schmitzer v Bundesministerin für Inneres* [2015] IRLR 331

In the United Kingdom age bands are viewed with suspicion, as any restriction on the use of age by insurers is thought to have an effect on insurance costs, leading to a reduction in choice. The UK market is highly competitive. For this reason, controls on the assessment of risk are considered to be necessary. Thus, age is used as a risk factor, but it is considered to be a legitimate practice only when “carried out by reference to relevant information from a source on which it is reasonable to rely.”²² Therefore, the UK differs from Austria on the basis that it does not look at the context of the insured. Instead, it relies on actuarial and statistical sources for ensuring transparency in accessing insurance for older people. This suggests that while financial services still have to be fit for purpose, older consumers must also be taken into account, but within these business boundaries. The competitiveness of the UK market is revealed by its dynamism in selling life insurance contracts. They must be sold only by a ‘tied agent,’ which means that the adviser can only advise on or sell the products that are offered by the company that employs him. This means that a better alternative, if one exists, cannot be revealed. Furthermore, premiums usually reflect individual risk. In this way, age, as a factor of risk, means that there is a wide range of products at a competitive price. Despite this, the UK is the country that has seen the greatest decrease in insurance spending, which means a decrease in the size of the insurance industry within the domestic economy. On the other hand, in contrast with Austria and Italy, the UK is the only country that has achieved real growth in life premiums, while non-life premiums paid in 2013 were the highest compared with Italy and Austria. This situation indicates that competitiveness brings success. Nevertheless, the UK places far greater emphasis on the problem of age bands, as age is strongly correlated with the costs of provision. Therefore, age discrimination against older consumers seems to be unavoidable, even though it does not reveal a clear advantage for the domestic economy.

Finally, age as an expression of the fundamental principle of non-discrimination would require that objective justification tests be applied with rigour. This rigour should underpin a clear and defined area of discrimination. However, employment cases have already mitigated the effects of age discrimination, lowering the bar for age equality. Consequently, the principle of proportionality should serve as a guideline for competitiveness among financial providers. The comparison with sex discrimination reveals how the principle of proportionality in the age discrimination field is, in some ways, mitigated by the flexibility allowed to the parties. Therefore, this principle requires a balance between competing values: age protection and public interest. Accordingly, chronological age does not always imply certain age-related characteristics.

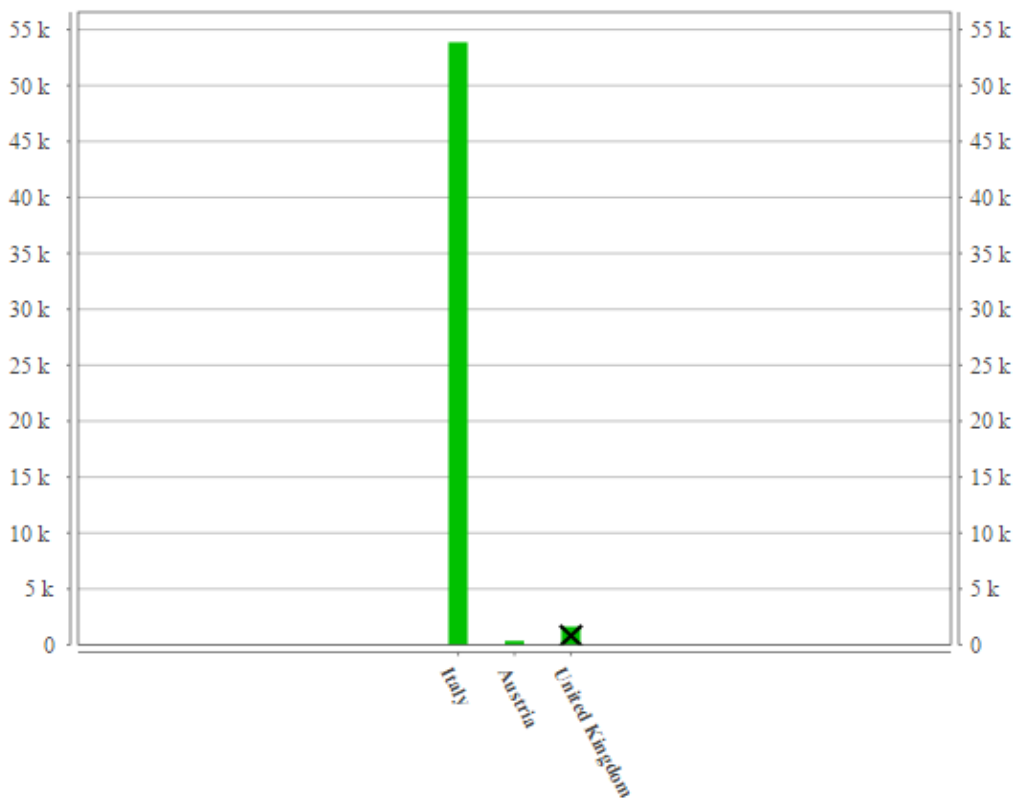
²² ABI, BIBA, HR Government, “Transparency and Access in Motor and Travel Insurance for Older People. An Agreement on Age and Insurance” [2016] Version 2.1., p 2 <
https://www.abi.org.uk/~/_media/Files/Documents/Publications/Public/2016/Age%20and%20Insurance/Agreement%20on%20Age%20and%20Insurance.pdf> accessed 12.09.2016

ANNEX

Table I: Population age structure by major age groups, 2004 and 2014 (% of the total population)²³

Population 65 years and over	2004	2014
Italy	19.2%	21.4%
Austria	15.5%	18.3%
UK	15.9%	17.5%

Table II: Insurance, gross claims payments by type of enterprise. 2012 Eurostat²⁴



²³ Eurostat, *Population age structure by major age groups, 2004 and 2014 (% of the total population)*, (Eurostat, 2016) < [tp://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_\(%25_of_the_total_population\)_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_(%25_of_the_total_population)_YB15.png) > accessed 1.08.2016

²⁴ Eurostat data, *Insurance, gross claims payments by type of enterprise*, (Eurostat, 2016) Available online: <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tin00031>> accessed 2.07.2016

Table III: Passenger cars in use (source: ACEA)²⁵

Countries	% growth 2013-14
Italy	0.3%
Austria	1.2%
UK	2.4%

Table IV: Insurance Spending, total, % of GDP, 2000-2014 Source: OECD Data 2016

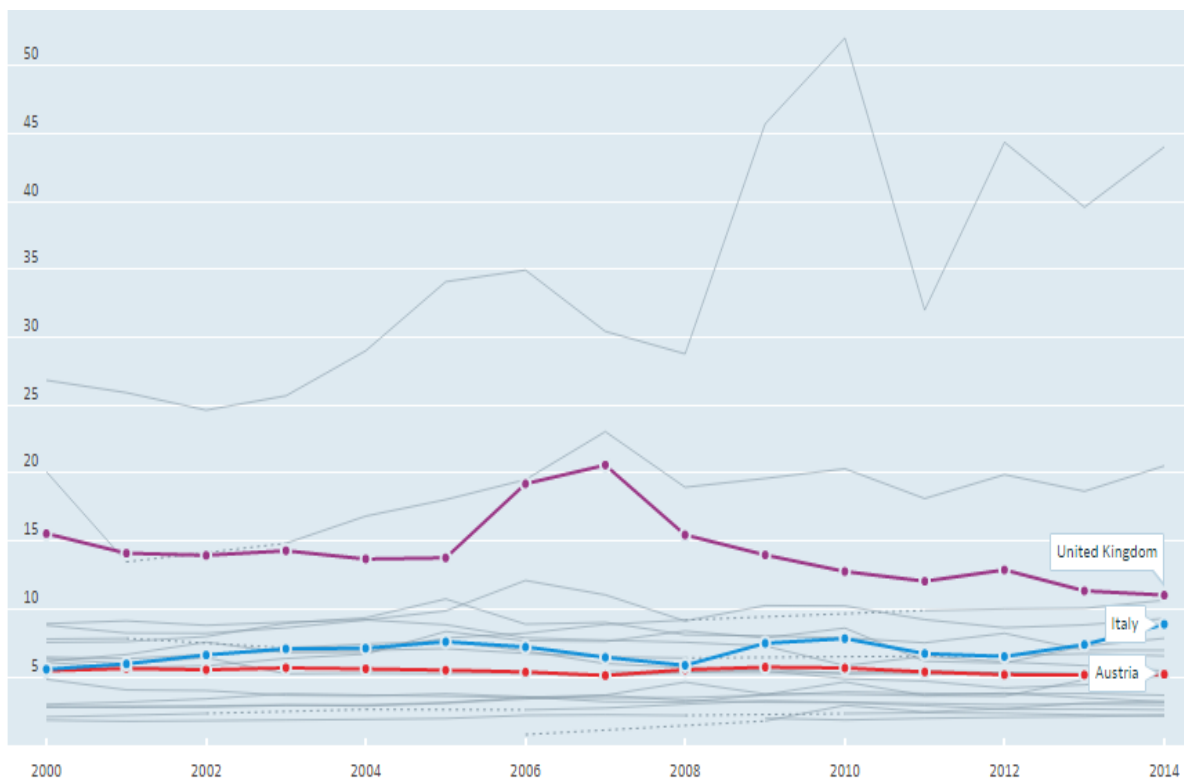
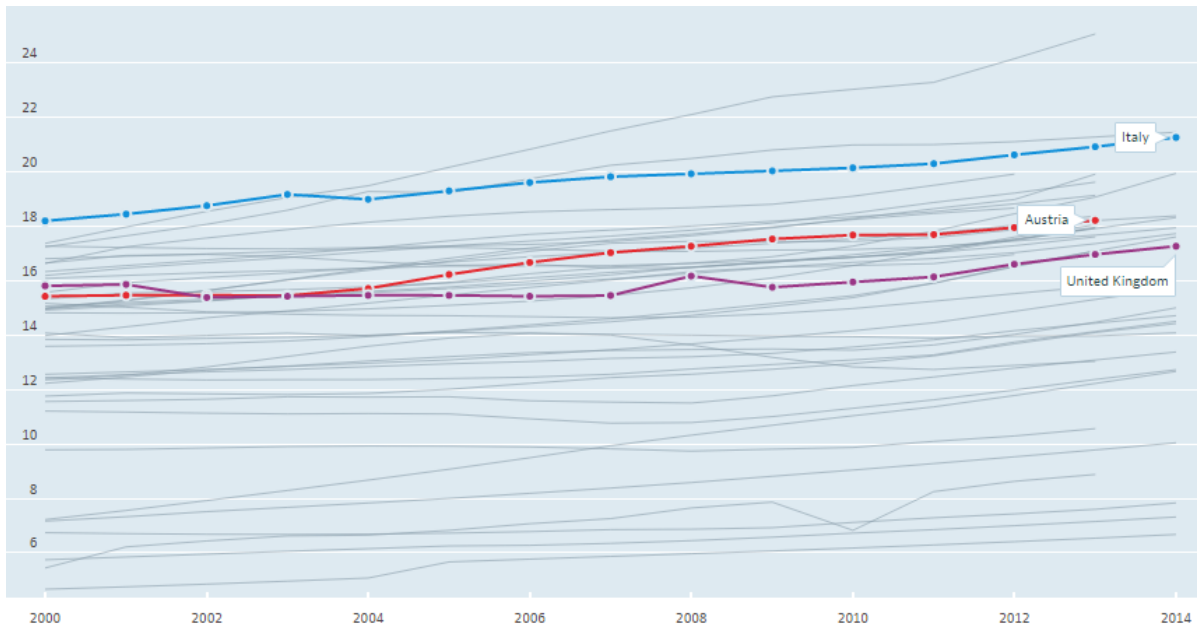


Table V: Elderly population total, % of population, 2000 – 2014

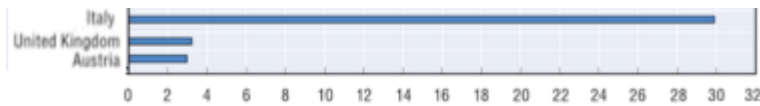
²⁵ European Automobile Manufacturers' Association (ACEA), *European Motor Vehicle Parc 2014* (Report, 2014), p.3 < http://www.acea.be/uploads/statistic_documents/ACEA_PARC_2014_v3.pdf> accessed 09.08.2016

Table IV:



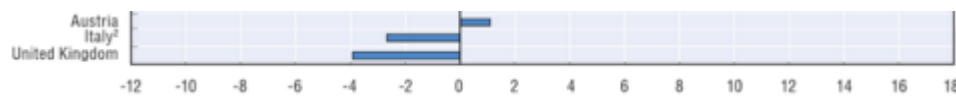
Source: OECD <<https://data.oecd.org/pop/elderly-population.htm#indicator-chart>> accessed 12.07.2016

Table VI: Annual real gross premium growth in 2014: life sector



Source: OECD Insurance Statistics 2015 (OECD Publishing, 2016) p. 16

Table VII: Annual real gross premium growth in 2014:non-life sector



Source: OECD Insurance Statistics 2015 (OECD Publishing, 2016) p. 16

The elderly population is defined as people aged 65 and over. The share of the dependent population is calculated as total elderly and youth population expressed as a ratio of the total population. The elderly dependency rate is defined as the ratio between the elderly population and the working age (15-64 years) population. The comparability of elderly population data is affected by differences, both within and across countries, in how regions and the geography of rural and urban communities, are defined. Elderly people tend to be concentrated in few areas within each country, which means that a small number of regions will have to face a number of specific social

and economic challenges due to population ageing. These demographic trends have a number of implications for government and private spending on pensions, health care, and education and, more generally, for economic growth and welfare. This indicator is measured as a percentage of population.

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