

SUMMARY

## **ECJ 21 July 2011, cases C-159/10 and C-160/10 (Fuchs and Köhler), Age discrimination**

***Council Directive 2000/78 [...] does not preclude a law [and...] which provides for the compulsory retirement of permanent civil servants - in this instance prosecutors - at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.***

### **Facts**

Mr Fuchs and Mr Köhler (the 'plaintiffs') were employed by the German province (Land) Hessen as State prosecutors. Article 50 of the provincial Law on the Civil Service (Hessisches Beamtengesetz or 'HBG') provided that civil servants must retire at age 65 but that they may continue working until 68 if they so wish and if that is in the interests of the service. The plaintiffs applied to continue working beyond 65 but their applications were turned down. They brought an action before the administrative court (Verwaltungsgericht) in Frankfurt.

### **National proceedings**

The administrative court was not sure whether Article 50 was compatible with Directive 2000/78. It explained that Article 50 was introduced in 1962, at a time when it was thought

that fitness for work declines after 65. Since that time, the increase in life expectancy has led the German legislature to increase the retirement age for federal employees and private-sector employees. Moreover, elected civil servants in Hessen may perform their duties until age 71. In 1962 the Hessen legislature introduced Article 50 to promote the employment of younger people and thus to ensure an appropriate age structure without, however, specifying what such a structure might be. According to the court the aim of achieving an appropriate age structure does not serve the public interest. Moreover, the retirement of prosecutors does not always result in a recruitment exercise to fill the newly-vacated posts. It would therefore seem that the provincial government is endeavouring to make budgetary savings.

In light of the above, the administrative court referred three questions, each with many sub-questions, to the ECJ.

### **ECJ's findings**

1. Question 1 was essentially whether Directive 2000/78 precludes a law, such as Article 50, which provides for the compulsory retirement of civil servants at age 65, subject to the option to continue until age 68 if that is in the interests of the service, if that law has one or more of the following aims: the creation of a 'favourable age structure', planning of staff departures, promotion of civil servants, prevention of disputes or achieving budgetary savings (§ 32).
2. Article 50 creates a difference in treatment on grounds of age. Such a difference does not constitute discrimination if it is objectively justified pursuant to Article 6(1) of Directive 2000/78. Therefore, it is necessary to investigate whether Article 50 is justified by a legitimate aim and the means put in place to achieve that aim are appropriate and necessary (§ 33-36).
3. The HBG does not clearly state the aim pursued by Article 50. However, that aim may be identified in other ways: see Palacios, Petersen and Rosenbladt (§ 38-39).
4. Originally, Article 50 was based on an irrebuttable presumption that a person is unfit to work beyond age 65. However, that presumption should no longer be regarded as underpinning Article 50. An alteration of the aim of a law does not, of itself, preclude that law from pursuing a legitimate aim. Circumstances can change and the law may nevertheless be preserved for other reasons (§ 40-43).
5. A measure may be justified by more than one legitimate aim and the various aims may be linked to one another or classed in order of importance (§ 44-46).
6. The provincial government of Hessen and the German government submit that a 'favourable age structure', i.e. having a range of ages of employees, is the principal aim of

Article 50. This range helps employees to pass on experience and to share recently acquired knowledge. The ECJ has acknowledged this as a legitimate aim. The same applies to the aim of preventing disputes concerning employees' fitness for work beyond a certain age (§ 47-50).

7. In *Age Concern* (C-388/07), the ECJ held that aims that may be considered 'legitimate' within the meaning of the Directive are aims that have a public interest nature that is distinguishable from reasons particular to the employer's situation, such as cost reduction or improving competitiveness (§ 51-52).

8. The aims of establishing a balanced age structure, improving personnel management and preventing disputes, taking into account the interests of all affected civil servants, may be regarded as aims in the public interest (§ 53).

9. In *Palacios de la Villa* the ECJ held that it must be possible to alter the means used to attain a legitimate aim (§ 54).

10. Given the scarcity of prosecutors' posts, it is not unreasonable for the Hessen government to take the view that a measure such as Article 50 can secure the aim of putting in place a balanced age structure (§ 56-60).

11. The Member States enjoy broad discretion to choose measures capable of achieving a legitimate aim. Taking into account the circumstances of the case, including prosecutors' pension rights and the possibility of working for three more years if that is in the interests of the service, Article 50 does not go beyond what is necessary to achieve said aim (§ 61-68).

12. Budgetary considerations can underpin the chosen social policy of a Member State, but they cannot in themselves constitute a legitimate aim within the meaning of the Directive (§ 69-74).

13. Question 2 asks what information a Member State must produce in order to demonstrate the appropriateness of and need for the measure at issue and, in particular, whether statistics or precise data with figures must be supplied (§ 76).

14. Mere generalisations are not enough. Article 6 (1) of the Directive imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as justification (§ 77-78).

15. The Member States enjoy broad discretion in the choice of measures they consider appropriate. That choice may be based on all kinds of considerations including political ones, which will often involve a compromise and which cannot with certainty lead to the expected result (§ 80-81).

16. It is for the national court to assess the probative value of the evidence adduced, which may include statistical evidence (§ 82).

17. Question 3 queries the coherence of a law such as the HBG, given that (i) it allows prosecutors to continue to work until age 68 if that is in the interests of the service, (ii) it seeks to restrict voluntary retirement at the age of 60 or 63 by a reduction in pension rights and (iii) the federal law and the laws of a number of other Länder as well as the law applicable to private sector employees provide for an increase to the normal retirement age from 65 to 67 (§ 84).

18. The option to continue to work until age 68 is intended to cover cases where a prosecutor reaches the age of 65 but has been allocated a criminal case in which proceedings have not yet been concluded. Such an exception is unlikely to undermine the aim of achieving a balanced age structure. The same applies to other exceptions, such as allowing teachers to continue beyond age 65 until the end of the school year and allowing elected officials to complete their term of office (§ 85-91).

19. The fact that a person who retires before the normal retirement age receives a reduced pension is logical (§ 92-93).

20. The fact that the legislature envisages raising the normal retirement age does not mean that, from that point on, the existing law is unlawful. Moreover, legislation can vary from one region to another (§ 94-97).

### **Ruling**

Council Directive 2000/78 [...] does not preclude a law [...] which provides for the compulsory retirement of permanent civil servants - in this instance prosecutors - at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.

In order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.

A law such as the Law on the Civil Service of the Land Hessen [...], which provides for the

compulsory retirement of prosecutors when they reach 65, does not lack coherence merely because it allows them to work until 68 in certain cases or contains provisions intended to restrict retirement before the age of 65. Other legislation of the Member State concerned provides for certain - particularly elected - civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2011-07-21

**Case number:** C-159/10 and C-160/10