Introduction to European Business Law

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Module 7 (labour law)

A glossary of key terms and a summary of case notes from week 7

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These notes were prepared by Penny Parker for others who are taking this MOOC course, for personal private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

Age discrimination -- the legal regulation of age discrimination in the EU stands out in some respects. The protection covers both old and young people, and discrimination on grounds of age can be justified to a greater extent than discrimination on other grounds. This has to do with the traditional role age is assigned in the labor market. According to Article 6 of the Employment Equality Directive, member states may provide that differences of treatment on grounds of age shall not constitute discrimination if in the context of National law they are objectively and reasonably justified by a legitimate aim such as employment policy, labor market and vocational training objectives. The means also have to be appropriate and necessary.

In recent years, much of the case law from the Court of Justice has evolved around age discrimination. The first case was **Mangold** (C-144/04), in 2005, which created a lot of attention and debate. Here, the Court of Justice declared that not only was age discrimination covered by the Directive, but also that EU law encompassed an independent general principle of non-discrimination on grounds of age, which might have some form of horizontal application.

Many of the cases have dealt with mandatory retirement. The Court of Justice basically deems mandatory retirement rules to be age discriminatory, but these rules can be permitted if objectively justified. The member states have been given a large margin of appreciation in determining when discrimination based on age is justified. When applying Article 6 of the Employment Equality Directive, the court has often found the differences of treatment on grounds of age to be justified by legitimate aims, such as intergenerational fairness, prevention of humiliating forms of termination of employment and a reasonable balance between labor market and budgetary concerns. In addition, the means for achieving these aims have frequently been found appropriate and necessary.

Annual leave -- Article 31 of the EU Charter of Fundamental Rights on fair and just working conditions requires that every worker have a right to an annual period of paid leave. In recent years, the Court of Justice has delivered a series of judgments in relation to paid annual leave. The court has emphasized that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European union social law from which there can be no derogations. The Working Time Directive and the Court of Justices case law in this area is controversial and has been difficult to align with the demands of certain sectors, particularly healthcare. Several attempts have been made to revise the Working Time Directive in recent years but so far they have proved unsuccessful.

Autonomous collective bargaining – this refers to the so-called interference by EU institutions into areas traditionally reserved for trade unions and employer organizations to negotiate themselves. Both Viking and Laval have been interpreted as putting fundamental treaty freedoms and economic

integration first, and trade union rights and social integration second. The cases prompted huge and critical debate. And some member states, such as Sweden and Denmark, have also had to reform the laws on collective action and posted work, especially those building on so-called autonomous collective bargaining.

Burden of Proof Directive -- the protection and efficiency of Equality Law has been increased by the reverse burden of proof developed by the Court of Justice, and later on codified in secondary law as the Burden of Proof Directive (97/80/EC). Persons who consider themselves discriminated against have to establish facts from which it may be presumed that there has been direct or indirect discrimination. And it is then for the respondent to prove that there has been no breach of the principle of equal treatment.

Collective action – this includes bargaining, strikes and other union type collective actions to protest unfair working conditions. The Viking and Laval cases before the ECJ severely restricted the right to collective action, in lieu of the principles of free movement of services and free movement of establishment. The cases have received much criticism and are probably due for some correction once the human rights principles of the European Convention come into place in the Union. See a summary of the Viking and Laval cases below in the case summary portion of these notes. Note that an in-video quiz asks which alternatives are true about collection action in the EU today – correct answers are "collective action as a fundamental right" and "trade unions may take collective action if legitimate objective, necessary & proportionate". But the answer "trade unions are always allowed to take collective action" was not correct.

Collective bargaining -- negotiation of wages and other conditions of employment by an organized body of employees.

Collective Redundancies Directive – Directive 98/59/EC. This directive contains an obligation to inform and consult workers' representatives, as well as an obligation to notify the competent public authority of layoffs that are planned due to large-scale redundancies. It is one of 3 directives known as the restructuring directives, the other two being the insolvent employers and transfers of undertakings directives. The emphasis in this directive on information and consultation can also be found in the transfers of undertakings directive. EU labour law aims for a partial harmonization of information, consultation, and worker participation. When employers are contemplating layoffs due to collective redundancies, they must begin consultations with the workers' representatives, in good time, with a view to reaching agreement. These consultations must, at least, cover ways and means of avoiding collective redundancies if possible, or reducing the number of workers affected and of mitigating the consequences if layoffs are necessary. The employer must also supply workers' representatives with all relevant information.

Consultation process, ESD – the Commission must first consult with the social partners (employer and trade union organisations) to determine interest in a field which is about to be legislated, and then, consult them again with a draft proposal. For more detail see below in the ESD topic.

Direct discrimination -- direct discrimination is closely related to formal equality and refers to the situation where one person is treated less favorably on grounds of sex or another discrimination ground, that in other ways has been, or would be, in a comparable situation. Direct discrimination requires no motive or intention to discriminate. It is enough if the less favorable treatment is grounded upon, for example, gender.

Direct horizontal effect – a measure that can be applied by a private party to sue third parties directly. For example, in the **Viking** case that challenged the legality of a trade union's collective actions against a ferry boat operator, the Court stated that Article 43 EC (free movement of establishment) has direct horizontal effect, that is to say it confers rights which may be relied on not only against the authorities

of a Member State, but also against certain private parties such as, in this case, a trade union or an association of trade unions.

Discrimination by declaration -- the Court of Justice found in the case of **Firma Feryn** that a public statement by an employer that he would not recruit employees of a certain ethnic or racial origin constituted direct discrimination, even though there was no identified victim. This has been called discrimination by declaration. The **Firma Feryn** principle has later been confirmed in the **Accept** case relating to sexual orientation. See also the case summaries of **Firma Feryn** and **Accept** in the case notes section below.

Dual channel systems -- In so-called single-channel systems, worker participation is channeled only through trade unions, while in so-called dual-channel systems, worker participation is channeled both through trade unions and works councils. Practices differ greatly between member states. But each has some form of general duty to inform, consult and allow participation of workers in the formulation of labour law systems. EU law, in this area, has developed chronologically starting with worker participation relating to specific questions, such as transfers of undertakings and collective redundancies as we have heard. Then, to worker participation in transnational companies through European Works Councils, and finally to a general framework for information and consultation at workplace level. The subject matter of information and consultation varies and the degree of involvement also varies from simple information to consultation, and most intense of all, consultation with a view to reaching an agreement. See also the Information and Consultation Directive, below in this glossary.

Economic bailout crisis – the point made in the lectures this week is that the recent financial crises in the EU have tended to undermine various labour law reforms and protections and call into question human rights protections. The way in which the balance between flexibility and security is struck within the EU has been debated. The developments following the economic crisis intensify these debates, and some would even argue that the economic crisis has given rise to a crisis as regards the whole of the EU and social Europe.

Employer insolvency -- The employer insolvency directive applies to employees' claims from employment contracts, against employers who are in a state of insolvency. The member states are required to put in place an institution, which guarantees employees the payment of their outstanding claims for remuneration for a specific period. This is one of the three directives known as the restructuring directives, the other two being transfers of undertakings and collective redundancies. [I did not come across any citation reference for this directive]

Employment Equality Framework Directive [2000/78/EC] -- provides protection against discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Employment Equality Directive, like the Race Directive, contains protection against direct and indirect discrimination, harassment, as well as a rule on a reverse burden of proof. In relation to disability, there is a requirement for reasonable accommodation.

Enforcement Directive -- adopted in 2012 as a partial response to the conflicting case law on trade union rights of collective action in the EU. The broader initiative, known as the Monti II proposal, failed due to opposition from unions and some member states. I don't know what the reference citation is to this directive. I wasn't able to find it in any of the materials.

Equal pay – covered in article 157 TFEU and several Directives.

Equal Pay Directive – one of three so-called gender equality directives adopted in the 1970's. Adopted 10 Feb 1975, Directive 75/117/EEC. Article 1 of this directive provides that the principle of "principle of equal pay" in Article 157 TFEU means "for the same work or for work to which equal

value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." It requires member states to ensure that their national legislation give effect to this principle and provide a mechanism for redress where the principle has been violated (Articles 2 and 3). Under Article 5, member states are required to protect employees from victimization by employers for taking action to enforce the principle.

Equal Treatment Directive – one of the three so-called gender equality directives originally adopted in the 1970's. The Equal Treatment Directive 2006/54/EC is a consolidation of previous Directives in this area, notably, Directive 76/206/EEC, which was amended by Directive 2002/73/EC. This directive implements the principle of equal treatment between men and women in EU labour law. More specifically it now puts in place a general framework to ensure equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation, as regards access to employment or occupation and membership in certain organisations.

Equal Treatment in Social Security Directive -- – one of the three so-called gender equality directives originally adopted in the 1970's. Directive 79/7/EEC, adopted 19 December 1978. The purpose of the Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security. The Directive applies to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons. According to the ECJ, the provisions concerning social security do not apply to women who have never been employed, those who do not look for a job and those who have voluntarily stopped working [Joined cases 48/88, 106/88 and 107/88].

Equality Directives – also referred to as the gender equality directives, these usually are referred to as the three directives known as Equal Pay, Equal Treatment and Equal Treatment in Social Security.

Europe 2020 strategy -- Europe 2020 is the European Union's ten-year growth and jobs strategy that was launched in 2010. It is about more than just overcoming the crisis from which our economies are now gradually recovering. It is also about addressing the shortcomings of our growth model and creating the conditions for a smart, sustainable and inclusive growth. This week's lectures noted the Europe 2020 strategy in the context of the use of more and more soft law measures to achieve EU labour policy. Also, it was noted that today, flexicurity is part of the European Employment Strategy and the Europe 2020 Strategy, and has been criticized for focusing predominantly on labour market flexibility and deregulation, rather than the protection of worker rights.

ECJ – we learned this week that the ECJ has played a more and more central role in EU labour law in recent years. The ECJ's case law has contributed greatly to the development of this area of law. The principles and rules developed by the Court of Justice in its case law have often been codified later in secondary law. The Court of Justice has frequently strengthened the protection of individual employees, but when faced with a conflict between the free movement rules and the employment rights, it has favored free movement. In recent years, not least after the enlargement of the EU, it has been increasingly difficult to reach political agreement on hard-law solutions. Instead, there has been a continued emphasis on soft-law mechanisms and an increased importance on the Court of Justice and case law.

Employment protection – protection of worker rights is primarily a matter of member state law, not EU law. At EU level, employment protection is only partly regulated. There is no EU employment protection directive. Instead, we find patchwork regulation in Article 30 of the EU Charter of Fundamental Rights, the Fixed-term Work Directive, the Transfers of Undertakings Directive, the Collective Redundancies Directive, and in the different Equality Directives which have banned discriminatory dismissals.

Equality law – the primary sources for EU equality law are found in articles 19 (authority of the Council to combat discrimination) and 157 (equal pay) TFEU, the Race Directive, the Employment Equality Directive, the Charter of Fundamental Rights, the three gender equlality directives (the Equal Pay Directive, the Equal Treatment Directive and the Equal Treatment in Social Security Directive), and, following the Maastricht Treaty in the 1990s, Directive of Pregnant Workers, the Directive on Parental Leave, the Burden of Proof Directive and the Directive on Goods and Services. Citations for most of these Directives were not provided in the course materials.

EU competence in the field of labour law -- EU labour law is an area of shared competence per article 3(3) TEU, meaning the preference is for member states laws to govern in all areas except where the EU has been granted exclusive jurisdiction or where it makes more sense for practical reasons to have the EU step into certain areas.

European Social Dialogue (ESD) -- the Maastricht Treaty and the social policy agreement first introduced a consultation process at the EU level, the so-called European Social Dialogue now regulated in Articles 154 and 155 TFEU. Before submitting proposals in the social policy field, the European Commission must consult the European social partners, the employers organizations and trade unions at the EU level, on the possible direction of union action, the so-called first consultation. If the Commission considers union action advisable, it must consult the European social partners regarding the content of the envisaged proposal, the so-called second consultation. The European social partners may then inform the commission of their wish to negotiate and initiate the process provided for in Article 155, possibly resulting in European collective agreements. Note: in an in-video quiz, the question who was the ESD dialogue between, the correct answer was between the social partners (not between the EU and the social partners or states), because it is the social partners who represent the interests of workers and employers at the EU level. Agreements have been reached in this way on parental leave, part-time work and fixed term work. Once one of the social partners agreements is completed, they can be implemented either through the Council, and new Directive, or by the social partners themselves. However, in recent years the approach seems to have stagnated with most new Directives coming from other sources, not the ESD.

European social model -- the European social model is an often used but rather vague concept. Values such as democracy, individual rights, collective bargaining, and equality of opportunity are central to the European social model, a model which is recognized by all EU institutions. Despite a common European social model, there is still great variety among the member states, labor law, and industrial relation system. As regards, for example, the importance of constitutional principles, the balance between legislation and collective bargaining, the degree of state intervention, the role of courts and case law, and the degree of trade union organization and forms of workers' representation.

European Works Council – a directive in 1994 established the European-wide works council, to deal with information and consultation of employees when transnational corporations are making some type of restructuring or redundancy activity that affects the jobs of employees. This eventually led to the Information and Consultation Directive of 2002 which provides a general framework for these types of consultations.

Exemption periods – the non-discrimination rule as it applies to the flexible work directives (part-time, fixed term and temporary agency) does not have any exemptions per se, but does have some limited exceptions as to time -- a short grace period may be available in some cases before it applies or, in other words a short exemption period of time.

Fixed Term Work Directive – Directive 99/70/EC. One of three directives that are part of the so-called flexicurity package; the other two being the part-time work directive and the temporary agency work directive. The fixed-term work directive is more restrictive as regards flexibility, and its purpose

is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts. Thus, the other two directives are designed to encourage this type of flexible work, while the Fixed Term Work Directive has an emphasis on the protection of flexible workers.

Flags of convenience – the term used to describe a ship owner who has changed its home registration from one country to another. For example, in the Viking case in our materials this week, the ferry operator who had a Finnish flag/Finnish home registration, wanted to change to Estonia, to save on labour costs. Estonia was the flag of convenience in this example.

Flexibilization – one of the terms used to describe how the labour market within the EU has been made more flexible, by permitting alternative forms of employment which might otherwise be considered discriminatory, such as part-time work, fixed-term work, and temporary agency work.

Flexicurity – One of the other terms used to refer to the making of a more flexible labour market. In recent years, EU labour law and employment policy have been greatly influenced by a flexicurity agenda inspired, for example, by the practice in the Netherlands and Denmark. Flexicurity is about combining flexibility for employers and security for employees, and aims at reducing labour market segmentation and increasing economic growth. But flexicurity is also partly about deregulation of employment protection, combined with equal treatment of various forms of flexible employment. It is also about effective, active labour market polices, reliable and adaptable systems for lifelong learning and modern social security systems. The part-time work, fixed-term work, and temporary agency works directives form part of this flexicurity agenda. The part-time work and fixed-term work directives result from the European Social Dialogue. Today, flexicurity is part of the European Employment Strategy and the Europe 2020 Strategy, and has been criticized for focusing predominantly on labour market flexibility and deregulation, rather than protection of worker rights.

Formal equality – the traditional approach, based on the simple premise that what is alike should be treated alike. Closely related to the concept of direct discrimination. By contrast, EU law has instead recognized the role for substantive equality, meaning equality as regards outcome and results. For example, by bans on indirect discrimination, rules on a reverse burden of proof and provisions on positive action.

Freedom of establishment – one of the fundamental treaty freedoms in the EU, regulated in Article 49 TFEU. It was applied in the Viking case covered in our materials this week, to prohibit collective action against a company who wished to transfer domiciles (establishment) in order to seek cheaper wages.

Freedom to provide services -- the free movement of services is one of the fundamental treaty freedoms in the EU, regulated in Article 56 TFEU. The posting of workers, which means the transnational provision of services whereby a company sends or posts a worker from one member state, the so-called home state, to another member state, the so-called host state, to fulfill a contract, raises important questions. What wages and working conditions apply? Which laws apply? Why is this important? If the home state laws continue to apply, this protects the employees but possibly restricts the free movement of services, making it difficult for the company to compete in a cheap labour state. But if the host state's laws apply, it can lead to the practice of social dumping – employers who pursue the cheapest labour conditions to the detriment of the employees concerned. According to the Court of Justice, for example, in the **Sager** judgment, a restriction of the free movement of services may only be accepted if justified by overriding reasons of public interest and is proportional (does not go beyond what is necessary). As several of the cases have concluded, this means that even the seemingly normal activities of trade unions to collectively bargain or to take collective actions such as strikes against

perceived unfair conditions, can be an illegal restriction on the free movement of services under EU law.

Gender discrimination – discrimination based on gender is prohibited under EU law in employment, vocational training, social security and goods and services. By contrast, discrimination on the basis of religion or belief, disability, age and sexual orientation is only prohibited in employment and vocational training. However, race discrimination is the most far reaching under current EU law. In addition to the grounds listed for gender discrimination there is also protection from race discrimination in the areas of social advantages, education and healthcare.

Harassment -- unwanted conduct related to the gender of a person, or another protected discrimination ground, with the purpose or effect of violating the dignity of a person, or of creating an intimidating, hostile, degrading or offensive environment. Harassment is, per se, discriminatory.

Harmonization – we learned in this module's materials that the EU has attempted only to partially harmonize the different labour law and industrial relation systems in the member states. The personal scope of most EU labor directives is defined in relation to the different notions of an employee developed and existing in each of the member states. However, in the area of free movement of workers, EU law contains a separate, autonomous, and far-reaching notion of an employee. And this uniform notion of an employee has recently seemed to spread into other areas of labor and equality law, such as equal pay and working time. There is no comprehensive coverage of EU labor law and it does not exactly replicate national labor law. In addition, EU labor law emphasizes and regulates issues of a cross-border nature and the intersection between the internal market, and fundamental freedoms, and national labor law.

Health & safety regulation -- Working conditions and their improvement is an important aspect of EU labour law and there is regulation on health and safety and working time. The framework directive on health and safety aims at measures to encourage improvements in the health and safety of workers at work, and lays down minimum standards in this area. Note: no references were provided to any directives or regulations on health & safety.

Home state law – this is the state where a company and employee are based, in considering the choice of laws under the Posted Workers Directive. When these issues are litigated, usually the laws of the home state are more favourable to the employee than the laws and wages in the host state, and the question becomes which laws and wage conditions apply. Basically the Directive requires that the host state laws apply in certain areas listed in Article 3(1); in all other areas, the home state law applies. There is also no equal treatment guarantee – employees that are posted to a host state are not entitled to equal treatment as employees for whom that state is their home, and visa versa.

Host state law – this is the state where an employee is sent to work under the Posted Workers Directive. Usually when these issues are litigated, the host state's labour laws and/or wages are less favourable to the employee than in the home state. The host state in such cases is entitled to regulate the labour conditions listed in Article 3(1) of the Posted Workers Directive, but not other areas.

Human rights -- human rights play a key role in EU labour law. The Lisbon treaty implies a new emphasis on fundamental rights and a further constitutionalization of EU labour law. According to Article 6 TEU, the EU Charter of Fundamental Rights is made legally binding and part of primary law, and the EU is to accede to the European Convention of Human Rights. The EU Charter encompasses several rights and freedoms of great relevance to EU labour law. Such as

- respect for private and family life,
- freedom of expression,
- freedom of association,

- non-discrimination,
- equality between men and women,
- right to information and consultation,
- right of collective bargaining and collective action,
- protection in the event of unjustified dismissal,
- and fair and just working conditions.

At present, as the case law of the Court of Justice, on the EU Charter of Fundamental Rights develops, attention is drawn both to the content and meaning of specific articles and to the general scope, application, and interpretation of the charter.

Human rights concerns have also surfaced in connection with the recent financial bailout packages and the austerity measures adopted in connection thereto. The European Committee of Social Rights, in relation to a number of collective complaints, has found, for example, recent Greek reforms to be in violation of the right to a fair remuneration and the right to social security.

Hypothetical comparator -- If you want to make a claim for direct discrimination you need to **compare** your treatment with the treatment of someone else. This person is called a **comparator.** In principle, there is a need to identify an actual or hypothetical comparator or, basically, direct discrimination cannot be justified. If you want to show you've suffered direct discrimination, you need to **compare** your treatment with the treatment of someone else who doesn't have the same protected characteristic as you. The comparator is someone who is in the same or similar enough situation to you, but who doesn't have the same **protected characteristic**.

ILO – the International Labour Organization. The ILO was founded in 1919, in the wake of a destructive war, to pursue a vision based on the premise that universal, lasting peace can be established only if it is based on social justice. The ILO became the first specialized agency of the UN in 1946. There are 185 member states, including all of the states of the European Union. The ILO's Governing Body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. There are presently 1,200 ratifications of these 8 core conventions, representing 85% of the maximum possible ratifications. There are 189 total conventions. The ILO was awarded the Nobel Peace Prize in 1969 for its work.

ILO Conventions 87 & 98 – these two conventions guarantee the rights, respectively, to bargain collectively and to take collective action. They appear to be in conflict with the ECJ's decisions in Viking and Laval. In two important cases before the European Court of Human Rights, the ILO conventions have been held to be part of the European Convention on Human Rights. The cases are from 2008 and 2009, the case of Demir & Baykara, and the case of Enerji Yapi-Yol Sen, the European court of human rights aligned its case law with ILO Conventions number 87 and 98 on freedom of association and right to collective bargaining, as well as with the Council of Europe's European Social Charter. The freedom of association, as protected by Article 11 of the European Convention of Human Rights, is now said to comprise also the right to bargain collectively and the right to collective action. The ILO Committee of Experts and the Council of Europe's European Committee of Social Rights have also expressed concern about Viking and Laval, and their implications for national labor law systems and found them to be in conflict with fundamental trade union rights.

These two ILO conventions have also figured prominently in discussions of bailout packages. In 2011, the ILO sent a specific high level mission to Greece and the ILO Committee of Experts has also expressed deep concern about the Greek developments in relation to conventions number 87 and number 98 and the freedom of association and right to collective bargaining.

Indirect discrimination -- the EU ban on indirect discrimination was first developed by the Court of Justice and inspired by the concept of disparate impact in American law. It targets measures which are discriminatory in effect. It refers to situations where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Information and Consultation Directive – Directive 2002/14/EC. The purpose of this directive is to establish a general framework, which sets out minimum requirements for the right to information and consultation of employees. The employer and employees' representatives must work in a spirit of cooperation. And the directive provides different rules on information and consultation, such as an obligation to consult with a view to reaching an agreement on decisions likely to lead to substantial changes in work organization or contractual relations. Note: even though this directive arose from the transnational companies issue, I think it applies to both transnational and national companies, although this wasn't made crystal clear in the lecture. In skimming through the directive itself, the recitals indicate it applies only "to undertakings with at least 50 employees or establishments employing at least 20 employees" but I could see no limit on companies that cross borders versus companies that are located wholly within one member state.

Lacuna -- a gap or blank space in something : a missing part. This term was used in the **Demir and Baykara v. Turkey** case in justifying a court-made rule to extend the rights to collective action in the ILO conventions to the national legislation in Turkey even though Turkey had so far failed to enact the relevant provisions.

Mandatory retirement -- many of the cases on age discrimination have dealt with mandatory retirement. The Court of Justice basically deems mandatory retirement rules to be age discriminatory, but these rules can be permitted if objectively justified. The member states have been given a large margin of appreciation in determining when discrimination based on age is justified. When applying Article 6 of the Employment Equality Directive, the court has often found the differences of treatment on grounds of age to be justified by legitimate aims, such as intergenerational fairness, prevention of humiliating forms of termination of employment and a reasonable balance between labor market and budgetary concerns. In addition, the means for achieving these aims have frequently been found appropriate and necessary. Note, an in-video quiz asks whether mandatory retirement can be allowed; the correct answer is yes because "even though age is a ground for discrimination, mandatory retirement can be justified with regards to legitimate aims."

Monti II Directive – this was the draft proposal the Commission offered in 2012 to bridge the gap between the Court decisions and trade union rights, setting out conditions under which collective action would be permitted in cross border situations, but in the end, the initiative failed over opposition from trade unions and many member states.

Non discrimination -- The principle of non-discrimination and equal treatment has not been given a coherent design in the flexible work directives. In the Part-time Work Directive and the Fixed-term Work Directive, there is a principle of non-discrimination, which states that in respect of the employment conditions, part-time or fixed-term workers must not be treated in a less favorable manner than comparable full-time or permanent workers, solely on the basis that they work part-time, or have a fixed-term contract, unless that differential treatment is justified on objective grounds. In these two directives the principle of non-discrimination is limited, since it requires that any unfavorable treatment of the part-time worker or the fixed-term worker is to relate solely to the part-time work or fixed-term employment contract. It also enables the employer to justify such unfavorable treatment with objective grounds. By contrast, in the Temporary Agency Work Directive, the principle of equal treatment states that for the duration of their assignment at a user undertaking, the basic working and employment

conditions of temporary agency workers must be at least those which would apply if the workers had been recruited directly by that undertaking to occupy the same job. Note that an in-video quiz asks whether these types of workers can be treated less favorably than full-time, permanent workers. The correct answer is yes, for part-time and fixed-time workers if the employer can show objective grounds for the difference in treatment, but not for agency workers. There can also be some exceptions to the non-discrimination rule over a grace period or a short period of time.

Open list -- Article 21 of the EU Charter contains a so-called open list of non-discrimination grounds. It specifies that "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. …. any discrimination on grounds of nationality shall be prohibited." The phrase "on any ground such as" means the list is not limited to the items mentioned.

Parental Leave Directive -- The aim of the Parental Leave Directive is to lay down minimum requirements designed to facilitate work-life balance. Men and women are entitled to an individual right to parental leave, which must be granted for at least a period of four months. But the member states decide themselves whether parental leave should also be paid.

Part Time Work Directive – Directive 97/81/EC, one of three EU Directives that regulate atypical work. Alongside the Fixed-term Work Directive and the Agency Work Directive, its aim is to ensure that people who have not contracted for permanent jobs are nevertheless guaranteed a minimum level of equal treatment compared to full-time permanent staff. The purpose of the Part-Time Work Directive is to provide for the removal of discrimination against part-time workers. And to improve the quality of part-time work, while also facilitating the development of voluntary part-time work, and contributing to the flexible working time in the interest of both employers and workers.

Posted Workers Directive -- Article 56 TFEU is supplemented by the Posted Workers Directive (96/71/EC). It has a two-fold and conflicting aim to enable the free movement of persons and services, and to provide protection for workers in the case of the posting of workers. Posted workers refer to the concept of a TNC who transfers some of its employees from the company's home state to a hosted state where labour laws and conditions are different. Article 3 of the Posted Workers Directive lays down the so-called nucleus of mandatory rules for minimum protection, which the host member state must ensure that the undertakings guarantee to workers posted to their territory. The terms and conditions and questions can be laid down by legislation and/or by collective agreements declared universally applicable within the meaning of Article 3(8).

This nucleus of mandatory rules that must be ensured by the host state covers, for example,

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- the minimum rates of pay,
- health, safety at work,
- equality of treatment between men and women,
- and other provisions on non-discrimination

Article 3(7) states that the directive will not prevent application of terms and conditions of employment which are more favorable to workers. However, the case law clarifies that the Posted Workers Directive establishes only a minimum protection of a nucleus of mandatory rules, and does not provide for equal treatment of domestic and foreign employers as a means of combating social dumping. In other words, the host state can apply its labour law rules to posted workers, but only in the areas listed in Article 3(1). In all other areas, home state law applies. Furthermore, the cases show that the directive

is really a maximum directive, establishing a ceiling for the terms and conditions of employment that a trade union or a state may require foreign service providers to apply to employees.

Note that the in-video quiz asks which core article of the TFEU is supplemented by the Posted Workers Directive; the correct answer is article 56 on the free movement of services, not article 49 on free establishment or article 45 on free movement of workers. See also the case summaries of the Laval, Ruffert and Commission v. Luxembourg cases, summarized below in the case summary section.

Pregnant Workers Directive -- the Court of Justice clarified early on in the **Dekker** case that discrimination on grounds of pregnancy constitutes direct discrimination on the grounds of sex, as pregnancy is intrinsically linked to the female sex. In these cases, there is no need for a comparator. The Directive on Pregnant Workers aims to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. Workers are entitled to a continuous period of at 14 weeks of maternity leave. Note: an in-video quiz asks on what basis is discrimination against pregnant workers grounded; the correct answer is sex, not parenthood or disability.

Proactive mainstreaming -- a proactive mainstreaming approach, meaning that the EU in all its activities and policies must aim to eliminate inequalities and to combat discrimination has also been developed and enforced, and now enjoys Treaty support.

Proportionality -- we learned this week that labour law is an area of shared competence, meaning the EU should act only when it must (subsidiarity principle) and only to the extent that is necessary (proportionality principle). The preference remains for most aspects of labour law to be controlled at the member state level. In the **Viking** case, also summarized in the case notes below, the Court of Justice found that the collective action taken by the Finnish trade union to protest the ferry boat owner's change of home state from Finland to Estonia constituted a restriction on the freedom of establishment. But when it came to whether the restriction was permissible anyway, based on justification and proportionality, the Court of Justice instead left that assessment to the national court. However, it provided some guidance, requiring the national court to consider whether the jobs and conditions of employment of the trade union members on board the vessel were jeopardized or under serious threat. And if so, whether the trade union did not have other means at its disposal which were less restrictive on freedom of establishment. Only if these conditions were satisfied would the strike action be justified and proportionate.

Race discrimination – is the most broadly protected type of discrimination under current EU law. Discrimination based on gender is prohibited in employment, vocational training, social security and goods and services. By contrast, discrimination on the basis of religion or belief, disability, age and sexual orientation is only prohibited in employment and vocational training. However, race discrimination is the most far reaching under current EU law. In addition to the grounds listed for gender discrimination there is also protection from race discrimination in the areas of social advantages, education and healthcare.

Race Directive -- the Race Directive states that direct discrimination requires one person to have been treated less favorably than another. Despite this, the Court of Justice found in the case of Firma Feryn that a public statement by an employer that he would not recruit employees of a certain ethnic or racial origin constituted direct discrimination, even though there was no identified victim. This has been called discrimination by declaration, and Firma Feryn has later been confirmed in the Accept case relating to sexual orientation.

Reasonable accommodation -- the Employment Equality Directive, like the Race Directive, contains protection against direct and indirect discrimination, harassment, as well as a rule on a reverse burden of proof. In relation to disability, there is a requirement for reasonable accommodation. This means

that employers are required to take appropriate measures to enable a person with a disability to have access to employment or training and to exercise their employment unless doing so would impose a disproportionate burden on the employer. Reasonable accommodation includes for example that in a job interview, in a promotion test or in a training exam, a deaf person should be able to answer questions in a written manner. Likewise, a blind person should be able to answer questions in an oral manner. For employed people with disabilities reasonable accommodation measures include, for example, providing wheelchair access, adjusting working hours, adapting office equipment or simply redistributing tasks between the members of a team. To determine a "disproportionate burden" which would allow an employer not to establish these measures, the Directive indicates that account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation and the possibility of obtaining public funding or any other assistance.

Restructuring Directives – this term refers to a collection of directives in the areas of transfers of undertakings, collective redundancies and employer insolvency. Adopted in the 1970s, the directives address social consequences of restructuring and economic change as relevant today as in the 1970s, and aim to increase the protection of employees and to promote industrial democracy and worker participation. For more specifics see the three topics in this glossary – transfer of undertakings, collective redundancy and employer insolvency.

Reverse burden of proof -- the protection and efficiency of Equality Law has been increased by the reverse burden of proof developed by the Court of Justice, and later on codified in secondary law. Persons who consider themselves discriminated against have to establish facts from which it may be presumed that there has been direct or indirect discrimination. And it is then for the respondent to prove that there has been no breach of the principle of equal treatment.

Scope of protection, equality directives – it is important to recognize that different types of discrimination have different scopes of protection in EU law. Discrimination based on gender is prohibited under EU law in employment, vocational training, social security and goods and services. By contrast, discrimination on the basis of religion or belief, disability, age and sexual orientation is only prohibited under EU law in employment and vocational training. However, race discrimination has the most far reaching protection under current EU law. In addition to the grounds listed for gender discrimination there is also protection from race discrimination in the areas of social advantages, education and healthcare.

Shared competence – EU labour law is an area of shared competence per article 3(3) TEU, meaning the preference is for member states laws to govern in all areas except where the EU has been granted exclusive jurisdiction or where it makes more sense for practical reasons to have the EU step into certain areas. Central aspects of national labor law and industrial relations system, such as pay, the right of association, and the right to strike, are excluded from the EU's competence to adopt directives. Although there are some exceptions when labour law issues come into conflict with the freedom to provide services, freedom of establishment, and national collective labor law. Despite there is a wide variety of directives on EU labour law.

Single channel systems -- In so-called single-channel systems, worker participation is channeled only through trade unions, while in so-called dual-channel systems, worker participation is channeled both through trade unions and works councils. Practices differ greatly between member states. See also the Information and Consultation Directive, above in this glossary.

Social dumping – this is the practice where employers supposedly pursue the cheapest labour conditions to the detriment of the employees concerned. It is addressed in the case law under free movement of services and also in the Posted Workers Directive. But the issue remains somewhat murky because the circumstances of each case may or may not justify the employer seeking out the cheapest labour conditions in moving its services to particular member states.

Social partners – these are entities that contribute to the implementation of EU Labour Law directives, including employers organizations and trade unions, especially as these parties affect collective bargaining activities.

Social policy -- Social policy is often understood to include areas connected to the welfare state, such as social security, social assistance, healthcare, and housing. But at EU level, most of the hard-law regulation in the area of social policy actually refers to EU labour law. According to Article 151 TFEU the Union and the member states must aim for -- the promotion of the employment, improved living and working conditions, social protection, and dialogue between management and labor.

Soft law -- the term "**soft law**" refers to quasi-**legal** instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional **law**, often contrasted with **soft law** by being referred to as "hard **law**". From the materials in this module we learned that soft-law measures are increasingly important in EU labour law both as a complement and alternative to hard-law regulations. After the insertion of the employment title into the treaty after Amsterdam and the development of the European employment strategy, labour law is now seen as an integrated part of employment policy, which in turn is subject to the integrated guidelines in the Europe 2020 strategy. In recent years, not least after the enlargement of the EU, it has been increasingly difficult to reach political agreement on hard-law solutions. Instead, there has been a continued emphasis on soft-law mechanisms and an increased importance on the Court of Justice and case law.

Subsidiarity -- the area of EU labour law is one of shared competence, meaning that the EU should step in only when it is granted exclusive jurisdiction or when it makes practical sense for it to legislate. The preference remains to let the member states control most of the issues that come up.

Temporary Agency Work Directive -- Directive 2008/14/EC. This is one of three of the directives in the so-called flexicurity package, aimed at providing more flexibility in the labour market. The other two are the part-time work directive and the fixed term work directive. It seeks to guarantee those working through employment agencies equal pay and conditions with employees in the same business who do the same work. The purpose then is to ensure protection of temporary agency workers and to improve the quality of temporary agency work, while also taking into account the need to establish a suitable framework for the use of such work in order to create jobs and develop flexible forms of work.

Transferred discrimination – In the **Coleman** case, a woman was found to have suffered discrimination when she was treated less favorably and harassed because of her son's, not her own, disability. This is so called, transferred discrimination. See also the case summary of Coleman in the case notes section below.

Transfers of Undertakings Directive -- 2001/23/EC. This directive aims at safeguarding the rights of employees when a business is transferred, and providing rights of information and consultation for workers' representatives. It is one of the three directives that are part of the restructuring directives – the other two being the employer insolvency and collective redundancies directives. This directive applies to any transfer of an undertaking, business, or part of an undertaking or business, to another employer, as a result of a legal transfer or merger. The extensive case law of the Court of Justice on the crucial concept of a transfer of an undertaking, has now been codified in this directive. This definition of a transfer of an undertaking, covers many different situations and in principle, includes contracting out. The directive provides for

- an automatic transfer of the employment relationship
- and the transferor's rights and obligations arising from the contract of employment to the transferee.

- the transferee must continue to observe the terms and conditions agreed in any collective agreement for a specified period.
- the directive also provides some employment protection.

The transfer of an undertaking does not, in and of itself, constitute grounds for dismissal, but does not stand in the way of dismissals due to economic, technical, or organizational reasons. This point that there must be more than a simple transfer of a business to justify dismissals of employees was also the subject of an in-video quiz in this module. Article 4.1 of the Directive 2001/23/EC states that the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. The transfers of undertakings directive also provides that both the transferor and the transferee are required to inform the workers' representatives of the date and reasons for the transfer, and the legal, economic, and social implications of the transfer.

Transnational corporations (TNCs) – These types of entities have been difficult to decide how best to regulate within the EU since they are present in multiple member states and/or in states outside of the EU as well as inside the EU. Several attempts to establish procedures for transnational information and consultation in the EU were made prior to the adoption of the European Works Council Directive in 1994. The preamble to the directive emphasizes that national procedures for informing and consulting employees are often not geared to the transnational structure of these types of entities, which make the decisions affecting those employees. The purpose of the directive is, thus, to improve the right to information and consultation of employees in union-scale undertakings and groups of undertakings. To that end, a European Works Council or a procedure for informing and consulting employees must be established. The European Works Council Directive was eventually replaced/supplemented (not sure which) by the Information and Consultation Directive of 2002 which provides a general framework for these types of consultations (although it applies to both TNCs and other companies). See also the Posted Workers Directive which addresses the issue of employees from TNCs who are sent to another state to work, clarifying which laws apply and how to protect the employees' interests in such cases.

Troika -- the European Commission, the European Central Bank, and the International Monetary Fund. These are the EU institutions normally involved in bailout discussions with member states who are in financial difficulties, e.g., Greece.

Working Time Directive – Directive 2003/88/EC. This directive sets out minimum health and safety requirements for the organization of working time. The directive contains provisions on daily rests, breaks, weekly rest periods, maximum weekly working time, annual leave, and night work.

This description is from the European Commission's policy/activities page on the Directive: To protect workers' health and safety, working hours must meet minimum standards applicable throughout the EU. The EU's Working Time Directive (2003/88/EC) requires EU countries to guarantee the following rights for all workers: a limit to weekly working hours, which must not exceed 48 hours on average, including any overtime, a minimum daily rest period of 11 consecutive hours in every 24, a rest break during working hours if the worker is on duty for longer than 6 hours, a minimum weekly rest period of 24 uninterrupted hours for each 7-day period, in addition to the 11 hours' daily rest, paid annual leave of at least 4 weeks per year, extra protection for night work, e.g. average working hours must not exceed 8 hours per 24-hour period, night workers must not perform heavy or dangerous work for longer than 8 hours in any 24-hour period, and night workers have the right to free health assessments and, under certain circumstances, to transfer to day work.

The site goes on to describe the 2-stage consultation process (ESD) that has been going on since 2010 to improve and amend this directive. No agreement was reached, so the next step will be ...

"Since workers' and employers' organisations have been unable to reach agreement, it is now up to the Commission to decide on the review of the Working Time Directive. The Commission is carrying out a detailed impact assessment, which will take full account of both social and economic aspects, building on preliminary studies and further analysis of the possible options and their foreseeable effects."

Case law summaries from this module 7

Recommended case law: Freedom to provide services

- C-341/05 **– Laval (2007).** 14 pages. The right to collective actions. The court held that actions taken by a trade union to force a Latvian company to pay higher wages, were not permitted under EU law. The following summary was taken from the video lecture notes for this course and the summary prepared by the European Commission Legal Service office at this URL: http://ec.europa.eu/dgs/legal_service/arrets/05c341_en.pdf

  From the lecture notes:

  The Laval case was referred by the Swedish Labor Court to the Court of Justice for a preliminary ruling. In May of 2004, Laval, a Latvian company, posted workers from Latvia to work on Swedish building sites. The work included the renovation and extension of school premises.

  In June 2004, Laval and the Swedish Building Workers' Union started negotiations with a view to concluding a collective agreement. But Laval later signed collective agreement with a Latvian trade union regulating the work at the site. Consequently, no agreement was reached between Laval and the Swedish Building Workers' Union.

  In November, the Swedish trade union therefore started collective actions in the form of a blockade at all Laval building sites, and another Swedish trade union took sympathy action. After work on the site had been interrupted for some time, the company became bankrupt and the Latvian workers posted by Laval returned to Latvia.

  The question was whether the trade union collective actions were lawful under EU law. The Court held no, they were not lawful.

  In both Viking and Laval, the Court of Justice declared that collective action fell within the scope of the treaty and that Articles 56 and 49 could be invoked against trade unions. The Court of Justice, with reference to Article 28 of the EU Charter of Fundamental Rights, also recognized the right to take collective action as a fundamental right which forms an integral part of the general principles of union law. However, the exercise of the right to collective action could be restricted.

  The Court of Justice then considered in Viking whether the collective action at issue constituted a restriction of the freedom of establishment. And in Laval, whether the collective action constituted a restriction on the free movement of services. Although in both cases the Court of Justice emphasized that the European Union not only has an economic, but also a social purpose, it concluded in Laval that the collective action constituted a restriction on the free movement of services.

  The Court of Justice declared that "the right to take collective action for the protection of the workers of the host state against social dumping could constitute an overriding reason of public interest." However, the specific obligations linked to the signing of the collective agreement in the building sector in Laval could not be justified as necessary to attain such an objective, and the collective action was unlawful.

From the EC Legal Service office:

Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, judgment of 18 December 2007

Internal market and free movement – freedom to provide services and collective action initiated by a trade union; The Court rules on the relationship between fundamental rights and the principles of free movement within the internal market.

With a view to operating the sites of a number of construction projects it had successfully tendered for in Sweden, Laval un Patneri, a Latvian construction company, established a subsidiary, L&P Baltic Bygg AB, and posted Latvian workers to that subsidiary in order to carry out the work. Laval also began negotiations with the Swedish building workers' trade union, Svenska Byggnadsarbetareförbundet, aimed at fixing the rates of pay for the posted workers and signing the collective agreement for the building sector. However, these negotiations were not concluded. Thus, in the meantime, Laval signed collective agreements with the Latvian building sector's trade union, of which 65% of the posted workers were members. The Swedish trade union then initiated collective action in the form of a blockade at all Laval's building sites in Sweden. After work had been interrupted for a certain period of time, the subsidiary L&P Baltic Bygg was declared bankrupt and the posted workers returned to Latvia.

The Arbetsdomstolen, before which Laval had brought an action regarding inter alia the legality of the collective action and compensation for the loss suffered, asked the Court of Justice whether the relevant provisions of Community law preclude trade unions from taking collective action, in the circumstances described, in order to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement.

Firstly, the Court stated that Directive 96/71/EC, concerning the posting of workers to another Member State in the framework of the provision of services, allows the host Member State to make the provision of services in its territory by posted workers conditional on the observance of a set of terms and conditions of employment, more specifically mandatory rules for minimum protection provided for in Article 3(1)(a) to (g) of the Directive. This makes it possible to ensure both minimum protection for posted workers and a climate of fair competition between national undertakings and undertakings which provide services transnationally. Furthermore, the Court pointed out that Directive 96/71/EC did not harmonise the material content of those mandatory rules for minimum protection, with the result that each State is free to define that content by law or by collective agreements declared either to be of universal application or, in any event, generally applicable to all similar undertakings in the sector concerned, in compliance with the Treaty and the general principles of Community law.

In this context, the Court found that, in Sweden, the terms and conditions of employment applicable to posted workers are laid down by law, save for the minimum rates of pay which in the construction sector are normally set by means of collective negotiations on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned. The Court took the view that a rate of pay set in this way cannot be imposed under Directive 96/71 EC on undertakings established in other Member States in the framework of the transnational provision of services.

The Court then considered the collective action in the light of Article 49 EC, in so far as that action seeks to force a service provider established in another Member State to enter into negotiations with a view to laying down more favourable terms than the minimum terms required by the

Directive. The Court made clear that, as regards the matters covered by Directive 96/71/EC, that directive expressly lays down the degree of protection which the host State is entitled to require undertakings established in other Member States to observe to the benefit of the workers of those undertakings who are posted in the territory of the host State, without prejudice to the right of those undertakings to sign of their own accord a collective agreement in the host Member State or to apply more favourable terms under a collective agreement of the State of origin.

In this context, the Court went on to point out, as it had in the judgment in Viking given one week previously, that the right to take collective action constitutes a fundamental right which forms an integral part of the general principles of Community law, but that that right must nevertheless be reconciled with the fundamental freedoms guaranteed by the Treaty, with the result that the exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality.

It further found that the right to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement, certain terms of which depart from the measures transposing the Directive, is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services.

The Court next considered whether there was any justification based on a legitimate objective in the public interest which was appropriate and proportionate. As in Viking, the Court acknowledged that the protection of workers may constitute such an overriding reason of public interest. However, in view of the fact that the immediate objective of the collective action in question was to require Laval to sign the collective agreement for the building sector in order to force it adopt working conditions going beyond the minimum protection provided for in Directive 96/71/EC, the Court took the view that the legitimate objective of protecting workers is sufficiently protected by compliance with the nucleus of mandatory rules for minimum protection in Directive 96/71/EC. It added that such collective actions cannot be justified where negotiations on pay form part of a national context characterised by a lack of provisions which are sufficiently precise and accessible, in order not to render it impossible or excessively difficult for an undertaking of another Member State to determine the obligations with which it is required to comply as regards minimum pay.

The Court concluded by finding that the rules of a Member State which fail to take into account collective agreements to which undertakings that post workers to other Member States are already bound in the Member State in which they are established are likewise contrary to the provisions on the freedom to provide services, whereas agreements concluded in the first Member State are taken into account. This is a case of direct discrimination based on nationality for which there is no justification.

- C-438/05 – **Viking** (2007). 10 pages. The right to collective actions. This case involves the right of a trade union to stage a strike against an employer, a ferry boat operator, who was attempting to change its collective bargaining agreement from Finland to Estonia in order to take advantage of cheaper wages. While the Court left the final decision to be made by the national court, its guidance seems to indicate that the trade union's actions were not permitted under EU law. The following summary was taken from the video lecture notes for this course and the summary prepared by the European Commission Legal Service office at this URL: http://ec.europa.eu/dgs/legal_service/arrets/05c438_en.pdf

  From the lecture notes:

The Viking case was referred by the Court of Appeal in the UK to the Court of Justice for a preliminary ruling. It concerned a dispute between a Finnish trade union and the International Transport Workers Federation, on the one hand, and Viking, a ferry operator, on the other.

Viking wanted to re-flag one of its vessels from the Finnish flag to the Estonia flag in order to reduce wage costs. As long as the vessel was under the Finnish flag, Viking was obliged under Finnish law and the terms of the collective agreement to pay the crew wages at the same level as those applicable in Finland. Estonia wages for crew were lower than Finnish wages. Re-flagging the vessel to Estonia would enable Viking to enter into a new collective agreement.

Since the International Transport Workers Federation was running a campaign opposing such flags of convenience, it sent out a circular to its affiliates, asking them in the name of solidarity to refrain from entering into negotiations with Viking. The Finnish trade union gave Viking notice of a strike.

Similarly to Laval, in Viking, the Court of Justice found that the collective action constituted a restriction on the freedom of establishment. But when it came to justification and proportionality, the Court of Justice instead left the assessment to the national court.

However, it provided some guidance, requiring the national court to consider whether the jobs and conditions of employment of the trade union members on board the vessel were jeopardized or under serious threat. And if so, whether the trade union did not have other means at its disposal which were less restrictive on freedom of establishment. Only if these conditions were satisfied would the strike action be justified and proportionate.

Both Viking and Laval have been interpreted as putting fundamental treaty freedoms and economic integration first, and trade union rights and social integration second. The cases prompted huge and critical debate. And some member states, such as Sweden and Denmark, have also had to reform the laws on collective action and posted work, especially those building on so-called autonomous collective bargaining.

From the EC legal services office:

Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU˙Viking Line Eesti, judgment of 11 December 2007

Internal market and free movement – freedom of establishment and collective action initiated by a trade union; the Court rules on the relationship between fundamental rights and the principles of free movement within the internal market.

Viking Line, a Finnish shipping company, is the owner of the Rosella, a ferry flying the Finnish flag and plying the route between Tallinn and Helsinki. The crew of the Rosella are members of the Finnish Seamen's Union (FSU), which is affiliated to the International Transport Workers' Federation (ITF), an international federation which brings together 600 transport workers' unions from 140 countries and has its headquarters in London.

Viking Line gave notice to the FSU of its intention to reflag the Rosella by registering it in Estonia in order to be able to enter into a new collective agreement with a trade union established in that State and to employ an Estonian crew, whose wages are lower than those paid in Finland. Following that notice, the ITF sent a circular to its affiliates asking them to refrain from entering into negotiations with Viking Line, as a result of which Viking Line was prevented from holding talks with Estonian trade unions. At the same time, the FSU announced its intention to strike, demanding inter alia that a collective agreement be concluded which provided that, during the

reflagging, Viking Line would continue to comply with Finnish employment law and not lay off the crew.

Viking Line then brought an action before the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) in the United Kingdom, where the ITF has its headquarters, requesting that the ITF be ordered to withdraw the circular and the FSU be ordered not to infringe its right of establishment with regard to the reflagging of the Rosella. The Court of Appeal, before which an appeal against the decision granting Viking's application was lodged, referred to the Court 10 questions for a preliminary ruling concerning the provisions on the freedom of establishment and the restrictive nature of the measures adopted by the ITF and the FSU under those provisions.

The Court pointed out first of all that the provisions on the fundamental freedoms within the internal market (Articles 39, 43 and 49 EC) do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, and in order to avoid creating inequalities, collective action initiated by a trade union or a group of trade unions which seeks to induce an undertaking to enter into a collective agreement falls, in principle, within the scope of Article 43 EC.

In this context, the Court acknowledged that the right to take collective action, including the right to strike, constitutes a fundamental right which forms an integral part of the general principles of Community law (in this regard, reference is even made to the Charter of Fundamental Rights). It added that that right must, however, be reconciled with the fundamental freedoms within the internal market, such that exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality.

Continuing its line of reasoning, the Court stated that Article 43 EC has direct horizontal effect, that is to say it confers rights which may be relied on not only against the authorities of a Member States, but also against certain private parties such as, in this case, a trade union or an association of trade unions. The abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.

Finally, the Court examined whether or not the actions taken by the ITF and the FSU were restrictive and whether there was any justification for them.

First of all, it found that those actions have the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, such that they constitute restrictions on that freedom.

Next, it set out the criteria on the basis of which the referring court must examine whether or not justifications exist: the protection of workers and improved living and working conditions are legitimate interests which, in principle, justify a restriction of one of the fundamental freedoms guaranteed by the Treaty. More specifically, the actions taken by the FSU could be justified if it were established that the jobs or conditions of employment of the members of that trade union employed by Viking Line were genuinely jeopardised or under serious threat, and if the collective action initiated by that union were suitable to ensure the achievement of the objective pursued and did not go beyond what is necessary to attain that objective.

- Application no. 34503/97, ECHR – **Case of Demir and Baykara v. Turkey** (Nov 2008). Freedom to form trade unions and enter into collective agreements. 40 pages. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89558

  Note that this case was before the European Court of Human Rights in Strasbourg, not the European Court of Justice. It began by a complaint filed in October 1996 by two Turkish nationals, Mr. Demir and Mrs. Baykara (Mr. Demir as a member and Mrs. Baykara in her capacity as president of the trade union at issue). They claimed a breach of article 11 (right to form trade unions) of the European Convention on Human Rights, by itself or in conjunction with Article 14 (non-discrimination), in that the domestic courts had denied them, firstly, the right to form trade unions and, secondly, the right to engage in collective bargaining and enter into collective agreements. A series of procedural steps took place, ending in 2007 in a request from the Government of Turkey that the case be heard by the entire court, that is the Grand Chamber. A hearing of the Grand Chamber then took place in January 2008. This decision was issued in November 2008. In other words, the entire process took more than 12 years, plus the 3 years before that when the matter was proceeding through the Turkey courts – a total of 15 years.

  A collective bargaining agreement was entered into between the trade union Tum Bel Sen and the Gaziantep Municipal Council in February 1993, covering the Municipal government's employees, including salaries, allowances and welfare services. The Municipal Council almost immediately failed to honor the financial obligations under the agreement so the union brought an action to court in June 1993 in order to enforce the terms. The court found in favor of the union and the government appealed. In December 1994 the appeals court, the Court of Cassation, found in favor of the government, quashed the lower court's judgment and held that even though there was no legal bar preventing civil servants from forming a trade union, any union so formed had no authority to enter into collective agreements as the law stood. The court said that public employees could not freely engage in collective bargaining like private sector unions can – for public employees to have these rights there needs to be specific legislation adopted covering them and spelling out their rights.

  Three months later (March 1995), in a new judgment by the lower court, it stood by its original judgment on the ground that, despite the lack of express statutory provisions recognizing a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation (ILO) which had already been ratified by Turkey and which, by virtue of the Turkish Constitution, were directly applicable in domestic law. Nine months later (December 1995), the appeals court, the Court of Cassation, again quashed the District Court's Judgment of March 1995, finding that certain rights and freedoms mentioned in the Turkish Constitution were directly applicable to litigants, whereas others were not. In fact, the Constitution, by the indication "the exercise of this right shall be governed by legislation" clearly earmarked the rights and freedoms which, to be used and applied, required the enactment of specific legislation. Absent such legislation, these rights and freedoms, which included the freedom to join a trade union and to bargain collectively, could not be exercised.

  Applicable law included the relevant Turkish Constitutional provisions, ILO Conventions 87 on freedom of association and 98 on the right to organize and bargain collectively, and relevant articles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Also article 5 of the European Social Charter (revised, not yet ratified by Turkey), and article 12 of the European Union's Charter of Fundamental Rights.

  The court noted that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common

international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty. … In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies…

The Court reiterates that Article 11 § 1 presents trade-union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police v. Belgium*, 27 October 1975, § 38, Series A no. 19, and *Swedish Engine Drivers' Union*, cited above, § 39). The Convention makes no distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. Article 11 is no exception to that rule. On the contrary, § 2 *in fine* of this provision clearly indicates that the State is bound to respect freedom of assembly and association, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration (see *Tüm Haber Sen and Çınar*, cited above, § 29). Article 11 is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law (see *Swedish Engine Drivers' Union*, cited above, § 37).

The Court then concludes that the Turkish government was in breach of its obligations under article 11 of the European Convention on Human Rights in failing to protect the rights of this particular union to enter into a binding legal agreement with a municipality. More specifically: "The Court thus considers that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 prevented the State from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and cannot be justified as "necessary in a democratic society" within the meaning of Article 11 § 2 of the Convention. Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union."

… "Moreover, the Grand Chamber observes that the Government failed to adduce evidence of any specific circumstances that could have justified the exclusion of the applicants, as municipal civil servants, from the right, inherent in their trade-union freedom, to bargain collectively in order to enter into the agreement in question. The explanation that civil servants, without distinction, enjoy a privileged position in relation to other workers is not sufficient in this context. The Court thus finds that the impugned interference, namely the annulment *ex tunc* of the collective agreement entered into by the applicants' union following collective bargaining with the authority was not "necessary in a democratic society", within the meaning of Article 11 § 2 of the Convention. There has therefore been a violation of Article 11 of the Convention on this point also, in respect of both the applicants' trade union and the applicants themselves."

- Application no. 68959/01, ECHR – Case of **Enerji Yapi-Yol Sen v. Turkey (April 2009)**. The right to strike is not absolute and can be subject to certain conditions and restrictions. However, in this particular case, the Turkish government went too far in attempting to prevent all of its public employees from joining a one-day national strike in general support of the right to collective bargaining. This action did not satisfy the narrow criteria for permitting a restriction on the right to strike.

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Note that this case was before the European Court of Human Rights in Strasbourg, not the European Court of Justice. The link below is to a press release on the case, not the text of the judgment itself. It appears there is no English language version of the judgment itself. The Turkish language version is 7 pages.
http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2712212- 2963054

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of ***Enerji Yapi-Yol Sen v. Turkey*** (application no. 68959/01), concerning a ban preventing public-sector employees from taking part in a one-day national strike in support of the right to a collective-bargaining agreement. The Court considered the exercise of the right of civil servants to strike, observing that strike action provided a trade union with an opportunity to make its voice heard and was an important aspect of the protection of its members' interests. Nonetheless civil servants could be prohibited from exercising a right to strike to civil servants, provided that the statutory restrictions on that right defined as clearly and as narrowly as possible the categories of civil servants concerned.

The Court unanimously found a **violation of Article 11 (freedom of assembly and association)** of the European Convention on Human Rights. In application of Article 41 (just satisfaction) of the Convention, it awarded the applicant union 1,500 euros (EUR) for costs and expenses.

Principal facts

Enerji Yapı-Yol Sen is a union of civil servants which was founded in 1992 and is active in the fields of land registration, energy, infrastructure services and motorway construction. It is based in Ankara and is a member of the Federation of Public-Sector Trade Unions. On 13 April 1996 the Prime Minister's Public-Service Staff Directorate published circular no. 1996/21, which, *inter alia*, prohibited public-sector employees from taking part in a national one-day strike organised in connection with events planned by the Federation of Public-Sector Trade Unions to secure the right to a collective-bargaining agreement. On 18 April 1996 some of the trade union's board members took part in the strike and received disciplinary sanctions as a result. Appeals lodged by Enerji Yapı-Yol Sen were dismissed, the Turkish courts considering in particular that the aim of the impugned circular was to remind public servants of the legislative provisions governing the conduct expected of them.

Decision of the Court

Concerning the general principles relating to the obligations incumbent on the States under Article 11, the Court referred to its case-law set out in its Grand Chamber judgment in the case of *Demir and Baykara v. Turkey* (12 November 2008, application no. 34503/97). It pointed out, *inter alia*, that the impugned circular had been adopted five days before the action planned by the Federation of Public-Sector Trade Unions, at a time when work was under way to bring Turkey's legislation into line with international conventions on the trade-union rights of State employees and the legal situation of public servants was unclear.

The Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns. In this particular case the circular had been drafted in general terms, completely depriving all public servants of the right to take strike action.

Furthermore, there was no evidence that the national action day on 18 April 1996 had been prohibited. In joining in the action the members of the applicant trade union had simply been making use of their freedom of peaceful assembly. In the Court's view the disciplinary action taken

against them on the strength of the circular was capable of discouraging trade-union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests. Furthermore, the Turkish Government had failed to justify the need for the impugned restriction in a democratic society.

The Court found that the adoption and application of the circular did not answer a "pressing social need" and that there had been disproportionate interference with the applicant union's rights. There had therefore been a violation of Article 11.

Recommended case law: equality law

- C-54/07 – **Firma Feryn** (2008). 6 pages. Direct discrimination. Summary: http://ec.europa.eu/dgs/legal_service/arrets/07c054_en.pdf

  The Court of Justice found in the case of Firma Feryn that a public statement by an employer that he would not recruit employees of a certain ethnic or racial origin constituted direct discrimination, even though there was no identified victim. This has been called discrimination by declaration. Directive 2000/43/EC.

  C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, judgment of 10 July 2008

  Citizenship – discrimination on the grounds of racial or ethnic origin

  The Court clarifies the scope of the protection afforded by Community law against discrimination on the grounds of racial or ethnic origin.

  Directive 2004/43/EC establishes the legal framework for combating discrimination on the grounds of racial or ethnic origin. The Belgian legislation transposing that directive allows the Centrum voor gelijkheid van kansen en voor racismebestrijding [Centre for equal opportunities and combating racism] ("the Centre") to bring legal proceedings in cases of actual or potential discrimination, even if there is no identifiable complainant.

  Following a number of public statements made by the director of the company Feryn to the effect that his undertaking was looking to recruit fitters but that it could not employ "immigrants" because its customers were reluctant to give them access to their private residences, the Centre applied to the Belgian labour courts for a finding that the company Feryn applied a discriminatory recruitment policy. Following the initial dismissal of the application by the Voorzitter van de arbeidsrechtbank te Brussel [President of the Labour Court, Brussels], the Centre appealed to the l'Arbeidshof te Brussel [Labour Court, Brussels], which decided to refer to the Court of Justice questions for a preliminary ruling concerning the terms 'discrimination', 'presumption of discrimination' and 'sanctions' within the meaning of Directive 2000/43/EC.

  The Court observed first of all that discrimination for the purposes of the Directive does not necessarily require that there is an identifiable complainant/victim. The Directive does allow Member States to lay down the right for associations with a legitimate interest in ensuring compliance with the obligations under that directive to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant. **In addition, the Court pointed out that the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin constitutes of itself direct discrimination in respect of recruitment, since such statements are likely to**

strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

The Court went on to state that a presumption of discrimination may be found to exist if it is based on facts such as statements giving rise to a presumption of a discriminatory recruitment policy. In such a situation, it is for the employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice does not correspond to those statements.

Finally, the Court pointed out that the sanctions for such a breach of the principle of discrimination – which must be effective, proportionate and dissuasive – may take the form of a finding of discrimination by the court with an adequate level of publicity, or an injunction ordering the employer to cease the discriminatory practice and a fine, or even the award of damages to the body bringing the proceedings.

- C-81/12 – **Asociatia Accept v. Consiliul National pentru Combaterea Discriminarii** (Romanian National Council for Combatting Discrimination) (2013). 9 pages. Discrimination on grounds of sexual orientation. Directive 2000/78/EC.

  The Accept case extends the principles upheld in the Firma Feryn case to discrimination based on sexual orientation. The case involved the interpretation of the Equality Directive 2000/78. Article 1 of Directive 2000/78, sets out the purpose of the 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'.

  Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

  An NGO, Accept, representing lesbian, gay, bi-sexual and transsexual rights lodged a complaint against a Bucharest Football Club (SC Fotbal Club Steaua Bucuresti SA) and its representative, Mr. Becali, claiming breach of equal treatment in recruitment matters. In a media interview concerning the possible transfer of a professional footballer X, Mr. Becali had made statements that he would rather hire a player from the junior team than hire a player who was thought to be homosexual. When asked whether this player X would not be offered a contract because he was homosexual, Mr. Becali essentially said yes. The football club was also sued because Accept claimed that despite the fact that Mr Becali's statements were broadcast in the media the football club never distanced itself from them. To the contrary, FC Steaua's lawyer was said to have confirmed that that policy had been adopted at club level for hiring players because 'the team is a family' and the presence of a homosexual on the team 'would create tensions in the team and among spectators'. Furthermore, in Accept's view, when Mr Becali made the statements at issue he was still a shareholder in FC Steaua.

  Accept submitted that Mr Becali and the Football Club directly discriminated on grounds of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals.

  The court concludes that "facts such as those from which the dispute in the main proceedings arises are capable of amounting to 'facts from which it may be presumed that there has been … discrimination' as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general

public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters."

- C-303/06 – **Coleman v. Attridge Law and Steve Law** (2008). 8 pages. Discrimination on grounds of disability. UK employment tribunal case. A woman with a disabled child was terminated from her employment and claimed discrimination. The Court held that she was entitled to bring a discrimination claim based on disability, even though it was her child who was disabled and not herself, provided she establishes the basic causation criteria of the Directive (2000/78/EC). The following summary includes some brief lecture notes and the summary of the EC legal services office found at the following URL: http://ec.europa.eu/dgs/legal_service/arrets/06c303_en.pdf

  From the lecture notes: In Coleman, a woman was found to have suffered discrimination when she was treated less favorably and harassed because of her son's, not her own, disability. So called, transferred discrimination.

  From the EC legal services office:

  C-303/06 Coleman v Attridge Law, judgment of 17 July 2008

  Citizenship – discrimination on grounds of a disability; the Court clarifies the scope of the protection afforded by Community law against discrimination on the grounds of a disability.

  In 2002, Ms Coleman, who was employed in a London law firm, gave birth to a disabled child whose condition required specialised and particular care provided primarily by her. Following the termination of her contract of employment, in 2005 Ms Coleman lodged a claim with the Employment Tribunal, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.

  The national court referred to the Court of Justice four questions for a preliminary ruling relating to Directive 2000/78/EC, which, as regards employment and occupation, lays down the legal framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation. Those questions essentially sought to establish whether the prohibition of direct discrimination on the grounds of disability laid down in the Directive applies only to actions taken in respect of an employee who is himself disabled or whether it applies equally to an employee who is not himself disabled but who is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

  After recalling that direct discrimination occurs where one person is treated less favourably than another is treated in a comparable situation, the Court stated that it does not follow from the provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. Consequently, although certain provisions of the Directive are, by their nature, applicable only to disabled people – for example the provisions on positive discrimination measures – the principle of equal treatment enshrined in that directive must otherwise be interpreted broadly. So far as the objectives of the Directive are concerned, the Court maintained that that directive also has the objective of creating within the Community a level playing field as regards equality in employment and occupation. The objectives of the Directive and its effectiveness would be undermined if an employee in the situation of the claimant in the main proceedings cannot rely on the prohibition of direct discrimination laid down in the Directive where it is proven that he has been treated less favourably than another employee in a comparable

situation on the grounds of his child's disability, and this is the case even though that employee is not himself disabled.

As to the burden of proof in this case, in the event that Ms Coleman establishes facts from which it may be presumed that there has been direct discrimination, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no breach of that principle.

- C-144/04 – **Werner Mangold v. Rudiger Helm** (2005). 9 pages. Discrimination on grounds of age. From the German Arbeitsgericht in München, a request to the ECJ for a preliminary ruling. The case involved a fixed term contract entered into between Mr. Mangold as employee and Mr. Helm as the employer. Mr. Mangold was 56 years old when the contract took effect in July 2003. The EU law involved was Directive 2000/78. The German implementation initially applied an easier threshold (no objective justification standard) if the employee was 60 years and older, but this exception was changed to 52 years and older shortly after the law's adoption. Mr. Mangold claimed this change was age discrimination, not permitted by the Directive. The German government apparently would have been okay if they had stuck to the strict wording of the Directive, but once they changed criteria and age thresholds they drifted outside of the permitted scope of the Directive and were held to be guilty of age discrimination in the formulation of the German law.

  From the lecture notes: This was the first age discrimination case under the Directive, Mangold (C-144/04), in 2005, which created a lot of attention and debate. Here, the Court of Justice declared that not only was age discrimination covered by the Directive, but also that EU law encompassed an independent general principle of non-discrimination on grounds of age, which might have some form of horizontal application.

  From Wikipedia:

  Mangold was a 56-year-old German man employed on a fixed term contract in a permanent full-time job. The German government introduced the so called Employment Promotion Act 1996 (*Beschäftigungsforderungsgesetz*) which allowed fixed term contracts for a two year maximum, and otherwise were unlawful unless they could be objectively justified. But even this protection was removed (apparently to "promote employment") if the employee was over 60. Further amendments then changed the age to 52. Mr Mangold claimed that the lack of protection, over age 52, was unjustified age discrimination.

  Judgment. The ECJ held in its judgment the German law contravened the Employment Equality Framework Directive [2000/78/EC], even though it did not have to be implemented until the end of 2006. It said that, in general terms, legislation that lets employers treat people differently because of their age "offends the principle" in international law of eliminating discrimination on the basis of age. The ECJ ruled that national courts must set aside any provision of national law which conflicts with the directive even before the period for implementation has expired.

  "64. ... application of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers." "

"65. In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that effect, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78."

[...] " 75. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law..."

Significance of the case (according to Wikipedia): Because it recognised that equal treatment is a general principle of EU law, Mangold v Helm is significant for three critical reasons. First, it means that a claim for equal treatment is available for private citizens on a horizontal direct effect basis. It is unnecessary to wait for a Directive to have been implemented before making a claim to have caused discrimination. Second, it means that member state and EU legislation, like Directives, may be challenged on the ground that they fail to comply with the general principle of equal treatment. Third, because the court did not limit its remarks to the particular grounds of discrimination presently found in the equal treatment Directives (on sex, race, and disability, belief, sexual orientation and age) it follows that claims against unjustified discrimination on the basis of other characteristics may be possible (such as caste, education, property or military service). It would be likely to reflect the jurisprudence from the European Convention on Human Rights, where Article 14 which lists similar grounds to those already in the EU Directives but also adds "or other status".