I – Introduction

1. The Italian on-call contract, ‘il contratto di lavoro intermittente’, is a flexible employment contract whereby an employee makes himself available to an employer, who can assign him work on an intermittent basis depending on the needs of the employer. That contract is generally subject to objective conditions relating to the intermittent nature of the services and requirements specified in collective agreements. In addition, however, the same contract may be offered ‘in any event’ to workers under the age of 25 or over the age of 45.

2. Mr Bordonaro was employed by Abercrombie & Fitch Italia Srl. (‘Abercrombie & Fitch’) under an on-call employment contract for over a year and a half. When he turned 25 years of age, his employment contract was brought to an end due to the fact that the age condition ceased to be fulfilled.

3. In this factual and legal context, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) asks whether the Italian provision governing on-call contracts, to the extent that it contains specific access and dismissal conditions for persons under the age of 25, is contrary to the principle of non-discrimination on grounds of age enshrined in Directive 2000/78/EC\(^2\) and in Article 21(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’).
4. The present case invites the Court to assess, for the first time, to my knowledge, a national measure introducing specific conditions for younger workers with regard to access to a particular type of flexible employment contract from the perspective of age discrimination.

II – Legal framework

A – EU law

5. Recital 25 of Directive 2000/78 states that ‘the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited’.

6. Article 1 of Directive 2000/78 sets out the Directive’s purpose: ‘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’.

7. Article 2 of the Directive provides:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...

8. Entitled ’Justification of differences of treatment on grounds of age’, Article 6(1) of Directive 2000/78 lays down that:

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

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

3 — The order of 16 January 2008, Polier (C-361/07, not published, EU:C:2008:16) concerned the French employment contract ‘nouvelles embauches’. The Court found that the situation did not fall within its jurisdiction. The questions posed by the referring court in that case did not, however, concern the principle of non-discrimination on grounds of age.
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

B – Italian law

9. According to the referring court, Article 34 of Legislative Decree No 276/2003 on the application of delegations in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003 (‘the Legislative Decree’), in the version applicable on the date when Mr Bordonaro was hired,\(^4\) stated:

‘1. An on-call employment contract may be concluded for the performance of services of a discontinuous or intermittent nature in accordance with the requirements specified in the collective contracts established by the employers’ and employees’ associations that are comparatively speaking most representative at national or territorial level, for predetermined periods in the course of a week, month or year within the meaning of Article 37.

2. An on-call employment contract may, in any event, be concluded in respect of services provided by persons under 25 years of age or by workers over 45 years of age, including pensioners.’\(^5\)

10. The referring court further explains that, on the date of Mr Bordonaro’s dismissal, Article 34(2) of Legislative Decree No 276/2003 provided that: ‘an on-call employment contract may, in any event, be concluded with persons over 55 years of age and with persons under 24 years of age, on the understanding, in the latter case, that the contractual services must be performed before the age of 25 is reached’.\(^6\)

11. Article 34 of the Legislative Decree is no longer in force. Its content has nonetheless been partially taken over by Article 13 of Legislative Decree No 81 of 15 June 2015 (the current provision in force).\(^7\)

III – The dispute in the main proceedings and the question referred

12. Mr Bordonaro was employed by Abercrombie & Fitch on the basis of an on-call, fixed-term employment contract concluded on 14 December 2010. On 1 January 2012, the contract was converted into an on-call contract of indefinite duration. From the observations presented to the Court, it appears that Mr Bordonaro worked on average three to five times per week. From 26 July 2012 onward, he was no longer included in the work schedule. After enquiring about this by email, he was notified on 30 July 2012 that his dismissal had occurred on 26 July 2012, due to the fact that he had turned 25. Thus, he no longer complied with the conditions for the intermittent contract, as laid down by the Italian legislation.

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\(^{6}\) – Decreto Legislativo 15 giugno 2015, n. 81, Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell’articolo 1, comma 7, della legge 10 dicembre 2014, n. 183. (GURI No 144, of 24 June 2015, Ordinary Supplement No 34) (on the systematic regulation of employment contracts and the revision of legislation on job duties, pursuant to Article 1(7) of Law No 183 of 10 December 2014).
13. Mr Bordonaro commenced an action before the Tribunale di Milano (District Court, Milan, Italy) alleging that his contract and his dismissal were unlawful. He asked to be reinstated to his position. That action was declared inadmissible by an order, which was subsequently overturned on appeal by the Corte d'appello di Milano (Court of Appeal, Milan, Italy). The appeal court held that both the on-call employment contract concluded with Mr Bordonaro on the basis of his age, as well as his dismissal when he turned 25 years of age, were discriminatory. It held that an employment relationship of indefinite duration had been created. It ordered Abercrombie & Fitch to reinstate Mr Bordonaro to his position and to pay him damages.

14. Abercrombie & Fitch appealed before the Corte suprema di cassazione (Supreme Court of Cassation, the referring court). Abercrombie & Fitch submits, essentially, that the Court of Appeal erred in considering that the principle of non-discrimination had been infringed. The present case concerns a law that *benefits* workers on the grounds of their age rather than the reverse. Abercrombie & Fitch further argues that Article 34(2) of the Legislative Decree is in line with the Directive and has requested that the matter be referred to the Court for a preliminary ruling.

15. Considering that Article 34(2) of Legislative Decree No 276/2003 could be contrary to the principle of non-discrimination on grounds of age given the specific and clear reference to age, the referring court has stayed the proceedings and asked for a preliminary ruling inquiring:

‘Whether the rule of national law set out in Article 34 of Legislative Decree No 276 of 2003, according to which an on-call employment contract may, in any event, be concluded in respect of services provided by persons under 25 years of age, is contrary to the principle of non-discrimination on grounds of age referred to in Directive 2000/78 and Article 21(1) of [the Charter]?’

16. Written observations have been submitted by Mr Bordonaro, Abercrombie & Fitch, the Italian Government and the European Commission, all of whom presented oral argument at the hearing that took place on 12 January 2017.

IV – Assessment

17. The present case concerns a national provision that allows employers to conclude, ‘in any event’, on-call employment contracts with persons who are younger than 25 years of age or older than 45. The same type of contract for persons in the remaining ‘middle’ age group is available only under particular conditions. Furthermore, for workers younger than 25, the national provision has been construed as entailing an automatic termination of the employment relationship when the age of 25 is reached.

18. The question posed by the referring court is concerned with that provision only with regard to its application to workers under 25. It enquires about the compatibility of that measure with the prohibition of discrimination on grounds of age enshrined in two different EU law instruments — Article 21(1) of the Charter and Directive 2000/78 — in a case that involves a legal relationship between private parties.

19. Some preliminary considerations are therefore called for (A) before addressing the substance of the question referred (B). Those preliminary considerations relate to the identification of the EU law provisions that are pertinent for the analysis in the present case (1) and the precise scope of the question submitted by the referring court (2).

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7 — That age limit was raised to age 55 by a subsequent reform of the provision at issue. See point 10 of the present Opinion.
8 — Even though the condition relating to the fact ‘that the contractual services must be performed before the age of 25 ...’ was only introduced by the Law of 28 June 2012 (see point 10 of the present Opinion), the Italian Government clarified at the hearing that Article 34(2) of the Legislative Decree has always been interpreted as leading to the termination of contract at the age of 25.
A –Preliminary considerations

1. The relevant EU law provisions

20. The prohibition of discrimination on grounds of age is a general principle of EU law that has been codified by Article 21(1) of the Charter. Directive 2000/78 represents a particular expression of that principle in the fields of employment and occupation.9

21. For this reason, when a situation falls within the scope of the Directive, it is the Directive as the more specific instrument that will form the primary analytical framework.10

22. Does the situation in the present case fall within the scope of the Directive? As the Court has consistently ruled, it is apparent from the title, the content, as well as the purpose of the Directive that it seeks to lay down a general framework to guarantee equal treatment ‘in employment and occupation’, by offering effective protection against discrimination on the listed grounds.11 Specifically, Article 3(1)(a) of the Directive provides that that directive applies, within the areas of competence conferred on the European Union, to all persons in relation to ‘conditions for access to employment, ... including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy’. According to Article 3(1)(c), it also applies to ‘employment and working conditions, including dismissals and pay’.12

23. The present case concerns recruitment and dismissal. There is no doubt that a provision such as that at issue in the main proceedings concerns ‘conditions for access to employment’ as well as ‘working conditions, including dismissals’. It therefore falls squarely within the material scope of the Directive.

24. Regarding the personal scope of the Directive, subject to the ultimate factual verification of the national court, it is unquestionable on the facts that Mr Bordonaro can be considered as worker within the meaning of EU law. According to the clarifications provided by Mr Bordonaro, he had worked three to five times per week during a period of over a year and a half. His activity cannot be considered purely marginal or ancillary.13 A person employed under an on-call contract is not precluded by reason of the conditions of employment from being considered to be a worker within the meaning of EU law.14

25. In those circumstances, the Directive is applicable to the situation giving rise to the dispute in the present case.

26. The fact that the ensuing analysis in the present Opinion takes the Directive as its primary analytical framework in no way precludes the simultaneous applicability of Article 21(1) of the Charter. Indeed, as long as the provisions at issue fall within the scope of EU law through the operation of Directive 2000/78, the scope of protection of the Charter is triggered according to its Article 51(1).15

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9 See, for example, judgments of 19 April 2016, DI (C-441/14, EU:C:2016:278, paragraphs 22 and 23 and the case-law cited), and of 21 December 2016, Bowman (C-539/15, EU:C:2016:977, paragraph 19 and the case-law cited).
11 See, for example, judgment of 10 November 2016, de Lange (C-548/15, EU:C:2016:850, paragraph 16 and the case-law cited).
12 See, for example, judgment of 21 January 2015, Felber (C-529/13, EU:C:2015:20, paragraph 19).
13 See, to that effect, judgment of 1 October 2015, O (C-432/14, EU:C:2015:643, paragraph 22 et seq. and the case-law cited).
15 See, to that effect, judgment of 19 April 2016, DI (C-441/14, EU:C:2016:278, paragraph 24).
27. The relationship between Article 21(1) of the Charter and Directive 2000/78 is thus not one of mutual exclusion. It is rather one of concretisation and complementarity. As already mentioned, the Directive represents a specific expression of the general principle enshrined in the Charter. Thus, the corresponding analytical framework under both is bound to be similar. Moreover, in so far as is appropriate, the approach under both should follow the same logic in order to ensure a coherent approach to judicial review of EU law and national law in the field on non-discrimination on the grounds of age in employment.

28. It is also clear that the principle of non-discrimination, as enshrined in Article 21(1) of Charter, remains applicable, even in the face of a simultaneous application of Directive 2000/78. There are in particular two situations in which Article 21(1) of the Charter is of continuous relevance in such a scenario. First, the provisions of the Charter remain fully applicable for the purposes of potential consistent interpretation of secondary EU law and national law which falls within the scope of EU law. Second, the provisions of the Charter constitute the ultimate yardstick of validity of EU secondary law.

29. Furthermore, the ‘independent life’ of the equal treatment principle as a general principle of law or as a fundamental right of the Charter is of particular relevance where, as consistently held by the Court, the possibility to rely on the Directive is hindered by the fact that a dispute concerns private parties.

2. The precise scope of the question posed by the national court

30. In the pleadings before this Court, only Mr Bordonaro argued that the national provision at issue should be dissapplied and that the EU principle of non-discrimination on grounds of age be applied directly.

31. However, the thorny issue of potential direct applicability of Article 21(1) of the Charter in a horizontal relationship is not one that needs to be addressed in the present case, essentially for two reasons.

32. First, the preliminary question referred before the Court concerns exclusively the ‘normative’ or ‘abstract’ compatibility of a national provision with EU law. Is a national provision, which is generally applicable in all types of legal relationships, compatible with EU law? That assessment is prior to and independent of potential subsequent remedies available in a specific constellation of a private law relationship. That is to say, the crux of this case is whether a national provision, considered in abstracto irrespective of its application in vertical or horizontal relationships, is compatible with EU law. The referring court has not asked about the consequences to be drawn from a potential non-conformity of the national provision at issue with the Directive.

16 For the same logic in a reverse scenario, see my Opinion in Fries (C-190/16, EU:C:2017:225).
18 See judgments of 19 January 2010, Kucükdeveci (C-555/07, EU:C:2010:21, paragraphs 50 and 51), and of 19 April 2016, DI (C-441/14, EU:C:2016:278, paragraphs 35 to 37).
33. Second, as has been put forward by the Commission and by Abercrombie & Fitch in their written pleadings, and as also confirmed at the hearing, Directive 2000/78 has been transposed into Italian law. ¹⁹ The importance of this fact should be expressly raised. This means that the obligation of not discriminating on the basis of age is arising not only from the Directive, or only from Article 21(1) of the Charter, but also from national rules transposing those EU law provisions into national law.

34. Within such a constellation, the way EU law might later potentially reach into horizontal relationships is primarily through the interpretation of the national prohibition of discrimination on the basis of age in conformity with the original (and later parallel) provisions of EU law, as interpreted by the Court. If needed, the national court shall then consider the whole body of rules of law and apply the methods of interpretation available to it. ²⁰ There is nothing in the order for reference indicating that it is impossible for the national court to interpret the national provision at issue in a manner that is consistent with EU law. ²¹

35. The EU law-based prohibition of discrimination on the basis of age will therefore primarily reach into concrete situations on the national level via its national implementing provisions, interpreted in conformity with the EU law provisions from which the former originate. The acknowledgment of this fact prevents misconceptions about the scope of potential horizontal direct applicability of the provisions of the Charter. In practical terms, it limits the situations in which such direct application of Charter provisions to relationships between private parties could be contemplated to very few and rather extraordinary instances. It also takes into account the, in my view, sensible practice of a number of legal systems that see the role of fundamental rights in private law relationships primarily as an interpretative one: the content of rights and duties, that are to be as far as their existence is concerned, set by national legislation, is to be interpreted in conformity with fundamental rights.

36. With these preliminary considerations in mind, my analysis in the following section of this Opinion will focus on the compatibility of the national provision at issue with the Directive.

B – Discrimination on the basis of age

37. The principle of equal treatment under Article 2(1) of the Directive prohibits direct or indirect discrimination on any of the grounds referred to in Article 1 of that directive. Those grounds include age. According to Article 2(2)(a) of the Directive, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 of that directive. ²²


²⁰ — See, in this regard, judgments of 5 October 2004, Pfeiffer and Others (C-397/01 to C-403/01, EU:C:2004:584, paragraph 113); of 19 January 2010, Kucükdeveci (C-553/07, EU:2010:21, paragraph 48); of 15 January 2014, Association de médiation sociale (C-176/12, EU:C:2014:2, paragraph 38); and of 19 April 2016, DI (C-441/14, EU:C:2016:278, paragraph 31).

²¹ — Unlike the situation addressed in the judgments of 19 January 2010, Kucükdeveci (C-555/07, EU:C:2010:21, paragraph 49), and of 15 January 2014, Association de médiation sociale (C-176/12, EU:C:2014:2, paragraph 40). Considering the eventual impossibility of interpretation in conformity with EU law, see also judgment of 19 April 2016, DI (C-441/14, EU:C:2016:278, paragraph 37).

²² — See also, for example, judgment of 24 November 2016, Parris (C-443/15, EU:C:2016:897, paragraph 65).
38. Age discrimination is different from other ‘suspect grounds’, such as religion or belief, disability or sexual orientation. In contrast to the other grounds, direct discrimination on the basis of age is capable of being justified under the specific regime of Article 6. According to Article 6(1) of the Directive, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

39. Having this normative framework of Article 2(2)(a) and Article 6(1) of the Directive in mind, my analysis is structured as follows. First, I will examine whether there is a different treatment between comparable groups of individuals on a prohibited ground (1). Next, I will analyse what is meant by ‘less favourable’ treatment (2). Finally, I will turn to permissible justifications, namely whether the differential treatment pursues a legitimate aim and whether the measure is appropriate and necessary for attaining that aim (3).

1. Difference in treatment of comparable situations on a prohibited ground

40. Comparability does not mean identity. It just examines whether, in relation to a given quality (that is, tertium comparationis, which may be a value, aim, action, situation, and so on), the elements of comparison (such as persons, undertakings, products) demonstrate more similarities or more differences. The assessment of comparability requires due regard to be taken of the concrete context in which the assessment is carried out: that of the benefit or regime concerned. As the Court has consistently held, the comparable nature of situations is to be assessed globally in the light of all factors characterising those situations, in the light of the subject matter and purpose of the act which makes the distinction in question.

41. In the present case, the overall legislative framework in which the comparison occurs is determined by Directive 2000/78. The given quality with regard to which comparison is to be carried out is thus treatment (access, conditions, dismissal) in employment and occupation.

42. Elements of comparison are persons that are subject to such (un)equal treatment. The national legislation at issue (both at the time of recruitment and dismissal) regulates on-call contracts. It establishes two different regimes depending on the age of the worker. First, according to Article 34(1) of the Legislative Decree, that contract can be used by employers, regardless of the age of the worker, when certain objective conditions are met. The application of such a contract is made conditional upon the discontinuous or intermittent nature of the services to be performed according to the requirements set up by collective agreements, for predetermined periods. Second, according to Article 34(2) of the Legislative Decree, for workers aged under 25 or over 45 (or, as changed later, over 55), these conditions are not necessary and intermittent contracts can be concluded ‘in any event’. Moreover, as clarified at the hearing by the Italian Government, the on-call contracts concluded under the latter provision with persons under 25 come to an end on their 25th birthday.

23 — Judgment of 5 March 2009, Age Concern England (C:388/07, EU:C:2009:128, paragraph 60). For a discussion on the ‘different’ nature of age as a ‘suspect ground’ see, for example, Opinions of Advocate General Mazák in Palacios de la Villa (C:411/05, EU:C:2007:106, points 61 to 64), and in Age Concern England (C:388/07, EU:C:2008:518, points 73 to 75), and Opinion of Advocate General Jacobs in Lindorfer v Council (C:227/04 P, EU:C:2005:656 point 83 et seq.).

24 — See my Opinions in Lidl (C:134/15, EU:C:2016:169, point 69), and in Belgium v Commission (C:270/15 P, EU:C:2016:289, point 30).

25 — See, to that effect judgments of 12 December 2013, Hay (C:267/12, EU:C:2013:823, paragraph 33 and the case-law cited), and of 1 October 2015, O (C:432/14, EU:C:2015:643, paragraph 32).

26 — See, for example, judgments of 16 December 2008, Arcelor Atlantique et Lorraine and Others (C:127/07, EU:C:2008:728, paragraphs 25 and 26 and the case-law cited), and of 1 October 2015, O (C:432/14, EU:C:2015:643, paragraph 31).

27 — The Italian Government clarified at the hearing that as those collective agreements have not been concluded, those requirements have been set out by a Ministerial Decree adopted in 2004.
43. It is precisely with regard to access to a particular type of contract and dismissal that the rule at issue distinguishes between three groups of persons on the basis of their age. The effect of that regime is that some individuals are treated differently than others on the sole ground of age, irrespective of the fact that those individuals may find themselves in comparable situations concerning the nature of the services and tasks, professional experience or qualifications.

44. Moreover, concerning automatic dismissal at the age of 25, workers on an on-call contract under Article 34(2) of the Legislative Decree who have turned 25 are in a situation comparable to that of younger workers hired under the same contract, as well as with workers employed under Article 34(1). They nonetheless face dismissal solely on grounds of their age.

45. There is thus a clear difference in treatment on the basis of age. The comparability of such different groups of persons would only be precluded if there were an element, such as a personal feature or a factual or legal circumstance, which makes the situations so different that the comparison becomes illogical or unreasonable. The differences outweigh the similarities, or there may even be just one, albeit fundamental, difference which renders the comparison impossible.

46. That is, in my point of view, not the case here. It could be suggested that the social issue of particularly serious unemployment among young persons constitutes such a fundamental distinguishing element. Thus, because unemployment of young persons might be said to be quite high and structural, the younger population ceases to be, in terms of access to the job market, comparable to the remainder of the population. It could be said to create a distinct category of its own.

47. I disagree. As already mentioned, the assessment of comparability is a comprehensive one. It looks globally at a number of factors that are relevant to the given quality that is being compared. In relation to access to and treatment in employment and occupation, all of the age groups may be given the same contracts. They all compete for the same jobs. They are therefore fully comparable. 28

48. The fact that there may be some partial difference, such as that a given age group might have some particular problems, may naturally be relevant for the motivation of a national measure seeking to redress that problem. It may fuel the policy underlying the adoption of that measure. Such considerations then lie, however, at the core of the legitimate aim put forward by the Italian Government. The examination of that element therefore appertains to the analysis of the justification of the measure.

49. Younger workers to whom Article 34(2) of the Legislative Decree applies are therefore in a comparable situation to other workers and jobseekers. Moreover, it is clear that by imposing automatic termination of the contract at the age of 25, the provision at issue also operates a difference in treatment with regard to workers hired under Article 34(2) of the Legislative Decree not having reached that age or being older than 45 or 55, and to those workers under on-call contracts under the general regime of Article 34(1) of the Legislative Decree. 29

50. In sum, Article 34(2) of the Legislative Decree provides for a difference in treatment between comparable groups directly based solely on one of the prohibited grounds, namely age.

28 — That is also why the judgment of 1 October 2015, O (C-432/14, EU:C:2015:643, paragraphs 37 to 39) ought to be distinguished here. That case concerned a national provision under which an end-of-contract payment, paid on the expiry of a fixed-term employment contract where the contractual relationship was not continued in the form of an indefinite contract, was not payable where the contract was concluded with a young person for a period during his school holidays or university vacation. The Court found that those students were not in a situation that was objectively comparable to that of other workers entitled to that payment. Unlike the O case, persons in the age group of under 25 in the present case are seeking normal employment, not just summer vacation work experience. For that reason, they do not form a specific group seeking a different type of professional experience: again, they are likely to seek precisely the same type of contract as the rest of the population.

29 — See, to that effect, judgment of 13 September 2011, Prigge and Others (C-447/09, EU:C:2011:573, paragraph 44).
2. Less favourable treatment

51. According to Article 2(2)(a), the protection of the Directive is triggered where one person is treated 'less favourably than another' person. That means that the different treatment has to be to the disadvantage or to the detriment of the person(s) of a given age.

52. The age discrimination cases that arrive at the Court typically concern benefits, working conditions or limitations that clearly entail an advantage or a disadvantage for a particular claimant. In those cases, to ascertain whether the measure at issue operates to the detriment of an individual is rather straightforward. Not receiving a benefit, being paid less, or being obliged to retire when one does not want to clearly constitutes less favourable treatment.

53. The present case is, however, more complex. Whether or not the contested national provision is to the benefit or to the detriment of the protected group has given rise to quite some discussion before the Court.

54. Mr Bordonaro submits that the intermittent contract is an unfavourable type of contract. It lacks certainty with regard to working hours. It enables dismissal solely on the grounds of age.

55. In its written observations, the Commission focused on the element of automatic termination of the contract at the age of 25. According to the Commission, this element amounts to direct discrimination on the basis of age for the purposes of the Directive.

56. The Italian Government and Abercrombie & Fitch oppose those views. They maintain that the difference in treatment does not amount to less favourable treatment. Workers under 25 are actually treated more favourably than workers aged 25 and over. According to Abercrombie & Fitch, the on-call contract is an 'additional contractual opportunity' granting a privileged contractual status to the worker, who becomes more attractive for employers. Moreover, the Italian Government has submitted that the non-discrimination principle applies to other working conditions under the intermittent contract, such as salary, annual leave, and social protection.

57. At the outset, it should be clarified that there is nothing to indicate that the provision at issue falls within the category of positive action. Article 7(1) of the Directive provides that, with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. The measures covered by that provision are specifically and exclusively designed to prevent or compensate actual disadvantages that exist in fact.

58. However, in the present case, far from being unequivocally directed at providing an advantage aimed at ensuring full equality in practice for younger workers, the genuine impact of the measure appears to be mixed. From a certain vantage point, it could be seen as perpetuating the more precarious position of the younger part of the population in the labour market.

30 — See, for example, concerning calculation of pension rights, judgment of 16 June 2016, Lestar (C-159/15, EU:C:2016:451). On tax deductions of training costs, see judgment of 10 November 2016, de Lange (C-548/15, EU:C:2016:850). On conditions of advancement in salary, see, for example, judgment of 21 December 2016, Bowman (C-539/15, EU:C:2016:977). On age limits for the exercise of a profession, see, for example, judgments of 13 September 2011, Prige and Others (C-447/09, EU:C:2011:573), and of 15 November 2016, Salabertia Sorondo (C-258/15, EU:C:2016:873). On termination of employment on the basis of retirement, see, for example, judgment of 12 October 2010, Rosenbladt (C-45/09, EU:C:2010:601).

31 — See, by analogy, judgment of 17 October 1995, Kalanke (C-450/93, EU:C:1995:322, paragraph 18). Such measures consisting of, inter alia, rules promoting priority for appointment or promotion nonetheless face some limitations. See, for example, judgments of 17 October 1995, Kalanke (C-450/93, EU:C:1995:322, paragraph 22), and of 11 November 1997, Marchall (C-409/95, EU:C:1997:533, paragraph 32).

32 — In the field of discrimination on grounds of sex, the Court has dismissed the possibility to consider a national measure as covered by ‘positive action’ when that rule, far from ensuring full equality in practice, was liable to perpetuate a traditional distribution of the roles of men and women. See, for example, judgment of 16 July 2015, Maidstrellis (C-222/14, EU:C:2015:473, paragraph 50 and the case-law cited).
59. Be that as it may, the Italian Government confirmed at the hearing that the provision at issue is not intended as a measure of positive action in the sense of Article 7(1) of the Directive.

60. Taking that statement as a starting position, the assessment of the existence of ‘less favourable treatment’ remains pertinent. It is obvious that the measure at issue has a mixed impact. It is also apparent that the assessment of whether a measure amounts to a less favourable treatment may depend on the point of view of a potential claimant and on the focus of the analysis.

61. Recital 15 of the Directive states that the appreciation of the facts from which it may be inferred that there is direct discrimination is a matter for the national jurisdiction in accordance with rules of national law or practice. Where those facts are established, it is for the respondent to prove that there has been no breach of the principle of equal treatment, in accordance with the mechanism laid down in Article 10(1) of the Directive.

62. Thus, also in line with the division of tasks under the Article 267 TFEU preliminary ruling procedure, the essentially factual assessment of whether there is a less favourable treatment, crucial for the establishment of discrimination, is a task for the national court. However, in order to assist the national court, some useful guiding elements can be outlined.

63. Automatic dismissal at the age of 25 can be seen as a limitation on the use of the on-call contract under Article 34(2) of the Legislative Decree. From a certain point of view, that measure could indeed be seen as directed at not perpetuating the precarious situation of the workers who become progressively ‘less young’. However, it also places the workers in the position of being dismissed regardless of their performance or particular behaviour. The fact that that element, individually considered, amounts to less favourable treatment, can hardly be contested.

64. However, as already suggested, the assessment of more or less favourable treatment in the present case cannot be limited to just one single element. The question of the referring court concerns the rule set out in Article 34(2) of the Legislative Decree, which contains both an element of access to work and an element connected to termination of a contract. Both elements, in my mind, are intrinsically connected. Therefore, in order to give a useful answer to the referring court, the assessment of the measure must be a comprehensive, global one, balancing different elements of the contractual relationship, conditions, and considerations. In particular, the impact of the contract must be assessed in the light of the overall legislative framework applicable, which includes the general regime of working conditions attached to the on-call contract (such as severance pay, annual leave, equality of position of the employer and the employee or possibility of the employee to freely refuse work) as well as consideration of the impact on access of young persons to the market.

65. The Court considered in Mangold that the authorisation without restriction of fixed-term contracts for workers having reached a certain age was covered by the Directive as different treatment on the basis of age. In Georgiev the Court declared that the imposition of fixed-term contracts on professors who had reached the age of 65 was different treatment in the sense of Article 6 of the Directive, because their employment conditions became ‘more precarious’ than those of professors under the age of 65.
66. From that case-law it is apparent that when a disparity in treatment exists, its less favourable character is ascertained through a global assessment of the conditions emanating from the contractual regimes applicable to specific age categories, taking as a point of reference the ordinary employment relations as opposed to other forms of more flexible work, such as fixed-term contracts. As a result of such an assessment, the unrestricted authorisation or the imposition of specific (fixed-term) contractual forms characterised by a lesser degree of stability with regard to indefinite employment contracts has been considered as 'less favourable treatment'.

67. In the present case, the on-call contract constitutes a sui generis contractual form characterised by derogation from the ‘ordinary contracts’ (both full-time and part-time contracts) in terms of the temporal organisation of the labour relationship. Flexibility applies to the temporal element of the labour relationship, which is left in the hands of employers to be decided according to their needs. The application of on-call contracts entails that a worker does not have a guaranteed number of working hours, and therefore no fixed income. Whereas that regime is applicable for workers in all categories on objective reasons and under certain conditions, the regime for workers under 25 forms, in its turn, a derogation from the regulatory conditions that justify recourse to that sui generis type of contract.

68. On the other hand, however, the provision at issue allegedly offers broader access to the job market to persons younger than 25 years of age through a particularly flexible contract. It does not preclude the possibility that employers offer those persons other types of contract. However, at the same time, the possibility to resort to on-call contracts with no objective requirements may render it more difficult for persons under 25 to access other contracts which do not grant the employer such flexibility. As a consequence, younger workers may be placed in a position where it is more difficult to access ‘regular’ employment during a part of their working life. In short, even if EU law does not preclude those more flexible contractual modalities, their imposition or unrestricted application to a particular age group may become problematic.

69. Moreover, the fact that the general use of on-call contracts is limited by national law (and that the limitations have progressively been strengthened through time) signals that, with regard to working conditions, the application of the contract is not unambiguously considered as a more favourable or protective treatment from the point of view of national law. Indeed, in its written observations, the Italian Government has referred to this contract as an instrument 'less exigent and costly than the ordinary employment contract'.

70. In conclusion therefore, in my opinion, the assessment of the existence of less favourable treatment ought to be a comprehensive assessment of the impact of the operation of the rule. Such an assessment requires both knowledge of factual impact and knowledge of the further legislative environment in which the rule operates. It is therefore a matter for the national court.

71. In carrying out such an assessment, two extremes should be avoided. First, as is apparent from this section, the assessment of less favourable treatment should not look at just one very specific rule read in isolation, disregarding the rest. Second, comprehensive, global assessment means that some individual elements within the bundle might be positive, others negative. Hardly any measures could be said to be exclusively favourable in all their elements. It is the total that counts: on the whole, does the measure leave the protected group worse off?

40 — See, for example, judgment of 12 October 2004, Wippel (C-313/02, EU:C:2004:607).
72. Finally, it should also be borne in mind that the impact of the measure shall not be confused with the objective of the measure put forward by the Italian Government. The provision at issue may indeed be aimed at granting young jobseekers additional opportunities to enter the job market. However, the standard for ascertaining the disadvantageous character of the measure with regard to that group of persons shall be that of the impact, which, again in its comprehensive assessment involves not only market access, but also working conditions and dismissal.

3. Justification

73. If the national court considers that Article 34(2) of the Legislative Decree amounts to less favourable treatment in the sense of Article 2(2)(a) of the Directive, it is necessary to examine whether that difference of treatment can be justified under Article 6(1) of the Directive. More specifically, the assessment then moves on to the examination of whether the difference in treatment can be objectively and reasonably justified by a legitimate aim (a), whether the means relied on to attain that aim are appropriate and whether they do not go beyond what is necessary to attain the aim pursued (b).

a) Legitimate aim

74. In the present case, the identification of the legitimate aim pursued by Article 34(2) of the Legislative Decree has not been free of controversy. As the referring court points out, the legislative decree does not contain any specific reference to the objectives it pursues through its Article 34(2).

75. In principle, Article 6(1) of the Directive imposes on Member States the burden of establishing the legitimacy of the aim pursued to a high standard of proof. 11 Nevertheless, in the absence of a clear statement as to the objective supposedly underlying the measure, the Court has accepted certain flexibility in order to identify the underlying aims, allowing recourse to elements such as the general context of the measure concerned. 12

76. The Italian Government has put forward a number of different objectives underlying the measure, somehow interrelated but not entirely overlapping. First, the measure at issue is part of a legal framework aiming at promoting flexibility in the job market, in order to increase the employment rate. Second, the national legislation aims at fostering the entry of young people in the labour market. Third, at the hearing, the Italian Government further explained that the more specific objective underlying the particular provision at issue is to provide for the first opportunity to be employed, thus allowing for initial and subsequent relevant experience on the job market, but not for stable employment.

77. The Commission submitted that that aim could be also identified from the ‘legge di delega’ (the delegation law) forming the base of the legislative decree at issue, whose Article 1(1) refers to the objective of enhancing ‘... the capacity of professional integration of the unemployed and of all those who are searching a first employment, with particular regard to women and young persons’. 13

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12 See, for example, judgments of 16 October 2007, Palacios de la Villa (C-411/05, EU:C:2007:604, paragraphs 56 and 57); of 5 March 2009, Age Concern England (C-388/07, EU:C:2009:128, paragraph 45); of 12 January 2010, Petersen (C-341/08, EU:C:2010:4, paragraph 40); and of 13 November 2014, Vital Pérez (C-416/13, EU:C:2014:2371, paragraph 62).
78. Article 6(1) of the Directive provides an illustrative list of legitimate aims. Included on the list are employment policy, labour market and vocational training. Article 6(1)(a) explicitly provides examples of legitimate differences in treatment as ‘the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection’.

79. Promotion of employment thus undoubtedly constitutes a legitimate objective. This is all the more so with regard to employment of young persons, a matter of concern also for the European institutions. The Court has iteratively confirmed legitimate aims as including the encouragement of recruitment involving promotion of access of young people to a profession or the promotion of the position of young people on the labour market in order to promote their vocational integration or ensure their protection.

80. The Court has also acknowledged that measures promoting flexibility in the labour market may be regarded as a measure of employment policy. In that regard, the Court has specifically acknowledged that national rules may award and reserve, in the pursuit of legitimate public interest aims of employment or labour market policy, a certain degree of flexibility for employers. In particular, the facilitation of recruitment of younger workers by increasing the flexibility of personnel management constitutes a legitimate aim.

81. As a result, it appears that each of the aims put forward by the Italian Government and the Commission could constitute, in principle, a legitimate aim under Article 6(1) of the Directive.

82. However, the precise problem of the present case is not the absence of any legitimate aim. On the contrary — there appears to be an abundance of aims invoked by the Italian Government, each of them pulling, however, in a somewhat different direction. The persisting doubts as to the precise objective pursued in the present case are a matter for the national court.

83. The necessity of a clear identification of a specific legitimate aim behind the measure becomes crucial for the subsequent stage of analysis: the assessment of the appropriateness, consistency and necessity of the measure. That assessment, as with any examination of proportionality, targets the relationship between aims and means. However, to assess the appropriateness of the means chosen is impossible without clarity about the aims. Metaphorically speaking, it is difficult to discuss whether one is on the right track if it is not stated where one is actually travelling. The aim — of which several may be pursued at the same time — needs therefore to be clearly identified.

44 — See, to that effect, judgments of 5 March 2009, Age Concern England (C-388/07, EU:C:2009:128, paragraph 43); of 12 October 2010, Rosenbladt (C-45/09, EU:C:2010:601, paragraph 40); and of 13 September 2011, Prigge and Others (C-447/09, EU:C:2011:573, paragraph 80).

45 — See Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (OJ 2013 C 120, p. 1). This instrument establishes guidelines and recommends that Member States ‘ensure that all young people under the age of 25 years receive a good-quality offer of employment, continued education, an apprenticeship or a traineeship within a period of four months of becoming unemployed or leaving formal education’ (emphasis added).

46 — See, for example, judgments of 16 October 2007, Palacios de la Villa (C-411/05, EU:C:2007:604, paragraph 65); of 12 January 2010, Petersen (C-341/08, EU:C:2010:4, paragraph 68); of 18 November 2010, Georgiev (C-250/09 and C-268/09, EU:C:2010:699, paragraph 45); and of 21 July 2011, Fuchs and Köhler (C-159/10 and C-160/10, EU:C:2011:508, paragraph 49).


49 — See to that effect, judgments of 5 March 2009, Age Concern England (C-388/07, EU:C:2009:128, paragraph 46); and of 21 July 2011, Fuchs and Köhler (C-159/10 and C-160/10, EU:C:2011:508, paragraph 52).


b) Appropriateness and necessity

84. Appropriateness assesses whether the means chosen are liable to meet the objective. Necessity focuses on whether there are no other less intrusive alternatives to the means chosen. Both types of assessment require detailed knowledge of the overall legislative landscape, such as the general rules designed for the protection of workers, the specific rules for the avoidance of abuse as well as the rules governing the material working conditions attached to the on-call contract at issue in the present case. It is therefore again ultimately for the national court to proceed to the assessment of the appropriateness and necessity of the national provision at issue.

85. The following considerations are aimed at providing the referring court with some guidance for that assessment, without prejudice to a more precise identification of the underlying aim carried out by the referring court. For this purpose, I will examine the criteria of appropriateness and necessity with regard to each of the aims advanced by the Italian Government: the aim of promoting flexibility in the job market (i); of fostering access to the labour market for young people (ii); and of providing a first employment opportunity for younger persons (iii).

86. As an opening remark common to this section, it shall be recalled that Member States enjoy broad discretion in their choices to pursue a particular aim in the field of social and employment policy, as well as in the configuration of the measures capable of achieving it. That discretion nonetheless encounters its limit in the prohibition of frustrating the implementation of the principle of non-discrimination on grounds of age.

i) The objective of promoting flexibility in the job market

87. The Italian Government has clarified that the national provision at issue is an element of a broader legislative framework which over the past decade has sought to bring flexibility to the labour market.

88. In general, a measure that allows for types of employment contracts which are less rigid for the employers may indeed be regarded as prima facie appropriate in order to attain a greater degree of flexibility in the employment market.

89. However, Article 34(2) of the Legislative Decree allows for greater recourse to a flexible contract with regard to particular age groups: persons under 25 and those over 45 years of age. It could therefore be questioned how easing access to a flexible contractual form only to specific age groups consistently pursues the overall objective of flexibility in the job market. From this point of view, the national court will have to assess why a measure seeking a general objective of increasing flexibility in the job market should only be applicable to particular age groups. In other words, if flexibility is an aim applicable to the entire job market, it is unclear, without further explanation, why the burden of realising that aim should be borne only by specific age groups.

90. Furthermore, when examining whether the measure goes beyond what is necessary to achieve the aim pursued, that provision must be placed in its context. The adverse effects it is liable to cause to the persons concerned must be considered. Therefore, the referring court, when considering the necessity of the measure with regard to the objective of promoting flexibility in the job market, will need to assess whether the measure at issue strikes a reasonable balance between the general employment policy interests and the risks run by younger workers of being pigeonholed in the more precarious clusters of the job market.

52 — See, for example, judgment of 18 November 2010, Georgiev [C-250/09 and C-268/09, EU:C:2010:699, paragraph 50 and the case-law cited).
54 — See, to that effect, judgments of 6 December 2012, Odar [C-152/11, EU:C:2012:772, paragraph 65], and of 11 April 2013, HK Danmark [C-335/11 and C-337/11, EU:C:2013:222, paragraph 89).
ii) The objective of facilitating youth employment

91. The Italian Government has submitted that broader access to on-call contracts for jobseekers under 25 aims at attaining the objective of facilitating the access of young persons to the employment market.

92. The Commission considers, however, that this objective is not pursued in a coherent fashion since young workers engaged under this regime are dismissed at the age of 25. This cancels out the advantageous effects of the measure on youth employment.

93. Having in mind the broad discretion enjoyed by the national legislature in this regard, and lacking further, in particular statistical data, it cannot be concluded at this stage that the measure is manifestly inappropriate to attain the purported objective. It is for the national court with the appropriate elements of fact and evidence to determine whether that is indeed the case.

94. However, it shall be recalled that ‘mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim’. 55

95. In particular, it is for the national court to assess, according to the rules of its national law, the probative value of the evidence presented before it, which may include, in particular, statistical evidence. 56 In this connection, it is true that legislative choices in the area of employment, where Member States enjoy particular leeway, may be based on forecasts and political considerations, both of which are likely to involve a degree of uncertainty. 57 The appropriateness requirement imposed by Article 6(1) of the Directive requires, however, at least a logical relationship of suitability and coherence between the objective pursued and the means chosen.

96. It will therefore have to be ascertained whether the aim of enhancing recruitment of young persons is pursued in a consistent and systematic manner by Article 34(2) of the Legislative Decree. In particular, the argument put forward by the Commission regarding the lack of internal coherence of that provision due to the automatic dismissal at the age of 25 deserves further examination. If buttressed by further evidence, it could indeed be said that the provision at issue, rather than looking for a remedy to unemployment, simply shifts the problem: It merely postpones unemployment to the next age group.

97. From the point of view of the necessity of the measure, it is also for the national court to examine less intrusive alternatives to automatic dismissal that might allow for a more nuanced approach to the age limitation.

iii) First employment opportunity

98. Finally, at the hearing, the Italian Government clarified that the main and specific aim of the provision at issue is not to grant young people access to the employment market on a stable basis, but only to provide them with a first opportunity to access the labour market. The aim is not to get younger people on the market and retain them in (permanent) employment, but to provide them with

56 — See, to that effect, judgment of 21 July 2011, Fuchs and Köhler (C-159/10 and C-160/10, EU:C:2011:508, paragraph 82).
57 — See, to that effect, judgment of 21 July 2011, Fuchs and Köhler (C-159/10 and C-160/10, EU:C:2011:508, paragraph 81).
a first experience that will later place them in a better position to compete on the job market. In other words, the challenged national provision was effectively said to operate one step ahead of full access to the job market. Its aim is to create certain equality of chance or opportunity, so that in the subsequent step, persons under 25 may effectively compete with older age groups.

99. Prima facie, age, particularly the ages under 25, might be used as a proxy for lacking experience in the job market. The appropriateness of the measure with that aim again needs to be ascertained with the probative elements available for the national court and having due regard to the margin of appreciation enjoyed by the national legislature.

100. In particular, the referring court will need to take account of the fact that, even if pursuing the aim of granting a first job opportunity, the particular provision at issue does not require that the persons to which Article 34(2) of the Legislative Decree is applicable have no previous experience. Indeed, that provision only refers to age and is not connected with experience, education or apprenticeship.

101. Moreover, it should be noted that even though the Italian Government has stated that the provision at issue does not aim at creating stable employment opportunities, the on-call contract can also be concluded in the form of an employment contract of indefinite duration. It is for the national court to assess the relevance of this fact, as a matter of consistency, having due regard for the length of time which that contract can remain applicable to young workers having attained working age according to national law.

102. From the point of view of the necessity criterion, it has to be ascertained whether other less onerous means could not have been envisaged. In particular, the assessment of the measure shall take account of the fact that the provision at issue relies solely on the basis of age. It is for the national court to examine whether the measure could indeed have reasonably attained the purported objective through additional suitable criteria, such as the requirement of being unemployed or the lack of previous experience. 58

103. In addition, the Italian Government also submitted that the objective of granting a first employment experience of a non-stable nature justifies the automatic termination of employment when the age of 25 is reached. This, according to the Italian Government, allows the measure to attain a high level of effectiveness. It enables a larger number of persons to have access to the available positions. According to this argument, the underlying rationale is that of sharing the available positions: offering a slice of the cake to everybody.

104. However, this ‘cake sharing’ explanation does not appear entirely convincing. A person hired at a younger age may have his or her slice of the cake for several years, whereas those closer to 25 would enjoy it only for few months. Why not then rather set a maximum duration of the contract to apply to each person, in order to distribute the ‘cake’ more evenly? The ‘cake sharing’ explanation becomes rather circular with regard to the under 25 age group itself: that age group has to share it, whereas the others are being served a different meal?

105. In sum, in sensitive matters such as employment and social policy, the Member States enjoy broad discretion. They may pursue a number of legitimate aims. However, the pursuit of those aims must demonstrate a reasonable amount of clarity and coherence, encapsulated in the criteria of appropriateness and necessity.

58 — See, to that effect, judgment of 22 November 2005, Mangold (C-144/04, EU:C:2005:709, paragraphs 64 and 65).
V – Conclusion

106. In view of the foregoing considerations, I propose that the Court answer the question referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

Article 2(2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that on-call contracts are applicable in any event to workers of less than 25 years of age, as long as:

— that legislation pursues a legitimate aim linked to employment and labour market policy; and

— it achieves that aim by means which are both appropriate and necessary.

It is for the national court to determine whether those conditions are satisfied in the present case.