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Paradoxes of Technology. Reflections on Early and Late Retirement in the Digital Transition: The Case of Commercial Pilots

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Abstract

Discrimination on ground of age has always been a matter of difficult apprehension in the legal field, especially since Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, admitted the establishment on a national basis of justified differences in treatment, in view what it described as legitimate objectives of employment or labor market. Although technological innovation is often seen as a possible vector for the expulsion of older workers, finally it can also constitute an appreciable element when it comes to inducing the permanence of older workers as assets in the labour market. In this sense, this article reflects on the peculiar situation experienced by pilots and co-pilots when making decisions about their professional life, in view of the current legislation, the evident technological advances in the commercial air transport sector, and the imperatives derived from aeronautical safety.

Keywords: *Discrimination; Age; Retirement; Digital Transition; Airline pilots.*

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1. Introduction

Age discrimination has always been a difficult issue to apprehend from a legal perspective. In fact, Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, acknowledged that the prohibition of age discrimination, despite it being 'an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity of the workforce', admitted the establishment, at the national level —it actually referred to the possibility of adopting 'specific provisions which may vary in accordance with the situation in Member States'—, of differences in treatment. These differences were justified in view of what was described as 'legitimate employment policy, labour market and vocational training objectives' (recital 25).

At the same time, recital 26 of the Directive argued that 'the prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons' of, for instance, a certain age. However, the question is, as it has already been pointed out, that 'there is limited collective perception of the unjustified and harmful nature of differences in treatment on the basis of age, which often leads to their being accepted without question'.[1] This circumstance is probably connected to the peculiar nature of age as a discriminating factor, which 'on the one hand, facilitates a lesser attachment of people to it, while, on the other, favours a greater tolerance of practices that affect it'.[2]

In general terms, although technological innovation is often seen as a possible vector for the expulsion of older workers, it may also be a significant element in supporting their permanence as active workers in the labour market.[3] In fact, technology may be considered a powerful ally when it comes to that permanence. In this sense, it is possible to say that technological progress has an ambivalent nature: it may expel from the labour market older workers who cannot adapt to technological change,

[1] Sanguineti Raymond, W., 'La edad: ¿cenicienta de las discriminaciones?', *Trabajo y Derecho*, 2019, No. 59, p. 10.

[2] Sanguineti Raymond, W., 'La edad: ¿cenicienta de las discriminaciones?', *op. cit.*, p. 10.

[3] For this issue, it may be interesting to see Jafarova, S., Gurzaliyeva, U. and Masso, A., 'The effect of technological innovation on age-specific labour demand', *Growinpro* (working paper), February, 2021, No. 1, which can be found in: http://www.growinpro.eu/wp-content/uploads/2021/02/working_paper_2021_35-1.pdf

or whose position disappears as a result of that change, but, at the same time, it may promote their active presence in the market.

The present article reflects on the paradoxical nature of technology, which proves to be especially interesting when the focus is set on a specific group of workers, such as airline pilots and co-pilots. As some specialists have pointed out, 'neither technological progress applied to aviation nor the developments expected from artificial intelligence in this field are irrelevant' nowadays.[4] In fact, in the last few years we have witnessed, besides the use of computerized flight plans in 'automatic pilot' systems, the development of successive technological advances in pilotage that are rapidly bringing commercial aviation closer to being performed without any human intervention in the cockpit. The vertiginous technological development that has enabled the manufacture of drones is a living example of it.

Admitting that the future of aviation will include highly automatized flights, the present is still unfolding within a working space, the cockpit, that brings together increasingly evolved technological tools and specialized workers—pilots and co-pilots—whose activity is very much conditioned by aviation and labour regulations, thus representing a good example of the above-described paradox. Along with international regulations, which stipulate the conditions for the consideration of those workers as active, particularly from an aviation safety perspective, there are national regulations that develop them but, at the same time, contemplate the possibility of an early retirement and, according to the dictates of international aviation legislation, make it difficult, if not prevent, the extension of the working life of pilots and co-pilots after a certain age.

Generally speaking, it seems natural to think that technology supports the extension of working life. But this is not actually happening, because, among other reasons, in the specific field of air transport, aviation safety considerations are still prioritized over the specific psychophysical situation of pilots and co-pilots. This question will be discussed in the following section.

[4] Casas Baamonde, M. E. and Ángel Quiroga, M., 'Supuesta discriminación por razón de edad: jubilación forzosa de pilotos de aeronaves a los 60 años', *Revista de Jurisprudencia Laboral*, 2019, No. 8, p. 13.

2. International and European Union Commercial Pilot Licence Regimes

The undisputable benchmark in what regards international pilot licence standards is the Convention on International Civil Aviation (hereinafter, Chicago Convention),[5] signed in Chicago, on December 7, 1944, and ratified by all European Union Member States, although the European Union as such has not. In Annex I ('Personnel licencing') of the convention, the International Civil Aviation Organization (ICAO) gathers the norms and methods recommended for the issuance of pilot licences, and establishes the following:

> 2.1.10.1 A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot, their 65th birthday.
> 2.1.10.2 Recommendation. A Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 65th birthday.

As shown, the position of the ICAO regarding this issue is clear and forceful, and does not admit any exceptions in the case of pilots over 65 years. The possibility of contracting states issuing licences, or acknowledging their validity, to pilots aged 65 years or more is not considered, while pilots aged 60 and over may only command an aircraft accompanied by another pilot below that age. In the case of co-pilots, the Chicago Convention is not favourable to the extension of their activity in commercial flights after they turn 65.

In consonance with the Chicago Convention, the Joint Aviation Requirements–Flight Crew Licence 1 (JAR-FCL1)—which are the other international aviation standards that need to be taken into consideration in relation to this matter—,[6] specify, in point 1.060:

[5] This convention is at the basis of the creation of the International Civil Aviation Organization (ICAO). According to article 44, the objectives of this organization are 'to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport'.

[6] The international standards of private, commercial or airline pilots are drafted by an international organization called Joint Aviation Authorities. Among these standards, the Joint Aviation Requirements–Flight Crew Licensing 1 (hereinafter JAR-FCL 1) were adopted on April 15, 2003.

> Curtailment of privileges of licence holders aged 60 or more:
> a) Age 60–64: The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport operations except:
> 1) as a members of a multi-pilot crew and provided that
> 2) such holder is the only pilot in the flight crew who has attained age 60.
> b) Age 65: The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport operations.

As regards European Union (EU) law, Commission Regulation (EU) No. 1178/2011, of 3 November 2011, laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) 216/2008 of the European Parliament and of the Council, is the norm that regulates the activity of commercial pilots.[7] Annex I, point FCL.065 ('Curtailment of the privileges of licence holders aged 60 years or mor in commercial air transport') of this regulation establishes the following:

> a) Age 60–64. Aeroplanes and helicopters. The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport except:
> 1) as a member of a multi-pilot crew; and
> 2) provided that such a holder is the only pilot in the flight crew who has attained the age of 60 years.
> b) Age 65. The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport.

As expected, this EU norm translates almost literally point 1.060 of the international JAR-FCL 1 norm.
In summary, international and EU regulations advocate, in general terms, the non-extension of the working life of pilots beyond the age of 65. This legal criterion, which has the status of a peremptory norm, has remained

[7] According to point FCL.010 of Annex I in Regulation 1178/2011, 'commercial air transport' should be understood, for the purpose of this norm, as 'the transport of passengers, cargo or mail for remuneration or hire'. On the other hand, the pilots affected by this EU law are, basically, those of: a) aircraft registered in a Member State, unless their regulatory safety oversight is delegated to a third country and they are not used by an EU operator; b) aircraft registered in a third country and used by an operator supervised by a Member State, or by an operator established or resident in the EU in routes entering or exiting EU territory or located within it.

unchanged over time, and technological progress in aviation has not affected the ICAO's will to maintain it nor its lack of consideration to the possibility of extending the working life of pilots, in contrast with the general position of the EU on this matter in recent years. In this sense, it is possible to affirm that commercial aviation is a world apart, impervious to EU policies on the extension of the working life of pilots and co-pilots. Nevertheless, this norm does not prevent the establishment of a legal framework allowing the early retirement of pilots, an option that, in the case of Spain, has been well received and has led to the approval of the corresponding regulation, which acknowledges the peculiar conditions in which piloting takes place, and the psychophysical weariness resulting from this activity.

3. Reduced Retirement Age for Pilots

Spanish social security legislation has traditionally considered, as an exception to the general rule of ordinary retirement at 65 years of age—currently, 66 years and 2 months—, the reduction of the ordinary retirement age for flight personnel, including airline pilots.[8] This special regime is regulated by Royal Decree 1559/1986, of 28 June, reducing the retirement age of technical flight personnel,[9] which was issued in accordance with the provisions of article 154.2 of the General Social Security Law (hereinafter, GSSL)—nowadays article 206 of the GSSL.[10] This legal provision acknowledges that the minimum age allowing access to 100% of the retirement pension may be reduced by a governmental Royal Decree, as proposed by the Ministry of Inclusion, Social Security and Migrations, 'for those professional groups or activities involving exceptionally arduous, toxic, hazardous or unhealthy work, and affected by high morbidity and mortality rates, providing that the workers concerned fulfil the minimum period of activity required as per their profession or position'.

[8] As established by the judgement of the Spanish Supreme Court (Labour Chamber) of 14 December 1999 (rec. No. 1183/1999), and later on confirmed by the judgement of the Supreme Court (Labour Chamber) of 27 January 2009 (r.c.u.d. No. 1354/2008) in relation to a flight technician, Royal Decree 1559/1986, of 28 June, reducing the retirement age of technical flight personnel, is also applied to the staff of aircraft engaged in transport of passengers and cargo.

[9] Boletín Oficial del Estado (BOE, Official State Gazette), No. 182, of 1 July 1986.

[10] Promulgated by Royal Legislative Decree 1/1994, of 20 June, approving the consolidated text of the General Social Security Law (BOE, No. 154, of 29 June 1994), which has been successively modified over the years.

The specially hazardous and arduous conditions in which the work of airline pilots and, in general terms, that of aircrews engaged in commercial air transport is performed, as well as 'the premature ageing' experienced by these workers under such conditions—using the words of the Spanish Supreme Court and of the preamble to Royal Decree 1559/1986[11]—and the obligation of these crews to periodically undergo medical and psychophysical examinations that may determine the revocation of their flight licences at an earlier age than that of ordinary retirement, have justified for years the specific and restrictive treatment of their working lifespan. In the case of Spain, article 6.3 of currently in force Royal Decree 270/2000, of 25 February, laying down the conditions for the exercise of the functions of civil aircraft flight personnel,[12] establishes that the holder of a licence having attained the age of 60 years shall not act as a pilot in an aircraft engaged in commercial air transport operations, except as a member of a multi-pilot crew and providing that they are the only pilot in the crew who has attained that age. In all cases, the work of pilots aged 65 and older is forbidden. Before this norm was approved, Royal Decree 959/1990, of 8 June, on civil aeronautical licences and qualifications,[13] which was later on repealed, established that the holder of a licence aged 60 years or more could not 'act as a pilot in command or a co-pilot in air transport services performed for remuneration or hire' (article 2.2).[14]

This is the context in which this exceptional regime regulated by the above-mentioned Royal Decree 1559/1986 must be situated. In consonance with the above said, this norm considers the reduction of the minimum age of 65 required to qualify for a retirement pension that is equivalent to the time 'resulting from applying to the time effectively worked' a reduction coefficient of 0.40 in the case of pilots and second pilots (article 1).[15] In order to calculate the time effectively worked, the

[11] In the judgement of the Supreme Court (Labour Chamber), of 14 December 1999 (rec. No. 1183/1999), quoted above.

[12] BOE, No. 64, of 15 March 2000, successively amended.

[13] BOE, No. 177, of 15 June 1990.

[14] It had, in turn, repealed a Decree of 13 May 1955, on civil aeronautical qualifications.

[15] The norm establishes a 0.30 coefficient in the case of 'aircraft maintenance technician, air photography navigator-operator, technology operator, aerial photographer and air camera operator'.

As established in article 2 of Royal Decree 1559/1986, the minimum age of 65 required for entitlement to a retirement pension is reduced 'in an amount of time that is equivalent to the one resulting from applying to the time effectively worked in each professional category and specialty' specified in the Royal Decree the coefficient specified in that norm, i.e., 0.40 or 0.30. In any case, it is important to take into

regulatory norm establishes that all the time off work shall be deducted, with the only exception of 'medical leaves due to ordinary or occupational disease or accident at work, whether or not work-related', and 'those authorized by the corresponding labour regulations with entitlement to retribution' (article 3). Likewise, it establishes that 'the amount of time deducted from the retirement age of the worker […] shall be counted as having made contributions for the only purpose of determining the percentage applicable for calculating the amount of the retirement pension' (article 4).[16]

In any case, it is important to underline that the logic behind this regulatory norm is that of reducing the retirement age of pilots and co-pilots in an amount of time that is proportional to the number of years they have developed their activity. At the same time, in order to avoid the damage that a premature access to the retirement pension may cause to those professionals, the law establishes the legal fiction of counting the amount of time in which the retirement is brought forward as having made contributions. This technique is not the only one applied to groups that are legally benefitted by he reduced retirement age regime. By way of example, the case of disabled workers may be mentioned, in which Spanish legislation set an age from which the which they may retire (52 years, from the end of 2021 onwards), thus avoiding the application of reduction coefficients.[17] The decision, in this case, is based on the belief

consideration that the reduction of retirement age in Spain has been traditionally implemented in two different ways: 1) by applying reduction coefficients to the time effectively worked in situations that justify such reduction—this is the formula used in the case of pilots and co-pilots—; and 2) by establishing a minimum retirement age below the ordinary retirement age. This second mechanism is considered to be indifferent to the worker's actual situation because it does not take into account the time that the worker was exposed to the hazardous or arduous conditions of their work. In fact, this has been historically the least applied procedure.

[16] The regulatory norm establishes as well that 'for contribution purposes, both the age reduction and its calculation shall be applied to the retirement of workers to whom the provisions of this Royal Decree are applicable and under any social security regime' (article 5.1).

[17] In the last few years, the minimum age to qualify for this type of retirement has been progressively reduced. Before Law 27/2011, of 1 August, updating and modernizing the social security system, came into force, the age was set at 58 years; after the norm came into force the age was lowered to 56 years. Subsequently, Law 27/2021, of 28 December, guaranteeing the purchasing power of pensions and other measures to reinforce the financial and social sustainability of the public pension system (BOE, No. 312, of 29 December 2021), set the currently accepted age.

that disabled workers often suffer diseases that tend to reduce their life expectancy.

However, in recent years the regulatory context around this norm has changed, as has, ultimately, the perception of retirement at a lower age. In contrast, the regime applied to pilots and co-pilots has not, which, as shown below, has its consequences.

3.1. The Reform of the Reduced Retirement Age Regime by Law 40/2007 and its Regulatory Development

Law 40/2007, of 4 December, on measures concerning social security matters,[18] added a new provision to the GSSL, article 161 bis, which modified the previously in force article 161.2 of the GSSL and, in general terms, the reduced retirement age regime. Basically, Law 40/2007 integrated in a single and specific precept the treatment of early retirement and ordinary retirement at a lower age, a situation that was criticized by the legal doctrine in Spain, which rightly pointed out that the case herein discussed is not a typical early retirement case. Even if retirement takes place before the ordinary retirement age, the reduced retirement age is the one ultimately considered as ordinary for the groups that can benefit from it, in our case pilots and co-pilots.[19] In addition, it is necessary to take into account that, in contrast with early retirement, which is always penalized, ordinary retirement at a lower age is not, given that the workers retire when it is time for them to do it.[20]

In addition, the above-mentioned Law of 2007, in consonance with the legislative reforms of that period, which incentivized delayed retirement, introduced for the first time an important nuance, which had not been considered by Royal Decree 1559/1986 and implied that 'the establishment of coefficients to reduce retirement age […] shall be applied only when the working conditions cannot be modified'.[21] In other words, thenceforth the establishment of reduction coefficients by the above-mentioned Royal Decree, i.e., through the State's action, shall only be

[18] BOE, No. 291, of 5 December 2007.

[19] Martínez Barroso, M. R., 'El impacto de las jubilaciones anticipadas en el sistema de pensiones', *Temas Laborales*, No. 103, 2010, p. 117.

[20] In this sense, see González Ortega, S.: 'La jubilación ordinaria', *Temas Laborales*, No. 112, 2011, p. 141.

[21] 45th Additional Disposition incorporated to the GSSL by virtue of the 2nd Additional Disposition of Law 40/2007.

effective when adapting the working conditions to avoid insalubrity, hazardousness, arduousness or toxicity is proved to be impossible.[22]

This legal approach, which was undoubtedly novel, responded to the legislative will to limit the expectations of multiple groups to benefit from this technique, which, in practice, provides access to early retirement. The message was clear: only when the working conditions cannot be modified shall the use of reduction coefficients be approved. It should be noted that the new legal formula ultimately introduced the spirit of Law 31/1995, of 8 November, on the prevention of occupational risks into this retirement regime.[23] Both the general principle of preventive action to the work to the person (article 15.1 d) and the dispositions of article 25 according to which entrepreneurs must specifically guarantee 'the protection of workers who, due to their personal characteristics or known biological state […] are especially sensitive to the risks associated with their work'.[24]

On the other hand, the setting, for the first time, of a minimum age to qualify for this type of retirement was also novel.[25] Law 40/2007 specified that under no circumstances could the application of age reduction coefficients lead to the workers' entitlement to a retirement pension at an age below 52 years. This limitation was a turning point in the conception of this type of retirement, and was doubtlessly established in accordance with EU policies promoting the extension of working life beyond the ordinary retirement age, which in Spain remained fixed at the age of 65.

In any case, the above-mentioned Law 40/2007 (article 3.3) introduced as well a legal limitation on the use of coefficients to reduce the retirement age and to access the retirement pension, which at least in the case of partial retirement is certainly questionable. In effect, that law specified that reduction coefficients shall not be taken into consideration when proving the age required to qualify for partial retirement. In practice, this legal provision meant that pilots and co-pilots were not entitled to partial

[22] Alzaga Ruiz, I., 'La jubilación a edad reducida', in AA.VV., *La reforma de las pensiones*, Ediciones Laborum, Murcia, 2011, p. 407.

[23] BOE, No. 269, of 10 November 1995, the text of which has been amended in recent years.

[24] Maldonado Molina, J. A.: 'La jubilación a edades reducidas…', *op. cit.*, p. 221.

[25] It is important, however, to underline the existence of a specific case in which a minimum age had already been set prior to the passing of the above-mentioned Law 40/2007, and that was the case of seafarers, who for years have not been allowed to retire before the age of 55.

retirement at the ordinary retirement age if this age is reduced.[26] However, it remains unclear why a retired person over 65 years is entitled to partial retirement, while a worker who applies for early retirement for doing a hazardous, toxic, unhealthy or arduous work is not. For instance, the current IX Collective Agreement between Iberia Airlines and its pilots,[27] far from acknowledging the possibility of partial retirement to pilots aged 60 and older, recognizes instead that of remaining in active flying service by reducing their activity by 45% until they turn 65—with a proportional reduction of their retribution, so that the pilot is actually working part-time—, a situation that has nothing to do with partial retirement.[28]

Finally, it should be added that, among its novelties, this significant piece of labour legislation included a consideration[29] according to which the establishment of reduction coefficients shall 'entail the necessary adjustments in the worker's contribution to guarantee financial balance'. As it has been sometimes pointed out, this provision is 'an elusive euphemism for a more than probable increase of the amount of the social security contribution'. In any case, it underlines the fact that this regime is expected to be financially sustainable,[30] an issue on which we will insist when we comment on the 2021 reform of the social security system concerning this matter.

The reform of the GSSL promoted by Law 40/2007 was significant, and not the least so was its regulatory development through Royal Decree 1698/2011, of 18 November, regulating the legal arrangements and general procedure for setting reduction coefficients and lowering the retirement age in the social security system. This Royal Decree brought

[26] It is important to take into account as well that article 166.2 a) of the GSSL, regulating partial retirement for workers aged 61 or older, expressly forbids taking into consideration 'the anticipation of the retirement age that may apply to those concerned'. Likewise, article 166.1 of the GSSL specifies that partial retirement from age 65 onwards may occur when 'the requirements that qualify for a retirement pension are met'.

[27] Annex 2. Published on BOE, No. 128, of 27 May 2004, pp. 40071 ff.

[28] As pointed out by López Cumbre, L., 'La posibilidad de adelantar la jubilación tras la reforma de 2011', *Temas Laborales*, No. 112, 2011, p. 178, 'if partial retirement is possible for those who have attained ordinary retirement age [65 years], it should also be possible for those who are older, even if their age is below the general one', i.e., for those under a reduced retirement age regime.

[29] 2nd Additional Disposition of Law 40/2007, incorporating the 45th Additional Disposition to the GSSL.

[30] García-Perrote Escartín, I., 'La reforma de las pensiones en la Ley 40/2007, de medidas en materia de Seguridad Social', in AA.VV., *La Seguridad Social en el siglo XXI*, V Congreso Nacional de la Asociación Española de Salud y Seguridad Social, Laborum, Murcia, 2008, p. 21.

into effect the provision of the law (45th Additional Disposition) that established, by way of regulation, 'the general procedure to reduce the retirement age, providing for the conduct of studies on the statistics of accidents at work in each sector, as well as on the arduousness, hazardousness and toxicity of the working conditions, their impact on the workers' incapacity for work, and the physical requirements for the performance of the activity'.

The regulatory norm is relevant, as well as for establishing the above-mentioned general procedure, because it consolidates the approach introduced by Law 40/2007 in the GSSL in relation to the subsidiary consideration of retirement at a lower age as a formula to address situations in which workers are exposed to exceptionally arduous, toxic, hazardous or unhealthy conditions and suffer high rates of morbidity and mortality. As indicated in the preamble to the Royal Decree, 'the implementation of new coefficients shall be a proxy measure, because the workers' health shall take precedence and impose a modification in their working conditions'. The issue here is that the groups benefitted by the reduction coefficients do not seem to have significantly changed their perception of ordinary retirement at a lower age after the legislator's change of approach to it.

Without claiming to be exhaustive, a good example of the above is the already mentioned IX Collective Agreement between Iberia Airlines and its pilots. Article 140 in this agreement regulates the 'age at separation of flight services'.[31] This conventional provision and the appendix that completes it—Annex 2—consider the issue from a point of view that has remained almost unchanged over the years—see also the VII Collective Agreement of 22 April 2009,[32] or the VIII Collective Agreement of 4 April 2014,[33] which address the issue in the same terms—and can be summarized as follows:

a) At 55 years of age, the pilot may voluntarily demand to enter a situation of 'special rescission'—a kind of special unpaid leave—until the age of 65, which means that from that moment onwards the pilot shall stop working as such. In that case, the agreement (Annex 2.2) will acknowledge the pilot's right to receive from the company an amount equivalent to 100% of their retirement pension 'which they would have received from the

[31] Published on BOE, No. 217, of 7 September 2018, pp. 87498 ff.

[32] Published on BOE, No. 113, of 9 May 2009, pp. 40052 ff, which came into effect on 1 January 2015.

[33] Published on BOE, No. 128, of 27 May 2014, pp. 40071 ff.

social security system had they been 65 years or more'. This amount shall be subject to periodic revaluation by the social security system, as pensions are. In addition, a pilot in unpaid leave may subscribe a special agreement with the social security system, 'according to which the worker's contribution will be paid monthly by the company in the amount in effect at that time'. In case the pilot dies at 60 or more years, the monthly payment to which the deceased pilot would have been entitled shall be paid to their widow or widower, or, failing this, their children, until the moment in which they would have turned 65.

b) In addition to the above-described situation, the collective agreement establishes that a pilot who has attained 60 years and has not applied to a 'special rescission' shall necessarily enter a 'reserve status' in the conditions specified in Annex 2 of the collective agreement (article 140, paragraph 4), with the age limit set again at 65 (Annex 2.1). For this purpose, the Annex describes the three alternatives offered to the worker, whose decision should, in principle, be accepted by the company: 1) to remain in active service full time; ii) to remain in active service 50% of the time, with the corresponding proportional reduction of their salary, while the contribution of both parties to the Social Flight Fund and the Mutual Fund remain the same, as if the pilot were flying full time; iii) to enter the 'reserve status', a legal situation that is also made available to pilots who, having definitely lost their capacity to fly, are 55 years old or more, and apply to it. From that moment onwards, the pilot shall receive fourteen monthly payments, the amount of which will be established by the collective agreement, and shall remain affiliated to the social security system, while the company will have the right to use 'the services of the crewperson for specific counselling tasks and collaborations on the ground'. However, those professionals shall not 'under any circumstances, be allowed to occupy commanding positions in their corresponding organic unit'. In any case, the collective agreement establishes that, when a pilot aged 60 or more 'suffers psychophysical alterations that affect compliance with the conditions and requirements of their job (loss of licence), they shall automatically enter the reserve status'.

After analysing the above-mentioned agreement, it is easy to conclude that the logic behind it contradicts the one assumed by the legislator in recent years. Even if it is ultimately the pilot's decision when to separate themselves from service—insofar as their flight licence is still in effect—, the truth is that relocating the worker is considered a residual option, while modifying the working conditions to adapt them to the pilot's

personal situation so that they can maintain the same job is only possible by reducing their activity by 50%. No additional consideration is made. Nevertheless, as pointed out at the beginning of this analysis, Spanish legislation forbids pilots aged 60 or more to fly unless they are part of a multi-pilot crew in which they are the only pilot having attained that age.[34]
Royal Decree 1698/2011 not only defines, as reflected in the title, the regime and general procedure to establish reduction coefficients and lower the retirement age. It also considers and facilitates changing the already existing reduction coefficients and the minimum ages to qualify for retirement. Even though, in principle, the regulatory norm excludes its application 'to workers performing an activity for which another norm has already acknowledged the use of coefficients to reduce the retirement age or, when applicable, its anticipation' (article 1), the regulation indicates that this shall be so 'without prejudice to the provisions of the first additional disposition'. To this effect, the norm establishes that 'in cases where production processes are modified in a way that substantially alters the working conditions of a specific activity or sector, in the scale, category or specialty in relation to which the reduction coefficients or anticipation of the age of retirement are established, they may be subject to change, while respecting the situation of the workers who have developed that specific activity prior to the date in which that change becomes effective' (1st Additional Disposition, second paragraph).[35]
Two considerations can be made in relation to the group of pilots and co-pilots. First of all, according to the above-mentioned disposition, it will be possible to implement the reduced retirement age regime of those workers in the future providing that the production processes are modified so much as to 'substantially' alter their working conditions. However, and despite the generic nature of the terms used, the truth is that this legal option has never translated into a reform of the regime applied to pilots and co-pilots in these cases.
Secondly, the regulatory norm respects the expectations generated among those who have developed their professional activity within the framework of a specific reduced retirement age regime. The problem is that the legal formula is unclear, because what does it mean that the

[34] Article 6.3 of Royal Decree 270/2000, of 25 February (BOE, No. 64, of 15 March 2000, amended several times).
[35] The future modification of the reduction coefficients or the minimum age to qualify for a retirement pension is also considered in the Royal Decree in the case of groups for which those coefficients and minimum age are established according to the procedure regulated in the above-mentioned norm. See article 9.

modification will be done 'respecting the workers' situation'? Focusing on the case discussed in this work, that of pilots and co-pilots, we understand that the norm acknowledges, under a hypothetical modification to the reduction coefficients for this group of workers, the right of the workers to have the currently in effect 0.40 coefficient applied to the time of activity before the coming into force of such modification, while to the period following that change the new reduction coefficient will be applied. This logic is also behind section 5 of article 206 of the GSSL, redrafted during the reform carried out at the end of 2021.[36]

Despite the fact that Royal Decree 1698/2011 opened the door to a change in the ordinary retirement at a lower age regime of pilots and co-pilots, we cannot but highlight that this legal reform has never taken place. Therefore, the regime established in 1986 is the one still in force regardless of all technological advances in aviation, an industry that in the last thirty-five years has evolved from analogic avionics to essentially digital avionics.

3.2. The Reform of the Social Security System at the end of 2021: No News is Good News?

So far, we have seen that the reduced retirement age regime has not changed significantly in the last thirty-five years, even if the reform of the social security system undertaken in 2007 intended to update the legal treatment of this legal specialty. If anything has changed at all, it is the context where this particular legal regime unfolds, because in recent years such phenomena as the progressive increase of the retirement age or the penalization of early retirement have transformed retirement at a lower age into a particularly interesting option for certain groups of workers. In this sense, this is a legal option that, in principle, does not penalize retirement before reaching the ordinary retirement age in effect at that moment.[37] Hence the significant increase in the number of groups claiming for the implementation of the procedure established by Royal

[36] In particular, this section establishes that: 'The reviewing of the reduction coefficients used to lower the retirement age shall not affect the situation of workers who, prior to it, have carried out their activity for as much time as required to qualify for retirement'.

[37] It should also be taken into account that, ever since 2008, Spanish regulation demands attaining the corresponding age with no possibility of lowering it so that groups as the one here discussed can access other retirement options, such as partial retirement (Maldonado Molina, J. A., 'Las jubilaciones anticipadas y por edad reducida en la Ley 21/2021, de 28 de diciembre', *Revista de Trabajo y Seguridad Social. CEF*, No. 467 (January-March), 2022, p. 28.

Decree 1698/2011. These claims have been mostly unsuccessful because the list of groups benefitting from the procedure has hardly been extended in the last years, mostly incorporating law enforcement agencies.[38] In this sense, the Government's caution when it comes to extending that list, together with the complexity of the procedure to acknowledge this right to new groups, have certainly had much to do with the discrete evolution of this legal option.[39]

The reform of the social security system approved at the end of 2021 was a good opportunity to reform the current status quo.[40] However, as suggested by the title of the present section, little new can be said from the point of view that seemed to be imposing itself on our legal system through the regulatory development undertaken for the first time in 2007. After all, section 3 of article 206 of the GSSL, in the consolidated text, continues to reflect the same legal logic: 'The establishment of coefficients to reduce the retirement age shall only be applied when modifying the working conditions proves to be impossible'.

[38] In the case of local police forces, the retirement age reduction procedure regulated by Royal Decree 1698/2011 was applied. However, the Policía Foral de Navarra (Regional Police of Navarra) and the Mossos d'Esquadra (Regional Police of Catalonia) were both granted an age reduction regardless of that procedure, as set by the General State Budget Law for 2022.

In contrast with groups granted access to ordinary retirement at a lower age—three since the passing of the 2011 Royal Decree—, it is possible to count up to twenty-three groups that, in the last few years, have unsuccessfully demanded to be granted that same legal treatment. From a historical perspective, it should be kept in mind that the lowering of the retirement age on grounds of performance of specific professional activities in Spain is a legal assumption linked to the constitution of some special social security regimes (on this issue, see Barceló Fernández, J., 'Los coeficientes reductores en la edad de jubilación por razón de actividad. Del derecho al privilegio', in AA.VV., *Por una pensión de jubilación, adecuada, segura y sostenible*, III Congreso Internacional y XVI Congreso Nacional de la Asociación Española de Salud y Seguridad Social, Tomo I, Laborum, Murcia, 2019, p. 180 ff.).

[39] As pointed out by several authors—among them, Maldonado Molina, J. A., 'Las jubilaciones anticipadas y por edad reducida en la Ley 21/2021, de 28 de diciembre', *op. cit.*, p. 30—, the result of years of applying the general procedure for the establishment of reduction coefficients to lower the retirement age is frustrating, because the procedure is far too complicated and has proved to be almost unviable, for it requires the performance of previous studies on the statistics of accidents at work in the corresponding sector, as well as the intervention of various social and institutional actors.

[40] Law 21/2021, of 28 December, guaranteeing the purchase capacity of pensions and other measures to reinforce the financial and social sustainability of the public pension system (BOE, No. 312, of 29 December 2021).

In fact, the novelties are concentrated in three very specific spheres: a) the revised text of article 206 of the GSSL, which seems to relinquish the possibility of setting a fixed age from which certain workers would be able to retire—as mentioned before, this is the legal technique used in the case of disabled workers—, and confirms the use of reduction coefficients as the legal mechanism to be applied, as has been for pilots and co-pilots since 1986; b) the 2nd Additional Disposition of Law 21/2021, which recommends the Government the development, within the terms agreed with the most representative labour unions and business organizations, of the regulatory framework of the failed Royal Decree 1698/2011, thus highlighting the need to reform a regime—in particular, the procedure to grant access to this type of retirement to certain groups—that, as pointed out before, has not been effective in acknowledging the entitlement of those groups to retirement at a lower age or in updating, as in the case of pilots and co-pilots, the conditions under which retirement may be accessed; c) finally, the new 206.5 section of the GSSL, which establishes that the coefficients to reduce the retirement age 'shall be reviewed every ten years, according to the procedure determined by the regulation'. This last aspect is the most interesting one for pilots and co-pilots.

As pointed out before, section 5 of article 206 of the GSSL somehow responds to 'the effects that the new technologies may have on the arduous or hazardous nature of an activity, which can determine changes in the production systems leading to a reduction of efforts or risks in consonance with the philosophy that promotes prevention over reparation, adapting the work to the person, and preventing, therefore, arduous work from appearing to be an unalterable situation during a person's working life', the fatigue caused by it compensated with the lowering of the retirement age.[41] We believe that this picture is particularly accurate in the case of pilots and co-pilots, especially because it puts the focus on an issue that, in our opinion, has not been sufficiently valued, which is the impact that digital technology has on the work of these professionals. In other words, it can hardly be argued that the technological evolution of passenger air transport services in recent years has affected the way and conditions in which these professionals carry out their work. And yet, the message behind the fact that the retirement regime applicable to pilots and co-pilots has not been modified in the last thirty-five years seems to be exactly the opposite.

[41] Maldonado Molina, J. A., 'Las jubilaciones anticipadas y por edad reducida en la Ley 21/2021, de 28 de diciembre', *op. cit.*, p. 34.

The last novelty contained in Law 21/2021 refers to the contribution required to, in our case, pilots and co-pilots who wish to have access to this particular type of retirement, and represents a significant shift in the perception of it. With regard to this, it is important to remember that Recommendation No. 12 of the Toledo Pact, in the 2020 version, underlines 'the need to improve the regulatory framework to favour the identification of these groups, so that the function of protecting those whose health suffers and/or see their life expectancy reduced under such negative circumstances is fulfilled'.[42] However, Law 21/2021 has been criticized[43] for introducing one section in article 206 of the GSSL that literally establishes the following: 'In order to maintain the financial equilibrium of the system, the application of reduction coefficients shall entail an increase in the contribution to the social security system that shall vary according to the group, sector and activity specified in the corresponding norm, in the terms and conditions also established therein. This increase shall consist of an additional contribution applied to the basic contribution that covers common eventualities provided by both the company and the worker'.

Suddenly, the need to ensure the financial equilibrium of the social security system and the sustainability of the pension system come to the fore. The norm suggests that, in the medium term, the legislator may increase the contribution required, in our case, from pilots and co-pilots as well as from the airlines, in order to financially balance the realization of a legal possibility that has been acknowledged as a right in our country for decades. The challenge that currently characterizes the social security system is felt again in this case: 'to find a retirement model that, while responding to the financial needs of the system, is appealing to the worker'.[44]

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[42] It is important to remember that the well-known Toledo Pact is a political agreement approved by the Spanish Parliament in 1995 and subsequently monitored by a parliamentary commission. It set out the guidelines for the future legislative reforms of the social security systems. Its latest version, dating from 27 October 2020, may be consulted in: https://www.congreso.es/public_oficiales/L14/CONG/BOCG/D/BOCG-14-D-175.PDF

[43] Cano Galán, Y., 'La reforma de las pensiones: el nuevo marco legal de la jubilación', *Revista Aranzadi Doctrinal*, No. 3 (March), 2022, p. 14.

[44] Ortiz de Solorzano Aurusa, C., 'Las recomendaciones del Pacto de Toledo sobre la edad de jubilación en un sistema abierto y flexible de acceso a la pensión', in Hierro, F. J. (dir. and coord.), *Perspectivas jurídicas y económicas del 'Informe de Evaluación y Reforma del Pacto de Toledo' 2020*, Thomson Reuters Aranzadi, Madrid, 2021, p. 554.

In any case, as the reader will probably have observed, the actual implementation of the reduced retirement age regime is again postponed—pending a later regulatory development that should be agreed upon by the most representative business organizations and labour unions. Pilots and co-pilots will, for now, continue to be subject to a regime that is already familiar to them given its inalterability over the years.

4. The Extension of Working Life: Reflections on the Most Recent Case Law of the Court of Justice of the European Union and its Consequences from the Point of View of Antidiscrimination Protection

The extension of the working life of pilots and co-pilots is also an interesting issue to discuss from the point of view of Directive 2000/78/EC, particularly in view of the jurisprudence of the Court of Justice of the European Union (hereinafter, CJEU) in the last few years. In fact, the three judgements analysed below are a very interesting corpus of jurisprudence in what regards the matter here studied, because it somehow responds to the most common cases affecting this professional activity.

First of all, the judgements delivered in the Prigge (2011)[45] and Fries (2017)[46] cases address issues related to the forced retirement of pilots working in passenger airlines.[47] Secondly, the judgement in the Cafaro (2019)[48] case delves into the legal problem of forced retirement among pilots who work for airlines specialized in providing services to national intelligence agencies, in this case the Italian secret services, and are therefore very much linked to the sphere of national security. Finally, the judgements given in the Prigge (2011) and Cafaro (2019) cases share a particular connection, insofar as the latter relies on the former to draw a

[45] Judgement of the Court of Justice of the European Union (Grand Chamber) of 13 September 2011 (Reinhard Prigge and others v. Deutsche Lufthansa AG, C-477/09).

[46] Judgement of the Court of Justice of the European Union (First Chamber) of 5 July 2017 (Werner Fries v. Lufthansa CityLine GmbH, C-190/16).

[47] For the judgement of the Fries case, see a specific comment from the perspective of extending the working life of pilots in Elorza Guerrero, F., 'Sobre la capacidad de los pilotos que hayan cumplido los sesenta y cinco años para realizar "vuelos en vacío" o "vuelos de traslado", así como ejercer actividades de instructor y/o examinador a bordo de una aeronave', *Revista de Derecho del Transporte*, 2017, No. 20, p. 225 ff.

[48] Judgement of the Court of Justice of the European Union (First Chamber) of 7 November 2019 (Gennaro Cafaro v. DQ, C-396/18).

totally opposite conclusion, basically because the pilots' professional development was completely different in the two cases, as was the legal treatment of the aviation regulatory field.

In the judgement delivered in the Prigge case (2011), the CJEU concluded that setting the age of 60 years as a limit on the exercise of the pilot's activity cannot be considered a necessary measure in terms of public safety and healthcare, in the sense described in section 5 of article 2 of Directive 2000/78/EC. The reason for which it is not acceptable to forbid the pilots to perform their activity after they have attained the age of 60 years is basically that this measure may be regarded as disproportionate in the sense indicated in section 1 of article 4 of Directive 2000/78/EC. Annex I, point FCL.065 of the Regulation (EU) No. 1178/2011, establishing that pilots aged 60 or more can only command aircraft engaged in commercial air transport operations as members of a multi-pilot crew and providing they are the only crew member having attained that age may be included among the less drastic, though limiting, measures.

Years later, the judgement in the Fries case (2017) estimated that, according to Annex I point FCL.065 of Regulation (EU) No. 1178/2011, pilots working for commercial airlines and having reached the age of 65 years could not be denied the possibility of commanding 'empty flights' or 'transfer flights' in which neither passengers, nor cargo, nor mail were carried, or of acting as instructors and/or examiners on board aircraft without being a crew member. This was of course an interesting contribution, given the existing legal restrictions to the extension of the working life of those professionals. From this perspective, the doctrine of the Prigge case (2011) can also be considered a valuable contribution insofar as it prevented the possibility of collective agreements forcing the early retirement of pilots aged 65 or more.

As regards the judgement in the Cafaro case (2019), it delved into a new dimension in aviation, connected to activities developed in the sphere of national security, on which there are no specific provisions in International Law—basically, ICAO standards— or in EU Law limiting pilot licences and, therefore, the pilots' capacity to carry out their activity on the grounds of age. As it has been graphically pointed out, 'the age limit is of course not 65, as in commercial aviation',[49] although the judgement pointed out that the states have a very broad margin of

[49] Casas Baamonde, M. E. and Ángel Quiroga, M.., 'Supuesta discriminación por razón de edad: jubilación forzosa de pilotos de aeronaves a los 60 años', *op. cit.*, p 13.

discretion, precisely because of the lack of actual legal criteria at the international or EU level. In any case, the judgement referred to the action and criterion of the national legal bodies—acknowledging therefore the existence of legal protection even in cases linked to national security, which is usually a fairly vague sphere—, which, based on the requirements of the corresponding activity, will decide whether age may affect the pilots' professional performance or not.[50]

Oddly enough, the Spanish Constitutional Court (Judgement 22/1981), after analysing the 5th Additional Disposition of Law 8/1980 (forced retirement) from a constitutional perspective, dismissed the presumption of a person's ineptitude because of their age. However, EU jurisprudence shows that, whatever the nuances, there is indeed a presumption that pilots become unfit to perform certain activities as part of their service after they reach certain age. In fact, comparing the judgements of the Prigge (2011) and the Cafaro (2019) cases has led some renowned specialists to argue that 'it is doubtful that the physical conditions required from pilots commanding "state flights" or flights related to the national security of a state—which is not the same thing—, should not, in what concerns the prevention of human failure, be the same as those demanded from pilots commanding commercial flights, on whose expertise and excellent physical conditions depends the safety of so many people'.[51] The same observation can be made in relation to the Fries case (2017), because it is important to keep in mind that the so-called 'empty flights' or 'transfer flights' will frequently share the airspace with commercial flights

[50] This solution has led, for instance, Rojo Torrecilla, E., 'UE. Pilotos de aeronaves y extinción forzosa de la relación laboral al cumplir los 60 años. ¿Discriminación por razón de edad o protección de la seguridad nacional?. Notas a la sentencia del TJUE de 7 de noviembre de 2019 (asunto C-396/18)', in http://www.eduardorojotorrecilla.es/2019/11/ue-pilotos-de-aeronaves-y-extincion.html, to qualify the this approach to this case as 'oscillating jurisprudence', in the sense that it accepts the possibility of terminating the pilot's contract after they attain a certain age, given the specific conditions of their activity, and at the same time refers to the national legal body as the one responsible to solve the case and ponder whether age affects the worker's performance. The issue is that, as pointed out by Sanguineti Raymond, W., 'La edad: ¿cenicienta de las discriminaciones?', *op. cit.*, p. 15, at least in the case of Spain, 'the exact scope of the strict canon that needs to be applied for the assessment of the constitutionality of differences in treatment on the grounds of age having an impact on labour relations is still to be defined', and this theoretical construction is obviously necessary to elaborate a coherent doctrine on the matter. Meanwhile, the courts just do their best every time they have to judge one of these cases.

[51] Casas Baamonde, M. E. and Ángel Quiroga, M., 'Supuesta discriminación por razón de edad: jubilación forzosa de pilotos de aeronaves a los 60 años', *op. cit.*, p. 12.

carrying passengers and may, therefore, be the origin of potential air accidents. For this reason and despite being a doctrine that favours the extension of the pilots' working life, the diverging consideration of age is not fully understandable.[52] Ultimately, the existing jurisprudence may be thought to express what has been called 'acceptance of the game of presumptions—topical associations that eventually become apparently undisputable normative truths'—,[53] which at the end of the day leads to the consolidation of contradictory situations as the ones described herein.

Years ago, Rodríguez-Sañudo started his analysis on the termination of labour relations on the grounds of age by making an indisputable assertion: 'A worker's age is, as is well known, a circumstance that modifies their ability to act'.[54] And he finished his work by saying that addressing this issue within the sphere of positive law requires taking into consideration 'not only the legal problems associated with the extinction of the relation itself, but first and foremost the situation of the retired worker in its double—social and economic— dimension'.[55] It is undeniable that the doctrine around the retirement of pilots contradicts the EU policy on the extension of working life.[56] Far from accepting this state of affairs as unchangeable, we understand that it is time to provide effective solutions to this unsatisfactory situation, as evidenced by the successive legal conflicts that periodically reach not only the CJEU, but also the national courts.[57] All in all, technological advances in the field of

[52] Elorza Guerrero, F., 'Sobre la capacidad de los pilotos que hayan cumplido los sesenta y cinco años para realizar "vuelos en vacío" o "vuelos de traslado", así como ejercer actividades de instructor y/o examinador a bordo de una aeronave', *op. cit.*, pp. 236–237.

[53] Fita Ortega, F., 'Non-discrimination of older workers in the Spanish and the European Union context', *Labos: Revista de Derecho del Trabajo y Protección Social*, No. 1, 2020, p. 87.

[54] Rodríguez-Sañudo Gutiérrez, F., 'La extinción de la relación laboral por edad del trabajador', *Revista de Política Social,* 1973, No. 97, p. 23.

[55] Rodríguez-Sañudo Gutiérrez, F.: 'La extinción de la relación laboral por edad del trabajador', *op. cit.*, p. 67.

[56] See Casas Baamonde, M. E. and Ángel Quiroga, M., 'Supuesta discriminación por razón de edad: jubilación forzosa de pilotos de aeronaves a los 60 años', *op. cit.*, p. 12.

[57] As an invitation to reflect on this and despite the assertion of the Supreme Court that pilots and air traffic controllers are subject to totally differentiated regimes, we would like to comment on the way a law suit concerning the forced retirement of an air traffic controller has recently been solved. Judgement of the Supreme Court No. 164/2020, of 21 February, supported the decision of the company ENAIRE to forcefully retire one worker, by virtue of the 4th Additional Disposition of Law 9/2020, of 14 April, regulating the provision of air traffic services, which established the obligations of civil providers of such services in addition to setting certain working conditions for civil air traffic controllers. The judgement underlined that 'the constitutional doctrine indicates that it is unquestionable that certain activities demand from the worker some physical or

aviation—the automatic pilot is possibly the most obvious one—should favour the extension of the pilots' working life, provided they wish to extend it and are personally fit for it.

5. Final Reflections

Following the call for papers for this monograph issue, we were invited to reflect on the discriminatory practices resulting from the use of technology, and on how labour and antidiscrimination legislation can protect workers from them. In the previous pages, we have tried to describe the paradox associated with the technological evolution of commercial aviation and the legal regime that regulates the right of airline pilots and co-pilots to either retire before the ordinary retirement age because of the arduous nature of their profession, or to extend their working life after they attain 60 or, in certain cases, 65 years of age. Although in the last seventy years the evolution of aeronautical technology has been undeniable, the legal restrictions to exercise that right, which are justified in terms of aviation safety, continue to act as an immovable retaining wall that complicates both the early retirement of pilots and co-pilots and the possibility of extending their working life. From the perspective of article 6 of Directive 2000/78/EC, it is important to be aware that age is addressed in deliberately ambiguous terms when it comes to justifying differences of treatment. Consequently, a more concrete and precise regulation is not to be expected in the medium term, especially considering how in recent years the CJEU has interpreted the Directive and, more specifically, article 6 of it. The court's position has been oscillating,[58] to say the least, and has often reflected a

intellectual conditions that tend to decline over time. Therefore, it seems reasonable to presume that a person's capacities will have diminished at a certain age and, on that basis, establish the termination of a labour relation'. However, in this specific case, the air traffic controller had occupied and expected to continue occupying a non-operational post, the requirements for which—and, consequently, its arduousness—were not necessarily the same as those demanded to work in the air traffic control tower. In the same line, the Supreme Court issued two judgements on 18 February 2020 (No. 150/2020 and No. 151/2020). All three judgements shared the same doctrine and evidenced the significant litigiousness around this issue. Their severity, however, clashes with the controllers' will, a situation that illuminates that of pilots and co-pilots.

[58] Together with judgements that rigorously deal with the issue, such as the one delivered in the Mangold case (2005), there are others that do not address unequal treatment as affecting the principle of non-discrimination, but as a question related to the typical dynamics of the labour market. This is the case of the judgements given in the Palacios Villa (2007), Rosenbladt (2010) and Abercombie (2017) cases.

relaxation of the requirements that any measure or practice meant to define the exceptions to the application of the fundamental right to no discrimination based on age should meet, especially when the purpose is to fight against indirect discrimination. This contemplative attitude of not only the CJEU but also the Spanish Supreme Court,[59] observed, for instance, whenever they address the possibly discriminatory nature of forced retirement,[60] has led more than one jurist to rightly estimate that, even if the prohibition of age discrimination is considered a fundamental right in the European Union, this type of discrimination has become the 'Cinderella' of discriminations in the current legal practice, because the level of protection provided against is much lower than for other discriminations, which are not subject to so many exceptions.[61] This is hardly surprising, considering that the legal doctrine has for some time now denounced the existence of some sort of hierarchy of discriminations established by the EU, where gender discrimination is granted the maximum protection and age discrimination receives the minimum. This is evidenced by the unequal treatment that the Directive admits in the case of age, which complicates the identification of indirect discrimination situations, but also of direct ones, 'thus totally undermining the intense protection granted to this type of discrimination in the legal doctrine applied to gender'.[62] This view, reflected in EU legislation, has been transferred to the CJEU jurisprudence, as well as to the action of Spanish courts. Consequently, certain sectors have discussed the convenience of applying the parameters used to address unequal treatment on grounds of sex to unequal treatment on grounds of age.[63]

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[59] Nevertheless, certain sectors of the legal doctrine have rightly argued that, while EU regulation on age discrimination has had a clear impact on Spanish legislation and jurisprudence, the influence of EU jurisprudence has been uneven (see Manerio Vázquez, Y., 'La aplicación de la Directiva 2000/78/EC por el Tribunal de Justicia: avances recientes en la lucha contra la discriminación', *Nueva Revista Española de Derecho del Trabajo*, 2016, No. 191, pp. 146 ff.).

[60] See judgements 280/2006 and 341/2006 of the Spanish Supreme Court; also, judgement 66/2015 of the Constitutional Court.

[61] Sanguineti Raymond, W., 'La edad: ¿cenicienta de las discriminaciones?', *op. cit.*, p. 8.

[62] Ballester Pastor, A., 'Género y edad: los dos extremos del principio antidiscriminatorio comunitario', in AA.VV., *La relevancia de la edad en la relación laboral y de Seguridad Social*, Aranzadi Thomson Reuters, Madrid, 2009, p. 35.

[63] See, for instance, Fita Ortega, F., 'Non-discrimination of older workers in the Spanish and the European Union context', *op. cit.*, p. 87. In this sense, this jurist echoes the proposition made by González Ortega, S., 'La discriminación por razón de edad', *Temas Laborales*, 2001, núm. 59, pp. 112 -113, who raised the question of the convenience of

In any case, until the Directive is reformed to bring the protection against age discrimination closer to that which is granted to gender discrimination, or a change of attitude occurs in the courts in relation to the criteria that are used to detect the existence of age discrimination, both direct and indirect, we believe it is reasonable to ask what else can be done. We can start by saying that, as scientific research has shown more than once, 'age is a highly individualized phenomenon, which depends to a large extent on each person',[64] and, consequently, the physical and cognitive decline that may happen with age is unlikely to be identical for all people, although it is obvious that the passing of time implies a progressive deterioration of a person's faculties, regardless of the pace at which it happens.

Focusing on the situation of pilots and co-pilots, we will start by referring to the legal treatment given so far to ordinary retirement at a lower age in our country. We believe this regime, which is ultimately protected by the provisions of article 6.2 of Directive 2000/78/EC—establishing that the setting by the different states of a specific age at which professionals registered under certain social security regimes are entitled to retire cannot be considered discriminatory—was interestingly and accurately reformulated during the 2007 reform of the social security system. As pointed out before, that reform consolidated the idea that the use of reduction coefficients, when applicable, is an appropriate procedure only when arduous working conditions cannot be modified. In fact, the preamble to Royal Decree 1698/2011 underlined that the procedure to establish reduction coefficients described in the regulatory norm was originally intended, as a result of the studies required prior to the establishment of those coefficients, to induce 'an improvement of the working conditions'. However, in no way did this reform modify the regime in what concerns the reduction coefficients applicable to pilots and co-pilots. It is true that article 1 of Royal Decree 1698/2011 specified that 'workers performing an activity for which another norm has already acknowledged the use of coefficients to reduce the retirement age' are excluded from the provisions of this regulatory norm. Thus, the scheme applied to pilots and co-pilots remained unaffected. But it is also true that the norm stated that groups for which reduction coefficients had already been established are entitled to request that they be modified through the procedure described in the 2011 norm.

applying the parameters used to address differences in treatment based on sex to differences in treatment based on age to avoid unwanted effects.

[64] Sanguineti Raymond, W., 'La edad: ¿cenicienta de las discriminaciones?', *op. cit.*, p. 2.

As mentioned before, nothing of this has happened. In this sense, the social security reform approved at the end of 2021, the effective development of which has been postponed for an indefinite period of time, is a new opportunity to bring research on the impact that the work environment and the activity of flying aircraft have on pilots and co-pilots up to date. In fact, we understand that article 206.5 of the GSSL, according to which reduction coefficients shall be revised every ten years through the procedure determined by the regulation, is especially interesting, because in the medium term it should lead to the periodical updating of the studies on the impact that the activity of aviation has on pilots and co-pilots and on whether, for instance, technological evolution justifies the continued use of 0.40 as the reduction coefficient.

As regards the extension of pilots' working life, and regardless of the legislation that, in Spain, promotes the active retirement of workers, it seems clear that, as long as the ICAO does not modify its position in relation to the age at which pilots should retire, EU legislation will not open up to other considerations, especially when the CJEU—remember the doctrine established in the judgement of the Prigge case—has incorporated, without discussion, the norm that this international organization established through its JAR-FCL 1. In any case, we hope that the decision on whether or not a pilot is fit to fly at 65 years of age or more will someday be an individual one, based on a personalized assessment. All in all, the assessment procedure already exists and pilots need to undergo periodic controls to determine whether they can keep their licence. It would be easy to repeat those controls for pilots who are considering the possibility of flying beyond the age of 65.

In our opinion, the conventional treatment given to Iberia pilots of advanced age—between 55 and 65 years old—leaves much to be desired in the sense of allowing the possibility of extending their working life. As mentioned before, the collective agreement of this airline with its pilots grants them the possibility of entering a reserve status. But this only a prerogative of the firm, not the right of the workers, and only for the purpose of the pilot performing counselling tasks and collaborations on the ground, dismissing the fact that the CJEU judgement in the Fries case (2017) admitted that pilots, not only aged 55 to 65, but also over 65, can command 'empty flights' or 'transfer flights' and work as instructors or examiners on board aircraft. In this sense, we believe there is room for the development of relocation policies to permit the pilots who wish it to continue their activity in accordance with the companies' needs and for as long as their psychophysical aptitudes allow it. Milestones such as flying accident No. 1549 of US Airways (2009), which was considered by the

National Transportation Safety Board (NTSB) of the United States as 'the most successful water landing in the history of aviation', have taught as that sometimes experience can be decisive when it comes to facing very difficult situations in flight that technology cannot solve on its own, at least for now.[65] As acknowledged by the CJEU in its judgement delivered in the Fries case (2017), 'the competence of these specialists [the pilots] remains one of the principal guarantees of the reliability and safety of civil aviation'.

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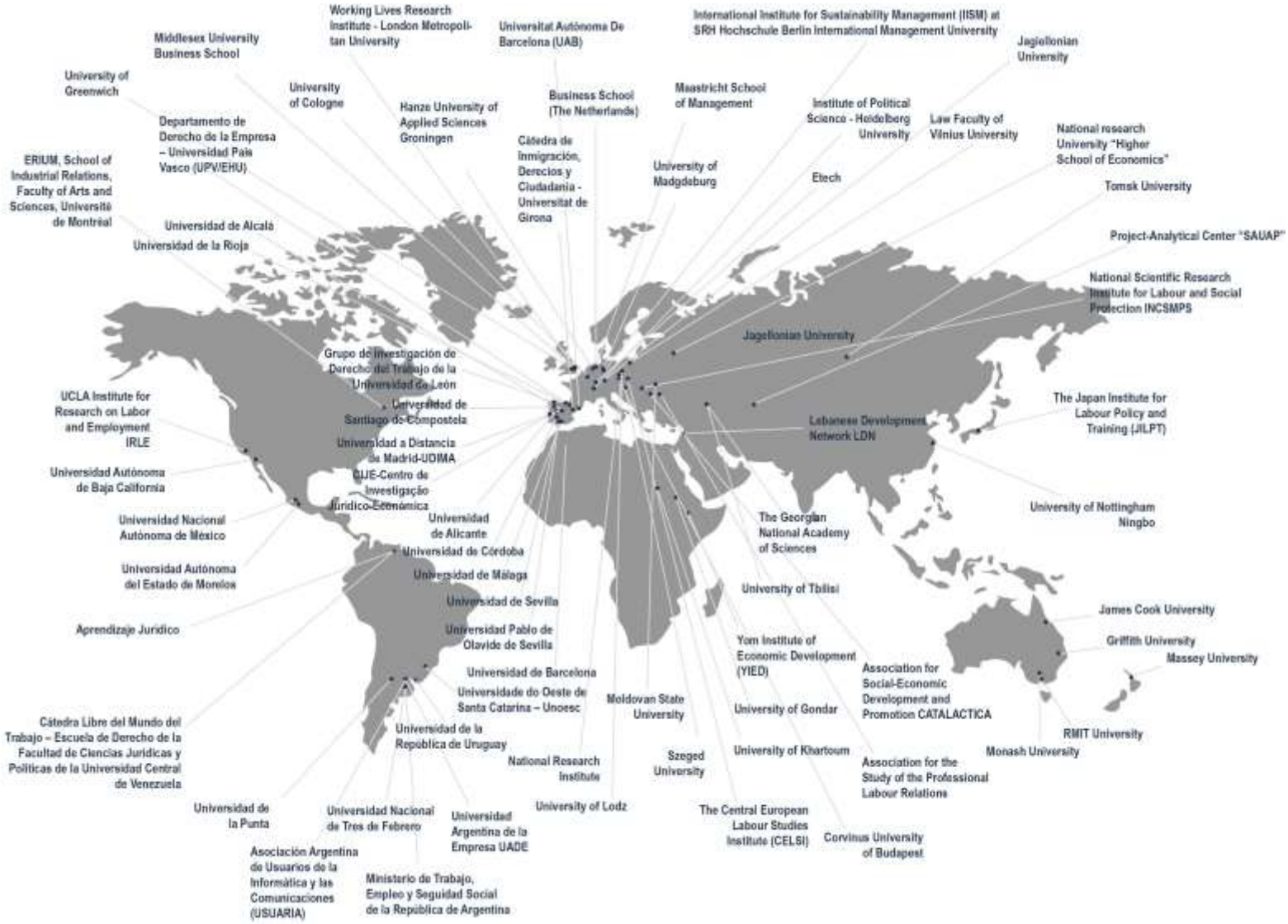

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