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on the implementation of EU law on equal opportunities and anti-discrimination**

**DISCUSSION PAPER
AGE DISCRIMINATION**

The content of this discussion paper has been drafted by Eirini-Maria Gounari (Migration Policy Group), managing editor of the European Network of Legal Experts in the non-discrimination field, and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities

Age discrimination: How old is too old?

Age discrimination is generally based on prejudices in relation to a person's age. While it affects people at all stages of their working lives, difficulties experienced in selection, development, and promotion can be particularly acute at the two extremes of the age spectrum. Prior to the existence of Directive 2000/78/EC, age discrimination in the workplace was rationalised and justified, being related to an older person's cognitive, physical skills, and decision making activities.

In most cases, age discrimination in the workplace is based on prejudiced attitudes, when people determine that everyone in a certain age group is going to act the same way. Manifestations of age discrimination can be subtle or unconcealed; typical actions might include refusing to hire or promote older workers, curtailing their employee benefits, limiting their training opportunities or limiting their job responsibilities and duties. Older workers may be targeted in reductions of the work force or may be encouraged to retire. Exit incentive programmes may deny valuable additional benefits to an older worker and early retirement incentives may pressure older workers to retire prematurely. Incentive benefits may be reduced for people who continue working beyond mandatory retirement age. All of these actions reinforce a stereotype of older workers as the most dispensable in the workforce.

In addition, as people's identities are, more often than not, complex and multi-layered, individuals may also experience discrimination due to a combination of several grounds. Women are usually more prone to discrimination in employment than men and can be victims of unequal treatment against dual or triple grounds, not only in relation to their age but also to their gender; and it is noteworthy that a large number of women is discriminated not only when they approach seniority and retirement, but also during young age, in relation to motherhood, existing or potential. Unfortunately, there is still a significant gap between legislative reforms and the attitudes of closely involved actors and of the society in general, which, when focuses its attention on people that belong to these groups, it tends to be in stereotypical ways that express more about the fears and prejudices of the 'mainstream' public than it does about the individuals, their potential and their positive contributions to society.

Justified difference of treatment on grounds of age

a) Social and employment policy objectives:

Especially concerning differences of treatment on the ground of age, the first subparagraph of Article 6(1) of Directive 2000/78/EC stipulates that such inequalities will 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". The second subparagraph of Article 6(1) provides several examples of differences of treatment having characteristics such as those mentioned in the first subparagraph and, therefore, compatible with the requirements of Community law.

This article has given rise to a number of ECJ judgements discussed further below.

b) Occupational requirements:

The Employment Equality Directive prohibits less favourable treatment in employment and occupation on grounds of age; however, it does allow for age-based employment decisions that are justified as a bona fide occupational requirement (Preamble Recitals 18, 23, 25, Art. 4). These are circumstances where it is believed that an individual's age can affect job performance. Occupational requirements are primarily used in positions involving public safety, such as police, prison, emergency services or the armed forces. In order for this difference of treatment to be justified, it has to be reasonably necessary to the essence of the employer's business and to rely on age-based criteria. The complainant does not need to prove that age was the *only* factor motivating the employer's decision, but must establish that age was one of the determining factors guiding the employer's actions. Once the complainant establishes a <http://www.answers.com/topic/prima-facie> prima facie case, the burden of evidence shifts to the employer, who must provide a legitimate, non discriminatory reason for the employee's demotion or discharge. In fact, the employer needs to be able to show that all or nearly all of the workers above a certain age lack the qualifications for the particular job or show that it is highly impractical for the employer to perform individual tests in order to determine whether each person possesses the necessary qualifications for the particular position.

In general, an employer seeking to rely on the occupational requirements must show that its age classification is reasonably necessary to the safe and proper performance of the job in question. Specifically, the employer must show either: a) that it is reasonable to believe that all or most employees of a certain age cannot perform the job safely, or b) that it is impossible or highly impractical to test employees' abilities to tackle all tasks associated with the job on an individualized basis (for instance firefighters, police forces, army).

Mandatory retirement age

Recital 14 of the Preamble stipulates that "This Directive shall be without prejudice to national provisions laying down retirement ages". The European Court of Justice clarified in *Palacios de la Villa* (C-411/05) that this Recital "merely states that the directive does not affect the competence of the Member States to determine retirement age and does not preclude the application of the directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached" and that the Directive is applicable to situations such as the case concerned, therefore further elucidating its scope of application.

The Court ascertained that the prohibition of any discrimination on grounds of age does not preclude a national law allowing compulsory retirement clauses to be included in collective agreements, where such clauses provide that workers must have reached retirement age, set at 65 by national law, and fulfilled the conditions set out for entitlement to a retirement pension under their contribution regime, provided that

- the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market (here the employment of younger persons), and
- the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose (in particular age should not be used as sole criterion, but combined with others, such as here entitlement to full pension).

In *Mangold v Helm*¹ the Court underlined that the Member States enjoy a broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy and stated that observance of the principle of proportionality requires every derogation from an individual right to reconcile the requirements of the principle of equal treatment with those of the aim pursued. However, it found that the German legislation in question failed to objectively justify that, the fixing of the age threshold, regardless of other considerations linked to the structure of the labour market or the personal situation of the person concerned, was objectively necessary to increase the inclusion of older worker in the labour market.

In another case regarding fixed retirement age, the *Incorporated Trustees of the National Council for Ageing (Age Concern England), v Secretary of State for Business, Enterprise and Regulatory Reform*², the Court examined whether the scope of Directive 2000/78/EC extends to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement, if they were introduced before or after the adoption of the Directive; also if Article 6(1) of the Directive permits a general justification of differences of treatment on grounds of age or whether it requires Member States to specify the kinds of differences of treatment which may be justified by means of a list or other measure which is similar in form and content to the list in Article 6(1).

The ECJ confirmed its *Mangold* ruling as regards the broad discretion of the Member States when choosing the means to achieve their social policy objectives, but held that this discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age.

¹ Case C-144/04, (2005) ECR I-9981.

² Case C-388/07, Judgment of 5 March 2009.

It concluded that Article 6(1) of Directive 2000/78 offers the Member States the discretion to provide for certain kinds of differences in treatment on the ground of age if they are “objectively and reasonably” justified by a legitimate aim, but it imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.

National developments on age discrimination

There has been a gradually increase over the years of cases concerning age discrimination that are brought at the national courts and Equality bodies (and to the ECJ through preliminary references). One complaint was against an insurance company, which refused to make a contract due to age of the applicant; another one alleged unfair dismissal, formally on redundancy grounds, but actually on the grounds of age, and the court declared the statistics submitted by the applicant to be the key proof in the case. Other complaints concerned age limit for entrance in civil service, violation of the principle of equal pay for equal work on the grounds of age, reaching the retirement age and entitlement to a pension were the reasons of the termination of the labour contract, and complaints regarding collective redundancies in which the employees dismissed were selected solely on the grounds of age.

All these cases illustrate how the ground of age has started to be seriously considered as a discriminative factor by employees and national courts, which carefully examine all measures taken by employers that might constitute unlawful treatment and have also started to accept statistics as key evidence that allows for the shift of the burden of proof. The lawfulness of the mandatory retirement age still remains to be challenged, but the ECJ case law can be expected to provide increased guidance in the future. However, it should be noted that age discrimination exists in many areas of life and not only employment and does not only cause personal hardship and injustice but also harms the economy; these problems will hopefully be remedied by the adoption of the new directive covering discrimination on other fields apart from employment.

Questions:

How, according to your opinion, can mandatory retirement ages be objectively justified under the Employment Equality Directive?

Are you aware of any special measures, proactive legislation or affirmative action programmes for the protection against age discrimination?

Are any age limits in order to enrol in a particular profession in your country?