



AGE AND EMPLOYMENT

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Cloisters

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Age and Employment

- Report on Age and Employment prepared on the authority of the European Network of Legal Experts in the non-discrimination field.
- Based on country reports with a cut-off date of 31/12/2009.
- Main points of interest arising from the reports:
 - (a) justification of direct age discrimination;
 - (b) specific example of minimum/maximum ages for entry to professions and retirement ages.

Justification of direct age discrimination

- Long-standing assumption that discrimination on grounds of age is valid and useful.
- Many entrenched practices are directly discriminatory on grounds of age, e.g.:
 - retirement ages (state and employer-specific);
 - minimum and maximum ages for entering professions;
 - pension ages;
 - benefits or special conditions for older/younger workers.

Justification of direct age discrimination

Directive makes clear that *some* direct age discrimination may be valid:

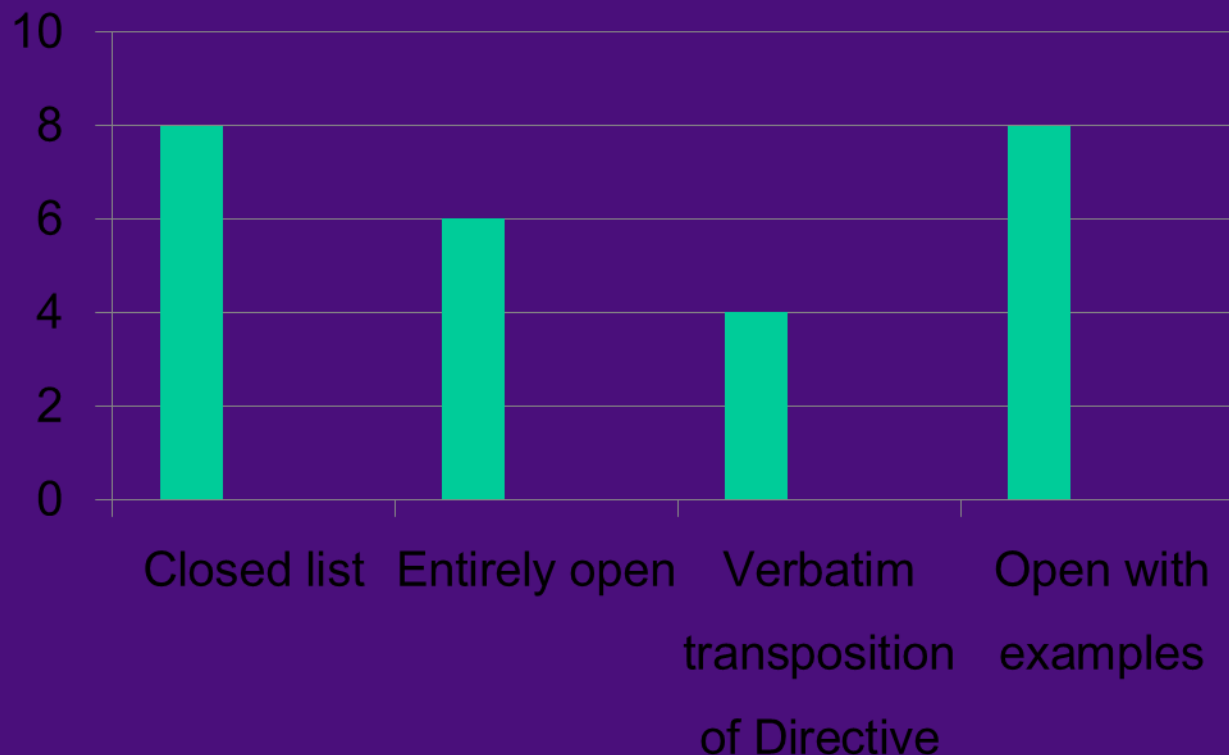
“Member states may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives,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

Justification of direct age discrimination

- Lack of clarity in the Directive?
- Are public interest/social policy aims required for justification, or will a broader range of aims be considered legitimate as in the case of indirect discrimination on other grounds?

Justification of direct age discrimination

How have the justification provisions been
transposed into domestic law?



Occupational Pension Schemes: a contrast

- Art 6(2) sets out clear exceptions to the prohibition of direct age discrimination in relation to occupational pension schemes.
- The vast majority of reporting states simply transposed these exceptions into national legislation, resulting in greater uniformity across the Member States.

Minimum/ maximum ages

- Art 6(1) specifically states that the following may be justified:
 - fixing of minimum ages/seniority/experience for access to employment or particular conditions,

and/or
 - fixing of maximum ages for recruitment.
- All reporting states have taken advantage of these provisions.

Minimum/ maximum ages

- Majority of reporting states set a minimum age for employment, ranging from 15 to 18, with exceptions e.g. for the performing arts.
- 13 states have made general provision for the fixing of minimum and maximum ages for entry to employment/training, with a requirement for justification.
- Some states have legislation permitting a minimum/maximum age for entry to particular professions (usually the public service) without the need for justification in the individual case.

Retirement ages

- Article 6 contains no reference to the linked question of retirement ages, but recital (14) in the preamble to the Directive states that it is:

“without prejudice to national provisions laying down retirement ages”

- CJEU held in *Palacios de la Villa v Cortefiel Servicios SA* that retirement ages are subject to the direct age discrimination provisions of the Directive.

Retirement ages

- Only a minority of reporting states (6) impose a blanket mandatory retirement age, and in 4 of those cases, employment can be extended by agreement between employer and employee.
- However, most states have a mandatory retirement age for public servants, or certain categories of public servants.

Has the Directive changed national practice?

- Almost all of these national provisions permitting the use of minimum/maximum ages and retirement ages pre-date the implementation of the Directive.
- The country reports show that little consideration has been given to whether such provisions comply with the Directive.



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Has the Directive changed national practice?

Some exceptions:

- Austria: compulsory retirement for civil servants ruled unconstitutional in 2003;
- Belgium and the Netherlands: legislation being screened for potential age-based discrimination;
- Denmark: discussion of abolishing mandatory civil service retirement at 70;
- France: collective agreements fixing retirement ages between 60 and 65 rendered invalid from 2006;
- Germany: abolition of retirement age of 68 for physicians, dentists and psychotherapists from 2008.



Has the Directive changed national practice?

- Country reports therefore suggest that the Directive has had little early impact on pre-existing national provisions which are *prima facie* discriminatory.
- Individuals wishing to challenge such provisions have had to take cases to the CJEU for clarification of the law.
- The Directive's exemplar wording has neither the flexibility of previous indirect discrimination proportionality provisions, nor the clarity of a prescriptive closed list of exceptions.



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