



**Legal Seminar 26 November 2012**  
**Equality Law for Everyone: Challenges Ahead**

**SUMMARY - WORKSHOP 4**  
*Age Discrimination in Employment*

*This document does not necessarily reflect the opinion or position of the European Commission, Directorate-General Justice.*

*Extract from the thematic report “Age and Employment” written by Declan O’Dempsey and Anna Beale, Supervised by Mark Freedland, published by the European Network of Legal Experts in the Non-Discrimination Field, in November 2011.*

The framework of EU law prohibiting age discrimination, as created by Article 19 TFEU and Directive 2000/78/EC on Employment Equality (‘the Directive’), is unique in European discrimination law. It provides for a broader range of exceptions to the principle of equal treatment than is permitted in connection with any other protected characteristic. In particular, the Directive provides that direct discrimination on grounds of age may be justified; whereas direct discrimination on any of the other grounds covered by the Directive may not. This creates an inherent vulnerability at the heart of the prohibition of age discrimination, and means that a careful balance has to be struck in order to ensure that the prohibition is meaningful. It points towards the need for consistent guidance on the facts of ageing being made centrally available so that the prohibition can be applied with some consistency in identical factual situations in different member States.

This report examines some practical aspects of the implementation of the prohibition of age discrimination by reporting States. In particular, the report considers how the different ways in which the various exceptions, or potential exceptions, to the principle of equal treatment are phrased in the Directive have influenced national legislation on age discrimination.

A short summary of the main concepts in EU age discrimination law is provided in chapter 1. The Court of Justice of the European Union’s (‘CJEU’) involvement in this area of law has, since the Directive first began to be implemented by member States, been dominated by justification of direct discrimination. Insofar as the European Commission intended such justification to be exceptional, it appears that justification of direct age discrimination is not exceptional in any way, although certain courts have suggested that a higher degree of proof of the proportionality of treating an individual differently is required where that treatment is explicitly on the ground of age. Further there is now a lack of clarity concerning whether the concept of legitimate aims is confined, in this context, to public interest/social policy objectives.

The reporting States have adopted a number of different systems under which varying degrees of justification of direct discrimination are permitted. Chapter 2 of this report provides details of the system used by each State. Open or exemplar systems of justification predominate. These can quite easily be deployed so as to bring a wide variety of national regulations or practices within the exceptions permitted by Article 6 of the Directive; for example, in Germany, an extremely broad list of legitimate aims is given, which includes entrepreneurial interests. There is a need for objective evidence of links between age and (for example) capability to be generated so that such tests result in similar outcomes in the case law consistently (examples of divergent results in this area are given in the national case law summaries annexed to the report). A minority of States have adopted a closed list of legitimate aims or justified less favourable treatment, but some of these also have a constitutional principle of general justification, which may take precedence over the limited provisions in age-specific statutes.

Many States which have open or exemplar systems of justification also have a list of specific exceptions to the principle of equal treatment, in relation to retirement, recruitment, training, dismissal, promotion and occupational pensions. In most cases, these provisions pre-date implementation of the Directive. Some countries (e.g. Belgium and the Netherlands) are conducting audits of their age-based legislation and regulations to determine whether they are compatible with the Directive, but many more do not appear to be taking any such action. A comprehensive survey of the use of age differences in national law should be undertaken as it is known that there are a great many in use, but no reliable survey exists to permit consistency to be achieved in relation to their use (or justification).

Most reporting States have made use of exemptions relation to occupational pension schemes, as set out in chapter 4 of the report. The closed list of exemptions in this area, set out in Article 6(2) of the Directive, appears to have led to much greater uniformity of implementation across Europe than has been seen in respect of, for example, Article 6(1).

Considerable flexibility exists in the use of special measures to promote integration of, and to protect, older and younger workers and those with caring responsibilities. Details of the measures that exist in each reporting State are set out in chapter 5 of the report. Positive measures in connection with younger workers tend to focus on protection of development, morals and health and safety. Only a few experts report that their States have introduced measures such as a reduced minimum wage to encourage employers to recruit young people. By contrast, measures relating to older workers are aimed primarily at vocational integration; for example, subsidies for employers who recruit older workers, or incentives for older employees to remain in work for a longer period. It is arguable that some of the measures which are intended to protect older workers (e.g. prohibiting them from particular types of strenuous or dangerous employment) could violate the Directive, depending on the justification put forward for the age limit. Most countries make some provision to protect the employment of workers who care for others, although the extent to which this goes

beyond protection for a mother during pregnancy/maternity leave varies widely. Provisions of this nature have the potential to amount to indirect age discrimination if not justified.

Again it is impossible to have a clear picture of the success of the Directive at prohibiting (and not simply regulating) age discrimination without a survey in which such practices may be examined in detail. The Directive does appear to be succeeding in permitting existing forms of age differentiation with a positive effect on some age group to be continued. A comprehensive survey may reveal whether this is in practice entrenching age discrimination.

Minimum and maximum age requirements are also extensively used across virtually all reporting States, as detailed in chapter 6 of this report. The Directive appears to permit some of these to be challenged successfully, as is apparent both from the case law of the CJEU (e.g. Case C-555/07 *Kucukdeveci v Swedex GMBH & Co KG*,<sup>1</sup> where it was held that a law under which periods of service prior to the age of 25 were not taken into account in calculating notice periods was disproportionate) and of the various States' domestic courts and tribunals (see National case law Annex). However in a number of States minimum and maximum age requirements have been maintained following implementation of the Directive without apparent challenge.

Practices surrounding retirement, which are considered in chapter 7, reveal more and less proportionate approaches to the imposition of retirement ages, the use of pensions to enable transition to retirement, and show some interesting areas in which competence and age appear to be linked.

Very few reporting States have a universal mandatory retirement age, but most have mandatory retirement ages for particular sectors or professions. Some States appear initially to have taken the view, based on recital (14) of the Directive, which provides that it is without prejudice to national provisions laying down retirement ages, to mean that national retirement ages were outside the scope of the Directive. That view was rejected by the CJEU in Case C-41/05, *Palacios de la Villa v Cortefiel Servicios SA*.<sup>2</sup> However, the CJEU has tended to uphold state and national collectively agreed retirement ages.<sup>3</sup>

The extent to which those who have reached retirement age are permitted to continue to have employment rights and rights against dismissal reveals a spread of practices which show in several states that the elderly are to be permitted only to have legally or economically more precarious rights. Although only a small minority of States explicitly allow employers unilaterally to set their own internal retirement age (or even a contractual or collectively-agreed retirement age), a significant number permit employers to dismiss at a nationally-set age, and/or withdraw unfair dismissal

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<sup>1</sup> [2010] 2 CMLR 33.

<sup>2</sup> Case C-555/07 *Kucukdeveci v Swedex GMBH & Co KG*, [2010] not yet reported in the ECR.

<sup>3</sup> Case C-45/09, *Rosenbladt v Oellerking GMBH*, [2011], not yet reported in the ECR.

protection at such an age. Most of these latter types of provision do not appear to have been challenged.

Finally, age and length of service play a significant role in redundancy selection, as set out in chapter 8 of the report. Most countries do not explicitly allow age per se to be taken into account in selecting or compensating for redundancy; however they may permit objective justification of its use as a selection factor, and in a small minority of States, age is treated as a protective factor in this context. Most States use length of service but not age both as a selection factor for redundancy and a calculation factor in redundancy payments. The use of length of service generally needs to be justified as it may give rise to indirect discrimination (whether in terms of age or gender).

## **Conclusion**

The experience of the reporting States raises important questions about the best way in which to delineate exceptions to the principle of equal treatment. The information provided suggests that if the justification of direct age discrimination was intended to be exceptional in nature, a closed list of exemptions (such as that given in connection with occupational pension schemes) creates a clearer picture for States than the halfway house of an open-ended list with examples. The current Directive appears to create a general test using an exemplar list. Eventually the jurisprudence surrounding the application of that test will settle down; however, because the breadth of the examples used encompasses a very large number of factual and legal situations, this process of clarification may be protracted.