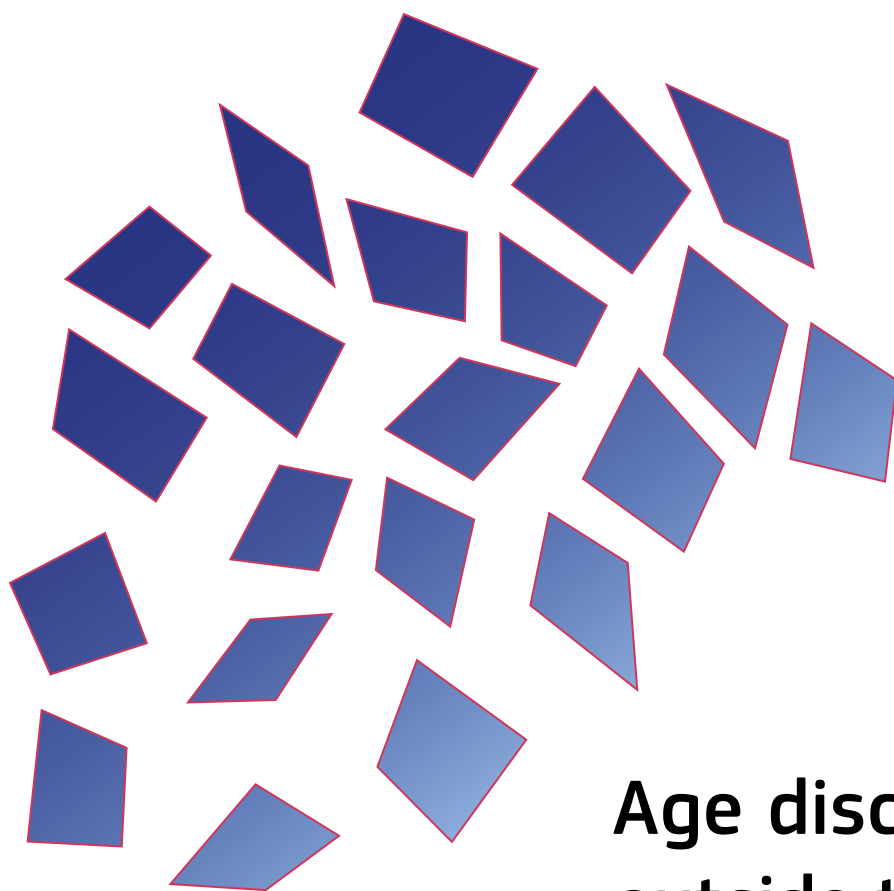




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Age discrimination law outside the employment field

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European Commission
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Age discrimination law outside the employment field

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2020

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Luxembourg: Publications Office of the European Union, 2020

ISBN 978-92-76-20760-3

doi:10.2838/214317

Catalogue number DS-01-20-454-EN-N

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Contents

EXECUTIVE SUMMARY	7
RÉSUMÉ	19
ZUSAMMENFASSUNG	33
INTRODUCTION	47
SECTION I. OVERVIEW OF EUROPEAN UNION AND EUROPEAN COURT OF HUMAN RIGHTS LAW	51
1 EUROPEAN UNION LAW	51
1.1 Treaty protection and the Charter of Fundamental Rights	51
1.2 Legislative protection	52
1.3 Case law protection	53
1.4 Can discrimination based on age be protected beyond the labour market?	53
1.5 Extension of EU law: The proposed Directive	54
2 EUROPEAN CONVENTION ON HUMAN RIGHTS LAW	57
2.1 Application of Article 14 and Protocol 12, Articles 1(1) and 1(2)	58
2.2 Age as a ground for discrimination	60
2.3 Scope of protection against age discrimination	61
2.4 Elements of a discrimination claim	61
2.4.1 Victim status	61
2.4.2 Definition of discrimination	62
2.4.3 Comparator	62
2.4.4 Multiple discrimination	63
2.5 Justifying differences in treatment	65
2.5.1 Shift in burden of proof	65
2.5.2 Objective justification and proportionality assessment	65
2.5.3 Margin of appreciation	66
2.6 Exceptions	67
2.7 Conclusion	67
SECTION II. OVERVIEW OF NATIONAL LAWS	69
3 MATERIAL SCOPE	69
4 DIRECT DISCRIMINATION	70
4.1 Protection models	71
4.2 Justifying direct discrimination	73
5 INDIRECT DISCRIMINATION	75
5.1 Protection models	76
5.2 Justifying indirect discrimination	76
6 HARASSMENT, INSTRUCTION TO DISCRIMINATE AND VICTIMISATION	76
6.1 Social protection	77
6.2 Education	78
6.3 Healthcare	79
6.4 Housing	80
6.5 Goods and services	81
6.6 Conclusions	82
7 MULTIPLE DISCRIMINATION	82
7.1 Protection against multiple discrimination	83
7.2 Additional penalties for multiple discrimination	83
8 SPECIFIC AGE-RELATED EXCEPTIONS TO ANTI-DISCRIMINATION LAW	84
8.1 Trends in exceptions to age-discrimination law	85
8.1.1 Age as a condition for assigning, acquiring or calculating rights	86

8.1.2	Age groups provided certain benefits	86
8.1.3	Maximum or minimum ages	87
8.2	Exceptions for financial services: Insurance and banking	87
8.2.1	Industry exemptions	88
8.2.2	Legitimate justification and proportionality test: the default test	89
8.2.3	Default test with industry regulation	90
8.2.4	Actuarial data requirement and reasonableness test	91
8.2.5	Actuarial data requirement and legitimate justification and proportionality test	91
9	POSITIVE ACTION MEASURES	91
9.1	Rationale and regulation	92
9.2	Duty to take positive action?	94
9.3	Examples of positive action measures	94
10	ENFORCEMENT OF EQUALITY PROVISIONS	97
10.1	Access to administrative or judicial procedures	98
10.2	Accompanying rights	98
10.3	Penalties	99
11	KEY CASE LAW	100
11.1	Key case law in social protection	101
11.2	Key case law in housing	102
11.3	Key case law in healthcare	104
11.4	Key case law in education	105
11.5	Key case law in goods and service	105
11.6	Conclusion	108
	SECTION III. CONCLUSIONS AND RECOMMENDATIONS	109
12	AREAS OF CONSENSUS	110
12.1	Direct discrimination	110
12.2	Indirect discrimination	111
12.3	Harassment and instructions to discriminate	112
12.4	Exceptions	113
12.5	Positive action	114
12.6	Enforcement and penalties	115
13	AREAS OF CONCERN	116
13.1	Victimisation	116
13.2	Financial services: insurance and banking	117
13.3	Multiple discrimination	120
13.4	Case law concerns	122
14	FINAL RECOMMENDATIONS	123
	BIBLIOGRAPHY	126

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Executive summary

Introduction

This report provides an analysis of the current law at regional and national level within the EU on the issue of age discrimination in the fields of social protection, education, housing, healthcare and access to goods and services. The Introduction to this report provides background information on the issue of age discrimination in the EU outside of the labour market and the proposed measures to tackle this phenomenon. Section I of the report examines regional anti-discrimination protections based on age in both EU law and in ECHR law. Section II analyses the law on age discrimination in the current 27 EU Member States. Section III provides a series of conclusions and recommendations as to how the law on age discrimination outside of the labour market context should develop in order to ensure adequate protection against age discrimination in EU Member States and to achieve uniformity and equality with other grounds of discrimination within the EU.

The EU is turning ‘increasingly grey’¹ as a result of dynamic shifts in fertility and life expectancy and significant pressures are being placed on the economic, social and competitive potential of the EU. There are huge efforts being made at an EU level to encourage full participation of all age groups in a variety of fields in an effort to encourage active and healthy ageing.² Such efforts aim to ensure that individuals are not disparately impacted financially, socially or in terms of their quality of life merely by virtue of their age. However, the phenomenon of age discrimination, assisted by persistent ageism, is hampering such efforts. The 2019 Eurobarometer Report on Discrimination in the EU³ reveals that 40 % of individuals in the EU believe that age discrimination is widespread in their country.⁴ Age discrimination, alongside gender discrimination, is still one of the most pervasive forms of discrimination in the EU based on personal experience.⁵ Individuals surveyed perceive discrimination arising not only in the employment context but also as occurring frequently in public spaces (23 %) including cafes, restaurants, bars and nightclubs (8 %), shops or banks (7 %), in healthcare (6 %), or by school or university personnel (6 %). 4 % of respondents identified discrimination in buying or renting an apartment or house and 4 % also reported discrimination or harassment by social service personnel.⁶ Tackling age discrimination at source is, therefore, central to fulfilling the EU policy agenda on active and healthy ageing.⁷

Naturally, legal efforts to combat discrimination are considered to be of high importance. Yet despite this, existing legal protections of age equality at an EU level extend only to the field of employment and vocational training.⁸ The proposed Directive on equal treatment on grounds of, inter alia, age in the fields of social protection, healthcare, housing, education and access to goods and services remains, since its unveiling in 2008, unadopted.⁹ The legal base of the proposal is Article 19 of the Treaty on the Functioning of the EU (TFEU) which requires consent of the European Parliament followed by unanimity in Council to

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- 1 European Commission, *The 2015 Ageing Report: Economic and Budgetary Projections for the 28 EU Member States (2013-2060)* European Economy 3/2015 at p. 1.
 - 2 The European Innovation Partnership on Active and Healthy Ageing available at: https://ec.europa.eu/eip/ageing/about-the-partnership_en.
 - 3 European Commission, *Special Eurobarometer Report 493* (2019).
 - 4 European Commission, *Special Eurobarometer Report 493* (2019) at p. 75.
 - 5 European Commission, *Special Eurobarometer Report 493* (2019) at p. 150.
 - 6 European Commission, *Special Eurobarometer Report 493* (2019) at p. 153.
 - 7 Guiding Principles for Active Ageing and Solidarity between Generations, jointly agreed by the Social Protection Committee and the Employment Committee of the Council of the European Union, 15725/12.
 - 8 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303 of 2.12.2000*, p. 16.
 - 9 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181), COM/2008/0426 final – CNS 2008/0140.

secure its adoption.¹⁰ To unblock the existing obstacle created by the need for unanimity, the Commission in 2019 suggested a move to qualified majority voting in areas still governed by unanimity through the application of the ‘general passerelle clause’ under Article 48(7) of the Treaty on European Union (TEU).¹¹ However, such a move would also require unanimity in the European Council as well as the consent of the European Parliament and as such remains a limited option to overcome the existing impasse. A more effective route would appear to be finding compromise with respect to the existing obstacles to adoption of the proposed Directive including the principle of subsidiarity, the economic impact of the proposed Directive and the compatibility between some of the legal concepts used and existing national legislation.¹² This report aims to provide an informative and analytical guide to the most pressing issues in age discrimination law currently in the EU as well as identifying the areas of most cohesion within Member States with a view to providing a base for overcoming the existing challenges to the adoption of the proposed Directive and to enhancing age equality protections within the EU and at a national level.

Section I: Overview of EU and ECHR law on age discrimination

There is no protection against age discrimination outside of the labour market context in EU law. The existing protections against age discrimination are contained in the treaties, the Charter of Fundamental Rights (CFR), legislative enactments and case law of the Court of Justice of the European Union (CJEU). An analysis of these texts indicates that protection against age discrimination exists only within the labour market context¹³ and that an extension to include protection within social protection, including social advantages, education, healthcare, housing and access to goods and services would require legislative action.

Protection against age discrimination was first expressly provided for by the TEU (ex Article 13) which provided a clear foundation for community action in the area of equality and non-discrimination law. After the Treaty of Lisbon, Article 19 TFEU retained and strengthened this protection and gave a clear basis for appropriate action to be taken in the area of age discrimination law. The CFR also identifies and protects ‘age’ as a ground of discrimination in Article 21. At a legislative level, Council Directive 2000/78/EC provides for the prohibition of discrimination on grounds of age in employment and occupation across the EU Member States.¹⁴ The Directive makes specific and flexible provision for discrimination on grounds of age in the labour market. Article 6 of the Directive provides that a difference in treatment on grounds of age (which includes both direct and indirect forms of discrimination) shall not constitute discrimination, if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of

10 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report ST 9567 2019 REV 1.

11 European Commission (2019), Communication from the Commission on More efficient decision-making in social policy: identification of areas for an enhanced move to qualified majority voting, 8799/19, Brussels, 23 April 2019; Annexes to the Communication, 8799/19, Brussels, 23 April 2019.

12 Finnish Presidency of the Council (2019), Summary by the Finnish Presidency of the policy debate on enhancing anti-discrimination in the European Union at the Employment, Social Policy, Health and Consumer Affairs Council on 24 October 2019.

13 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16.

14 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16. See the discussion on the belated nature of the Directive and other aspects of the Directive in Fredman, S., ‘Equality: A New Generation’ (2001) 30(2) *Industrial Law Journal* 145; Skidmore, P., ‘EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy’ (2001) 30(1) *Industrial Law Journal* 126; Bell, M., ‘The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?’ (2008) 79(1) *The Political Quarterly* 36; Schiek, D., ‘A New Framework on Equal Treatment of Persons in EC Law’ (2002) 8(2) *European Law Journal* 290. See also more general works on the discrimination law in the EU including: Fredman, S., *Discrimination Law* (Oxford: Clarendon Press, 2nd ed., 2011); Bartelings, P., *Age Discrimination Law in Europe* (The Netherlands: Kluwer Law International, 2009); Sergeant, M. (ed.), *The Law on Age Discrimination in the EU* (The Netherlands: Kluwer Law International, 2008); O’Cinnéide, C., *Age Discrimination and European Law* (Brussels: European Commission, 2005); Bell, M., ‘Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive’ (2009) 3 *The Equal Rights Review* 7; Howard, E., ‘The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from the Formal Idea of Equality?’ (2008) 14(2) *European Law Journal* 168.

achieving that aim are appropriate and necessary.¹⁵ In determining cases based on Article 6, the CJEU follows a four-stage process. It determines (a) whether the particular case falls within the scope of the Directive; (b) whether there has been a difference in treatment on grounds of age; (c) whether the difference in treatment can be objectively justified by reference to a particular legitimate aim, including legitimate employment policy, labour market and vocational training objectives; and (d) whether the method chosen for meeting this particular objective is appropriate and necessary.¹⁶ There is no legislative protection for age discrimination outside of this labour market context.

The CJEU has also sought to ensure protection against age discrimination in its decisions. In the case of *Mangold*,¹⁷ it was held that the ‘principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law’. The court drew upon various international instruments and the constitutional traditions common to the Member States as support for the protection against age discrimination within the EU. The protection afforded by Article 21 CFR, coupled with the CJEU decision in *Mangold* establishing the prohibition of discrimination on grounds of age as a general principle of EU law, does give rise to the question as to whether discrimination based on age is also potentially prohibited outside of the labour market context in other fields such as social protection, education, housing, healthcare or access to goods and services. The precise nature of Article 21 CFR was considered by Advocate General Jääskinen in the case of *Kaltoft*.¹⁸ Based on this opinion it is concluded in this report that age discrimination outside of the labour market context could not find protection under the CFR as it would potentially ‘breach the established boundary on the outer limit of EU fundamental rights law’.¹⁹ The CJEU concluded in *Kaltoft* that Directive 2000/78 should ‘not be extended by analogy’ beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. This would appear to also preclude any extension of the material scope of Directive 2000/78 beyond the labour market field.²⁰

On 2 July 2008, the Commission proposed a Council Directive²¹ as part of the ‘Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe’²² which would effectively harmonise the laws regarding equality on grounds of age in certain areas outside of the labour market.²³ The proposed Directive complements the existing legal framework under which discrimination on grounds of age is prohibited in the context of employment, occupation and vocational training²⁴ and supports the long-term strategic aim of completing the EU anti-discrimination legal framework which provides for more extensive, albeit inconsistent, protection for the grounds of sex and race.²⁵ The main objectives of the proposed Directive

- 15 Article 6, Directive 2000/78/EC. The Directive also provides examples of such differences in treatment by stating in Article 6 that: ‘Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.
- 16 Dewhurst, E., ‘The Development of EU Case Law on Age Discrimination in Employment: “Will you still need me? Will you still feed me? When I’m Sixty-Four”’ (2013) 19(4) *European Law Journal* 517-544.
- 17 C-144/04, *Mangold* ECLI:EU:C:2005:709, 22 November 2005.
- 18 C-354/13, *Kaltoft v Kommunernes Landsforening* ECLI:EU:C:20142463, 18 December 2014.
- 19 C-354/13, *Kaltoft v Kommunernes Landsforening*, para 25.
- 20 C-354/13, *Kaltoft v Kommunernes Landsforening*, paras 36.
- 21 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181), COM/2008/0426 final – CNS 2008/0140.
- 22 COM (2008) 412.
- 23 ‘Non-Discrimination and Equal Opportunities: A Renewed Commitment’ COM (2008) 420.
- 24 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16.
- 25 Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22; Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16; and Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004, p. 37. Directive 2000/43/EC protects persons against discrimination on the grounds of their racial or ethnic origin in the access to and supply of goods and services, social protection as well as education, whereas Directive 2004/113/EC offers protection against discrimination on the grounds of sex in the access to and supply of goods and services, with the exclusion of the content of media and advertising as well as education.

include increasing protection from discrimination based on age outside of the labour market context, ensuring legal certainty for economic operators and potential victims of age discrimination across the Member States, enhancing social inclusion and promoting the full participation of all age groups in society and in the economy.²⁶

The legal basis of the proposed Directive²⁷ is Article 19 TFEU and the proposed Directive intends to extend the degree and the form of protections against discrimination beyond the areas of employment into access to social protection,²⁸ access to education²⁹ and access to goods and services, including housing.³⁰ Services should be taken to be those within the meaning of Article 57 of the TFEU.³¹ Social protection is further defined in Recital 17b as covering social security, including statutory pension schemes, social assistance, social housing and healthcare.³² The proposal includes protections against the main forms of discrimination including direct and indirect discrimination,³³ harassment,³⁴ instructions to discriminate,³⁵ victimisation³⁶ and discrimination based on multiple grounds.^{37, 38} Discrimination based on association³⁹ or assumption⁴⁰ is also prohibited.⁴¹ Positive action based on age is also protected.⁴²

In a manner similar to the provisions of Directive 2000/78, differences in treatment on grounds of age are permitted if they are objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.⁴³ One of the most controversial areas concerning age discrimination is access to, and the provision of, financial services. Many financial service providers such as banks and insurance companies often refuse services or charge additional premiums to customers based on their age as a result of risk assessments. The proposed Directive does not prohibit such practices but encourages minimum standards of protection by providing that customers and relevant judicial and complaints bodies should have the right to be informed, upon request, about the reasons for any differences of treatment on the

26 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181), COM/2008/0426 final – CNS 2008/0140.

27 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT.

28 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(a).

29 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(c).

30 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(d).

31 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 9.

32 European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf, pp. 122-125 for more information on the definition in the EU law context.

33 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(a) and (b).

34 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(c).

35 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d-b).

36 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 9.

37 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(3-a).

38 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 12.

39 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d).

40 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d-a).

41 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 12a and 12b.

42 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 5(1).

43 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 14a and Article 2(6).

grounds of age in the provision of financial services.⁴⁴ More specifically, such information should be useful and understandable to the general public and should explain differences in individual risk for the service in question, while providing sufficient protection against the disclosure of commercially sensitive data. More express protections, similar to those provided in other equality directives, have not been included. In common with the other anti-discrimination directives, the proposed Directive incorporates a right to adequate means of legal protection⁴⁵ including that associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.^{46, 47} The proposal expects that the rules on the burden of proof should be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof should shift back to the respondent when evidence of such discrimination is established.⁴⁸ Member States are expected to provide for effective, proportionate and dissuasive penalties (including administrative and financial sanctions such as fines or payments or other types of sanctions) in the event of breaches of national provisions adopted pursuant to the proposed Directive.⁴⁹

The ECHR provides a broader level of protection than that found under EU law. More specifically, there is no limitation on the material scope as exists in EU law where existing protections are restricted to the labour market context. However, the ECHR is not without its challenges in other respects. There are two specific provisions, Article 14 and Protocol 12, which protect against age discrimination in the ECHR. However, due to low levels of ratification, Protocol 12 can only be used autonomously in 10 Member States. Furthermore, Article 14 works on a complementary basis with the other Articles of the ECHR. In order to base a claim on Article 14 ECHR, the applicant must demonstrate that they have been discriminated against with respect to the enjoyment of another substantive right protected under the ECHR, for example, the right to liberty under Article 5 or the right to privacy under Article 8. It, therefore, has no ‘independent existence’⁵⁰ upon which a claim for age discrimination can be based. However, despite these limitations, it has, at least, been consistently held that ‘age’ is a protected ground under both of these provisions.⁵¹

While age would appear to be a protected ground under both Article 14 and Protocol 12, the Court has not held that age discrimination should be equated with other ‘suspect’ grounds of discrimination such as sex or race.⁵² This has implications for the manner in which legitimate objectives, proportionality and the margin of appreciation granted to states are assessed. Under both Article 14 and Protocol 12, State Parties enjoy a margin of appreciation in assessing ‘whether and to what extent differences in otherwise similar situations justify’ different treatments.⁵³ As age has not been considered to be a suspect ground in the same manner as gender or race, states are generally given a wider margin of appreciation in

44 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 15b.

45 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 7(1).

46 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 7(2).

47 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 23.

48 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 24 and Article 8.

49 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 29 and Article 14.

50 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), 13 May 2014, para 53.

51 *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4.11.2000) European Treaty Series No. 177, para 20.

52 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 62; *British Gurkha Welfare Society v the United Kingdom* (Application No. 44818/11), 15 September 2016, para 88; *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), 3 October 2017, para 45.

53 ECtHR, *Stec and Others v the United Kingdom* (Application Nos. 65731/01 and 65900/01), 12 April 2006, para 51; *Van Raalte v Netherlands* (Application No. 20060/92), 21 February 1997, para 39.

justifying differences in treatment on grounds of age.⁵⁴ While there are no express exceptions to the equality guarantees in either Article 14 or Protocol 12, the case law does reveal that certain differences in treatment based on age will be considered to be reasonable and not subject to scrutiny by the court.⁵⁵

Protection against age discrimination is, however, not limited to the employment context as is the case in EU law and equality guarantees in the ECHR apply across all the sectors considered in this report, i.e. social protection,⁵⁶ education,⁵⁷ housing,⁵⁸ healthcare⁵⁹ and access to goods and services.⁶⁰ The ECHR protects against both direct and indirect discrimination.⁶¹ Discrimination by association,⁶² harassment⁶³ and instructions to discriminate⁶⁴ are also prohibited under the ECHR. Positive action is permitted.⁶⁵ While not expressly prohibited and not clearly defined, claims of multiple discrimination do occur under the ECHR. In the context of age, these tend to arise most specifically alongside claims relating to gender discrimination.

Overall, it can be positively asserted that EU law protections against age discrimination are limited to the labour market context and cannot be extended without unwarranted judicial machination to other fields such as social protection, education, healthcare, housing or access to goods and services.

Section II: Overview of national law on age discrimination outside the labour market

This section of the report identifies the main protections and assesses the extent to which national law protects against age discrimination outside of the labour market context in the 27 EU Member States. Although there are various methods by which the 27 current EU Member States seek to achieve equality on grounds of age in all fields, the report identifies three distinct models of protection: full protection,

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- 54 O'Hare criticises this approach as unsatisfactory: O'Hare, U., 'Enhancing European Equality Rights: A New Regional Framework' (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, pp. 137-138. While Article 1 of Protocol 12 is capable of encompassing new grounds of discrimination she feels this approach potentially creates a hierarchy between the listed and the unlisted grounds. See also Meenan, H., 'Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe' (2007) 14(1) *Maastricht Journal of European and Comparative Law* 39; Gerards, J., 'The discrimination ground of Article 14 of the European Convention on Human Rights' (2013) 13(1) *Human Rights Law Review* 99; Hurford, J., 'An Aspect of Ordinarity: Is Age a "Suspect Ground" under Article 14 ECHR?' (2014) 19(1) *Judicial Review* 39.
- 55 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), Concurring opinion of Judge Yudkivska.
- 56 There is no right to social security under the ECHR although some social protection rights, e.g. pension and benefit payments, have been held to fall within the ambit of other ECHR rights, e.g. Article 1 Protocol 1 or Article 8. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf, p. 125. Relevant cases on this topic include ECtHR, *Andrejeva v Latvia* (Application No. 55707/08), 18 February 2009; *Gaygusuz v Austria* (Application No. 17371/90), 31 August 1996; *Koua Poirrez v France* (Application No. 40892/98), 30 September 2003.
- 57 Article 2 Protocol 1 protects a right to education under the ECHR. See Council of Europe, *ECtHR Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education* (2017).
- 58 While there is no stand-alone right to housing, the court has interpreted Article 8 very broadly so as to provide protection for 'home' including living conditions. Case law of the court indicates that, in certain circumstances, discriminatory treatment can amount to degrading treatment. See ECtHR, *Smith and Grady v the United Kingdom* (Application Nos. 33985/96 and 33986/96), 27 September 1999, para 121.
- 59 While there is no right to healthcare under the ECHR, some rights have been interpreted to include certain healthcare rights, e.g. access to medical records or protection against inhuman and degrading treatment under Articles 8 and 3. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf, p. 127.
- 60 Under the ECHR there is protection afforded under Article 8. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf, p. 136. Cousins, M., 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16(3) *Journal of Social Security Law* 120.
- 61 ECtHR, *Garib v Netherlands* (Application No. 43494/09), 7 November 2017, para 31 dissenting judgment.
- 62 ECtHR, *Guberina v Croatia* (Application No. 23682/13), 22 March 2016.
- 63 ECtHR, *Đorđević v Croatia* (Application No. 41526/10), 24 July 2012; *Bączkowski and Others v Poland* (Application No. 1543/06), 3 May 2007.
- 64 ECtHR, *Bączkowski and Others v Poland* (Application No. 1543/06).
- 65 European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf, p. 77.

partial protection and no protection. Within these three models there are also many variations which are explained in full throughout the report. These models provide a useful method by which to gauge the overall level of protection and to derive useful conclusions and recommendations.

Full express and explicit protection against direct age discrimination is ensured in over 44 % of Member States. Some Member States have specific national anti-discrimination laws which explicitly prohibit direct discrimination on the grounds of age with respect to social protection,⁶⁶ education,⁶⁷ housing,⁶⁸ healthcare⁶⁹ and access to goods and services.⁷⁰ Some states, such as Austria⁷¹ or Belgium,⁷² have separate anti-discrimination legislation in each of their various regions. Other Member States provide for anti-discrimination on grounds of age in field-specific legislation such as social protection legislation,⁷³ education legislation,⁷⁴ housing legislation⁷⁵ or healthcare legislation.⁷⁶

However, the majority of Member States operate a partial protection model in which protection is only partially afforded. This may arise as a result of lack of express legislation where protection is afforded by constitutional or international law protections,⁷⁷ national internal administrative law⁷⁸ or as a result

66 These Member States are Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Ireland, Latvia, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

67 These Member States are Bulgaria, Croatia, Czechia, Finland, France, Germany, Lithuania, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

68 These Member States are Bulgaria, Croatia, Czechia, Finland, France, Germany, Lithuania, Luxembourg, Romania, Slovenia and Sweden.

69 These Member States are Croatia, Czechia, Finland, Germany, Hungary, Ireland, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

70 These Member States are Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Romania, Slovenia and Sweden.

71 See Austria where the protection against discrimination on social protection is provided in a number of instruments specific to the nine provinces. Austria, Viennese Anti-Discrimination Act, Wr LGBI Nr. 35/2004 (para 1); Burgenlandian Anti-Discrimination Act, Bgl LGBI Nr. 84/2005, (para 23); Carinthian Anti-Discrimination Act, Kntn LGBI Nr. 63/2004, (para 12); Lower Austrian Anti-Discrimination Act, NÖ LGBI Nr. 24/2017, (para 3); Upper Austrian Anti-Discrimination Act, OÖ LGBI Nr. 50/2005, (para 2); Salzburgian Equal Treatment Act, Slzb LGBI Nr. 31/2006, (para 28); Styrian Equal Treatment Act, Stmk LGBI Nr. 66/2004, (para 32); Tyrolian Anti-Discrimination Act, T LGBI Nr. 25/2005, (para 3); Vorarlbergian Anti-Discrimination Act, VlbG LGBI Nr. 17/2005, (para 1).

72 In the Belgian federal system, the competence to legislate on discrimination is divided between the federal state, the three communities and the three regions. Unlike in the French-speaking part of Belgium, in the Flemish part of the country, the region and community are merged. Overall, all the Belgian legislators have adopted laws extending the protection against age discrimination beyond the field of employment in their respective fields of competence such as social protection (including social security and social advantages), healthcare, education, housing and access to and supply of goods and services which are available to the public.

73 See the situation in Spain and Slovakia where there is both federal and specific legislation on social protection: Spain, Law 62/2003, of 30 December 2003, on Fiscal, Administrative and Social Measures (BOE, 31 December 2003), Articles 27 and 28 and General Social Security Act (*RLD 8/2015*) (BOE, 31 October 2015), Article 2; Slovakia, Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-Discrimination Act), Sections 2 para (1) and 2a (2) in conjunction with Sections 5(1) and 5(2)(a). This legislation operates in conjunction with Slovakia, Act No. 461/2003 on Social Insurance, as amended, Slovakia, Act No. 448/2008 on Social Services and on amending and supplementing Act No. 455/1991 on Licensed Trades (Small Business Act), as amended, Slovakia, Act No. 43/2004 on Old-Age Pension Saving and amending and supplementing certain laws, as amended, Section 9 and Slovakia, Act on Supplementary Pension Saving, 650/2004, Section 7(1).

74 See the situation in Malta, Poland, Slovakia and Spain. Spain: Law 62/2003, of 30.12.2003, on Fiscal, Administrative and Social Measures, Articles 27 and 28, Organic Law 2/2006 on Education, Article 1; Malta: The Education Act, Article 3; Poland, Act on Education 14.12.2016 (in force since 1 September 2017) (Dz.U.2017.59). This Act partially replaced the previous Act on the Education System (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*) (Dz. U. 2016, poz. 1943, 1954, 1985, 2169), 7.09.1991. The 1991 Act is still partly in force, in the version published in 2017 (Dz.U.2017.2198 t.j.). To differentiate between these Acts, in this report they are described as the 1991 Education Act and the 2016 Education Law; Slovakia: Section 2 para (1) in conjunction with Sections 5(1) and 5(2)(c) of the Slovak Anti-Discrimination Act.

75 See the situation in France: Article 1 par 3 of Law No. 89-462 of 6.07.1989, called 'Mermaz Law' and Portugal: Article 2(1) of the Basic Law on Housing – Law 83/2019, 3.09.2019, Article 1067-A of the Portuguese Civil Code.

76 See the situation in Spain, Law 62/2003, of 30.12.2003, on Fiscal, Administrative and Social Measures, Articles 27 and 28 and General Health Law, Article 3; France: Article L1110-3 of the Code of Public Health; Slovakia: Section 2 para (1) in conjunction with Sections 5(1) and 5(2)(b) of the Slovak Anti-Discrimination Act and Slovakia, Act No. 576/2004 on Healthcare, Services Related to the Provision of Healthcare and on amending and supplementing certain acts, as amended, Section 11(2-6).

77 See the situation in Cyprus, Article 28 of the Constitution; Estonia, Article 12 of the Constitution; Italy, Article 3 of the Constitution; Lithuania, social protection falls outside the main anti-discrimination legislation but may be subject to other protections (although this is not yet clear); Malta, Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.

78 Denmark.

of incomplete national protections (particularly prevalent in federal states). There are only two Member States (Greece and Poland)⁷⁹ which provide no explicit or implicit protection against direct discrimination on grounds of age outside the labour market context but it is important to note that this lack of protection is limited to specific fields (see Table 6). In the majority of Member States, differences in treatment on grounds of age can be justified by reference to a specific justificatory and proportionality test in all fields outside of the labour market.

Full protection against indirect discrimination is provided for in a variety of forms: by specific equality legislation⁸⁰ or by specific legislation in particular fields.⁸¹ More than a third of all Member States provide a form of partial protection. This arises by virtue of no express legislative protection but rather by reliance on constitutional or international provisions.⁸² Only Denmark and Poland do not provide any protection at all. Most states provide that as long as there is a legitimate aim and that the means of achieving that aim are proportionate (however defined), then indirect discrimination on grounds of age is potentially justifiable.⁸³

Harassment, instruction to discriminate and victimisation are also prohibited forms of discrimination at a national level across all fields, although victimisation is the least prohibited form of discrimination. The field of social security will be used here as an example of the variety of prohibitions provided in all fields. In social security, for example, over 44 % of Member States provide full protection against harassment, instruction to discriminate and victimisation. In Austria, full protection is afforded with respect to social security although not at a federal level.⁸⁴ In only eight Member States, for example, in Denmark, are no protections afforded at all. Partial protections also exist. For example, in Germany, civil law provides for no express or specific prohibition on harassment in any field. However, it is argued that some general provisions of civil law, including contractual obligations and tort law, would potentially cover harassment claims on the grounds of age. Regulation in public law is also absent. However, it is arguable that given rule of law standards applicable to public authorities inherent in Article 20(3) of the Constitution, it is considered that any such action in social law, public education, and access to goods and services through public bodies would be considered illegal.⁸⁵

79 It is worth noting here that there are some internal legal protections in Poland which could potentially provide a basis for a legal claim for discrimination on the grounds of age, for example, Article 32 of the Polish Constitution (right to equality) and Articles 23-24 of the Civil Code based on a breach of a person's personal rights. Poland has also a number of international law protections such as protection under the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the UN Convention on the Rights of the Child (1989). However, these have not yet been utilised in an age context to challenge an age discriminatory measure.

80 This is the situation in Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain and Sweden.

81 This is the situation in France. The general definition of discrimination includes direct and indirect discrimination at Article 1 of Law No. 2008-496 of 27.05.2008. Discrimination for all these goods and services is expressly prohibited by the civil general equality legislation at Articles 1 and 2 para (3) of Law No. 2008-496 of 27.05.2008. Specific legislation relating to housing also provides for the prohibition of discrimination on all grounds prohibited by French law, including age, at Article 1 par (3) of Law No. 89-462 of 6.07.1989, called 'Mermaz Law'. There is also a specific provision for access to healthcare providing a general prohibition of discrimination in access to healthcare that does not specify a list of grounds at Article L 1110-3 of the Code of Public Health. A similar situation arises in Portugal.

82 Cyprus, Article 28 of the Constitution; Italy, Article 3 of the Constitution; Malta, Article 45 of the Constitution; Netherlands, reliance on ECHR and ICCPR and other international instruments; Portugal, Article 13(2) of the Constitution.

83 This is the situation arising in the majority of Member States including Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain and Sweden.

84 See protections in each region: Austria, Vienna, Viennese Anti-Discrimination Act, Wr LGBl Nr. 35/2004, para 3/3; Burgenland: Burgenlandian Anti-Discrimination Act, Bgl LGBl Nr. 84/2005, para 25; Carinthia: Carinthian Anti-Discrimination Act, Kntn LGBl Nr. 63/2004, para 13; Lower Austria: Lower Austrian Anti-Discrimination Act, NÖ LGBl Nr. 24/2017, para 2(3) and para 3; Upper Austria: Upper Austrian Anti-Discrimination Act, OÖ LGBl Nr. 50/2005, paras 1/1/3, 4/3; Salzburg: Salzburgian Equal Treatment Act, Slzb LGBl Nr. 31/2006, paras 3/7, 28; Styria: Styrian Equal Treatment Act, Stmk LGBl Nr. 66/2004, para 32; Tyrol: Tyrolian Anti-Discrimination Act, T LGBl Nr. 25/2005, para 6; Vorarlberg: Vorarlbergian Anti-Discrimination Act, Vlb LGBl Nr. 17/2005, para 2/4.

85 Germany, Article 20(3), Constitution.

There is explicit full protection against multiple discrimination in some Member States (for example in Croatia,⁸⁶ Germany,⁸⁷ Greece,⁸⁸ Portugal⁸⁹ and Slovenia⁹⁰) and many of these Member States include protections on grounds of age.⁹¹ However, there are many Member States (a majority) which provide no express protection against multiple discrimination. This is the case in Cyprus, Czechia, Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Slovakia and Spain. This does not mean that claimants cannot make claims on individual grounds but this reliance on separate individual grounds is unsatisfactory. Whether remedies can be adjusted to take account of the gravity of multiple discrimination is also a divisive issue. While some states do provide for adjusted compensation, e.g. Croatia, what this actually means in practice is unclear. Other Member States do not provide for any adjusted compensation in these cases (Sweden).

Exceptions are common in age discrimination law, partly due to social normalisation and partly due to the apparent administrative simplicity of such age-based classifications. There appear to be three common forms of exception in Member State legislation: (a) age as a condition for assigning, acquiring or calculating rights; (b) age groupings being provided with certain benefits and (c) maximum or minimum ages for certain rights. Additionally, financial and insurance service providers often assert that age is a relevant factor in assessing risk for the provision of a particular banking or insurance product and that as a result access to such products should be either denied, minimised or provided at a much higher cost depending on the age of the applicant. Member States have reacted very differently to this challenge and the report identifies a scale of responses in the EU 27 Member States. At the lowest end of the scale are those Member States which provide that full exemptions should be provided for insurance and banking industries whose services are based on risk calculations and as such there is no protection for individuals against differential treatment based on age (Slovenia). Some Member States apply normal age discrimination principles, that is that any differences in treatment based on age should be justifiable and proportionate (Bulgaria). In other Member States a step-up in protection by way of industry regulation in addition to the normal justification and proportionality test can be identified (Hungary). There are a growing number of Member States which are taking even more proactive steps to reduce potential discrimination based on age by requiring financial and insurance service providers to demonstrate relevant and up-to-date actuarial evidence to support the risk assessment either in combination with a reasonableness test (Ireland, Portugal and Germany) or, more specifically, a full legitimate justification and proportionality test (Czechia).

There are also a variety of responses to positive action measures across the EU Member States which tend to differ depending on whether national legal systems are based on formal or substantive equality models.⁹² There are Member States, such as Cyprus, which have traditionally viewed positive action rather suspiciously and as contrary to anti-discrimination law rather than as a supplement to equality. Other Member States do not provide for positive action measures in their national contexts (although this does not mean that positive action measures would be considered contrary to anti-discrimination law and could not be introduced). This is the current situation in Denmark and Estonia. While some Member States do provide for the imposition of positive action measures on grounds of age, this can often be limited in application and scope. For example, in France, positive action on grounds of age is limited to the field of housing.

86 Croatia, Anti-Discrimination Act, 9.07.2008, Article 6(1). Article 6(2) of the Anti-Discrimination Act stipulates: 'The court shall take into consideration the circumstances referred to in Paragraph 1 of this Article when determining the amount of the compensation for non-pecuniary damage and when deciding about the fine for misdemeanours defined by this Act'.

87 Germany, General Act on Equal Treatment, Section 4.

88 Greece, Equal Treatment Law 4443/2016, Article 2(2)(g).

89 Portugal, Law 93/2017, Article 3(1)(e) and Article 4(1).

90 Slovenia, Protection Against Discrimination Act, Article 12, indent 1.

91 Greece, Equal Treatment Law 4443/2016, Article 2(2)(g).

92 European Commission, *National protection beyond the two EU Anti-discrimination Directives* (2014) available at: <https://op.europa.eu/en/publication-detail/-/publication/a8cac718-8369-479e-aaa8-d86efd897f8/language-en/format-PDF/source-search>, p. 36.

Enforcement measures via administrative or judicial procedures are available in the majority of Member States (81 %).⁹³ Only three Member States do not provide any clear administrative or judicial enforcement mechanism for age equality principles outside the labour market context.⁹⁴ Partial protection based on a lack of extension to certain fields (e.g. in Latvia, age equality principles in education and access to goods are not enforceable) or because of a lack of legal clarity around the issue (as is the case in Poland)⁹⁵ also exists in certain Member States. 81 % of Member States also provide that claimants can have assistance in bringing their claims alleging discriminatory treatment on the grounds of age.⁹⁶ This is the case, for example, in both Germany⁹⁷ and Greece.⁹⁸ Only four Member States do not provide for any assistance for a claimant of age discrimination outside the labour market.⁹⁹ The vast majority of Member States (74 %) provide for a shift in the burden of proof in cases involving age discrimination outside the labour market context.¹⁰⁰ Only a few Member States provide for no, or limited forms of, shift in the burden of proof.¹⁰¹ Some 78 % of Member States¹⁰² provide for compensation for breach of anti-discrimination principles on grounds of age in all fields. Only four Member States do not provide expressly for compensatory provisions (Denmark, Estonia, Italy and Spain). The majority of Member States (78 %)¹⁰³ provide for no official upper limit on compensation.

Finally, the report addresses key case law by field of application to determine commonalities and areas of concern for Member States. In the field of social protection, the key areas of complaint tend to congregate around policies which determine eligibility for social protection, including social advantages, based on a particular age. However, the national administrative and judicial bodies tend to give Member States a measure of leniency in the area of social protection with respect to public finances and measures

93 These Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

94 Denmark, Estonia and Italy.

95 In the Polish case it may be possible to enforce a claim for age discrimination under the Polish Constitution (Article 32, right to equality), or under Articles 23-24 of the Civil Code relating to personal rights of individuals. However, as this has not been attempted in an age discrimination context, it is still unclear as to whether this is practically or legally possible.

96 Austria, Belgium, Bulgaria, Croatia, Czechia (limited to legal advice not representation), France (limited to representation by NGOs and French Equality Body), Germany, Greece (full representation), Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal (expressly in housing), Romania, Slovakia, Slovenia, Spain and Sweden..

97 In Germany, associations (defined as people who, in accordance with their charter, promote the interests of people or groups of people discriminated against on the grounds covered by the General Law on Equal Treatment on a non-commercial basis) are entitled to act in support of victims of discrimination (Section 23(1) General Law on Equal Treatment). They must have at least 75 members or be a group of 7 associations with the same purpose. Legal personality of these associations is not a precondition but they must operate permanently and not just on an ad hoc basis to support one claim. Trade unions as such are not associations in this sense. The associations are limited to advising during court proceedings (Section 23(2) General Law on Equal Treatment). In this case, Section 90(2) Code of Civil Procedure provides that the actions of the counsel are taken as actions of the party, if the latter does not contradict them. Anti-discrimination associations may support claimants in court proceedings even if representations through advocates are mandatory. They are then able to act in support of the claimant in addition to an advocate. Although the General Law on Equal Treatment does not contain an explicit provision, it is generally held that anti-discrimination associations always need the consent of the victim when acting in support of the victim. In Germany, there is no special duty for associations to act in support of victim of discrimination.

98 In Greece, Article 8 of Equal Treatment Law 4443/2016 enshrines Article 7 of Directive 2000/43 and Article 9 of Directive 2000/78. Specifically, Article 8(3) of Law 4443/2016 states that: 'legal persons, unions or organisations including social partners and trade unions, whose purpose also includes the safe-guarding of the principle of equal treatment regardless of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics, may represent the injured party before the courts and represent them before any administrative authority or organ, as long as he/she provides in advance his/her consent through a notarial document or private document, which will bear their certified signature'. Moreover, Paragraph 4 of the same article further states that the aforementioned legal persons may also intervene in proceedings examining discrimination cases before the civil or administrative courts free of charge (i.e. they do not have to submit a separate court fee).

99 Cyprus, Denmark, Estonia and Italy.

100 Austria, Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovakia, Slovenia, Spain and Sweden.

101 Cyprus, Denmark, Estonia, Italy and Portugal (except in very limited circumstances). Latvia and Poland also provide a shift in the burden of proof in limited cases.

102 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden.

103 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal (except healthcare where fines can be imposed by regulatory authority and housing where fines of EUR 30 a day for continuing offence of harassment exist), Slovakia, Spain and Sweden.

promoting some form of public interest. In line with case law of the ECtHR, the national administrative and judicial bodies appear to give Member States a wide discretion with respect to the manner in which they determine eligibility for, or assign, social protections in view of the impact of such protections on public finances and inevitably certain public interests. Cases in the field of housing generally arise as a result of arbitrary conditions with respect to tenancies, accessing housing or with respect to accessing supports or subsidies associated with housing. Where age distinctions are used, sufficient legitimate justifications must be presented. In the housing context, it appears that the administrative and judicial bodies dealing with these cases at a national level are alive to the rather weak position of tenants and those seeking to access subsidies to secure their right to housing and as a result scrutinise justifications proffered for differences in treatment on the grounds of age more strictly. The case law on age discrimination in the field of healthcare is limited but it is potentially an area which is going to increase in currency given the recent Covid-19 crisis and its impact on healthcare systems and older people. Similar considerations with respect to public finances and social solidarity also arise in the context of healthcare as they do in the context of social security and Member States will be given a degree of leniency with respect to healthcare decisions which affect the public interest in some way. However, healthcare providers are not immune from age discrimination claims and need to ensure that any differences in treatment on grounds of age imposed are justifiable and proportionate. The cases on age discrimination with respect to access to goods and services reveal three key points: (a) there are a wide range of potentially discriminatory provisions in accessing goods and services which are open to challenge, (b) the majority of the discriminatory treatments occur with respect to the provision of insurance and financial services and (c) the administrative and judicial authorities hearing these complaints tend to expect providers of goods and services to make individualised assessments of each application on its merit and will strictly scrutinise blanket policies based on age. No key cases in the field of education were reported. This lack of case law is, in itself, revealing of a public information deficit and potentially highlights the importance of multiple discrimination provisions which would assist claimants in grounding claims in the education field.

Section III: Conclusions and recommendations

After an analysis and assessment of the law on age discrimination at regional level (EU and ECHR law) and at national level (27 Member States), the report concludes that there is a high degree of cohesion with respect to the concepts of equality law on grounds of age, but there are still some areas of concern which require action in order to bring them in line with other areas of EU equality law (namely, sex and race) and to reduce age discrimination within the EU. Five specific recommendations are made:

- **Recommendation 1: Adopt the Proposed Directive on Equal Treatment on Grounds of Age in fields outside the Labour Market** There is a substantial gap at an EU level in the protection of non-discrimination on grounds of age in the fields of social protection, education, housing, healthcare and access to goods and services. The gap is also not filled by the ECHR or by national Member State law. The proposed Directive has the benefit of overcoming the limitations and shortcomings in protection and would provide a very sustainable and effective basis for legal protection against age discrimination in EU Member States.
- **Recommendation 2: Implement protection against victimisation and inform stakeholders about detrimental impact of victimisation through research and information campaigns** Protection against victimisation is limited at a national level. Lack of protection can be attributed to poor understanding of the detrimental impact of victimisation in fields outside the labour market. Therefore, further research and information campaigns are necessary to address this knowledge gap and ensure protection.
- **Recommendation 3: Ensure that proportionate differences in treatment on the grounds of age do not constitute discrimination for the purposes of the proposed Directive if age is a determining factor in the assessment of risk for the service in question and this assessment**

is based on actuarial principles and relevant and reliable statistical data The existing proposal applies a default test to financial service providers who are making assessments of risk based on age. This is unsatisfactory. The implementation of this recommendation would ensure transparency, proportionality and individualised assessment of risk.

- **Recommendation 4: Adopt a protection against multiple discrimination.** Such protection should include protection against discrimination on all grounds protected under EU equality law, and should include a provision which allows sanctions to be adjusted to take account of the gravity of multiple discrimination
- **Recommendation 5: Promote research and information on age discrimination in the field of education** The lack of case law in the field of education on discrimination on grounds of age is remarkable. Promoting research and information campaigns on this particular area will enhance both understanding and protection of this issue.

In conclusion, it can be positively asserted that there are a great many more areas of cohesion and uniformity in the approaches of Member States to the issue of age discrimination in fields outside of the labour market than there are differences. Differences highlighted in this report can be removed or reduced through the adoption of the proposed Directive in the manner recommended here and through the promotion of research and information campaigns on age discrimination. In this manner, true equality on the ground of age may finally be achieved.

Résumé

Introduction

Le présent rapport propose une analyse de la législation nationale et régionale actuellement en vigueur au sein de l'UE en ce qui concerne la discrimination fondée sur l'âge dans les domaines de la protection sociale, de l'éducation, du logement, des soins de santé et de l'accès aux biens et aux services. L'introduction du rapport fournit des informations de base sur la question de la discrimination fondée sur l'âge dans l'UE en dehors du marché du travail et sur les mesures proposées pour combattre ce phénomène. Le premier chapitre se penche sur les protections contre la discrimination adoptées au niveau régional tant en droit de l'UE qu'en droit consacré par la CEDH. Le deuxième chapitre examine la législation en vigueur dans les 27 États membres actuels de l'UE en matière de discrimination fondée sur l'âge. Le troisième chapitre contient une série de conclusions et de recommandations quant à la manière dont la législation relative à la discrimination fondée sur l'âge en dehors du marché du travail devrait se développer pour assurer une protection adéquate contre cette forme de discrimination dans les États membres de l'UE et pour parvenir à une uniformité et une égalité avec d'autres motifs de discrimination au sein de l'Union.

La population de l'UE devient de plus en plus «grisonnante»¹ par suite d'évolutions dynamiques en termes de fécondité et d'espérance de vie, et de fortes pressions s'exercent sur le potentiel économique, social et compétitif de l'Union. Des efforts considérables sont déployés au niveau de l'UE pour encourager la pleine participation de l'ensemble des groupes d'âge à toute une série de domaines dans le but de favoriser un vieillissement actif et en bonne santé.² Ces efforts, qui visent à éviter que des personnes subissent, par le seul fait de leur âge, un impact différencié sur le plan financier ou social ou en termes de qualité de vie, sont cependant entravés par un phénomène de discrimination fondée sur l'âge, étayé par un âgisme persistant. Le rapport Eurobaromètre «La discrimination dans l'Union européenne»³ révèle que 40 % des citoyens de l'Union estiment que la discrimination fondée sur l'âge est largement répandue dans leur pays.⁴ Tout comme celle fondée sur le genre, la discrimination fondée sur l'âge reste, selon l'expérience personnelle,⁵ l'une des formes les plus omniprésentes de discrimination au sein de l'UE. Les personnes interrogées perçoivent une discrimination non seulement dans le cadre de l'emploi mais également comme survenant fréquemment dans l'espace public (23 %) en ce compris les cafés, restaurants, bars et nightclubs (8 %), magasins ou banques (7 %), dans les soins de santé (6 %) ou de la part du personnel scolaire ou universitaire (6 %). Les personnes interrogées sont 4 % à faire état d'une discrimination lors de l'achat ou de la location d'un appartement ou d'une maison; 4 % signalent également une discrimination ou un harcèlement de la part de membres des services sociaux.⁶ Il s'avère donc essentiel de lutter à la source contre la discrimination fondée sur l'âge pour atteindre l'objectif stratégique de l'UE en matière de vieillissement actif et en bonne santé.⁷

S'il va de soi que les efforts déployés sur le plan légal pour lutter contre la discrimination sont considérés comme très importants, force est de constater que les protections juridiques relatives à l'égalité par rapport à l'âge adoptées à l'échelon européen couvrent uniquement le domaine de l'emploi et de la

1 «increasingly grey»: Commission européenne, *The 2015 Ageing Report: Economic and Budgetary Projections for the 28 EU Member States (2013-2060)* European Economy 3/2015, p. 1.

2 Voir *European Innovation Partnership on Active and Healthy Ageing* sur: https://ec.europa.eu/eip/ageing/about-the-partnership_en.

3 Commission européenne, *Eurobaromètre spécial 493* (2019).

4 Commission européenne, *Eurobaromètre spécial 493* (2019), p. 75.

5 Commission européenne, *Eurobaromètre spécial 493* (2019), p. 150.

6 Commission européenne, *Eurobaromètre spécial 493* (2019), p. 153.

7 Principes directeurs en matière de vieillissement actif et de solidarité intergénérationnelle approuvés conjointement par le Comité de la protection sociale et le Comité de l'emploi de l'Union européenne, 15725/12.

formation professionnelle.⁸ La proposition de directive relative à l'égalité de traitement entre les personnes sans distinction, entre autres, d'âge dans les domaines de la protection sociale, des soins de santé, du logement, de l'éducation et de l'accès aux biens et aux services, dévoilée en 2008, n'a toujours pas été adoptée.⁹ Elle a pour base juridique l'article 19 du traité sur le fonctionnement de l'UE (TFUE), qui exigerait l'approbation du Parlement européen suivie d'une unanimité au sein du Conseil pour qu'elle soit adoptée.¹⁰ Afin de lever l'obstacle créé par l'obligation d'unanimité, la Commission a suggéré en 2019 de passer au vote à la majorité qualifiée dans les domaines encore régis par l'unanimité en recourant à l'application de la «clause passerelle générale» au titre de l'article 48, paragraphe 7, du traité sur l'Union européenne (TUE).¹¹ Étant donné que cette démarche exigerait aussi l'unanimité au sein du Conseil européen ainsi que l'approbation du Parlement européen, elle ne constitue elle-même qu'une option limitée pour débloquer l'impasse actuelle. Une piste plus efficace pourrait consister à trouver un compromis pour lever les obstacles qui empêchent aujourd'hui l'adoption de la proposition de directive, y compris le principe de subsidiarité, l'impact économique de la directive proposée et la compatibilité entre certains des concepts juridiques utilisés et la législation nationale en place.¹² Le présent rapport se veut un guide d'information et d'analyse sur les aspects actuellement les plus urgents en matière de droit relatif à la discrimination fondée sur l'âge au sein de l'UE; il vise également à recenser les domaines où la cohésion entre les États membres est la plus grande, afin de proposer une base permettant de surmonter les obstacles sur la voie de l'adoption de la proposition de directive et de renforcer les protections en faveur de l'égalité par rapport à l'âge à la fois dans l'Union et au niveau national.

Chapitre I: Aperçu du droit de l'UE et de la CEDH en matière de discrimination fondée sur l'âge

Le droit de l'UE ne prévoit aucune protection contre la discrimination fondée sur l'âge en dehors du marché du travail. Les protections existantes à l'encontre de cette forme de discrimination se trouvent dans les traités, dans la charte des droits fondamentaux (CDF), dans des actes législatifs et dans la jurisprudence de la Cour de justice de l'Union européenne (CJUE). L'analyse de ces textes montre que la protection contre la discrimination fondée sur l'âge existe exclusivement dans le contexte du marché du travail¹³ et que son élargissement à la protection sociale, en ce compris les avantages sociaux, à l'éducation, aux soins de santé, au logement et à l'accès aux biens et aux services, exigerait une action législative.

La protection contre la discrimination fondée sur l'âge a été expressément prévue pour la première fois par le TUE (ex-article 13), qui fournit un fondement clair en vue d'une action communautaire dans le domaine du droit en matière d'égalité et de non-discrimination. Après le traité de Lisbonne, l'article 19 du TFUE a maintenu et renforcé cette protection, et instauré une base précise en vue d'une prise d'action adéquate dans le domaine de la discrimination fondée sur l'âge. La CDF recense et protège également, en son article 21, «l'âge» en tant que motif de discrimination. Au plan législatif, la directive 2000/78/CE du Conseil prévoit l'interdiction de discrimination fondée sur l'âge en matière d'emploi et de travail

8 Directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *JO L 303 du 2.12.2000*, p. 16.

9 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle (SEC(2008) 2180) (SEC(2008) 2181), COM(2008)0426 final – 2008/0140 CNS).

10 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle – Rapport sur l'état des travaux 9567/1/19 REV 1.

11 Commission européenne (2019), Communication – Une prise de décision plus efficace en matière de politique sociale: renforcer le passage au vote à la majorité qualifiée dans certains domaines, 8799/19, Bruxelles, 23 avril 2019; annexes à la Communication, 8799/19, Bruxelles, 23 avril 2019.

12 Présidence finlandaise du Conseil (2019), Note de la présidence finlandaise concernant le débat d'orientation – Renforcer la lutte contre la discrimination dans l'Union européenne adressée au Conseil EPSCO du 24 octobre 2019.

13 Directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *JO L 303 du 2.12.2000*, p. 16.

dans l'ensemble des États membres.¹⁴ Elle contient une disposition spécifique et flexible pour ce qui concerne la discrimination fondée sur l'âge sur le marché du travail: son article 6 prévoit en effet que des différences de traitement fondées sur l'âge (ce qui couvre à la fois la forme directe et la forme indirecte de discrimination) ne constituent pas une discrimination lorsqu'elles sont objectivement et raisonnablement justifiées, dans le cadre du droit national, par un objectif légitime, notamment des objectifs légitimes de politique de l'emploi, du marché du travail et de la formation professionnelle, et que les moyens de réaliser cet objectif sont appropriés et nécessaires.¹⁵ Lorsqu'elle statue dans des affaires fondées sur l'article 6, la CJUE procède en quatre étapes. Elle détermine (a) si une affaire particulière relève du champ d'application de la directive; (b) s'il y a eu différence de traitement fondée sur l'âge; (c) si la différence de traitement peut être objectivement justifiée en référence à un objectif légitime précis, y compris un objectif légitime de politique de l'emploi, du marché du travail ou de la formation professionnelle; et (d) si la méthode adoptée pour atteindre cet objectif spécifique est appropriée et nécessaire.¹⁶ Il n'existe aucune protection législative à l'encontre de la discrimination fondée sur l'âge en dehors de ce contexte du marché du travail.

La CJUE a également cherché à assurer dans ses décisions une protection contre la discrimination fondée sur l'âge. Dans l'affaire *Mangold*,¹⁷ elle a considéré que «le principe de non-discrimination en fonction de l'âge doit être ainsi considéré comme un principe général du droit communautaire». La Cour s'est appuyée sur divers instruments internationaux et sur les traditions constitutionnelles communes aux États membres pour étayer la protection contre la discrimination fondée sur l'âge au sein de l'UE. La protection conférée par l'article 21 de la CDF, conjuguée à la décision de la CJUE dans l'affaire *Mangold* établissant l'interdiction de discrimination par rapport à l'âge en tant que principe général du droit de l'UE, pose la question de savoir si la discrimination fondée sur l'âge est potentiellement interdite également en dehors du contexte du marché du travail dans des domaines tels que la protection sociale, l'éducation, le logement, les soins de santé ou l'accès aux biens et aux services. La nature exacte de l'article 21 de la CDF a été examinée par l'Avocat-général Jääskinen dans l'affaire *Kaltoft*.¹⁸ Ses conclusions conduisent le présent rapport à constater que la discrimination fondée sur l'âge en dehors du cadre du marché du travail ne peut invoquer une protection au titre de la CDF car cela «enfreindrait la limite externe de la législation de l'Union en matière de droits fondamentaux». ¹⁹ La CJUE a conclu dans l'affaire *Kaltoft* qu'«il n'y a pas lieu d'étendre le champ d'application de la directive 2000/78 par analogie au-delà des discriminations fondées sur les motifs énumérés de manière exhaustive à l'article 1^{er} de celle-ci» – ce qui

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- 14 Directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, JO L 303 du 2.12.2000, p. 16. Voir la discussion sur le caractère tardif et d'autres aspects de la directive dans Fredman, S., «Equality: A New Generation» (2001) 30(2) *Industrial Law Journal* 145; Skidmore, P., «EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy» (2001) 30(1) *Industrial Law Journal* 126; Bell, M., «The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?» (2008) 79(1) *The Political Quarterly* 36; Schiek, D., «A New Framework on Equal Treatment of Persons in EC Law» (2002) 8(2) *European Law Journal* 290. Voir également des ouvrages plus généraux concernant le droit relatif à la discrimination dans l'UE parmi lesquels: Fredman, S., *Discrimination Law* (Oxford: Clarendon Press, 2nd ed., 2011); Bartelings, P., *Age Discrimination Law in Europe* (Pays-Bas: Kluwer Law International, 2009); Sergeant, M. (Éd.), *The Law on Age Discrimination in the EU* (Pays-Bas: Kluwer Law International, 2008); O'Cinnéide, C., *Age Discrimination and European Law* (Bruxelles: Commission européenne, 2005); Bell, M., «Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive» (2009) 3 *The Equal Rights Review* 7; Howard, E., «The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from the Formal Idea of Equality?» (2008) 14(2) *European Law Journal* 168.
- 15 Article 6 de la directive 2000/78/CE. La directive propose également des exemples de ces différences de traitement en déclarant dans ce même article 6 que «Ces différences de traitement peuvent notamment comprendre: (a) la mise en place de conditions spéciales d'accès à l'emploi et à la formation professionnelle, d'emploi et de travail, y compris les conditions de licenciement et de rémunération, pour les jeunes, les travailleurs âgés et ceux ayant des personnes à charge, en vue de favoriser leur insertion professionnelle ou d'assurer leur protection; (b) la fixation de conditions minimales d'âge, d'expérience professionnelle ou d'ancienneté dans l'emploi, pour l'accès à l'emploi ou à certains avantages liés à l'emploi; (c) la fixation d'un âge maximum pour le recrutement, fondée sur la formation requise pour le poste concerné ou la nécessité d'une période d'emploi raisonnable avant la retraite.»
- 16 Dewhurst, E., «The Development of EU Case Law on Age Discrimination in Employment: «Will you still need me? Will you still feed me? When I'm Sixty-Four» (2013) 19(4) *European Law Journal* 517-544.
- 17 C-144/04, *Mangold* ECLI:EU:C:2005:709, 22 novembre 2005.
- 18 C-354/13, *Kaltoft c. Kommunernes Landsforening* ECLI:EU:C:2014:2463, 18 décembre 2014.
- 19 C-354/13, *Kaltoft c. Kommunernes Landsforening*, point 25.

semble exclure également tout élargissement du champ d'application matériel de la directive 2000/78 à d'autres domaines que le marché du travail.²⁰

Le 2 juillet 2008, la Commission a proposé dans le cadre de sa communication «Un agenda renouvelé: opportunités, accès et solidarité dans l'Europe du XXI^e siècle»²¹ une directive du Conseil²² susceptible d'harmoniser effectivement les législations en matière d'égalité par rapport à l'âge dans divers domaines en dehors du marché du travail.²³ La directive proposée complète le cadre juridique existant en vertu duquel la discrimination fondée sur l'âge est interdite dans le contexte de l'emploi, du travail et de la formation professionnelle,²⁴ et étaye l'objectif stratégique à long terme visant à compléter le cadre juridique anti-discrimination de l'UE qui prévoit une protection plus étendue, mais incohérente, pour ce qui concerne les motifs du sexe et de la race.²⁵ Les principaux objectifs de la directive proposée visent à améliorer la protection contre la discrimination fondée sur l'âge en dehors du contexte du marché du travail, à garantir la sécurité juridique pour les opérateurs économiques et les victimes potentielles de discrimination fondée sur l'âge dans l'ensemble des États membres, à renforcer l'inclusion sociale et à encourager la participation de tous les groupes d'âge à la vie sociale et économique.²⁶

La directive proposée²⁷ a pour base juridique l'article 19 du TFUE et pour objet d'étendre le degré et la forme de la protection contre la discrimination au-delà du domaine de l'emploi jusque dans les domaines de l'accès à la protection sociale,²⁸ l'accès à l'éducation²⁹ et l'accès aux biens et aux services et leur fourniture, y compris en matière de logement.³⁰ Les services devraient s'entendre au sens de l'article 57 du TFUE.³¹ La protection sociale fait l'objet d'une définition plus poussée au considérant 17 *ter*, qui précise qu'elle couvre la sécurité sociale, y compris les régimes légaux de retraite, l'aide sociale, le logement social et les soins de santé.³² La proposition inclut des protections contre les formes principales

20 C-354/13, *Kaltoft c. Kommunernes Landsforening*, point 36.

21 COM (2008) 412.

22 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle (SEC(2008) 2180) (SEC(2008) 2181), COM/2008/0426 final – 2008/0140 (CNS).

23 Communication «Non-discrimination et égalité des chances: un engagement renouvelé», COM (2008) 420.

24 Directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *JO L 303 du 2.12.2000*, p. 16.

25 Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique, *JO L 180 du 19.7.2000*, p. 22; directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *JO L 303 du 2.12.2000*, p. 16; et directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en œuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et des services et la fourniture de biens et services, *JO L 373 du 21.12.2004*, p. 37. La directive 2000/43/CE protège les personnes contre la discrimination fondée sur leur race ou leur origine ethnique dans l'accès et la fourniture de biens et services, la protection sociale ainsi que l'éducation, tandis que la directive 2004/113/CE offre une protection contre la discrimination fondée sur le sexe dans l'accès et la fourniture de biens et services, à l'exclusion du contenu des médias et de la publicité ainsi que de l'éducation.

26 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle (SEC(2008) 2180) (SEC(2008) 2181), COM/2008/0426 final – 2008/0140 (CNS).

27 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT.

28 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 3, par. 1 sous a).

29 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 3, par. 1 sous c).

30 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 3, par. 1 sous d).

31 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 9.

32 Agence des droits fondamentaux de l'Union européenne et Conseil de l'Europe, *Manuel de droit européen en matière de non-discrimination* (2018) disponible sur: <https://fra.europa.eu/fr/publication/2018/manuel-de-droit-europeen-en-matiere-de-non-discrimination-edition-2018>, pp. 139-144 pour des informations complémentaires concernant la définition dans le contexte du droit de l'UE.

de discrimination, en ce compris la discrimination directe et indirecte,³³ le harcèlement,³⁴ l'injonction de discriminer,³⁵ les rétorsions³⁶ et la discrimination fondée sur des motifs multiples.^{37, 38} La discrimination par association³⁹ ou présomption⁴⁰ est également interdite.⁴¹ L'action positive par rapport à l'âge est pour sa part protégée.⁴²

De façon similaire aux dispositions de la directive 2000/78, des différences de traitement liées à l'âge sont autorisées si elles sont objectivement justifiées par un objectif légitime et si les moyens utilisés pour atteindre cet objectif sont appropriés et nécessaires.⁴³ L'un des domaines les plus controversés en ce qui concerne la discrimination fondée sur l'âge est l'accès aux services financiers et leur fourniture. Il est fréquent que des prestataires des services financiers tels que des banques ou des compagnies d'assurance refusent des services ou facturent des primes supplémentaires à des clients sur la base de leur âge par suite d'évaluations des risques. La directive proposée n'interdit pas ce type de pratique mais encourage des normes de protection minimales en prévoyant que les clients et les instances judiciaires et de traitement des plaintes compétentes devraient avoir le droit d'être informés, lorsqu'ils en font la demande, des motifs expliquant une différence de traitement fondée sur l'âge en ce qui concerne les services financiers.⁴⁴ De manière plus spécifique, cette information devrait être utile et compréhensible pour le grand public et devrait expliquer les différences de risque individuel pour le service en question tout en assurant une protection suffisante contre la divulgation de données commercialement sensibles. Des protections plus spécifiques, telles que celles prévues dans d'autres directives en matière d'égalité, n'ont pas été incluses.

Tout comme les autres directives anti-discrimination, la directive proposée comporte un droit à des moyens adéquats de protection juridique⁴⁵ en veillant notamment à ce que les associations, les organisations et d'autres entités juridiques puissent engager toute procédure judiciaire au nom ou en soutien d'une victime, sans préjudice des règles de procédure nationales relatives à la représentation et à la défense devant

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- 33 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 2 sous a) et b).
 - 34 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 2 sous c).
 - 35 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 2 sous d *ter*).
 - 36 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 9.
 - 37 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 3 *bis*.
 - 38 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 12.
 - 39 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 2 sous d).
 - 40 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 2, par. 2 sous d *bis*).
 - 41 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 12 *bis*.
 - 42 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 5, par. 1.
 - 43 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 14 *bis* et article 2, par. 6.
 - 44 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 15 *ter*.
 - 45 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 7, par. 1.

les juridictions.^{46 47} La proposition s'attend à ce que les règles de preuve soient aménagées dès lors qu'il s'agit d'une présomption de discrimination et, dans le cas où cette situation se vérifie, la mise en œuvre effective du principe de l'égalité de traitement devrait requérir que la charge de la preuve revienne à la partie défenderesse.⁴⁸ Il est attendu des États membres qu'ils mettent en place des sanctions effectives, proportionnées et dissuasives (y compris des sanctions administratives et financières telles que des amendes ou le paiement d'indemnités, ainsi que d'autres types de sanctions) en cas de non-respect des dispositions nationales adoptées au titre de la directive proposée.⁴⁹

La CEDH prévoit un niveau de protection plus large que le droit de l'UE. Plus précisément, la Convention ne limite pas le champ d'application matériel comme c'est le cas en droit de l'UE, lequel restreint actuellement les protections au contexte du marché du travail. La CEDH comporte néanmoins son lot de défis à d'autres égards. Elle contient deux dispositions spécifiques qui assurent une protection contre la discrimination fondée sur l'âge, à savoir l'article 14 et le protocole n° 12. En raison toutefois de son faible niveau de ratification, le protocole n° 12 ne peut être utilisé de manière autonome que dans 10 États membres seulement. De surcroît, l'article 14 fonctionne à titre complémentaire avec les autres articles de la CEDH: pour fonder une plainte sur l'article 14, le requérant doit montrer avoir fait l'objet d'une discrimination par rapport à la jouissance d'un autre droit substantiel protégé par la Convention, tel le droit à la liberté en vertu de l'article 5 ou le droit au respect de la vie privée en vertu de l'article 8, par exemple. Cet article n'a donc pas «d'existence indépendante»⁵⁰ sur laquelle fonder une plainte pour discrimination par rapport à l'âge. En dépit de cette limitation, il a cependant été systématiquement considéré que «l'âge» constitue un motif protégé au titre de ces deux dispositions.⁵¹

S'il semble que l'âge soit un motif protégé en vertu à la fois de l'article 14 et du protocole n° 12, la Cour n'a pas considéré pour autant que la discrimination fondée sur l'âge doive être mise sur le même plan que d'autres motifs «suspects» de discrimination tels que le sexe ou la race⁵² – ce qui a des implications sur la façon dont les objectifs légitimes, la proportionnalité et la marge d'appréciation accordée aux États sont évalués. En vertu de l'article 14 et du protocole n° 12, les États contractants jouissent d'une certaine marge d'appréciation pour déterminer «si et dans quelle mesure des différences entre des situations à d'autres égards analogues justifient» des distinctions de traitement.⁵³ L'âge n'ayant pas été considéré comme un motif suspect de la même manière que le genre ou la race, les États bénéficient généralement d'une marge d'appréciation plus large pour justifier des différences de traitement fondées sur l'âge.⁵⁴ Si ni l'article 14 ni le protocole n° 12 ne contiennent expressément d'exceptions aux garanties d'égalité, la

46 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, article 7, par. 2.

47 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 23.

48 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 24 et article 8.

49 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, ST 10740 2019 INIT, considérant 29 et article 14.

50 CouEDH, *Khamtokhu et Aksenchik c. Russie* (Requêtes n° 60367/08 et 961/11), 13 mai 2014, point 53.

51 *Rapport explicatif du Protocole n° 12 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales* (Rome, 4.XI.2000), Série des traités européens – n° 177, point 20.

52 CouEDH, *Khamtokhu et Aksenchik c. Russie* (Requêtes n° 60367/08 et 961/11), point 62; *British Gurkha Welfare Society c. Royaume-Uni* (Requête n° 44818/11), 15 septembre 2016, point 88; *Carvalho Pinto de Sousa Morais c. Portugal* (Requête n° 17484/15), 3 octobre 2017, point 45.

53 CouEDH, *Stec et autres c. Royaume-Uni* (Requêtes n° 65731/01 et 65900/01), 12 avril 2006, point 51; *Van Raalte c. Pays-Bas* (Requête n° 20060/92), 21 février 1997, point 39.

54 O'Hare critique cette approche en la jugeant insatisfaisante: O'Hare, U., «Enhancing European Equality Rights: A New Regional Framework» (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, p. 137-138. Même si l'article premier du protocole n° 12 est en mesure d'englober de nouveaux motifs de discrimination, l'auteure estime que cette approche risque de créer une hiérarchie entre les motifs énumérés et ceux qui ne le sont pas. Voir également Meenan, H., «Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe» (2007) 14(1) *Maastricht Journal of European and Comparative Law* 39; Gerards, J., «The discrimination ground of Article 14 of the European Convention on Human Rights» (2013) 13(1) *Human Rights Law Review* 99; Hurford, J., «An Aspect of Ordinarity: Is Age a "Suspect Ground" under Article 14 ECHR?» (2014) 19(1) *Judicial Review* 39.

jurisprudence montre pour sa part que certaines différences de traitement basées sur l'âge peuvent être considérées comme raisonnables et non soumises à l'examen de la Cour.⁵⁵

La protection contre la discrimination fondée sur l'âge ne se limite cependant pas au contexte de l'emploi comme c'est le cas en droit de l'UE et les garanties d'égalité prévues par la CEDH s'appliquent à tous les secteurs pris en compte dans le présent rapport, à savoir la protection sociale,⁵⁶ l'éducation,⁵⁷ le logement,⁵⁸ les soins de santé⁵⁹ et l'accès aux biens et aux services.⁶⁰ La CEDH protège à la fois contre la discrimination directe et contre la discrimination indirecte.⁶¹ Elle interdit également la discrimination par association,⁶² le harcèlement⁶³ et l'injonction de discriminer.⁶⁴ Elle autorise par ailleurs l'action positive.⁶⁵ Sans que cette forme de discrimination soit expressément interdite et sans qu'elle soit clairement définie, des recours pour discrimination multiple sont introduits au titre de la CEDH. Elles tendent plus spécifiquement à survenir, dans le contexte de l'âge, parallèlement à des plaintes relatives à une discrimination fondée sur le genre.

On peut formellement affirmer que, de manière générale, les protections conférées par le droit de l'UE contre la discrimination fondée sur l'âge se limitent au contexte du marché du travail et que leur extension à d'autres domaines tels que la protection sociale, l'éducation, les soins de santé, le logement ou l'accès aux biens et aux services requiert le recours à un mécanisme judiciaire à l'issue incertaine.

Chapitre II: Aperçu du droit national en matière de discrimination fondée sur l'âge en dehors du marché du travail

Ce deuxième chapitre du rapport s'attache à recenser les principales protections et à apprécier dans quelle mesure le droit national assure une protection contre la discrimination fondée sur l'âge en dehors du marché du travail dans les 27 États membres actuels de l'UE. En dépit de la diversité des moyens utilisés par ceux-ci pour parvenir à l'égalité par rapport à l'âge dans tous les domaines, le rapport distingue trois

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- 55 CouEDH, *Carvalho Pinto de Sousa Morais c. Portugal* (Requête n° 17484/15), Opinion concordante du juge Yudkivska.
- 56 La CEDH ne fait mention d'aucun droit à la sécurité sociale même si certains droits à une protection sociale (paiement de pensions et de prestations sociales notamment) ont été considérés comme relevant du champ d'application d'autres droits visés par la Convention, en vertu notamment de l'article premier du protocole n° 1 et de l'article 8. Ce point est examiné dans le *Manuel de droit européen en matière de non-discrimination* (2018) de l'Agence des droits fondamentaux de l'Union européenne, disponible sur: <https://fra.europa.eu/fr/publication/2018/manuel-de-droit-europeen-en-matiere-de-non-discrimination-edition-2018>, p. 142. Les cas pertinents à ce sujet sont notamment CouEDH, *Andrejeva c. Lettonie* (Requête n° 55707/08), 18 février 2009; *Gaygusuz c. Autriche* (Requête n° 17371/90), 31 août 1996; *Koua Poirrez c. France* (Requête n° 40892/98), 30 septembre 2003.
- 57 L'article 2 du protocole n° 1 protège un droit à l'instruction en vertu de la CEDH. Voir Conseil de l'Europe, *Guide sur l'article 2 du protocole n° 1 à la Convention européenne des droits de l'homme – Droit à l'éducation* (2017).
- 58 Si aucun droit autonome au logement n'est prévu, la Cour a donné une interprétation très large à l'article 8 de manière à assurer une protection du «domicile» comprenant les conditions de vie. Il ressort de la jurisprudence de la Cour que, dans certaines circonstances, un traitement discriminatoire peut constituer un traitement dégradant. Voir CouEDH, *Smith et Grady c. Royaume-Uni* (Requêtes n° 33985/96 et 33986/96), 27 septembre 1999, point 121.
- 59 Si la CEDH ne fait mention d'aucun droit aux soins de santé, certains droits ont été interprétés comme incluant des droits aux soins de santé tels que l'accès aux dossiers médicaux ou la protection contre un traitement inhumain ou dégradant en vertu des articles 8 et 3. Ce point est examiné dans le *Manuel de droit européen en matière de non-discrimination* (2018) de l'Agence des droits fondamentaux de l'Union européenne, disponible sur: <https://fra.europa.eu/fr/publication/2018/manuel-de-droit-europeen-en-matiere-de-non-discrimination-edition-2018>, p. 144.
- 60 Une protection existe en vertu de l'article 8 de la CEDH. Ce point est examiné dans le *Manuel de droit européen en matière de non-discrimination* (2018) de l'Agence des droits fondamentaux de l'Union européenne, disponible sur: <https://fra.europa.eu/fr/publication/2018/manuel-de-droit-europeen-en-matiere-de-non-discrimination-edition-2018>, p. 154. Cousins, M., «The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?» (2009) 16(3) *Journal of Social Security Law* 120.
- 61 CouEDH, *Garib c. Pays-Bas* (Requête n° 43494/09), 7 novembre 2017, point 31 (opinion dissidente).
- 62 CouEDH, *Guberina c. Croatie* (Requête n° 23682/13), 22 mars 2016.
- 63 CouEDH, *Dordević c. Croatie* (Requête n° 41526/10), 24 juillet 2012; *Bączkowski et autres c. Pologne* (Requête n° 1543/06), 3 mai 2007.
- 64 CouEDH, *Bączkowski et autres c. Pologne* (Requête n° 1543/06).
- 65 Agence des droits fondamentaux de l'Union européenne et Conseil de l'Europe, *Manuel de droit européen en matière de non-discrimination* (2018), disponible sur: <https://fra.europa.eu/fr/publication/2018/manuel-de-droit-europeen-en-matiere-de-non-discrimination-edition-2018>, p. 87.

modèles de protection: la protection totale, la protection partielle et l'absence de protection. On observe à l'intérieur même de ces trois modèles de nombreuses variations qui sont expliquées dans le détail tout au long du rapport. Ces modèles constituent une base méthodologique utile pour évaluer le niveau général de protection et en tirer de précieuses conclusions et recommandations.

Une protection expresse et explicite à l'encontre d'une discrimination directe fondée sur l'âge est assurée dans plus de 44 % des États membres. Certains d'entre eux se sont dotés de lois anti-discrimination spécifiques interdisant explicitement la discrimination directe fondée sur l'âge pour ce qui concerne la protection sociale,⁶⁶ l'éducation,⁶⁷ le logement,⁶⁸ les soins de santé⁶⁹ et l'accès aux biens et aux services.⁷⁰ D'autres, tels que l'Autriche⁷¹ ou la Belgique,⁷² ont des législations anti-discrimination distinctes dans chacune de leurs diverses régions. D'autres États membres encore prévoient une interdiction de discrimination fondée sur l'âge dans une législation spécifique à un domaine: législation en matière de protection sociale,⁷³ d'éducation,⁷⁴ de logement⁷⁵ ou de soins de santé.⁷⁶

La majorité des États membres appliquent toutefois un modèle de protection partielle, à savoir un modèle dans lequel la protection n'est que partiellement octroyée. Cette situation peut résulter d'un manque de

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- 66 Ces États membres sont l'Allemagne, la Belgique, la Bulgarie, la Croatie, la Finlande, la France, l'Irlande, la Lettonie, le Luxembourg, la République tchèque, la Roumanie, la Slovaquie, la Slovénie et la Suède.
- 67 Ces États membres sont l'Allemagne, la Bulgarie, la Croatie, la Finlande, la France, la Lituanie, le Luxembourg, la République tchèque, la Roumanie, la Slovaquie, la Slovénie et la Suède.
- 68 Ces États membres sont l'Allemagne, la Bulgarie, la Croatie, la Finlande, la France, la Lituanie, le Luxembourg, la République tchèque, la Roumanie, la Slovénie et la Suède.
- 69 Ces États membres sont l'Allemagne, la Croatie, la Finlande, la Hongrie, l'Irlande, le Luxembourg, la République tchèque, la Roumanie, la Slovaquie, la Slovénie et la Suède.
- 70 Ces États membres sont l'Allemagne, la Belgique, la Bulgarie, la Croatie, la Finlande, la France, la Grèce, l'Irlande, la Lituanie, le Luxembourg, la République tchèque, la Roumanie, la Slovénie et la Suède.
- 71 Voir l'Autriche où la protection contre la discrimination en matière de protection sociale est assurée au travers d'une série d'instruments propres aux neuf provinces. Autriche, loi anti-discrimination pour Vienne, Wr LGBI n° 35/2004 (article 1); loi anti-discrimination pour le Burgenland, Bgl LGBI n° 84/2005 (article 23); loi anti-discrimination pour la Carinthie, Kntn LGBI n° 63/2004 (article 12); loi anti-discrimination pour la Basse-Autriche, NÖ LGBI n° 24/2017 (article 3); loi anti-discrimination pour la Haute-Autriche, OÖ LGBI n° 50/2005 (article 2); loi anti-discrimination pour Salzbourg, Slzb LGBI n° 31/2006 (article 28); loi sur l'égalité de traitement pour la Styrie, Stmk LGBI n° 66/2004 (article 32); loi anti-discrimination pour le Tyrol, T LGBI n° 25/2005 (article 3); loi anti-discrimination pour Vorarlberg, Vlbz LGBI n° 17/2005 (article 1).
- 72 Dans le système fédéral belge, la compétence législative en matière de discrimination est répartie entre l'État fédéral, les trois communautés et les trois régions. Contrairement à la partie francophone du pays, la région et la communauté sont fusionnées dans la partie flamande. Tous les législateurs belges ont, de façon générale, adopté des lois qui étendent la protection contre la discrimination fondée sur l'âge au-delà de la sphère de l'emploi dans leurs domaines respectifs de compétence tels que la protection sociale (y compris la sécurité sociale et les avantages sociaux, les soins de santé, l'éducation, le logement et l'accès et la fourniture de biens et de services à la disposition du public.
- 73 Voir la situation en Espagne et en Slovaquie où s'exercent à la fois une législation fédérale et une législation spécifique en matière de protection sociale: Espagne, loi 62/2003 du 30 décembre 2003 relative à des mesures budgétaires, administratives et sociales (BOE du 31 décembre 2003), articles 27 et 28, et loi générale sur la sécurité sociale (*RLD 8/2015*) (BOE du 31 octobre 2015), article 2; Slovaquie, loi n° 365/2004 relative à l'égalité de traitement dans certains domaines et à la protection contre la discrimination (loi anti-discrimination), article 2, par. 1, et article 2a, par. 2, en combinaison avec l'article 5, par. 1 et par. 2 sous a). Cette législation est appliquée en combinaison avec la loi slovaque n° 461/2003 relative à l'assurance sociale, telle que modifiée; la loi slovaque n° 448/2008 relative aux services sociaux et à la loi de modification et de complément n° 455/1991 relative aux opérations économiques agréées (loi sur les petites entreprises), telle que modifiée; la loi slovaque n° 43/2004 sur l'épargne-pension de vieillesse modifiant et complétant certaines lois, telle que modifiée, article 9; et la loi slovaque n° 650/2004 sur l'épargne-pension complémentaire, article 7, par. 1.
- 74 Voir la situation à Malte, en Pologne, en Slovaquie et en Espagne. Espagne: loi 62/2003 du 30 décembre 2003 relative à des mesures budgétaires, administratives et sociales, articles 27 et 28, loi organique 2/2006 relative à l'éducation, article 1; Malte: loi sur l'éducation, article 3; Pologne, loi sur l'éducation du 14 décembre 2016 (en vigueur depuis le 1^{er} septembre 2017) (Dz.U.2017.59). Cette loi remplace partiellement la loi antérieure sur le système d'enseignement (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*) (Dz. U. 2016. poz. 1943, 1954, 1985, 2169) du 7 septembre 1991. La loi de 1991 reste partiellement en vigueur, dans la version publiée en 2017 (Dz.U.2017.2198 t.j.). Afin d'établir la distinction entre ces deux lois, le présent rapport les désigne respectivement comme la loi de 1991 sur l'éducation et la loi de 2016 sur l'éducation; Slovaquie: article 2, par. 1, combiné à l'article 5, par. 1 et par. 2 sous c), de la loi slovaque anti-discrimination.
- 75 Voir la situation en France: article 1, par 3, de la loi n° 89-462 du 6 juillet 1989 («loi Mermaz») et Portugal: article 2, par. 1, de la loi fondamentale sur le logement – loi 83/2019 du 3 septembre 2019; article 1067-A du code civil portugais.
- 76 Voir la situation en Espagne, loi 62/2003 du 30 décembre 2003 relative à des mesures budgétaires, administratives et sociales, articles 27 et 28, et loi générale sur la santé, article 3; France: article L1110-3 du code de la santé publique; Slovaquie: article 2, par. 1, combiné à l'article 5, par. 1 et par. 2 sous b), de la loi slovaque anti-discrimination et de la loi slovaque n° 576/2004 relative aux soins de santé et aux services liés à la fourniture de soins de santé et modifiant et complétant certaines lois, telle que modifiée, article 11, par. 2 à 6.

législation explicite lorsque la protection est assurée par le droit constitutionnel ou international⁷⁷ ou par le droit administratif interne du pays concerné,⁷⁸ ou résulter du caractère incomplet des protections nationales (particulièrement fréquent dans des États fédéraux). Seuls deux États membres (la Grèce et la Pologne)⁷⁹ ne prévoient aucune protection explicite ou implicite contre la discrimination directe fondée sur l'âge en dehors du contexte du marché du travail mais il est important de noter que cette absence de protection se limite à certains domaines spécifiques (voir le tableau 6). Dans la majorité des États membres, des différences de traitement en raison de l'âge peuvent être justifiées par référence au critère de justification et de proportionnalité dans tous les domaines en dehors du marché du travail.

Une protection complète contre la discrimination indirecte est prévue sous des formes diverses: par une législation spécifique sur l'égalité⁸⁰ ou par une législation spécifique dans des domaines particuliers.⁸¹ Plus d'un tiers de l'ensemble des États membres prévoient une forme de protection partielle. Cette situation découle d'une absence de protection législative expresse et de l'option de privilégier le recours aux dispositions constitutionnelles ou internationales.⁸² Seuls le Danemark et la Pologne n'assurent aucune protection du tout. La plupart des États prévoient qu'une discrimination indirecte fondée sur l'âge est potentiellement justifiable pour autant qu'il existe un objectif légitime et que les moyens d'atteindre cet objectif soient proportionnés (quelle qu'en soit la définition).⁸³

Le harcèlement, l'injonction de discriminer et les rétorsions sont également des formes de discrimination interdites au niveau national dans tous les domaines (les rétorsions étant la forme de discrimination la moins interdite). Le présent rapport a choisi la sécurité sociale pour illustrer la diversité des interdictions prévues dans les différents domaines. C'est ainsi qu'en matière de sécurité sociale, plus de 44 % des États membres assurent une protection complète contre le harcèlement, l'injonction de discriminer et les rétorsions. En Autriche, cette protection intégrale est prévue en matière de sécurité sociale, mais pas au niveau fédéral.⁸⁴ Dans huit États membres seulement, parmi lesquels le Danemark, aucune protection du tout n'est prévue. Des protections partielles peuvent exister: ainsi en Allemagne, le droit civil ne contient

77 Voir la situation à Chypre, article 28 de la Constitution; en Estonie, article 12 de la Constitution; en Italie, article 3 de la Constitution; en Lituanie, la protection sociale ne relève pas de la législation principale anti-discrimination mais peut faire l'objet d'autres protections (peu clair à ce jour cependant); à Malte, article 45 de la Constitution; au Portugal, article 13, paragraphe 2, de la Constitution.

78 Danemark.

79 Il convient de signaler qu'il existe en Pologne certaines protections juridiques internes susceptibles de servir de fondement à un recours en justice pour discrimination fondée sur l'âge: tel est notamment le cas de l'article 32 de la constitution polonaise (droit à l'égalité) et des articles 23 et 24 du code civil sur la base d'un non-respect des droits individuels de la personne. La Pologne compte également un certain nombre de protections relevant du droit international telles que la protection en vertu de la Déclaration universelle des droits de l'homme (1948), du Pacte international relatif aux droits civils et politiques (1966) et de la Convention des Nations unies relative aux droits de l'enfant. Ces dispositions n'ont toutefois jamais été invoquées à ce jour dans le contexte de l'âge pour contester une mesure discriminatoire par rapport à l'âge.

80 Telle est la situation en Autriche, Belgique, Bulgarie, Croatie, Espagne, Estonie, Finlande, France, Grèce, Hongrie, Irlande, Lettonie, Lituanie, République tchèque, Roumanie, Slovaquie, Slovénie et Suède.

81 Telle est la situation en France. La définition générale de la discrimination figurant à l'article premier de la loi n° 2008-496 du 27 mai 2008 inclut la discrimination directe et indirecte. La discrimination pour tous les biens et services visés est expressément interdite par la législation civile générale sur l'égalité aux articles 1 et 2, paragraphe 3, de la loi 2008-496 du 27 mai 2008. Une législation spécifique en matière de logement prévoit également l'interdiction de discrimination fondée sur tous les motifs interdits par le droit français, y compris l'âge à l'article 1, paragraphe 3, de la loi n° 89-462 du 6 juillet 1989 dite «loi Mermaz». Il existe également une disposition portant spécifiquement sur l'accès aux soins de santé et portant interdiction générale de discrimination à cet égard sans préciser de liste de motifs à l'article L 1110-3 du Code de la santé publique. Une situation analogue existe au Portugal.

82 Chypre, article 28 de la Constitution; Italie, article 3 de la Constitution; Malte, article 45 de la Constitution; Pays-Bas, recours à la CEDH et au PIDCP et à d'autres instruments internationaux; Portugal, article 13, paragraphe 2, de la Constitution.

83 Telle est la situation dans la majorité des États membres comprenant l'Autriche, la Belgique, la Bulgarie, la Croatie, l'Espagne, l'Estonie, la Finlande, la France, la Grèce, la Hongrie, l'Irlande, la Lettonie, la Lituanie, la République tchèque, la Roumanie, la Slovaquie, la Slovénie et la Suède.

84 Voir les protections propres à chaque région: Autriche, loi anti-discrimination pour Vienne, Wr LGBl n° 35/2004 (article 3, paragraphe 3); loi anti-discrimination pour le Burgenland, Bgl LGBl n° 84/2005 (article 25); loi anti-discrimination pour la Carinthie, Kntn LGBl n° 63/2004 (article 13); loi anti-discrimination pour la Basse-Autriche, NÖ LGBl n° 24/2017 (article 2, paragraphe 3, et article 3); loi anti-discrimination pour la Haute-Autriche, OÖ LGBl n° 50/2005 (article 1, paragraphes 1 et 3, et article 4, paragraphe 3); loi anti-discrimination pour Salzbourg, Slzb LGBl n° 31/2006 (article 3, paragraphe 7, et article 28); loi sur l'égalité de traitement pour la Styrie, Stmk LGBl n° 66/2004 (article 32); loi anti-discrimination pour le Tyrol, T LGBl n° 25/2005 (article 6); loi anti-discrimination pour Vorarlberg, Vlb LGBl n° 17/2005 (article 2, paragraphe 4).

pas d'interdiction expresse ou spécifique du harcèlement, quel que soit le domaine considéré; mais on fait valoir que certaines dispositions générales du droit civil, y compris des obligations contractuelles et la responsabilité civile, pourraient couvrir les recours pour harcèlement fondé sur l'âge. Il n'y a pas davantage de réglementation en droit public, mais on pourrait faire valoir qu'au vu des normes d'état de droit applicables aux pouvoirs publics inhérentes à l'article 20, paragraphe 3, de la Constitution, toute action de ce type serait considérée comme illégale pour ce qui concerne le droit social, l'éducation publique et l'accès aux biens et aux services via des instances publiques.⁸⁵

Une protection complète à l'encontre de la discrimination multiple est explicitement prévue dans plusieurs États membres (Allemagne,⁸⁶ Croatie,⁸⁷ Grèce,⁸⁸ Portugal⁸⁹ et Slovénie⁹⁰ notamment) et beaucoup d'entre eux y incluent des protections par rapport à l'âge.⁹¹ Nombreux sont toutefois les États membres (une majorité) qui ne prévoient aucune protection expresse à l'encontre de la discrimination multiple. Tel est le cas de Chypre, du Danemark, de l'Espagne, de l'Estonie, de la Finlande, de la France, de l'Irlande, de l'Italie, de la Lettonie, de la Lituanie, du Luxembourg, des Pays-Bas, de la République tchèque et de la Slovaquie. Cela ne signifie pas pour autant que des requérants ne peuvent introduire de recours pour des motifs individuels, mais cet appui sur des motifs distincts n'est guère satisfaisant. La question de savoir si les sanctions peuvent être aménagées de façon à tenir compte de la gravité de la discrimination multiple est également controversée. Si certains pays tels que la Croatie prévoient effectivement un ajustement de l'indemnisation, ce que le concept signifie concrètement reste peu clair. D'autres États membres ne prévoient pas d'ajustement de l'indemnisation dans ce type d'affaire (Suède).

Les exceptions sont fréquentes dans la législation relative à la discrimination fondée sur l'âge: elles résultent partiellement d'une normalisation sociale et partiellement de l'apparente simplicité administrative de ces classifications basées sur l'âge. Trois formes courantes d'exception ressortent de la législation des États membres: (a) l'âge en tant que condition pour assigner, acquérir ou calculer des droits; (b) des groupements par âge assortis de certains avantages; et c) un âge maximum ou minimum pour certains droits. De surcroît, des prestataires de services financiers ou d'assurance affirment fréquemment que l'âge est un facteur pertinent lors de l'évaluation du risque en vue de la fourniture d'un produit bancaire ou d'assurance particulier et que, par conséquent, l'accès à ces produits doit être refusé, réduit ou fourni à un prix nettement plus élevé en fonction de l'âge du demandeur. Les États membres ont réagi très différemment à ce défi et le rapport décrit un large éventail de réponses dans les 27 États membres de l'Union. On trouve au bas de cette échelle les États membres qui prévoient des dérogations intégrales pour les secteurs de l'assurance et de la banque dont les services se basent sur des calculs de risque – avec pour conséquence que les personnes ne bénéficient dès lors d'aucune protection contre les différences de traitement fondées sur l'âge (Slovénie). Plusieurs États membres appliquent les principes habituels de discrimination par rapport à l'âge, à savoir que toute différence de traitement fondée sur l'âge doit être justifiable et proportionnée (Bulgarie). On trouve, dans d'autres États membres, un renforcement de la protection au moyen d'une réglementation sectorielle en sus du critère habituel de justification et de proportionnalité (Hongrie). Un nombre croissant d'États membres prennent des mesures davantage proactives encore en vue de réduire le risque de discrimination fondée sur l'âge en exigeant des prestataires de services financiers et d'assurance qu'il fournissent une preuve actuarielle pertinente et actualisée à l'appui de leur évaluation du risque, soit en combinaison avec un critère de caractère raisonnable (Irlande, Portugal et Allemagne) soit, de manière plus spécifique, un critère légitime complet de justification et de proportionnalité (République tchèque).

85 Allemagne, article 20, paragraphe 3, de la Constitution.

86 Allemagne, loi générale sur l'égalité de traitement, article 4.

87 Croatie, loi anti-discrimination du 9 juillet 2008, article 6, paragraphe 1. L'article 6, paragraphe 2, de cette loi précise que "la juridiction tiendra compte des circonstances visées au premier paragraphe du même article au moment de décider du montant de l'indemnisation pour dommage moral et de l'amende pour les infractions définies par la présente loi".

88 Grèce, loi n° 4443/2016 sur l'égalité de traitement, article 2, paragraphe 2 sous g).

89 Portugal, loi n° 93/2017, article 3, paragraphe 1 sous e) et article 4, paragraphe 1.

90 Slovénie, loi sur la protection contre la discrimination, article 12, premier alinéa.

91 Grèce, loi n° 4443/2016 sur l'égalité de traitement, article 2, paragraphe 2 sous g).

Il existe également parmi les États membres de l'UE une grande diversité de réponses aux mesures d'action positive, lesquelles tendent à différer selon que les systèmes juridiques nationaux s'appuient sur des modèles d'égalité formelle ou d'égalité réelle.⁹² Des États membres tels que Chypre ont traditionnellement envisagé l'action positive avec une certaine suspicion en la considérant comme contraire au droit anti-discrimination plutôt que comme un complément à l'égalité. D'autres États membres ne prévoient pas de mesures d'action positive dans leur ordre national (ce qui ne signifie nullement que des mesures de ce type seraient considérées comme contraire au droit anti-discrimination et pourraient dès lors ne pas être introduites). On observe actuellement cette situation au Danemark et en Estonie. Si certains États membres prévoient effectivement l'imposition de mesures d'action positive par rapport à l'âge, il est fréquent que celles-ci soient limitées en termes de champ d'application et de mise en œuvre. Ainsi en France, par exemple, l'action positive en rapport avec l'âge est limitée au domaine du logement.

La majorité des États membres (81 %)⁹³ ont adopté des mesures d'exécution s'appuyant sur des procédures administratives ou judiciaires. Seuls trois États membres n'ont pas mis en place de mécanisme d'exécution explicite par voie administrative ou judiciaire concernant les principes d'égalité en matière d'âge en dehors du contexte du marché du travail.⁹⁴ Une protection partielle résultant d'une absence d'élargissement à certains domaines (ainsi en Lettonie, par exemple, les principes d'égalité en matière d'âge dans le domaine de l'éducation et de l'accès aux biens ne sont pas respectés) ou d'une absence de clarté juridique sur la question (comme c'est le cas en Pologne)⁹⁵ est également constatée dans certains États membres. Par ailleurs, 81 % des États membres prévoient la possibilité d'une assistance aux requérants qui souhaitent introduire une plainte invoquant un traitement discriminatoire fondé sur l'âge.⁹⁶ Tel est notamment le cas tant en Allemagne⁹⁷

92 Commission européenne, *National protection beyond the two EU Anti-discrimination Directives* (2014), disponible sur <https://op.europa.eu/en/publication-detail/-/publication/a8cac718-8369-479e-aaa8-d86efdf897f8/language-en/format-PDF/source-search>, p. 36.

93 Ces États membres sont l'Allemagne, l'Autriche, la Belgique, la Bulgarie, la Croatie, Chypre, l'Espagne, la Finlande, la France, la Grèce, la Hongrie, l'Irlande, la Lituanie, le Luxembourg, Malte, les Pays-Bas, le Portugal, la République tchèque, la Roumanie, la Slovaquie, la Slovénie et la Suède.

94 Danemark, Estonie et Italie.

95 Dans le cas de la Pologne, il est sans doute possible de faire valoir un recours pour discrimination fondée sur l'âge en invoquant la Constitution polonaise (article 32, droit à l'égalité) ou les articles 23 et 24 du Code civil relatifs aux droits individuels de la personne. Étant donné toutefois que cette voie n'a pas encore été tentée dans le contexte de l'âge, rien ne permet encore d'affirmer qu'elle est pratiquement ou juridiquement possible.

96 Allemagne, Autriche, Bulgarie, Croatie, Espagne, France (limitation à une représentation par des ONG et l'organisme français de promotion de l'égalité), Grèce (pleine représentation), Hongrie, Irlande, Lettonie, Lituanie, Luxembourg, Malte, Pays-Bas, Portugal (en matière de logement expressément), République tchèque (limitation à un avis juridique, pas de représentation), Roumanie, Slovaquie, Slovénie et Suède.

97 En Allemagne, des associations (définies comme des personnes qui, conformément à leur charte, s'attachent à promouvoir sur une base non commerciale les intérêts de personnes ou de groupes de personnes visées par des discriminations fondées sur les motifs couverts par la loi générale sur l'égalité de traitement) sont habilitées à agir en soutien de victimes de discrimination (article 23, paragraphe 1, de la loi générale sur l'égalité de traitement). Elles doivent compter un minimum de 75 membres ou constituer un groupement de 7 associations ayant la même finalité. La personnalité juridique de ces associations n'est pas une condition préalable, mais elles doivent fonctionner de manière permanente et non sur une base ad hoc destinée à soutenir une plainte unique. Les syndicats ne sont pas en tant que tels des associations dans ce sens. Les associations se limitent à fournir des conseils durant les procédures judiciaires (article 23, paragraphe 2, de la loi générale sur l'égalité de traitement). L'article 90, paragraphe 2, du Code de procédure civile prévoit ici que les actions du conseiller sont considérées comme des actions de la partie concernée si cette dernière ne les contredit pas. Les associations de lutte contre la discrimination peuvent soutenir des requérants dans le cadre de procédures judiciaires même si les représentations par avocats sont obligatoires. Elles peuvent alors agir en soutien de la partie requérante en plus d'un avocat. Bien que la loi générale sur l'égalité de traitement ne contienne aucune disposition explicite, il est généralement considéré que les associations de lutte contre la discrimination doivent toujours avoir le consentement de la victime lorsqu'elles agissent en soutien de celle-ci. L'Allemagne ne prévoit aucune obligation particulière pour les associations d'agir en soutien d'une victime de discrimination.

qu'en Grèce.⁹⁸ Seuls quatre États membres ne prévoient aucune assistance à un requérant introduisant un recours pour discrimination fondée sur l'âge en dehors du marché du travail.⁹⁹ La grande majorité des États membres (74 %) prévoient un renversement de la charge de la preuve dans les affaires impliquant une discrimination fondée sur l'âge en dehors du contexte du marché du travail.¹⁰⁰ Quelques États membres seulement ne prévoient aucun renversement de la charge de la preuve, ou ont opté pour une forme limitée de celui-ci.¹⁰¹ Quelque 78 % des États membres¹⁰² prévoient dans tous les domaines une indemnisation en cas de non-respect des principes d'interdiction de discrimination fondée sur l'âge. Seuls quatre États membres ne prévoient pas expressément de dispositions compensatoires (le Danemark, l'Espagne, l'Estonie et l'Italie). La majorité des États membres (78 %)¹⁰³ ne prévoient officiellement aucun plafond pour l'indemnisation.

Enfin, le rapport se penche sur la jurisprudence essentielle par domaine d'application afin de déterminer les éléments communs et les sujets de préoccupation des États membres. En ce qui concerne la protection sociale, les plaintes tendent à se concentrer autour des politiques fixant l'éligibilité au bénéfice de cette protection, y compris les avantages sociaux, en fonction d'un âge particulier. Les instances administratives et judiciaires nationales tendent néanmoins à accorder aux États membres une certaine clémence en matière de protection sociale en rapport avec les finances publiques et les mesures promouvant une forme d'intérêt public. Dans le droit fil de la jurisprudence de la CouEDH, les instances administratives et judiciaires nationales semblent accorder aux États membres une grande latitude quant à la manière dont ils définissent l'éligibilité au bénéfice des protections sociales, ou dont ils les attribuent, pour tenir compte de l'incidence que ces protections peuvent avoir sur les finances publiques et, inévitablement, sur certains intérêts publics. Les affaires dans le domaine du logement découlent le plus souvent des conditions arbitraires visant les locations, l'accès au logement ou l'accès à des soutiens ou subventions associés au logement. Des justifications légitimes suffisantes doivent être présentées lorsque des différenciations sont appliquées en fonction de l'âge. Il apparaît que, dans le cadre du logement, les instances administratives et judiciaires chargées de ces affaires au niveau national sont conscientes de la position de relative faiblesse des locataires et de ceux qui cherchent à obtenir des subventions pour exercer leur droit au logement, et qu'elles examinent dès lors avec davantage de rigueur les justifications présentées pour expliquer une différence de traitement basée sur l'âge. La jurisprudence relative à la discrimination fondée sur l'âge dans le domaine des soins de santé est peu abondante mais pourrait gagner en importance à l'heure de la crise du Covid-19 et de ses répercussions sur les systèmes de santé et les personnes âgées. Des considérations analogues en rapport avec les finances publiques et la solidarité sociale s'expriment également dans le cadre de la sécurité sociale, et une certaine latitude sera laissée aux États membres pour ce qui concerne les décisions en matière de soins de santé qui affectent, d'une manière ou d'une autre, l'intérêt public. Les prestataires de soins de santé n'en sont pas pour autant à l'abri de plaintes pour discrimination fondée sur l'âge et doivent veiller à ce que les

98 En Grèce, l'article 8 de la loi 4443/2016 sur l'égalité de traitement consacre l'article 7 de la directive 2000/43 et l'article 9 de la directive 2000/78. De manière plus spécifique, l'article 8, paragraphe 3, de la dite loi dispose que «les personnes morales, unions ou organisations, y compris les partenaires sociaux et les syndicats, dont l'intérêt inclut notamment la sauvegarde du principe de l'égalité de traitement sans distinction de race, de couleur, d'origine nationale ou ethnique, d'ascendance, de religion ou d'autres convictions, de handicap ou de maladie chronique, d'âge, de situation familiale ou sociale, d'orientation sexuelle, d'identité ou de caractéristiques de genre, peuvent représenter la partie lésée devant les tribunaux et devant toute autorité ou instance administrative, pour autant que la dite partie donne préalablement son consentement par un document notarié ou sous seing privé portant sa signature authentifiée». Le paragraphe 4 du même article dispose en outre que les personnes morales susmentionnées peuvent également intervenir dans des procédures d'examen de cas de discrimination devant des juridictions civiles ou administratives à titre gratuit (autrement dit, sans devoir verser de frais de justice distincts).

99 Chypre, Danemark, Estonie et Italie.

100 Allemagne, Autriche, Belgique, Bulgarie, Croatie, Espagne, Finlande, France, Grèce, Hongrie, Irlande, Lituanie, Luxembourg, Malte, Pays-Bas, République tchèque, Roumanie, Slovaquie, Slovénie et Suède.

101 Chypre, Danemark, Estonie, Italie et Portugal (hormis dans des circonstances très restreintes). La Lettonie et la Pologne prévoient également un renversement de la charge de la preuve dans un nombre limité de cas.

102 Allemagne, Autriche, Belgique, Bulgarie, Croatie, Chypre, Finlande, France, Grèce, Hongrie, Irlande, Lituanie, Luxembourg, Malte, Pays-Bas, Portugal, République tchèque, Roumanie, Slovaquie, Slovénie et Suède.

103 Allemagne, Autriche, Belgique, Bulgarie, Croatie, Chypre, Danemark, Espagne, Estonie, Finlande, France, Grèce, Hongrie, Italie, Lituanie, Luxembourg, Malte, Pays-Bas, Pologne, Portugal (hormis le domaine des soins de santé dans lequel l'organisme de réglementation peut imposer des amendes, et le domaine du logement où des amendes de EUR 30 par jour pour infraction continue de harcèlement sont prévues), République tchèque, Slovaquie et Suède.

différences de traitement imposées soient justifiables et proportionnées. Trois points essentiels ressortent des affaires portant sur une discrimination fondée sur l'âge en rapport avec l'accès aux biens et aux services: (a) il existe, en ce qui concerne l'accès aux biens et aux services, un large éventail de dispositions potentiellement discriminatoires et contestables; (b) la majorité des cas de traitement discriminatoire sont liés à la fourniture de services financiers et d'assurance; et (c) les instances administratives et judiciaires saisies de ces plaintes tendent à escompter que les prestataires de biens et de services procèdent à l'évaluation personnalisée de chaque demande selon son mérite, et veilleront à examiner rigoureusement les règles fondées sur l'âge. Aucun cas majeur de jurisprudence n'a été signalé dans le domaine de l'éducation – une rareté de contentieux qui révèle à elle seule les carences en termes d'information publique et qui souligne sans doute l'importance de dispositions en matière de discrimination multiple susceptibles d'aider les requérants à fonder leurs recours dans le domaine de l'éducation.

Chapitre III: Conclusions et recommandations

Après avoir analysé et évalué le droit en matière de discrimination fondée sur l'âge à l'échelon régional (droit de l'UE et CEDH) et au niveau régional (27 États membres), le rapport conclut à l'existence d'une forte cohésion quant aux concepts de droit à l'égalité par rapport à l'âge tout en relevant encore plusieurs aspects préoccupants qui réclament d'agir dans une perspective d'alignement avec d'autres domaines du droit de l'UE relatif à l'égalité (en l'occurrence le sexe et la race) et d'une atténuation de la discrimination fondée sur l'âge au sein de l'Union. Cinq recommandations sont spécifiquement formulées:

- **Recommandation n° 1: Adopter la proposition de directive sur l'égalité de traitement par rapport à l'âge dans d'autres domaines que le marché du travail.** On observe au niveau de l'UE un déficit majeur de protection contre la discrimination fondée sur l'âge dans les domaines de la protection sociale, de l'éducation, du logement, des soins de santé et de l'accès aux biens et aux services. Ce déficit n'est comblé ni par la CEDH ni par le droit national des États membres. La directive proposée présente l'avantage de remédier aux limites et aux lacunes de la protection actuelle et constituerait un fondement extrêmement durable et efficace pour l'instauration d'une protection juridique contre la discrimination fondée sur l'âge dans les États membres de l'UE.
- **Recommandation n° 2: Faire appliquer la protection contre les rétorsions et informer les parties intéressées de l'effet néfaste des rétorsions au moyen de campagnes de recherche et d'information.** La protection contre les rétorsions est limitée au niveau national et cette carence peut être attribuée à une compréhension insuffisante de l'incidence négative des rétorsions dans d'autres domaines que le marché du travail. Des campagnes de recherche et d'information plus intensives s'imposent donc pour remédier à cette méconnaissance et assurer une protection.
- **Recommandation n° 3: Veiller à ce que des différences de traitement proportionnées basées sur l'âge ne constituent pas une discrimination au sens de la directive proposée lorsque l'âge est un facteur déterminant dans l'évaluation du service considéré, et à ce que cette évaluation se fonde sur des principes actuariels ainsi que sur des données statistiques pertinentes et fiables.** La proposition actuelle applique un critère par défaut aux prestataires de services financiers qui procèdent à l'évaluation des risques sur la base de l'âge, ce qui n'est guère satisfaisant. La mise en œuvre de la présente recommandation garantirait la transparence, la proportionnalité et la personnalisation de l'évaluation des risques.
- **Recommandation n° 4: Adopter une protection à l'encontre de la discrimination multiple.** Il devrait s'agir d'une protection contre les discriminations fondées sur tous les motifs protégés par le droit de l'UE sur l'égalité, qui inclurait une disposition permettant d'adapter les sanctions pour tenir compte de la gravité de la discrimination multiple.

- **Recommandation n° 5: Promouvoir la recherche et l'information concernant la discrimination fondée sur l'âge dans le domaine de l'éducation.** Le peu de jurisprudence en matière de discrimination fondée sur l'âge dans le domaine de l'éducation est frappant. Encourager des campagnes de recherche et d'information sur ce thème particulier permettra d'améliorer à la fois la connaissance et la protection de cette problématique.

En conclusion, on peut affirmer que les approches des États membres vis-à-vis de la question de la discrimination fondée sur l'âge dans d'autres domaines que le marché du travail présentent bien plus d'éléments de cohésion et d'uniformité que de différences. Les disparités mise en évidence par le rapport peuvent être éliminées ou réduites par l'adoption de la proposition de directive en agissant de la manière recommandée ici et en encourageant des campagnes de recherche et d'information concernant la discrimination fondée sur l'âge. Une véritable égalité par rapport à l'âge pourrait ainsi être – enfin – réalisée.

Zusammenfassung

Einleitung

Der vorliegende Bericht enthält eine Analyse der gegenwärtigen auf regionaler und nationaler Ebene innerhalb der EU bestehenden Rechtsvorschriften zum Thema Altersdiskriminierung in den Bereichen Sozialschutz, allgemeine Bildung, Wohnen, Gesundheitswesen und Zugang zu Gütern und Dienstleistungen. Die Einleitung zu dem Bericht liefert Hintergrundinformationen zum Thema Altersdiskriminierung in der EU außerhalb des Arbeitsmarktes und zu den Maßnahmen, die zur Bekämpfung dieses Phänomens vorgeschlagen wurden. In Abschnitt I des Berichts werden regionale Vorschriften zum Schutz vor Altersdiskriminierung, sowohl im Unionsrecht als auch im Recht der EMRK, beleuchtet. Abschnitt II untersucht die Rechtsvorschriften zum Thema Altersdiskriminierung in den derzeit 27 EU-Mitgliedstaaten. Abschnitt III enthält eine Reihe von Schlussfolgerungen und Empfehlungen dazu, wie die Rechtsvorschriften zur Altersdiskriminierung außerhalb des Arbeitsmarktes weiterentwickelt werden sollten, um sowohl einen angemessenen Schutz vor Altersdiskriminierung in den EU-Mitgliedstaaten zu gewährleisten als auch Gleichheit und Einheitlichkeit mit anderen Diskriminierungsgründen innerhalb der EU zu erreichen.

Die EU „ergraut“ zusehends.¹ Grund dafür sind dynamische Veränderungen der Geburtenraten und der Lebenserwartung. Das wirtschaftliche und soziale Potenzial sowie die Wettbewerbsfähigkeit der EU geraten dadurch unter erheblichen Druck. Auf Unionsebene werden große Bemühungen unternommen, die vollständige Teilhabe aller Altersgruppen in einer Vielzahl von Bereichen zu fördern und auf diese Weise ein aktives und gesundes Altern zu unterstützen.² Ziel dieser Bemühungen ist es sicherzustellen, dass Menschen nicht allein wegen ihres Alters finanziell oder sozial bzw. in ihrer Lebensqualität unterschiedlich betroffen sind. Behindert werden diese Bemühungen jedoch durch das Phänomen der Altersdiskriminierung, das durch hartnäckigen Ageismus gefördert wird. Laut dem Eurobarometer Spezial von 2019 zum Thema „Diskriminierung in der EU“³ sind 40 % der Unionsbürgerinnen und -bürger der Auffassung, dass Altersdiskriminierung in ihrem jeweiligen Land weit verbreitet ist.⁴ Altersdiskriminierung ist, neben geschlechtsbezogener Diskriminierung, immer noch eine der am weitesten verbreiteten persönlichen Diskriminierungserfahrungen in der EU.⁵ Die befragten Personen gaben an, Diskriminierungen nicht nur im Beschäftigungskontext, sondern häufig auch im öffentlichen Raum (23 %), einschließlich Cafés, Restaurants, Bars und Nachtclubs (8 %), Geschäften und Banken (7 %), im Gesundheitswesen (6 %) oder von Schul- oder Hochschulbeschäftigten (6 %) wahrgenommen zu haben. 4 % der Befragten gaben an, beim Kauf oder bei der Anmietung einer Wohnung oder eines Hauses diskriminiert worden zu sein, weitere 4 % berichteten darüber hinaus über Diskriminierungen oder Belästigungen durch Beschäftigte in sozialen Dienstleistungen.⁶ Um die politische Agenda der EU für aktives und gesundes Altern umzusetzen, ist es daher von zentraler Bedeutung, Altersdiskriminierung an der Quelle zu bekämpfen.⁷

Rechtlichen Anstrengungen zur Bekämpfung von Diskriminierung wird natürlich große Bedeutung beigemessen. Auf Unionsebene erstreckt sich der rechtliche Schutz vor Altersdiskriminierung derzeit

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- 1 Europäische Kommission, *The 2015 Ageing Report: Economic and Budgetary Projections for the 28 EU Member States (2013-2060)*. European Economy 3/2015, S. 1.
 - 2 *European Innovation Partnership on Active and Healthy Ageing* (Europäische Innovationspartnerschaft im Bereich „Aktivität und Gesundheit im Alter“), abrufbar unter: https://ec.europa.eu/eip/ageing/about-the-partnership_en.
 - 3 Europäische Kommission, *Special Eurobarometer Report 493* (2019).
 - 4 Europäische Kommission, *Special Eurobarometer Report 493* (2019), S. 75.
 - 5 Europäische Kommission, *Special Eurobarometer Report 493* (2019), S. 150.
 - 6 Europäische Kommission, *Special Eurobarometer Report 493* (2019), S. 153.
 - 7 Leitlinien für aktives Altern und Solidarität zwischen den Generationen, gemeinsam vereinbart vom Ausschuss für Sozialschutz und dem Beschäftigungsausschuss des Rats der Europäischen Union, 15725/12.

jedoch nur auf den Bereich der Beschäftigung und der beruflichen Bildung.⁸ Die vorgeschlagene Richtlinie zur Gleichbehandlung – u.a. aufgrund des Alters – in den Bereichen Sozialschutz, Gesundheitswesen, Wohnen, allgemeine Bildung sowie Zugang zu Gütern und Dienstleistungen wurde im Jahr 2008 vorgelegt, bislang jedoch nicht verabschiedet.⁹ Rechtsgrundlage für den Vorschlag ist Artikel 19 des Vertrags über die Arbeitsweise der EU (AEUV), dem zufolge seine Verabschiedung nur möglich ist, wenn sich der Rat nach vorheriger Zustimmung des Europäischen Parlaments einstimmig dafür ausspricht.¹⁰ Um das Hindernis der vorgeschriebenen Einstimmigkeit zu überwinden, schlug die Kommission 2019 vor, in Bereichen, in denen Entscheidungen nach wie vor mit Einstimmigkeit getroffen werden, durch Anwendung der „allgemeinen Passerelle-Klausel“ nach Artikel 48 Absatz 7 des Vertrags über die Europäische Union (EUV) zur qualifizierten Mehrheit überzugehen.¹¹ Ein solcher Schritt würde jedoch ebenfalls Einstimmigkeit im Europäischen Rat sowie die Zustimmung des Europäischen Parlaments erfordern und ist insofern nur eine eingeschränkte Option zur Überwindung der derzeitigen Sackgasse. Ein aussichtsreicherer Weg scheint darin zu bestehen, bei den Konfliktpunkten, die einer Annahme der vorgeschlagenen Richtlinie derzeit im Wege stehen – unter anderem das Subsidiaritätsprinzip, die wirtschaftlichen Auswirkungen der vorgeschlagenen Richtlinie und die Vereinbarkeit einiger der verwendeten Rechtsbegriffe mit der bestehenden nationalen Gesetzgebung – Kompromisse zu finden.¹² Der vorliegende Bericht will einen informativen und analytischen Überblick über die derzeit dringendsten Fragen der Rechtsvorschriften zur Altersdiskriminierung in der EU zur Verfügung stellen und die Bereiche ermitteln, in denen der Zusammenhalt zwischen den Mitgliedstaaten am stärksten ist, mit dem Ziel, eine Grundlage zur Überwindung der bestehenden Hindernisse für die Verabschiedung des Richtlinienvorschlags und zur Verbesserung des Schutzes vor Altersdiskriminierung, sowohl in der Union als auch auf nationaler Ebene, zu schaffen.

Abschnitt I: Überblick über die Rechtsvorschriften der Union und der EMRK zum Thema Altersdiskriminierung

Außerhalb des Beschäftigungsbereichs gibt es im Unionsrecht keinen Schutz vor Altersdiskriminierung. Die bestehenden Vorschriften zum Schutz vor Altersdiskriminierung sind in den Verträgen, in der EU-Grundrechtecharta (EU-GRC), in Rechtsakten mit Gesetzescharakter und in der Rechtsprechung des Gerichtshofs der Europäischen Union (EuGH) enthalten. Eine Analyse dieser Texte zeigt, dass Schutz vor Altersdiskriminierung nur im Kontext des Arbeitsmarktes existiert¹³ und dass eine Ausweitung des Schutzes auf die Bereiche Sozialschutz, einschließlich sozialer Vergünstigungen, allgemeine Bildung, Wohnen, Gesundheitswesen sowie Zugang zu Gütern und Dienstleistungen gesetzgeberische Maßnahmen erfordern würde.

Schutz vor Altersdiskriminierung wurde erstmals ausdrücklich im EU-Vertrag (exArtikel 13) verankert, der eine klare Grundlage für Gemeinschaftsmaßnahmen im Bereich des Gleichbehandlungs- und Antidiskriminierungsrechts lieferte. Nach dem Vertrag von Lissabon bewahrte und stärkte Artikel 19 AEUV diesen Schutz und schuf eine präzise Basis, um im Bereich der Rechtsvorschriften zur Altersdiskriminierung entsprechende Maßnahmen zu ergreifen. Auch die EU-GRC benennt und schützt in Artikel 21 „Alter“ als

- 8 Richtlinie 2000/78/EG vom 27.11.2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16.
- 9 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung (SEK(2008) 2180) (SEK(2008) 2181), KOM/2008/0426 endg. – CNS 2008/0140.
- 10 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung – Sachstandsbericht ST 9567 2019 REV 1.
- 11 Europäische Kommission (2019), Mitteilung der Kommission „Effizientere Entscheidungsfindung in der Sozialpolitik: Ermittlung möglicher Bereiche für einen verstärkten Übergang zur Beschlussfassung mit qualifizierter Mehrheit“, 8799/19, Brüssel, 23. April 2019; Anhänge zur Mitteilung der Kommission, 8799/19, Brüssel, 23. April 2019.
- 12 Finnische Ratspräsidentschaft (2019), Zusammenfassung der Orientierungsaussprache über die Stärkung von Antidiskriminierung in der Europäischen Union beim Rat für Beschäftigung, Sozialpolitik, Gesundheit und Verbraucherschutz am 24. Oktober 2019.
- 13 Richtlinie 2000/78/EG vom 27.11.2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16.

einen Diskriminierungsgrund. Auf gesetzgeberischer Ebene verbietet die Richtlinie 2000/78/EG des Rates Diskriminierung wegen des Alters in Beschäftigung und Beruf in sämtlichen EU-Mitgliedstaaten.¹⁴ Die Richtlinie enthält spezifische und flexible Bestimmungen für altersbezogene Ungleichbehandlungen auf dem Arbeitsmarkt. Nach Artikel 6 der Richtlinie stellen Ungleichbehandlungen wegen des Alters (was sowohl unmittelbare als auch mittelbare Formen von Diskriminierung umfasst) keine Diskriminierung dar, sofern sie objektiv und angemessen sind und im Rahmen des nationalen Rechts durch ein legitimes Ziel, worunter insbesondere rechtmäßige Ziele aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt und berufliche Bildung zu verstehen sind, gerechtfertigt sind und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.¹⁵ Bei Entscheidungen auf der Grundlage von Artikel 6 wendet der EuGH ein vierstufiges Verfahren an: Er bestimmt, (a) ob der betreffende Fall in den Anwendungsbereich der Richtlinie fällt, (b) ob eine Ungleichbehandlung wegen des Alters stattgefunden hat, (c) ob die Ungleichbehandlung durch ein bestimmtes rechtmäßiges Ziel, insbesondere ein rechtmäßiges Ziel aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt oder berufliche Bildung, gerechtfertigt werden kann und (d) ob die zur Erreichung dieses spezifischen Ziels gewählte Methode angemessen und erforderlich ist.¹⁶ Außerhalb dieses Arbeitsmarktkontextes existiert kein gesetzlicher Schutz vor Altersdiskriminierung.

Der EuGH hat sich auch bemüht, in seinen Entscheidungen einen Schutz vor Altersdiskriminierung zu gewährleisten. In der Rechtssache *Mangold*¹⁷ stellte er fest: „Das Verbot der Diskriminierung wegen des Alters ist somit als ein allgemeiner Grundsatz des Gemeinschaftsrechts anzusehen“. Um den Schutz vor Altersdiskriminierung innerhalb der EU zu untermauern, stützte sich der Gerichtshof auf verschiedene internationale Instrumente und die gemeinsamen Verfassungstraditionen der Mitgliedstaaten. Der in Artikel 21 EU-GRC gewährte Schutz in Verbindung mit der Entscheidung des EuGH in *Mangold*, der zufolge das Verbot der Diskriminierung wegen des Alters als ein allgemeiner Grundsatz des Unionsrechts anzusehen ist, wirft die Frage auf, ob Diskriminierungen aufgrund des Alters auch außerhalb des Arbeitsmarktes, in Bereichen wie Sozialschutz, allgemeine Bildung, Gesundheitswesen, Wohnen oder Zugang zu Gütern und Dienstleistungen möglicherweise untersagt sind. Der genaue Charakter von Artikel 21 EU-GRC wurde von Generalanwalt Jääskinen in der Rechtssache *Kaltoft* untersucht.¹⁸ Auf der Grundlage dieses Schlussantrags kommt der vorliegende Bericht zu dem Ergebnis, dass die EU-GRC für Altersdiskriminierung außerhalb des Arbeitsmarktes keinen Schutz bietet, da dies möglicherweise „die anerkannte äußere Grenzlinie der Unionsgrundrechte überschreiten“ würde.¹⁹ Der EUGH kam in *Kaltoft* zu dem Schluss, dass die Richtlinie 2000/78 „nicht in entsprechender Anwendung über die Diskriminierungen

- 14 Richtlinie 2000/78/EG vom 27.11.2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16. Vgl. die Diskussion über die verspätete Vorlage und andere Aspekte der Richtlinie in Fredman, S., „Equality: A New Generation“ (2001) 30(2) *Industrial Law Journal* 145; Skidmore, P., „EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy“ (2001) 30(1) *Industrial Law Journal* 126; Bell, M., „The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?“ (2008) 79(1) *The Political Quarterly* 36; Schiek, D., „A New Framework on Equal Treatment of Persons in EC Law“ (2002) 8(2) *European Law Journal* 290. Vgl. auch allgemeinere Arbeiten zum Antidiskriminierungsrecht der EU wie z. B. Fredman, S., „Discrimination Law“ (Oxford: Clarendon Press, 2. Aufl., 2011); Bartelings, P., „Age Discrimination Law in Europe“ (The Netherlands: Kluwer Law International, 2009); Sergeant, M. (Hrsg.), „The Law on Age Discrimination in the EU“ (The Netherlands: Kluwer Law International, 2008); O’Cinnéide, C., „Age Discrimination and European Law“ (Brussels: Europäische Kommission, 2005); Bell, M., „Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive“ (2009) 3 *The Equal Rights Review* 7; Howard, E., „The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from the Formal Idea of Equality?“ (2008) 14(2) *European Law Journal* 168.
- 15 Richtlinie 2000/78/EG, Artikel 6. Die Richtlinie liefert auch Beispiele für solche Ungleichbehandlungen, indem sie in Artikel 6 feststellt: „Derartige Ungleichbehandlungen können insbesondere Folgendes einschließen: (a) die Festlegung besonderer Bedingungen für den Zugang zur Beschäftigung und zur beruflichen Bildung sowie besonderer Beschäftigungs- und Arbeitsbedingungen, einschließlich der Bedingungen für Entlassung und Entlohnung, um die berufliche Eingliederung von Jugendlichen, älteren Arbeitnehmern und Personen mit Fürsorgepflichten zu fördern oder ihren Schutz sicherzustellen; (b) die Festlegung von Mindestanforderungen an das Alter, die Berufserfahrung oder das Dienstalter für den Zugang zur Beschäftigung oder für bestimmte mit der Beschäftigung verbundene Vorteile; (c) die Festsetzung eines Höchstalters für die Einstellung aufgrund der spezifischen Ausbildungsanforderungen eines bestimmten Arbeitsplatzes oder aufgrund der Notwendigkeit einer angemessenen Beschäftigungszeit vor dem Eintritt in den Ruhestand“.
- 16 Dewhurst, E., „The Development of EU Case Law on Age Discrimination in Employment: Will you still need me? Will you still feed me? When I’m Sixty-Four“ (2013) 19(4) *European Law Journal* 517-544.
- 17 C-144/04, *Mangold*, ECLI:EU:C:2005:709, 22. November 2005.
- 18 C-354/13, *Kaltoft / Kommunernes Landsforening*, ECLI:EU:C:20142463, 18. Dezember 2014.
- 19 C-354/13, *Kaltoft / Kommunernes Landsforening*, Rn. 25.

wegen der in Artikel 1 *dieser Richtlinie abschließend aufgezählten Gründe hinaus* ausgedehnt werden“ darf. Damit scheint auch eine Ausdehnung des sachlichen Geltungsbereichs der Richtlinie 2000/78 über den Bereich des Arbeitsmarktes hinaus ausgeschlossen.²⁰

Am 2. Juli 2008 schlug die Kommission als Teil der Agenda „Eine erneuerte Sozialagenda: Chancen, Zugangsmöglichkeiten und Solidarität im Europa des 21. Jahrhunderts“²¹ eine Richtlinie des Rates vor,²² mit der die Rechtsvorschriften zur Gleichbehandlung aufgrund des Alters in bestimmten Bereichen außerhalb des Arbeitsmarktes wirksam vereinheitlicht werden sollen.²³ Die vorgeschlagene Richtlinie ergänzt den bestehenden Rechtsrahmen, der Diskriminierungen aufgrund des Alters in Beschäftigung, Beruf und Berufsausbildung verbietet,²⁴ und unterstützt das langfristige strategische Ziel der Vervollständigung des EU-Antidiskriminierungsrechts, das einen umfassenderen, wenngleich uneinheitlichen, Schutz für die Diskriminierungsgründe Geschlecht und „Rasse“ bietet.²⁵ Wichtigste Ziele des Richtlinienvorschlags sind die Stärkung des Schutzes vor Altersdiskriminierung außerhalb von Beschäftigung und Beruf, die Gewährleistung von Rechtssicherheit für Wirtschaftsakteure und potenzielle Opfer von Altersdiskriminierung in allen Mitgliedstaaten sowie die Verbesserung der sozialen Eingliederung und die Förderung der uneingeschränkten Teilhabe aller Altersgruppen an Wirtschaft und Gesellschaft.²⁶

Rechtsgrundlage des Richtlinienvorschlags²⁷ ist Artikel 19 AEUV, und Ziel des Vorschlags ist es, den Grad und die Form des Antidiskriminierungsschutzes über den Bereich der Beschäftigung hinaus auf den Zugang zu sozialem Schutz,²⁸ den Zugang zu allgemeiner Bildung²⁹ und den Zugang zu Gütern und Dienstleistungen, einschließlich Wohnraum,³⁰ auszudehnen. Unter Dienstleistungen sind Dienstleistungen im Sinne von Artikel 57 AEUV zu verstehen.³¹ Sozialer Schutz wird in Erwägungsgrund 17b genauer definiert und umfasst Sozialversicherung einschließlich gesetzlicher Rentensysteme, Sozialhilfe, Sozialwohnungen und Gesundheitsversorgung.³² Der Vorschlag sieht Schutz vor den wichtigsten Formen

20 C-354/13, *Kaltoft / Kommunernes Landsforening*, Rn. 36.

21 KOM(2008) 412.

22 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung (SEK(2008) 2180) (SEK(2008) 2181), KOM/2008/0426 endg. – CNS 2008/0140.

23 „Nichtdiskriminierung und Chancengleichheit: Erneueres Engagement“, KOM(2008) 420.

24 Richtlinie 2000/78/EG vom 27.11.2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16.

25 Richtlinie 2000/43/EG des Rates vom 29.6.2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. L 180 vom 19.7.2000, S. 22; Richtlinie 2000/78/EG des Rates vom 27.11.2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16, und Richtlinie 2004/113/EG des Rates vom 13.12.2004 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, ABl. L 373 vom 21.12.2004, S. 37. Die Richtlinie 2000/43/EG schützt Personen vor Diskriminierung aufgrund ihrer „Rasse“ oder ethnischen Herkunft beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, beim Sozialschutz und in der Bildung, während die Richtlinie 2004/113/EG Schutz vor Diskriminierung aufgrund des Geschlechts beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, mit Ausnahme von Medien- und Werbeinhalten sowie des Bildungswesens, bietet.

26 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung (SEK(2008) 2180) (SEK(2008) 2181), KOM/2008/0426 endg. – CNS 2008/0140.

27 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT.

28 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 3 Abs. 1 Bst. a.

29 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 3 Abs. 1 Bst. c.

30 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 3 Abs. 1 Bst. d.

31 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 9.

32 Für weitere Informationen zur Definition im Unionsrecht vgl.: Agentur der Europäischen Union für Grundrechte und Europarat, *Handbook on European Non-Discrimination Law* (2018) abrufbar unter: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, S. 122-125.

von Diskriminierung einschließlich unmittelbarer und mittelbarer Diskriminierung,³³ Belästigung,³⁴ Anweisung zur Diskriminierung,³⁵ Viktimisierung³⁶ und Mehrfachdiskriminierung vor.^{37, 38} Diskriminierungen aufgrund einer Assoziation³⁹ oder Vermutung⁴⁰ sind ebenfalls verboten.⁴¹ Altersbezogene positive Maßnahmen sind geschützt.⁴²

Ähnlich wie in den Bestimmungen der Richtlinie 2000/78 ist eine unterschiedliche Behandlung aufgrund des Alters zulässig, wenn sie durch ein rechtmäßiges Ziel sachlich gerechtfertigt ist und wenn die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.⁴³ Einer der umstrittensten Bereiche im Zusammenhang mit Altersdiskriminierung ist der Zugang zu und die Bereitstellung von Finanzdienstleistungen. Es kommt häufig vor, dass Finanzdienstleister wie Banken und Versicherungen aufgrund von Risikobewertungen Kunden wegen ihres Alters Dienstleistungen verweigern oder Zusatzprämien von ihnen verlangen. Die vorgeschlagene Richtlinie verbietet solche Praktiken nicht, unterstützt jedoch Mindestschutzstandards dahingehend, dass sowohl die Kunden als auch die zuständigen Gerichts- und Beschwerdestellen das Recht haben sollten, auf Anfrage über die Gründe für eine unterschiedliche Behandlung wegen des Alters bei der Bereitstellung von Finanzdienstleistungen informiert zu werden.⁴⁴ Insbesondere sollten derartige Informationen für das breite Publikum nützlich und verständlich sein und Unterschiede im individuellen Risiko für die betreffende Dienstleistung erklären, gleichzeitig jedoch ausreichend Schutz vor der Offenlegung wirtschaftlich sensibler Daten bieten. Spezifischere Schutzvorschriften, wie sie in anderen Gleichbehandlungsrichtlinien existieren, sind nicht vorgesehen.

Ebenso wie die anderen Antidiskriminierungsrichtlinien enthält auch die vorgeschlagene Richtlinie ein Recht auf angemessene Rechtsschutzmittel,⁴⁵ einschließlich der Befugnis für Verbände, Organisationen und andere juristische Personen, sich an Verfahren zu beteiligen, auch im Namen oder zur Unterstützung von Betroffenen, unbeschadet der nationalen Verfahrensregeln bezüglich Vertretung und Verteidigung vor Gericht.^{46 47} Der Richtlinienentwurf sieht vor, dass die Beweislastregeln angepasst werden sollten, wenn das Vorliegen einer Diskriminierung glaubhaft gemacht wird, und dass, im Hinblick auf eine wirksame Anwendung des Gleichbehandlungsgrundsatzes, die Beweislast auf die beklagte Partei zurückverlagert

33 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 Abs. 2, Bst. a und b.

34 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 Abs. 2, Bst. c.

35 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 Abs. 2 (db).

36 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 9.

37 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 (3-a).

38 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 12.

39 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 Abs. 2 Bst. d.

40 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 2 Abs. 2 (da).

41 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgründe 12a und 12b.

42 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 5 Abs. 1.

43 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 14a und Artikel 2 Abs. 6.

44 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 15b.

45 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 7 Abs. 1.

46 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Artikel 7 Abs. 2.

47 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 23.

werden sollte, wenn Nachweise einer solcher Diskriminierung erbracht werden.⁴⁸ Von den Mitgliedstaaten wird erwartet, dass sie bei Verstößen gegen die aufgrund des Richtlinienvorschlags erlassenen nationalen Vorschriften wirksame, verhältnismäßige und abschreckende Sanktionen (einschließlich verwaltungsrechtlicher und finanzieller Sanktionen wie Geldbußen oder Zwangsgelder sowie anderer Arten von Sanktionen) verhängen.⁴⁹

Die EMRK bietet ein breiteres Schutzniveau als das Unionsrecht. Genauer gesagt enthält sie keine Einschränkung des sachlichen Geltungsbereichs, wie sie im Unionsrecht besteht, in dem die Schutzvorschriften auf den Arbeitsmarkt beschränkt sind. In anderen Aspekten ist die EMRK jedoch nicht unproblematisch. Es gibt zwei spezielle Bestimmungen, Artikel 14 und Protokoll 12, die vor Altersdiskriminierung schützen. Aufgrund des geringen Ratifizierungsgrades kann das Protokoll 12 jedoch nur in 10 Mitgliedstaaten eigenständig angewandt werden. Hinzu kommt, dass Artikel 14 ergänzend zu den anderen Artikeln der EMRK wirkt. Um einen Anspruch nach Artikel 14 EMRK geltend zu machen, muss die beschwerdeführende Partei nachweisen, dass sie in Bezug auf den Genuss eines anderen materiellen Rechts, das durch die EMRK geschützt wird (zum Beispiel das Recht auf Freiheit nach Artikel 5 oder das Recht auf Privatsphäre nach Artikel 8), diskriminiert wurde. Der Artikel hat also keine „eigenständige Existenz“,⁵⁰ auf die sich eine Klage wegen Altersdiskriminierung stützen könnte. Trotz dieser Einschränkungen wurde zumindest durchgängig festgestellt, dass „Alter“ nach Maßgabe beider Bestimmungen ein geschützter Grund ist.⁵¹

Obwohl Alter sowohl nach Artikel 14 als auch nach Protokoll 12 ein geschützter Grund zu sein scheint, war der Gerichtshof nicht der Ansicht, dass Altersdiskriminierung mit anderen „verdächtigen“ Diskriminierungsgründen wie Geschlecht oder „Rasse“ gleichgestellt werden sollte.⁵² Dies hat Auswirkungen darauf, wie rechtmäßige Ziele, Verhältnismäßigkeit und der den Staaten zugestandene Ermessensspielraum bewertet werden. Sowohl nach Artikel 14 als auch nach Protokoll 12 verfügen die Vertragsstaaten über einen Ermessensspielraum bei der Beurteilung der Frage, „ob und inwieweit Unterschiede bei ansonsten ähnlichen Situationen eine unterschiedliche Behandlung rechtfertigen“. ⁵³ Da Alter nicht im gleichen Maße wie Geschlecht oder „Rasse“ als verdächtiger Grund gilt, wird den Staaten bei der Rechtfertigung von Ungleichbehandlungen aufgrund des Alters in der Regel ein größerer Ermessensspielraum zugestanden.⁵⁴ Zwar gibt es weder in Artikel 14 noch in Protokoll 12 ausdrückliche Ausnahmen von den Gleichheitsgarantien, die Rechtsprechung zeigt jedoch, dass gewisse Unterschiede in der Behandlung aufgrund des Alters als akzeptabel und als nicht der Kontrolle des Gerichts unterliegend angesehen werden.⁵⁵

Der Schutz vor Altersdiskriminierung ist jedoch nicht auf den Bereich der Beschäftigung beschränkt, wie dies im Unionsrecht der Fall ist; die Gleichbehandlungsgarantien in der EMRK gelten vielmehr für

48 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 24 und Artikel 8.

49 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, ST 10740 2019 INIT, Erwägungsgrund 29 und Artikel 14.

50 EGMR, *Khamtokhu und Aksenchik gg. Russland* (Beschwerden Nr. 60367/08 und 961/11), 13. Mai 2014, Ziffer 53.

51 *Erläuternder Bericht zum Protokoll Nr. 12 zur Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (Rom, 4.11.2000), Sammlung der Europaratsverträge Nr. 177, § 20.

52 EGMR, *Khamtokhu und Aksenchik gg. Russland* (Beschwerden Nr. 60367/08 und 961/11), Ziffer 62; *British Gurkha Welfare Society gg. das Vereinigte Königreich* (Beschwerde Nr. 44818/11), 15. September 2016, Ziffer 88; *Carvalho Pinto de Sousa Morais gg. Portugal* (Beschwerde Nr. 17484/15), 3. Oktober 2017, Ziffer 45.

53 EGMR, *Stec u. a. gg. das Vereinigte Königreich* (Beschwerden Nr. 65731/01 und 65900/01), 12. April 2006, Ziffer 51; *Van Raalte gg. die Niederlande* (Beschwerde Nr. 20060/92), 21. Februar 1997, Ziffer 39.

54 O'Hare kritisiert diesen Ansatz als unbefriedigend: O'Hare, U., „Enhancing European Equality Rights: A New Regional Framework“ (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, S. 137-138. Obwohl Artikel 1 des Protokolls Nr. 12 imstande ist, neue Diskriminierungsgründe einzubeziehen, etabliert dieser Ansatz nach Ansicht der Autorin potenziell eine Hierarchie zwischen den aufgelisteten und den nicht aufgelisteten Gründen. Vgl. auch Meenan, H., „Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe“ (2007) 14(1) *Maastricht Journal of European and Comparative Law* 39; Gerards, J., „The discrimination ground of Article 14 of the European Convention on Human Rights“ (2013) 13(1) *Human Rights Law Review* 99; Hurford, J., „An Aspect of Ordinarity: Is Age a 'Suspect Ground' under Article 14 ECHR?“ (2014) 19(1) *Judicial Review* 39.

55 EGMR, *Carvalho Pinto de Sousa Morais gg. Portugal* (Beschwerde Nr. 17484/15); übereinstimmende Rechtsauffassung von Richterinnen Judkivska.

alle in diesem Bericht berücksichtigten Sektoren, als da wären Sozialschutz,⁵⁶ allgemeine Bildung,⁵⁷ Wohnraumversorgung,⁵⁸ Gesundheitswesen⁵⁹ sowie Zugang zu Gütern und Dienstleistungen.⁶⁰ Die EMRK schützt sowohl vor unmittelbarer als auch vor mittelbarer Diskriminierung.⁶¹ Diskriminierungen aufgrund von Assoziierung,⁶² Belästigungen⁶³ und Anweisungen zur Diskriminierung⁶⁴ sind nach der EMRK ebenfalls verboten. Positive Maßnahmen sind erlaubt.⁶⁵ Mehrfachdiskriminierungen sind zwar nicht ausdrücklich verboten und nicht klar definiert, entsprechende Beschwerden nach der EMRK kommen jedoch vor. Im Zusammenhang mit Alter treten diese insbesondere in Verbindung mit Beschwerden wegen geschlechtsbezogener Diskriminierung auf.

Insgesamt kann klar festgestellt werden, dass der unionsrechtliche Schutz vor Altersdiskriminierung auf den Arbeitsmarktkontext beschränkt ist und ohne ungebührliche juristische Schachzüge nicht auf andere Bereiche wie Sozialschutz, allgemeine Bildung, Gesundheitswesen, Wohnen oder Zugang zu Gütern und Dienstleistungen ausgedehnt werden kann.

Abschnitt II: Überblick über die nationalen Rechtsvorschriften zu Altersdiskriminierung außerhalb des Arbeitsmarktes

Dieser Teil des Berichts ermittelt die wichtigsten Schutzvorschriften und bewertet, inwieweit das nationale Recht der gegenwärtig 27 EU-Mitgliedstaaten vor Altersdiskriminierung außerhalb des Arbeitsmarktes schützt. Zwar existieren vielfältige Methoden, mit denen die Mitgliedstaaten altersbezogene Gleichheit in allen Bereichen herzustellen versuchen; der Bericht unterscheidet jedoch zwischen drei Schutzmodellen: vollständiger Schutz, partieller Schutz und kein Schutz. Innerhalb dieser drei Modelle existieren zahlreiche Varianten, die im Laufe des Berichts ausführlich erläutert werden. Die genannten Modelle stellen eine zweckdienliche Methode dar, um das allgemeine Schutzniveau zu bemessen und nützliche Schlussfolgerungen und Empfehlungen abzuleiten.

Ein vollständiger, ausdrücklicher Schutz vor unmittelbarer Altersdiskriminierung wird in über 44 % der Mitgliedstaaten gewährt. Einige Mitgliedstaaten verfügen über spezielle Antidiskriminierungsgesetze, die

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- 56 Der EMRK zufolge gibt es kein Recht auf soziale Sicherheit, obwohl festgestellt wurde, dass einige soziale Rechte, z. B. Renten und Sozialleistungen, in den Geltungsbereich anderer EMRK-Rechte, beispielsweise Artikel 1 oder Artikel 8 Protokoll 1, fallen. Siehe dazu: Agentur der Europäischen Union für Grundrechte und Europarat, *Handbook on European Non-Discrimination Law* (2018), abrufbar unter https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, S. 125. Wichtige Rechtsstreite in diesem Zusammenhang sind u. a. EGMR, *Andrejeva gg. Lettland* (Beschwerde Nr. 55707/08), 18. Februar 2009, *Gaygusuz gg. Österreich* (Beschwerde Nr. 17371/90), 31. August 1996, und *Koua Poirrez gg. Frankreich* (Beschwerde Nr. 40892/98), 30. September 2003.
- 57 Artikel 2 Protokoll 1 schützt ein Recht auf allgemeine Bildung im Rahmen der EMRK. Vgl. Europarat: *ECtHR Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education* (2017).
- 58 Zwar gibt es kein eigenständiges Recht auf Wohnraum, doch hat der Gerichtshof Artikel 8 sehr weit dahin ausgelegt, dass er den Schutz der „Wohnung“ einschließlich der Lebensverhältnisse gewährleistet. Der Rechtsprechung des Gerichtshofs zufolge kann eine diskriminierende Behandlung unter bestimmten Umständen einer erniedrigenden Behandlung gleichkommen. Vgl. EGMR, *Smith und Grady gg. das Vereinigte Königreich* (Beschwerden Nr. 33985/96 und 33986/96), 27. September 1999, Ziffer 121.
- 59 Zwar gibt es nach der EMRK kein Recht auf Gesundheitsversorgung, doch wurden einige Rechte dahin ausgelegt, dass sie bestimmte Rechte im Bereich der Gesundheitsversorgung mit einschließen, z. B. den Zugang zu Krankenakten oder den Schutz vor unmenschlicher und erniedrigender Behandlung nach Artikel 8 und Artikel 3. Siehe dazu: Agentur der Europäischen Union für Grundrechte und Europarat, *Handbook on European Non-Discrimination Law* (2018), abrufbar unter https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, S. 127.
- 60 Die EMRK bietet Schutz im Rahmen von Artikel 8. Siehe dazu: Agentur der Europäischen Union für Grundrechte und Europarat, *Handbook on European Non-Discrimination Law* (2018), abrufbar unter: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, S. 136. Cousins, M., „The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?“ (2009) 16(3) *Journal of Social Security Law* 120.
- 61 EGMR, *Garib gg. die Niederlande* (Beschwerde Nr. 43494/09), 7. November 2017, Ziffer 31 abweichende Auffassung.
- 62 EGMR, *Guberina gg. Kroatien* (Beschwerde Nr. 23682/13), 22. März 2016.
- 63 EGMR, *Đorđević gg. Kroatien* (Beschwerde Nr. 41526/10), 24. Juli 2012; *Bączkowski u. a. gg. Polen* (Beschwerde Nr. 1543/06), 3. Mai 2007.
- 64 EGMR, *Bączkowski u. a. gg. Polen* (Beschwerde Nr. 1543/06).
- 65 Agentur der Europäischen Union für Grundrechte und Europarat, *Handbook on European Non-Discrimination Law* (2018), abrufbar unter: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, S. 77.

unmittelbare Diskriminierungen wegen des Alters in den Bereichen Sozialschutz,⁶⁶ allgemeine Bildung,⁶⁷ Wohnen,⁶⁸ Gesundheitsversorgung⁶⁹ und Zugang zu Gütern und Dienstleistungen⁷⁰ ausdrücklich verbieten. In einigen Ländern – z.B. in Österreich⁷¹ und in Belgien⁷² – verfügen die verschiedenen Regionen über jeweils eigene Antidiskriminierungsgesetze. In anderen Ländern ist der Schutz vor Altersdiskriminierung in bereichsspezifischen Rechtsvorschriften, z.B. in der Sozialgesetzgebung,⁷³ der Bildungsgesetzgebung,⁷⁴ der Wohnungsgesetzgebung⁷⁵ oder in den Rechtsvorschriften für das Gesundheitswesen⁷⁶ verankert.

Die meisten Mitgliedstaaten wenden jedoch ein Modell des partiellen Schutzes an, das nur bedingt Schutz gewährt. Grund dafür ist möglicherweise, dass ausdrückliche Rechtsvorschriften fehlen und sich der Schutz aus verfassungs- oder völkerrechtlichen Bestimmungen⁷⁷ bzw. aus dem innerstaatlichen Verwaltungsrecht⁷⁸ herleitet oder dass die nationalen Schutzvorschriften unvollständig sind (besonders

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- 66 Diese Mitgliedstaaten sind Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Irland, Kroatien, Lettland, Luxemburg, Rumänien, Schweden, Slowakei, Slowenien und Tschechien.
- 67 Diese Mitgliedstaaten sind Bulgarien, Deutschland, Finnland, Frankreich, Irland, Kroatien, Luxemburg, Rumänien, Schweden, Slowakei, Slowenien und Tschechien.
- 68 Diese Mitgliedstaaten sind Bulgarien, Deutschland, Finnland, Frankreich, Irland, Kroatien, Luxemburg, Rumänien, Schweden, Slowenien und Tschechien.
- 69 Diese Mitgliedstaaten sind Deutschland, Finnland, Irland, Kroatien, Luxemburg, Rumänien, Schweden, Slowakei, Slowenien, Tschechien und Ungarn.
- 70 Diese Mitgliedstaaten sind Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Litauen, Luxemburg, Rumänien, Schweden, Slowenien und Tschechien.
- 71 Vgl. Österreich, wo der Schutz vor Diskriminierung im Bereich des Sozialschutzes in jeweils eigenen Instrumenten der neun Bundesländer verankert ist. Österreich, Wiener Antidiskriminierungsgesetz, Wr LGBl Nr. 35/2004, (§ 1); Burgenländisches Antidiskriminierungsgesetz, Bgl LGBl Nr. 84/2005, (§ 23); Kärntner Antidiskriminierungsgesetz, Kntn LGBl Nr. 63/2004, (§ 12); Niederösterreichisches Antidiskriminierungsgesetz, NÖ LGBl Nr. 24/2017, (§ 3); Oberösterreichisches Antidiskriminierungsgesetz, OÖ LGBl Nr. 50/2005, (§ 2); Salzburger Gleichbehandlungsgesetz, Slzb LGBl Nr. 31/2006, (§ 28); Steiermärkisches Gleichbehandlungsgesetz, Stmk LGBl Nr. 66/2004, (§ 32); Tiroler Antidiskriminierungsgesetz, T LGBl Nr. 25/2005, (§ 3); Vorarlberger Antidiskriminierungsgesetz, VlbG LGBl Nr. 17/2005, (§ 1).
- 72 Im belgischen föderalen System ist die Zuständigkeit für die Gesetzgebung im Bereich Diskriminierung zwischen dem Föderalstaat, den drei Gemeinschaften und den drei Regionen aufgeteilt. Anders als im französischsprachigen Teil Belgiens sind im flämischen Teil des Landes Region und Gemeinschaft zusammengelegt. Insgesamt haben alle belgischen Gesetzgeber Gesetze verabschiedet, die den Schutz vor Altersdiskriminierung über den Bereich der Beschäftigung hinaus in ihre jeweiligen Zuständigkeitsbereiche – als da wären Sozialschutz (einschließlich Sozialversicherung und Sozialleistungen), Gesundheit, Bildung, Wohnungswesen sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen – ausweiten.
- 73 Vgl. die Situation in Spanien und der Slowakei, wo es sowohl nationale als auch bereichsspezifische Rechtsvorschriften zum Sozialschutz gibt: Spanien, Gesetz 62/2003, vom 30. Dezember 2003, über steuerliche, administrative und soziale Maßnahmen (BOE, 31. Dezember 2003), Artikel 27 und 28 sowie Allgemeines Sozialversicherungsgesetz (*RDL 8/2015*) (BOE, 31. Oktober 2015), Artikel 2; Slowakei, Gesetz Nr. 365/2004 über die Gleichbehandlung in bestimmten Bereichen und den Schutz vor Diskriminierung (Antidiskriminierungsgesetz), Artikel 2 Abs. 1 und Artikel 2a Abs. 2 in Verbindung mit Artikel 5 Abs. 1 und Abs. 2 Buchst. a. Dieses Gesetz wirkt in Verbindung mit Slowakei, Gesetz Nr. 461/2003 über die Sozialversicherung (geänderte Fassung), Slowakei, Gesetz Nr. 448/2008 über soziale Dienstleistungen sowie zur Änderung und Ergänzung des Gesetzes Nr. 455/1991 über konzessionierte Gewerbe (Gewerbegesetz) (geänderte Fassung), Slowakei, Gesetz Nr. 43/2004 über das Altersvorsorgespargen sowie zur Änderung und Ergänzung einiger Gesetze (geänderte Fassung), Artikel 9 und Slowakei, Gesetz Nr. 650/2004 über das Alterszusatzrentensparen, Artikel 7 Abs. 1.
- 74 Vgl. die Situation in Malta, Polen, der Slowakei und Spanien. Spanien: Gesetz 62/2003 vom 30.12.2003 über steuerliche, administrative und soziale Maßnahmen, Artikel 27 und 28, Organengesetz 2/2006 über das Bildungswesen, Artikel 1; Malta: *Education Act*, Artikel 3; Polen, Bildungsgesetz vom 14.12.2016 (in Kraft seit 1. September 2017) (Dz.U.2017.59). Dieses Gesetz ersetzt zum Teil das vorherige Gesetz über das Bildungssystem (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*) (Dz. U. 2016. poz. 1943, 1954, 1985, 2169), 7.09.1991. Das Gesetz von 1991 ist, in der 2017 veröffentlichten Fassung (Dz.U.2017.2198 t.j.), zum Teil nach wie vor in Kraft. Um zwischen diesen Gesetzen zu unterscheiden, werden in diesem Bericht die Bezeichnungen „Bildungsgesetz von 1991“ und „Bildungsgesetz von 2016“ verwendet; Slowakei: Artikel 2 Abs. 1 in Verbindung mit Artikel 5 Abs. 1 und Abs. 2 Buchst. c des slowakischen Antidiskriminierungsgesetzes.
- 75 Vgl. die Situation in Frankreich: Artikel 1 Abs. 3 Gesetz Nr. 89-462 vom 6.07.1989 (sog. „Mermaz-Gesetz“) und Portugal: Artikel 2 Abs. 1 Wohnraumrahmengesetz – Gesetz 83/2019, 3.09.2019, Artikel 1067-A des portugiesischen Zivilgesetzbuchs.
- 76 Vgl. die Situation in Spanien, Gesetz 62/2003 vom 30.12.2003 über steuerliche, administrative und soziale Maßnahmen, Artikel 27 und 28 sowie Allgemeines Gesetz über das Gesundheitswesen, Artikel 3; Frankreich: Gesetz über das öffentliche Gesundheitswesen, Artikel L1110-3; Slowakei: Artikel 2 Abs. 1 in Verbindung mit Artikel 5 Abs. 1 und Artikel 5 Abs. 2 Buchst. b des slowakischen Antidiskriminierungsgesetzes sowie Slowakei, Gesetz Nr. 576/2004 über die Gesundheitsversorgung, mit der Gesundheitsversorgung zusammenhängende Dienstleistungen sowie zur Änderung und Ergänzung einiger Gesetze (geänderte Fassung), Artikel 11 Abs. 26.
- 77 Vgl. die Situation in Zypern, Artikel 28 der Verfassung; Estland, Artikel 12 der Verfassung; Italien, Artikel 3 der Verfassung; Litauen: Der Sozialschutz wird von den wichtigsten Antidiskriminierungsvorschriften nicht erfasst, kann aber anderen Schutzvorschriften unterliegen (dies ist jedoch noch unklar); Malta, Artikel 45 der Verfassung; Portugal: Artikel 13 Abs. 2 der Verfassung.
- 78 Dänemark.

ausgeprägt in Föderalstaaten). Es gibt nur zwei Mitgliedstaaten (Griechenland und Polen⁷⁹), die außerhalb des Arbeitsmarktes weder explizit noch implizit Schutz vor unmittelbarer Altersdiskriminierung gewähren, wobei jedoch zu beachten ist, dass dieser fehlende Schutz auf bestimmte Bereiche beschränkt ist (siehe Tabelle 6). In den meisten Mitgliedstaaten lassen sich Ungleichbehandlungen aufgrund des Alters in allen Bereichen außerhalb des Arbeitsmarktes nach dem Kriterium der Berechtigung und Verhältnismäßigkeit rechtfertigen.

Vollständiger Schutz vor mittelbarer Diskriminierung wird in unterschiedlicher Form gewährt: in Form spezieller Gleichbehandlungsvorschriften⁸⁰ oder in Form spezieller Rechtsvorschriften für bestimmte Bereiche.⁸¹ Mehr als ein Drittel aller Mitgliedstaaten gewährt eine Form von partiellem Schutz. Dieser ergibt sich nicht aus ausdrücklichen gesetzlichen Schutzvorschriften, sondern vielmehr aus dem Rückgriff auf verfassungsrechtliche oder internationale Bestimmungen.⁸² Lediglich Dänemark und Polen gewähren überhaupt keinen Schutz. In den meisten Staaten gilt, dass mittelbare Diskriminierungen aufgrund des Alters dadurch gerechtfertigt werden können, dass ein rechtmäßiges Ziel verfolgt wird und die Mittel zur Erreichung dieses Ziels verhältnismäßig (wie auch immer definiert) sind.⁸³

Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind ebenfalls Formen von Diskriminierung, die auf nationaler Ebene in sämtlichen Bereichen verboten sind, wobei Viktimisierung die am wenigsten verbotene Diskriminierungsform ist. Die Vielfalt der in den diversen Bereichen bestehenden Verbote wird im Bericht anhand des Bereichs der sozialen Sicherheit beispielhaft aufgezeigt. Im Bereich der sozialen Sicherheit ist es so, dass mehr als 44 % der Mitgliedstaaten vollständigen Schutz vor Belästigungen, Anweisungen zur Diskriminierung und Viktimisierung gewähren. Österreich gewährt vollständigen Schutz im Bereich der sozialen Sicherheit, wenn auch nicht auf Bundesebene.⁸⁴ Lediglich acht Mitgliedstaaten, darunter z.B. Dänemark, gewähren überhaupt keinen Schutz. Es gibt auch Länder, die partiellen Schutz gewähren. In Deutschland sieht das Zivilrecht zum Beispiel in keinem Bereich ein ausdrückliches oder spezielles Verbot von Belästigungen vor. Einige allgemeine Bestimmungen des Zivilrechts, z.B. Vertragspflichten und Haftungsrecht, könnten Klagen wegen Belästigungen aufgrund des Alters jedoch abdecken. Auch im öffentlichen Recht existieren keine Regelungen. Angesichts der in Artikel 20 Absatz 3 Grundgesetz verankerten rechtsstaatlichen Standards für staatliche Stellen kann jedoch davon

- 79 Es sei darauf hingewiesen, dass in Polen einige interne Rechtsschutzbestimmungen existieren, die gegebenenfalls Grundlage für eine Klage wegen Diskriminierung aufgrund des Alters sein können, etwa Artikel 32 der polnischen Verfassung (Recht auf Gleichheit) sowie Artikel 23-24 des Zivilgesetzbuches bzgl. einer Verletzung der Persönlichkeitsrechte Einzelner. Polen verfügt auch über eine Reihe völkerrechtlicher Schutzbestimmungen, z.B. Schutzbestimmungen im Rahmen der Allgemeinen Erklärung der Menschenrechte (1948), des Internationalen Paktes über bürgerliche und politische Rechte (1966) und der UN-Konvention über die Rechte des Kindes (1989). Bislang wurden diese jedoch noch nicht im Zusammenhang mit „Alter“ eingesetzt, um altersdiskriminierende Maßnahmen anzufechten.
- 80 Dies gilt für Belgien, Bulgarien, Estland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Lettland, Litauen, Österreich, Rumänien, Schweden, die Slowakei, Slowenien, Spanien, Tschechien und Ungarn.
- 81 Dies gilt für Frankreich. Die allgemeine Definition des Begriffs „Diskriminierung“ in Artikel 1 Gesetz Nr. 2008496 vom 27.05.2008 umfasst unmittelbare und mittelbare Diskriminierung. Diskriminierung ist nach den allgemeinen zivilrechtlichen Gleichbehandlungsbestimmungen in Artikel 1 und Artikel 2 Abs. 3 Gesetz Nr. 2008-496 vom 27.05.2008 in Bezug auf sämtliche Güter und Dienstleistungen ausdrücklich verboten. Spezielle Rechtsvorschriften über das Mietrecht enthalten in Artikel 1 Abs. 3 Gesetz Nr. 89-462 vom 6.07.1989 (das sogenannte Mermaz-Gesetz) auch ein Verbot von Diskriminierung aus sämtlichen nach französischem Recht verbotenen Gründen, einschließlich des Alters. Darüber hinaus gibt es eine spezielle Vorschrift über den Zugang zur Gesundheitsversorgung (Artikel L 1110-3 Gesetz über das öffentliche Gesundheitswesen), die ein allgemeines Verbot von Diskriminierung beim Zugang zur Gesundheitsversorgung enthält und keine Merkmale auflistet. In Portugal ist die Situation ähnlich.
- 82 Zypern: Artikel 28 der Verfassung; Italien: Artikel 3 der Verfassung; Malta: Artikel 45 der Verfassung; Niederlande: Rückgriff auf EMRK, ICCPR und andere internationale Instrumente; Portugal: Artikel 13 Abs. 2 der Verfassung.
- 83 Dies trifft auf die meisten Mitgliedstaaten zu, insbesondere auf Belgien, Bulgarien, Estland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Lettland, Litauen, Österreich, Rumänien, Schweden, die Slowakei, Slowenien, Spanien, Tschechien und Ungarn.
- 84 Vgl. die Schutzvorschriften der einzelnen Bundesländer: Österreich, Wien: Wiener Antidiskriminierungsgesetz, Wr LGBI Nr. 35/2004, § 3 Abs. 3; Burgenland: Burgenländisches Antidiskriminierungsgesetz, Bgl LGBI Nr. 84/2005, § 25; Kärnten: Kärntner Antidiskriminierungsgesetz, Ktn LGBI Nr. 63/2004, § 13; Niederösterreich: Niederösterreichisches Antidiskriminierungsgesetz, NÖ LGBI Nr. 24/2017, § 2 Abs. 3 und § 3; Oberösterreich: Oberösterreichisches Antidiskriminierungsgesetz, OÖ LGBI Nr. 50/2005, § 1 Abs. 1 und 3, § 4 Abs. 3; Salzburg: Salzburger Gleichbehandlungsgesetz, Slz LGBI Nr. 31/2006, § 3 Abs. 7, § 28; Steiermark: Steiermärkisches Gleichbehandlungsgesetz, Stmk LGBI Nr. 66/2004, § 32; Tirol: Tiroler Antidiskriminierungsgesetz, T LGBI Nr. 25/2005, § 6; Vorarlberg: Vorarlberger Antidiskriminierungsgesetz, Vlb LGBI Nr. 17/2005, § 2 Abs. 4.

ausgegangen werden, dass entsprechende Handlungen seitens öffentlicher Stellen im Sozialrecht, im öffentlichen Bildungswesen und beim Zugang zu Gütern und Dienstleistungen als rechtswidrig eingestuft würden.⁸⁵

Einige Mitgliedstaaten gewähren ausdrücklichen, vollständigen Schutz vor Mehrfachdiskriminierung (z. B. Kroatien,⁸⁶ Deutschland,⁸⁷ Griechenland,⁸⁸ Portugal⁸⁹ und Slowenien⁹⁰), und viele von ihnen schließen den Diskriminierungsgrund Alter mit ein.⁹¹ Es gibt jedoch auch viele Mitgliedstaaten (die Mehrzahl), die keinen ausdrücklichen Schutz vor Mehrfachdiskriminierung gewähren. Dies gilt für Dänemark, Estland, Finnland, Frankreich, Irland, Italien, Lettland, Litauen, Luxemburg, die Niederlande, die Slowakei, Spanien, die Tschechische Republik und Zypern. Dies bedeutet nicht, dass Betroffene nicht aus einzelnen Diskriminierungsgründen Ansprüche geltend machen können, ein solcher Rückgriff auf einzelne Diskriminierungsgründe ist jedoch unbefriedigend. Strittig ist auch, ob Abhilfemaßnahmen so angepasst werden können, dass sie der Schwere von Mehrfachdiskriminierungen Rechnung tragen. Einige Staaten (z. B. Kroatien) sehen zwar eine Anpassung der Entschädigung vor, was dies in der Praxis tatsächlich bedeutet, ist jedoch unklar. Andere Mitgliedstaaten sehen in derartigen Fällen keine Anpassung der Entschädigung vor (Schweden).

Ausnahmen sind in den Vorschriften zum Schutz vor Altersdiskriminierung üblich, teils aufgrund sozialer Normierung, teils aufgrund der offensichtlichen Einfachheit der Verwaltung solcher altersbasierten Klassifikationen. In der Gesetzgebung der Mitgliedstaaten scheint es drei gängige Formen von Ausnahmen zu geben: (a) Alter als Voraussetzung für die Zuerkennung, den Erwerb oder die Berechnung von Ansprüchen, (b) Altersgruppen, denen bestimmte Vergünstigungen gewährt werden, und (c) Höchst- bzw. Mindestalter für bestimmte Ansprüche. Darüber hinaus machen Finanz- und Versicherungsdienstleister häufig geltend, dass Alter ein maßgeblicher Faktor für die Bewertung des Risikos bei der Bereitstellung eines bestimmten Bank- oder Versicherungsprodukts ist und folglich der Zugang zu solchen Produkten je nach Alter des Antragstellers bzw. der Antragstellerin entweder verweigert, minimiert oder zu einem wesentlich höheren Preis gewährt werden sollte. Die Mitgliedstaaten haben sehr unterschiedlich auf diese Herausforderung reagiert, und der Bericht zeigt die Skala der Reaktionen in den 27 EU-Mitgliedstaaten auf. Am unteren Ende der Skala befinden sich die Mitgliedstaaten, in denen Versicherungen und Banken, deren Dienstleistungen auf Risikoberechnungen basieren, vollständig befreit sind, und die von daher Betroffenen keinen Schutz vor einer unterschiedlichen Behandlung aufgrund des Alters bieten (Slowenien). Manche Mitgliedstaaten wenden die normalen Grundsätze der Altersdiskriminierung an, d. h. dass jegliche Ungleichbehandlung aufgrund des Alters gerechtfertigt und verhältnismäßig sein sollte (Bulgarien). In anderen Mitgliedstaaten ist eine Verstärkung des Schutzes durch Branchenregulierungen, zusätzlich zur normalen Prüfung der Rechtfertigung und Verhältnismäßigkeit, festzustellen (Ungarn). Es gibt eine wachsende Zahl von Mitgliedstaaten, die noch weitergehende, proaktive Maßnahmen ergreifen, um die Gefahr möglicher Diskriminierungen aufgrund des Alters zu reduzieren, indem sie von Finanz- und Versicherungsdienstleistern einschlägige, aktuelle versicherungsmathematische Nachweise zur Untermauerung der Risikobewertung verlangen, entweder in Kombination mit einer Angemessenheitsprüfung (Deutschland, Irland und Portugal) oder aber in Kombination mit einer vollständigen Prüfung der legitimen Rechtfertigung und Verhältnismäßigkeit (Tschechien).

Auch was die Haltung gegenüber positiven Maßnahmen betrifft, sind innerhalb der EU-Mitgliedstaaten Unterschiede festzustellen, die in der Regel davon abhängen, ob die nationalen Rechtsordnungen auf

85 Deutschland, Grundgesetz, Artikel 20 Abs. 3.

86 Kroatien, Antidiskriminierungsgesetz, 9.07.2008, Artikel 6 Abs. 1. In Artikel 6 Abs. 2 Antidiskriminierungsgesetz heißt es: „Bei der Festlegung der Höhe des Ausgleichs für immaterielle Schäden und bei der Entscheidung über die Geldbuße für die in diesem Gesetz definierten Verstöße berücksichtigt das Gericht die in Absatz 1 dieses Artikels erwähnten Umstände“.

87 Deutschland, Allgemeines Gleichbehandlungsgesetz, § 4.

88 Griechenland, Gleichbehandlungsgesetz 4443/2016, Artikel 2 Abs. 2 Buchst. g.

89 Portugal, Gesetz 93/2017, Artikel 3 Abs. 1 Buchst. e und Artikel 4 Abs. 1.

90 Slowenien, Gesetz zum Schutz vor Diskriminierung, Artikel 12, Pkt. 1.

91 Griechenland, Gleichbehandlungsgesetz 4443/2016, Artikel 2 Abs. 2 Buchst. g.

formalen oder materiellen Gleichheitsmodellen basieren.⁹² Es gibt Mitgliedstaaten, z.B. Zypern, die positiven Maßnahmen traditionell eher misstrauisch gegenüberstehen und sie nicht als eine Ergänzung zur Gleichheit, sondern als einen Verstoß gegen das Antidiskriminierungsrecht betrachten. Andere Mitgliedstaaten sehen in ihrem jeweiligen nationalen Kontext keine positiven Maßnahmen vor (was jedoch nicht bedeutet, dass solche Maßnahmen als gegen das Antidiskriminierungsrecht verstoßend angesehen würden und nicht implementiert werden könnten). Dies ist derzeit in Dänemark und Estland der Fall. Zwar sehen einige Mitgliedstaaten die Umsetzung positiver altersbezogener Maßnahmen vor, Anwendung und Umfang derselben sind jedoch häufig beschränkt. In Frankreich sind positive altersbezogene Maßnahmen beispielsweise auf den Bereich des Wohnens beschränkt.

Durchsetzungsmaßnahmen in Form von Verwaltungs- oder Gerichtsverfahren sind in den meisten Mitgliedstaaten (81 %) vorgesehen.⁹³ Lediglich drei Mitgliedstaaten verfügen über keine klaren Mechanismen, mit deren Hilfe der Grundsatz der Nichtdiskriminierung aufgrund des Alters außerhalb des Arbeitsmarktes auf dem Verwaltungs- oder dem Gerichtsweg durchgesetzt werden kann.⁹⁴ In einigen Mitgliedstaaten ist der Schutz partiell, weil er bestimmte Bereiche nicht mit einbezieht (z. B. ist in Lettland der Grundsatz der Nichtdiskriminierung aufgrund des Alters im Bildungswesen und beim Zugang zu Gütern nicht einklagbar) oder weil in dieser Frage mangelnde Rechtsklarheit herrscht (z. B. in Polen⁹⁵). In 81 % der Mitgliedstaaten können Personen, die sich wegen einer diskriminierenden Behandlung aufgrund des Alters für beschwert halten, Unterstützung bei der Geltendmachung ihrer Ansprüche erhalten.⁹⁶ Dies ist z. B. in Deutschland⁹⁷ und in Griechenland der Fall.⁹⁸ Lediglich vier Mitgliedstaaten sehen für Personen, die eine Diskriminierung wegen des Alters außerhalb des Arbeitsmarktes geltend machen, keinerlei Unterstützung

92 Europäische Kommission, *National protection beyond the two EU Anti-discrimination Directives* (2014), abrufbar unter: <https://op.europa.eu/en/publication-detail/-/publication/a8cac718-8369-479e-aaa8-d86efdf897f8/language-en/format-PDF/source-search>, S. 36.

93 Diese Mitgliedstaaten sind: Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Litauen, Luxemburg, Malta, die Niederlande, Österreich, Portugal, Rumänien, Schweden, die Slowakei, Slowenien, Spanien, Tschechien, Ungarn und Zypern.

94 Dänemark, Estland und Italien.

95 Im Fall Polens ist es wahrscheinlich möglich, Ansprüche wegen Altersdiskriminierung unter Berufung auf die polnische Verfassung (Artikel 32, Recht auf Gleichheit) oder auf Artikel 23-24 des Bürgerlichen Gesetzbuches bzgl. der Persönlichkeitsrechte der Einzelnen geltend zu machen. Da dies in Bezug auf Altersdiskriminierung jedoch noch nie versucht wurde, ist unklar, ob es praktisch bzw. rechtlich möglich ist.

96 Belgien, Bulgarien, Deutschland, Frankreich (beschränkt auf die Vertretung durch NROs und die französische Gleichbehandlungsstelle), Griechenland (umfassende Vertretung), Irland, Kroatien, Lettland, Litauen, Luxemburg, Malta, die Niederlande, Österreich, Portugal (ausdrücklich in Mietfragen), Rumänien, Schweden, die Slowakei, Slowenien, Spanien, Tschechien (nur Rechtsberatung, keine Vertretung) und Ungarn.

97 In Deutschland sind Verbände (definiert als Personenzusammenschlüsse, die nicht gewerbsmäßig entsprechend ihrer Satzung die Interessen von Personen oder Personengruppen wahrnehmen, die nach Maßgabe des Allgemeinen Gleichbehandlungsgesetzes – kurz „AGG“ – benachteiligt sind) befugt, Benachteiligte zu unterstützen (§ 23 Abs. 1 AGG). Sie müssen mindestens 75 Mitglieder haben oder einen Zusammenschluss aus mindestens sieben Verbänden bilden, die denselben Zweck verfolgen. Die Rechtspersönlichkeit dieser Verbände ist keine Voraussetzung, sie müssen aber dauerhaft und nicht nur vorübergehend zur Unterstützung einer einzigen Klage oder Beschwerde tätig sein. Gewerkschaften als solche sind keine Verbände in diesem Sinne. Die Verbände sind darauf beschränkt, in gerichtlichen Verfahren als Beistände Benachteiligter aufzutreten (§ 23 Abs. 2 AGG). In diesem Fall sieht § 90 Abs. 2 der Zivilprozessordnung vor, dass das von dem Beistand Vorgetragene als von der Partei vorgebracht gilt, sofern Letztere diesem nicht widerspricht. Antidiskriminierungsverbände können benachteiligte Personen in gerichtlichen Verfahren unterstützen, auch wenn eine anwaltliche Vertretung vorgeschrieben ist. In diesem Fall können sie zusätzlich zu einem Anwalt zur Unterstützung der betreffenden Person tätig werden. Obwohl das Allgemeine Gleichbehandlungsgesetz dazu keine ausdrückliche Bestimmung enthält, wird allgemein davon ausgegangen, dass Antidiskriminierungsverbände immer die Zustimmung der betroffenen Person benötigen, wenn sie zu deren Unterstützung tätig werden. In Deutschland gibt es keine besondere Pflicht für Verbände, zur Unterstützung von benachteiligten Personen tätig zu werden.

98 In Griechenland sind Artikel 7 der Richtlinie 2000/43 und Artikel 9 der Richtlinie 2000/78 in Artikel 8 des Gleichbehandlungsgesetzes 4443/2016 verankert. Speziell heißt es in Artikel 8 Abs. 3 dieses Gesetzes: „Juristische Personen, Verbände oder Organisationen, einschließlich Sozialpartner und Gewerkschaften, deren Zweck die Wahrung des Grundsatzes der Gleichbehandlung – ungeachtet der Rasse, Hautfarbe, nationalen oder ethnischen Herkunft, Abstammung, religiösen oder sonstigen Überzeugungen, einer Behinderung oder chronischen Krankheit, des Alters, des familiären oder sozialen Status, der sexuellen Ausrichtung, der geschlechtlichen Identität oder Merkmale – umfasst, können Geschädigte vor Gericht sowie vor Verwaltungsbehörden und organen vertreten, sofern diese vorab mithilfe einer notariellen Urkunde bzw. einer privaten, mit ihrer beglaubigten Unterschrift versehenen Urkunde ihre Zustimmung erteilen.“ In Abs. 4 desselben Artikels heißt es darüber hinaus, dass die oben genannten juristischen Personen in Verfahren wegen Diskriminierung vor den Zivil- oder Verwaltungsgerichten unentgeltlich intervenieren können (d.h. sie müssen keine gesonderte Gerichtsgebühr entrichten).

vor.⁹⁹ Die große Mehrheit der Mitgliedstaaten (74 %) sieht in Fällen von Altersdiskriminierung außerhalb des Arbeitsmarktes eine Verlagerung der Beweislast vor.¹⁰⁰ Nur wenige Mitgliedstaaten sehen keine Beweislastverlagerung oder eingeschränkte Formen der Beweislastverlagerung vor.¹⁰¹ Etwa 78 % der Mitgliedstaaten¹⁰² sehen bei Verstößen gegen die Grundsätze der Nichtdiskriminierung aufgrund des Alters in sämtlichen Bereichen Entschädigungen vor. Nur in vier Mitgliedstaaten gibt es keine ausdrücklichen Entschädigungsregelungen (Dänemark, Estland, Italien und Spanien). In den meisten Mitgliedstaaten (78 %)¹⁰³ existiert keine offizielle Obergrenze für Entschädigungen.

Schließlich untersucht der Bericht wichtige Rechtsprechungsfälle aus den verschiedenen Anwendungsbereichen, um sowohl Gemeinsamkeiten als auch Aspekte zu ermitteln, die den Mitgliedstaaten Probleme bereiten. Im Bereich des Sozialschutzes konzentrieren sich die Beschwerden auf Politikmaßnahmen, die Ansprüche auf Sozialschutz, einschließlich sozialer Vergünstigungen, an ein bestimmtes Alter knüpfen. Die nationalen Verwaltungs- und Justizbehörden neigen jedoch dazu, im Bereich des Sozialschutzes mit Blick auf die öffentlichen Finanzen und auf Maßnahmen zur Förderung irgendeiner Form des öffentlichen Interesses gegenüber den Mitgliedstaaten eine gewisse Nachsicht zu üben. In Übereinstimmung mit der Rechtsprechung des EGMR scheinen die nationalen Verwaltungs- und Justizbehörden den Mitgliedstaaten bei der Entscheidung darüber, wie sie – angesichts der Auswirkungen des Sozialschutzes auf die öffentlichen Finanzen und zwangsläufig auf bestimmte öffentliche Interessen – die Anspruchsberechtigung auf Sozialschutz festlegen bzw. zuerkennen, einen weiten Ermessensspielraum einzuräumen. Im Bereich des Wohnungswesens beziehen sich die Beschwerden im Allgemeinen auf willkürliche Bedingungen in Bezug auf Mietverhältnisse, Zugang zu Wohnraum bzw. Zugang zu wohnraumbezogenen Unterstützungen oder Zuschüssen. Wenn Unterscheidungen aufgrund des Alters getroffen werden, müssen ausreichende berechtigte Gründe vorgelegt werden. Was den Bereich des Wohnungswesens angeht, so scheinen sich die Verwaltungs- und Justizbehörden, die sich auf nationaler Ebene mit diesen Fällen befassen, der eher schwachen Position von Mietern und von Personen, die Zuschüsse beantragen, um ihr Recht auf Wohnraum auszuüben, bewusst zu sein und daher die Gründe, die für eine unterschiedliche Behandlung aufgrund des Alters angeführt werden, strenger zu prüfen. Die Rechtsprechung zu Altersdiskriminierung im Bereich des Gesundheitswesens ist beschränkt. Angesichts der Covid-19-Pandemie und ihrer Auswirkungen auf die Gesundheitssysteme und auf ältere Menschen wird dieser Bereich möglicherweise jedoch an Aktualität gewinnen. Was das Gesundheitswesen betrifft, so gilt in Bezug auf öffentliche Finanzen und soziale Solidarität Ähnliches wie im Zusammenhang mit sozialer Sicherheit und wird den Mitgliedstaaten bei Entscheidungen im Gesundheitsbereich, die in irgendeiner Weise das öffentliche Interesse berühren, eine gewisse Nachsicht entgegengebracht. Nichtsdestotrotz sind Leistungserbringer im Gesundheitswesen vor Klagen wegen Altersdiskriminierung nicht gefeit und müssen sicherstellen, dass altersbedingte Unterschiede in der Behandlung gerechtfertigt und verhältnismäßig sind. Aus den Beschwerden wegen Altersdiskriminierung beim Zugang zu Gütern und Dienstleistungen lassen sich drei wesentliche Punkte ableiten: (a) Es gibt ein breites Spektrum potenziell diskriminierender Bestimmungen beim Zugang zu Gütern und Dienstleistungen, die angefochten werden können, (b) die meisten diskriminierenden Behandlungen finden bei der Bereitstellung von Versicherungs- und Finanzdienstleistungen statt und (c) die Verwaltungs- und Justizbehörden, die mit diesen Beschwerden befasst sind, erwarten von den Anbietern von Gütern und Dienstleistungen in der Regel, dass sie jeden Antrag individuell nach seinem sachlichen Gehalt beurteilen, und unterziehen Blankopolicen, die auf das Alter abstellen, einer strengen Prüfung. Aus dem Bildungsbereich wurden keine zentralen Rechtsstreite

99 Dänemark, Estland, Italien und Zypern.

100 Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Litauen, Luxemburg, Malta, die Niederlande, Österreich, Rumänien, Schweden, die Slowakei, Slowenien, Spanien, Tschechien und Ungarn.

101 Dänemark, Estland, Italien, Portugal (außer in sehr begrenzten Fällen) und Zypern. Lettland und Polen sehen in begrenzten Fällen ebenfalls eine Verlagerung der Beweislast vor.

102 Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Griechenland, Irland, Kroatien, Litauen, Luxemburg, Malta, die Niederlande, Österreich, Portugal, Rumänien, Schweden, die Slowakei, Slowenien, Tschechien, Ungarn und Zypern.

103 Belgien, Bulgarien, Dänemark, Deutschland, Estland, Finnland, Frankreich, Griechenland, Italien, Kroatien, Litauen, Luxemburg, Malta, die Niederlande, Österreich, Polen, Portugal (mit Ausnahme des Gesundheitswesens, wo von der Regulierungsbehörde Geldstrafen verhängt werden können, und des Wohnungswesens, wo es Geldstrafen von EUR 30 pro Tag für fortgesetzte Belästigungsdelikte gibt), Schweden, die Slowakei, Spanien, Tschechien, Ungarn und Zypern.

gemeldet – ein Mangel an Rechtsprechung, der an sich schon auf fehlende Information der Öffentlichkeit hinweist und die Bedeutung von Vorschriften über Mehrfachdiskriminierung unterstreicht, die Betroffenen bei der Begründung von Beschwerden im Bildungsbereich helfen würden.

Abschnitt III: Schlussfolgerungen und Empfehlungen

Nach einer Analyse und Bewertung der Rechtsvorschriften zur Altersdiskriminierung auf regionaler Ebene (Unionsrecht und EMRK) und auf nationaler Ebene (27 Mitgliedstaaten) kommt der Bericht zu dem Ergebnis, dass ein hohes Maß an Kohäsion existiert, was die Konzepte des Gleichbehandlungsrechts in Bezug auf Alter betrifft, dass jedoch noch einige Problembereiche existieren, in denen Handlungsbedarf besteht, um sie mit anderen Bereichen des EU-Gleichbehandlungsrechts (als da wären Geschlecht und „Rasse“) in Einklang zu bringen und Altersdiskriminierung innerhalb der EU abzubauen. Es werden fünf konkrete Empfehlungen formuliert:

- **Empfehlung Nr. 1: Den Richtlinienvorschlag zur Gleichbehandlung ungeachtet des Alters in Bereichen außerhalb des Arbeitsmarktes verabschieden.** In den Bereichen Sozialschutz, allgemeine Bildung, Wohnen, Gesundheitsversorgung sowie Zugang zu Gütern und Dienstleistungen besteht auf Unionsebene ein erhebliches Defizit beim Schutz vor altersbedingter Diskriminierung. Dieses Defizit wird weder durch die EMRK noch durch das nationale Recht der Mitgliedstaaten kompensiert. Die vorgeschlagene Richtlinie hat den Vorteil, dass sie die Beschränkungen und Lücken im derzeitigen Schutz überwindet, und würde eine sehr nachhaltige und wirksame Grundlage für den gesetzlichen Schutz vor Altersdiskriminierung in den EU-Mitgliedstaaten schaffen.
- **Empfehlung Nr. 2: Einen Schutz vor Viktimisierung implementieren und die beteiligten Parteien mithilfe von Forschungs- und Informationskampagnen über die negativen Auswirkungen von Viktimisierung informieren.** Der Schutz vor Viktimisierung ist auf nationaler Ebene beschränkt. Dieser unzureichende Schutz kann auf ein mangelndes Verständnis der negativen Auswirkungen von Viktimisierung in Bereichen außerhalb des Arbeitsmarktes zurückgeführt werden. Es sind daher weitere Forschungs- und Informationskampagnen erforderlich, um diesen Mangel an Kenntnissen zu beheben und Schutz zu gewährleisten.
- **Empfehlung Nr. 3: Sicherstellen, dass verhältnismäßige Ungleichbehandlungen aus Gründen des Alters keine Diskriminierung im Sinne des Richtlinienvorschlags darstellen, sofern bei der betreffenden Dienstleistung das Alter ein maßgeblicher Faktor für die Risikobewertung ist und diese Bewertung auf Grundlage versicherungsmathematischer Grundsätze sowie relevanter und zuverlässiger statistischer Daten erfolgt.** Der derzeitige Vorschlag wendet auf Finanzdienstleister, die Risikobewertungen auf Grundlage des Alters vornehmen, eine Standardprüfung an. Dies ist unbefriedigend. Die Umsetzung der vorliegenden Empfehlung würde die Transparenz, Verhältnismäßigkeit und Personalisierung der Risikobewertung gewährleisten.
- **Empfehlung Nr. 4: Einen Schutz vor Mehrfachdiskriminierung beschließen.** Dieser sollte den Schutz vor Diskriminierung aus allen im EU-Gleichbehandlungsrecht geschützten Gründen umfassen und eine Bestimmung enthalten, die eine Anpassung der Abhilfemaßnahmen ermöglicht, um der Schwere von Mehrfachdiskriminierungen Rechnung zu tragen.
- **Empfehlung Nr. 5: Forschung und Information über Altersdiskriminierung im Bildungsbereich fördern.** Der Mangel an Rechtsprechung zu altersbedingten Diskriminierungen im Bildungsbereich ist bemerkenswert. Die Förderung von Forschungs- und Informationskampagnen zu diesem speziellen Thema wird sowohl das Verständnis dieser Materie als auch den entsprechenden Schutz verbessern.

Zusammenfassend lässt sich sagen, dass die Ansätze der Mitgliedstaaten in der Frage der Altersdiskriminierung in Bereichen außerhalb des Arbeitsmarktes weit mehr Elemente des Zusammenhalts

und der Einheitlichkeit aufweisen als Unterschiede. Die im Bericht herausgestellten Unterschiede können beseitigt oder verringert werden, indem die vorgeschlagene Richtlinie in der hier empfohlenen Weise beschlossen wird und indem Forschungs- und Informationskampagnen zum Thema Altersdiskriminierung gefördert werden. Auf diese Weise könnte endlich eine echte Gleichbehandlung hinsichtlich des Alters erreicht werden.

Introduction

As the EU turns ‘increasingly grey’¹ as a result of dynamic shifts in fertility and life expectancy, significant pressures are being placed on the economic, social and competitive potential of the EU. The Europe 2020 Strategy seeks to encourage active and healthy ageing,² participation in the workforce and social inclusion as key responses to these challenges.³ However, such efforts are often hampered by the inequalities brought about by age discrimination in a variety of fields, including the labour market, social protection, healthcare, education, housing and access to goods and services.⁴ Therefore, tackling age discrimination is central to fulfilling the EU policy agenda on active and healthy ageing.⁵

However, despite legislative initiatives at an EU level, age discrimination remains persistent. The 2019 Eurobarometer Report on Discrimination in the EU⁶ reveals that 40 % of individuals in the EU believe that age discrimination is widespread in their country.⁷ Age discrimination, alongside gender discrimination, is still one of the most pervasive forms of discrimination experienced by people in the EU.⁸ Individuals surveyed perceived discrimination arising not only in the employment context but also as occurring frequently in public spaces (23 %) including cafes, restaurants, bars and nightclubs (8 %), shops or banks (7 %), in healthcare (6 %), or by school or university personnel (6 %). 4 % of respondents identified discrimination in buying or renting an apartment or house and 4 % also reported discrimination or harassment by social service personnel.⁹ Analysing these figures further demonstrates that it is mostly the younger age groups (15-24 year olds) who experience discrimination in public spaces (27 %) such as cafes, restaurants, bars and nightclubs (13 %) or by school or university personnel (18 %), while older persons (55+) (11 %) and retired persons (13 %) are more likely to experience discrimination in healthcare.¹⁰ These results indicate that outside the employment context, age discrimination across all age groups can be experienced in a variety of settings.

Legal efforts to combat discrimination must, therefore, be considered to be of high importance. Yet despite efforts to address inequality on grounds of age at a legislative level, existing legal protections at an EU level extend only to the field of employment and vocational training.¹¹ There have been efforts to extend the protections afforded on the grounds of age (and other grounds including sexual orientation, disability and religion and belief) to the fields of social protection, education, housing, healthcare and access to goods and services in the form of a proposed Directive in 2008.¹² However, 12 years on, the proposed Directive remains unadopted with 2 Member State delegations maintaining general reservations on the proposal, all delegations maintaining scrutiny reservations on the text and 2 delegations maintaining

1 European Commission, *The 2015 Ageing Report: Economic and Budgetary Projections for the 28 EU Member States (2013-2060)* European Economy 3/2015 at p. 1.

2 The European Innovation Partnership on Active and Healthy Ageing available at: https://ec.europa.eu/eip/ageing/about-the-partnership_en.

3 Communication from the Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682.

5 Guiding Principles for Active Ageing and Solidarity between Generations, jointly agreed by the Social Protection Committee and the Employment Committee of the Council of the European Union, 15725/12.

6 European Commission, *Special Eurobarometer Report 493* (2019).

7 European Commission, *Special Eurobarometer Report 493* (2019) at p. 75.

8 European Commission, *Special Eurobarometer Report 493* (2019) at p. 150.

9 European Commission, *Special Eurobarometer Report 493* (2019) at p. 153.

10 The statistics on younger people are also borne out in the Survey on Youth and Multiple Discrimination which found that 53.8 % of respondents experienced discrimination in education; 29.2 % when looking for accommodation; 26.6 % in healthcare; 24.9 % in restaurants, cafes and pubs; 24.7 % when accessing banking services; 24 % at the cinema, theatre or clubs; 19.3 % in sports centres and 22.8 % in shops, supermarkets or shopping centres. European Youth Forum, *Survey on Youth and Multiple Discrimination* (2018) available at: <https://www.youthforum.org/sites/default/files/publication-pdfs/Survey-on-Youth-and-Multiple-Discrimination.pdf>.

11 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, p. 16).

12 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/* COM/2008/0426 final – CNS 2008/0140 */.

parliamentary scrutiny reservations. The legal basis of the proposal is Article 19 of the TFEU and thus requires consent of the European Parliament followed by unanimity in Council to secure its adoption.¹³ There are a variety of reasons why the proposal has not been adopted, many of which are beyond the scope of this report and arise from difficulties surrounding the other grounds also protected by the proposed Directive, but certain problems connected with the grounds of age have also arisen. This report aims to fulfil an important function in this respect by analysing the law at regional (both EU law and ECHR law) and national level (the law of all 27 EU Member States), highlighting areas of cohesion and areas of concern and making appropriate recommendations which will assist in the development of the law on age discrimination in all fields within the EU.

The report begins in Section I with an overview of the age discrimination laws in the EU and in the ECHR. The section begins with an examination of EU law and analyses the law in the Treaties, in legislation, in case law of the CJEU and under the CFR. It determines that the existing law is limited to providing protection in the field of employment and vocational training and it questions whether the existing legal protections can be extended to provide protection outside of this limited field and to cover other fields such as social protection, housing, healthcare, education and access to goods and services. It concludes that this is currently not possible under existing legislation and case law and that currently the protections at an EU level are eminently limited. The section then moves on to examine the protection against age discrimination under the ECHR. Specific analyses of Article 14 and Protocol 12 of the ECHR are undertaken with respect to whether these provisions provide protections against discrimination on the grounds of age (which is not expressly listed in Article 14 or Protocol 12) and which fields it applies to. While the analysis reveals that age is a protected ground under the ECHR and that protection is afforded in a variety of fields including social protection, education, healthcare, housing and access to goods and services, a number of limitations prevent effective protection under the ECHR. These limitations relate to the limited applicability of Protocol 12, the complementary nature of Article 14, the need to demonstrate victim status and the wide margin of appreciation given to states with respect to age discrimination. It is concluded in this section that while no protection arises under EU law and only limited protection is afforded under ECHR law, the gap in protection for individuals discriminated against on grounds of age in fields outside the labour market is significant. Only implementation of a more coherent and inclusive framework at EU law level will ameliorate these gaps.

Section II of the report focuses on providing a succinct overview of national law in the 27 Member States of the EU on protection against age discrimination in the fields of social protection, housing, healthcare, education and access to goods and services. The report analyses the central concepts of equality which provide the most fundamental protections against forms of discrimination namely: direct discrimination, indirect discrimination, harassment, instruction to discriminate, victimisation and multiple discrimination. It reviews the justifications and proportionality assessments which normally arise for both direct and indirect discrimination in age discrimination law. It also assesses the variety of exceptions granted with respect to differences in treatment on grounds of age and pays particular attention to exemptions granted to financial service providers in the insurance and banking sectors in assessing risk based on age. The protection of positive action is analysed and enforcement mechanisms and associated penalties are examined. Key case law is also described with a view to identifying the most common areas of concern as well as highlighting the commonalities in approach of judicial and administrative bodies in resolving age discrimination cases.

The analysis of these particular aspects of Member State law is conducted by identifying three common models or approaches to age discrimination protection in Member States: full protection, partial protection and no protection. The first of these models is self-explanatory: full protection arises where the Member State expressly either through specific anti-discrimination legislation or through field-specific legislation provides full protection against a particular concept e.g. direct discrimination. The no protection model

13 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report ST 9567 2019 REV 1.

applies to those Member States who do not expressly or by implication protect against a certain form of discrimination on the grounds of age in the fields studied in this report. The partial protection model is more complex and can arise in a variety of ways: where Member States do not provide for federal or national protections but internal regions provide for their own limited protections; where protections are limited in scope (for example, do not extend to private providers); or where protections are afforded by national constitutions, regional conventions (e.g. ECHR) or international conventions which are often inconsistently applied or are of uncertain application. Throughout this section of the report, assessments based on these models are made and used as a method of determining the most common approaches and the most significant differences in the protection against age discrimination in all fields outside the labour market.

The report also deals with some of the most controversial aspects of age discrimination law including the issues of multiple discrimination and exceptions to age discrimination law. In each of these areas, the report examines particular differences in approach and attempts to identify the key issues which the proposed Directive on this area needs to address. In the area of multiple discrimination, questions relating to the extension of the proposed Directive to include grounds covered in other areas of EU law (such as sex and race) and the potential for remedies to be adjusted to take account of the gravity of multiple discrimination are discussed. Similarly, with respect to exceptions, the report identifies common categories of exceptions across the Member States with a view to providing a cohesive assessment of the impact of these exceptions on individuals. The most striking issue with respect to exceptions is the issue of financial and insurance service providers and exceptions with respect to basing risk assessments on age. The report identifies a range of Member State responses to these issues: (a) industry exemptions from age discrimination legislation; (b) a legitimate justification and proportionality test (the default test); (c) a default test and industry regulation; (d) specific actuarial requirements and a reasonableness test and (e) specific actuarial requirements and a legitimate justification and proportionality test. The report identifies how the proposed Directive has moved from approach (e) to approach (b) and what the implications of this move are with respect to protection against age discrimination in the financial and insurance services sector.

Finally, the report examines key case law emanating from the 27 EU Member States in the fields of social protection, education, housing, healthcare and access to goods and services. A measure of cohesion with respect to the issues raised and the manner in which the national judicial and administrative bodies have dealt with these issues can be identified. Of note is the fact that there is no key case law in the field of education. This is an issue of concern and one which is addressed more cohesively in the Conclusions and Recommendations.

In Section III, the report identifies a number of Conclusions and Recommendations. The conclusions are twofold: (1) there are a number of areas of consensus drawing on the regional and national law analysis, and adopting certain provisions of the proposed Directive with respect to direct and indirect discrimination, harassment, instruction to discriminate, positive action, exceptions, enforcement and penalties, should not be complicated; and (2) there are areas of concern which give rise to difficulties because of a lack of uniform approach by Member States to certain issues, namely multiple discrimination, victimisation and exceptions relating to financial and insurance service providers or because of a lack of information about the impact of age discrimination in a particular field, namely education. The report then assesses these areas of consensus and concern and arrives at a series of five recommendations.

- Recommendation 1: Adopt the proposed Directive on Equal Treatment on Grounds of Age in fields outside the Labour Market.
- Recommendation 2: Implement protection against victimisation and inform stakeholders about detrimental impact of victimisation through research and information campaigns.
- Recommendation 3: Ensure that proportionate differences in treatment on the grounds of age do not constitute discrimination for the purposes of the proposed Directive, if age is a determining

factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data.

- Recommendation 4: Adopt a protection against multiple discrimination. Such protection should include protection against discrimination on all grounds protected under EU equality law, and should include a provision which allows sanctions to be adjusted to take account of the gravity of multiple discrimination.
- Recommendation 5: Promote research and information on age discrimination in the field of education.

Despite a wide range of legal instruments at a national level, only a minority of people in the EU (26 %) believe that their country's efforts to fight discrimination are effective,¹⁴ with 36 % believing that the efforts are moderately effective and 28 % believing that they are not effective at all.¹⁵ The number of Member States providing only partial or no protection with respect to discrimination on grounds of age in fields outside the labour market correlates with this perception of ineffectiveness. It is interesting to compare responses here with the Member States that provide basic protection against age discrimination in all fields. Greece and Poland were the two countries identified in this report as not providing any protection against discrimination in some fields. In Greece, 35 % of respondents found the response of their state to be ineffective. In Poland, the figures were more on par with the average (28 %). There is, therefore, some correlation with explicit enforceable age discrimination legislation and perceptions of effectiveness. Individuals surveyed in Cyprus (40 %), France (40 %) and Croatia (38 %) recorded the highest number of respondents who felt their country's efforts to tackle age discrimination are not effective. The Cyprus result would appear to correlate with the lack of explicit protection against age discrimination outside of the labour market. However, in France and Croatia this is not the case and the results here cannot be said to be correlated with national law protections, albeit that there may be other alternative reasons such as limited enforcement which is beyond the scope of the study. Italy (12 %) and Latvia (11 %) are the only countries where more than 10 % of respondents felt their country is making no effort to tackle discrimination. This result would also appear to correlate with national law protections studied in this report as in both Member States there is again a reliance on national constitutional law or international protections and a lack of express legal protection against discrimination leading in many cases to limited, inconsistent and uncertain protection against age discrimination outside the labour market context. This report provides evidence that express and complete protection against age discrimination in all fields is essential to address age discrimination within the EU and that the proposed Directive is one of the most effective ways of achieving coherent and uniform protection across the 27 EU Member States.

¹⁴ European Commission, *Special Eurobarometer Report 493* (2019) at p. 172.

¹⁵ European Commission, *Special Eurobarometer Report 493* (2019) at p. 173.

Section I. Overview of European Union and European Court of Human Rights law

Existing law on prohibiting discrimination on grounds of age exists in both EU law and in ECHR law. However, the scope and application of the protection against age discrimination varies between the two. In the context of EU law, very little protection exists outside the labour market context, while in ECHR law there is potentially protection in all areas including social protection, housing, healthcare, education and access to goods and services. This section examines the existing laws in the EU and under the ECHR on age discrimination outside the labour market context. The following table provides a very brief comparative overview with the caveat that some nuances, exceptions and limitations apply as described below.

Table 1. Overview of protection under EU law and ECHR law

Protection against age discrimination in:	EU law	ECHR law
Labour market	√	√
Social protection	X	√
Housing	X	√
Healthcare	X	√
Education	X	√
Access to goods and services	X	√

1 European Union law

There is no protection against age discrimination outside of the labour market context in EU law. The existing protections against age discrimination are contained in the treaties, the CFR, legislative enactments and case law of the CJEU. An analysis of these texts indicates that protection against age discrimination exists only within the labour market context¹⁶ and that an extension to include protection within social protection, including social advantages, education, healthcare, housing and access to goods and services would require legislative action.

Table 2. Overview of protection under EU law

Area	Labour market	Education	Healthcare	Housing	Social protection	Goods and services
Protection against age discrimination	√	X	X	X	X	X

1.1 Treaty protection and the Charter of Fundamental Rights

Protection against age discrimination was first expressly provided for by the TEU (ex Article 13) which provided a clear foundation for community action in the area of equality and non-discrimination law. After the Treaty of Lisbon, Article 19 TFEU retained and strengthened this protection and gave a clear basis for appropriate action to be taken in the area of age discrimination law. The CFR also identifies and protects 'age' as a ground of discrimination in Article 21. The Charter does not grant power to enact legislative measures to combat discrimination. It is limited to addressing discrimination 'by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member

¹⁶ Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02.12.2000, p. 16.

States only when they are implementing Union law'.¹⁷ The potential scope for the use of the CFR, and in particular Article 21, as a ground for extending the protection of age discrimination law within the EU outside of the labour market context is reviewed below. However, it is concluded that presently this is not possible without legislative intervention.

1.2 Legislative protection

At a legislative level, Council Directive 2000/78/EC provides for the prohibition of discrimination on grounds of age in employment and occupation across the EU Member States.¹⁸ The Directive makes specific and flexible provision for discrimination on grounds of age in the labour market. Article 6 of the Directive provides that a difference in treatment on grounds of age (which includes both direct and indirect forms of discrimination) shall not constitute discrimination, if, within the context of national law, it is 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'.¹⁹ In determining cases based on Article 6, the court follows a four-stage process. It determines (a) whether the particular case falls within the scope of the Directive; (b) whether there has been a difference in treatment on grounds of age; (c) whether the difference in treatment can be objectively justified by reference to a particular legitimate aim, including legitimate employment policy, labour market and vocational training objectives; and (d) whether the method chosen for meeting this particular objective is appropriate and necessary.²⁰ As regards scope, the Court has interpreted the Directive rather broadly and measures dealing with pay and conditions of employment, recruitment,²¹ or termination of employment²² have all been found to fall within the scope of the Directive.²³ In determining whether a difference of treatment has occurred, little difficulties have arisen in finding a suitable comparator and the court has taken a 'very pragmatic approach to the identification of differences in treatment which usually involves a very simple comparison between the individual involved, who is of a certain age (X), with an individual of a different age (Y)'.²⁴ Advocate General Kokott has defined difference in treatment as existing 'not only where one person is treated less favourably than another is, has been or would be treated in a comparable situation expressly on grounds of age, but also where such treatment is afforded to that person on the basis of a

17 Article 51, CFR.

18 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, p. 16). See the discussion on the belated nature of the Directive and other aspects of the Directive in Fredman, S., 'Equality: A New Generation' (2001) 30(2) *Industrial Law Journal* 145; Skidmore, P., 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy' (2001) 30(1) *Industrial Law Journal* 126; Bell, M., 'The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?' (2008) 79(1) *The Political Quarterly* 36; Schiek, D., 'A New Framework on Equal Treatment of Persons in EC Law' (2002) 8(2) *European Law Journal* 290. See also more general works on the discrimination law in the EU including: Fredman, S., *Discrimination Law* (Oxford: Clarendon Press, 2nd ed., 2011); Bartelings, P., *Age Discrimination Law in Europe* (The Netherlands: Kluwer Law International, 2009); Sergeant, M. (ed.), *The Law on Age Discrimination in the EU* (The Netherlands: Kluwer Law International, 2008); O'Cinnéide, C., *Age Discrimination and European Law* (Brussels: European Commission, 2005); Bell, M., 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review* 7; Howard, E., 'The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from the Formal Idea of Equality?' (2008) 14(2) *European Law Journal* 168.

19 Article 6, Directive 2000/78/EC. The Directive also provides examples of such differences in treatment by stating in Article 6 that: 'Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement'.

20 Dewhurst, E., 'The Development of EU Case Law on Age Discrimination in Employment: "Will you still need me? Will you still feed me? When I'm Sixty-Four"' (2013) 19(4) *European Law Journal* 517-544.

21 Case C-229/08, *Wolf* ECLI:EU:C:2010:3, 12 January 2010, paras 26 and 27.

22 Case C-341/08, *Petersen* ECLI:EU:C:2010:4, 12 January 2010, para 33.

23 Case C-555/07, *Seda Küçükdeveci* ECLI:EU:C:2010:21, 19 January 2010 para 27 and the opinion of A.G. Bot at para 32. See also Case C-88/08, *Hütter* ECLI:EU:C:2009:380 18 June 2009, para 36.

24 Dewhurst, E., 'The Development of EU Case Law on Age Discrimination in Employment: "Will you still need me? Will you still feed me? When I'm Sixty-Four"' (2013) 19(4) *European Law Journal* 517-544 and the cases of Case C-499/08, *Ingeniørforeningen i Danmark* ECLI:EU:C:2010:600, 12 October 2010; C-144/04, *Mangold*; Case C-411/05, *Palacios de la Villa* ECLI:EU:C:2007:604, 16 October 2007.

criterion which is inextricably linked to absolute or relative age'.²⁵ The more complex part of the analysis arises in the third and fourth stages where the court has the difficult task of determining whether there is a legitimate objective justifying a difference in treatment and whether this legitimate objective is proportionate to the aim sought to be achieved. The court has generally granted Member States a very broad discretion in relation to the choice of aims and the measures imposed to meet these aims.²⁶ The Court has held that social policy objectives, such as those related to employment policy, the labour market or vocational training will be considered to be legitimate objectives under the Directive.²⁷ Some examples of such legitimate aims include measures enacted to promote the aim of integrating older workers into the labour force,²⁸ policies promoting 'intergenerational employment'²⁹ and policies to 'encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service'.³⁰ The final stage effectively involves a proportionality test of these measures (although not expressly stated as such in the Directive): an examination of the appropriateness and necessity of the legitimate aim pursued. Appropriateness is assessed by way of a consideration as to whether the measure is arbitrarily constructed on age grounds, as opposed to other social factors.³¹ In relation to the issue of necessity, the main question is whether there are more lenient measures that would achieve the same aim, i.e. whether an age threshold is objectively necessary.³²

There is no legislative protection for age discrimination outside of this labour market context.

1.3 Case law protection

The CJEU has also sought to ensure protection against age discrimination in its decisions. In the case of *Mangold*,³³ it was held that the 'principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'. The court drew upon various international instruments and the constitutional traditions common to the Member States as support for the protection against age discrimination within the EU. Since *Mangold*, the CJEU has continued to reiterate the principle of non-discrimination on grounds of age as a fundamental principle of community law, so it must be assumed that *Mangold* establishes age discrimination as a general principle of Community law. All of the case law to date has centred predominantly around the interpretation of the Directive 2000/78, i.e. age discrimination within a labour market context.

1.4 Can discrimination based on age be protected beyond the labour market?

The protection afforded by Article 21 CFR, coupled with the CJEU decision in *Mangold* establishing the prohibition of discrimination on grounds of age as a general principle of EU law, does give rise to the question as to whether discrimination based on age is also potentially prohibited outside of the labour market context in other fields such as social protection, education, housing, healthcare or access to goods and services.

25 Case C-499/08, *Ingeniørforeningen i Danmark*, opinion of A.G. Kokott, ECLI:EU:C:2010:248, 6 May 2010 para 36.

26 C-144/04, *Mangold*, para 31 and Case C-411/05, *Palacios de la Villa*, para 68.

27 Case C-388/07, *Age Concern England*, ECLI:EU:C:2009:128, 5 March 2009, para 46; Case C-88/08, *Hütter*, para 41; Case C-447/09, *Prigge and Others*, ECLI:EU:C:2011:573, 13 September 2011, para 81.

28 C-144/04, *Mangold*, para 61; Case C-555/07, *Seda Küçükdeveci* opinion of A.G. Bot at paras 38-40.

29 Case C-411/05, *Palacios de la Villa* ECLI:EU:C:2007:106, 15 February 2007, opinion of A.G. Mazák, para 71.

30 C-160/10, *Fuchs and Köhler* ECLI:EU:C:2011:508, 21 July 2007, para 50.

31 Dewhurst, E., 'Proportionality Assessments of Mandatory Retirement Measures: Uncovering Guidance for National Courts in Age Discrimination Cases' (2016) 45(1) *Industrial Law Journal* 60-88; see also Case C-411/05, *Palacios de la Villa*, opinion of A.G. Mazák, para 75.

32 C-144/04, *Mangold*, para 65; Case C-88/08, *Hütter*, para 49.

33 C-144/04, *Mangold*.

The precise nature of Article 21 CFR was considered by Advocate General Jääskinen in the case of *Kaltoft*³⁴ and in particular he considered whether Article 21 CFR included a general prohibition in EU law on all forms of discrimination outside of the main anti-discrimination law directives. He referred specifically to Article 6(1) TEU which precludes recourse to the CFR to extend the competences of the EU as defined in the Treaties and also to Article 51(1) CFR which expressly states that the CFR is only binding when Member States are implementing EU law. He opined that before a legal situation could fall within the scope of the CFR, a 'dual identification exercise' must be conducted. This essentially requires the Court to establish first, that there is an identifiable provision of EU law other than the CFR which is relevant to the dispute and, second, once identified, whether a specific ground of discrimination is prohibited under this provision of EU law.³⁵

The only identifiable provision of EU law which expressly prohibits age discrimination is Directive 2000/78 which is limited to the labour market context. Based on the 'dual identification exercise' established by the Advocate General in *Kaltoft*, age discrimination outside of this context cannot find protection under the CFR. Any other conclusion would 'breach the established boundary on the outer limit of EU fundamental rights law'.³⁶ The case of *Kaltoft* itself concerned the recognition of an additional ground of discrimination, obesity, but Jääskinen concluded that there was nothing in the case law to suggest that there was some 'general principle of law precluding discrimination' and he was guarded against reliance on the constitutional provisions common to Member States or the ECHR protocol to establish such a principle which would 'oblige Member States to combat discrimination on grounds which are not spelled out in the treaties or legislation'.³⁷ While this case concerned expanding the grounds of discrimination to include a ground of obesity, the opinion of Advocate General Jääskinen would equally appear to preclude any extension of the fields in which age discrimination may be prohibited beyond that which is protected in Directive 2000/78 based on the same reasoning. The CJEU concurred with the opinion of Advocate General Jääskinen and effectively conducted a dual identification exercise by expressly referencing the lack of explicit protection against discrimination on grounds of obesity in the treaties, or in secondary legislation. With respect to the latter, the Court concluded that Directive 2000/78 should 'not be extended by analogy' beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof. This would appear to also preclude any extension of the material scope of Directive 2000/78 beyond the labour market context.³⁸

1.5 Extension of EU law: The proposed Directive

Table 3. Overview of protection under the proposed Directive

Area	Labour market	Education	Healthcare	Housing	Social protection	Goods and services
Existing protection against age discrimination	√	X	X	X	X	X
Proposed protection against age discrimination	√	√	√	√	√	√

On 2 July 2008, the Commission proposed a Council Directive³⁹ as part of the 'Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe'⁴⁰ which would effectively harmonise the

34 C-354/13, *Kaltoft v Kommunernes Landsforening*.

35 Ward, A., 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More of a Whimper than a Bang' (2018) 20 *Cambridge Yearbook of European Legal Studies* 32.

36 C-354/13, *Kaltoft v Kommunernes Landsforening*, para 25.

37 C-354/13, *Kaltoft v Kommunernes Landsforening*, para 25.

38 C-354/13, *Kaltoft v Kommunernes Landsforening*, para 36.

39 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181) /* COM/2008/0426 final – CNS 2008/0140 */.

40 COM (2008) 412.

laws regarding equality on grounds of age in certain areas outside of the labour market.⁴¹ The proposed Directive complements the existing EU legal framework under which discrimination on grounds of age is prohibited in the context of employment, occupation and vocational training⁴² and supports the long-term strategic aim of completing the EU anti-discrimination legal framework which provides for more extensive, albeit inconsistent, protection for the grounds of sex and race.⁴³ The main objectives of the proposed Directive include increasing protection from discrimination based on age (and other grounds) outside of the labour market context, ensuring legal certainty for economic operators and potential victims of age discrimination across the Member States, enhancing social inclusion and promoting the full participation of all groups in society and the economy.⁴⁴

The legal basis of the proposed Directive⁴⁵ is Article 19 TFEU and the proposed Directive intends to extend the degree and the form of protections against discrimination beyond the areas of employment into access to social protection,⁴⁶ access to education⁴⁷ and access to goods and services, including housing.⁴⁸ Services should be taken to be those within the meaning of Article 57 of the TFEU.⁴⁹ Social protection is defined in Recital 17b as covering social security, including statutory pension schemes, social assistance, social housing and healthcare.⁵⁰ The proposal includes protections against direct and indirect discrimination,⁵¹ harassment,⁵² instructions to discriminate⁵³ and discrimination based on multiple grounds.⁵⁴ ⁵⁵ Discrimination based on association⁵⁶ or assumption⁵⁷ is also prohibited.⁵⁸ Positive action based on age is also protected.⁵⁹

41 'Non-Discrimination and Equal Opportunities: A Renewed Commitment' COM (2008) 420.

42 Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02.12.2000, p. 16.

43 Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.07.2000, p. 22); Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation. (OJ, 2000, L 303, p. 16); and Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37). Directive 2000/43/EC protects persons against discrimination on the grounds of their racial or ethnic origin in the access to and supply of goods and services, social protection as well as education, whereas Directive 2004/113/EC offers protection against discrimination on the ground of sex in the access to and supply of goods and services, with the exclusion of the content of media and advertising as well as education.

44 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181) /* COM/2008/0426 final – CNS 2008/0140 */.

45 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT.

46 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(a).

47 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(c).

48 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 3(1)(d).

49 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 9.

50 European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discrimination_ENG.pdf, pp. 122-125 for more information on the definition in the EU law context.

51 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(a) and (b).

52 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(c).

53 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d-b).

54 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(3-a).

55 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 12.

56 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d).

57 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(2)(d-a).

58 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 12a and 12b.

59 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 5(1).

Differences in treatment in connection with age are permitted under certain circumstances if they are objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.⁶⁰ This mirrors the approach taken in Article 6 of Directive 2000/78 and the case law interpreting Article 6 (discussed above) will be useful and relevant in guiding the court as to the relevant interpretation of this section. The Recital to the proposal gives some examples as to what might constitute a legitimate aim and how such an aim may be proportionate. It states that one such legitimate aim may include the promotion of economic, cultural or social integration of persons belonging to specific age groups.⁶¹ 'The means of achieving this aim, such as the offer of more favourable conditions of access to persons belonging to specific age groups, should be appropriate and necessary.'⁶²

One of the most controversial areas concerning age discrimination is access to and the provision of financial (banking and insurance) services. To ensure minimum standards of protection in this particular context, the proposed Directive provides in the Recital that customers and relevant judicial and complaints bodies should have the right to be informed, upon request, about the reasons explaining differences of treatment on the grounds of age in the provision of financial services.⁶³ More specifically, such information should be useful and understandable to the general public and should explain differences in individual risk for the service in question, while providing sufficient protection against the disclosure of commercially sensitive data. More express protections, similar to those provided in other equality directives, have not been included. Other exceptions to protection against age discrimination are also envisaged in the Recital. It provides that measures 'relating to age that offer more favourable conditions to persons of a certain age than are available to others, such as free or reduced tariffs for the use of public transport, museums, or sport facilities, are presumed to be compatible with the principle of non-discrimination and do not constitute discrimination on the ground of age'.⁶⁴

In common with the other anti-discrimination directives, the proposed Directive incorporates a right to adequate means of legal protection⁶⁵ including that associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.⁶⁶ The proposal expects that the rules on the burden of proof should be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively the burden of proof should shift back to the respondent when evidence of such discrimination is established.⁶⁷ Protection against victimisation is also included.⁶⁸ Member States are expected to provide for effective, proportionate and dissuasive penalties (including administrative and financial sanctions such as fines or payments or other types of sanctions) in the event of breaches of national provisions adopted pursuant to this proposed Directive.⁶⁹

60 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 14a and Article 2(6).

61 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 2(6).

62 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 14a and Article 2(6-a).

63 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 15b.

64 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 14a and Article 2(6-a).

65 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 7(1).

66 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Article 7(2) and Recital 23.

67 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 24 and Article 8.

68 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 25 and Article 9.

69 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation ST 10740 2019 INIT, Recital 29 and Article 14.

Despite a broad support for the objectives of the proposed Directive among Member States, further work is needed before unanimity can be reached in the Council. Without this, the proposed Directive remains a mere proposal and EU law still has no legal protection against age discrimination outside the labour market context.

2 European Convention on Human Rights law

The ECHR provides a broader level of protection than that found under EU law. More specifically, there is no limitation on the material scope as exists in EU law which is restricted to the employment context. However, the ECHR is not without its challenges in other respects.

There are two specific provisions which protect against age discrimination in the ECHR. The first is Article 14 which provides that the

‘enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

The second is Protocol 12 which provides in Article 1(1) that the

‘enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’

and further in Article 12(2) that

‘[n]o one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.’

These two central anti-discrimination provisions provide the sole basis for protection against discrimination on grounds of age in the ECHR. There is no limitation set out in the ECHR in relation to the various fields in which the equality guarantee applies. In theory, the equality guarantees in the ECHR apply across all the sectors considered in this report, i.e. social protection, education, housing, healthcare and access to goods and services. However, there are limitations on the application, scope and interpretation of the equality provisions.

Table 4. Overview of protection under ECHR law

Area	Labour market	Education	Healthcare	Housing	Social protection	Goods and services
Protection against age discrimination	√ ⁷⁰	√ ⁷¹	√ ⁷²	√ ⁷³	√ ⁷⁴	√ ⁷⁵

2.1 Application of Article 14 and Protocol 12, Articles 1(1) and 1(2)

While all Member States of the Council of Europe have signed and ratified the ECHR, only 21 of the existing 27 EU Member States have signed Protocol 12 and just 10 Member States have fully ratified Protocol 12. Therefore, the reach of Protocol 12 is more limited. The 10 Member States which have ratified Protocol 12 are Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Spain. A further 11 Member States have signed Protocol 12 including Austria, Belgium, Czechia, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia and Slovakia but have not as yet ratified it. Six Member States have neither signed nor ratified Protocol 12, including Bulgaria, Denmark, France, Lithuania, Poland, and Sweden. Therefore, only in 10 Member States can Protocol 12 effectively be used autonomously.

The reason ratification of Protocol 12 is so important is that Article 14 of the ECHR has a rather curious limitation. Article 14 works on a complementary basis with the other Articles of the ECHR. In order to base a claim on Article 14 ECHR, the applicant must demonstrate that they have been discriminated against with respect to the enjoyment of another substantive right protected under the ECHR, for example, the right to liberty under Article 5 or the right to privacy under Article 8. It, therefore, has no 'independent existence'⁷⁶ upon which a claim for age discrimination can be based. However, there is no need for a violation of one of the substantive rights to have occurred. A measure could be in conformity with one of the other substantive rights enshrined in the ECHR but still may infringe Article 14 because it is discriminatory. To this extent, Article 14 is autonomous once a connection to another substantive right protected by the ECHR is identified.⁷⁷ As stated in the case of *Khamtokhu and Aksenchik*, for Article 14

70 ECtHR, *British Gurka Welfare Society and others v United Kingdom* (Application No. 44818/11) 15 September 2016 on pension entitlements.

71 Article 2, Protocol 1 protects a right to education under the ECHR. See: Council of Europe, European Court of Human Rights (2017), *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights* available at: https://www.echr.coe.int/Documents/Guide_Art_2_Protocol_1_ENG.pdf.

72 While there is no right to healthcare under the ECHR, some rights have been interpreted to include certain healthcare rights, e.g. access to medical records or protection against inhuman and degrading treatment under Articles 8 and 3 respectively. European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 127.

73 While there is no stand-alone right to housing, the court has interpreted Article 8 very broadly so as to provide protection for 'home' including living conditions. Case law of the court indicates that, in certain circumstances, discriminatory treatment can amount to degrading treatment. For example, see *Smith and Grady v United Kingdom* 27 September 1999 (Application Nos. 33985/96 and 33986/96), para 121.

74 There is no right to social security under the ECHR although some rights, e.g. pension and benefit payments, have been held to fall within the ambit of other ECHR rights e.g. Article 1, Protocol 1 and Article 8. See European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 125 and cases *Andrejeva v Latvia* (Application No. 55707/00); *Gaygusuz v Austria* (Application No. 17371/90) and *Koua Poirrez v France* (Application No. 40892/98). For a useful analysis see Cousins, M., 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16(3) *Journal of Social Security Law* pp. 120-138.

75 Article 8 is the main ground for protection of goods and service provision under the ECHR. European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 136.

76 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), 13 May 2014, para 53.

77 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 53.

to become applicable it suffices that the facts of the case fall ‘within the ambit’ of another substantive provision of the ECHR or its Protocols.⁷⁸

Articles 1(1) and 1(2) of Protocol 12 do not suffer from the same complementarity limitations as Article 14. Protocol 12 is essentially autonomous so that there is no need to demonstrate that another substantive right protected by the ECHR has been interfered with. Article 1 of Protocol No. 12 extends the scope of protection to ‘any right set forth by law’. The Explanatory Report of Protocol No. 12 states that Article 1 of Protocol No. 12 relates to discrimination:

‘(i) in the enjoyment of any right specifically granted to an individual under national law; (ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; (iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies); (iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).’⁷⁹

In this respect, Protocol 12 provides a more substantive basis for age discrimination claims outside of those raised within the context of Article 14.

No claims have yet been based on Protocol 12 with respect to age discrimination. However, some claims have been raised under Article 14. The most commonly invoked articles alongside Article 14 with respect to age are Article 5 (right to liberty and security)⁸⁰ and Article 8 (right to respect for private and family life).⁸¹ In addition, claims have been based on Article 7 (no punishment without law),⁸² Article 1 Protocol 1 (right to protection of property)⁸³ and on Article 12 (right to marry and found a family).⁸⁴

A good example is the case of *Schwizgebel*. In that case, Ms Schwizgebel complained that the Swiss adoption authorities had discriminated against her on the basis of her age relying on Article 14, taken together with Article 8 (the right to respect for private and family life). As adoption clearly fell within the scope of Article 8, it was then possible to move on to consider whether discrimination had occurred under Article 14. The authorities had prevented her from adopting a second child due to her age (47 at the time of her application) on the basis that the age gap between the applicant and the child would have been too great and that this was not in the best interests of the child. The European Court of Human Rights (ECtHR) sitting as a Grand Chamber examined firstly whether the applicant had been subjected to a difference in treatment on grounds of age based on persons in a comparable situation. Comparing the applicant to that of a younger unmarried woman who might in the same circumstances have succeeded in gaining the authorisation to adopt a second child, it held that the applicant had been subjected to a difference in treatment on the basis of her age. The court then went on to examine if this could be justified. Basing their decision on the age difference between the applicant and the child, the potential effect of this on the adopted child and the fact that there was no consensus in other legal systems of the Member States of the Council of Europe as to the age of the adopter or what age difference might be appropriate, it concluded that the Swiss authorities had a considerable discretion to decide on such matters. There was

78 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 53; *Clift v United Kingdom* (Application No. 7205/07), 13 July 2010, para 41; *Kafkaris v Cyprus* (Application No. 21906/04), 12 February 2008, para 159; *Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’* (Application Nos. 1474/62, 1691/62, 1769/63, 1994/63 and 2126/64), 9 February 1967.

79 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para 22.

80 ECtHR, *A and Others v Bulgaria* (Application No. 51776/08), 29 November 2011; *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11); *Nelson v United Kingdom* (Application No. 11077/84) Commission Decision 13 October 1986.

81 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) 3 October 2017; *Euan Sutherland v United Kingdom* (Application No. 25186/94) Commission Decision 1 July 1997; *Schwizgebel v Switzerland* (Application No. 25762/07) 10 June 2010.

82 ECtHR, *Nelson v United Kingdom* (Application No. 11077/84).

83 ECtHR, *British Gurkha Welfare Society v United Kingdom* (Application No. 44818/11) 15 September 2016.

84 ECtHR, *Schwizgebel v Switzerland* (Application No. 25762/07).

no arbitrariness in the decision, there was ample reasoning given and the decision had been based on comprehensive enquiries. Therefore, the difference in treatment did not amount to a violation of Article 14, taken together with Article 8.

2.2 Age as a ground for discrimination

Neither Article 14 nor Protocol 12 expressly provides that age is a protected ground under the ECHR.⁸⁵ However, both indicate that the list of grounds expressly stated in Article 14 and Protocol 12 is not exhaustive but merely illustrative and that discrimination on any 'other status' will also be protected by the ECHR. 'Other status' has been defined as including 'identifiable, objective or personal characteristics... by which individuals or groups are distinguishable from one another'.⁸⁶ The term 'other status' has been given a wide meaning and has not 'been limited to characteristics which are personal in the sense that they are innate or inherent'.⁸⁷ It has been consistently held that 'age' is a protected ground under this 'other status' heading.⁸⁸ Indeed, the Explanatory Report on Protocol 12 indicated that the same list used in Article 14 was adopted into Protocol 12 as it was considered preferable to other solutions such as expressly

'including certain additional non-discrimination grounds (for example...age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included'.⁸⁹

However, while age would appear to be a protected ground under both Article 14 and Protocol 12, the Court has not held that age discrimination should be equated with other 'suspect' grounds of discrimination such as sex or race.⁹⁰ This has implications for the manner in which legitimate objectives, proportionality and the margin of appreciation granted to states are assessed. Therefore, while age is ostensibly protected as a ground for discrimination, it is not necessarily granted the same level of protection as more 'suspect' grounds such as race or sex.⁹¹ O'Hare has commented that the failure to list age as a protected ground in Article 14 or Protocol 12 indicates that there may well be a 'hierarchy between the listed and unlisted grounds'.⁹²

85 See discussion in Spanier, B. et al., 'Older Persons' Use of the European Court of Human Rights' (2013) 28 *Journal of Cross Cultural Gerontology* 407, p. 413.

86 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 61.

87 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 61; *Clift v United Kingdom* (Application No. 7205/07), paras 56-58; *Carson and Others v United Kingdom* (Application No. 42184/05), paras 61 and 70; *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Application Nos. 5926/72, 5095/71, 5920/72) 7 December 1976, para 56.

88 ECtHR, *Schwizgebel v Switzerland* (Application No. 25762/07), para 85; *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 62; *Nelson v United Kingdom* (Application No. 11077/84); *X. v United Kingdom* (Application No. 7215/75) Commission Decision 12 June 1979, p. 66 and *Dudgeon v United Kingdom* (Application No. 7525/76) 22 October 1981, p. 117.

89 *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4 Nov 2000) European Treaty Series No. 177, para 20.

90 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 62; *British Gurkha Welfare Society v United Kingdom* (Application No. 44818/11), para 88; *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 45.

91 Mjöll Arnardóttir, O., 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 1 *Oslo Law Review* 150.

92 O'Hare criticises this approach as unsatisfactory: O'Hare, U., 'Enhancing European Equality Rights: A New Regional Framework' (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, pp. 137-138. While Article 1 of Protocol 12 is capable of encompassing new grounds of discrimination she feels this approach potentially creates a hierarchy between the listed and the unlisted grounds. See also Meenan, H., 'Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe' (2007) 14(1) *Maastricht Journal of European and Comparative Law* 39; Gerards, J., 'The discrimination ground of Article 14 of the European Convention on Human Rights' (2013) 13(1) *Human Rights Law Review* 99; Hurford, J., 'An Aspect of Ordinarity: Is Age a "Suspect Ground" under Article 14 ECHR?' (2014) 19(1) *Judicial Review* 39.

2.3 Scope of protection against age discrimination

Protection against age discrimination is not limited to the employment context as is the case in EU law and equality guarantees in the ECHR apply across all the sectors considered in this report, i.e. social protection,⁹³ education,⁹⁴ housing,⁹⁵ healthcare⁹⁶ and access to goods and services.⁹⁷ While both Article 14 and Protocol 12 protect individuals from discrimination by the State, Protocol 12 also applies in the context of 'relationships between private persons, which should normally be regulated by the state'.⁹⁸ For example, the Explanatory Report on Protocol 12 notes that it will apply in cases involving 'arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity'.⁹⁹

2.4 Elements of a discrimination claim

2.4.1 Victim status

One limitation on making a discrimination claim in ECHR law, which does not arise under EU law, is that procedurally, in order to lodge a complaint, an applicant must demonstrate that they have been 'directly affected' by the measure complained of, i.e. that they have victim status. EU law is broader in that it does not require 'victim status' and in fact no identifiable complainant claiming to be a victim of discrimination is required. The case of *Feryn*¹⁰⁰ is illustrative of this broad approach of EU law. In that case, the CJEU held that an employer who publicly declared that it would not recruit employees of a certain ethnic or racial origin constituted discrimination within the meaning of Directive 2000/43 because such statements 'are likely to strongly dissuade candidates' from applying for the role in question. This effectively means that an applicant in EU law would not need to show victim status in the same way as is required under the ECHR.

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- 93 There is no right to social security under the ECHR although some social protection rights, e.g. pension and benefit payments, have been held to fall within the ambit of other ECHR rights, e.g. Article 1 Protocol 1 or Article 8. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 125. Relevant cases on this topic include *Andrejeva v Latvia* (Application No. 55707/08) 18 February 2009; *Gaygusuz v Austria* (Application No. 17371/90) 31 August 1996; *Koua Poirrez v France* (Application No. 40892/98) 30 September 2003.
- 94 Article 2 Protocol 1 protects a right to education under the ECHR. See Council of Europe, ECtHR Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education (2017).
- 95 While there is no stand-alone right to housing, the court has interpreted Article 8 very broadly so as to provide protection for 'home' including living conditions. Case law of the court indicates that, in certain circumstances, discriminatory treatment can amount to degrading treatment. See *Smith and Grady v United Kingdom* (Application Nos. 33985/96 and 33986/96), para 121.
- 96 While there is no right to healthcare under the ECHR, some rights have been interpreted to include certain healthcare rights, e.g. access to medical records or protection against inhuman and degrading treatment under Articles 8 and 3. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 127.
- 97 Under the ECHR there is protection afforded under Article 8. This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 136. Cousins, M., 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16(3) *Journal of Social Security Law* 120.
- 98 This is discussed in European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 34.
- 99 *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4 November 2000) European Treaty Series No. 177 para 28.
- 100 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397 10 July 2008.

2.4.2 Definition of discrimination

The ECtHR has stated numerous times that the meaning of the term ‘discrimination’ in both Article 14 and in Protocol 12 was intended to be identical.¹⁰¹ Discrimination has been defined in the Court’s jurisprudence as ‘treating differently, without an objective and reasonable justification, persons in similar situations’.¹⁰² Direct discrimination is expressly prohibited by Article 14 and Protocol 12 in a manner similar to Article 6 of Directive 2000/78 in EU law. However, the Court has also indicated that there are ‘more insidious forms of discrimination’ which are also covered by the ECHR mainly because these are ‘all the more dangerous as they are not so easy to pinpoint, while being particularly harmful for those affected’.¹⁰³ The Court has accepted in a line of case law that indirect discrimination is also prohibited by Article 14 and Protocol 12. It has defined indirect discrimination as a ‘difference in treatment’ which ‘may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group’.¹⁰⁴ It has also been confirmed that such indirect discrimination does not require a discriminatory intent. Discrimination by association,¹⁰⁵ harassment¹⁰⁶ and instructions to discriminate¹⁰⁷ are also prohibited under the ECHR (although this is not expressly stated but rather it can be implied from the case law of the court). Positive action is permitted, although the case law of the ECHR has focused almost solely on state obligations to take positive action rather than whether a state may be allowed to take such action in general terms.¹⁰⁸

2.4.3 Comparator

Article 14 and Protocol 12 both require that a comparator be identified so that a difference in treatment can be established. The comparator must be a person in analogous, or relatively similar, situations. The court has reiterated that an ‘applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relatively similar situation to others treated differently’.¹⁰⁹ Comparators in age discrimination cases can be more difficult to establish because there is not always a clear comparator. However, it has rarely been an issue for the court. For example, in *Affaire A*,¹¹⁰ the court held that the comparator for a child subject to an anti-social behaviour order was an adult who was not subject to the same orders and who when detained had a right to judicial review. In *Khamtokhu*,¹¹¹ the comparator was between those who were between the ages of 18-65 years and those who were older or younger than this age group and who had been convicted of the same or comparable offences. In *Schwitzgebel*, the comparator was a younger woman in a similar situation who would have likely been given the authorisation to adopt, unlike the claimant, a woman of 47 years, who had been refused authorisation to adopt a second child on the grounds of her age.¹¹²

However, specific difficulties arise where there is no clear comparator. This may arise, for example, in a case involving stereotyping where there is no obvious difference in treatment between the applicant

101 Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov 2000) European Treaty Series No. 177 para 18; *Sejdić and Finci v Bosnia and Herzegovina* (Application Nos. 27996/06 and 34836/06) 22 December 2009, para 55; *Zornić v Bosnia and Herzegovina* (Application No. 3681/06) 15 July 2014, para 27; *Baralija v Bosnia and Herzegovina* (Application No. 30100/18) 29 October 2019, para 46.

102 ECtHR, *Sejdić and Finci v Bosnia and Herzegovina* (Application Nos. 27996/06 and 34836/06), para 55.

103 ECtHR, *Garib v Netherlands* (Application No. 43494/09) 7 November 2017, para 31 dissenting judgment.

104 ECtHR, *Sejdić and Finci v Bosnia and Herzegovina* (Application Nos. 27996/06 and 34836/06), para 184; *Hugh Jordan v United Kingdom* (Application No. 24746/94) 4 August 2001, para 154; *Hoogendijk v Netherlands* (Application No. 58641/00) 6 January 2005.

105 ECtHR, *Guberina v Croatia* (Application No. 23682/13) 22 March 2016.

106 ECtHR, *Bordević v Croatia* (Application No. 41526/10) 24 July 2012; *Bączkowski and Others v Poland* (Application No. 1543/06) 3 May 2007.

107 ECtHR, *Bączkowski and Others v Poland* (Application No. 1543/06).

108 European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on European Non-Discrimination Law* (2018) available at: https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf, p. 77.

109 ECtHR, *Écis v Latvia* (Application No. 12879/09) 10 January 2019, para 78; *Fábián v Hungary* (Application No. 78117/13) 5 September 2017.

110 ECtHR, *A and Others v Bulgaria* (Application No. 51776/08).

111 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11).

112 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07), para 85.

and those in analogous or similar situations.¹¹³ This arose in the seminal case of *Carvalho*.¹¹⁴ In this case, a woman in her 50s, suffered injury during vaginal surgery to treat a painful condition and had her compensation (partly for the injury and partly to allow her to receive domestic help) reduced on appeal by the Portuguese Supreme Administrative Court on the grounds that it had not been established that (a) the 'plaintiff had lost her capacity to take care of domestic tasks'; (b) that 'professional activity outside the home is one thing while domestic work is another', and (c) that 'considering the age of her children, she [the plaintiff] probably only needed to take care of her husband; this leads us to the conclusion that she did not need to hire a full-time maid'. Additionally, the court added that 'it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age'.¹¹⁵ Here the ECtHR held that there was no evidence that the Supreme Administrative Court in Portugal treated the woman any differently from other women in similar or analogous situations but the Supreme Administrative Court had instead engaged in stereotyping women over the age of 50 years and made decisions related to compensation on the basis of these stereotypes, i.e. that sex was not as important to women of this age. Judge Motoc, in delivering a concurring opinion in the case, identified a pattern for determining cases of this nature. Firstly, the stereotype should be named and identified. Secondly, the stereotype should be contested. During the contesting phase of analysis, a comparator is not required as in other discrimination cases, rather, evidence of disadvantage will suffice. He specifically stated that the 'test of comparability is not suited to stereotyping'.¹¹⁶ To prove disadvantage, it is sufficient to 'prove that the stereotypes are harmful to the group to which the applicant belongs and that the rule or practice applied by the State is based on such stereotypes'.¹¹⁷ As the decision of the Supreme Administrative Court had been based on a stereotype of the applicant based on her age and gender, it constituted disadvantage and was ultimately held to be in violation of Article 14 in combination with Article 8.

2.4.4 Multiple discrimination

While not expressly prohibited and not clearly defined, claims of multiple discrimination do occur under the ECHR. In the context of age, these tend to arise most specifically alongside claims relating to gender discrimination. The case of *Carvalho* involved intersections of age discrimination with gender discrimination. However, where age and gender arise together, there is a tendency for the court to focus more specifically on the gender aspects of the decision and to either ignore the age dimension entirely or to denigrate the age issue and deal with it as a mere side issue. This is perhaps due to the fact that gender is a more well-trodden and understood ground of discrimination or because it is considered to be more odious than age discrimination and therefore requiring more detailed consideration. The lack of express protection against age discrimination in the ECHR may also be an issue here. It may well be a result of a combination of all these issues.

In *Carvalho*, the issue of multiple discrimination was identified by the court from the outset. Challenging the inadequacy of a national court decision regarding medical malpractice, the court sought to consider the case under Article 8, in conjunction with Article 14, citing both age and sex as the grounds for discrimination. The court was called upon to consider whether the Supreme Administrative Court decision to reduce the damages awarded to the applicant was influenced by its reliance on the fact that the applicant 'was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age'.¹¹⁸ The issue which had to be determined by the court was whether or not the Supreme Administrative Court's reasoning led to a difference of treatment

113 Gerards, J., 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 *Human Rights Law Review* 99.

114 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15).

115 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 16.

116 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Motoc, para 18.

117 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Motoc, para 18.

118 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 16.

of the applicant based on her sex and age, amounting to a breach of Article 14 in conjunction with Article 8.¹¹⁹

The court acknowledged here that the case was not about age alone or sex alone, but rather the intersectional effect of age and sex taken together. More specifically, the court noted that they needed to examine:

‘the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women’s sexuality in the specific case of the applicant.’¹²⁰

They further reiterated the multiple level of discrimination when they stated that ‘the applicant’s age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds’.¹²¹ The court examined two cases of medical malpractice of males of the same age range as the applicant before the same court in Portugal and noted that in those cases many of the factors considered relevant in the case of *Carvalho* were not found to be relevant in those cases. Specifically mentioned was the manner in which the domestic court took into consideration the fact that the men could not have sexual relations and how this had affected them, regardless of their age, and that the court had not examined, unlike in the applicant’s case, whether the men already had children or not, or looked at any other factors.¹²² In view of this, the court found a violation of Article 14 taken in conjunction with Article 8.

While the court did not specifically refer to the concept of multiple discrimination, it is clear that the judgment did reflect the fact that the applicant had suffered discrimination not just on the basis of one of the grounds alone but as a result of the intersection of both grounds, although even if her age had not been an issue, it is probable that sex discrimination could have been found. According to the concurring opinion of Judge Yudkivska it was ‘clear that out-dated gender stereotypes have influenced a judicial decision and this in itself amounts to a violation of the applicant’s Convention rights’.¹²³ While Judge Yudkivska does agree that ‘it was the specific combination of *female* gender and age that concerned the Portuguese court’¹²⁴ that led them to their discriminatory conclusion, the concurring opinion clearly focuses, almost in its entirety, on gender stereotyping and discrimination. Indeed, Judge Motoc in another concurring opinion identified two stereotypes at play in the decision of the national court: the gender role stereotype (ascribing a certain role and behaviour to women) and the sexual stereotype (concerning physical and biological difference) without once referring to the stereotypes based on age.¹²⁵ Indeed, dissenting judges Ravarani and Bošnjak identified the lack of age analysis as a ‘shortcoming’ in the decision.¹²⁶ Mantovani, Spanier and Doron comment that ‘the main criticism of the *Carvalho* decision is that the Court gave too little weight to *Carvalho*’s age; or, more specifically, that it failed to address the social construction given to age by the Portuguese courts’¹²⁷ and that therefore the decision was a missed opportunity to finally deal with the growing problem of ageism.¹²⁸ While this is undoubtedly correct, the

119 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 51.

120 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 52.

121 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 53.

122 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), para 55.

123 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Yudkivska, p. 22.

124 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Yudkivska, p. 22.

125 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Motoc, para 14.

126 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) joint dissenting judgment of Judges Ravarani and Bošnjak, para 15.

127 Mantovani, E., Spanier, B. and Doron, I. ‘Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v Portugal* Case’ (2018) 11 *De Paul Journal for Social Justice* 1, p. 13.

128 Mantovani, E., Spanier, B. and Doron, I. ‘Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v Portugal* Case’ (2018) 11 *De Paul Journal for Social Justice* 1, p. 15.

decision could also be viewed as a missed opportunity with respect to developing the jurisprudence on multiple discrimination, particularly with respect to age and gender.

2.5 Justifying differences in treatment

2.5.1 Shift in burden of proof

The Court has reiterated on numerous occasions that once an applicant has demonstrated a difference in treatment, it is for the state party to show that it can be justified.¹²⁹ Therefore, as in EU law, there is a shift in the burden of proof to the respondent once a difference in treatment has been established.

2.5.2 Objective justification and proportionality assessment

Similar to the law on age discrimination in EU law, discrimination is only deemed to have occurred under Article 14 or Protocol 12 when there is 'no objective or reasonable justification' for the difference in treatment suffered. This essentially means that in order not to constitute discrimination the impugned treatment must 'pursue a legitimate aim' and there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.¹³⁰

Numerous justifications have been proffered by State Parties and accepted by the court in cases involving age discrimination. A classic example is the protection of some vulnerable groups, such as children.¹³¹ In *Khamtokhu*, the exemption of juvenile offenders from life imprisonment was important to protect such offenders given their 'presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation'.¹³² In addition, those over the age of 65 have also been deemed in need of protection from the imposition of mandatory life sentences in order to ensure that the prospect of release did not become a 'mere illusory possibility'.¹³³ Protection of the best interests of the child is also an identifiable objective in the case of *Schwitzgebel*, where the court based their decision on the age difference between the applicant and the child and, in the absence of consensus on the matter, the potential effect of this on the adopted child.¹³⁴

The protection of morals has also been considered a legitimate objective. In the case of *Sutherland*,¹³⁵ while not explicitly addressing the question of age discrimination, the Commission accepted that 'legal measures which prescribe age limits for particular types of sexual behaviour are, in principle, a legitimate way of pursuing' the aim of protecting morals.¹³⁶ Whether this aim will be sufficient in a particular case to justify differing ages was considered by the Commission to be a matter of considering the proportionality of the means and the aim. In the *Sutherland* case the Commission did not consider the means (imposition of criminal sanctions) to be proportionate to the aim of protecting morals.¹³⁷

An important limitation with respect to objective justifications is that justifications based on stereotypes, whether based on gender or other grounds, will not amount to sufficient justification for a difference in treatment. The case of *Carvalho* is illustrative in this regard. In the concurring opinion of Judge Yudkivska it was noted that the decision of the Supreme Administrative Court in Portugal had been based on

129 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 65; *Biao v Denmark* (Application No. 38590/10) 25 March 2014, para 92; *D.H. and Others v Czech Republic* (Application No. 57325/00), para 177.

130 ECtHR, *Baralija v Bosnia and Herzegovina* (Application No. 30100/18) 29 October 2019, para 48; *Molla Sali v Greece* (Application No. 20452/14) 19 December 2018, para 133; *Andrejeva v Latvia* (Application No. 55707/00) 18 February 2009, para 81.

131 ECtHR, *A and Others v Bulgaria* (Application No. 51776/08), paras 76 and 110.

132 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 80.

133 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 81.

134 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07).

135 ECtHR, *Euan Sutherland v United Kingdom* (Application No. 25186/94).

136 ECtHR, *Euan Sutherland v United Kingdom* (Application No. 25186/94), para 63.

137 ECtHR, *Euan Sutherland v United Kingdom* (Application No. 25186/94), para 65.

presumption and a generalisation about the age of the woman and her sex life. Judge Yudkivska concluded that 'it was both irrational and degrading for the Administrative Court to speculate as to the applicant's sex life in general and to make any presumption in this respect based on a generalisation'.¹³⁸

2.5.3 Margin of appreciation

Under both Article 14 and Protocol 12, State Parties enjoy a margin of appreciation in assessing 'whether and to what extent differences in otherwise similar situations justify' different treatments.¹³⁹ The scope of this margin will alter depending on a number of factors including (a) the circumstances of the case, (b) the subject matter and (c) the background.¹⁴⁰ The Court gives a very narrow margin of appreciation to state actions where differences in treatment are based exclusively on the grounds of sex and very weighty reasons would have to be put forward to justify such differences in treatment.¹⁴¹ References to

'traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation'.¹⁴²

As age has not been considered to be a suspect ground in the same manner as gender or race, states are generally given a wider margin of appreciation in justifying differences in treatment on grounds of age.¹⁴³

In addition, the Court gives a wider margin of appreciation to states where the differences in treatment arise from general measures of economic or social strategy.¹⁴⁴ This is because states have direct knowledge of their society and needs and are therefore in a better position to appreciate the public interest on social or economic grounds. The Court will only step in where the state actions are 'manifestly without reasonable foundation'.¹⁴⁵ In addition, the Court also gives a wider margin of appreciation in relation to criminal matters, for example, the appropriate term of detention applicable to particular offences or the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court.¹⁴⁶

A relevant factor in determining the extent of the margin of appreciation to be afforded to State Parties includes 'the existence or non-existence of a European consensus'.¹⁴⁷ This can be seen as particularly

138 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15) concurring opinion of Judge Yudkivska, p. 25.

139 ECtHR, *Stec and Others v United Kingdom* (Application Nos. 65731/01 and 65900/01) 12 April 2006, para 51; *Van Raalte v Netherlands* (Application No. 20060/92) 21 February 1997, para 39.

140 ECtHR, *Stec and Others v United Kingdom* (Application Nos. 65731/01 and 65900/01), para 52; *Petrovic v Austria* (Application No. 20458/92) 27 March 1998, para 38.

141 ECtHR, *Stec and Others v United Kingdom* (Application Nos. 65731/01 and 65900/01), para 52; *Van Raalte v Netherlands* (Application No. 20060/92), para 39; *Schuler-Zraggen v Switzerland* (Application No. 14518/89) 24 June 1993, para 67.

142 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 78; *Konstantin Markin v Russia* (Application No. 30078/06) 22 March 2012, para 127; *X and Others v Austria* (Application No. 19010/07) 19 February 2013, para 99; *Vallianatos and Others v Greece* (Application Nos. 29381/09 and 32684/09) 7 November 2013, para 77; *Hämäläinen v Finland* (Application No. 37359/09) 16 July 2014, para 109.

143 O'Hare criticises this approach as unsatisfactory: O'Hare, U., 'Enhancing European Equality Rights: A New Regional Framework' (2001) 8(2) *Maastricht Journal of European and Comparative Law* 133, pp. 137-138. While Article 1 of Protocol 12 is capable of encompassing new grounds of discrimination she feels this approach potentially creates a hierarchy between the listed and the unlisted grounds. See also Meenan, H., 'Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe' (2007) 14(1) *Maastricht Journal of European and Comparative Law* 39; Gerards, J., 'The discrimination ground of Article 14 of the European Convention on Human Rights' (2013) 13(1) *Human Rights Law Review* 99; Hurford, J., 'An Aspect of Ordinarity: Is Age a "Suspect Ground" under Article 14 ECHR?' (2014) 19(1) *Judicial Review* 39.

144 ECtHR, *Stec and Others v United Kingdom* (Application Nos. 65731/01 and 65900/01), para 52; *James and Others v United Kingdom* (Application No. 8793/79) 21 February 1986, para 46; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom* (Application No. 21319/93) 23 October 1997, para 80.

145 ECtHR, *Stec and Others v United Kingdom* (Application Nos. 65731/01 and 65900/01), para 52.

146 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 78; *Vinter and Others v United Kingdom* (Application Nos. 66069/09, 130/10 and 3896/10) 9 July 2013, para 105; *T. v United Kingdom* (Application No. 24724/94) 16 December 1999, para 117; *V. v United Kingdom* (Application No. 24724/94) 16 December 1999, para 118.

147 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 78.

relevant in the cases dealing with age discrimination. The Court has held that it must have consideration of the 'changing conditions within the respondent State and within Contracting States generally and respond, for example, to any emerging consensus as to the standards to be achieved'.¹⁴⁸ In addition, comparative law has been used to demonstrate state consensus.¹⁴⁹ A good example of the application of all of these principles in relation to age discrimination is the case of *Schwitzgebel*. The applicant had been denied authorisation to adopt a second child on the basis of her age (specifically because the age difference between the applicant and the child adopted would be excessive and not in the child's interests). The Court considered that the State had a legitimate aim, namely to protect the well-being and rights of the child.¹⁵⁰ The question which then arose was whether this aim was justified. The court examined whether there was common ground in this area, particularly whether the law in other Member States of the Council of Europe had similar rules. No uniform principle could be found, 'neither in respect of the lower and upper age-limits for adopters nor in respect of the age difference between the adopter and the adopted child'.¹⁵¹ In the absence of consensus, the Swiss government had a wide margin of appreciation.¹⁵² However, the court did warn that this wider margin of appreciation should not be interpreted 'as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention'.¹⁵³ This approach does, however, open up the possibility of a stricter margin of appreciation being applied where there is a greater consensus between Member States with respect to age-related differences in treatment.

2.6 Exceptions

While there are no express exceptions to the equality guarantees in either Article 14 or Protocol 12, the case law does reveal that certain differences in treatment based on age will be considered to be reasonable and not subject to scrutiny by the court. For example, in *Carvalho* it was considered that it would be reasonable to take age into account in determining the amount of damages to be awarded in a given case because it was evident that a 'younger claimant will probably have to live with a given injury for longer than an older claimant'.¹⁵⁴ Further in *Carvalho* it was indicated that it might even be reasonable to consider age in determining whether or not a claimant is affected by the inability to have children.¹⁵⁵

In more general terms, Article 14 (and by assumption Protocol 12) does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the ECHR.¹⁵⁶

2.7 Conclusion

Both EU law and ECHR law protect against age discrimination. However, the scope and extent of such protection differs considerably. Under EU law, the protection only extends to the labour market, with discrimination on grounds of age in other fields such as education or healthcare remaining largely unprotected. Even the CFR which provides for a strong equality guarantee in Article 21 has been limited in its application by the decisions of the CJEU which has determined that in order to be effective, an alternative basis for protection under EU law must be identified, for example, a directive. There have been moves to develop a proposed Directive on equal treatment on grounds of, inter alia, age in other fields

148 ECtHR, *Khamtokhu and Aksenchik v Russia* (Application Nos. 60367/08 and 961/11), para 78; *Schwitzgebel v Switzerland* (Application No. 25762/07), paras 79-80; *Dickson v United Kingdom* (Application No. 44362/04) 4 December 2007, para 81; *Fretté v France* (Application No. 36515/97) 26 February 2002, para 40; *Petrovic v Austria* (Application No. 20458/92), para 38.

149 ECtHR, *Khamtokhu and Aksenchik v Russia* (Applications Nos. 60367/08 and 961/11), paras 21, 83 and 85.

150 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07), para 86.

151 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07), para 90.

152 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07), paras 92, 93.

153 ECtHR, *Schwitzgebel v Switzerland* (Application No. 25762/07), para 94.

154 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), Concurring opinion of Judge Yudkivska.

155 ECtHR, *Carvalho Pinto de Sousa Morais v Portugal* (Application No. 17484/15), Concurring opinion of Judge Yudkivska.

156 ECtHR, *G.M.B. and K.M. v Switzerland* (Application No. 36797/97) 27 September 2001.

such as social protection, healthcare, education, housing and access to goods and services but this is currently still being discussed in Council.

ECHR law is wider in scope and application than EU law in that it technically applies outside of the labour market to other fields such as social protection, healthcare, education, housing and access to goods and services. However, it also has a number of limitations such as the limited applicability of Protocol 12, the requirement to locate an existing right within the ECHR wherein discrimination under Article 14 can be identified, the need to demonstrate victim status and the wide margin of appreciation given to states with respect to age discrimination.

It is clear that the proposed Directive has the benefit of overcoming these limitations and shortcomings in protection and would provide a very sustainable and effective basis for legal protection against age discrimination in EU Member States.

Table 5. Comparison of protection under EU law (in force and proposed) and ECHR law

Field	Labour market	Education	Healthcare	Housing	Social protection	Goods and services
EU law	√	X	X	X	X	X
ECHR law	√	√	√	√	√	√
Proposed directive	√	√	√	√	√	√

Section II. Overview of national laws

The previous section examined the existing protections under EU and ECHR law on age discrimination outside the labour market. This section of the report seeks to illustrate the existing national laws relating to age discrimination outside the labour market in the current 27 EU Member States and to provide a succinct overview of the general level of protection throughout the EU. Although there are potentially numerous and various methods by which the 27 current EU Member States seek to achieve equality on grounds of age, the report identifies three distinct models of protection: full protection, partial protection and no protection. Within these three models there are also many variations which are explained in full throughout the report. However, these three models provide a useful method by which to gauge the overall level of protection and to derive useful conclusions and recommendations. Tables throughout this section illustrate which model is operational in the various Member States and in the fields considered in this report. Throughout this section the full protection model is identified in green, the no protection model is identified in red and the partial protection model is identified in amber.

This section outlines the legal protection against discrimination on the grounds of age in the field of social protection, education, housing, healthcare and access to goods and services within the 27 EU Member States. It examines the different protections available including protection against direct and indirect discrimination, including any justification requirements and/or exceptions. It will examine existing protections with respect to harassment, instructions to discriminate and victimisation and whether these are considered to be discriminatory forms of action in individual Member States. In addition, it analyses specific age-related exceptions to age discrimination law including those in the financial services and insurance sectors. It analyses protections of positive action and protections against multiple discrimination. Enforcement rules are also considered in addition to compensation provisions. Finally, some key case law is addressed identifying not only the variety of age discrimination issues arising in Member States outside of the labour market context, but also the commonality in approach of Member States to these specific issues.

It concludes that there are many more similarities in the levels of protection afforded across the EU Member States than there are variations and that this provides concrete support for a proposed directive on this matter. This will be discussed further in the Conclusions and Recommendations.

3 Material scope

The proposed Directive on equal treatment on grounds of age, sexual orientation, disability and religion and belief, outside the labour market¹⁵⁷ provides in Article 3 that it applies to ‘all persons, as regards both the public and private sectors, including public bodies, in relation to access to’: (a) social protection, ‘in so far as it relates to social security, including statutory supplementary pension schemes, and to social assistance, social housing’ and healthcare; (b) access to education; and (c) access to and supply of goods and other services, including housing, which are available to the public. Given the limited competences of the EU in certain areas, e.g. education, the proposed Directive also includes a number of provisions which detail what does not fall within its scope of application. Firstly, it does not apply to matters covered by family law. Secondly, it does not apply to the organisation and funding of Member States’ social protection systems, including the setting up and management of such systems and related institutions as well as the substance, the amount, the calculation and the duration of benefits and services, and the conditions of eligibility for these benefits and services, such as, for example, age limits for certain benefits. Thirdly, it does not apply to the organisation and funding of the Member States’ educational systems, including the setting up and management of educational institutions, the content of teaching and of educational

¹⁵⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/^{*} COM/2008/0426 final – CNS 2008/0140 ^{*}/.

activities, the development of curricula, the definition of examination processes, and the conditions of eligibility, such as, for example, age limits for schools, scholarships or courses.

These definitions conform, and provide uniformity, with the Race and Gender Directives¹⁵⁸ and ensure that the legislation remains within the competency of EU law. The extent to which Member States currently comply with the material scope of these other EU equality laws in these fields is fully assessed in the 2019 report of the European Network of Legal Experts in Gender Equality and Non-Discrimination.¹⁵⁹ In the context of a proposed extension of age discrimination law, some further divergences do exist. Where significant divergences arise in the implementation of age discrimination protections outside the labour market context, these are flagged in this report as evidence of partial protection within each form of discrimination discussed in this section. For example, in the case of Austria there is no protection with respect to direct discrimination in the field of access to goods and services provided by the private sector. In general, though, it is determined that Member States tend to apply the same scope to all forms of discrimination in all fields. Other than the anomalies highlighted further in this report, and those raised in the most recent report of the European Network of Legal Experts in Gender Equality and Non-Discrimination, there is a high degree of similarity with respect to the material scope of the protections afforded in all fields throughout the Member States and with those proposed in the proposed Directive.

4 Direct discrimination

An examination of the protection against direct discrimination on grounds of age in the 27 EU Member States indicates that over 44 % of Member States provide full protection against direct discrimination and that almost 48 % provide some partial protection. Only 7 % of Member States provide no protection at all. Therefore, there is a general uniformity of approach with respect to direct discrimination on grounds of age across the 27 EU Member States. When the data is further explored, it is clear that there is very little difference with respect to the actual protection afforded in different fields and that when states provide full protection, they tend to do so across the various fields unanimously rather than picking and choosing which fields to include or exclude.

Table 6. Protection for direct discrimination in the 27 EU Member States

Country	Social protection	Education	Healthcare	Housing	Goods and services
Austria	Yes	Yes	Yes	Yes	Partial
Belgium	Yes	Yes	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes	Yes	Yes
Croatia	Yes	Yes	Yes	Yes	Yes
Cyprus	Partial	Partial	Partial	Partial	Partial
Czechia	Yes	Yes	Yes	Yes	Yes
Denmark	Partial	Partial	Partial	Partial	Partial
Estonia	Partial	Partial	Partial	Partial	Partial
Finland	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes

158 Council Directive 79/7/EEC of 19.12.1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6, 10.1.1979, p. 24-25; Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37-43; Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26.

159 European Commission, *A Comparative Analysis of non-discrimination law in Europe in 2019* (December 2019), p. 55 et al. Available at: <https://www.equalitylaw.eu/downloads/5118-a-comparative-analysis-of-non-discrimination-law-in-europe-2019-1-72-mb>.

Country	Social protection	Education	Healthcare	Housing	Goods and services
Germany	Yes	Yes	Yes	Yes	Yes
Greece	No	No	No	No	Yes
Hungary	Yes	Yes	Yes	Partial	Yes
Ireland	Partial	Yes	Yes	Yes	Yes
Italy	Partial	Partial	Partial	Partial	Partial
Latvia	Yes	Partial	Partial	Partial	Partial
Lithuania	Partial	Yes	Partial	Yes	Yes
Luxembourg	Yes	Yes	Yes	Yes	Yes
Malta	Partial	Yes	Partial	Partial	Partial
Netherlands	Partial	Partial	Partial	Partial	Partial
Poland	No	Partial	Partial	No	No
Portugal	Partial	Partial	Partial	Yes	Partial
Romania	Yes	Yes	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes	Partial	Partial
Slovenia	Yes	Yes	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes

4.1 Protection models

Within the context of prohibiting direct discrimination on grounds of age, three models of protection exist: full protection, partial protection and no protection.

Full express and explicit protection against direct age discrimination is ensured in over 44 % of Member States. This means that these Member States protect against direct discrimination on grounds of age in all fields outside the labour market context. Naturally, there are variations as to how this is achieved. Some Member States have specific national (federal) anti-discrimination laws which explicitly prohibit direct discrimination on the grounds of age with respect to social protection,¹⁶⁰ education,¹⁶¹ housing,¹⁶² healthcare¹⁶³ and access to goods and services.¹⁶⁴ Some states, such as Austria¹⁶⁵ or Belgium,¹⁶⁶ have separate anti-discrimination legislation in each of its various regions. Other Member States provide for

¹⁶⁰ These Member States are Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Ireland, Latvia, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

¹⁶¹ These Member States are Bulgaria, Croatia, Czechia, Finland, France, Germany, Lithuania, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

¹⁶² These Member States are Bulgaria, Croatia, Czechia, Finland, France, Germany, Lithuania, Luxembourg, Romania, Slovenia and Sweden.

¹⁶³ These Member States are Croatia, Czechia, Finland, Germany, Hungary, Ireland, Luxembourg, Romania, Slovakia, Slovenia and Sweden.

¹⁶⁴ These Member States are Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Romania, Slovenia and Sweden.

¹⁶⁵ See Austria where the protection against discrimination in social protection is provided in a number of instruments specific to the nine provinces: Austria, Viennese Anti-Discrimination Act, Wr LGBl Nr. 35/2004, (para 1); Burgenlandian Anti-Discrimination Act, Bgl LGBl Nr. 84/2005, (para 23); Carinthian Anti-Discrimination Act, Kntn LGBl Nr. 63/2004, (para 12); Lower Austrian Anti-Discrimination Act, NÖ LGBl Nr. 24/2017, (para 3); Upper Austrian Anti-Discrimination Act, OÖ LGBl Nr. 50/2005, (para 2); Salzburgian Equal Treatment Act, Slzb LGBl Nr. 31/2006, (para 28); Styrian Equal Treatment Act, Stmk LGBl Nr. 66/2004, (para 32); Tyrolian Anti-Discrimination Act, T LGBl Nr. 25/2005, (para 3); Vorarlbergian Anti-Discrimination Act, Vlb LGBl Nr. 17/2005, (para 1).

¹⁶⁶ In the Belgian federal system, the competence to legislate on discrimination is divided between the federal state, the three communities and the three regions. Unlike in the French-speaking part of Belgium, in the Flemish part of the country, the region and community are merged. Overall, all the Belgian legislators have adopted laws extending the protection against age discrimination beyond the field of employment in their respective fields of competence such as social protection (including social security and social advantages), healthcare, education, housing and access to and supply of goods and services which are available to the public.

anti-discrimination on grounds of age in field-specific legislation such as social protection legislation,¹⁶⁷ education legislation,¹⁶⁸ housing legislation¹⁶⁹ or healthcare legislation.¹⁷⁰ Whichever specific format of protection is chosen, the result is the same: direct discrimination on grounds of age is explicitly prohibited in all fields outside the labour market.

However, the majority of Member States operate a partial protection model which indicates that while there is an intention to protect against direct discrimination on grounds of age, this is not expressly provided for in all fields outside the labour market, or is limited in its scope or application.

- **Constitutional / International law protection:** In many Member States, there is no express legislation but reliance is instead placed on the interpretation of national constitutional provisions or on the European Convention on Human Rights (ECHR) in social protection,¹⁷¹ education,¹⁷² healthcare,¹⁷³ housing¹⁷⁴ and access to, and provision of goods¹⁷⁵ and services.¹⁷⁶ However, this form of protection is viewed as partial protection as it can be inconsistent in application, uncertain in scope, potentially devoid of horizontal application¹⁷⁷ and often subject to arbitrary interpretations which may be contrary to the ECHR. A useful example with respect to the latter is the situation in Cyprus, where the Supreme Court requires that comparators can only be derived from those in an equal situation whereas the ECHR countenances comparators who are unequal in certain respects.¹⁷⁸

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- 167 See the situation in Spain and Slovakia where there is both federal and specific legislation on social protection: Spain, Law 62/2003, of 30 December 2003, on Fiscal, Administrative and Social Measures (BOE, 31 December 2003), Articles 27 and 28 and General Social Security Act (RLD 8/2015) (BOE, 31 October 2015), Article 2; Slovakia, Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-Discrimination Act), Sections 2 para (1) and 2a(2) in conjunction with Sections 5(1) and 5(2)(a). This legislation operates in conjunction with Slovakia, Act No. 461/2003 on Social Insurance, as amended, Slovakia, Act No. 448/2008 on Social Services and on amending and supplementing Act No. 455/1991 on Licensed Trades (Small Business Act), as amended, Slovakia, Act No. 43/2004 on Old-Age Pension Saving and amending and supplementing certain laws, as amended, Section 9 and Slovakia, Act on Supplementary Pension Saving, 650/2004, Section 7(1).
- 168 See the situation in Malta, Poland, Slovakia, Spain. Spain, Law 62/2003, of 30.12.2003, on Fiscal, Administrative and Social Measures, Articles 27 and 28 and Organic Law 2/2006 on Education, Article 1; Malta, The Education Act, Article 3; Poland, Act on Education 14.12.2016, in force since 1.09.2017 (Dz.U.2017.59). This Act partially replaced the previous Act on the Education System (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*) (Dz. U. 2016, poz. 1943, 1954, 1985, 2169), 7.09.1991. The 1991 Act is still partly in force, in the version published in 2017 (Dz.U.2017.2198 t.j.); Slovakia: Slovak Anti-Discrimination Act, Sections 2(1) and 5(1) and 5(2)(c).
- 169 See the situation in France: Law No. 2008-496 of 27.05.2008, Article 2 paragraph 3 and Law No. 89-462 of 6.07.1989, called 'Mermaz Law', Article 1(3) and Portugal: Article 2(1) of the Basic Law on Housing – Law 83/2019, 3.09.2019, Article 1067-A of the Portuguese Civil Code.
- 170 See the situation in Spain: Law 62/2003, of 30.12.2003, on Fiscal, Administrative and Social Measures, Articles 27 and 28 and General Health Law, Article 3; France: Article 2 paragraph 3 of Law No. 2008-496 of 27.05.2008 and Article L1110-3 of the Code of Public Health; Slovakia: Sections 2 para (1) in conjunction with Sections 5(1) and 5(2)(b) of the Slovak Anti-Discrimination Act and Slovakia, Act No. 576/2004 on Healthcare, Services Related to the Provision of Healthcare and on amending and supplementing certain acts, as amended, Section 11(2-6).
- 171 See the situation in Cyprus: Article 28 of the Constitution; Estonia: Article 12 of the Constitution; Italy: Article 3 of the Constitution; Lithuania: social protection falls outside the main anti-discrimination legislation but may be subject to other protections (although this is not yet clear); Malta: Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.
- 172 See the situation in Cyprus: Article 28 of the Constitution; Estonia: Article 12 of the Constitution; Italy: Article 3 of the Constitution; Latvia: Article 91 of the Constitution; Malta: Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.
- 173 See the situation in Cyprus: Article 28 of the Constitution; Estonia: Article 12 of the Constitution; Italy: Article 3 of the Constitution; Malta: Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.
- 174 See the situation in Cyprus: Article 28 of the Constitution; Estonia: Article 12 of the Constitution; Spain: Article 14 of the Constitution; Italy: Article 3 of the Constitution; Malta: Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.
- 175 See the situation in Latvia: Article 91 of the Constitution.
- 176 See the situation in Cyprus: Article 28 of the Constitution; Estonia: Article 12 of the Constitution; Italy: Article 3 of the Constitution; Malta: Article 45 of the Constitution; Portugal: Article 13(2) of the Constitution.
- 177 See the situation in Latvia with respect to the extension of application of the law to public but not privately provided goods.
- 178 Cyprus, Supreme Court, *Cyprus Athletics Organisation v Andreas Potamitis* (Κυπριακός Οργανισμός Αθλητισμού v Ανδρέα Ποταμίτη), No. 111/2007, 18.06.2010. Available at: http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2010/rep/2010_3_0315.htm&qstring=%F0%EF%F4%E1%EC%E9.%F4*%20and%2018%20and%20%E9%EF%F5%ED*%20and%202010. The claimant in this case was a Paralympics athlete who had been awarded a sum of one-fifth of the amount payable to the Olympics athletes. Although his discrimination claim was deemed valid by the trial court, the Appeal Court found that the trial court had erroneously tried to compare two unequal things whilst Article 28 only requires equal treatment of equal situations.

- Administrative law protections: Partial protection can also arise where national internal administrative law provides for forms of limited protection by way of a general principle of equality. This is the form of partial protection which exists in Denmark which extends a general principle of equality under administrative law to the fields of social protection, education, healthcare, housing and access to goods and services.¹⁷⁹ However, this form of partial protection suffers from many of the same problems as those arising with constitutional and ECHR protection.
- Incomplete national protections: Partial protection may arise where a Member State's legislation does not extend to the entire national territory so that gaps and inconsistencies of protection occur within that Member State, although it must be noted that this was not identified in the context of direct discrimination protections. Additionally, it may be the case that partial protection will arise in Member States where only certain aspects of a specific field are protected. For example, in Ireland, certain social advantages have been held to fall outside the scope of the anti-discrimination legislation.¹⁸⁰ In Latvia, only public state/municipal healthcare, housing and services are protected under the anti-discrimination legislation.¹⁸¹ In Austria there is no protection against age discrimination with respect to access to goods and services in the private sector. In Poland, higher education institutions are not covered by anti-discrimination provisions in the field of education. In addition, only waiting lists for the provision of healthcare are covered in Poland. In Slovakia, discrimination based on age in the fields of housing and access to goods and services is only prohibited where the discrimination occurs 'in conjunction with special laws'.¹⁸² This is problematic since it may potentially exclude age discrimination which arises in access to or provision of housing or goods and services provided on the basis of legal acts of lower legal force than laws (e.g. governmental regulations or ordinances of ministries) or generally binding regulations of municipalities or self-governing regions.

Despite the wide variation with respect to partial protection, it is clear that the vast majority of Member States provide some protection against discrimination on grounds of age outside the labour market. There are only two Member States (Greece and Poland) which provide no clear explicit or implicit protection against direct discrimination on grounds of age. However, even in these cases, non-protection does not arise in all fields.

4.2 Justifying direct discrimination

In the majority of Member States, differences in treatment on grounds of age can be justified by reference to a specific justificatory and proportionality test in all fields outside of the labour market. This reflects the protection afforded in the labour market context where Directive 2000/78 allows Member States to justify differences in treatment by reference to a legitimate aim and as long as such an aim is reasonable and necessary (Article 6).

In some Member States there are no justificatory provisions allowed, but this is highly unusual (Ireland, Luxembourg and Romania) and often is tempered by a variety of exceptions. The legislation in Ireland is a useful example of this as it contains many exceptions on the grounds of age outside the labour market context.¹⁸³ There are some anomalies in individual Member States whereby differences in treatment on grounds of age can be justified in certain regions of a Member State but not in all regions. This is the

179 Public authorities are governed by a general principle of equality applicable under administrative law. The general principle has the force of legislation (and not constitutional law) and means that public authorities must treat equal matters with full equality before the law.

180 See the discussion in Fennelly, D., *Selected Issues in Irish Equality Case Law 2008-2011* (2012), p. 91, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

181 Latvia, Law on Social Security, Article: 2.¹(1-6).

182 Slovak Anti-Discrimination Act, Sections 2(1) and 2a(2) in conjunction with Sections 5(1) and 5(2)(d).

183 Ireland, Equal Status Act 2000 (various sections).

case in Austria where both Vorarlberg¹⁸⁴ and Vienna¹⁸⁵ have justificatory provisions in place for all areas including social protection, education, healthcare, housing and goods and services but the other regions do not have the same justificatory provisions.

Where justificatory provisions are utilised, certain trends with respect to the type of test used to determine justification can be identified. By far the most common justificatory defence is similar to that allowed under Article 6 of Directive 2000/78, i.e. the need to demonstrate a legitimate aim and a proportionate means of achieving that aim, with evaluations of reasonability, necessity and suitability forming part of this assessment. This is the test applied in the majority of jurisdictions.¹⁸⁶ In a few jurisdictions, there is a condition that in order to be justifiable the measure which creates the difference in treatment must be imposed by law. This is the situation in Belgium,¹⁸⁷ Finland¹⁸⁸ and Lithuania.¹⁸⁹ In other Member States, legitimate aims compatible with human rights can justify a difference in treatment on grounds of age (Finland¹⁹⁰ and Hungary).¹⁹¹ Of course, in many states where protection is available only under national constitutional or ECHR jurisprudence, the justificatory provisions align with the national constitutional or ECHR rules on justification. In these cases, the main legitimate objectives allowed include public interest but most still require some form of proportionality assessment (Cyprus and Estonia).¹⁹²

An interesting situation arises in the Netherlands. There is no specific legislative or constitutional protection against discrimination on grounds of age at a national level but rather reliance is placed on Article 14 of the ECHR and on Article 26 of the ICCPR. In cases taken under these provisions, a variety of different justifications have been accepted by the courts, including public health¹⁹³ and considerations of social policy. Regarding the latter, the courts have accepted that recipients of a state pension are in a different position from persons not receiving such a pension, which can allow for differences in treatment regarding tax advantages,¹⁹⁴ income supplements,¹⁹⁵ conditions for going abroad¹⁹⁶ and, even fishing rights.¹⁹⁷ It was also accepted that the state has a responsibility to ensure that young people in particular (under 27 years) are able to pursue an education which allows them to enter the labour market. The Amsterdam District Court accepted this as the justification for a distinction in the field of social assistance, whereby recipients aged 27 or younger were subject to more coercive measures, if they did not participate in a reintegration programme, compared to older recipients.¹⁹⁸

184 Austria, para 4/6 Vorarlbergian Anti-Discrimination Act reads: '(6) A difference of treatment on ground of one of the grounds mentioned in para 3/1 does not constitute discrimination if it is justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.'

185 Austria, para 2/7 Viennese Anti-Discrimination Act reads: 'Furthermore, a difference of treatment on ground of one characteristic mentioned in sub para. 1 does not constitute discrimination if it is objective and proportionate as well as justified by a legitimate aim and the means of achieving that aim are objective, proportionate and necessary.'

186 See the position in Austria, Belgium, Croatia, Czechia, Finland, France, Germany, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Spain and Sweden.

187 Belgium, Federal Act of 10.05.2007 pertaining to fight certain forms of discrimination, Article 11, para 1; Decree of 6.11.2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training, Article 10, para 2; Framework Decree for the Flemish equal opportunities and equal treatment policy of 10.07.2008, Article 21, para 2; Ordinance of 5.10.2017 aiming to combat discrimination and promote equal treatment in the Region of Brussels-Capital Article 13, para 1; Decree of the French Community adopted on 12.12.2008 on the fight against certain forms of discrimination, Article 5, al. 5; Decree of 9.07.2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment, Article 14.

188 Finland, Non-Discrimination Act 1325/2014, Section 11(1).

189 Lithuania, The Law on Equal Treatment, Article 2(9(1)).

190 Finland, Non-Discrimination Act, 1325/2014, Section 11(2).

191 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA), Articles 7(2) and (3). The Hungarian legislature has made a distinction on the basis of whether a certain differentiation concerns a fundamental right (such as the right to education) or a right that may not be regarded as such (e.g. access to services). In the former case, the test is stricter (there has to be a legitimate aim, notably the enforcement of another fundamental right, and the test of necessity, suitability and proportionality is applied), while in the latter, the criterion is objective reasonability.

192 Estonia, Constitution, Article 11; Cyprus, Constitution, Article 28.

193 Netherlands, District Court of The Hague 19.01.2018, AWB – 18_3876, ECLI:Netherlands:RBDHA:2018:2423.

194 Netherlands, Court of Appeal of The Hague, 25.09.2019, BK-19/00238, ECLI:Netherlands:GHDHA:2019:2541.

195 Netherlands, Central Appeals Tribunal, 9.07.2019, 18/2549 PW, ECLI:Netherlands:CRVB:2019:2263.

196 Netherlands, Central Appeals Tribunal, 24.06.2014, 13-2363 WWB, ECLI:Netherlands:CRVB:2014:2282.

197 Netherlands, District Court of The Hague, 27.12.2016, AWB – 16_3019, ECLI:Netherlands:RBDHA:2016:16229.

198 Netherlands, District Court of Amsterdam, 1.11.2018, AMS 18/3325, ECLI:Netherlands:RBAMS:2018:7835.

Therefore, it would appear that justifications in all fields are commonplace across the EU, even those that arise under Constitutional and international instruments, and that, a few individual Member States aside, there is a very standard measure which is effectively similar in nature and scope to Article 6 of Directive 2000/78.

5 Indirect discrimination

In general, similar levels of protection exist for indirect discrimination as in the direct discrimination context and justificatory provisions are more widespread. The majority (55 %) of Member States prohibit indirect discrimination in all fields and many more Member States (29 %) provide for partial protection alongside full protection in some fields. Very few Member States (almost 15 %) provide for no protection against indirect discrimination on grounds of age in some of these fields, with only 7 % (two Member States) providing no protection in any field. The general consensus would appear to be that indirect discrimination on grounds of age should be prohibited in the fields studied in this report.

Table 7. Protection for indirect discrimination in the 27 EU Member States

Country	Social protection	Education	Healthcare	Housing	Goods and services
Austria	Yes	Yes	Yes	Yes	Yes
Belgium	Yes	Yes	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes	Yes	Yes
Croatia	Yes	Yes	Yes	Yes	Yes
Cyprus	Partial	Partial	Partial	Partial	Partial
Czechia	Yes	Yes	Yes	Yes	Yes
Denmark	No	No	No	No	No
Estonia	Yes	Yes	Yes	Yes	Yes
Finland	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Yes
Greece	No	No	No	No	Yes
Hungary	Yes	Yes	Yes	Yes	Yes
Ireland	Partial	Yes	Yes	Yes	Yes
Italy	Partial	Partial	Partial	Partial	Partial
Latvia	Yes	No	Yes	Yes	Partial
Lithuania	Partial	Yes	Partial	Yes	Yes
Luxembourg	Yes	Yes	Yes	Yes	Yes
Malta	Partial	Yes	Partial	Partial	Partial
Netherlands	Partial	Partial	Partial	Partial	Partial
Poland	No	No	No	No	No
Portugal	Partial	Partial	Partial	Yes	Partial
Romania	Yes	Yes	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes	Partial	Partial
Slovenia	Yes	Yes	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes

5.1 Protection models

Full protection against indirect discrimination is provided for in the majority of Member States. This can once again be provided for in a variety of forms similar to the manner in which direct discrimination is prohibited: by specific equality legislation¹⁹⁹ or by specific legislation in particular fields.²⁰⁰ More than a third of all Member States provide a form of partial protection. This can arise by virtue of no express legislative protection but rather by reliance on constitutional or international provisions.²⁰¹ It can also arise by virtue of a lack of federal legislation with certain communities, regions and provinces in certain countries applying varying levels of protection and in varying fields of application or scope of application.²⁰² Only Denmark and Poland do not provide any protection at all.

5.2 Justifying indirect discrimination

Some states do not allow for any justifications even in cases of indirect discrimination.²⁰³ Generally, however, indirect discrimination is considered to be justifiable on certain grounds. Most states provide that as long as there is a legitimate aim and that the means of achieving that aim are proportionate (however defined), then indirect discrimination on grounds of age will be justifiable.²⁰⁴ Belgium provides that where a measure is imposed by law (for example, through legislation) this will also be a justification for indirect discrimination.²⁰⁵ Certain constitutional protections provide for very specific objective justifications including the avoidance of dangers, the prevention of damage or other comparable aims, the protection of privacy or personal security, the granting of special advantages where there is no specific interest in enforcing equal treatment,²⁰⁶ safeguarding public safety, public order, the prevention of crimes, the protection of health, the protection of the rights and freedoms of others.²⁰⁷

6 Harassment, instruction to discriminate and victimisation

Harassment, instruction to discriminate and victimisation are all considered forms of discrimination under Directive 2000/78 and as such, individuals should not be harassed, victimised or be the subject of an instruction to discriminate on grounds of age in the labour market context. While these forms of discrimination are not universally recognised in other fields, there is a growing acceptance that such recognition as forms of discrimination should exist. The proposed Directive provides that harassment,²⁰⁸

199 This is the situation in Austria, Bulgaria, Croatia, Czechia, Estonia, Finland, Germany, Hungary, Luxembourg, Romania, Slovenia, Spain and Sweden.

200 This is the situation in France. The general definition of discrimination includes direct and indirect discrimination at Article 1 of Law No. 2008-496 of 27.05.2008. Discrimination for all these goods and services is expressly prohibited by the civil general equality legislation at Articles 1 and 2(3) of Law No. 2008-496 of 27.05.2008. Specific legislation relating to housing also provides for the prohibition of discrimination on all grounds prohibited by French law, including age at Article 1 par 3 of Law No. 89-462 of 6.07.1989, called 'Mermaz Law'. There is also a specific provision for access to healthcare providing a general prohibition of discrimination in access to healthcare that does not specify a list of grounds at article L 1110-3 of the Code of Public Health. A similar situation arises in Portugal.

201 Cyprus: Article 28 of the Constitution; Italy: Article 3 of the Constitution; Malta: Article 45 of the Constitution; Netherlands: reliance on ECHR and ICCPR and other international instruments; Portugal: Article 13(2) of the Constitution.

202 See the situation arising in Greece, Ireland, Latvia, Lithuania and Slovakia.

203 Luxembourg is a good example of this.

204 This is the situation arising in the majority of Member States including Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain and Sweden.

205 Article 11, para 1 of the GAFA; Article 10, para 2 of the WEMD; Article 21, para 2 of the FLED; Article 13, para 1 of the BETO; Article 5, al. 5 of the FranceED; Article 14 of the CED.

206 According to Article 19(1) General Law on Equal Treatment, an indirect discrimination can be justified by an objective reason. The reasons listed that justify direct discrimination are relevant in this case, too: the avoidance of dangers, the prevention of damage or other comparable aims (Section 20(1)(1) General Law on Equal Treatment); the protection of privacy or personal security (Section 20(1)(2) General Law on Equal Treatment); the granting of special advantages when there is no specific interest in enforcing equal treatment (Section 20(1)(3) General Law on Equal Treatment).

207 Greece, Law 4443/2016, Article 2(2)(b).

208 Article 2(2)(c), Proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

instruction to discrimination²⁰⁹ and victimisation²¹⁰ are all considered to constitute forms of discrimination. For ease of analysis, this section will analyse the protections afforded in Member States in each field.

6.1 Social protection

Some general remarks can be made about the protection against harassment, instruction to discriminate and victimisation with respect to social protection. In the first instance, it is clear that where recognition of harassment as a form of discrimination arises, similar recognitions with respect to instruction to discriminate and victimisation also tend to arise, albeit that recognition of victimisation as a form of discrimination appears to be less common than recognition of harassment and instruction to discriminate as forms of discrimination. Over 44 % of Member States provide full protection against all three forms of discrimination with respect to social protection. For example, in Austria, full protection is afforded with respect to social security although not at a federal level.²¹¹ In only 8 Member States (29 %) are no protections afforded. For example, in Denmark there is no recognition of harassment, instruction to discriminate or victimisation as forms of discrimination in the field of social security.

In some Member States, partial protection exists. This may arise where there is no express legislation recognising harassment, instruction to discriminate or victimisation as forms of discrimination on grounds of age in the field of social security but some other form of recognition may exist. For example, in Germany, civil law provides for no express or specific prohibition on harassment in any field. However, it is argued that some general provisions of civil law, including contractual obligations and tort law, would potentially cover harassment claims on the grounds of age. Regulation in public law is also absent. However, it is arguable that given the standards on the rule of law applicable to public bodies inherent in Article 20(3) of the Constitution, it is considered that any such action in social law, public education, and access to goods and services through public bodies would be considered illegal.²¹²

Table 8. Prohibition of harassment, instruction to discriminate and victimisation in the area of social protection

Country	Harassment	Instruction to discriminate	Victimisation
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czechia	Yes	Yes	No
Denmark	No	No	No
Estonia	No	No	No
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes

209 Article 2(2)(d-b), Proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

210 Article 9, Proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

211 Austria, See protections in each region: Vienna, Viennese Anti-Discrimination Act, Wr LGBl Nr. 35/2004, para 3/3; Burgenland: Burgenlandian Anti-Discrimination Act, Bgl LGBl Nr. 84/2005, para 25; Carinthia: Carinthian Anti-Discrimination Act, Kntn LGBl Nr. 63/2004, para 13; Lower Austria: Lower Austrian Anti-Discrimination Act, NÖ LGBl Nr. 24/2017, para 2(3) and para 3; Upper Austria: Upper Austrian Anti-Discrimination Act, OÖ LGBl Nr. 50/2005, paras 1/1/3, 4/3; Salzburg: Salzburgian Equal Treatment Act, Slzb LGBl Nr. 31/2006, paras 3/7, 28; Styria: Styrian Equal Treatment Act, Stmk LGBl Nr. 66/2004, para 32; Tyrol: Tyrolian Anti-Discrimination Act, T LGBl Nr. 25/2005, para 6; Vorarlberg: Vorarlbergian Anti-Discrimination Act, VlbG LGBl Nr. 17/2005, para 2/4.

212 Germany, Constitution, Article 20(3).

Country	Harassment	Instruction to discriminate	Victimisation
Germany	Partial	No	No
Greece	Yes	Yes	No
Hungary	Partial	Partial	Partial
Ireland	Yes	No	Yes
Italy	No	No	No
Latvia	Yes	Yes	Yes
Lithuania	No	Partial	No
Luxembourg	Yes	Yes	Yes
Malta	No	No	No
Netherlands	No	No	No
Poland	No	No	No
Portugal	No	No	No
Romania	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	Yes	Yes	Yes

6.2 Education

In the field of education, the general consensus that full protection against all these forms of discrimination should exist is only slightly lower than in the field of social security, with 11 Member States (over 40 %) providing full protection in the context of education. An almost equal proportion (37 %) provide no protection at all and the recognition of victimisation as a form of discrimination is, once again, more limited than the other forms of discrimination.

Partial protections exist in some states, like Greece, where recognition that harassment and instruction to discriminate are forms of discrimination exists but recognition of victimisation as a form of discrimination does not.²¹³ Where no specific protections arise, constitutional protections may provide some protection against these forms of discrimination in education (however, due to the uncertain nature of these protections these are not considered here).²¹⁴

Table 9. Prohibition of harassment, instruction to discriminate and victimisation in the area of education

Country	Harassment	Instruction to discriminate	Victimisation
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czechia	Yes	Yes	No
Denmark	No	No	No
Estonia	No	No	No
Finland	Yes	Yes	Yes

213 Greece, Equal Treatment Law 4443/2016, Article 10.

214 An example is Cyprus, Constitution, Article 28.

Country	Harassment	Instruction to discriminate	Victimisation
France	Yes	Yes	Yes
Germany	No	No	No
Greece	Yes	Yes	No
Hungary	Partial	Partial	Partial
Ireland	Yes	No	Yes
Italy	No	No	No
Latvia	No	No	No
Lithuania	Yes	Yes	No
Luxembourg	Yes	Yes	Yes
Malta	No	No	No
Netherlands	No	No	No
Poland	No	No	No
Portugal	No	No	No
Romania	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	Yes	Yes	Yes

6.3 Healthcare

Protection in the field of healthcare effectively mirrors the prohibitions existing in the education field. Full protection against all three forms of discrimination is provided in 40 % of Member States with 33 % of Member States providing no recognition of these forms of discrimination at all. Once again victimisation is the least recognised form of discrimination. Partial protection arises once again due to inconsistent regional protection in the absence of federal regulation or because of limited personal scope of the existing national legislation. This is the case in Latvia where protection against harassment applies only with respect to healthcare protections when provided by state and municipal services.²¹⁵ In Hungary, the situation is similar. The legislation is limited specifically to harassment by public entities which are enumerated in the law or to harassment by certain private actors also enumerated in the law.²¹⁶ This naturally limits the scope and application of the provisions considerably.

Table 10. Prohibition of harassment, instruction to discriminate and victimisation in the area of healthcare

Country	Harassment	Instruction to discriminate	Victimisation
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czechia	Yes	Yes	No
Denmark	No	No	No
Estonia	No	No	No
Finland	Yes	Yes	Yes

215 Latvia, Harassment: Law on Social Security, Article: 2.¹(1,5); Instruction to Discriminate: Law on Social Security, Article: 2.¹(1,2) and Victimisation: Law on Social Security, Article: 34(2).

216 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 4 and 5.

Country	Harassment	Instruction to discriminate	Victimisation
France	Yes	Yes	Yes
Germany	No	No	No
Greece	Yes	Yes	No
Hungary	Partial	Partial	Partial
Ireland	Yes	No	Yes
Italy	No	No	No
Latvia	Partial	Partial	Partial
Lithuania	No	Yes	No
Luxembourg	Yes	Yes	Yes
Malta	No	No	No
Netherlands	No	No	No
Poland	No	No	No
Portugal	No	No	No
Romania	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	Yes	Yes	Yes

6.4 Housing

Prohibitions against harassment, instruction to discriminate and victimisation in the housing context are identical to those in healthcare, with victimisation once again being the least recognised form of discrimination. Over 40 % of Member States provide full protection, while just under 30 % provide no protection at all.

Partial limitations with respect to prohibitions arise in Hungary and in Latvia where these forms of discrimination are recognised and prohibited but are limited to those services provided by public entities. There is a ban on harassment on the grounds of age in Hungary but this is limited specifically to harassment by public entities which are enumerated in the law or to harassment by certain private actors also enumerated in the law.²¹⁷ Another useful example of this limited scope of the law is the case of Latvia where protection against harassment applies only with respect to housing when provided by state and municipal services.²¹⁸

Table 11. Prohibition of harassment, instruction to discriminate and victimisation in the area of housing

Country	Harassment	Instruction to discriminate	Victimisation
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czechia	Yes	Yes	No
Denmark	No	No	No

217 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 4 and 5.

218 Latvia, Harassment: Law on Social Security, Article: 2.¹(1,5); Instruction to Discriminate: Law on Social Security, Article: 2.¹(1,2) and Victimisation: Law on Social Security, Article: 34(2).

Country	Harassment	Instruction to discriminate	Victimisation
Estonia	No	No	No
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	No	No	No
Greece	Yes	Yes	No
Hungary	Partial	Partial	Partial
Ireland	Yes	No	Yes
Italy	No	No	No
Latvia	Partial	Partial	Partial
Lithuania	No	Yes	No
Luxembourg	Yes	Yes	Yes
Malta	No	No	No
Netherlands	No	No	No
Poland	No	No	No
Portugal	Yes	Yes	No
Romania	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	Yes	Yes	Yes

6.5 Goods and services

Recognition of, and prohibition of, harassment, instruction to discriminate and victimisation as forms of discrimination are more prevalent in the field of access to goods and services with just over 40 % of Member States providing full protection. 33 % of Member States still provide no protection at all with victimisation, once again, being the least recognised form of discrimination across all Member States. Partial protection exists mainly due to limitations in either the personal or material scope of the field protected. For example, in Hungary, as previously discussed, the scope of protection is limited in scope and application by the existing national legislation. There is a ban on harassment on the grounds of age in Hungary but this is limited specifically to harassment by public entities which are enumerated in the law or to harassment by certain private actors also enumerated in the law.²¹⁹ In Latvia, the material scope is limited so that while services are protected fully, access to, and supply of, goods are not.²²⁰

Table 12. Prohibition of harassment, instruction to discriminate and victimisation in the area of goods and services

Country	Harassment	Instruction to discriminate	Victimisation
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czechia	Yes	Yes	No

²¹⁹ Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Articles 4 and 5.

²²⁰ Latvia, Law on Social Security, Article: 2.¹(1).

Country	Harassment	Instruction to discriminate	Victimisation
Denmark	No	No	No
Estonia	No	No	No
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	No	No	No
Greece	Yes	Yes	No
Hungary	Partial	Partial	Partial
Ireland	Yes	No	Yes
Italy	No	No	No
Latvia	Partial	Partial	Partial
Lithuania	No	Yes	No
Luxembourg	Yes	Yes	Yes
Malta	No	No	No
Netherlands	No	No	No
Poland	No	No	No
Portugal	No	No	No
Romania	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	Yes	Yes	Yes

6.6 Conclusions

While it is generally accepted in the employment field that harassment, instruction to discriminate and victimisation amount to discriminatory acts, the same recognition of these forms of discrimination is not uniformly afforded in other fields. In general, just under a third of all Member States do not provide any recognition for these three forms of discrimination in any of the fields considered here. That being said, there is a general majority of Member States (at a minimum 40 %) that provide full recognition of all three forms of discrimination. Where Member States do not provide full recognition, many provide partial recognition either in the form of prohibiting some of the forms of discrimination, e.g. harassment but not victimisation or instruction to discriminate, or through limitations in the personal or material scope of protection. Victimisation is the least recognised form of discrimination in all fields, which is regrettable, as retaliation for assertion of legal rights can occur in many fields and failure to protect this right discourages true equality.²²¹

7 Multiple discrimination

Multiple discrimination is protected across Member States in varying ways and to varying degrees. The proposed Directive defines multiple discrimination as discrimination in any of its forms occurring on the basis of any combination of two or more of the following grounds, including where taken separately the situation would not give rise to discrimination against the person concerned: religion or belief, disability, age or sexual orientation.²²² Of note is the limitation of protection against multiple discrimination to the

221 Recital 25, Proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

222 Recital 12ab, Proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

grounds protected only in the proposed Directive, there being no extension to other grounds such as sex or race despite the significant impact of gender and race in multiple discrimination cases.

7.1 Protection against multiple discrimination

There is explicit full protection against multiple discrimination in some Member States (for example in Croatia,²²³ Germany,²²⁴ Greece,²²⁵ Portugal²²⁶ and Slovenia)²²⁷ and many of these Member States include protections on grounds of age.²²⁸ Member States which do provide protection tend to define multiple discrimination as ‘a combination of two or more discrimination factors’²²⁹ or ‘discrimination based on more than one [protected] ground’.²³⁰

However, there are many Member States (a majority) who provide only partial or no protection against multiple discrimination. In terms of partial protection, this may arise where a Member State provides only limited protection against multiple discrimination, for example, in Malta,²³¹ multiple discrimination claims are limited to the ground of disability.

In all other Member States there is no explicit protection against multiple discrimination. This is the case in the Netherlands despite the former Equal Treatment Commission’s suggestion to include this in the General Equal Treatment Act. It is also the case in Cyprus, Czechia, Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Slovakia and Spain. This does not mean that claimants cannot make multiple claims on individual grounds but this is rarely satisfactory. This is because there is the possibility that (a) a claim on one ground alone will not be successful whereas the combination of the two grounds could be sufficient to ground a claim of multiple discrimination and (b) there is no additional remedy to compensate for the aggravated nature of multiple discrimination. No protection can also arise where protection is not extended to the grounds of age. For example, in Portugal, the legislation is limited to cover the grounds of race/ethnic origin, nationality, ancestry and territory of origin.

7.2 Additional penalties for multiple discrimination

The impact of multiple discrimination on claimants often does not give rise to alternative sanctions, e.g. increased compensation, despite the fact that the finding of multiple discrimination indicates a serious violation of equality law. For example, in Bulgaria, both the equality body and administrative courts have heard cases where multiple grounds of discrimination were invoked, but no rulings have so far discussed any of the implications of multiple discrimination on compensation.²³² The Swedish Labour Court has held that one single omission (to invite an elderly woman for a job interview) that constitutes two types of discrimination, does not raise the level of the discrimination award.

223 Croatia, Anti-Discrimination Act, 9.07.2008, Article 6(1). Article 6(2) of the Anti-Discrimination Act stipulates: ‘The court shall take into consideration the circumstances referred to in paragraph 1 of this Article when determining the amount of the compensation for non-pecuniary damage and when deciding about the fine for misdemeanours defined by this Act’.

224 Germany, General Act on Equal Treatment, Section 4.

225 Greece, Equal Treatment Law 4443/2016, Article 2(2)(g).

226 Portugal, Law 93/2017 establishing the legal regime of prevention, prohibition and fight against discrimination on the grounds of race/ethnic origin, nationality, ancestry and territory of origin.

227 Slovenia, Protection Against Discrimination Act, Article 12(1).

228 Greece, Equal Treatment Law 4443/2016, Article 2(2)(g).

229 Portugal, Law 93/2017 establishing the legal regime of prevention, prohibition and fight against discrimination on the grounds of race/ethnic origin, nationality, ancestry and territory of origin.

230 Bulgaria, Protection Against Discrimination Act, Additional Provisions, Article 1.11.

231 Malta, Equal Opportunity (Persons with Disability) Act, Article 3A.

232 Bulgaria, Protection Against Discrimination Act, Article 48(3).

However, there are some states which do provide that multiple discrimination is an aggravating circumstance but what this actually means in practice is still unclear.²³³ In Austria, the fact of a finding of multiple discrimination must be considered when assessing the amount of immaterial damages in a cumulative rather than an individual manner. The law in Croatia also provides that multiple discrimination is a 'severe' form of discrimination, which needs to be considered when the amount of compensation or severity of other sanctions is evaluated.²³⁴ There is very limited case law on cases of compensation in multiple discrimination. One good example, however, which again highlights the relationship between age and gender, is a case from Liège in Belgium. The case concerned a 44-year-old man who applied for an administrative position in a company. On the same day of his application, he received a refusal justified on the grounds that the company essentially worked with women aged between 20 and 30 years old and that therefore, he could not fit in this restricted group. The Labour Tribunal of Liège found that the facts at issue revealed a situation of 'double discrimination' based on sex and age. Thus, the Tribunal held that there had been violation of the General Anti-Discrimination Federal Act because of age discrimination, but also a violation of the Gender Equality Federal Act because of sex discrimination. The Tribunal thus awarded compensation to the applicant, which amounted to double the lump sum award provided in each of the violated provisions.²³⁵ Additionally, in Hungary, although there is no legal protection against multiple discrimination, the aggravated nature of multiple discrimination has been identified in awarding compensation.²³⁶ A similar situation exists in Denmark.

However, it has been concluded that 'all existing national provisions have had limited effects in practice and case law remains very scarce'.²³⁷ In the few existing cases reported, the plurality of grounds does not generally have a direct impact on the amounts of compensation awarded.

In general, there is a consensus that multiple discrimination should be protected but there is some disagreement as to whether this should lead to additional compensatory awards. While many Member States do provide for additional compensation, this does not appear to be leading to practically higher awards.

8 Specific age-related exceptions to anti-discrimination law

From the legislative debates surrounding both Directive 2000/78 and the proposed Directive on equal treatment in fields outside the labour market and in case law of the CJEU, it is clear that there are numerous exceptions and qualifications to age discrimination laws which are generally acceptable because age-based classifications are so ingrained in our society.²³⁸ Not only are these age-based classifications considered 'acceptable' but they are also considered by many to be a 'positively beneficial and sometimes essential'²³⁹ way of easily administering social benefits and other forms of governmental activity. There appears to be a general consensus that age-based classifications were so ingrained in employment and in society in general that to approach the matter in any other way would lead to unnecessary complexity.

233 Romania, Anti-Discrimination Law, Article 2(6): 'Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing responsibility for a minor offence, unless one or more of its components is not subject to criminal law'.

234 Croatia, Anti-Discrimination Act, 9.07.2008, Article 6(1). Article 6(2) of the Anti-Discrimination Act stipulates: 'The court shall take into consideration the circumstances referred to in paragraph 1 of this Article when determining the amount of the compensation for non-pecuniary damage and when deciding about the fine for misdemeanours defined by this Act'.

235 Belgium, Labour Tribunal of Liège, decision of 11.08.2017, Case No. R.G. 16/294/A. 195; Sweden, Labour Court, *The Equality Ombudsman v State Employment Board*, judgment No. 91/2010, of 15.12.2010.

236 Equal Treatment Authority, EBH/467/2016, 30 December 2016. Description of the case based on Equal Treatment Authority (2018), EBH Booklet 5 – Multiple discrimination in the Equal Treatment Authority's case law, Budapest, Equal Treatment Authority, pp. 39-40, case summary available at: <https://www.egyenlobanasmod.hu/hu/jogeset/ebh4672016>.

237 European Commission, *A Comparative Analysis of non-discrimination law in Europe in 2019* (December 2019), p. 37. Available at: <https://www.equalitylaw.eu/downloads/5118-a-comparative-analysis-of-non-discrimination-law-in-europe-2019-1-72-mb>.

238 See Fredman, S., *Discrimination Law* (Oxford: Clarendon Press, 2nd ed, 2012), p. 101, who points to some of the many age classifications normally acceptable in society, including age limits for voting or driving, legislation restricting children's ability to undertake paid work and minimum wage, to name but a few.

239 Case C-227/04, *Lindorfer* ECLI:EU:C:2005:656, 27 October 2005, para 85 (opinion of AG Jacobs). This opinion was affirmed by AG Cruz Villalon in Case C-447/09 *Prigge* ECLI:EU:C:2011:321, 19 May 2011, para 34.

There are potentially many ‘socially beneficial functions’ of age-based classifications including making ‘life easier for government bureaucrats’, saving ‘costs which would be incurred by individual treatment’ and averting ‘injustice which might arise through application of discretion were a system of individualised treatment to supplant our age-gear society’.²⁴⁰ Eglit insists that a society based on age classifications ensures that the ‘appearance of justice is generated and maintained’.²⁴¹ The simplistic nature of age-based classifications and their widespread application, in areas such as social protection, has meant that age-related exceptions to anti-discrimination law are not viewed with the same suspicion by legislatures or by the courts as other forms of discrimination.²⁴²

However, just because a norm has become socially acceptable or because it reduces administrative burdens, is not a justifiable reason to maintain the *status quo* and fail to protect individuals from discriminatory treatment.²⁴³ Indeed, Eglit argues that there is a significant danger that such an approach perpetuates and further entrenches discriminatory stereotypes.²⁴⁴ Cultural mores change over time and the law should be a leader of change or should, at the very least, avoid entrenching discrimination in this manner. ‘Twas ever thus’ is not a justifiable reason to maintain a form of discrimination which can be a ‘significant, sometimes even intolerable vice’ and which undermines ‘basic social concepts of equality and individual worth’.²⁴⁵

This section of the report examines the existing exceptions reported by Member States in various fields outside the labour market. The exceptions are generally not uniform and tend to be field- and Member State- specific. For this reason, it can be difficult to categorise them. This section in the first part identifies certain trends in age-related exceptions to anti-discrimination law, giving examples of their application in various fields such as social protection or housing. The second part of this section focuses more specifically on the financial services and insurance industry and the challenging issue of risk assessment and the interplay with age discrimination. It concludes that there exists a tiered set of responses across Member States to this issue and outlines the commonalities as well as the differences in these responses. One common trend arising is that there appears to be a move away from generalisation towards more individualised assessment and this move is to be welcomed as a means of ameliorating the impact of age stereotypes.

8.1 Trends in exceptions to age-discrimination law

When examining age-related exceptions to age discrimination law, it becomes clear that societal age-based structures have influenced how many (particularly public) services are administered. In general, equality laws across Member States do not provide a wide range of exceptions for differences based on age outside the labour market context. This does not mean that age-based classifications do not exist but rather that Member States have not yet identified these as exceptions to anti-discrimination law. Sweden is an exception in this respect as it provides expressly in its legislation that discrimination on the grounds of age does not prevent application of provisions of an act in which a certain age is prescribed.²⁴⁶ The lack of express exceptions points to an acceptance of age-based stratification as a social norm across Member States. Healthcare is one particular area where there are limited exceptions provided for in Member State legislation. Once again, this does not mean that age-related exceptions do not arise in the provision of healthcare.²⁴⁷ On the contrary, age discrimination has been found to exist rather openly in the provision of

240 Eglit, ‘Of Age and the Constitution’ (1981) 57(4) *Chicago-Kent Law Review* 859, p. 899.

241 Eglit, ‘Of Age and the Constitution’ (1981) 57(4) *Chicago-Kent Law Review* 859, pp. 860-861.

242 Case C-388/07, *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* ECLI:EU:C:2008:518, 23 September 2008, para 74 (opinion of AG Mazak).

243 Alon-Schenker, P. ‘Age is Different: Revisiting the contemporary Understanding of Age Discrimination in the Employment Setting’ (2013) 17 *Canadian Labour and Employment Law Journal* 31, p. 41.

244 Eglit, ‘Of Age and the Constitution’ (1981) 57(4) *Chicago-Kent Law Review* 859, p. 863.

245 Eglit, ‘Of Age and the Constitution’ (1981) 57(4) *Chicago-Kent Law Review* 859, p. 863, pp. 861-862.

246 Sweden, Swedish Discrimination Act, Section 13 b, Chapter 2.

247 Kydd, A. and Fleming, A., ‘Ageism and Age discrimination in health care: Fact of fiction? A narrative review of the literature’ (2015) 81(4) *Maturitas* 432.

healthcare, particularly in acute healthcare settings. However, Member States generally do not legislate expressly to include age restrictions in respect of access to, and supply of, healthcare services. This may be something which arises in ethical considerations at individual medical treatment levels rather than at a state level.²⁴⁸ While express exceptions may, therefore, be limited, there are certain trends across all Member States which can be highlighted here as examples of the potential age-based exceptions which may need to be addressed if a uniformity in age discrimination law is to be achieved.

It is also worth noting that the proposed Directive explicitly mentions that 'preferential charges, fees or rates in respect of anything offered, or provided to persons in a specific age group shall not constitute discrimination'.²⁴⁹ In addition, one of the potential legitimate aims mentioned in the proposed Directive is the promotion of the economic, cultural or social integration of persons belonging to specific age groups. The Recital to the proposed Directive offers some insight into the means of achieving this aim,

'such as the offer of more favourable conditions of access to persons belonging to specific age groups,... more favourable conditions to persons of a certain age than are available to others, such as free or reduced tariffs for the use of public transport, museums, or sport facilities, are presumed to be compatible with the principle of non-discrimination and do not constitute discrimination on the ground of age'.²⁵⁰

Therefore, many of the categories of exceptions identified in Member States would potentially fall under either these exceptions or the legitimate justifications provided for under the proposed Directive.

8.1.1 Age as a condition for assigning, acquiring or calculating rights

This is commonplace in social protection systems which are often designed and based on age-based classifications (Belgium,²⁵¹ Croatia, Poland,²⁵² Sweden).²⁵³ In Ireland, for example, the right to free public transport accrues at the age of 66 years²⁵⁴ and in France those aged over 60 are entitled to a loss of autonomy benefit.²⁵⁵

8.1.2 Age groups provided certain benefits

Member States often provide benefits in various fields to particular age groups to ensure certain protections. In the field of education, in Ireland, for example, different treatment for the allocation of third level educational places to mature students can be identified.²⁵⁶ Certain services can also be reserved for persons belonging to certain age groups and this will not constitute discrimination. In Ireland, specific exceptions are in place for designation of certain residences as 'retirement homes'. It is provided in the Equal Status Act that where a premises or accommodation is reserved for a particular category of persons such as a nursing home, a retirement home, or for a similar purpose, a refusal to dispose of the premises or provide accommodation to people outside that category will not constitute discrimination.²⁵⁷

248 Dobrowolska, B. et al, 'Age discrimination in healthcare institutions perceived by seniors and students' (2019) 26(2) *Nursing Ethics* 443.

249 Article 2(6-a), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/* COM/2008/0426 final – CNS 2008/0140 */.

250 Recital 14a, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/* COM/2008/0426 final – CNS 2008/0140 */.

251 Belgium, Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination, Article 12(2).

252 Poland, Equal Treatment Act, Article 5(8)b.

253 Sweden, Swedish Discrimination Act, Chapter 2, Section 14b.

254 Ireland: Free Travel Card: https://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/extra_social_welfare_benefits/free_travel.html.

255 Decree No. 2001-1085 of 20.11.2001; Law No. 2001-647 of 20.07.2001 relating to compensation of loss of autonomy; Article L.232-1, al 2 of the Code of Social action and families.

256 Ireland, Equal Status Act 2000, Section 7(3)(e).

257 Ireland, Equal Status Act 2000, Section 6(5).

Additionally in Ireland, different treatment by housing authorities and voluntary housing associations is permitted in the provision of accommodation on the basis of, *inter alia*, age.²⁵⁸ Case law has clarified that this provision does not allow a housing authority to discriminate against the categories of persons referred to, but rather means that it can prioritise in favour of those categories of people. As regards rental situations, Germany provides for an exception based on age which can be justified for the purpose of creating and maintaining a socially stable structure of residents, balanced settlement structures and balanced economic, social and cultural relations.²⁵⁹ Categorisation of age groups can also arise in access to goods and services. The classification of films is another potential exception whereby certain age groups cannot view certain films classified outside of their age category. See for example the specific exception mentioned in Spain.²⁶⁰

8.1.3 Maximum or minimum ages

Maximum or minimum ages are commonly used in the employment context for the purposes of limiting access to certain professions or roles. They are equally common outside of this field. In the field of education, for example, maximum and minimum ages are often allocated for the purposes of accessing certain training or education facilities. This is the situation in, for example, Bulgaria²⁶¹ and Sweden.²⁶² Another particular example which arises in both Sweden and Ireland is a minimum legal drinking age. In Sweden there are lower age limits for admission to establishments where spirit drinks, wine, strong beer and other fermented alcoholic beverages are served on a commercial basis.²⁶³ In Ireland there is an exception for minimum age thresholds in relation to selling alcoholic drinks. For example, it is possible for licenced premises to apply an 'over-21 only' policy provided that a notice to that effect is displayed in a prominent place and the policy is implemented in good faith.²⁶⁴ Additionally, in Ireland, equality legislation provides that age discrimination law itself is limited in application to those over or under a certain age threshold. The Equal Status Act in Ireland²⁶⁵ provides that treating 'a person who has not attained the age of 18 years less favourably or more favourably than another, whatever that person's age shall not be regarded as discrimination on the age ground'. This section essentially means that minors cannot base direct discrimination claims on the age ground.²⁶⁶

8.2 Exceptions for financial services: Insurance and banking

Financial and insurance service providers often assert that age is a relevant factor in assessing risk for the provision of a financial or insurance product and that as a result access to such products should be either denied, minimised or provided at a much higher cost depending on the age of the applicant. Member States have reacted very differently to this challenge. Some Member States allow such service providers to operate unhindered regardless of the discriminatory consequences of their actions. Other Member States seek to restrict the manner of operation of such providers. There is a scale of responses in Member States ranging from not restricting financial and insurance service providers in any way to restrictions detailing how such providers are to operate so as to comply with age discrimination laws.

258 Ireland, Equal Status Act 2000, Section 6(6).

259 Germany, General Law on Equal Treatment, Section 19(3).

260 Spain, Spanish Cinema Law 55/2007 (BOE, 29 December 2007), Article 8.

261 Bulgaria, Protection Against Discrimination Act, Article 7 (1.11).

262 Sweden, Swedish Discrimination Act, Chapter 14, Section 6.

263 Sweden, Swedish Discrimination Act, Chapter 2, 12b.

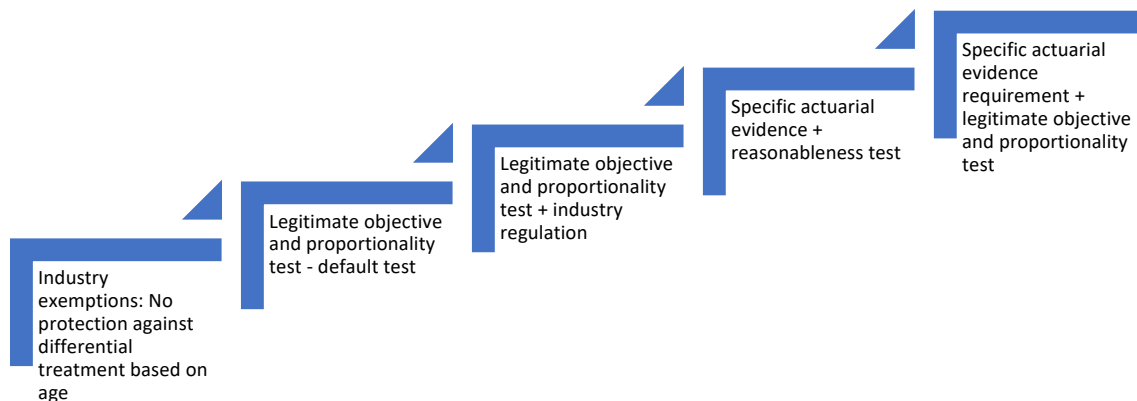
264 Ireland, Equal Status Act 2000, Section 15(4).

265 Ireland, Equal Status Act 2000, Section 3(3)(a).

266 Ireland, *Scanlon and Ryan v The Russell Court Hotel*, DEC-S2001-013, 26.10.2001, <https://www.workplacerelations.ie/en/cases/2001/october/dec-s2001-013.html>, para 6.2. The exception does not apply to the provision of car insurance, and so people aged under 18 can rely on the Equal Status Act 2000 to challenge age-based discrimination in that context: Section 3(3)(b). Section 3(3)(a) only refers to 'less' or 'more' favourable treatment and so arguably is confined to direct discrimination complaints even though the exception is contained within the section that defines both direct and indirect discrimination. It certainly should not prevent a child taking a harassment claim on the age ground under Section 11 of the Equal Status Act.

Chart 1. Member State responses to insurance and banking exceptions

This chart illustrates the range of responses Member States have taken to this issue:



At the lowest end of the scale are those Member States which provide that exemptions should be provided for insurance and banking industries whose services are based on risk calculations and as such there is no protection against differential treatment based on age. Some Member States do not provide for express limitation or exceptions but do not regulate the industry specifically other than to require any differences in treatment to be justified and found proportionate in the normal way. In other Member States a step up in protection by way of industry regulation in addition to the normal justification and proportionality test can be identified. There are a growing number of Member States which are taking more proactive steps to reduce potential discrimination based on age by requiring more probing actuarial evidence either in combination with a reasonableness test or more particularly a full legitimate justification and proportionality test. This section analyses each of these responses in turn.

8.2.1 Industry exemptions

At one end of the scale are the Member States which do not restrict such service providers in any way. Essentially such providers are exempted from the operation of age discrimination laws either by express exception²⁶⁷ or by limitation of age discrimination laws to those of public as opposed to private actors. This essentially means that age discrimination, and within this, the use of age in actuarial calculations, can occur freely. A useful example is the case of Slovenia²⁶⁸ where the law states that insurance companies shall treat all providers and potential policyholders wishing to access insurance services equally, but may, in the process of selection and risk assessment, in determining premiums and in paying out insurance, take into account the criteria of the insurance industry or the age of the policyholder which may reasonably affect the magnitude of the risk assumed. Similar provisions can be seen in Spain where the Spanish Law on Insurance Contracts²⁶⁹ allows insurance contracts to take age into account in determining the risk assessment. In Croatia, age can be used as a factor in assessing risk in insurance industries. The Anti-Discrimination Act provides expressly for an exception to discrimination on the grounds of age in this area, stating that it would not be discrimination to place a person in an unfavourable position on the grounds of age in the course of determining insurance premiums, insurance pay-outs and other insurance conditions.²⁷⁰ Similar rules can be identified in Slovakia²⁷¹ and Sweden.²⁷²

²⁶⁷ Spain, Spanish Law on Insurance Contract, Article 10 allows insurance contracts to cover all the circumstances that may influence the risk assessment.

²⁶⁸ Slovenia, Insurance Act 2015, Article 521, Paragraph 6.

²⁶⁹ Spain, Spanish Law on Insurance Contract, Law 50/1980 (BOE, 17 October 1980), Article 10.

²⁷⁰ Croatia, Anti-Discrimination Act, 9.07.2008, Article 9(2)(6).

²⁷¹ Slovakia, Anti-Discrimination Act, Section 8(6).

²⁷² Sweden, Swedish Discrimination Act, Chapter 2, Section 12b.

As an example of how this operates in practice, to the detriment of older persons particularly, the decisions of the Ombudsperson in Lithuania are illustrative. The Law on Insurance²⁷³ allows differential treatment on the grounds of age when calculating insurance risks. In one investigation regarding online travel insurance for persons over 75, the Ombudsperson found that:

‘It is not the age but the health changes and illnesses due to aging that affect and may affect the less favourable conditions or restricting possibilities for older people to obtain the travel insurance online, which are related to the need for health screening, more conservative evaluation of insurance receivers, that can objectively and reasonably be done during the individual evaluation of insurance receiver. <...> Restricted access to online travel insurance for older people cannot be seen as less favourable treatment on the basis of age when providing online travel insurance.’²⁷⁴

However, in one of the decisions of the Ombudsperson it recognised discrimination on the grounds of age despite the limitations of the legislation. The applicant complained that he obtained a bank card, which also had an insurance attached as an extra service. The applicant later found out that, because of his senior age, the insurance service did not apply to him to the fullest extent. The Ombudsperson determined that there had been discrimination on the grounds of age because the insurance was a side service, whereas the main service obtained by the applicant was the bank card, for which he paid the same amount of money as other service buyers and therefore the exception on the risks in the insurance field could not be applied. In another investigation the Ombudsperson recognised discrimination on the grounds of age in the provision of financial services in a case when a bank had applied different fees for different age groups acquiring a specific service plan and a recommendation was made by the Ombudsperson that these rules should be amended.²⁷⁵

In many jurisdictions, of which Poland is one, calculations of risk are rarely probed and thus differential treatment based on age is commonplace. In Poland in 2012, the Government Plenipotentiary for Equal Treatment received a complaint stating that car insurance companies, when entering into obligatory civil liability insurance contracts, differentiated between clients based on their age. The Plenipotentiary asked for the position of the Polish Chamber of Insurance and received a response stating that differentiation based on age may not be treated as discriminatory but rather it reflects the calculation of risk.²⁷⁶ In the same year, the Government Plenipotentiary for Equal Treatment received a complaint from a person who was refused a credit card by a bank based on age. In response to the Plenipotentiary’s inquiry, the bank’s representative admitted that the refusal was based on the calculation of risk but the relevant internal rules are not public and may not be revealed.²⁷⁷

8.2.2 *Legitimate justification and proportionality test: the default test*

A further step on the scale is a default level of protection consisting of a legitimate objective and proportionality test (the general justification test for direct or indirect discrimination). This means that financial and insurance providers can provide different treatment based on age as long as they can justify it and show that it is reasonable and necessary to impose such restrictions. In some Member States, and for certain products, the test is not as strict as that required with respect to direct or indirect discrimination because the law does not insist upon a proportionality assessment (see, for example, the case of Bulgaria and student loans).²⁷⁸

273 Lithuania, Law on Insurance 2003, No. 94-4246, <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=191fum7rlr&documentId=a9f083803c7911e68f278e2f1841c088&category=TAD>.

274 Lithuania, Decision of the Equal Opportunities Ombudsperson No. (17)SN-131)SP-64, 14.07.2017.

275 Lithuania, Decision of the Equal Opportunities Ombudsperson No. (16)SN-251)SP-7, 23.01.2017.

276 Poland, Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012, Warsaw, 2013, (hereafter ‘Plenipotentiary Annual Report 2013’), p. 65.

277 Poland, Plenipotentiary Annual Report 2013, pp. 66-67.

278 Bulgaria, Students and Doctoral Student Loans Act and Protection Against Discrimination Act Article 7 (1.12).

This default test will automatically apply where the law is silent on the issue and provides some protection against age discrimination in the field of access to goods and services.²⁷⁹ In Hungary, where this test applies in the insurance sector, the Equal Treatment Authority settled by friendly settlement a case involving a 73-year-old complainant who initiated a proceeding before the Authority because the fee of his mandatory vehicle liability insurance had significantly increased from one year to the next and he believed that the reason for this had been his age. The insurance company acknowledged that the increase of the fee had been more significant than it would have been in the case of a 50-year-old client with the same parameters as the complainant and the reason for the difference was his age. However, they argued that the differentiation had an objectively reasonable ground, namely that according to the company's own damage statistics, the risk assessed on the basis of damage frequency and the average amount of damages was much higher in the pre-30 and post-69 age groups than in the 30-69 age group. At the same time, the company expressed its willingness to settle, and offered monetary compensation to the client, who accepted the compensation, so that the proceeding was terminated.²⁸⁰ While the default test, therefore, provides a measure of protection, it can be rather unsatisfactory due to the fact that it relies on individuals to challenge, without access to actuarial data, the measures applied to them. It is also potentially far too easy for a financial service provider to justify their position by reference to actuarial data which may be outdated, inaccurate and based on prejudicial stereotypes.

8.2.3 *Default test with industry regulation*

The legitimate justification and proportionality test can be strengthened by additional industry regulation. Evidence of such an approach has only been identified in one Member State, Hungary, and the protection is limited to the refusal to provide a service as opposed to differential treatment with respect to the use of the service, e.g. higher premia. In Hungary, Recommendations No. 10/2016. (X.24.) of the Hungarian National Bank on the Principles of Consumer Protection for Financial Institutions²⁸¹ prescribe under Section III.6. that:

'financial institutions should not regard the client's age as a reason for automatically rejecting the client's request to use a service, but should assess instead [...] how they could provide that service to the elderly customers (e.g. by requesting additional assurances).'

Based on these recommendations (and a preceding set of similar recommendations by the Hungarian National Bank's predecessor, containing very similar language in this regard) as well as the general provisions of the equality legislation in Hungary, the Equal Treatment Authority in Hungary has held that several financial institutions are in breach of the requirement of equal treatment where these institutions refuse to provide loans or credit cards to clients over a certain age limit. In one such decision, the Authority concluded that the requirement of equal treatment had been violated when a bank had rejected the complainant's request for a credit card on the basis of his age (71), although he had been a loyal client of the bank for decades and the amount in his bank account would have provided sufficient financial coverage. In the proceedings, it was established that the client's age had been the sole reason for the refusal as the bank had not looked into his income, assets or credit history. The Authority banned the bank from future violations, ordered the publication of its decision and imposed a fine of HUF 3 million (EUR 12 750) on the bank. The Authority's decision was upheld on judicial review.²⁸²

279 The law is essentially silent in Bulgaria, Cyprus, Estonia, Finland, France, Greece, Italy, Latvia, Luxembourg, Malta and Romania but age discrimination is protected in the field of goods and services so the default test will apply.

280 Hungary, Equal Treatment Authority, Decision No. EBH/107/2019, 13.05.2019, available at: <https://www.egyenlobanasmod.hu/hu/jogeset/ebh1072019>.

281 Hungary, Hungarian National Bank, Recommendations No. 10/2016. (X.24.) of the Hungarian National Bank on the Principles of Consumer Protection for Financial Institutions (A Magyar Nemzeti Bank 10/2016. (X.24.) számú ajánlása a pénzügyi szervezetek számára a fogyasztóvédelmi elvek alkalmazásáról), 24.10.2016, <https://www.mnb.hu/letoltes/10-2016-fogyasztovedelmi-elvek.pdf>.

282 Hungary, Equal Treatment Authority, Decision No. EBH/92/2008, <https://www.egyenlobanasmod.hu/hu/jogeset/ebh922008>.

8.2.4 Actuarial data requirement and reasonableness test

A further step on the scale are those Member States who require specific actuarial data and a requirement of reasonableness with respect to the use of that data in order that a difference in treatment based on age would not amount to age discrimination. A useful example is the case of Ireland where the anti-discrimination legislation provides for an exception to general equality legislation in access to goods and services where differences in treatment arise in relation to annuities, pensions, insurance policies, or any other matters related to the assessment of risk as long as the treatment is effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely or other relevant underwriting or commercial factors and is reasonable having regard to the data or other relevant factors.²⁸³ Similar rules can be identified in Germany where differences in treatment on the grounds of age are only admissible for private insurance if it is based on acknowledged principles of calculations adequate to the risks (essentially actuarial evaluations based on statistical data).²⁸⁴ Portugal has also introduced regulations on this matter requiring actuarial data and a reasonableness test.²⁸⁵

8.2.5 Actuarial data requirement and legitimate justification and proportionality test

The most probing level of scrutiny is seen in Member States which apply a mixed test requiring that specific actuarial evidence must be provided to support differential treatment based on age in addition to the demonstration of a legitimate aim and proportionality. In the case of Belgium, it is provided that age proxies are permitted where age is the decisive factor in risk assessment (it must be possible to demonstrate that age leads to a greater risk), the data on which the insurer relies is accurate, recent and relevant; and the distinction based on age pursues a legitimate aim and the means of achieving that aim are appropriate and necessary.²⁸⁶ In Czechia, similar rules can be identified requiring both a reliance on relevant statistical methods and a proportionality assessment.²⁸⁷ This was similar to the original test proposed by the proposed Directive on age discrimination outside of the labour market but this has since been abandoned in favour of the default test. Discussion of this is included in the Conclusions and Recommendations.

Overall, while there are a great variety of exceptions and manners of dealing with these exceptions, these exceptions are capable of being categorised and there appears to be a great deal of uniformity as to how Member States have addressed concerns arising from these exceptions. There appears to be a move away from more generalised exceptions towards more individualised assessments which are based on accurate and reliable actuarial data and which require justification and a demonstration of proportionality in their application.

9 Positive action measures

There are a variety of responses to positive action measures generally across the EU Member States which tend to differ depending on whether national legal systems are based on formal or substantive equality models.²⁸⁸ There are Member States, such as Cyprus, which view positive action rather suspiciously and traditionally as contrary to anti-discrimination law rather than as a supplement to equality. Other Member

²⁸³ Ireland, Equal Status Act 2000, Section 5(2)(d).

²⁸⁴ Germany, General Law on Equal Treatment, Section 20(2).

²⁸⁵ Portugal, Decree-Law 72/2008, establishes the legal framework for insurance contracts and prohibits discriminatory practices in celebrating, executing and terminating insurance contracts that go against Article 13 of the Portuguese Constitution. Practices and techniques of evaluation, selection and acceptance of risks that are objectively reasoned, on the basis of rigorous and relevant data according to the principles of insurance techniques are accepted (Article 15, 3)

²⁸⁶ France, Unia (2019), *Trop jeune? Trop vieux! Unia combat la discrimination fondée sur l'âge*, October 2019, p. 16, www.unia.be/en.

²⁸⁷ Czechia, Act No. 277/2009 Coll. of 31.08.2009, Section 59(2).

²⁸⁸ European Commission, *National Protection Beyond the two EU anti-discrimination Directives* (2014) available at: <https://op.europa.eu/en/publication-detail/-/publication/a8cac718-8369-479e-aaa8-d86efdf897f8/language-en/format-PDF/source-search>, p. 36.

States do not provide for positive action measures in their national contexts (although this does not mean that positive action measures would be considered contrary to anti-discrimination law and could not be introduced).

In the specific context of the grounds of age, different approaches exist. There are those Member States which do not expressly provide for positive action measures on grounds of age. This is the current situation in Denmark and Estonia. While some Member States do provide for the imposition of positive action measures on the grounds of age, this can often be limited in application and scope. For example, in France, positive action is limited to the field of housing. It can also be limited in geographical scope to specified regions or communities where no federal legislation exists, as is the case in Austria. However, the majority of Member States do make express provision for the imposition of positive action on the grounds of age without limitation. Indeed, the Spanish Constitutional Court²⁸⁹ has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups 'even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations' and has been extended to include a positive duty to take such action in some Member States. Similar sentiments have been expressed in Ireland.²⁹⁰

9.1 Rationale and regulation

Where positive action is protected expressly on the grounds of age, the legislation protecting it tends to be adopted with certain defined purposes in mind. Commonly, such purposes include, but are not limited to:

- Securing equal treatment (Bulgaria)²⁹¹
- Preventing or equalising disadvantage (Bulgaria,²⁹² Finland,²⁹³ Ireland)²⁹⁴
- Compensating for existing disadvantage (Czechia)²⁹⁵
- Promoting de facto equality (Germany)²⁹⁶
- Catering for the special needs of persons, or category or persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have these special needs (Ireland).²⁹⁷

The regulation of positive action measures differs throughout the Member States although there are some general uniform approaches:

- Some Member States adopt an exemption approach to positive action measures. This means that positive action measures are an exception to the general rule regarding equal treatment and do

289 Spain, Constitutional Court Decision 128/1987, 1.07.1987, available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/860>.

290 Ireland, Equal Status Act 2000, Section 16(1)(a): '[i]mposing or maintaining a reasonable preferential fee, charge or rate in respect of anything offered or provided to or in respect of persons together with their children, married couples, persons in a specific age group or persons with a disability does not constitute (a) discrimination for the purposes of Section 5 or 6, or (b) a discriminatory rule, policy or practice for the purposes of Section 8(2)(a)'.

291 Bulgaria, Protection Against Discrimination Act, Article 7(1.14).

292 Bulgaria, Protection Against Discrimination Act, Article 7(1.14).

293 Finland, Non-Discrimination Act, Section 9.

294 Ireland, Equal Status Act 2000, Section 14(1)(b).

295 Czechia, Anti-Discrimination Act, Section 7(2).

296 Germany, General Law on Equal Treatment, Section 5.

297 Ireland, Equal Status Act 2000, Section 14(1)(b).

not constitute discrimination. This is the legal situation in, for example, Greece,²⁹⁸ Lithuania,²⁹⁹ Romania,³⁰⁰ Slovakia,³⁰¹ and Slovenia.³⁰²

- Other Member States do not mention positive action expressly in their legislation but this does not mean that such action is prohibited. This is the situation, for example, in Luxembourg, Latvia, Malta, the Netherlands and Poland. It may well be that constitutional (Poland) or international provisions (Netherlands) provide a suitable baseline for the introduction of positive action measures.
- Finally, there are Member States who endorse positive actions through express provisions allowing for such measures to be taken in the national context. It is in these latter Member States that the limits on positive action are most commonly expressly defined. Given the potential for misuse and the damaging effects of such misuse on equality, these Member States tend to provide for certain regulation of the use of positive action taking into account certain factors. These include:
 - **Temporality:** It must be demonstrated that positive action measures should be temporary in nature (Croatia)³⁰³ or effective only for a definite term or until a specific condition is met (Hungary).³⁰⁴ Similar sentiments are expressed in the Belgian legislation which states that as such measures are a response to a situation of proven manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is reached.³⁰⁵
 - **Necessity:** It should be demonstrated that the imposition of positive action measures is necessary (Croatia)³⁰⁶ or that there is ‘provable inequality’.³⁰⁷ In Belgium, for example, a positive action measure³⁰⁸ should be a response to situations of *manifest inequality*, i.e. it must be based on a demonstration that a clear imbalance between the groups will remain in the absence of such action.
 - **Appropriateness:** It should be demonstrated that the positive action measure chosen is appropriate to meet the need. (Croatia,³⁰⁹ Slovenia)³¹⁰
 - **Legal Basis:** It should be demonstrated that the positive action measure is based on a legal act, e.g. an Act of Parliament or Government decree based on an Act, or on a collective contract (Hungary).³¹¹ Similarly, in Belgium, the removal of inequality should be identified as a public goal. In this respect, the federal Government must authorise the adoption of positive action measures through an executive regulation (*arrêté royal*).³¹²

298 Greece, Equal Treatment Law 4443/2016, Article 7.

299 Lithuania, Law on Equal Treatment, Article 2(9).

300 Romania, Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30.08.2000, Article 2(9).

301 Slovakia, Anti-Discrimination Act, Section 8a

302 Bulgaria, Protection against Discrimination Act, Article 17.

303 Croatia, Anti-Discrimination Act, 9.07.2008, Article 9(2)(2).

304 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 11.

305 Belgium, Constitutional Court (*Cour d'Arbitrage*), 27.01.1994, Case No. 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on positive action: see Opinion No. 28.197/1 on the Bill which subsequently became the Act of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and social security. Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination, Article 10(2).

306 Croatia, Anti-Discrimination Act, 9.07.2008, Article 9(2)(2).

307 Slovakia, Anti-Discrimination Act, 365/2004, Section 8a(2).

308 Belgium, Constitutional Court (*Cour d'Arbitrage*), 27.01.1994, Case No. 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on positive action: see Opinion No. 28.197/1 on the Bill which subsequently became the Act of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and social security. Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination, Article 10(2).

309 Croatia, Anti-Discrimination Act, 9.07.2008, Article 9(2)(2).

310 Slovenia, Protection against Discrimination Act, Article 17.

311 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 11(1).

312 Belgium, In addition, where positive action measures are adopted in the field of work and employment, the social partners are consulted, via the competent bodies established respectively in the private and the public sectors (Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination, Article 10(4)).

- **Non-violation of rights:** It should be demonstrated that the imposition of positive action measures will not violate any basic rights (Hungary)³¹³ or disproportionately restrict the rights of others (Belgium).³¹⁴
- **Unconditional advantage:** It should be demonstrated that the imposition of positive action will not confer an unconditional advantage on a person (Hungary).³¹⁵
- **Consideration of individual circumstances:** It should be demonstrated that a positive action measure will be imposed with all due consideration of all individual circumstances. (Hungary).³¹⁶

While not all of these conditions have to be met in every Member State, it does provide an indication of the types of conditions Member States place on the imposition of such measures and indicates the importance of certain measures, e.g. temporality and proportionality, as well as the protection of individual rights in implementing such measures.

9.2 Duty to take positive action?

While positive action can be viewed with suspicion by some Member States and regulated extensively by others, there are some Member States which consider that there is a duty on public authorities to take positive action measures to equalise opportunities for disadvantaged groups. This is often referred to as a public sector duty or an equality duty. It is seen in these Member States as an important tool in implementing equality. This duty essentially consists of a positive obligation to promote equality and in some Member States amounts to an obligation to:

- promote conditions that ensure that the freedom and equality of individuals, and of the groups that they form, are real and effective (Spain);³¹⁷
- remove obstacles that impede or hamper the fulfilment of such freedom and equality (Spain);³¹⁸
- facilitate the participation of all citizens in political, economic, cultural and social life (Spain);³¹⁹
- ensure that measures are taken as a priority for victims of multiple discrimination (Bulgaria);³²⁰
- guarantee the principle of ‘proportional equality’ (Greece);³²¹
- assist in the ‘elimination of existing inequalities’ (Greece).³²²

9.3 Examples of positive action measures

There are a variety of positive action measures on the grounds of age implemented across the Member States in various fields. Generally, these measures fall into three categories of action:

- removing social or economic disadvantage that disproportionately affects representatives of disadvantaged groups;³²³
- supporting the interests of representatives of the disadvantaged groups in education, culture, healthcare and services;
- generating equality in access to education, healthcare and housing through targeting training programmes for representatives of the disadvantaged groups or through the dissemination of

313 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 11(1).

314 Belgium, In addition, where positive action measures are adopted in the field of work and employment, the social partners are consulted, via the competent bodies established respectively in the private and the public sectors (Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination, Article 10(4)).

315 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 11(1).

316 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 11(1).

317 Spain, Spanish Constitution (BOE, 29.12.1978) <https://www.boe.es/buscar/pdf/1978/BOE-A-1978-31229-consolidado.pdf>.

318 Spain, Spanish Constitution (BOE, 29.12.1978) <https://www.boe.es/buscar/pdf/1978/BOE-A-1978-31229-consolidado.pdf>.

319 Spain, Spanish Constitution (BOE, 29.12.1978) <https://www.boe.es/buscar/pdf/1978/BOE-A-1978-31229-consolidado.pdf>.

320 Bulgaria, Protection Against Discrimination Act, Article 11(2).

321 Greece, Greek Constitution, Article 116(2).

322 Greece, Greek Constitution, Article 116(2).

323 Slovenia, Anti-Discrimination Act, 365/2004.

information about these programmes or through opportunities to apply for jobs or places in the education system.³²⁴

There are numerous examples of positive action measures on the grounds of age taken across EU Member States which can be categorised by field to demonstrate the breadth and scope of such measures.

- Healthcare: In the field of healthcare, additional benefits are granted to specified social groups (Hungary),³²⁵ compensation is provided for medicine and medical aids for insured persons based on person's age (children up to 18 years old and persons of retirement age who have particular special needs can receive 100 % compensation in Lithuania);³²⁶ access to free medical care for certain age groups (Ireland and Sweden), free vaccinations for certain age groups (for example, in Croatia, there is a free flu vaccination for persons aged 65 years or older).³²⁷
- Education: In education, positive action measures have been imposed to secure preferential treatment to a specified group of participants in education within or outside the school system in respect of education or training (Hungary),³²⁸ to provide second opportunity scholarships to all who did not benefit from it 'at the proper age', to those who look to the educational system for professional or cultural promotion reasons (Portugal)³²⁹ and to provide an extra-school system in order to contribute to an effective equality of opportunities for all, for instance, through literacy education for adults (Portugal).³³⁰
- Goods and Services: Positive action measures in accessing goods and services are many and various throughout the Member States. From exemptions or reductions to preferential rates in tariffs for senior citizens on transport (Ireland, Portugal) or for the provision of other public services (Ireland) to general reductions for access to goods and services for children and young persons under the age of 18 years (Finland), there are a large number of public and private services which provide advantages for those who are in a particular age category. However, this can sometimes be a source of unease within Member States and in Ireland, preferential rates for public services have been the subject of a legal challenge by a person who did not fall within this preferential category.³³¹ In one case, a local authority charged householders a set fee for weekly collection of refuse contained in a standard size bin. People aged over 65 (provided they lived alone, or with only one other person who was also aged over 65) could avail of a preferential rate if they used a smaller size bin. Mr Dalton wanted to use the smaller bin and maintained that he should be entitled to the preferential rate even though he was aged under 65. He argued that the council's failure to extend the rate to him amounted to discrimination on the grounds of age. The equality officer was satisfied that the exception under section 16(1)(a) of the Equal Status Act relating to positive action applied to this practice. It provides that 'imposing or maintaining a reasonable preferential fee, charge or rate' regarding persons in a specific age group does not constitute discrimination. Therefore, there was no discrimination in this case. Another case illustrating the tension which can arise when positive action measures are imposed is the case of *Hoey*. Once again, this case arose in Ireland and involved a challenge to a government scheme introduced to mitigate the effects of the liberalisation of the taxi industry by

324 Slovenia, Anti-Discrimination Act, 365/2004, Section 8a(1).

325 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 25(2).

326 Lithuania, Law on Health Insurance, 1996, No. 55-1287.

327 Croatia, Croatian Institute of Public Health, Announcement of 28.10.2019, available on: <https://www.hzjz.hr/sluzba-epidemiologija-zarazne-bolesti/pocinje-cijepljenje-protiv-gripe-2/>.

328 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 29.

329 Portugal, Law 46/86, 14 October (the Basic Law of the Educational System), Article 3(i).

330 Portugal, Accordingly, Article 26(3)(b) also establishes an extra-school system, in order to contribute to an effective equality of opportunities for all, for instance, through literacy and education of adults. Law 46/86, 14 October (the Basic Law of the Educational System).

331 Ireland, Equality Tribunal, *Dalton v Limerick City Council*, DEC-S2004-042, 29.04.2004, <https://www.workplacerelations.ie/en/cases/2004/april/dec-s2004-042 - full case report.html>.

providing for a Taxi Hardship Scheme for those over the age of 50 years.³³² Mr Hoey argued that he had been directly discriminated against on the grounds of age as compensatory payments were confined to those aged over 50 and he did not qualify as a result. According to the respondent, the scheme advanced two special needs of people aged over 50: the increased costs of pension provision and the fact that taxi driving work becomes more difficult as one ages, due to increased risks of sickness and disability. Applying the provision to the facts before him, the equality officer in effect concluded that the age limit was arbitrary. The needs referred to could not just be attributed to people over 50. The Tribunal decision was overturned on appeal to the Circuit Court, although that decision was based on other jurisdictional factors rather than on the merits or otherwise of the positive action measure.

- Housing: In the field of housing, there are also many examples of positive action measures introduced to protect certain age groups. Member States have provided for different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of age (Ireland)³³³ and in the design and implementation of housing plans. In the case of *Jones v Dún Laoghaire–Rathdown County Council*³³⁴ from Ireland, such differences in treatment were held not to constitute discrimination. In Spain, Article 1 of the State Housing and Rehabilitation Plan³³⁵ identifies several groups that have ‘the right to preferential protection’ in the housing plans and among them two that are differentiated based on age: young people under 35 and people over 65. Member States have also introduced protection of tenancies for older persons. In the case of Portugal, there are several legal rules that take into account the age of the tenant, in particular in Law 6/2006³³⁶ and in Decree-Law 157/2006.³³⁷ These rules make it extremely difficult for tenancy contracts to be denounced or rents altered. The protection awarded to ‘older’ tenants (65 years or more) is only applicable mostly to older contracts and will disappear with time. However, Law 13/2009³³⁸ established that limited duration contracts regulated by Law 6/2006 that were renewed (i.e. the landowner did not oppose such renewal), will also be protected, if the tenant is 65 years old or more and lives in the household for more than 15 years. In this case the landowner cannot oppose the renewal of the contract except if he wishes to demolish the building or undertake profound construction works (Article 36(10) of Law 6/2006). Protection against eviction of older tenants is also a common positive action implemented by Member States. In Portugal, the age of the tenant is considered a weighing factor in the decision to evict tenants.³³⁹ Younger tenants can also be subject to positive action measures. In Portugal, there are special regimes to promote lease contracts for young tenants through rent subsidisation (PORTA 65).³⁴⁰ This regime is applicable to one-person households aged between 18 and 35 and cohabitating couples if one person is 36 years and the other 34 years maximum. Additionally, in Croatia, there are housing loans subsidies for persons under the age of 45. This is a measure of financial assistance intended to facilitate housing for the ‘younger’ population by repaying a part of their bank housing loans and is regulated by the Law on Subsidising Housing Loans.³⁴¹

332 Ireland, Equality Tribunal, *Hoey v Area Development Management Ltd.*, DEC-S2008-010, 31.01.2008, <https://www.workplacerelations.ie/en/cases/2008/january/dec-s2008-010-full-case-report.html>.

333 Ireland, Equal Status Act 2000, Section 6(6).

334 Ireland, DEC-S2004-081, 5.07.2004, <https://www.workplacerelations.ie/en/cases/2004/july/dec-s2004-081-full-case-report.html>.

335 Spain, State Housing and Rehabilitation Plan 2066/2008, (BOE, 24.12.2008), Article 1. <https://www.boe.es/buscar/act.php?id=BOE-A-2008-20751>.

336 Portugal, Law 6/2006, that approved the New Urban Lease Framework 27.02.2006, available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=691&tabela=leis.

337 Portugal, Law 157/2006, that regulates the Construction in Leased Buildings 8.08.2006, available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=912&tabela=leis&so_miolo.

338 Portugal, Law 13/2009, that establishes measures to correct imbalance situations between Landlords and Tenants and reinforce security and stability and protect tenants in situations of special fragility, *Diário da República Série I*, No. 30, 12.02.2019, available at: <https://data.dre.pt/eli/lei/13/2019/02/12/p/dre/pt/html>.

339 Portugal, Civil Procedure Code, Article 864 and Article 15.º-N of Law 6/2006.

340 Portugal, Decree-Law 308/2007, 3.09.2007, available at: https://dre.pt/web/guest/legislacao-consolidada/-/lc/34564575/view?p_p_state=maximized.

341 Croatia, Law on Subsidising Housing Loans, 15.06.2017, Official Gazette 65/17, 61/18, 66/19.

- Social Protection: In the area of social protection there are a number of positive action measures which are categorised by age. Perhaps the most common measures relate to transport benefits. In Lithuania, the Law on Transport Benefits foresees a possibility to a free ride in specified cases for persons up to 7 years old and a number of reduced rates for obtaining public transport tickets depending on the person's age: 80 % reduced-rates for persons who are 80 years old or older; 50 % reduced tickets for persons who are 70-80 years old and children from 7 to 10 years old.³⁴² The Law on Transport Benefits allows municipalities to provide transport benefits for more groups of persons than those set by law. For example, Vilnius Municipality regulates for a 50 % reduced rate for transport tickets for every person of retirement age, even though the Law on Transport Benefits allows this specific discount only for persons over 70 years old. In addition, some Member States offer fitness benefits at reduced rates for certain age groups. This has caused some litigation in Member States where the age categories have not been justifiably and proportionately granted such benefits. In Lithuania there was, for example, free access for senior citizens and athletes under the age of 28 years to the services of the Klaipėda Fitness Centre. A complaint regarding a decision of the Council of Klaipėda City Municipality was investigated in 2018. The Ombudsperson noted:

'When assessing exceptional conditions for the use of services for senior persons (retired persons) ... free of charge, it was decided that, based on higher morbidity of senior persons and persons with disabilities, their limited financial capacity, these groups have objectively different conditions, are in a different social, economic, financial environment, therefore cannot be compared to other groups of persons without these characteristics (younger persons and persons without disabilities). Based on the above, it has been established that there is no legal basis to assess whether persons of retirement age or persons with disabilities are treated more favourably in the area of consumer protection. For this reason, this part of the complaint was considered to be unfounded as the infringements referred to in the part of the complaint were not confirmed.'³⁴³ However, the Ombudsperson admitted the violation of equal treatment providing privileges for athletes younger than 28 and recommended that the decision be amended, which was done by the Council of Klaipėda City Municipality.

Therefore, while there are a wide variety of positive action measures which can be identified in Member States and which are implemented in order to mitigate the effects of inequality on certain age groups, Member States should be acutely aware that the imposition of such measures needs to be justifiable and proportionate to ensure that such measures do not impose inequality on other groups who are not the subject of the positive action measure involved.

10 Enforcement of equality provisions

A common component of all of the equality directives is the central idea that individuals should be able to enforce their right to non-discrimination. This means that persons who believe that they have been a victim of discrimination, in its many forms, should be able to access certain administrative or judicial procedures to ensure enforcement of these rights. This should extend to situations where the relationship in which the discrimination allegedly has taken place has ended.³⁴⁴ Certain accompanying rights are central to the effective enforcement of a right to non-discrimination such as allowing victims to be assisted in their discrimination claims by organisations which have a legitimate interest in fighting discrimination. In addition, Member States should ensure that the burden of proof in discrimination claims should shift to the respondent in cases alleging breach of the principle of equal treatment. Finally, penalties such as compensation should be imposed to ensure that the protection of equal treatment on the grounds of age

342 Lithuania, Law on Transport Benefits 2000, No. 32-890.

343 Lithuania, Decision of the Equal Opportunities Ombudsperson No. (18)SN-138)SP-98, 4.10.2018 available in Lithuanian at: <https://lygybe.lt/data/public/uploads/2018/10/18sn-138sp-98.pdf>.

344 Case C-185/97, *Belinda Jane Coote v Granada Hospitality Ltd*. ECLI:EU:C:1998:424, 22 September 1998.

is not just an illusory concept. This section will analyse what enforcement mechanisms are in place in the Member States and whether these accompanying rights are also protected.

10.1 Access to administrative or judicial procedures

Article 7(1) of the proposed Directive envisages that Member States will ‘ensure that judicial and/or administrative procedures, including conciliation procedures, where they deem it appropriate, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended’. Enforcement measures via administrative or judicial procedures are available in the majority of Member States (81 %).³⁴⁵ Only three Member States do not provide any clear administrative or judicial enforcement mechanism for age equality principles outside the labour market.³⁴⁶ Partial protection based on a lack of extension to certain fields (e.g. in Latvia, age equality based on education and goods are not enforceable) or because of a lack of legal clarity around the issue (Poland)³⁴⁷ also exists in certain Member States. However, overall the general picture emerging from Member States is generally a healthy one: equality on the grounds of age outside of the labour market should be enforceable.

10.2 Accompanying rights

In addition to a right to enforce allegations of discriminatory treatment, the vast majority of Member States provide for a host of important accompanying rights such as the right to assistance in bringing a claim and a shift in the burden of proof.

Article 7(2) of the proposed Directive provides that:

‘Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive’.

81 % of Member States provide that claimants can have assistance in bringing their claim alleging discriminatory treatment on the grounds of age.³⁴⁸ This is the case, for example, in both Germany³⁴⁹ and

345 These Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

346 Denmark, Estonia and Italy.

347 In the Polish case it may be possible to enforce a claim for age discrimination under the Polish Constitution (Article 32, right to equality), or under Articles 23-24 of the Civil Code relating to personal rights of individuals. However, as this has not been attempted in an age discrimination context, it is still unclear as to whether this is practically or legally possible.

348 Austria, Belgium, Bulgaria, Czechia, Germany, Greece (full representation), Finland, France (limited to NGOs and Equality Body), Croatia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal (expressly in housing), Romania, Slovakia, Slovenia, Spain and Sweden.

349 In Germany, associations (defined as people who, in accordance with their charter, promote the interests of people or groups of people discriminated against on the grounds covered by the General Law on Equal Treatment on a non-commercial basis) are entitled to act in support of victims of discrimination (Section 23(1) General Law on Equal Treatment). They must have at least 75 members or an association comprising at least seven organisations. Legal personality of these associations is not a precondition but they must operate permanently and not just on an ad hoc basis to support one claim. Trade unions as such are not associations in this sense. The associations are limited to advising during court proceedings (Section 23(2) General Law on Equal Treatment). In this case, Section 90(2) Code of Civil Procedure provides that the actions of the counsel are taken as actions of the party, if the latter does not contradict them. Anti-discrimination associations may support claimants in court proceedings even if representations through advocates are mandatory. They are then able to act in support of the claimant in addition to an advocate. Although the General Law on Equal Treatment does not contain an explicit provision, it is generally held that anti-discrimination associations always need the consent of the victim when acting in support of the victim. In Germany, there is no special duty for associations to act in support of a victim of discrimination.

Greece.³⁵⁰ Only four Member States do not provide for any assistance for a claimant of age discrimination outside the labour market.³⁵¹ Partial protection can arise where the term ‘assistance’ can have differing meanings in certain Member States which creates a lower level of protection in certain situations. For example, in the case of Czechia, assistance has a particular meaning defined in national law.³⁵² Also, the classification of organisations allowed to provide assistance can be limited. For example, in France, those organisations who can assist are limited to NGOs, trade unions (associations) and the equality body.

Common to all directives on equality is a commitment to a shift in the burden of proof in discrimination cases. Article 8 of the proposed Directive also provides for a shift in the burden of proof. This is due to the acknowledged difficulty in obtaining evidence necessary to prove a case which may often lie within the intimate knowledge of the respondent. This problem has been recognised by the CJEU³⁵³ and the Community legislator in Directive 97/80/EC. The shift of the burden of proof should apply to all cases alleging breach of the principle of equal treatment, including those involving associations and organisations. However, this shift in the burden of proof does not apply to situations where the criminal law is used to prosecute allegations of discrimination.

Once again, the vast majority of Member States (74 %) provide for a shift in the burden of proof in cases involving age discrimination outside the labour market context.³⁵⁴ Only five Member States provide for no shift in the burden of proof.³⁵⁵ Partial protection arises where burden of proof shifts are inconsistently applied in the remaining states. In Latvia and Poland, for example, there is unclear data as to whether a burden shift occurs in all cases and in Portugal a burden shift is limited to cases involving harassment in the field of housing.

10.3 Penalties

All the existing equality directives provide for penalties in the field of non-discrimination. Such provisions ensure that breaches of the national provisions are adequately applied and enforced. Normally penalties comprise the payment of compensation to the victims of the alleged discrimination, which may not be restricted by the fixing of a prior upper limit and must be effective, proportionate, and dissuasive.

78 % of Member States³⁵⁶ provide for compensation for breach of anti-discrimination principles on grounds of age in all fields. Only four Member States do not provide expressly for compensatory provisions (Denmark, Estonia, Italy and Spain). Two member states provide for partial protection of compensation. In Latvia, there is no compensation provision for discrimination in education or in the provision of goods

350 Greece, Equal Treatment Law 4443/2016, Article 8 enshrines Article 7 of Directive 2000/43 and Article 9 of Directive 2000/78. Specifically, Article 8(3) of Law 4443/2016 states that: ‘legal persons, unions or organisations including social partners and trade unions, whose purpose also includes the safe-guarding of the principle of equal treatment regardless of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics, may represent the injured party before the courts and represent them before any administrative authority or organ, as long as he/she provides in advance his/her consent through a notarial document or private document, which will bear their certified signature’. Moreover, Paragraph 4 of the same article further states that the aforementioned legal persons may also intervene (‘πρόσθετη παρέμβαση’) in proceedings examining discrimination cases before the civil or administrative courts free of charge (i.e. they do not have to submit a separate court fee ‘πράβολο’).

351 Cyprus, Denmark, Estonia and Italy.

352 Czechia, Anti-Discrimination Act, Section 11. Such legal entity may assist in all cases of discrimination irrespective of the discriminatory ground or applicable field. However, its rights and competencies are limited only to providing information about the victim’s rights and means of defence, the support and cooperation with drafting legal documents and proposals (Section 11(1) of the Anti-Discrimination Act). The Civil Procedural Act, Section 26(3) provides for legal representation of victims by these entities.

353 Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* ECLI:EU:C:1989:383 17 October 1989.

354 Austria, Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovakia, Slovenia, Spain and Sweden.

355 Cyprus, Denmark, Estonia, Italy, and Portugal (in very limited circumstances only).

356 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany (must also be appropriate), Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden.

and in Poland it is rather unclear and subject to judicial interpretation as to whether compensation would be payable.³⁵⁷

Restrictions via an upper limit on compensation should be avoided in order to ensure that compensation is effective, proportionate and dissuasive. The majority of Member States (78 %)³⁵⁸ provide for no official upper limit on compensation. There is one Member State where the question of whether an upper limit on compensation exists is slightly unclear due to judicial interpretation of the enacting legislation. In Croatia, there is no express ceiling in legislation on the maximum amount of compensation that can be awarded, under the law. This effectively appears to align with the general consensus on compensation. However, in 2002, the Supreme Court of the Republic of Croatia adopted guiding criteria for non-pecuniary damage (physical and mental pain, fear, mental pain caused by the death of a spouse or child, etc.) and the courts do use them as guidelines in all cases when they are deciding on non-pecuniary damage. The guidelines specify the amounts to be awarded for various types of non-pecuniary damage, with the maximum award of HRK 220 000 (approximately EUR 29 000), for the most serious damage, e.g. death of a spouse or child. The compensation for damages in discriminatory court proceedings is usually in the range of HRK 20 000 to 30 000 (approximately EUR 3 000 to 4 000), although the claims are often set at a higher amount. The higher amount of compensation is awarded only in rare cases that constitute an exception, not a rule.³⁵⁹ Only Ireland, Latvia, Romania and Slovenia provide for compensation limits (ranging from EUR 5 000 in Slovenia to EUR 15 000 in Ireland and to EUR 30 000 in Latvia (except in education where there is no compensation limit in Latvia)). Romania does not have a compensation limit in the field of social protection but does place a compensation limit in other fields of protection.

Criminal sanctions are not universally adopted. In a significant majority of Member States there are no criminal sanctions imposed for breaches of age discrimination law outside the labour market context (63 %).³⁶⁰ However, there are Member States which do provide for criminal sanctions in either all fields (Belgium,³⁶¹ Finland, France, Lithuania, Luxembourg, Slovenia) or in certain fields (Croatia – goods and services, Hungary – education, Greece for goods and services which are available to the public, Latvia for all fields except education). Where criminal sanctions are imposed, a wide range of sanctions are utilised including community service (Lithuania), fines (Greece (EUR 1 000-5 000), Lithuania, France (up to EUR 45 000 and in the case of a denial of access to a public place the fine can reach EUR 75 000)), detention (Lithuania) or imprisonment (Croatia, France, Greece, Lithuania, Slovenia). Terms of imprisonment from six months (Greece), one year (Slovenia), three years (Lithuania, Croatia) or even five years are possible (France).³⁶²

11 Key case law

Significant information about the manner in which ‘age’ as a ground of discrimination is protected in the fields outside the labour market context can be gleaned from the case law of the Member States in these

357 The situation in Poland is complicated by virtue of the fact that there is no compensation payable under the Equal Treatment Act but in matters not covered by the Equal Treatment Act, recourse may be made to civil law, which affords protection of ‘personal rights’ (Articles 23-24 of the Civil Code). If personal rights have been infringed, the individual concerned can demand that the person who infringed them rectify the effects of the violation – in particular, by making a statement of appropriate content and form. The claimant can also demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause based on the rules of compensation laid down in the Civil Code. If the infringement of personal rights results in material loss, the victim may demand compensation on general legal terms (Article 24(2)). Court verdicts are binding.

358 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal (except healthcare where fines can be imposed by regulatory authority and housing where fines of EUR 30 a day for continuing offence of harassment exist), Slovakia, Spain and Sweden.

359 Croatia, Supreme Court of the Republic of Croatia, Rev 1261/08-2, 16.02.2010 and Supreme Court guiding criteria for non-pecuniary damage, available at: <http://www.iusinfo.hr/UsefulDocs/Content.aspx?SOP=DDCroatia20110111N53>.

360 Austria, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Germany, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden.

361 But only for civil servants who, in the exercise of their functions, commit discrimination.

362 France, Article 225-2 Penal Code.

areas. This section analyses the key decisions by field: social protection, housing, healthcare, education and goods and services by examining the types of issues which have emerged in Member States and the manner in which the Member States have addressed these issues. This information is important in the assessment of where obstacles to the effective protection against age discrimination in fields outside the labour market context may exist and how these may be overcome.

11.1 Key case law in social protection

In the area of social protection, the key areas of complaint tend to congregate around policies which determine eligibility based on a particular age. However, a measure of leniency is given to Member States in the area of social protection by administrative and judicial bodies with respect to public finances and measures promoting some form of public interest similar to the margin of appreciation granted under the ECHR.

A useful example is the case of *Republic of Cyprus through the Finance Ministry v xxxxx Lakatamites*³⁶³ where a person with a disability was deemed ineligible for a state grant to buy a car on the basis that the applicant had already turned 70, which was the age limit for that particular scheme. At first instance, the trial court upheld his claim, ruling that his exclusion from the scheme on the grounds of his age amounted to unlawful discrimination in contravention of Article 28 of the Constitution and of the principle of equal treatment. The Republic appealed the trial court ruling on the grounds that the right to financial assistance is not protected by the Constitution, and in the case at hand the applicant was not treated less favourably than other persons of his age. The Appeal Court allowed the appeal and found in favour of the Republic and against the applicant, on the grounds that removing the age restriction in the scheme was likely to lead to an uncontrollable and sharp increase in the number of eligible persons, which would render the scheme unsustainable given the state of public finances.³⁶⁴

Other legitimate public interests which have been held to justify a difference in treatment on grounds of age have included the importance of integrating young people into public life (which justified the imposition of additional requirements in France on those under the age of 25 years before they could access social security minimal revenue)³⁶⁵ and to ensure participation of young people in education and labour market activation programmes.³⁶⁶ With respect to the latter, a case in the Netherlands arose where a 26-year-old applicant had her social assistance allowance terminated because she did not accept the reintegration programme offered to her. She claimed age discrimination on the grounds that the applicable legislation allows for the full reduction of social assistance benefits only if the beneficiary is under 27 years of age. For those aged 27 or older only a partial reduction is possible. The applicant relied on the non-discrimination provision of Article 26 ICCPR. The court accepted the legislator's argument that in general, people under 27 are to be regarded as a separate group where the regulation of social assistance and labour market activation are concerned, because they are still in a phase of learning/preparing to enter the labour market. In the view of the legislator, society bears a greater responsibility for the education of younger people as opposed to older people and this justifies the use of coercive measures to ensure participation in education or labour market activation programmes.

However, despite the leniency granted by administrative and judicial bodies within Member States, if a measure does not have a legitimate justification or is arbitrary in its application, then the courts have not been shy to determine that such measures will fall foul of age discrimination protections. In Portugal, for

363 Cyprus, Cyprus Supreme Court, Appeal Jurisdiction, Review Appeal No. 190/2012, 4.10.2018, www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2018/3-201810-190-12-3anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A.

364 Cyprus, Cyprus, Supreme Court, Appeal Jurisdiction, *Republic of Cyprus through the Finance Ministry v xxxxx Lakatamites*, Review Appeal No. 190/2012, 4.10.2018. Available at: www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2018/3-201810-190-12-3anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A.

365 France, Conseil d'Etat (Supreme Administrative Court), No. 343943, 27.10.2011, <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETAustriaEXT000024736716&fastReqId=770237236&fastPos=1>.

366 Netherlands, District Court of Amsterdam (*Rechtbank Amsterdam*) AMS 18/3325, ECLI:Netherlands:RBAMS:2018:7835.

example, an attempt to limit minimum income to those over the age of 25 years, which had previously been applicable to those over 18 years, was held to be unconstitutional on the grounds that it violated the right to a decent minimum income, inherent in the principle of respect for human dignity.³⁶⁷ Similarly, in Estonia, the Supreme Court had to balance the interests of the Member State in restricting access to sickness benefit to those over 65 years for financial reasons and those insured persons over 65 years who needed to claim this particular benefit. In the case of *H.I. v the Health Insurance Fund*³⁶⁸ the Supreme Court accepted that there was a legitimate aim of protecting the public finances but that it was disproportionate to exclude those over 65 years from equal access to the benefit. The Supreme Court weighed up the interference with the right to equality on one hand against the aim of protecting public finances on the other, and determined that the arbitrary fixing of the age of 65 years was unjustified, discriminatory and disproportionate. Again, in Greece, the Greek Ombudsman determined that a provision of the States Aid Regulation which excluded farmers over the age of 70 years from financial aid for damage caused by unforeseeable or exceptional occurrences was a form of direct discrimination on grounds of age.³⁶⁹

In conclusion, it can be asserted that the case law on social protection across Member States is generally consistent in that where measures are impugned, administrative and judicial bodies will give Member States some leniency with respect to justifications based on public finances or other public interests. However, Member States will not escape scrutiny entirely and must be sure to have legitimate justifications to impose measures which should also be proportionate to the aim sought to be achieved. Of course, there is the risk that Member States may restrict rather than expand measures which are considered discriminatory on grounds of age. This occurred in Ireland in 2011 in a case dealing with the Mobility Allowance Scheme which was limited to those under 66 years of age.³⁷⁰ After the scheme was determined to be directly discriminatory on grounds of age and contrary to the Equal Treatment Act, the Ombudsman issued a recommendation that the Department of Health review the mobility allowance scheme and render it compliant with the legislation. The Government did not follow its recommendations³⁷¹ and rather than ensure compliance, it closed the Motorised Transport Grant to new entrants in 2013. A replacement 'Transport Support Scheme' is yet to be established.

11.2 Key case law in housing

Cases in the housing context are interesting with respect to the balance to be struck between protecting against age discrimination on one hand and legitimate justifications for age-based distinctions on the other. The key to these decisions appears to be based on the requirement that restrictions on the right to equality should not be arbitrary in nature.

The Spanish Constitutional Court had to grapple with this problem in a case involving a tenant who did not want her lease to be automatically extended. The tenant, who was a woman in her 60s, wanted to live independently because she was currently living with her brothers who she did not get on with.³⁷² The Provincial Court of San Sebastián had originally denied her appeal on the basis that she needed to show two things in order not to extend her lease: a desire to live independently and 'the existence of these disagreements with her brothers'. However, such requirements were not attached to younger people who desired to live independently. The claimant alleged before the Constitutional Court a violation of the prohibition of discrimination on the grounds of age (Article 14 of the Spanish Constitution). The Constitutional Court agreed that this constituted discrimination based on age, because it imposed an arbitrary and harmful requirement on the right to equality before the law.

367 Portugal, Constitutional Court, Decision No. 509/2002.

368 Estonia, Supreme Court, Administrative case 3-4-1-12-10, <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-12-10>, 7 June 2011.

369 Greece, Greek Ombudsman, Cases 232490 and 243638, 28 November 2017 and 25 June 2018.

370 Ireland, An Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age, <https://www.ombudsman.ie/publications/reports/too-old-to-be-equal/index.xml>, April 2011.

371 Ireland, The Ombudsman issued a follow-up report, which is available here: <https://www.ombudsman.ie/publications/reports/too-old-to-be-equal-a-fol/index.xml>.

372 Spain, Constitutional Court Decision 69/1991, 8 April 1991 <https://hj.tribunalconstitucional.es/docs/BOE/BOE-T-1991-11642.pdf>.

Many housing decisions relate to accessing housing. One such case involved a claimant with a severe chronic psychic disability in Spain.³⁷³ He submitted a request to the Community of Madrid to recognise the disability and be granted a place in a specialised residence for people with mental disabilities. The Government of the Autonomous Community of Madrid recognised the degree of dependency requested but denied residential service treatment for people with mental disabilities who were over the age of 60 years, established in the Order 1363/1997 that regulates residences in the Community of Madrid. The rule does not establish any exceptions and does not provide any justification for this age exclusion rule. The Constitutional Court noted that the appellant had been discriminated against on the grounds of both age and disability and that the contested legislation should be declared null and void. A very similar situation arose in Ireland³⁷⁴ where the Health Service Executive failed to provide long-stay care for two complainants on the basis that they were aged under 65. The Ombudsman determined that this amounted to age discrimination and issued a non-binding recommendation that payment of EUR 130 000 be made to one claimant, and EUR 38 000 to the other claimant. These recommendations were accepted by the Health Services Executive.

In many countries, laws expressly protect persons over a certain age from eviction. For example, in France, persons over the age of 70 are generally immune from eviction except in certain exceptional circumstances. This has often been challenged by tenants who have been denied access to accommodation by landlords who do not want older tenants who they cannot evict or by landlords seeking repossession of their property. In a French case, a claimant was denied access to rental housing because of her status as a retired and old age person. The Versailles Correctional Court held that the request of landlords to repossess an apartment and landlords who refuse to rent housing to old persons who cannot be evicted due to their statutory protection related to their age (over 70 years), cannot be acted upon by real estate agents.³⁷⁵ The Tribunal d'Instance (civil court) of Paris's 14th arrondissement also considered a refusal to lease a flat to a claimant by reason of his age because of his statutory protection against eviction related to his age (over 70 years) and the court recognised again the civil liability of the real estate agency.³⁷⁶ Another interesting case arose in Portugal concerning the constitutionality of the rule in the Urban Rental Regime (RAU) which establishes that landlords are unable to unilaterally terminate rental contracts if tenants are over a certain age (65 years old), even if landlords need the property for their own accommodation and are over 65 years.³⁷⁷ According to the appellants, when interpreted in this way, the norm violated the principle of equality, because it distinguished landlords and tenants over 65 years without a reasonable ground. The Constitutional Court, however, found that the distinction established by the provision in question was not arbitrary. It seemed reasonable to resolve the conflict in favour of tenants, since they need more protection of the law. As such, the Court rejected all the allegations of the normative interpretation's unconstitutionality and denied the appeal.

Differences in treatment in the housing context also arise with respect to supports given to encourage housing purchases. In France, in order to facilitate access to housing, a local public authority put subsidies in place to assist first time purchasers. However, these subsidies were limited to those under the age of 40 years. The claimants, who were 43 and 46 at the time, had their application denied. Local authorities argued that this policy pursued the objective of 'keeping young working couples in the local area' and that it was implementing a wider policy pursued by the national ministry of employment. The Equality body considered that the objective was legitimate but that the age limitation was not proportionate. The programme was no longer in force at the time of the decision but the Equality body notified the local

373 Spain, Constitutional Court Decision 3/2018, Spanish Constitutional Court, 3/2018, 22.01.2018, available at: <https://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2018-2459.pdf>.

374 Ireland, Ombudsman Investigation: 'Care Denied – Failure to Provide Long-Stay Care for Under 65s, A complaint against the Health Service Executive', <https://www.ombudsman.ie/publications/reports/care-denied-failure-to-pr/Care-Denied-download-full-report.pdf>. March 2013.

375 France, Versailles correctional court, No. 11126080164, 02.01.2012, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=5756.

376 France, 'Instance' civil court of Paris 14th arr., No. 11-10-000481, 20.05.2011, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=5915.

377 Portugal, Constitutional Court, Decision No. 420/00, 11.10.2000.

authorities that it was illegal and addressed a recommendation to the association of French departments to work together on the definition of requirements that could support local attractivity while respecting the principle of equality.³⁷⁸

Cases in the housing context can arise in relation to arbitrary conditions with respect to tenancies, accessing housing or with respect to accessing supports or subsidies associated with housing. Where age distinctions are used, sufficient legitimate justifications must be presented. In the housing context, it appears that the administrative and judicial bodies dealing with these cases at a national level are alive to the rather weak position of tenants and those seeking to access subsidies to secure their right to housing and as a result scrutinise justifications proffered for differences in treatment on the grounds of age more strictly than in other areas.

11.3 Key case law in healthcare

Cases in the context of healthcare are limited but the few that do arise provide unique insight into some of the issues which can arise in this context and how Member State administrative and judicial complaint mechanisms have resolved these disputes.

Cases of direct discrimination tend to involve issues such as age limits on the provision of medical procedures, for example, in Czechia, the age limit of 49 in the case of artificial insemination and the limitations on reimbursement of related healthcare costs with respect to artificial insemination at age 39.³⁷⁹ Research on discrimination of elderly patients in healthcare in Lithuania in 2016, covering a review of both court cases and interviews, 'disclosed that the phenomenon of discrimination is neither perceived nor recognised. On the contrary, findings show that wide and open discrimination against elderly persons is manifest in patient care.'³⁸⁰ Similar to other fields, and particularly in Member States with public healthcare systems, legitimate justifications with respect to the public finances and the principles of solidarity, as well as other more specific justifications (for example, that 49 years is considered the end of the fertile age for most women in the Netherlands) have all been accepted as legitimate justifications for differences in treatment on grounds of age.³⁸¹

Cases of discrimination on grounds of age in the field of healthcare can often arise in different settings, for example, in relation to the provision of services under public schemes or in tax cases. However, the underlying issues relate to age discrimination in the healthcare context. An interesting example is the investigation carried out in 2017 in Lithuania regarding an order of the Minister of Health which provided that a smaller number of nappies would be compensated by the State to those with disabilities over the age of 18, even though the state of health of a person would remain the same. The investigation found that there was no objective data that would justify such a reduction and found that persons with disabilities were discriminated against based on their age. The Ombudsperson suggested that the Minister of Health change the procedure in order to ensure that the most necessary medical supplies are provided on an equal basis, regardless of the age of persons with disabilities, and obliged the Minister to inform the Ombudsperson about the changes made within a certain time.³⁸² Another interesting example is ostensibly a tax claim by a female claimant in the Netherlands who was 43 years old and who was denied a tax return for expenses made for her IVF treatment.³⁸³ The applicable legislation provides that tax returns are only granted for medical treatment that is covered by the Medical Insurance Act, which

378 France, *Défenseur des droits* (Equality body), No. 2011-016, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=1617&opac_view=-1.

379 Czechia, Ombudsperson's Opinion, 5143/2014/VOP, 12.09.2016.

380 Selli, K., Czabanowska, K., Danusevičienė, L., Butkevičienė, R., Jurkuvienė, R., Overall, J., 'Discrimination of elderly patients in the health care system of Lithuania'. Sweden EJPH 2016, Vol. 6. DOI. Available in English: <https://pdfs.semanticscholar.org/0894/c74ed2a00edadd33c9a2a88cc4e0942c6543.pdf>.

381 Netherlands, District Court of The Hague (*Rechtbank Den Haag*) AWB – 18_3876, ECLI:Netherlands:RBDHA:2018:2423.

382 Lithuania, Decision of the Equal Opportunities Ombudsperson No. (17)SN-170)SP-109, 29.12.2017 available in Lithuanian at: <https://www.lygybe.lt/data/public/uploads/2018/01/nr.-17sn-170sp-109.pdf>.

383 Netherlands, District Court of The Hague (*Rechtbank Den Haag*) AWB – 18_3876, ECLI:Netherlands:RBDHA:2018:2423.

includes IVF treatment only for women under 43. She claimed that she had been discriminated against on the grounds of age but the claim was rejected on the grounds that the age limit was based on a report by the Medical Insurance Council, which the court considered sufficient justification. The applicant also claimed gender discrimination, but this was denied on the grounds that 'it is a commonly known fact that the end of fertility comes at a different age for women than for men'. While this was a tax case, it is clear that there is potentially an issue regarding indirect discrimination in the healthcare context.

The case law on age discrimination in the field of healthcare is limited but it is potentially an area which is going to increase in currency given the recent Covid-19 crisis and its impact on healthcare systems and older people. Similar considerations with respect to public finances and social solidarity also arise in the context of healthcare as they do in the context of social protection and Member States will be given a degree of leniency with respect to healthcare decisions which affect the public interest in some way. However, healthcare providers are not immune from such claims and need to ensure that any differences in treatment on grounds of age imposed are justifiable and proportionate.

11.4 Key case law in education

No key cases in the field of education were reported. Similar considerations with respect to justifications related to public finances, as well as balancing this with a fundamental right to education, will be the main concern of administrative and judicial bodies in Member States.

11.5 Key case law in goods and service

In the field of goods and services, the most common cases arising relate to direct discrimination in the provision of services. Challenges generally arise in situations where service providers guarantee and provide discounts to people based on their age, for example, providing discounts in travel arrangements³⁸⁴ or on coach trips.³⁸⁵ The courts in the Member States have had little difficulty establishing that such discounts, for example, are directly discriminatory. In Hungary, for example, a respondent company operated a gym which offered a discount to fulltime students of higher education institutions but limited the offer to those who were younger than 25 years of age. The complainant was a 27-year-old fulltime law student. The company's defence was that many persons abused the discount and tried to enter the gym with other people's student IDs. The Authority did not accept this as an adequate justification and ordered the company to extend the discount to all fulltime students irrespective of age.³⁸⁶ Furthermore, requiring that individuals provide additional proof of student status when aged over 30 years has also been found to constitute direct discrimination.³⁸⁷ Fixing age limitations for car rental has been recommended by the French Equality Body to be prohibited by Articles 225-1 and 225-2 4 of the penal code.³⁸⁸

Cases of indirect discrimination on grounds of age outside of the labour market context are also relatively common. The case of *O'Connor v Iamród Éireann* is a useful illustration of how such claims can arise. The complainant held a free travel pass, which he was entitled to because he was over 65 years of age. He argued that the requirement to obtain a ticket on the day of travel, and other related conditions, such as the absence of an online booking facility, put him at a particular disadvantage compared to younger persons. The equality officer found that the conditions for members of the Free Travel Scheme fell within the definition of 'apparently neutral provisions'. She also found that the provisions put

384 Belgium, Brussels Commercial Court V.S. 02653/2008, 17.09.2008, <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-commerce-de-bruxelles-17-septembre-2008>.

385 Belgium, Bruges Commercial Court A/06/02016, 07.06.2007, <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-commerce-de-bruges-07-juin-2007>.

386 Hungary, Equal Treatment Authority, Decision No. EBH/26/2014, available at: <https://www.egyenlobanasmod.hu/hu/jogeset/ebh262014>.

387 Finland, National Non-Discrimination and Equality Tribunal of Finland, 309/2017, 21.03.2018.

388 France, *Défenseur des droits* (Equality body), No. 2016-279, 24.11.2016, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=20596&opac_view=-1.

older persons and disabled people at a particular disadvantage: 'I find that the Free Travel Scheme members are predominantly aged over 66 or disabled or both, and therefore the imposition of these unfavourable conditions has a disproportionate effect on these groups'. Because a prima facie case of indirect discrimination was established, the outcome rested on whether the respondent could rebut that inference by establishing that the provisions were objectively justified. The equality officer accepted that the prevention of fraud was a legitimate aim and then considered whether the measures taken to realise that aim were appropriate and necessary. She found that the respondent had given minimal consideration to the operation of the Free Travel Scheme and concluded that, 'the measures which are currently in place go beyond what is appropriate and necessary. I find them to be disproportionate restrictions on a very significant group of passengers, rather than a targeted solution to a specific problem'.³⁸⁹ The equality officer ordered the payment of compensation of EUR 500 to the victim and made an order that the respondent review its policy on free travel pass holders and render it compliant with the Equal Status Act within six months. Additionally, an order that the respondent 'update its website to communicate clearly to Senior Citizens, Disabled Passengers and other members of the Free Travel Pass Scheme comprehensive details about their entitlements and obligations as passengers' was also made. Online digital booking is now provided for this age group in Ireland.

Another useful example of cases in which indirect discrimination can arise is the Irish case of *Martin v Esplanade Hotel*³⁹⁰ where the respondent's method of offering discounted room rates was challenged. Mr Martin claimed that the practice of offering cheaper rates only through the online booking system put him, as an older person, at a particular disadvantage compared with younger service users. He sought to establish that disadvantage by supplying evidence to the effect that older people were less likely to have access to computer facilities and have information technology skills. The evidence in question was gathered from Central Statistics Office reports as well as from research conducted by an NGO, Age Action Ireland. The respondent hotel accepted that less expensive rates were available through its online booking system. It was able to offer those rates because there were no advertising and labour costs involved and those savings could be passed on as a discount to customers. Mr Martin established a prima facie case of indirect discrimination. The equality officer was satisfied that the documentary and statistical evidence presented showed that he and persons of his age group were put at a particular disadvantage by the requirement to transact online. The comparator group in question was 'persons of a different (younger) age'. However, the Tribunal found that the hotel could justify the provision. It pursued a legitimate aim, that of increasing occupancy. Using the internet as a sales tool was a 'well-established and effective business practice' and it was not necessary for the hotel to show that the aim was successful (i.e. that the online booking facility actually increased occupancy). As to whether the provision was appropriate and necessary to achieve the stated aim, the equality officer first noted that other methods of booking rooms were available to the complainant. He then reached the following conclusion:

'The policy in question was to provide discounts to persons who availed of the respondent's services by using the internet rather than other methods of booking. Providing the same rates through other methods as through the internet would make a nonsense of the strategy required to implement this policy. Therefore, it is perfectly reasonable and necessary for the respondent not to offer the discounts in question to other customers in such circumstances as this, and where it has already been established that the aim in question was legitimate'.

In essence, the provision was objectively justified because inducing people to use the online facility was legitimate: it resulted in lower costs for the hotel and it was justifiable to confine the benefit of those lower costs to persons availing of that facility.

389 Ireland, DEC-S2010-048, <https://www.workplacerelations.ie/en/cases/2010/october/dec-s2010-048-full-case-report.html>; DEC-S2010-034, <https://www.workplacerelations.ie/en/cases/2010/july/dec-s2010-034-full-case-report.html>.

390 Ireland, DEC-S2010-034, <https://www.workplacerelations.ie/en/cases/2010/july/dec-s2010-034-full-case-report.html>.

One area which draws a large amount of case law is access to and provision of insurance and insurance related products. There have been many cases challenging increased premiums after taking account of the age of the applicant³⁹¹ or denying access, or limiting access, to insurance products on the basis of age.³⁹² In the case of *Shanahan v Laya Healthcare Ltd*,³⁹³ the complainant was denied travel insurance on the basis of an administrative error which meant that the complainant was unable to receive a quotation for winter sports travel insurance either online or over the telephone as a result of his age, as there was no facility in these methods for outlining the options available for obtaining such insurance for someone over the age of 65 years. The respondent apologised unreservedly for their administrative error and was ordered to pay EUR 1 000 compensation by the Workplace Relations Commission.

Similar decisions arise in the field of financial services where cases of direct and indirect discrimination are commonplace and administrative and judicial bodies take a dim view of poor administrative practices leading to discriminatory outcomes. Common incidences of direct discrimination arise with respect to the restriction of eligibility for loans or credit cards³⁹⁴ or extension of financial facilities³⁹⁵ through the utilisation of upper age limits.³⁹⁶ Ombudspersons, equality officers and other official officers investigating such complaints have indicated that although the limitation of risk and securing the ability of a client to pay back a loan could be legitimate aims, this must be evaluated individually in each and every case and a blanket policy should not be applied.³⁹⁷ In one such French case, a claimant was refused credit because he was 66 years of age. The French equality body alerted the bank that its policy was contrary to Article 225-2 of the penal code and that a credit request could not be dismissed exclusively on considerations of age. The appreciation of the financial risk had to be based on a global evaluation of the situation of the client. The bank accepted to review its credit evaluation requirements.³⁹⁸ Similarly, in Hungary, a bank had rejected the complainant's request for a credit card on the basis of his age (71), although he had been a loyal client of the bank for decades and the amount on his bank account would have provided sufficient financial coverage. In the proceedings, it was established that the client's age had been the sole reason for the refusal: the bank had not looked into his income, assets or credit history and this was considered discriminatory in the absence of individualised assessment.³⁹⁹ In another Hungarian case, the 76-year-old complainant visited a bank's branch office to inquire about the conditions of a personal loan. He was informed verbally that persons older than 68 were not eligible for a personal loan. He initiated a procedure with the Equal Treatment Authority because he was of the view that the reason for the rejection was his age. The respondent argued that age is only one of the factors taken into account when loan requests are decided upon. They did not automatically reject the complainant's request: it was accepted and proceeded, but the complainant's financial standing was found to be insufficient. In November-December 2007, close to 800 clients who were over 70 years of age were found to be eligible for commodity loans by the company. The Authority called on the respondent company to submit its risk assessment policy. Eventually the Authority found that:

‘with a view to prudent operation and the need to reduce the risk of the non-payment of credits, the respondent has the right to carefully choose the clients they conclude a contract with on the basis of different factors, provided that they assess the prospective clients' characteristics in a holistic manner, and none of those characteristics, including age, results in automatic rejection. According

391 Belgium, President of the Brussels Commercial Court, 7.03.2005, <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/president-du-tribunal-du-commerce-de-bruxelles-7-mars-2005>.

392 France, Court of cassation, Criminal Chamber, No. 08-88017, 07.04.2009.

393 Ireland, DEC-S2016-071, <https://www.workplacerelations.ie/en/cases/2016/november/dec-s2016-071.html>.

394 Lithuania, Ombudsperson's Opinion, 117/2012/Diceland, 26.11.2012. See also Poland, Plenipotentiary Annual Report (2013), pp. 66-67.

395 Ireland, *A Complainant v A Financial Services Provider*, ADJ-00017971, <https://www.workplacerelations.ie/en/cases/2019/september/adj-00017971.html>.

396 Lithuania, Ombudsperson's Opinion, 116/2012/Diceland, 12.08.2013.

397 Ireland, *Ross v Royal & Sun Alliance Insurance Plc.*, DEC-S2003-116, <https://www.workplacerelations.ie/en/cases/2003/september/dec-s2003-116-full-case-report.html>.

398 France, *Défenseur des Droits*, 2018/099, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24674&opac_view=-1.

399 Hungary, Hungary, Equal Treatment Authority, Decision No. EBH/92/2008, <https://www.egyenlobanasmod.hu/hu/jogeset/ebh922008>.

to the information at hand, the respondent assessed the complainant's financial standing after taking into account all relevant factors, primarily his income and assets'.⁴⁰⁰

There appears to be a general consensus that individual assessment of each application on its own merits is key to ensuring non-discrimination on grounds of age. Other Member States, for example, Sweden, have also reported similar decisions by their Ombudsman in relation to access to credit facilities.⁴⁰¹

The cases on age discrimination with respect to goods and services reveal three key points: (a) there are a wide range of potentially discriminatory provisions in the provision of goods and services which are open to challenge, (b) the majority of the discriminatory treatments occur with respect to the provision of insurance and financial services and (c) the administrative and judicial authorities hearing these complaints tend to expect providers of goods and services to make individualised assessments of each application on its merit and will strictly scrutinise blanket policies based on age.

11.6 Conclusion

This section has outlined the approach of national laws of the 27 EU Member States on age discrimination in the fields of social protection, healthcare, housing, education and goods and services. The analysis reveals that a rich patchwork of measures exists across the EU Member States with many areas of commonality and rather limited areas of disagreement. On the whole, there appears to be a real consensus that protection against discrimination on grounds of age should be provided in all fields. The next section will provide some conclusions and recommendations as to the areas of cohesion and areas of concern which arise with respect to creating a more uniform approach to equality on the grounds of age within the EU Member States.

400 Hungary, Hungary, Equal Treatment Authority, Decision No. EBH/263/2008, <https://www.egyenlobanasmod.hu/hu/jogeset/ebh2632008>.

401 Sweden, Swedish Ombudsman, variety of decisions available at: <https://www.senioren.se/omvarld-ekonomi/ekonomi-juridik/inget-fall-till-domstol-i-ar/>; <https://www.senioren.se/nyheter/hakan-fick-ratt-i-do/> and <https://www.do.se/lag-och-ratt/stallningstaganden/banktjanst-och-kreditkontroll/>.

Section III. Conclusions and recommendations

The first section of this report analysed the existing protections under EU law and ECHR law and determined that there was a gap in protection at an EU level with respect to the protection against age discrimination outside the labour market context. This gap could not be sufficiently filled by ECHR protections. Although the ECHR is wider in scope and does extend protection to age discrimination outside the labour market context, it has a number of significant limitations. Therefore, the most effective way of ensuring protection against age discrimination in the fields of social protection, housing, education, healthcare and goods and services is to provide for a minimum level of uniform protection at a national level.

The second section of this report examined in detail the national laws currently in place in all 27 Member States of the EU. The aim of this section was to assess to what extent laws on age discrimination extend beyond protection in the labour market context and whether there were areas of cohesion which could form a sustainable basis for EU action in this area. The analysis indicates that there is a general consensus across Member States in favour of providing protection against discrimination on grounds of age in all of these fields⁴⁰² and the majority of Member States already provide for certain levels of protection. Consensus can be found with respect to the main concepts of equality law including direct discrimination, indirect discrimination, justificatory provisions and proportionality tests, harassment, instruction to discriminate, general exceptions, positive action, enforcement and penalties. These are the essential elements for any anti-discrimination law and indicates that there is cohesion across the Member States on the majority of issues. There were some areas where Member States either diverged in their approach or where there were gaps in protection. These areas of concern relate to the issues of victimisation, multiple discrimination, exceptions for the financial services sector (including insurance and banking sectors) and case law in the field of education.

This final section of the report brings together the main conclusions drawn from the analysis in Section 1 on the overview of EU and ECHR law and Section 2 on the overview of national law. It highlights areas of consensus and areas of concern arising from the results of this analysis. It makes general recommendations which can be used to develop further the equality acquis within the EU, particularly with respect to the proposed Directive on equal treatment on grounds including age outside of the labour market.⁴⁰³ The proposed Directive coalesces with the sentiments expressed in Articles 6, 7 and 8 of the Recommendation of the Committee of Ministers to the Member States on the promotion of Human Rights of Older Persons adopted by the Council of Europe in 2014.⁴⁰⁴ This Recommendation provides that older persons shall enjoy their rights and freedoms without discrimination on any grounds, including age (Article 6), that Member States should consider making explicit reference to ‘age’ in their national anti-discrimination legislation (Article 7) and that Member States should take effective measures to prevent multiple discrimination of older persons. This indicates a strong general consensus towards pursuing a directive on age discrimination outside of the labour market context. The adoption of the proposed Directive would also deliver on Principle 3 on equal opportunities in the European Pillar on Social Rights adopted in 2017. The most recent opinion of the EU Fundamental Rights Agency is that:

‘[t]he EU legislator should continue exploring all possible avenues to adopt the Equal Treatment Directive without further delay, in view of the persistent evidence of discrimination on grounds of religion or belief, disability, age and sexual orientation in areas such as education, social protection,

402 Fundamental Rights Agency, *Fundamental Rights Report 2020* (June 2020) p. 36 available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf.

403 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/^{*} COM/2008/0426 final – CNS 2008/0140 ^{*}/.

404 Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons (Adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers’ Deputies).

and access to goods and services, including housing. This would ensure that EU legislation offers comprehensive protection against discrimination in these key areas of life.⁴⁰⁵

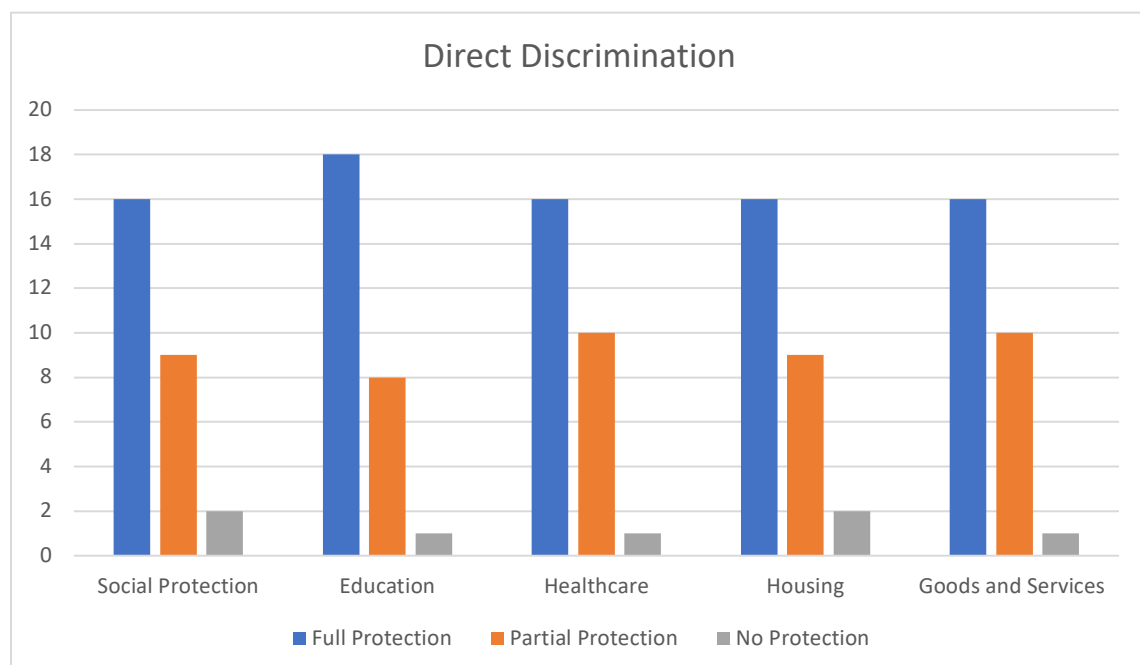
12 Areas of consensus

There are six main areas of consensus across the 27 EU Member States. These include consensus with respect to the main concepts of equality including direct discrimination, indirect discrimination, harassment and instruction to discriminate, general exceptions, positive action, enforcement and penalties.

12.1 Direct discrimination

The following chart indicates the number of Member States providing general protection against direct discrimination based on age in all fields.

Chart 2. General protection against direct discrimination



As can be seen from this chart which shows the number of Member States implementing each model of protection, there is a general consensus that direct discrimination based on age should be protected in all fields, with most Member States protecting against direct discrimination on the grounds of age in full or at least with partial protection. Very few Member States fail to provide any protection based on age in these fields. Furthermore, almost all Member States implement a justificatory model similar to Article 6 of Directive 2000/78 which provides that differences in treatment on grounds of age will not constitute discrimination where there is a legitimate aim and this aim is proportionate, in terms of suitability and necessity, to the aim sought to be achieved.

This coincides with the wording of the proposed Directive which provides for the prohibition of direct discrimination in Article 2(2)(a) and for a justification based on age in Article 2(6).⁴⁰⁶ One of the potential

⁴⁰⁵ Fundamental Rights Agency, *Fundamental Rights Report 2020* (June 2020) p. 49, Opinion 2.1 available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf.

⁴⁰⁶ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) (SEC(2008) 2181)/* COM/2008/0426 final – CNS 2008/0140 */.

legitimate aims mentioned in the proposed Directive is the promotion of the economic, cultural or social integration of persons belonging to specific age groups. There seems to be a general consensus that this could constitute a legitimate aim, albeit that Belgium considers this to be rather widely drafted.⁴⁰⁷ The Recital to the proposed Directive offers some insight into the means of achieving this aim,

‘such as the offer of more favourable conditions of access to persons belonging to specific age groups, ... more favourable conditions to persons of a certain age than are available to others, such as free or reduced tariffs for the use of public transport, museums, or sport facilities, are presumed to be compatible with the principle of non-discrimination and do not constitute discrimination on the ground of age’.

While there would appear to be little concern with the idea that the promotion of economic, social and cultural integration can be a legitimate aim, the real sticking point is the fact that certain measures outlined in Recital 14a are to be considered as compatible with the principle of non-discrimination and free from scrutiny. The Netherlands has expressed concern that such measures would be automatically considered to be non-discriminatory and not subject to individual assessment and this is a legitimate concern.⁴⁰⁸ The presumption of non-discrimination effectively means that the claimant will bear the burden of proof with respect to demonstrating any disproportionate effect of such measures effectively altering the long established rules on the burden of proof in EU equality law which has heretofore always maintained a sharing of the burden of proof to ensure that claimants are not unnecessarily disadvantaged and that discrimination can be effectively tackled. Since the outset of the proposed Directive, many options have been considered including a more widely drafted presumption that economic, social and cultural integrational measures would be presumed to be non-discriminatory.⁴⁰⁹ This was considered necessary in order to ensure reasonable exceptions would not be subject to challenge. Some Member States originally supported this proposal (Bulgaria, Finland, Ireland and Sweden). However, there was a general consensus among Member States that such measures should not be irrefutably non-discriminatory and that reversing the burden of proof would leave an excessive burden on the claimant (Austria, Belgium, Czechia, Estonia, Italy, Netherlands, Portugal, Spain).⁴¹⁰ There is now limited division between Member States on this issue with most acknowledging that a reversal in the normal rules on burden of proof in discrimination cases would be inconsistent with other EU anti-discrimination laws and be excessively burdensome on the claimant.⁴¹¹ Therefore, it is recommended in this report that the legitimate aim relating to economic, social and cultural integration should be retained but that the presumption of non-discrimination and the associated change in the rules on the burden of proof should be removed. This will ensure that claimants are not excessively burdened by the reversal in the normal rules concerning the burden of proof in discrimination cases and that such measures will be assessed in the normal way. Given that they fall under an established legitimate aim under the Directive (promotion of economic, social and cultural integration), the burden on the defendant to demonstrate proportionality will not be overly excessive.

12.2 Indirect discrimination

Once again, there is a wide measure of consensus with respect to the issue of indirect discrimination across Member States with commonly framed justificatory measures also in place which tend to mirror

407 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019) footnote 88.

408 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Recital 14a.

409 Council of the European Union, Brussels, 17 November 2009, Report from the Presidency to Permanent Representatives Committee (Part I) / Council (EPSCO) Progress Report 15575/09; Council of the European Union, Brussels, Report from Presidency Permanent Representatives Committee / Council, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report 14284/16.

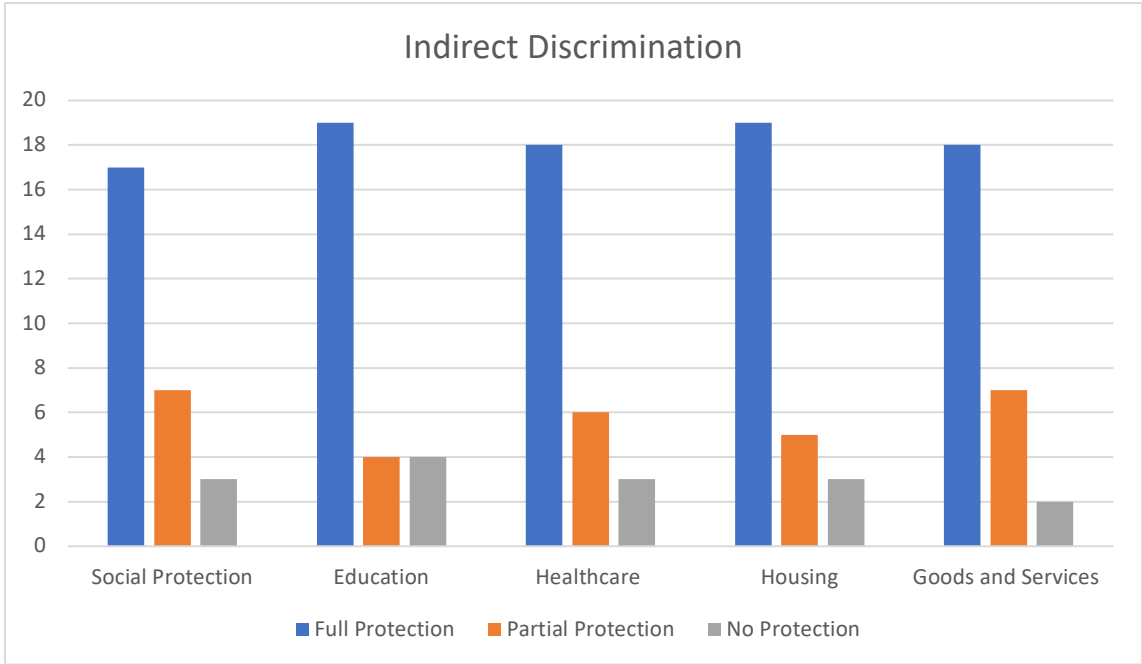
410 Council of the European Union, Brussels, 12 July 2016, Outcome of Proceedings from the Working Party on Social Questions on 7 July 2016, 10916/16.

411 Council of the European Union, Brussels, 12 July 2016, Outcome of Proceedings from the Working Party on Social Questions on 7 July 2016, 10916/16.

those already implemented under Directive 2000/78. The chart below indicates the number of Member States providing protection against indirect discrimination on grounds of age in all fields. The majority of Member States provide for either full or partial protection with respect to the fields studied in this report, with those providing full or partial protection far exceeding those that do not provide protection.

Article 2(2)(b) of the proposed Directive implements the prohibition against indirect discrimination on grounds of age. There are currently no Member State concerns with respect to this provision and this, in conjunction with the general cohesiveness of the law in Member States regarding indirect discrimination on grounds of age, indicates that this aspect of the proposed Directive should not require further adjustment.

Chart 3. General protection against indirect discrimination



12.3 Harassment and instructions to discriminate

Across the EU, there is a uniformity of practice emerging with respect to the protection against these forms of discrimination on grounds of age. Once again, the majority of Member States provide express legal protection against such forms of discrimination.

Chart 4. General protection against harassment and instructions to discriminate



This chart identifies the number of Member States who fully protect against harassment and instructions to discriminate. The proposed Directive also protects against these forms of discrimination in Article 2(2) (c) and in Article 2(2)(d-b). Member States have not raised any major objections to the inclusion of these provisions in the proposed Directive, possibly because such protections are ordinarily included within the scope of the existing legal measures at a national level. Therefore, there are no obvious impediments to the implementation of this provision in the proposed Directive.

12.4 Exceptions

Age-based classifications are common across the 27 Member States and it would be almost impossible to list all the various age-based exceptions which exist in Member State laws. There are a variety of ways in which Member States have attempted to deal with exceptions to age discrimination laws. In some states, no exceptions are made and reliance is placed on the existing justificatory provisions under direct and indirect discrimination law. In others, there are some exceptions expressly listed as exceptions to the age discrimination laws while other Member States take the view that all such classifications should be given a general exemption. In those Member States where there are exceptions provided in the law, these tend to be categorised into three types of exception: (a) age as a condition for assigning, acquiring or calculating rights; (b) age groups provided with certain benefits; and (c) minimum and/or maximum age requirements. In general, the law across Member States tends to be similar and provides for similar exceptions to the legal protections against age discrimination. Perhaps the most contentious area where exceptions arise is with respect to the insurance and banking industries. These are discussed in Section 13 (areas of concern).

Article 2(6-a) of the proposed Directive makes provision for a general exemption for certain age-based exceptions. It provides that '[p]referential charges, fees or rates in respect of anything offered, or provided to persons in a specific age group shall not constitute discrimination for the purpose of this Directive'. This particular exemption would appear to cover, rather comfortably, the exceptions which arise in Member States which provide specific age groups with certain benefits. There are some Member States (Austria, Finland, Spain) which currently find the existing wording too open and Finland, in particular,

would prefer the wording to be amended to provide that such a preferential treatment is 'presumed to be non-discriminatory' rather than the current wording which definitely provides that such exceptions are not discrimination. This would allow such preferential treatment to be assessed for their proportionality as suggested by Belgium, Czechia and Finland.⁴¹²

Considering the ubiquity of such provisions within national law, the approach taken in the proposed Directive is understandable. In addition, the proposed Directive refers specifically to 'preferential' charges, fees or rates, indicating something which might be considered advantageous or positive as opposed to charges, fees or rates which might impose a burden or disadvantage on persons of a specific age group. However, the very nature of preferential charges does imply that other age groups will face disadvantage or potentially serious forms of discrimination. With this in mind there are three options as to how this particular issue can be resolved. The first is that no exemption should be permitted and that individuals would be free to challenge these rules in the normal way with those providing for preferential charges, fees and rates having to demonstrate that there is a legitimate aim which is also proportionate. This has the benefit of being consistent and straightforward, but the disadvantage of opening up rather benign and advantageous measures to the scrutiny of the courts. The second is the existing proposal which exempts such preferential measures from this scrutiny. Exceptions are never ideal as there is always the potential for rather heinous forms of direct discrimination to be unchecked unless they are very limited and specific in their wording. The third is the introduction of a presumption of non-discrimination with respect to these preferential measures. As already discussed, the introduction of such a measure is unusual in anti-discrimination law and decreases legal certainty and uniformity by altering the existing rules on the burden of proof and departing from existing EU anti-discrimination laws.

It is arguable that many preferential charges, fees and rates could fall under the specific legitimate aim outlined in Article 2(6) and Recital 14a discussed above as promoting the economic, cultural or social integration of persons belonging to specific age groups. The Recital to the proposed Directive offers some insight into the means of achieving this aim including offering more favourable conditions of access to persons belonging to specific age groups or to persons of a certain age than available to others in, for example, public transport, museums or sporting facilities. It has been argued in this report that there is no reason why the normal rules on age discrimination should not apply in this context. Therefore, it is also arguable that the normal rules should also apply to these preferential fees, rates and charges. Of course, there will be preferential fees, rates and charges which may fall outside the scope of this legitimate aim but these can also be assessed in the normal way. This approach would mean that all preferential charges, fees and rates would potentially be justified by reference to the legitimate aim of promoting economic, cultural and social integration of persons belonging to specific age groups but could also be assessed for their proportionality so that individualised assessment is not eliminated. All other preferential fees, rates and charges should fall to be considered in the normal manner requiring a legitimate aim and a demonstration of proportionality. This approach would have the dual benefit of (a) consistency and (b) ensuring serious forms of discrimination do not go unchecked.

An added benefit of this approach is that all existing national law exceptions would fall to be assessed for their proportionality in the same manner should there be a challenge to their application or operation. Legal certainty, consistency and prevention of discrimination can be maintained by this approach.

12.5 Positive action

While there are a small number of Member States (Cyprus, Denmark and Estonia) which do not permit, or at least do not expressly permit, positive action measures, there is a general consensus among Member States that positive action is beneficial and necessary for the achievement of substantive equality.

⁴¹² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Article 2(6-a).

The proposed Directive makes similar overtures and '[w]ith a view to ensuring full equality in practice'⁴¹³ it provides for positive action as an exception to the general principle on equal treatment in order that Member States can maintain or adopt specific measures to prevent or compensate for disadvantages linked to age.⁴¹⁴ Member States do have a number of procedural checks in place to prevent misuse of positive action, including the requirement of temporality, proportionality (necessary and appropriate), defined legal basis and non-interference with the rights and freedoms of others. These requirements are not mentioned in the proposed Directive which is silent on the method by which these measures can be imposed and how they are to be assessed. However, they do accord with the manner in which positive action provisions in other equality directives⁴¹⁵ are assessed, certainly with respect to the need to demonstrate some form of proportionality in their application. Therefore, it would appear that positive action measures are unlikely to cause many concerns for Member States in implementing the proposed Directive.

12.6 Enforcement and penalties

There is a wide degree of consensus among Member States with respect to enforcement of legal rights and the penalties which should be imposed to ensure compliance with non-discrimination principles. The majority of Member States make provision for claims to be made to relevant administrative or judicial enforcement bodies in the case of an age discrimination claim in the fields studied in this report. In addition, despite some anomalies, most Member States also provide for individuals to be assisted and represented in their legal claims and provide for a shift in the burden of proof in age discrimination cases. Furthermore, in the case of penalties, the majority of Member States currently make provision with respect to compensation in all fields. While there may be outliers with respect to fixed upper compensation limits or failing to make compensation available in cases of age discrimination in certain fields, these are limited. The general consensus would appear to be that enforcement and penalties are a necessary part of protecting individuals from discriminatory treatment and ensuring the promotion of the principle of full equality on grounds of age.

Article 7 and Article 14 provide for the enforcement and the penalty protections in the proposed Directive. While there are very few Member States which intimate real concern with the draft provisions, both Ireland and Germany have requested the inclusion of a reference to national law with respect to the provision in Article 7(2) on the right of associations, organisations or other legal entities to engage on behalf or in support of the claimant in any judicial and/or administrative procedure. Both Ireland and Germany request that the provision be amended to take account of the criteria laid down in national law regarding legal standing. Given that both Member States have very particular conditions attached to who can give advice and represent a claimant, it is understandable that they would have difficulties with the provisions of the proposed Directive.⁴¹⁶ However, the inclusion of such a measure would be at odds with the other equality directives where such a provision is identically framed and under which both Germany and Ireland already make protections on other grounds in other fields. Therefore, to admit such an amendment would be at odds with the main purpose of the proposed Directive which is essentially to provide uniformity with respect to all grounds of discrimination and to bring existing age discrimination protections in line with protections on other grounds such as sex and race.

413 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Article 5(1).

414 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Article 5.

415 Council Directive 79/7/EEC of 19.12.1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6, 10.01.1979, pp. 24-25; Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, 21.12.2004, pp. 37-43; Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19.07.2000, pp. 22-26.

416 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Article 7(2).

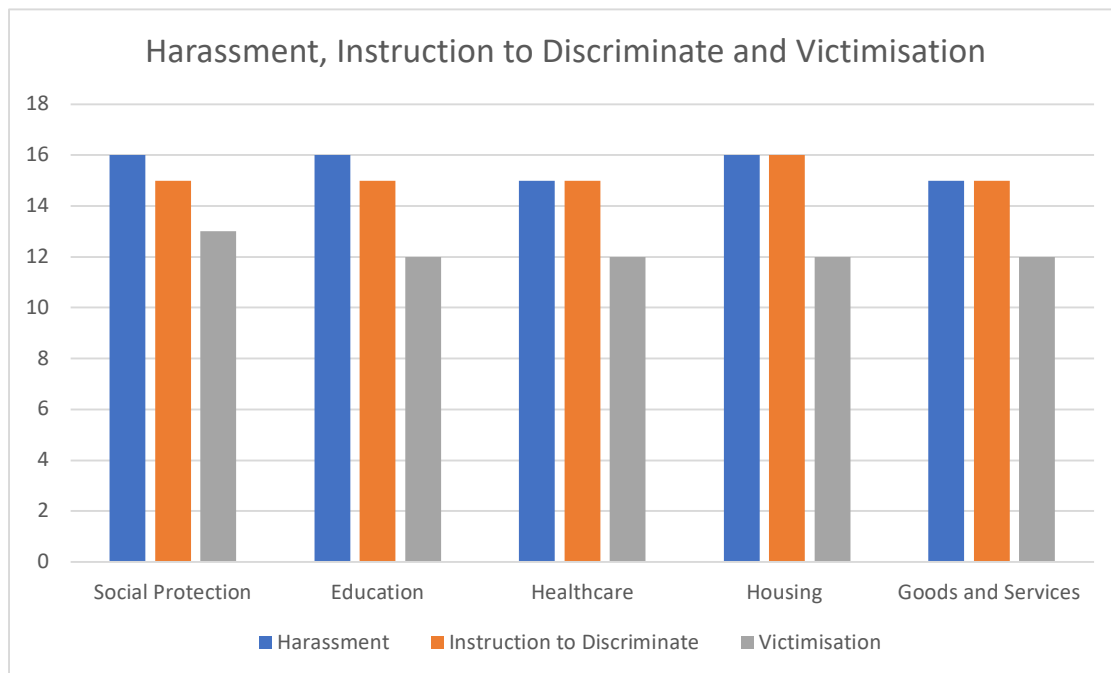
13 Areas of concern

Despite a wide measure of uniformity in the protections afforded with respect to discrimination based on age in all fields, there are some areas of concern where perhaps Member State responses vary widely, where there is limited support for particular protective measures or where there appears to be poor information or understanding at a national level of the impact of lack of protection. These areas relate to the protection against victimisation, the exemptions with respect to financial services (particularly, insurance and banking services), the inclusion of multiple discrimination and the dearth of case law in the field of education.

13.1 Victimisation

Victimisation is one of the least protected forms of discrimination in the age discrimination context in all the fields studied. This chart indicates the level of protection afforded against victimisation vis-à-vis harassment and instruction to discriminate and the number of Member States implementing protections on grounds of age in all fields.

Chart 5. Protection against harassment, instructions to discriminate and victimisation



There appears to be a view among Member States that victimisation, as a discriminatory act, is only relevant in the context of employment and is not as relevant with respect to other fields. However, victimisation can occur in all fields where individuals attempt to assert their legal rights and end up being denied access to or have rather different conditions imposed on them in the access to goods and services, education, healthcare, housing or social protection. This view by Member States is potentially due to a lack of information or understanding of the role of victimisation in perpetuating discrimination and increasing inequalities outside the labour market context. It is recommended that research is undertaken on victimisation in fields outside the labour market to assess the level, extent and impact of victimisation. Information campaigns on the detrimental effects of victimisation in all fields addressed to all relevant stakeholders should also be adopted. Finally, ensuring victimisation provisions are enforced is key to ensuring equality.

Article 9 of the proposed Directive provides that:

‘Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment’.

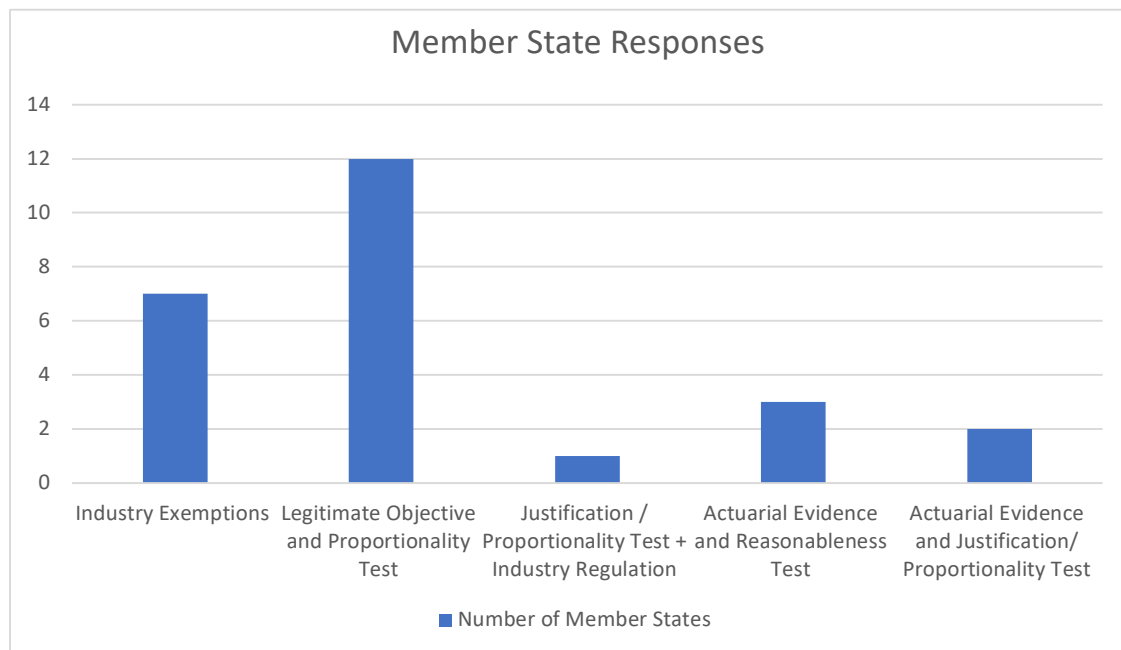
In the most recent review of the proposed Directive, Member States did not highlight any particular issues with the inclusion of protection against victimisation. Ireland did note that the proposed Directive appears to widen the scope of victimisation as compared to the definition in Directives 2000/78/EC and 2004/113/EC by referring to ‘proceedings’ as opposed to ‘legal proceedings’. This would appear to provide a wider measure of protection on grounds of age in that it would ostensibly include non-legal proceedings such as healthcare committees or university governing bodies. However, given the nature of the fields covered by the proposed Directive and the global move to less formal forms of dispute resolution processes, this widening is to be welcomed. It should not cause an impasse to the implementation of this particular provision of the proposed Directive.

13.2 Financial services: insurance and banking

One of the most controversial areas in age discrimination law is the extension of age discrimination principles to the operation of financial services such as insurance and banking. Many financial service providers utilise age proxies as a means of denying access to, or placing conditions upon, the provision of financial goods or services. Age is considered to be an important constituent part of the actuarial calculation of risk and so, many financial service providers are concerned that the extension of age discrimination law to them would mean that they could not base their financial decisions on age. This report highlights the range of responses Member States have taken to the question of age discrimination in the insurance and banking industries. It indicates that a number of Member States (five in total) are moving towards a model which would require such service providers to justify their use of age proxies, demonstrate that they are proportionate and base their decisions on up-to-date, relevant and reliable actuarial data. The report indicates that this is indeed a very pressing issue given that the majority of cases emanating from the field of goods and services on grounds of age relate to incidences of direct discrimination with respect to access to, and provision of, insurance and banking services.

This chart provides an outline of the various responses of Member States and the number of Member States implementing each response to this particular issue. It can be seen that the default model, which provides that any differences in treatment on grounds of age, must be justified and proportionate, is the approach taken by the majority of Member States. It is also now the approach proposed in the Directive.

Chart 6. Member State responses to insurance and banking exceptions



The original provisions which related to financial service providers have been removed from the most recent draft proposal⁴¹⁷ of the Directive. It had originally provided that:

‘proportionate differences in treatment on the grounds of age do not constitute discrimination for the purposes of this Directive, if age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data’.⁴¹⁸

This would have exempted these industries from the provisions of the Directive as long as certain conditions were met: that the measures imposed were proportionate, that age was a determining factor in the assessment of risk and that this assessment was based on actuarial principles and relevant and reliable statistical data. Several delegations expressed their doubts about the deletion, stating that the issue had already been dealt with in earlier phases of the discussion on the proposal and that it was important to keep these provisions concerning insurance, banking and other financial services.

The original Article 2(7) also modelled provisions in the other equality directives. Indeed, the European Economic and Social Committee⁴¹⁹ had expressed concern that the exception in the original proposed Directive was too broad and would perpetuate the ‘well documented disadvantage of young people, older people and disabled people in relation to banking and a range of insurance products’.⁴²⁰ Furthermore, they considered that this was a markedly different approach to that adopted under the Gender Goods and Service Directive⁴²¹ under which differential insurance rates and benefits could be permitted only

417 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019).

418 Former Article 2(7).

419 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.1.

420 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.1.

421 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.1.

if supported by accurate actuarial data that is compiled, published and regularly updated. In addition, Member States must review this decision after five years.⁴²² The Committee was of the opinion that Article 2(7) permitted too wide a scope for differential premiums without requiring insurers to disclose actuarial data. This means that prospective customers could not know whether differential rates were justified and competitors would have no incentive to offer more equitable prices.⁴²³ They recommended the extension of the same requirements ‘for transparency, review and oversight by the Member State’ as apply for gender.⁴²⁴ Differences in treatment should only be permitted where providers of financial services publish up-to-date actuarial or statistical data relevant to the particular activity, with periodic review to note variations of risk. Furthermore, Member States should be required, after a fixed period, to review the evidence for differential treatment and to consider gradual sharing of risks and equalisation of premiums.⁴²⁵

The removal of the exemption effectively means that the proposed Directive as it stands implements the default-position model whereby age-based assessments by financial service providers are potentially challengeable as direct discrimination which would then need to be justified and shown to be proportionate. This is the approach taken by the majority of Member States. However, as an addition to this model, the most recent version of the proposed Directive does include a statement in the recital that:

‘[c]ustomers and relevant judicial and complaints bodies should have the right to be informed, upon request, about the reasons explaining differences of treatment on the grounds of age or disability in financial services. The information provided should be useful and understandable to a general public and it should explain differences in individual risk for the service in question. Providers of financial services should, however, not be obliged to disclose commercially sensitive data’.⁴²⁶

The benefit of the statement in the recital with respect to access to information is particularly important so that affected claimants can make informed and accurate decisions as to whether discrimination has occurred and where a legal challenge should be made.

This new approach is generally in line with the approach taken in most Member States, albeit that the information requirement grants a slightly higher level of protection. While there are still Member States who apply blanket industry exemptions or express exceptions for these financial services in their national laws, more commonly, differential treatment on the grounds of age by financial service providers is considered a potential case of direct discrimination and the burden will shift to the service provider to justify the difference in treatment and demonstrate that this measure is proportionate. The fact that the majority of Member States utilise this approach is not because they have chosen this approach specifically but rather that their legislation is silent on the matter of financial services and the potential discrimination based on age caused by age assessments and as such the default rules tend to apply. An analysis of the key case law in the area indicates that one of the most important principles in preventing age discrimination is to ensure that financial service providers do not apply blanket policies. This approach does, at least, ensure that the difference in treatment must be proportionate, in that it should be suitable and necessary, ensuring that an assessment of the individual circumstances is considered rather than

422 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.1.

423 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.3.

424 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.4.

425 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, pp. 19-23 at para 3.1.3.5.

426 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019), Recital 15a.

blanket policies being imposed. Indeed, from this perspective, and from a uniformity perspective, this new revised approach may be effective.

However, this does not mean that this is the most acceptable or the most sensible solution. In fact, it is rather unsatisfactory for many reasons. A more appropriate solution is certainly the one currently operating in Czechia and Belgium and to a lesser degree in Germany, Portugal and Ireland, which mirror more closely Article 2(7) of the original proposed Directive. The approach operating in these jurisdictions ensures that an assessment of proportionality is made and that any assessments based on age are made with respect to reliable, relevant and up-to-date statistical data. This approach ensures two important and additional benefits to that currently proposed: (a) that any assessments made by financial service providers are based on sound actuarial principles and that the data is reliable and up to date taking into account the most recent statistical information and ensuring that individuals are not subject to decisions which are based on stereotyped and out-of-date information; (b) that there is a measure of equality with the other anti-discrimination directives. It is clear that the approach taken in the Gender Services Directive is certainly now much more transparent than that proposed by the proposed Directive in the area of age. While only five Member States have laws which are similar to the original Article 2(7) of the proposed Directive, there are many others which already carry out proportionality assessments and would not require much amendment to bring them in line with the proposed Directive. The additional requirement to openly publish such data, as recommended by the European Economic and Social Committee, has the advantage of achieving both uniformity and substantial equality which is currently lacking in this particular arena. As the Equinet Working Group on Equality Law have indicated in their most recent Discussion Paper on Fighting Discrimination on the Grounds of Age, the experience of equality across Member States is that at a minimum there should be (1) objective data available that is accurate, recent and relevant to show that age leads to a higher risk; (2) an individual assessment of the situation of the applicant and a possible refusal must not solely be based on the age of the applicant; and (3) an account taken of the principle of proportionality. A return to the original proposed Directive would address these principles most adequately.⁴²⁷

13.3 Multiple discrimination

The inclusion of protection against discrimination on multiple grounds in the proposed Directive can only be welcomed and provides a unique opportunity to provide a sound legal underpinning to the protection against multiple discrimination across the EU Member States. Bell notes that one of the founding rationales for adopting additional EU anti-discrimination legislation was the issue of multiple discrimination⁴²⁸ given that the 'lacunae in the existing legal framework frustrated the ability of the law to respond effectively to situations where individuals face discrimination on more than one ground'.⁴²⁹ Introduced as an amendment during the Maltese Presidency,⁴³⁰ the most recent iteration of the proposed Directive provides for inclusion of protection for situations of multiple discrimination, which was not originally included in the 2008 proposed Directive. Mention is made of multiple discrimination in Article 1 (purpose of the Directive) and Article 2 (concept of discrimination). Article 2(3-a) defines discrimination on multiple grounds as occurring when 'discrimination is based on any combination of grounds set out in

427 Equinet, *Discussion Paper on Fighting Discrimination on the Grounds of Age* (2018) available at: https://equineteurope.org/wp-content/uploads/2019/03/Age-Discrimination_updated-electronic.pdf at p. 36.

428 Bell, M., 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review* 7. See also European Commission, *Tackling Multiple Discrimination: Practice, Policies and Laws* (2007); Makkonen, T., 'Multiple, compound and intersectional discrimination: bringing the experiences of the most marginalised to the fore' (2002) Institute for Human Rights. Åbo Akademi University; Moon, G., 'Multiple Discrimination: Justice for the Whole Person'. *Roma Rights* 2, 2009: Multiple Discrimination. Available at: <http://www.errc.org/roma-rights-journal/roma-rights-2-2009-multiple-discrimination>; Burri, S. and Schiek, D., *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?* (2009) Available at: http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf.

429 Bell, M., 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review* 7 at p. 9.

430 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report ST 9481 2017 INIT – 2008/0140 (CNS).

Article 1 of this Directive' and may occur (Article 2(3-b)) 'on the basis of any such combination also where discrimination would not occur on one or more of the grounds when taken separately'. The rationale for the addition to the proposed Directive is reflected in Recital 12ab where it is noted that multiple discrimination should be recognised in order to reflect 'the complex reality of discrimination cases, as well as to increase the protection of victims'.

There have been some concerns raised by Member States with respect to the concept of multiple discrimination within the proposed Directive.

Firstly, three Member States particularly have concerns with including it within the concept of discrimination: Hungary is unable to accept the inclusion of 'multiple discrimination' in the text and Lithuania and the Netherlands have reserved a scrutiny reservation on all references to 'multiple discrimination' in the text. Hungary, Lithuania and the Netherlands do not have national legal protection against multiple discrimination so the reservations are not altogether surprising. However, what is more remarkable is that even though the vast majority of Member States do not have any express legal protections against multiple discrimination, only three Member States have expressed difficulties with its inclusion. This signifies a consensus within Member States that this is an issue which should be included, and which would complete the equality agenda within their national territory. Many Member States with no express legal protection report that, despite this lack of express protection, national courts do hear cases with multiple discrimination elements and the inclusion of multiple discrimination in the proposed Directive is a natural extension and important express statement of the *de facto* position in many Member States.

Secondly, there is a concern that the definition of multiple discrimination is limited to the grounds protected in the proposed Directive, namely, age, sexual orientation, disability and religion and belief. The European Economic and Social Committee recommended extending the definition to include all the multiple grounds protected in the Treaties and not just those protected in the proposed Directive.⁴³¹ This extension would seem to be more sensible considering that women are often victims of multiple discrimination, which is recognised within the proposed Directive in Recital 13⁴³² but a claim based on gender and age could not be taken under the current proposed Directive. However, it appears that such an extension was not favoured by certain delegations or by the Commission on the grounds that it was more consistent to refer only to the grounds mentioned in the proposed Directive.⁴³³ One suggestion under the Estonian Presidency⁴³⁴ was to introduce cross-references to the other equality directives in Article 2(3-a) and including a statement in the recital which would clarify that multiple discrimination is understood to occur on the basis of the combination of two or more of the following grounds: 'religion or belief, disability, age or sexual orientation, or, in some circumstances, sex, or racial or ethnic origin'. This would appear to be a more effective and uniform approach to the issue of multiple discrimination than that which currently exists in the proposed Directive. This would also reflect the position at national levels where Member States do tend to provide protection on all grounds covered by the directives or alternatively are content to cross-reference directives in finding multiple discrimination.⁴³⁵ This approach is supported by Belgium, Czechia, Estonia, Malta, Portugal and Spain who have asserted that it is 'important that "multiple grounds" also includes other grounds recognised by EU law, i.e. "sex" and "race and ethnic origin"' and should not be limited as in the current format. It is recommended that in the interests of clarifying the equality agenda and rendering the multiple discrimination provision effective this inclusion should be adopted.

431 Opinion of the European Economic and Social Committee on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation OJ C 182, 04.08.2009, p. 19-23 at para 4.1.

432 See also Bell who said that 'intersections between gender and other discrimination grounds are typically the best recognised instances of multiple discrimination': Bell, M., 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review* 7 at p. 9.

433 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report ST 9481 2017 INIT – 2008/0140 (CNS).

434 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report ST 14867 2017 INIT – 2008/0140 (CNS).

435 See the decision in Belgium: Labour Tribunal of Liège, decision of 11.08.2017, case No. R.G. 16/294/A. 195 Sweden, Labour Court, *The Equality Ombudsman v State Employment Board*, judgment No. 91/2010, of 15.12.2010.

Thirdly, the proposed Directive is silent as to ‘whether the remedy awarded should be adjusted’ to take account of multiple discrimination.⁴³⁶ This is something which Member States could address individually at a national level and there are some Member States which do provide for extended remedies, notably Austria, Hungary, Croatia and Belgium. However, there are other Member States which specifically indicate that remedies will not be adjusted in cases of multiple discrimination (Bulgaria and Sweden). If left to Member States to address individually, this could make the provisions on multiple discrimination ineffectual as there would be no increased penalty for a case of multiple discrimination in many Member States, despite the gravity of the claim. As Bell has intimated, there is no good reason why the proposed Directive could not take the impetus to lead the way on multiple discrimination with respect to this particular issue and provide clarity on the legal scope and effects arising from the complex interplay of the various discriminatory grounds.⁴³⁷

13.4 Case law concerns

What is notable about the case law emanating from Member States in all fields is that in general the manner in which Member States address claims based on direct and indirect discrimination and other forms of discrimination appear to be rather unvarying in approach and the analysis of legitimate justifications and proportionality tests show a high degree of uniformity. However, one general concern arises from the case law.

The lack of cases in the field of education is notable. There is evidence to suggest that over half of young people recently surveyed have experienced discrimination in education and there is also evidence of discrimination in other age groups in this field.⁴³⁸ There are potentially a number of reasons for this anomaly. It may be due to the limited protection in the field of education at a national level, for example, the exclusion of persons under the age of 18 from accessing age discrimination protections in Ireland. The definition of education in the proposed Directive will also be limited and will not assist greatly in this respect. The limited nature of the proposed Directive is directly attributable to the limited competences of the EU in this area. Article 3(1)(c) defines access to education as including ‘the process of seeking information, applying and registration as well as the actual admission to and participation in educational activities’. Member States retain exclusive competence with regard to the ‘organisation of their educational systems and the content of teaching and of educational activities, including the provision of special needs education’. They also retain competence for

‘the setting up, financing and management of educational institutions, for the development of curricula and other educational activities, for the definition of examination processes and for the setting of the conditions of eligibility, including, for example, age limits regarding eligibility for schools, scholarships or courses. In particular, Member States retain the possibility to set age limits in the area of education’.⁴³⁹

The low level of case law emanating from the education field may also be related to the fact that when discrimination occurs within education, it is not age specifically but rather other grounds, or the interplay with other grounds that leads to the discrimination. Therefore, cases may arise under other grounds in the education field but may still have an age component. The role of the protection against multiple discrimination in this context should not be underestimated.

436 Bell, M., ‘Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive’ (2009) 3 *The Equal Rights Review* 7 at p. 15.

437 Bell, M., ‘Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive’ (2009) 3 *The Equal Rights Review* 7 at p. 15.

438 Youth Forum, *Survey on Youth and Multiple Discrimination (2014)* available at: <https://www.youthforum.org/sites/default/files/publication-pdfs/Survey-on-Youth-and-Multiple-Discrimination.pdf> p. 9.

439 Recital 17(g).

In addition, the Survey on Youth and Multiple Discrimination in Europe noted that there was an information gap among young people particularly with respect to knowledge on discrimination and it concluded 'that despite a relatively high occurrence of discrimination among young people living in Europe their awareness of protective mechanisms is quite low and there is still an open space for promotion of human right standards among European residents'.⁴⁴⁰

Therefore, it may well be that a combination of a lack of information in conjunction with a limited scope and lack of protection against multiple discrimination has led to a low level of case law in this field despite evidence of discrimination. It is recommended that information on equality on grounds of age in the field of education is made more readily available to the public and that multiple discrimination protections are readily implemented so as to ensure access to justice for those affected.

14 Final recommendations

This report has analysed and assessed both the law at regional level (EU and ECHR law) and at national level (27 Member States). It identifies a high degree of cohesion with respect to the concepts of equality law on grounds of age, but there are also some areas of concern which require action in order to bring them in line with other areas of equality law (namely, sex and race).

Recommendation 1: Adopt the Proposed Directive on Equal Treatment on Grounds of Age in fields outside the Labour Market

There is a substantial gap at an EU level in the protection of non-discrimination on grounds of age in the fields of social protection, education, housing, healthcare and access to goods and services. There is no express legal protection at an EU level. The gap is also not filled by the ECHR because there are a number of limitations such as the limited applicability of Protocol 12, the requirement to locate an existing right within the ECHR wherein discrimination under Article 14 can be identified, the need to demonstrate victim status and the wide margin of appreciation given to states with respect to age discrimination. Therefore, it is recommended that the proposed Directive on equal treatment on the grounds of age, disability, sexual orientation and religion or belief in fields outside the labour market be adopted as a matter of priority. The proposed Directive has the benefit of overcoming these limitations and shortcomings in protection and would provide a very sustainable and effective basis for legal protection against age discrimination in EU Member States. This report has indicated that there is a high degree of cohesion among Member States with respect to direct and indirect discrimination, justificatory provisions and proportionality, harassment and instruction to discriminate, positive action, exceptions, enforcement and penalties. Indeed, the majority of Member States (81 %) have recently expressed support for the general aim of the proposed Directive.⁴⁴¹ In addition, they have 'affirmed the importance of promoting equal treatment as a shared social value within the EU'.⁴⁴²

There are, however, still problematic provisions within the proposed Directive which are hampering this important milestone in shoring up EU equality law. The problematic provisions on the age ground, the challenges posed by these provisions and the proposals for overcoming these obstacles have been discussed throughout this report but are summarised here:

440 Youth Forum, *Survey on Youth and Multiple Discrimination (2014)* available at: <https://www.youthforum.org/sites/default/files/publication-pdfs/Survey-on-Youth-and-Multiple-Discrimination.pdf> p. 9.

441 Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom (23 Member States). See Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019).

442 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: General Secretariat of the Council 10576/19 (26.06.2019).

Provision	Problem	Proposal
Article 2(6) and Recital 14a: economic, social and cultural integration as a legitimate aim and presumption of certain measures as non-discriminatory.	This provision adds a level of legal uncertainty and alters the well-established reversal of the burden of proof in discrimination cases.	Remove the presumption of non-discrimination in Recital 14a to allow all measures which fall under this legitimate aim to be assessed for proportionality.
Article 2(6-a): preferential charges, fees and rates are non-discriminatory and compatible with the proposed Directive.	This provision effectively removes many potentially discriminatory measures from the scope of the proposed Directive.	Remove this exception as a standalone provision placing it within Recital 14a to allow some measures to benefit from the legitimate aim of economic, social and cultural integration of specific age groups.
Article 2(7): In the financial services (insurance and banking) sector differences in treatment must be justified by reference to a legitimate aim and be proportionate.	Provides a low standard of protection to persons of specific ages who are subjected to differential treatment in this sector.	Return to the original Article 2(7) as an initial step in ensuring a measure of additional protection against discriminatory treatment. This would provide that proportionate differences in treatment on the grounds of age would not constitute discrimination for the purposes of the proposed Directive, if age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data.
Article 2(2): the protection against multiple discrimination.	Currently does not cover multiple discrimination on all grounds (only those grounds protected in the proposed Directive) and does not provide for an adjusted remedy in cases of multiple discrimination.	Ensure the maintenance of protection against multiple discrimination in the proposed Directive. In addition, include in the Recital a statement to the effect that multiple discrimination includes discrimination on all grounds covered by EU equality law (with relevant cross-references where necessary) and that remedies should be adjusted to take account of the grievous nature of multiple discrimination.

Recommendation 2: Implement protection against victimisation and inform stakeholders about detrimental impact of victimisation through research and information campaigns

Protection against victimisation is the least protected form of discrimination at national level. To ensure greater protection, the adoption of the proposed Directive is key. However, lack of protection can be attributed to poor understanding of the detrimental impact of victimisation in fields other than the labour market. Further research and information campaigns are necessary to address this knowledge gap and ensure protection.

Recommendation 3: Ensure that proportionate differences in treatment on the grounds of age do not constitute discrimination for the purposes of the proposed Directive if age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data

The existing proposal applies a default test to financial service providers who are making assessments of risk based on age. This is unsatisfactory for many reasons. The implementation of the original Article 2(7)

would ensure transparency, proportionality and individualised assessment of risk. While not providing exact equality with the Gender Directive, this approach would at least provide greater certainty and protection than the default model currently proposed.

Recommendation 4: Adopt a protection against multiple discrimination. Such protection should include protection against discrimination on all grounds protected under EU equality law and should include a provision which allows sanctions to be adjusted to take account of the gravity of multiple discrimination

The protection against multiple discrimination is a very welcome move in the proposed Directive and will certainly enhance protection against discrimination at a national and EU level. However, in order to achieve this and to have greatest impact, all grounds of discrimination need to be protected. This is particularly important given that multiple discrimination on grounds of age and gender is so prevalent. In addition, including a reference to the adjustment of remedies in cases of multiple discrimination will ensure uniform protection across Member States, enhance the impact of multiple discrimination claims and increase equality on grounds of age.

Recommendation 5: Promote research and information on age discrimination in the field of education

The lack of case law in the field of education on age discrimination on grounds of age is remarkable. This is the case despite the fact that discrimination on grounds of age in education is reported by many individuals. There may be many reasons for this anomaly relating to poor implementation or the limited scope of legal protections and the lack of multiple discrimination protections. However, lack of information and understanding around the scope and impact of age discrimination in education is also a key factor. Promoting research and information campaigns on this particular area will enhance both understanding and protection of this issue.

In conclusion, it can be positively asserted that there are a great many more areas of cohesion and uniformity in the approaches of Member States to the issue of age discrimination in fields outside of the labour market than there are differences. Differences highlighted in this report can be removed or reduced through the adoption of the proposed Directive in the manner recommended here and through the promotion of research and information campaigns on age discrimination. In this manner, true equality on the grounds of age may finally be achieved.

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