

Age discrimination and European Law

Fundamental rights & anti-discrimination

Employment & social affairs



European Commission

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European Commission

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

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Robby | 1951

Executive Summary

Part I – Age and the framework equality directive

Differences of treatment between different individuals or groups on the grounds of age are often based on generalised assumptions or casual stereotypes. When individuals are subject to discrimination as a result of these demeaning stereotypes, their fundamental right to respect for their human dignity is violated, as they are denied equality of treatment and respect. Such discrimination also prevents disadvantaged age groups from participating fully in the labour market.

A key step in any effective age equality strategy is to introduce legislation that prohibits unjustified forms of age discrimination in employment and provides effective remedies for victims of such discrimination. The Framework Equality Directive represents a major acknowledgement of the problem of age discrimination. It recognises that both younger and older workers have rights to age equality. It also is not solely concerned with ensuring formal equality, but also with combating age-based disadvantage and upholding basic rights. Within the parameters of this general approach, the Directive applies a similar approach to age discrimination as it does to the other forms of discrimination, prohibiting direct and indirect discrimination, harassment and associated wrongs linked to a person's age.

However, particular issues arise in respect of age discrimination that distinguish age from the other grounds. There are no fixed characteristics that define particular age groups, unlike the case in general with the other equality grounds, nor do individuals remain fixed within particular groups, nor do age-based assumptions by others about individuals of particular ages remain static. Also, age distinctions based upon unfair assumptions and stereotypes are undesirable: but other distinctions upon the grounds of age are rooted in rational considerations that are not incompatible with the recognition of individual dignity, serve valuable social and economic objectives, and often are designed to benefit or protect particular age groups.

Age discrimination controls need therefore to establish a framework for distinguishing between circumstances where the use of age (or age-linked characteristics) is legitimate, and when it is not. The Directive achieves this by specifically permitting the use of age-based distinctions when necessary as a result of a genuine occupational requirement, but also permits the use of age criteria in circumstances which would otherwise constitute direct discrimination when this can be demonstrated to be objectively necessary to achieve a legitimate aim and proportionate to the aim sought. Indirect age discrimination can also be justified if objectively necessary and proportionate. In both cases, the 'objective justification' test must be applied in a rigorous manner, to prevent unfair stereotyping; but it also has sufficient flexibility to allow the use of age and age-linked characteristics where appropriate and justified, as permitted by both Articles 4 and 6 of the Directive.

The Directive also makes provision for special exemptions that are very important in the age context. Article 3(3) and Recital 13 exempts state social security schemes from the Directive's general provisions, and thus from the requirement to justify age-based distinctions. Member states by virtue of Article 6(2) are also permitted to introduce a special exemption for the use of age-based criteria in occupational security schemes. Article 3(4) also specifically permits member states to exempt their armed forces from the age provisions of the Directive.

Part II – Direct and indirect discrimination

To establish an initial claim for direct age discrimination (before the issue of justification arises), a claimant needs to show that he or she was treated less favourably than another person in the same situation was, is or would have been treated. However, the fluid nature of a person's age, the uncertain and shifting nature of 'age groups', the changing expectations that accompany changes in age, and the differences in position and expectations that often exist even between persons of very similar ages all make the application of the comparator test difficult in the context of age.

The simplest solution to this problem would be for national legislation to provide that it was discriminatory to subject a person to detriment on the grounds of their age, and thus avoid the need to show a comparator. An alternative way forward is to make use of hypothetical comparators, as permitted by the Directive, to ask how a comparator 'would have been treated'. The Directive permits a flexible and nuanced approach to the comparator question, and existing sex discrimination case-law can provide relevant guidance.

Once less favourable treatment can be demonstrated, the next key issue that arises is whether courts and tribunals will be able to infer that the less favourable treatment in question is based on age grounds. In line with the provisions of Article 10(1), if a claimant can establish a *prima facie* case that age was a material causal factor in the decision to subject him or her to less favourable treatment, then the respondent will have to prove that age was not a factor, or that its use was justified. A variety of factors may be relevant in convincing the tribunal that an inference of discrimination is appropriate.

Many criteria or practices could hypothetically raise issues of indirect age discrimination. This however does not pose any particular legal or practical problems: if a practice, provision or criterion can satisfy the test of objective justification, then employers have nothing to fear from its use. Age does present challenges in applying the indirect discrimination test, but no more than does gender.

Part III: Limitations and derogations

In respect of the issue of justification, member states would be advised to give real consideration and appropriate guidance as to when age discrimination can be justifiable, whether on the basis that it constitutes a genuine occupational qualification, direct discrimination or indirect discrimination.

It is difficult to see many circumstances where such a blunt and general characteristic such as age would be required as a genuine occupational requirement. However, an important issue arises as to when it will be possible to use age as a proxy for another quality or characteristic that is a general occupational characteristic for a particular job, or else when the use of age as a proxy in this way to differentiate between individuals will satisfy the objective justification test. The use of age as a proxy for characteristics such as incapacity, ill-health or immaturity will often be highly questionable.

The use of general age limits where individual assessment is possible will also be very problematic. Even well-recognised legitimate aims such as those set out as examples in Article 6(1) cannot justify the use of age limits that are not linked to a clear justification, or which could be replaced with less restrictive methods of achieving the legitimate aim in question. The use of age distinctions to protect or benefit vulnerable groups may be less problematic, as this will often constitute positive action to combat disadvantage in many circumstances, but the scope and extent of such measures may give rise to some concerns in certain contexts. They will have to be objectively justified by reference to the need to protect particular classes of worker or to combat specific disadvantages faced by workers of a particular age.

Uncertainty surrounds the question of retirement. It is important to distinguish between pensionable ages, state-imposed retirement ages, and contractual or employer-imposed retirement ages. The key issue for many member states concerns the third category, that is whether employers are entitled to set retirement ages by contract, collective bargaining or unilaterally. Under the Directive, a requirement that an employee retire at a specified age may amount to less favourable treatment on grounds of age and may therefore be unlawful unless justifiable under Article 6. The same is true for other detriments, such as the loss of protection from unfair dismissal. This means that retirement ages must be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim must be appropriate and necessary, i.e. that the proportionality test must be satisfied.

A key issue is now whether member states are permitted to enact a blanket exemption for retirement ages that will be automatically deemed to be justified, or whether there is a further need for express justification for the introduction of a national 'default retirement age', to be demonstrated either by the member state on a national basis across the labour force, or by each employer on a case by case basis. It is likely that member states using a default retirement age will need to show that it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and that setting a default age to achieve these goals is appropriate and necessary.

While there may be legitimate labour market reasons to permit employers in certain circumstances to be able to regulate the timing of retirement of older workers, such as the need for workforce planning and the possibility of opening up vacancies for young people, it is contestable if mandatory retirement is the least restrictive method of achieving these goals. For retirement ages that are introduced by individual employers, these will have to be measured against the strict proportionality standard set out in Article 6, and the outcome will be a matter of case by case analysis.

The denial or restriction of employment rights to workers above a particular age also raises serious questions under the Directive. It is difficult to see why employees should be denied the right to challenge acts of unfair dismissal and other abuses of employment rights on the grounds of age, or granted more limited protection in labour law than employees of other ages.

Distinctions based on seniority and experience will similarly be subject to the requirement to satisfy the objective justification test. As with European sex discrimination law, the use of such distinctions will only be justifiable if serving a legitimate aim, genuinely related to the needs of the job in question, and proportionate in nature.

Conclusion

Taken together, all of these issues point towards the need for member states to take age discrimination seriously, and to be prepared to carry out the comprehensive assessment of their policies and legislation that ideally would accompany the effective transplantation of the Directive into their national legal systems.

Remke | 1988

Part I

Age and the framework equality directive

Why age discrimination?

Differentiating between individuals on the grounds of a person's age is a relatively common practice throughout the EU. Such distinctions can sometimes serve useful social or economic objectives, and are often based upon rational considerations. However, differences of treatment between different individuals or groups on the grounds of age are also often based on generalised assumptions or casual stereotypes. Both younger and older persons may be affected by such stereotypes. For example, younger persons are often assumed to lack maturity: older persons are often assumed to lack flexibility, motivation and the ability to absorb new ideas.¹

These assumptions are often highly inaccurate, and are based upon misleading and unfair stereotypes that do not reflect the true diversity of individuals within the age groups affected.² When individuals are subject to discrimination as a result of these demeaning stereotypes, their fundamental right to respect for their human dignity is violated, as they are denied equality of treatment and respect.³ Unjustified age discrimination also produces negative social consequences: affected age groups often suffer social exclusion, high levels of poverty and the denial of access to basic goods and services, which in turn imposes substantial economic and social welfare costs upon society at large.⁴

The negative impact of age stereotypes and prejudice is particularly marked in the context of employment. Access to work for both young and old is necessary to allow individuals to realise themselves through their work and to participate in society. This is reflected in the major human rights instruments, which recognise the central importance of the right to work⁵, and in the European Charter of Fundamental Rights and Freedoms. As recognised in the Lisbon agenda, there are also great economic and social advantages in ensuring age diversity in the workforce, widening participation in the labour market and combating social exclusion. However, unjustified age discrimination often deprives individuals of equal access to work opportunities. It also hinders the development of the Lisbon agenda by preventing particular age groups from participating fully in the labour market. While the use

¹ See S. Fredman, 'The Age of Equality', in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003) 21-70, especially 22-35.

² The Irish case of *Byrne v FAS*, DEC-E2002-045 is a good example of a case involving discriminatory and unfair assumptions. The case found that a 48-year old woman was refused a vocational training place, and was told at interview that older students were less successful at technical drawing and had more conflict with family commitments. The Equality Officer in finding for the claimant observed that no objective evidence to support these comments had been produced, and the interviewer seemed just to have applied a series of discriminatory assumptions in refusing her a place.

³ See Fredman, cited above at n. 1: see also C. O'Cinneide, 'Comparative European Perspectives on Age Discrimination' in Fredman and Spencer, 195-218, especially 214-5; *Age Matters: A Report on Age Discrimination*, Australian Human Rights and Equal Opportunity Commission (Canberra: HREOC, May 2000); *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (Toronto: Ontario Human Rights Commission, 2000).

⁴ See UK Employers' Forum on Age, *The Cost of Ageism* (London: EFA, 1998), quoted in H. Meenan, 'Age Discrimination in the UK' (2000) 4 *International Journal of Discrimination and the Law* 247-292; National Economic and Social Forum, *Labour Market Issues for Older Workers* (Dublin: NESF, 2003).

⁵ Article 26 of the UN International Covenant on Civil and Political Rights requires equal treatment and protection against discrimination, and guarantees rights such as the right to life (art. 6) and freedom from cruel or degrading treatment (art. 7). The UN International Covenant on Social, Economic and Cultural Rights guarantees the right to work (art. 6), to favourable work conditions (art. 7), right to an adequate standard of living (art. 11), to the highest attainable standard of health (art. 12) and to education (art. 13). The importance of these principles in the context of age equality was emphasised in the UN International Plan of Action on Ageing (1982), the UN Principles for Older Persons (1991) and the ILO Discrimination (Employment and Occupation) Convention (ILO 111). The right to life is guaranteed by ECHR art 2, freedom from degrading treatment by art. 3 and non-discrimination in the application of the ECHR rights is guaranteed by art. 14.

of age-based distinctions may sometimes be rational and necessary in the employment context, the use of unjustified assumptions and stereotypes violates basic equality rights and harms the attainment of valuable social and economic goals.

Combating such unjustified age discrimination in employment will require the use of a wide variety of policy tools, including education, training programmes and the encouragement of best practice. However, a fundamental step in any effective age equality strategy is to introduce legislation that prohibits unjustified forms of age discrimination in employment and provides effective remedies for victims of such discrimination.⁶ This legislation will also have to clarify when age can legitimately be used to differentiate between individuals and groups, and when it cannot. The Framework Equality Directive requires all member states of the EU to introduce such legislation at the latest by December 2006, and therefore is the major relevant legal instrument in the EU age equality strategy.⁷

The provisions of the equality directive

The recitals accompanying the Directive recognise the crucial importance of combating age discrimination in employment, and how it can harm both individual equality rights and important social objectives. Recitals 8 and 25 refer to the EU Employment Guidelines, which place great emphasis on supporting older workers in order to increase their participation in the labour force. Protection against age discrimination is seen as ‘an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce.’⁸ The recitals also refer to the importance of the fundamental rights of dignity and equality, and recognise that unjustified discrimination based upon stereotypes and prejudice violates these basic individual rights.⁹

The content of these recitals should be borne in mind in interpreting the Directive, and in particular its specific provisions in respect of age. Its basic objectives include ensuring respect for human dignity by protecting of the right to equal treatment and enhancing the ability of all age groups to participate in employment and employment-related activities. The Directive is not solely concerned with achieving greater economic efficiency, but adopts a rights-centred approach to age equality issues, just as it does with other equality issues.¹⁰ Age discrimination is not a subsidiary concern, nor an issue of lesser concern than the other equality grounds: it constitutes a denial of basic rights and dignity, just as do the other forms of discrimination, albeit each in their own manner.

The Directive does not define ‘age’, but unlike the US age discrimination legislation, its scope is not limited to discrimination against those above a particular age. Therefore, the provisions of the Directive must be applied so that victims of age discrimination from all age groups can vindicate their rights under the Directive, subject to necessary limitations (see below). Therefore, both younger and older workers have rights to age equality, and the implications of the Directive for younger workers should not be overlooked.

⁶ Comparative experience shows that age discrimination legislation can be effective in reducing the inequalities faced by older workers: see Z. Hornstein (ed.) *Outlawing Age Discrimination: Foreign Lessons, UK Choices* (York: Joseph Rowntree Foundation, July 2001).

⁷ Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303/16, 2 December 2000): <http://europa.eu.int/eur-lex/en/index.html>

⁸ Recital 25

⁹ See Recitals 4 to 6.

¹⁰ For an analysis of a rights-based approach to equality, see the discussion in S. Fredman, ‘Equality: A New Generation?’ (2001) 30 *Industrial Law Journal* 145.

The Directive also is not solely concerned with ensuring formal equality, i.e. that all individuals in similar positions are treated in an identical manner. Recital 26 makes it clear that the ‘prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular...age’, thereby making it clear that positive action to assist groups disadvantaged by ageist prejudices will be permissible, just as similar measures are permissible for other disadvantaged groups. The Directive is therefore concerned with combating age-based disadvantage and upholding basic rights, not just with ensuring sameness of treatment: ensuring identical treatment irrespective of age will often be an important step in securing genuine substantive equality, but sometimes differential treatment designed to redress age-based disadvantage will also be necessary.¹¹

Within the parameters of this general approach, the Framework Equality Directive establishes a general framework for prohibiting discrimination in employment and occupation on any of four grounds of age, disability, religion or sexual orientation, which member states are obliged to implement in their own national legal systems. The Directive makes some special provision for the age ground (see below), but in the main its general provisions apply across all the four grounds of discrimination to which it applies, and it requires Member States to take the same basic steps for each of the four grounds.¹²

Direct and indirect discrimination on each of the grounds is to be prohibited.¹³ Harassment on each of the grounds is deemed to constitute discrimination, and is therefore also to be prohibited,¹⁴ along with instructions to discriminate¹⁵ and victimisation connected to complaints of discrimination.¹⁶ The burden of proof is to be imposed upon respondents to prove that there has been no discriminatory treatment once a person alleging discrimination establishes facts ‘from which it may be presumed that there has been direct or indirect discrimination’¹⁷ Judicial and/or administrative procedures must be available to permit complainants to bring a legal action¹⁸, and member states will have to establish an effective system of remedies, as well as taking steps to bring existing legislation and collective agreements into conformity with the Directive’s requirements.

The Directive also clarifies that it is laying down minimum requirements, does not permit any reduction in existing protection for equal treatment (non-regression), and does not invalidate any national provisions which offer a higher level of protection for equality.¹⁹ Articles 12, 13 and 14 of the Directive require Governments to promote awareness of the issues, proposals and protection offered in the Directive, and to engage stakeholders and NGOs in the dialogue around the transposition and implementation processes.²⁰

¹¹ For an analysis of the concepts of equality underlying the structure and contents of the Directive, see M. Bell and L. Waddington, ‘Reflecting On Inequalities in European Equality Law’ (2003) 28(3) *European Law Review* 349.

¹² For the background to Article 13 of the EC Treaty and the Directive, see M. Bell and L. Waddington, ‘The 1996 Intergovernmental Conference and the Prospects of a Non-discrimination Treaty Article’ (1996) 25 ILJ 320-36, M. Bell, ‘The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?’ (1999) 6 *Maastricht Journal of European Law* 5-23, S. McNerney, ‘Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin: A Comment’, (2000) 25 *European Law Review* 317-323.

¹³ Article 2

¹⁴ Article 2(3)

¹⁵ Article 2(4)

¹⁶ Article 11

¹⁷ Article 10

¹⁸ Article 9

¹⁹ Article 8: see also Recital 28.

²⁰ The Directive does not require the establishment of an independent body with investigative and support functions, unlike the Race Equality Directive.

All these steps must be taken in respect of age discrimination just as they must be for the other equality grounds. Therefore, dialogue on how to transpose the Directive's general framework in the context of age should involve NGOs and relevant stakeholders,²¹ legislation implementing the burden of proof requirements of the Directive should also apply to age-related cases, harassment on the grounds of age needs to be prohibited, sufficient awareness of this ban should be promoted, and so on. Article 16 requires Member States to take the necessary measures to ensure that the use of differences of treatment like age limits in laws, regulations and collective agreements comply with the multiple requirements of the Employment Directive.²²

The unique nature of age discrimination

However, when implementing these general provisions of the Directive, particular issues arise in respect of age discrimination that distinguish age from the other grounds. Firstly, a person's age will obviously alter over time, meaning that she or he may be subject to different forms of stereotyping, and will certainly have different expectations, goals and relationships with employers and fellow employees during the course of this process. There are no fixed characteristics that define particular age groups, unlike the case in general with the other equality grounds, nor do individuals remain fixed within particular groups, nor do age-based assumptions by others about individuals of particular ages remain static.

This can make it difficult to compare the treatment of an individual to that of others. It may be impractical in various circumstances to compare different age groups (for example, to compare those over sixty with those under sixty), given the fluid and indeterminate nature of 'age groups'. All of this makes the standard approach in direct discrimination cases of identifying an appropriate comparator more difficult to apply in the context of age than for the other equality grounds, which will be discussed further in Part 11 below. It also can cause complications in the application of the indirect discrimination test: see below also.

Also, as discussed above, age distinctions based upon unfair assumptions and stereotypes are undesirable: but other distinctions upon the grounds of age are rooted in rational considerations that are not incompatible with the recognition of individual dignity, serve valuable social and economic objectives, and often are designed to benefit or protect particular age groups. The general framework of the Directive in Article 4 permits a difference of treatment based upon a characteristic related to one of the four grounds when that characteristic constitutes a genuine and determining occupational requirement for a particular post (a 'GOR'). However, unlike the other equality grounds, there are many circumstances where distinctions based upon age may be rational and acceptable given the overall rights-based context of the Directive, but where the age distinction in question will not constitute a GOR.

Sometimes, such distinctions may not be based directly upon an individual's age, but may be based upon characteristics that are in reality closely linked to age. 'Seniority', 'maturity' and 'experience' are all examples of this type of *age-linked characteristic*, as they are often only capable of being acquired by those who have spent a

²¹ Very few countries have set up an information campaign to inform citizens about their age equality rights. In many countries, the only information supplied to the general public is the European Commission campaign 'For Diversity - Against Discrimination.' Without national initiatives, there is a real danger that public knowledge of age discrimination legislation will remain inadequate. See Age Concern, *Addressing Age Barriers* (London: Age Concern, 2004). There also appears to be a reluctance to consult with NGOs on age equality issues: Denmark, Cyprus, Italy and Slovakia are four examples cited by AGE where consultation with NGOs has been inadequate: see AGE's *Analysis of the State of Transposition of the Employment Directive at December 2004* (Brussels: AGE, 2004).

²² None of the Member States have announced such a comprehensive overhaul as yet.

number of years in an activity, which in turn means that they will usually only be acquired by those of a certain minimum age. When will the use of such age-linked characteristics effectively constitute direct discrimination on the grounds of age, and when will their use be justified and proportionate? Also, given that many characteristics used to differentiate between individuals such as education, knowledge, communicative ability and so on are usually acquired over time, will their use constitute the application of apparently neutral criteria that actually disadvantage persons of a particular age and which therefore will require justification under the indirect discrimination provisions of the Directive? Both these issues are further explored in Part II and III.

Similarly, again unlike the case with many of the other equality grounds, a rational case for treating age itself as a potentially relevant and legitimate characteristic can be made in quite a few circumstances. Age is often used as a 'proxy' for other characteristics such as maturity, health or vulnerability. Often, the use of age in this way as a proxy will be very questionable, especially when its use means that the individual characteristics and abilities of employees are not taken into account: using age as a proxy for health, ability to absorb new information or competency is particularly questionable.²³ However, arguably, in other circumstances, the use of age as a proxy will be necessary and unavoidable, especially when assessing the qualities of each individual is not possible or will be excessively costly in the circumstances. For example, age-based distinctions may classify all those within a particular age group as lacking some necessary quality or requiring special protection, such as when those below a particular age are prohibited from working in particular environments. This general rule does not take into account the different levels of maturity of different individuals: however, assessing the level of maturity of each and every person in the relevant age group may not be possible, so the use of age as a proxy to establish a general rule will be justified. Often, age will be also used as a direct indicator of key information, as when a person's age is used to calculate the length of time that person will remain in employment. Again, this will sometimes see age used unfairly and in a prejudicial manner: but again its use may be necessary in particular circumstances.

Age discrimination controls need therefore to establish a framework for distinguishing between circumstances where the use of age (or age-linked characteristics) is a legitimate proxy, and when it is not. The Directive achieves this by specifically exempting in Article 6 the use of age-based distinctions from its general prohibition on direct discrimination on the prohibited grounds, if the use of such age-based distinctions can be demonstrated to be objectively necessary to achieve a legitimate aim and proportionate to the aim sought. In contrast, direct discrimination on the other equality grounds is prohibited, subject to the general GOR defence. Article 2(2)(b) provides that indirect age discrimination can also be justified if objectively necessary and proportionate, as is the case with indirect discrimination across all the other grounds covered by the Directive.

This 'objective justification' test must be applied in a rigorous manner, to prevent unfair stereotyping: but it also has sufficient flexibility to allow the use of age and age-linked characteristics where appropriate and justified. What exemptions will be justified under this test will be discussed in Part III. For now, it is worth noting that this test should be applied with reference to the overall rights-based framework of the Directive, including the provisions of Article 7, which permit member states to take positive measures to prevent or compensate for existing disadvantages linked to any of the grounds.

²³ See J. Grimley-Evans, 'Age Discrimination: Implications of the Ageing Process' in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Hart: 2003, Oxford), 11-20. See also in the same book, T. Schuller, 'Age Equality in Access to Education', 117-144.

The scope of the directive

The general scope of the Directive also gives rise to issues particular to age. Article 3 of the Directive defines employment and occupation in broad terms as including access to employment, recruitment, promotion, all types and levels of vocational training,²⁴ working conditions, pay, dismissal, and membership of or involvement in employers' bodies, trade unions and other professional organisations. Practical work experience is covered, which could cover certain types of unpaid voluntary work.

Article 3(3) and Recital 13 clarifies that the scope of the Directive does not include state social security and social protection schemes whose benefits are not treated as income within the meaning given to that term within EC law, nor to 'any kind of payment by the State aimed at providing access to employment or maintaining employment'. This restriction of the scope of the Directive exempts state social security schemes from the Directive's general provisions, and thus from the requirement to justify age-based distinctions. Recital 14 then states that the Directive is 'without prejudice to national provisions governing retirement ages': the meaning of this is unclear, but appears to confirm that state-imposed retirement ages related to pension provision are exempt from the reach of the Directive's age provisions.

The combined effect of both these exceptions means that the use of age distinctions in state social security and pension schemes will not have to be objectively justified under Article 6. This was done to ensure legal certainty, as well as to allow member states flexibility in designing and reforming their social security frameworks. However, this wide exception does not apply to any benefits, including occupational security and pension schemes, which may be provided by employers (including public bodies) to supplement national social security provision. Nor does it seem to apply to mandatory retirement ages imposed by employers, even where state legislation permits employers to introduce such mandatory retirement schemes, which instead will have to be objectively justified like any other form of age-based distinction.²⁵

Whether the use of age limits by employers will be permitted will therefore normally depend on whether an objective justification can be established under Article 6 (1) (see Part III below). However, under Article 6(2) member states are permitted to introduce a special exemption from the age provisions of the Directive to allow occupational security schemes to fix ages for admission or entitlement to retirement or invalidity benefits (including fixing different ages for employees or groups of employees), or to use age criteria in actuarial calculations in such schemes, provided that this does not result in sex discrimination. Article 3(4) also specifically permits member states to exempt their armed forces from the age provisions of the Directive.

²⁴ It is unclear as to the extent to which adult learning including community-based education will be covered. Vocational training has been defined as a course of education that prepares students for a qualification for a specific profession, vocation or job, or which provides students with the special skills required for the exercise of such profession, vocation or job, and is thus defined by reference to the nature of the course, rather than the place or institute at which it takes place: see *Gravier v Liège* (C 293/83) [1985] ECR 593 and *Belgium v Humbel* (C263/86) [1988] ECR 5365. The Directive does not prohibit discrimination in respect of education generally (see Article 3(1) (a) and (b)).

²⁵ As previously mentioned, the wording of Recital 14 is not entirely clear in referring to the Directive as not 'prejudicing national provisions governing retirement ages'. In the absence of any exemption in the main text of the Directive for employer-imposed retirement ages, it appears likely that the Recital can be interpreted as referring only to retirement ages imposed as part of state social security schemes (exempt under Article 3(3)). National legal measures that may permit employers to make use of mandatory retirement ages will have to be justified in accordance with Article 6(1): see Part III below, and Ch. 4 'Retirement Ages' in *Equality and Diversity: Age Matters* (London: DTI, 2003).

Other provisions that modify how the general framework of the Directive is to be applied, which are not specific to age but do have considerable significance for how the age provisions will be applied, are:

- Positive action is permitted, as discussed above, to prevent or compensate for existing disadvantages (Article 7.1 Recital 26));
- Genuine and determining occupational requirements are permitted, that allow for direct discrimination, but only if the objective is legitimate and the requirement is proportionate (Article 4.1, Recital 23);
- Measures laid down by law are exempted which, in a democratic society, are necessary for public security, maintenance of public order, crime prevention, health protection or protection of others' rights or freedoms (Article 2.5);
- The Directive 'does not require the recruitment, promotion, maintenance in employment, or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned, or to undergo the relevant training'...(Recital 17)
- In particular, armed forces, police, prison and emergency services are not required to recruit, or maintain in employment, persons who do not have the required capacity to carry out their range of functions, having regard to legitimate objectives of preserving operational capacity (Recital 18).

Implementing the directive

Special provision is also made for age in the implementation requirements imposed by the Directive. Its general provisions had to be implemented by member states by 2 December 2003, but Article 18 permits a member state to wait a further three years (to 2 December 2006) before implementing the provisions concerning age discrimination, 'in order to take account of particular conditions.' The 'enlargement states' had to implement the provisions of the Directive by the date of accession. Germany, Sweden, Belgium, the Netherlands and the UK have formally asked for an extension of the deadline by 3 years and thus have until December 2006 to transpose the employment directive for the grounds of age. Denmark took advantage of a delay of one year. However, Belgium, the Netherlands and Denmark have not awaited the end of the deadline and have already introduced legislation combating discrimination on the grounds of age, along with the majority of states such as Spain and Italy which did not take advantage of the delay period. Luxembourg has recently implemented the age provisions of the Directive. In Lithuania, some amendments to bring existing laws into line with the directive were due to enter into force in January 2005. Malta is also in the process of adapting its existing legislation.²⁶

It is clear from the experience of the member states which have introduced age discrimination legislation in conformity with the requirements of the Directive that age discrimination cases will be in all likelihood be common throughout much of the EU. In the Republic of Ireland, for example, in the period 2000-2003, 17% of employment discrimination claims referred to the Equality Tribunals have been on the age ground, and this proportion has stayed fairly constant.²⁷ The claims covered the full range of employment, from advertising job vacancies to dismissal and severance packages, as well as vocational training and professional bodies. It is clear therefore that age discrimination cases under the Directive might be expected to be quite diverse and to involve all stages and forms of employment. The majority of decided cases in Ireland so far have concerned people aged

²⁶ See AGE, *AGE's Analysis of the State of Transposition of the Employment Directive at December 2004* (Brussels: AGE, 2004).

²⁷ ODEI/The Equality Tribunal, *Annual Reports, 2000-2003* (The figures quoted are for claims concerning a single equality ground. A significant number of other claims are referred on multiple grounds: no breakdown of grounds is available for these, but a substantial number would still involve age.)

between forty and sixty. However, there have also been a significant number of claims of discrimination against younger workers.²⁸ Initial experience from the Netherlands and Belgium²⁹ appears again to suggest that age discrimination cases will form a substantial part of case-law generated as a result of the provisions of the Directive, and anecdotal evidence from several member states indicates that age discrimination remains a considerable problem.³⁰

²⁸ For example, the first Irish decision on age-based harassment concerned a young female manager who was consistently ridiculed before other staff by an older male colleague as a "young, fooling girl": see *A Named Female Complainant v a Company*, DEC-E2002-014.

²⁹ In 2003, claims based on age discrimination constituted 7.5% of the caseload of the Belgian Centre for Equal Opportunities (20 complaints). Half of these concerned employment complaints. See Age Concern, *Addressing Age Barriers* (London: Age Concern, 2004).

³⁰ See e.g. N. Trimikliniotis, *Report on Measures to Combat Discrimination in the 13 Candidate Countries* (vt/2002/47): Country Report Cyprus: European Network of Legal Experts in the Non-discrimination Field (Netherlands: human european consultancy and Brussels: Migration Policy Group, November 2004).

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Part II

Direct and indirect discrimination

Having discussed the general provisions of the Directive and the place of age within this general framework, it is necessary to examine in greater detail how direct and indirect age discrimination will be defined under the terms of the Directive, and what evidence will be necessary to establish the existence of either type of age discrimination. Part III will then examine the scope of the justification defence provided for by Article 6 and the other exceptions to the general prohibition on age discrimination.

Direct discrimination and the comparator problem

The Directive defines direct age discrimination in Article 2.1.2(a): ‘direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the [ground of age]’. Therefore direct discrimination on the grounds of age as defined in Article 2(2)(a) will occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of age.

‘Less favourable treatment’ will involve the imposition of some detriment upon a claimant, the nature of which will be similar to the types of detriment recognised in gender discrimination law. The wording of the Directive appears sufficiently wide to include less favourable treatment on the grounds of someone’s *perceived age*. Article 2(3) provides that harassment as defined by the Directive can constitute discrimination, as can instructions to discriminate (Article 2(4)); therefore, the types of conduct that can give rise to a direct discrimination claim are wide.³¹

To establish a successful claim for direct discrimination, a claimant needs to show that he or she was treated less favourably than another person in the same situation was, is or would have been treated. The Directive therefore adopts a ‘comparator approach’: a claimant will have to point to a real or hypothetical ‘comparator’, compared to whom he or she was treated less favourably on the grounds of age.

However, as already discussed above, the fluid nature of a person’s age, the uncertain and shifting nature of ‘age groups’, the changing expectations that accompany changes in age, and the differences in position and expectations that often exist even between persons of very similar ages all make the application of the comparator test difficult in the context of age. If a court or tribunal is hearing a claim of direct age discrimination brought by a sixty-three year old nearing retirement, should the appropriate comparator be sixty-one, fifty-five, twenty-one, or any other age? A sixty-three year old employee nearing retirement may be in a wholly different position to a sixty-one year old in many key respects, and both may be in a different position to a fifty-five year old. Similarly, an eighteen-year old employee who has just started work may have very different expectations compared to a twenty-five year old or thirty-five year old who has also just entered the work force. Very different results may be produced depending upon what comparator is used in any given case.

The facts of the Irish case of *Perry v Garda Commissioner*³² illustrates the problem well: the claimant alleged that a voluntary early retirement scheme gave greater retirement incentives to candidates aged under 60, and thus

³¹ The case law decided thus far by the Dutch Equal Treatment Commission indicates that an applicant must, in order for him/her to successfully lodge a complaint, have suffered a sufficiently *measurable* (meetbaar) and *existing* (werkelijk) detriment. See M. Gijzen, Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004).

³² *Perry v Garda Commissioner*, DEC-E2001-029; see also M. Reid, ‘Age Discrimination in Employment: Issues Arising in Practice’, lecture delivered at Academy of European Law, Trier, 2 October 2004, available at http://www.era.int/www/gen/f_19096_file_en.pdf (last accessed 17 January 2004).

discriminated on the grounds of age. The complainant, who was 64, argued that the severance package payable to her was substantially smaller than that payable to her chosen comparator, who was 59. The respondent employer argued that the differences were not due to age, but were designed to compensate the younger employee for losing more years' paid employment. As the 59-year old did have more years to work until her formal retirement date, the chosen comparator was in a very different position than the 64-year old, and thus a comparison between the two could not in itself demonstrate the existence of age discrimination. It was only because the Equality Officer deciding the case was prepared to use the device of a 'hypothetical comparator', that this issue could be resolved (see below).³³

There is no doubt that courts and tribunals may in practice be able to identify actual or hypothetical comparators from the specific circumstances of a particular case. If an older worker is replaced by a considerably younger employee, or a younger employee is required to undertake degrading tasks when older workers of the same rank and seniority are not, then the appropriate comparator may be obvious from the facts of the case.³⁴ However, where an obvious comparator does not exist, then difficulties may arise. National implementing legislation has in the main just incorporated the text of the Directive, or used alternative wording that has not clarified how the comparator requirement should be applied.³⁵

The simplest solution to this problem would be for national legislation to provide that it was discriminatory to subject a person to detriment on the grounds of their age, and thus avoid the need to show a comparator.³⁶ The European Court of Justice has adopted this approach in the context of pregnancy (because there was no possible comparator to a pregnant woman),³⁷ as have various national courts in the context of disability discrimination.³⁸

However, the Directive itself retains the comparator requirement, as have all states that have thus far implemented it. An alternative way forward is to focus upon the core issue of whether the claimant has suffered age-based detrimental treatment by making use of hypothetical comparators, that is by asking how a comparator 'would have been treated'. This allows the court or tribunal to identify whether age was a causative factor. Several hypothetical comparators could also be used in combination if necessary, to clarify whether and how treatment would vary with age.

³³ The Equality Officer held that age discrimination existed, but that it was not unlawful at the time, due to transitional provisions allowing age-related pay to continue until three years after the Irish equality legislation came into effect. Subsequent legislative changes now permit the use of age distinctions in voluntary retirement packages, and the Irish government considers that the use of these age distinctions can be justified under Article 6 of the Directive.

³⁴ For an example, in an Irish case about vocational training, the complainant showed that she was a mature student with young children, and was significantly older than all the other students in her class, who were therefore treated as the obvious relevant comparators. See *Minaguchi v Wineport Lakeshore Restaurant*, DEC-E2002-020.

³⁵ The Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is not clear from the legal text, nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared. See M. Gijzen, Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004).

³⁶ See Fredman, cited above, 56; see also B. Hepple, 'Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC', in S. Fredman and S. Spencer, *Age as an Equality Issue* (Oxford: Hart, 2003), pp. 71-115, at 82. This would of course be compatible with EC law, as Article 8(1) permits member states to provide a higher level of protection than that required by the Directive.

³⁷ See e.g. C-177/88 *Dekker* [1990] ECR I-394.

³⁸ See e.g. *Clark v Novacold* [1999] 2 All ER 977 (CA).

In *Perry*, the Irish case discussed above, the Equality Officer investigated the claim by considering the hypothetical example of two workers taking advantage of the early retirement scheme at issue, with both having identical service records, but aged respectively 60 plus one day, and 60 minus one day (payments under the scheme were intended to compensate for loss of future earnings, and varied with age). The use of the two hypothetical comparators clarified that the scheme would result in the younger worker gaining almost IR £6,000 more, which clearly was not proportionate to the two-day difference between their loss of future earnings. The Equality Officer concluded that the 64-year old claimant had suffered discriminatory treatment. The use of a hypothetical set of comparators allows a greater focus on the issue of whether detriment exists, and may avoid the danger of an excessive formalism that might treat the absence of an actual comparator as a reason for denying a remedy.

Age as a ‘material factor’

Once less favourable treatment can be demonstrated, the next key issue that arises is the question of when courts and tribunals will be able to infer that the less favourable treatment in question is based on age grounds. In some circumstances, less favourable treatment will obviously be based directly upon age.

However, in many other cases there will be no express reference to age as the reason for the less favourable treatment, but other age-linked factors might be relevant to the employer’s decision. Characteristics such as seniority, experience, high pay and maturity are linked to age, as older workers will have greater opportunities to acquire these characteristics. Similarly, characteristics such as high levels of physical fitness, knowledge of ‘youth culture’ and a willingness to travel abroad for extended periods may all be factors linked to age, which this time are generally more readily acquired or possessed by younger workers. To what extent should courts and tribunals be willing to treat reliance by an employer upon a factor that is wholly or partially linked or related to age as constituting direct discrimination on the grounds of age?

Hepple has argued that courts and tribunals in applying the Directive or national laws should apply a similar version of the ‘but for’ test utilised by the UK courts in the gender discrimination context³⁹, and ask whether a claimant’s age was a substantial factor in the decision to subject the claimant to less favourable treatment, or played a role in the making of that decision.⁴⁰ The US Supreme Court adopts a similar approach in its age discrimination case-law,⁴¹ as does the Dutch Equal Treatment Commission.⁴² The Dutch Commission has emphasised in applying this approach that age need not be the sole reason for the decision in question: if age has been a material factor or ‘has also played a role’, that will suffice.⁴³

This approach appears consistent with much of existing gender discrimination case-law throughout the EU. Hepple suggests that this test would mean that the use of age-linked factors which are ‘analytically separate’ from

³⁹ See e.g. *James v Eastleigh BC* [1990] 2 AC 751

⁴⁰ See Hepple, cited above, at 82.

⁴¹ See *Hazen Paper v Biggins* 507 US 604 (1993)

⁴² See M. Gijzen, Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004). See in particular Case 2004/130 of 11 October 2004, where the Equal Treatment Commission held that to establish an unlawful distinction on a prohibited ground, it is not necessary that this ground has been the *only reason* for the alleged distinction, as it suffices if the prohibited ground has *played a role*.

⁴³ See the recent opinion by the Equal Treatment Commission, *Opinion 2004-130*, where the Commission refers to other opinions in which this same stance is reflected (e.g., opinions 1995-15; 1999-34; 2001-113, RN 2002, 1507, annotated by M.S.A. Vegter and 2004-26).

age, such as seniority, experience, qualifications and pay levels would not be deemed to constitute direct age discrimination (even if they may give rise to issues of *indirect* age discrimination: see below). However, factors that are essentially ‘age proxies’, that is, which are directly linked and act as a proxy for a person’s age, will be deemed to constitute direct discrimination, as age will actually be a ‘material factor’ in the decision-making process.⁴⁴ Examples of the latter would be when an employee is dismissed for being ‘around for too long’ or was denied a promotion on the grounds of being ‘overqualified’, when the decision was essentially based upon their age.⁴⁵ The ‘material factor’ test would also ensure that the use of age categories (such as ‘younger’ or ‘older’) would constitute age discrimination, which the Dutch legislation implementing the Directive’s age provisions makes clear.⁴⁶ As per usual in EC anti-discrimination law, it will be irrelevant whether or not the employer who relies on age as a material factor had an actual intent to discriminate.⁴⁷

The burden of proof provisions of the Directive will also be of assistance here. According to Article 10(1), if a claimant can establish a *prima facie* case that age was a material causal factor in the decision to subject him or her to less favourable treatment, then the respondent will have to prove that age was not a factor, or that its use was justified. As with the other equality grounds, in establishing a *prima facie* case a claimant will be able to ask a court or tribunal to draw an inference from particular circumstances that age discrimination was the reason for their less favourable treatment.

Inferring direct discrimination

The existing case-law from Ireland, the Netherlands and Slovakia on age discrimination gives a good indication of when the presence of age discrimination as a material factor in a decision will be inferred from a set of facts. In cases where one candidate for a post or a promotion is preferred over another candidate, the mere fact that the candidates are of different ages will not be enough to shift the burden of proof to the respondent.⁴⁸ However, where a complainant is a different age than the comparator and appears to be objectively better qualified,⁴⁹ or when additional circumstances exist that may indicate the presence of age bias, an inference of age discrimination may be established. In other circumstances, a variety of factors may convince the tribunal that an inference of

⁴⁴ Hepple, at 82.

⁴⁵ See *Sperling v Hoffman La Roche Inc* 924 F Supp 1396 (1996) (US District Court); *Taggart v Time Inc.* 924 F2d 43 1991; *Clancy v Preston Trucking Company* 967 F. Supp. 806 (D. Del. 1997).

⁴⁶ See Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law*, M. Gijzen, December 2004. Gijzen notes that ‘the Age Discrimination Act’s definition of *direct distinction* only mentions the word ‘*distinction*’, whereas its counterpart definitions in the General Equal Treatment Act and the Disability Discrimination Act use the wording ‘*distinction between persons*’... I suggest that this slight difference in legal drafting might be explained as follows. It follows explicitly from the Explanatory Memorandum to the Age Discrimination Act, that *direct age distinction*, might not only occur if a person’s age forms the basis of a given decision but also where *age categories* are employed in a given decision-making process. In fact, then a distinction is made between *groups of persons*, rather than between *persons*.’

⁴⁷ See I.P. Asscher-Vonk, ‘Towards One Concept of Objective Justification’ in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives* (The Hague: Kluwer Law International, 1999) p. 39-51, at p. 43.

⁴⁸ *Margetts v Graham Anthony*, DEC-E2002-050; *Sheehan v DPP* DEC-E2002-047; *McCormack v Dublin Port* DEC-E2002-046.

⁴⁹ *Margetts v Graham Anthony*, DEC-E2002-050: see also M. Reid, ‘Age Discrimination in Employment: Issues Arising in Practice’, lecture delivered at Academy of European Law, Trier, 2 October 2004, available at http://www.era.int/www/gen/f_19096_file_en.pdf (last accessed 17 January 2004); H. Meenan ‘Age, the Individual and the Law: part 1’ (2002) 20 *Irish Law Times* 154-158; H. Meenan, ‘Age, the Individual and the Law: Part 2’ (2002) 20 *Irish Law Times* 170-18.

discrimination is appropriate. These may include some or all of the following, which will be familiar from the gender equality context:

- A marked statistical difference in success rates for different age groups in apparently similar circumstances;⁵⁰
- A lack of rationale for decisions that appear to disregard relevant considerations and where the claimant is older and better qualified;⁵¹
- Comments that indicate an intention to discriminate;⁵²
- Lack of transparency, or unexplained procedural unfairness⁵³, may create an inference of discrimination;⁵⁴
- Mismatch between formal selection criteria and those apparently applied in practice may also create an inference of discrimination;
- A pattern of significant inconsistency with older candidates' previous assessments;⁵⁵
- Language in advertisements that given their natural and normal meaning indicate an intention to rely upon age as a material factor;⁵⁶
- Discriminatory questions asked at interview: age-discriminatory statements or questions during selection are treated by the Irish tribunals as unlawful discrimination, which will ground an award of compensation for age discrimination, even where the selection itself is held not to be discriminatory.⁵⁷

Conversely, when selection criteria appear objective, and seem to have been fairly applied in practice, or statistics suggest that success rates are broadly similar for different age groups, this may weigh against an inference or a conclusion of age discrimination.⁵⁸ However, the fact that persons of a similar age as the claimant have not been subject to the detrimental treatment in question will not in itself prevent an inference of age discrimination, if

⁵⁰ See *O'Mahony v Revenue Commissioners* EDA033;

⁵¹ In Slovakia, the District Court in Zvolen of June 11, 2003 No. 7C 190/02-309 held that a research worker with more than 20 years experience in the field of forestry had been directly discriminated against on the grounds of age when she was excluded from the position of a coordinator of a project, even though she developed the initial project proposal and had been mentioned as the coordinator of the project in the project documentation. The employer decided without consulting her to appoint another employee with lower qualifications and less experience as coordinator. The lack of consultation combined with the absence of good cause for the decision and the difference in qualifications and experience lead to an inference of the existence of direct discrimination on the facts.

⁵² *A Firm of Solicitors v a Worker*, Labour Court EED011, 21 May 2001.

⁵³ See *Minaguchi v Wineport Lakeshore Restaurant*, DEC-E2002-020; see also the Dutch Equal Treatment Commission decision in Case 2004/130 of 11 October 2004.

⁵⁴ See also the decision of the Dutch Equal Treatment Commission in Case 2004/156 of 3 December 2004, where an employer *inter alia* failed to adequately react to the applicant's complaints of age discrimination by failing to mention the possibility of submitting a complaint of discrimination under the (internal) individual complaints procedure.

⁵⁵ *O'Mahony v Revenue Commissioners* EDA033

⁵⁶ *Equality Authority v Ryanair* DEC-E/2000/14.

⁵⁷ *O'Mahony v Revenue Commissioners* EDA033. In this case, four candidates aged over 50 claimed that they had been treated less favourably than younger candidates of similar merit. The Labour Court found statistical evidence suggesting age discrimination, but was prepared to infer discrimination from a question put to one candidate as to 'why he was seeking promotion at this stage of his career'. The Court accepted that the comment related directly to his age, and held that 'apart from the question being offensive and discriminatory in the case of the person to whom it was put, it also indicates that, probably subconsciously, the age of the candidates had become a matter of some relevance in the selection process ... this is evidence of relevance to the whole case, and not just to the [complainant concerned].'

⁵⁸ *Sheehan v DPP*, DEC-E2002-047; *McCormack v Dublin Port* DEC-E2002-046. See also *Freeman v Superquinn* DEE0211, where the Labour Court found that a three-year difference between candidates was not sufficient (combined with unexplained procedural unfairness) to suggest age discrimination, while in *Reynolds v Limerick Co Council* EDA048 the Court held that an eight-year age gap was large enough.

other factors exist that might support such an inference.⁵⁹ The real circumstances of a case have also to be considered: initial acceptance by claimants of voluntary redundancy schemes, particular working conditions or other treatment that may be apparently legitimate may nevertheless constitute direct age discrimination if particular groups of employees are effectively coerced into accepting this treatment.

This general approach to inferring that less favourable treatment is based on age has been described as a ‘rational choice’ standard of scrutiny, and strongly resembles that adopted by the ECJ and courts across the EU in the context of gender equality. The same approach to inferring when a distinction is based on age will in all likelihood be adopted by many national courts and the ECJ in respect of age.

Indirect discrimination

According to Article 2.1.2(b), indirect age discrimination will exist where a) an apparently neutral provision, criterion or practice b) puts persons of a ‘particular age’ at a c) ‘particular disadvantage’ compared to others unless that provision, criterion or practice can be d) objectively justified.

The same general approach to the definition of what constitutes a ‘provision, criterion or practice’ that currently is adopted by national courts and the ECJ in the context of gender discrimination⁶⁰ will presumably be adopted by courts and tribunals across the different equality grounds, with age being no exception. Existing approaches as to when indirect discrimination can be inferred, especially from the existence of statistical evidence, will presumably also be applied in the age context. The Directive provides in Recital 15 that ‘the appreciation of facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with the rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means, including on the basis of statistical evidence.’

Similarly, the existing approach adopted in the gender context to the application of the justification test will presumably also be applied in the age context, with its use of a well-developed proportionality standard to assess whether the use of an apparently neutral provision, criterion or practice that would put persons having a particular age at a particular disadvantage compared with other persons may be justified. Therefore, for the most part, implementing the Directive’s provisions in respect of indirect age discrimination should give rise to few problems that are particularly unique to the age context. However, the application of indirect discrimination tests tend to give rise to complex and sometimes difficult issues across all equality grounds, and two issues in particular could arise with indirect age discrimination.

The scope of indirect discrimination

The first issue concerns the fact that ‘almost any criterion or practice can be potentially indirectly discriminatory’,⁶¹ especially on the grounds of age. Experience, ‘know-how’, educational qualifications, decision-making capabilities, emotional maturity and almost any other neutral criterion that might be applicable in the employment context

⁵⁹ In *O’Connell v Consolidated Coin* 517 US 308 (1996), the US Supreme Court held that if the claimant was replaced by a person who was also within the age group protected by the US legislation (40 years and older), this could still constitute age discrimination, despite the fact that the comparator was within the protected age group.

⁶⁰ See e.g. *Bilka Kaufhaus C-170/84* [1986] ECR 1607.

⁶¹ Fredman, cited above, 58.

could put persons of a particular age at a disadvantage (as discussed in Part 1). Frequently, as with educational qualifications, maturity and decision-making capabilities, older workers will have had greater opportunity to attain desirable qualities than younger workers. Other qualities, such as knowledge of computers or physical fitness, may be more likely to be found in younger workers. In general, the application of almost any provision, criterion or practice relevant to employment decisions is likely to put some age group at a disadvantage.

This however does not pose any particular legal or practical problems: if a practice, provision or criterion can satisfy the test of objective justification, then employers have nothing to fear from its use. Cost factors for example may justify the preferential dismissal of higher paid workers during redundancy programmes, even though this would be likely to have a disparate impact upon older workers. For another example, market forces were accepted as a sufficient justification for paying a younger female solicitor more than an older male counterpart doing similar work in the Irish case of *Glen v Ulster Bank*.⁶² The respondent had to recruit urgently an experienced specialist to cover a particular project; such qualifications were in high demand, and realistically, the respondent had no choice but to pay the complainant the price specified by the younger worker in those circumstances. In fact, the existence of the objective justification test plays a valuable role, as it ensures that the criteria used in employment decisions are appropriate to the job in question and screens out irrelevant criteria.⁶³ Only those which cannot be shown to be justified, or which are applied in an unfair manner, will be unlawful discrimination.

This will particularly impact upon the introduction of unnecessary job requirements, such as a requirement for knowledge of computing skills when no real expertise is actually required, or the exclusion of particular candidates from serious consideration for a post on indirectly discriminatory grounds. For example, a recent Irish case concerned a candidate rejected as ‘overqualified’ without an interview. The complainant conceded that an overqualified candidate might lack motivation for the particular post in question, but argued that this should be tested at interview rather than casually assumed by the employer, and succeeded in establishing the existence of indirect age discrimination: the practice of not calling overqualified persons for interview was held to constitute indirect discrimination against older workers which could not be justified.⁶⁴

Establishing ‘disadvantage’

More complex issues arise with respect to the requirement that a neutral provision, practice or criterion must put persons of a ‘particular age’ at a disadvantage. As Hepple notes, this wording implies that if two or more persons of a particular age suffer disadvantage, this will constitute indirect discrimination, without the need to show that a particular *age group* has suffered a disadvantage. It is unclear what effect this provision will have. Indirect discrimination is primarily concerned with disadvantages that are imposed on particular *groups*, rather than *individuals* (with whom direct discrimination is concerned): it may be difficult in many cases to demonstrate that ‘persons of a particular age’ have been placed at a definite disadvantage without analysing the impact of the apparently neutral criterion in question upon the relevant age group to which they belong.

However, given the fluidity and diversity of age groups, it may prove very difficult in practice to define the relevant age group in indirect age discrimination cases. Persons of a ‘particular age’ may vary immensely in terms of qualifications, competencies, skills, aspirations, financial position and other characteristics. For example, if a claimant alleges that a requirement that job applicants possess a particular skill puts persons of his particular age

⁶² *Glen v Ulster Bank*, DEC-E2004-020

⁶³ *Fredman*, 58-59.

⁶⁴ *Noonan v Accountancy Connections*, DEC-E2004-042

at a disadvantage, should the relevant age group be defined as a) all of those persons who are of his actual chronological age, b) all those who are of a similar age, c) all those persons of an identical/similar age who are potential applicants for the job in question d) all those of an identical/similar age with a similar educational background, e) all those of an identical/similar age resident in a particular geographical area, or f) some other group?

The same problems exist in different forms across all the equality grounds, but the extent to which considerable variances exist within age groups makes these problems more complex. Very different results may flow from whichever age group is selected, and will vary from context to context.⁶⁵ For similar reasons, it may be difficult to select a comparator age group in order to demonstrate disadvantage. As in the case of direct discrimination, the fluid nature of age groups, and the constantly shifting comparisons that can be made between different age groups, presents difficulties in identifying suitable comparators.⁶⁶

However, these difficulties are not insurmountable. The Directive only requires that 'detriment' be shown, avoiding the need to show substantial disadvantage, which in the age context could be very difficult to prove. By its reference to 'particular age', it also allows courts and tribunals considerable flexibility in defining who constitute the relevant groups in any given context. This means that the definition of the appropriate age group can be calibrated as necessary to determine the impact of a particular provision or criterion, and should prevent an excessive reliance upon strict chronological categories that may be too formalistic and narrow to reflect the fluid nature of age groups. The development of case-law in the gender discrimination context can provide guidance as to who should be deemed to constitute the relevant groups, especially where apparently neutral criteria have been challenged on the basis that they put members of a particular sex who are of a particular age at a disadvantage. Age presents challenges in applying the indirect discrimination test, but many of the same problems arise with respect to gender equality issues.

⁶⁵ For example, refusing to call 'overqualified' applicants for interview may in usual circumstances disadvantage older workers: see *Noonan v Accountancy Connections*, DEC-E2004-042, referred to above. However, implementing the same practice in a particular information technology sectors might actually disadvantage younger workers, given the rapidity of promotion for recently employed graduates within particular IT sectors.

⁶⁶ These difficulties may have contributed to the reluctance of the US Supreme Court to confirm that the US age discrimination legislation has a 'disparate impact' dimension: see *Hazen Paper v Biggins* 507 US 604 (1993), especially the sceptical views expressed by Kennedy J. in his concurring opinion. However, it should be remembered that the US legislation varies considerably from the framework of the EU Directive.

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Part III

Limitations and derogations

The limitations to, and derogations from, the Directive's general prohibition on age discrimination in employment and occupation give rise to important legal issues. As discussed in Part 1 of this report, age discrimination legislation has to distinguish between the use of age distinctions which are based upon unfair and demeaning stereotypes, and those which are rational, necessary, serve important social and economic objectives and do not infringe basic principles of human dignity. Age can be used as a proxy for other characteristics such as health or experience, or it can be used as a direct indicator of information about individuals, such as when they will retire; or it can be claimed to constitute a genuine occupational requirement for a particular post. Sometimes, the use of age to distinguish between individuals in these ways will be legitimate and necessary: sometimes, in contrast, it will constitute a denial of equality and dignity. A person's age will often not be a very accurate indicator of their abilities and competence, and the use of age distinctions often relies upon stereotypes and assumptions that tend to ignore the diversity of individuals within particular age groups. Therefore, a rights-based approach to age discrimination should require that a clear justification exists for the use of age-based distinctions, and in particular that their use is objectively necessary to achieve a legitimate aim and is also proportionate in the particular circumstances at issue.

The Directive adopts this approach in defining what limitations exist on its general prohibition of age discrimination in employment and occupation.⁶⁷ It does not specify exactly what age-based distinctions can be used by employers. There is at present a very wide range of age-based differences of treatment in the employment field across the EU. Some of these, such as protection of younger workers from exploitation, are generally uncontroversial. Others, such as mandatory retirement ages and the use of seniority in redundancy decisions, give rise considerable financial, economic and equality issues. Given this diversity of approaches and attitudes throughout the EU, the Directive could not set out in detail every age distinction that was legitimate. Instead, it establishes a framework for assessing the legitimacy and justification for the use of age distinctions, while also permitting member states to introduce some specific exemptions if they wish in certain narrowly-defined areas.

Justifying age discrimination

Under the Directive, age distinctions will be deemed justified in three circumstances:

- a) when being of a particular age is a genuine and determining occupational requirement for a particular post (Article 4);
- b) when a person is subject to what would otherwise constitute direct age discrimination, but where a member state has provided that the use of an age distinction is proportionate and necessary 'within the context of national law' to attain a broad set of legitimate objectives, including "legitimate employment policy, labour market and vocational training objectives" (Article 6(1)). The Directive in Article 6(1) also gives specific examples of the type of legitimate aim and differences of treatment that may be justified in this type of circumstance;
- c) when a person is subject to what would otherwise constitute indirect discrimination on the grounds of age, but the application of the provision, practice or criterion in question is justified as objectively necessary and proportionate (Article 2(2)(b)).

⁶⁷ See Recital 25, which states that '...differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination, which must be prohibited.'

In all three circumstances, any age distinctions will have to be shown to satisfy three requirements: that they are a) objectively necessary to b) achieve a legitimate aim, and c) that they have been applied in a proportionate manner. As discussed above, the age provisions of the Directive are exceptional in permitting direct discrimination on the basis of age to be justified. For the other grounds in EC anti-discrimination law, the objective justification test can only be applied within the framework of the use of a prohibited ground as a genuine occupational requirement or of indirect discrimination.

The Dutch government, in implementing the age provisions of the Directive in legislation,⁶⁸ has taken the view that as both direct and indirect age discrimination may be 'objectively justified', and the same test applies to determining the existence of age as a genuine occupational requirement, any distinction between these three circumstances is redundant and unnecessary.⁶⁹ This approach is somewhat questionable: in all three circumstances, objective justification in accordance with the proportionality test must be demonstrated, but what has to be demonstrated will vary in each case. For age to qualify as a genuine occupational requirement, it will have to be shown that is necessary to be of a particular age to perform a particular job. For direct age discrimination to be justified, the use of age as a 'material factor' in decision-making (see Part II) will have to be shown to be proportionate and necessary. Finally, for indirect discrimination, the use of a neutral provision, practice or criterion that disadvantages persons of a particular age will have to be justified. Therefore, there exist good reasons for keeping the three circumstances where justification can be shown distinct and separate, as does the text of the Directive.⁷⁰

The Dutch academic Grapperhaus has also argued that the objective justification test for direct age discrimination contained in Article 6 varies from the test to be applied in the two other circumstances. He argues that in addition to the three standard elements of the objective justification test, legitimate aim, necessity and proportionality, a fourth requirement is also imposed by the Directive that an exception to the prohibition on direct age

⁶⁸ See *Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsopleiding* (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*) ('Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (Act on Equal Treatment on the Ground of Age in Employment)'). *Staatsblad* 2004, 30: referred to hereafter as the 'Age Discrimination Act'.

⁶⁹ Article 1(1) of the Age Discrimination Act sets out the definition of *distinction* ('*onderscheid*'): 'In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in discrimination on the grounds of age'. Article 7(1) then provides that 'The prohibition of distinction does not apply if the distinction...c) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary.' Therefore, in contrast to the conventional approach adopted in Dutch equal treatment legislation, no distinction is made here between direct distinction and indirect distinction. See the *Memorie van Toelichting bij de Wet Gelijke Behandeling op grond van leeftijd bij arbeid, beroep en beroepsopleiding* (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*), Tweede Kamer, 2001-2002, 28 170, nr. 3, p. 17 ('Explanatory Memorandum to the Act on Equal Treatment on the Grounds of Age in Employment, Occupation and Vocational Training (Act on Equal Treatment on the Grounds of Age in Employment)', Second Chamber of Parliament, 2001-2002, 28 170, nr., 3, p. 17). See for a full and detailed commentary on this issue by Marianne Gijzen, M. Gijzen, Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004).

⁷⁰ In its commentary on the Dutch government's legislative proposals, the Equal Treatment Commission advised the government to retain the conventional distinction between direct and indirect distinction, on the basis that the type of distinction in question will impact upon how the case is handled and on the burden of proof. *Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd* (2001) [Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age (2001)] available at www.cgb.nl. In the academic literature, the absence of the conventional schism between direct and indirect distinction has also been criticised. See Gijzen, cited above.

discrimination must be *explicitly* provided for in national law. He suggests that this additional requirement is introduced by the text of Article 6(1), with its reference to any distinctions based directly on age having to be objectively justified 'within the context of national law'. Grapperhaus therefore suggests that national implementing legislation must therefore specifically recognise and define any permissible forms of direct age discrimination before they can be deemed to be justified under Article 6.⁷¹

This interpretation is at variance with the standard view of Article 6(1), which considers that the reference in the text to the 'context of national law' merely requires that national implementing legislation define in domestic law when direct age discrimination can be objectively justified in conformity with the Directive. This second view appears more likely to be accepted given the language of Article 6(1), and may be a more practical interpretation, given the wide range of possible age-based distinctions that may require justification in law and which may be impossible to codify with any precision. However, this issue is ultimately for the European Court of Justice (ECJ) to resolve.

'Open' v 'Closed' systems of implementing the directive

There may nevertheless be certain advantages in national legislation expressly setting out particular circumstances in which age-based distinctions will be deemed in national law to be justified. There is no reason why national legislation could not specify when age would constitute a genuine occupational circumstance, for example, or when direct age discrimination will be deemed to be objectively justified. Any such express definitions of when age discrimination will be considered to be justified would of course have to comply with the requirements of the Directive and be subject to challenge before the ECJ if necessary. However, such express definitions could give a degree of guidance to employers and workers. Also, there is no obligation for member states to make full use of the possibilities to justify age discrimination that the Directive permits. Therefore, a member state could choose to limit the available opportunities for justifying age discrimination to particular express circumstances, thereby limiting the use of potentially unfair age distinctions and providing greater legal certainty.

The term 'closed structure approach' is used to describe implementation measures that expressly set out the circumstances when age discrimination can be justified. The Irish legislation has adopted a 'closed' approach, setting out in the Employment Equality Act 1998 and the Equality Act 2004 the circumstances where age distinctions will be considered justified in law, including the following:

- Prohibiting the employment of persons aged under compulsory school age (presently 16)
- Compliance with two laws protecting young persons in employment
- Setting a minimum recruitment age (not exceeding 18)
- Setting a maximum recruitment age which takes account of cost or time needed to train the person into the job, or the need for a minimum effective period before retirement age
- Differences in remuneration or conditions of employment based on relative seniority or length of service
- Genuine and determining occupational requirements
- Compliance with various laws restricting the age for various public transport licences (air traffic controllers, commercial pilots, train or bus drivers, lorries, etc)

⁷¹ This summary of Grapperhaus' views is based upon the account given by Marianne Gijzen in the Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004). See also F.B.J. Grapperhaus, "Het verbod op onderscheid op grond van leeftijd in arbeid en beroep", *Ondernemingsrecht 2002-12*, pp. 356-363, especially at p. 359-361.

- All employment in Defence Forces, and aspects of employment in police, prison or emergency services
- Access to certain jobs within private households
- Vocational training: preferential offers of places to mature students

In contrast, an 'open approach' is adopted when a member state chooses to introduce into national law a general objective justification test similar to that used under the Directive. The Belgian legislation prohibits discrimination that is not 'objectively and reasonably justified'; the Finnish age discrimination legislation permits the use of age distinctions for a 'justified purpose'⁷²; many other EU states have simply chosen to transplant the wording of the Directive, in particular that of Article 6(1), with minor alterations.⁷³

'Half open approaches' combine elements of both approaches, usually introducing a general objective justification test but also expressly setting out particular circumstances when age discrimination is deemed to be justified. For example, the Dutch Age Discrimination Act contains a general 'objective justification' test (as previously discussed), but also provides that the dismissal of employees on age grounds who have reached the statutory retirement age of 65 is considered to be objectively justified, as is the use of age distinctions as part of government programmes to promote the participation of particular age groups in the labour market.⁷⁴ The UK is contemplating combining a general justification defence for direct and indirect age discrimination with an express provision permitting employers to dismiss employees on the grounds of age at a default retirement age of 65 unless an alternative agreement between employer and employee is in place.⁷⁵

The 'open' approach allows for more flexibility, while the 'closed' approach allows for more precision: the 'half open' approach attempts to combine the advantages of both. Any of the three approaches can be adopted, bearing in mind that national legislation must in any case conform with the Directive. There is a danger however with national implementation measures, in particular with 'open' approaches, that no real consideration will be given as to what age-based distinctions member states wish to preserve and which are unnecessary. There appears to be little analysis by many member states thus far of the technical and policy aspects of age discrimination, or of the issues involved in deciding which distinctions should be justifiable in national law: nor has there often been any clear indication in legislation or in accompanying guidance of what constitute a legitimate objective, nor of the standard to be applied in proportionality analysis. Many states appear content to leave these issues to the national and European judiciary: but the lack of appropriate legislative or administrative guidelines in the US, Canada and Australia in the context of age discrimination has often resulted in legal uncertainty, the *ad hoc* development of legal rules, a lack of clear principles and claimants being deterred from bringing cases.

AGE, the European Older People's Platform, have argued that 'our view is that policy-makers need to decide clearly what constitutes an objective and reasonable justification for their territory, in the context of the provisions of the Directive, taking into account their wider national policy and cultural contexts and in consultation with industrial stakeholders and organisations representing the interests of people of all ages who face discrimination. They also need to clearly decide the areas for positive action to enable targeted actions to help support the inclusion of

⁷² S. 7(1) (3) of the Non-Discrimination Act [yhdenvertaisuuslaki (21/2004)].

⁷³ For example, the Cypriot Law on Equality of Treatment in Occupation and Employment (N.58 (1)/2004) reproduces almost verbatim the wording of the Directive. See N. Trimikliniotis, *Report on Measures to Combat Discrimination in the 13 Candidate Countries (vt/2002/47): Country Report Cyprus*: European Network of Legal Experts in the Non-discrimination Field (Netherlands: human european consultancy and Brussels: Migration Policy Group, November 2004). The Polish Labour Code speaks of 'justifiability': see P. Filipek and M. Pamula, *Report on Measures to Combat Discrimination: 2004 Poland Report*: European Network of Legal Experts in the Non-discrimination Field (Netherlands: human european consultancy and Brussels: Migration Policy Group, November 2004).

⁷⁴ Article 7 of the Age Discrimination Act.

⁷⁵ See DTI, 'Age Discrimination: Treatment of Retirement Age', December 2004.

groups of workers in employment and training who are currently excluded because of age discrimination or for other reasons.⁷⁶ There is clearly a need for a greater focus upon the appropriate scope of limitations to the Directive's prohibition of age discrimination.

The specific exemptions

As briefly discussed in Part 1, the Directive also permits states to introduce specific exemptions under Article 6(2) (admission or entitlement to retirement or invalidity benefits) and Article 3(4) (armed forces). In both cases, the member state must actively specify that they are taking advantage of the exception. Member States have again in general chosen to take advantage of both exceptions, often again without any close analysis of their scope.

Given the lack of close analysis of these issues, some brief analysis of some of the key areas of concern may be useful.

Age as a genuine occupational requirement ('GOR')

Article 4 allows Member States to provide that a difference in treatment shall not constitute unlawful discrimination where being of a particular age is a genuine and determining occupational requirement for the position in question, and it is proportionate to apply this requirement in the particular circumstances. In general, national and European courts have adopted a strict approach to this test, requiring that the quality in question must be necessary to a proper performance of the post in question and that no other method of performing the job is possible.⁷⁷

In relation to age, it is difficult to see many circumstances where such a blunt and general characteristic such as age would be required as a 'genuine occupational requirement'. In the UK government's consultation paper on implementing the Directive, it was suggested that there will be 'very few cases where age is genuinely a requirement.... Consultation to date has only identified acting as an occupation where this flexibility is needed. But there might be others – for example, modelling clothes aimed at specific age groups.⁷⁸ The UK Age Advisory Group similarly suggested that age will only constitute a GOR in exceptional circumstances.⁷⁹

A related issue is when will it be possible to use age as a proxy for another quality or characteristic that is a GOR for a particular job. For example, if a post has to be filled by a physically fit man, can the employer exclude anyone over the age of thirty on the basis that their age means that they automatically lack the required level of fitness?

The use of age in such a manner as a proxy for characteristics such as incapacity, ill-health or immaturity should not in normal circumstances be permitted: age is not a sufficiently precise indicator for any of these characteristics

⁷⁶ AGE's Analysis of the State of Transposition of the Employment Directive at December 2004 (Brussels: AGE, 2004).

⁷⁷ See for example *Etam plc v Rowan* 1989 IRLR 150, a case concerning a man applying to work in a women's clothes store: where the re-organisation of existing responsibilities within a workforce could remove the need for the job to be filled by a person of a particular sex, then the GOR test was not satisfied.

⁷⁸ Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), paras. 9.13-9.15.

⁷⁹ Age Advisory Group, *Response to the Issues Paper*, AAG/o4 (London: Dept. of Works and Pensions, 2001).

for it to be possible normally to use it as a substitute for a ‘real’ GOR.⁸⁰ In particular, the use of stereotypes that automatically equate being of an older age with decreased employment efficiency, or assume younger workers lack relevant skills and expertise, need to be considered with a great deal of suspicion.⁸¹ Even where age can be statistically linked to trends such as increased ill health, the individual deviations from the statistical trend are often so great as to ensure that age often constitutes an inadequate proxy for any given individual.⁸²

There may be circumstances however where the assessment of individual workers is impossible or excessively onerous, and where a person’s age can in some way be linked to possession of a GOR or a characteristic that is relevant to the post in question. In such cases, age discrimination may be a necessary shorthand to distinguish between different groups of workers, where individual assessment is impracticable. For example, requiring pilots to retire at comparatively early ages might be deemed necessary and proportionate to achieve the legitimate goal of protecting public safety, if there is extensive evidence of eyesight and reaction level deterioration with age, and it is impossible to test individually to determine which pilots were vulnerable.⁸³ However, the use of such age limits will have to be shown to be clearly necessary: even a pressing legitimate aim such as public safety cannot justify the sweeping use of age limits where individual assessment is possible.⁸⁴

Justifying direct age discrimination

Article 6.1 provides that:

“Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

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;

⁸⁰ In applying their versions of the objective justification test, two questions have generally been asked by the Australian and Canadian courts: a) are the characteristics that are cited to justify the act of discrimination legitimate and justifiable grounds for distinguishing between two people, and b) is age an effective and reliable proxy for the relevant characteristics or a necessary differentiating tool for determining whether an individual possesses those characteristics? See *Law v Canada (Minister of Employment and Immigration)* [1989] 1 SCR 143, *Qantas v Christie* (1998) 152 ALR 1295.

⁸¹ See e.g. the Canadian decision in *O’Brien v Ontario Hydro* (1981) 2 CHRR D/504, where a 40-year old man was refused an apprenticeship: the Board of Inquiry ruled that the employer’s argument that age had relevancy when determining whether a person would adjust to particular job conditions was unjustified age discrimination.

⁸² See The Carnegie Third Age Programme, *Life, Work and Livelihood in the Third Age: A Summary of the Report of the Carnegie Inquiry* (London: Carnegie Third Age, 1993). See also Action on Age: Report of the Consultation on Age Discrimination in Employment (London: DfEE, 1998).

⁸³ This two-stage test was applied in the Canadian case of *MacDonald v Regional Administrative School Unit No. 1* (1992) 16 CHRR D/409, which upheld a state-wide policy of mandatory retirement for school bus drivers at 65 on the basis that no adequate method of individual assessment was possible as a result of the numbers of drivers involved. In contrast, in Israel, airline pilots are subject to more frequent testing rather than a compulsory retirement rule.

⁸⁴ See the US Supreme Court decision in *Western Airlines v Criswell* No 83-1545, where the Court emphasised that employers would have to demonstrate that the use of an age limit was ‘necessary’ and individual assessment was not possible, even where public safety was an issue.

- (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.”

The Directive therefore lists examples of legitimate objectives that may justify direct discrimination on the grounds of age, and of the types of differential treatment that can be carried out to achieve these objectives within the limits of proportionality. Both the specified legitimate aims and the examples of differential treatment should be seen as broad guidelines, not as specific categories of automatic exemptions.⁸⁵ Even age distinctions which fall within the scope of these examples need to satisfy the objective justification test.

Legitimate aims

Any employer attempting to satisfy the ‘objective justification’ test will have to first show the existence of a legitimate aim on their part. Applying the standard approach in assessing the legitimacy of an aim in sex discrimination and human rights cases, the aim cited to justify the use of an age distinction cannot be discriminatory in itself.

In addition to the examples of legitimate aims contained in Article 6(1), the UK consultation paper set out other potential examples of what would constitute a legitimate aim:

- a. health, welfare, and safety – for example, the protection of younger workers;
- b. facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;
- c. the particular training requirements of the post in question – for example, air traffic controllers, who have to undergo 18 months theoretical and practical training at the College of Air Traffic Control, followed by further on the job training;
- d. encouraging and rewarding loyalty;
- e. the need for a reasonable period of employment before retirement – for example, an employer who has exceptionally justified a retirement age of 65 might decline to employ someone only a few months short of 65 if the need for, and the cost and length of, training meant that the applicant would not be sufficiently productive in that time.⁸⁶

The UK consultation paper also suggested that as factual circumstances change, so may the validity of the legitimate aim initially put forward: this suggests that employers who avail themselves of age distinctions on the basis of a particular aim will need to regularly revise the situation to assess if their aims are still relevant and valid.⁸⁷

⁸⁵ Criticism by Eurolink Age and other NGOs of the text of the Directive centred on the very broad and vague wording of the examples of legitimate objectives listed in Article 6(1), such as “legitimate employment policy”, labour and training objectives. Their concern was that including such open-ended and broad examples in the text might encourage a loose approach to the objective justification test on the part of governments and national courts. See Eurolink evidence to the UK House of Lords Select Committee on the European Union, “EU Proposals to Combat Discrimination”, HL Paper 68, 16 May 2000. See also H. Meenan, ‘Age Equality after the Employment Directive’ (2003) 10 *Maastricht Journal of European and Comparative Law* 9-38; S. González Ortega, ‘La Discriminación por Razón de la Edad’ (2001) 59 *Temas Laborales* pp. 93-124.

⁸⁶ UK Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), para. 3.15.

⁸⁷ The same will apply to assessing the proportionality of the use of an age distinction: changing circumstances may alter the position.

In addition, in common with all forms of discrimination law, the employer will obviously have to have a subjective belief in the validity of the legitimate aim in question.⁸⁸ Finally, the less pressing and immediate the legitimate aim concerned, the greater may be the degree of scrutiny of the objective justification of an age distinction: a discriminatory scheme justified on public safety grounds will generally require less clear-cut justification than one based on economic reasons.⁸⁹

Necessity and proportionality

In addition to showing the existence of a legitimate aim for their use of an age-based distinction, employers will have to satisfy the test of proportionality by showing the use of age was ‘appropriate and necessary’. When will this apply?

In essence, age limits that are not linked to a clear justification may be very vulnerable, as will age limits which could be replaced with less restrictive methods of achieving the legitimate aim in question. Minimum age limits on particular occupational posts such as judges could for example be replaced with a requirement for a minimum training period.⁹⁰ If age-based distinctions are used for recruitment to particular posts, they will be unlikely to be found objectively justified if similar posts are filled without using such distinctions. In Cyprus, the Commissioner for Administration held that a maximum age limit of sixty set as a pre-condition for the appointment of members of the Commission for Educational Service constituted discrimination, as no age limit is set for appointment on other commissions of similar nature.⁹¹

As is the case of the genuine occupational requirement (GOR), the use of age as a proxy for other characteristics should only be usually permitted where individual assessment is impracticable, as discussed above. A person’s health maturity, ability to learn, experience, skill, willingness to work may often be ascertained by normal vetting procedures, individual assessments and good job specifications. A 50-year old secretary, for example, could be assumed to have certain types of experience usually not held by a 20-year old, but this alone should not justify an automatic selection of the older applicant without an assessment of the merits of the 20-year old. The use of maximum entry ages for the police in many member states may for example be very questionable.⁹² In a Dutch case, a number of referees successfully challenged the age limits of 47 and 49 used by the Royal Dutch Football Association (KNVB) on the basis that an individual assessment of each referee’s capability for the job of referee was entirely possible, and it was a breach of the proportionality principle to set a fixed age limit.⁹³

Age limits may be necessary in particular industries to ensure a ‘turnover’ of workers and to encourage recruits into a profession: the Dutch Supreme Court has upheld the imposition of a compulsory retirement age upon airline pilots

⁸⁸ *Ibid.*

⁸⁹ See *Ontario Human Rights Commission v Etobicoke* (1982) 132 DLR (3d) 14 (SCC).

⁹⁰ Maximum age limits on judges could readily be justified as necessary to maintain judicial independence, as no individual competency tests could be administered to judges without endangering the perception of their independence.

⁹¹ Commissioner of Administration File No. A.K.I. 25/2004, 08.11.2004.

⁹² In Slovenia, for example, applicants for police posts cannot be older than 30. Police Act, Official Gazette of the Republic of Slovenia no. 49/1998 (66/1998- corr.), 93/2001, 56/2002. Zakon o policiji, Uradni list Republike Slovenije _tevilka 49/1998 (66/1998- corr.), 93/2001, 56/2002.

⁹³ See Amsterdam Court of Appeal [Hof Amsterdam] 13-01-2000, JAR 2000, 42.

for this reason.⁹⁴ Age limits to ensure employers get a reasonable return on training and recruitment appear reasonable, as indicated by the text of Article 6(1)(c), and perhaps even to facilitate good employment planning (e.g. to compensate for a high proportion of the workforce nearing retirement), where proportionate: however, the use of age limits that are intended to simply shift the age profile of the company or which unreasonably narrow the age spread of new recruits may face great difficulties in showing objective justification. Ensuring that a diversity of age groups is represented in a particular workforce may constitute a legitimate aim, reflecting as it does some aspects of the overall equality agenda: however, it may prove very difficult to demonstrate that the exclusion or preferential treatment of particular candidates on age grounds was proportionate, especially if alternative methods of attracting a broader diversity of candidates had not been tried first.

Positive action and the protection of disadvantaged groups

Many age-based distinctions in employment are intended to compensate for specific disadvantages suffered by members of particular age groups. The Directive as discussed in Part 1 does not adopt a strict model of formal equality, where all are treated identically. Article 7 of the Directive allows states to maintain specific measures to compensate or prevent disadvantage, meaning that the proportionate use of age distinctions to compensate for disadvantage should be deemed to be objectively justified, if such measures are the result of ‘specific measures... introduced or adopted by a member state’. Very often, such measures will be directed towards enhancing substantive equality and human dignity, and the Directive should be applied and interpreted to permit such positive action.⁹⁵

This conclusion is supported by Article 6(1)(a), which makes it clear that the Directive recognises that the promotion of vocational integration and the protection of vulnerable groups is a legitimate aim. Special employment-related measures to integrate particular sections of the population into the workforce are common throughout the EU. For example, the UK Government has introduced ‘New Deal’ programmes, which have been restricted to the under-26s and over-50s, and aim to integrate deprived and socially excluded groups into the

⁹⁴ Dutch Supreme Court, 8 October 2004 - Nr. C03/077HR - *16 pilots v. Martinair Holland NV and the Vereniging van Nederlandse Verkeersvliegers*: this case concerned a challenge to a policy of compulsory retirement at the age of 56 of pilots employed with Martinair on the grounds of a breach of Article 1 of the Constitution and Article 26 of the International Covenant on Civil and Political Rights (ICCPR). (The case predated the coming into force of the Directive and the Dutch implementing legislation.) The rationale for retirement of pilots at 56 was to guarantee ‘circulation’, based upon the idea that any pilot’s career (starting with a very costly education and ending with early retirement) is structured in terms of the expectation that it will be possible for all pilots to reach the highest seniority level before retirement. Both the cantonal court and the district court ruled that this rationale formed an ‘objective justification’. The Supreme Court affirmed this and rejected the applicants’ claim. See also Dutch Supreme Court, 8 October 2004, Nr. C03/133HR, *Applicant v. Koninklijke Luchtvaartmaatschappij NV (Royal Dutch Airlines) and the Association of Dutch Traffic Pilots*

⁹⁵ The Canadian Supreme Court in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 considered the constitutionality of age distinctions for determining entitlement to survivor pensions under the Canada Pension Plan. The appellant was not entitled to a survivor’s pension when her husband died because she was 30 years old and the minimum age for such pensions was 45 years old. It was plain that the legislation in issue subjected the claimant to differential treatment on the grounds of age. The Court stated that the purpose of the equality clause in s.15(1) of the Charter was to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping or prejudice. Accordingly, in analysing whether an act was discriminatory, it was necessary to examine whether the law had the effect of demeaning a claimant’s dignity. The Court examined the purpose of the provisions, finding that it was to assist older widows and widowers to meet their basic needs over a long term basis. The Court also found in general that the legislation did not stereotype, exclude or devalue adults under age 45. Since the law intended to improve the needs of a more disadvantaged group, the legislation did not demean the claimant’s dignity, and therefore there was no discrimination.

workforce before the demoralising effects of long-term unemployment become established. These programmes make use of age distinctions, with upper age limits being placed upon apprenticeships, student loans, or access to Jobcentre Plus and New Deal advice and training.⁹⁶

The use of age limits in such schemes may deprive some individuals of benefits or support on the grounds of age alone: however, given the reality of resource limitations, public programmes must be able to be targeted at specific elements of the population to achieve maximum impact. Not every worker in the groups selected for positive support will be disadvantaged on age grounds, but defining the group on age grounds can be necessary to make positive action work, where there is no other reasonable method of targeting the appropriate group. Therefore the use of age distinctions in such programmes should in normal circumstances be found to be objectively justified, unless the proportionality of the measure vis-à-vis the social harm it is designed to address can be questioned.⁹⁷

Similar arguments apply when age limits are used to protect disadvantaged groups, as with the work restrictions imposed on younger persons by the Young Persons' Directive 94/33/EC: in the absence of any way of assessing each and every person's competency and maturity, age limits are objectively necessary as they set a definite cut-off point that can be effectively enforced across an industry or across the country.⁹⁸ The text of Article 6(1)(a) makes it clear that such measures are regarded as potentially objectively justifiable.

A more complex issue concerns the age disadvantages faced by younger workers in several national minimum wage schemes, as they are often entitled to a much lower rate, or else completely excluded. The UK government has argued that this differential treatment can be justified as necessary to promote the interests of younger workers, who might otherwise face exclusion from the labour market due to their relative cost when compared to their lack of experience and training needs. To demonstrate objective justification, compelling evidence that these fears were based on real assessments would be required. Hepple suggests that the UK government has partially based its position on the advice of the UK Low Pay Commission, which would go some way towards showing justification.⁹⁹

The relaxation of restrictions upon fixed-term contracts in respect of workers aged 52 or older to encourage greater employment of older workers, as gradually implemented in Germany since 1996, also will require objective justification. While such measures could be justified as necessary to compensate for disadvantages that older workers face in staying in the labour market, it is very questionable whether weakening the employment rights of older workers in this way can be demonstrated to be proportionate, especially now that age discrimination in employment is prohibited by virtue of the Directive and alternative strategies may be available to encourage greater employment of older workers.¹⁰⁰

Member States may also provide for special protection for older employees in redundancy decisions. In Slovenia, Article 100 of the Employment Rights Act sets out the criteria for deciding on redundancy, and age is one of the

⁹⁶ UK Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), paras. 3.21-3.23. See Hepple, 95.

⁹⁷ Note that the use by the state of age distinctions in tax credits, employment benefits, employer incentives and other financial inducements to encourage worker integration will not be subject to the Directive, to the extent that they will be seen as part of national social security schemes (Article 3(3)). See UK Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), para. 3.21.

⁹⁸ A defence of compliance with statutory requirements may need to be included in legislation to protect employers implementing these restrictions: see UK Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), para. 3.23.

⁹⁹ See Hepple, 95.

¹⁰⁰ See for a comprehensive discussion of the potential impact of the Directive upon German policy approaches towards implementing the European Employment Strategy in P. Skidmore, 'The European Employment Strategy and Labour Law: A German Case Study' [2004] 29 (1) *European Law Review* 52-73. A reference for a preliminary ruling has already been made to the European Court of Justice from the Arbeitsgericht München in respect of the differential treatment of workers aged 52 years or older: see C-144/04, http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_146/c_14620040529en00010001.pdf

factors that employers are obliged to take into account. This is seen as an example of positive discrimination since older workers are less likely to get a new job.¹⁰¹ In the Netherlands, greater redundancy payments are also available for older workers¹⁰², as in the UK and many other member states at present.

However, in Irish law, greater lump sum payments that were available for older workers were abolished in 2003, and in Slovakia, the age of an employee cannot be taken into account in redundancy decisions.¹⁰³ The UK is contemplating abolishing its previous approach of weighting redundancy payments in favour of older workers, partially on the basis that the disadvantages faced by older workers that this was originally designed to combat, such as poverty and age discrimination, are now increasingly also faced by younger workers or are no longer as pressing as they once were.¹⁰⁴

This diversity of approaches indicate the complexity of the age discrimination issues that surround redundancy: it is also worth noting that many other relevant factors in redundancy decision-making may have an indirectly discriminatory effect (see the discussion on seniority below). Granting older workers greater protection during redundancies can be seen as a positive action strategy, especially in particular member states where specific historical and economic factors may cause older workers may be in a much more vulnerable position than younger workers. Therefore, provided it is proportional, such preferential treatment might be treated as reasonably justified. Article 6(1)(a) again supports this interpretation, with its reference to 'dismissal and remuneration conditions' as an example of appropriate measures to protect older workers. However, shifting social conditions, similar to those highlighted in the UK consultation paper, may call into question the proportionality of such measures and leave them over time more exposed to legal challenges.

The position under the Directive is more complex when *employers* implement practices which involve differentiation on the grounds of age but are designed to benefit older workers, especially those nearing retirement. This type of practice can include pre-retirement courses, extra payments, extra holidays and adjustments to work loads. When done to help older workers prepare for retirement, this can be regarded as a species of positive action, and has been treated as such by the Canadian courts.¹⁰⁵ However, Article 7 of the Directive only refers to positive action which is 'maintained or adopted' by *member states*: does this mean that voluntary positive action policies adopted by employers but not expressly permitted by national legislation will not come within Article 7?¹⁰⁶ If this is the case, then will such policies be deemed to be objectively justified, or else held to be discriminatory? While the Canadian courts have treated these policies as justified, the Dutch Equal Treatment Commission have taken the opposite view: in Case 2004/150 of 15 November 2004, the Commission held that an employer's policy of gradually reducing working hours and granting extra holiday time for employees of 57 years age or older was not objectively justified.¹⁰⁷

¹⁰¹ Also in Slovakia, employees who are more than 55 years old (or 51 if women), cannot be dismissed without their consent. However, this provision, which was incorporated in the Slovak legislation with the clear intention of providing certain categories of employees a special protection, is having a mixed impact, with some employers attempted to induce employees to retire by subjecting them to bad treatment.

¹⁰² See M. Gijzen in the Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004)

¹⁰³ Section 63, par. 1(b) and Section 76 of the Slovakian Labour Code.

¹⁰⁴ UK DTI, *Equality and Diversity: Age Matters* (London: DTI, 2003) para. 6.5.

¹⁰⁵ In the Canadian case of *Broadley v Steel Co of Canada Inc* (1991) 15 CHRR D/408 extended vacations for employee's aged 61 or older were held to be justifiable discrimination on the basis that the transition to retired status was a major psychological and financial shift, and the extended vacations were a proportionate measure to alleviate the hardship that might be caused by an abrupt transition.

¹⁰⁶ Note that the UK government is considering permitting employers to take limited positive action measures to address under-representation of particular age groups: see UK Department of Trade and Industry, *Equality and Diversity: Age Matters* (London: DTI, 2003), paras. 9.16-9.22.

¹⁰⁷ Similarly, in Case 2004-118 of 24 September 2004, the Commission found the granting of extra days of holidays to employees of 45 or older to employees who have more than 10 years of service with the employer, and the granting of reduced working hours to employees of 60 years and older, was unjustified.

Much will depend on the nature of the benefits in question, and whether they are designed proportionally: 'preparing for retirement' should not be allowed to become a legitimate aim that could justify any preferential treatment for older workers, irrespective of whether the measure in question had any real link with assisting the transition to retirement. However, it would be also problematic if an excessive concentration upon achieving formal equality were to prevent employers introducing special provisions for older workers moving towards retirement.

Retirement ages

Great uncertainty surrounds the question of retirement ages and the extent to which the Directive's age discrimination provisions require existing national practices to be altered. The term 'retirement age' itself generates confusion, due to the varying terminologies in use throughout the European Union.

It is important to distinguish between pensionable ages, state-imposed retirement ages, and contractual or employer-imposed retirement ages. *Pensionable age* is the age set by a member state at which individuals become entitled to a state pension (as distinct from the age at which individuals retire from work). Article 3(3) specifically excludes state social security systems from the scope of the Directive, and therefore age-based state pension rules are exempt from its scope. Article 6(2) also permits the use of age criteria for admission or entitlement to occupational social security systems including retirement benefits: thus, member states can choose to exempt the use of pensionable ages in occupational pension arrangements (see below).

Some states also impose fixed *mandatory retirement ages* upon all citizens or upon certain classes of citizens. In Cyprus, all civil servants may retire at fifty-five if they so wish, but are compelled to retire at sixty.¹⁰⁸ The Directive is ambiguous in respect of this type of mandatory retirement age. Recital 14 states that 'this Directive shall be without prejudice to national provisions laying down retirement ages', but there is no further reference in the actual text of the Directive to any automatic exemption for any form of retirement age. State-imposed mandatory retirement ages may be exempt by virtue of Article 3(3) if they can be classed as part of state social security schemes. Otherwise, they require justification under Article 6(1).

The key issue for many member states concerns the third category, that is whether employers are entitled to set retirement ages by contract, collective bargaining or unilaterally. Employers may be given the right to set retirement ages by legislation: for example, in Estonia, Article 120 of the Law on Public Service provides that in general an employer has the right to terminate the employment contract of an employee if the employee has attained 65 years of age. Alternatively, employers may be able to set retirement ages because legislation deprives employees over that age of protection from unfair dismissal. In Cyprus, under s.4 of the Law on Unfair Dismissal, the right to protection from unfair dismissal is lost upon reaching retirement age, as it is in the UK at present. Other countries, including France, provide that protection from unfair dismissal is lost when full pension rights accrue.¹⁰⁹

Under the Directive, a requirement that an employee retire at a specified age amounts to less favourable treatment on grounds of age and is therefore unlawful unless justifiable under Article 6 (or is deemed to constitute a genuine occupational requirement under the provisions of Article 4, if such a measure could ever be shown to constitute positive action to combat disadvantage). The same is true for other detriments, such as the

¹⁰⁸ See also in Spain, Law 30/1984 on Civil Service Reform, art. 33, which imposes a mandatory retirement age of 65 for the civil service, with some exceptions.

¹⁰⁹ See Article L122-14-13 of the French Labour Code. In certain Member States, employees retain full employment rights during the course of their employment, as is the case in Poland and Slovakia, irrespective of their ages.

loss of protection from unfair dismissal. This means that retirement ages must be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim must be appropriate and necessary (Article 6(1)), or else that the requirement in question can meet the strict requirements of the genuine occupational requirement test (see above). A key issue is now whether member states are permitted to enact a blanket exemption for retirement ages that will be automatically deemed to be justified for the purposes of Article 6(1), or whether there is a further need for express justification for the introduction of a national 'default retirement age', to be demonstrated either by the member state on a national basis across the labour force, or by each employer on a case by case basis.

Several member States have chosen to introduce default retirement ages, and have provided in their national implementing legislation that reliance upon this default age will not have to be shown to be objectively justified. For example, Article 7(1)(b) of the Dutch Age Discrimination Act provides that the prohibition of age discrimination will not apply once an employee reaches the statutory retirement age of 65, or an older age if it has been laid down by an Act or governmental decree, or which has been mutually agreed by the parties involved. The UK government has recently announced its intention of establishing a 'default retirement age' of 65, whereby employers will be able to dismiss employees on the grounds of age at this age, but a) must consider requests to work on, b) be prepared to justify any lower retirement age and c) can retain workers beyond this age.¹¹⁰

Interestingly, in contrast, the Irish Employment Equality Act 1998 Act originally protected only those aged between 18 and 65 (65 is the most usual retirement age in Ireland.) However, the Equality Act 2004 removed the upper limit altogether, and the lower limit is now 16 (the age up to which everyone is required to attend full-time schooling).¹¹¹

Therefore, it appears that in Ireland employers will have to justify the use of mandatory retirement ages on a case-by-case basis, whereas the effect of the Dutch, French and UK legislation is ostensibly to remove the need for employers to show justification at all. It is far from clear whether this device is sufficient to meet the rigorous standard of justification required by Article 6(1). At the very least, member states using the default device will need to show that it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and that setting a default age to achieve these goals is appropriate and necessary. While there may be legitimate labour market reasons to permit employers in certain circumstances to be able to regulate the timing of retirement of older workers, such as the need for workforce planning and the possibility of opening up vacancies for young people,¹¹² it is contestable if permitting employers to make use of mandatory retirement ages is the least restrictive method of achieving these goals.

Mandatory retirement involves the selection of an arbitrary chronological date (usually the 65th birthday). It fails to take account of the vastly different situations that older persons may find themselves in at that date.¹¹³ By denying access to the workplace, it can close off opportunities for individual self-realisation and constitute a paternalist intrusion in personal life that violates the principle of human dignity. Perhaps the most compelling argument against mandatory retirement ages is that employers could hypothetically achieve the same degree of certainty and planning by setting individual contractual terms, encouraging early retirement where necessary, and using good performance management techniques rather than the blunt tool of a mandatory retirement age.

¹¹⁰ See the statement by Patricia Hewitt, Secretary of State for Trade and Industry, to the UK Parliament, Age Discrimination: Treatment of Retirement Age, *Hansard*, HC Vol. 428, 127WS (14 December 2004).

¹¹¹ The recent Public Service Superannuation Bill 2004 provides that with some exceptions, recruits to the public service after April 2004 "shall not be obliged to retire on age grounds".

¹¹² Upheld as such by the Canadian Supreme Court in *McKinney v University of Guelph* [1990] 3 SCR 229.

¹¹³ See Ontario Human Rights Commission, note above, at p. 4.

An alternative source of justification for mandatory retirement is the need to free up jobs held by older people in order to make space for younger people. However, while it may be possible to justify this in the context of specific forms of employment,¹¹⁴ it is contestable whether it can be justified across the labour force as a whole, particularly since it has been shown that relatively high levels of employment of older people are correlated with higher, not lower, levels of employment of younger people.¹¹⁵ Careful consideration needs to be given by member states to the range of issues and arguments at stake. Member states introducing default ages should be aware that Article 8(2) of the Directive prohibits regression in implementing its contents from existing levels of protection: therefore, if the introduction of a default age would deprive workers of employment rights they have previously enjoyed, then this may not be a permissible step.¹¹⁶

If a member state does not introduce a default retirement age, or fails to justify its use, or an employer chooses to introduce a mandatory retirement age at an earlier age than that specified by national legislation, then each individual employer will have to justify the imposition of this detriment as being in accordance with Article 6(1) (and also that the use of such a mandatory retirement age is permitted by the provisions of national law that specify when direct age discrimination will be justified). So far as demonstrating justification for retirement ages at the level of the individual enterprise is concerned, there are a similar range of arguments both for and against as apply to the use of national default ages. The particular arguments in favour of the use of a mandatory age that are presented by a specific employer will have to be measured against the strict proportionality standard set out in Article 6, and the outcome will be a matter of case by case analysis.¹¹⁷ The use of automatic mandatory retirement ages in collective agreements and employment contracts which cannot be justified by reference to specific considerations, particular to particular types of employment, and which are not permitted by national legislation that satisfies the requirements of the Directive, may struggle to meet the requirements of the proportionality standard.¹¹⁸

Employment rights

The denial or restriction of employment rights to workers above a particular age also raises serious questions under the Directive, as this constitutes direct age discrimination which again requires objective justification. Hepple has argued that the traditional justifications for excluding older workers from the protection of unfair dismissal legislation was based upon some of the same concerns that underpin mandatory retirement ages, in particular the desire to encourage older workers to make way for fresh blood. He however also argues that as national legislation on retirement ages now permits workers to continue working beyond the pension date, the restriction of employment rights cannot be objectively justified, as this leaves older workers without adequate protection against other forms of unfair dismissal apart from age.¹¹⁹

¹¹⁴ See the Dutch Supreme Court decision in *Martinair Holland* referred to above.

¹¹⁵ See Fredman, 'The Age of Equality', cited above, especially p. 47.

¹¹⁶ See R. Crasnow, *Scope, Retirement Age and Regression*, Seminar Paper, 11 September 2003, distributed by Age Concern England. See also M. Rubinstein, 'Golden Threads amongst the Silver – Principles for Age Discrimination Law' (2002) Employment Law Association Annual Lecture, available at <http://www.michaelrubenstein.co.uk/pdfs/AnnualLectureNOV2002.pdf> (last accessed 14 January 2004).

¹¹⁷ For an example of a specific context where a mandatory retirement age could be justified, see footnote 89 above for a discussion of how the need to preserve judicial independence could justify the imposition of a maximum age limit. See also the discussion of age limits imposed in the interests of health and safety, above.

¹¹⁸ See for example the decision of the Spanish Supreme Court (Social Division) on 9 March 2004, annulling the clauses of collective agreements forcing workers to retire at age 65, because there was no national provision permitting such compulsory retirement and insufficient justification in the circumstances for differences of treatment based on age "by legitimate employment policy, labour market and vocational training objectives". In its legal argument, the Supreme Court made extensive use of the considerations and articles of the Directive.

¹¹⁹ Hepple, cited above, 94.

The UK government has come to a similar conclusion, suggesting that depriving older workers of their employment rights is disproportionate and unnecessary.¹²⁰ This logic appears convincing: it is difficult to see why an employee can legally continue to work beyond their pension age but is denied the right to challenge acts of unfair dismissal and other abuses of employment rights. Ensuring a turnover of employees can be ensured by the use of default mandatory ages, so the denial or restriction of employment rights would not appear to be the 'least intrusive measure' with which to accomplish this aim, and hence would in all likelihood fail the proportionality test.

Similarly, other restrictions upon the employment rights of younger or older workers need to be carefully scrutinised: unless such restrictions can be clearly and objectively justified by reference to the need to protect particular classes of worker or to combat specific disadvantages faced by workers of a particular age, the denial of basic rights will be likely to fail the objective justification test.¹²¹ With the introduction of age discrimination legislation, it may be increasingly difficult to argue that the disadvantages and discrimination younger and older workers face requires a lowering of their employment rights, as proper framing and enforcement of the legislation should be the appropriate tool for combating this discrimination rather than reducing the rights of those affected.

Pensions and insurance

Article 3(3) of the Directive provides that it "does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes". As previously discussed, this exempts all state social security schemes from the scope of the Directive. Financial inducements to employers to hire older or younger workers, direct inducements to particular age categories of worker to re-enter the workforce, variances on age grounds in unemployment benefit and jobseekers' allowance and other state payments that give rise to issues of age inequality seem thus to be all exempted, including national insurance provisions.¹²²

However employment-related occupational pensions and insurance are within the scope of the Directive. This fits with other provisions in European law: an occupational pension for example has been considered to form part of the pay of an employee for the purposes of equal pay between the sexes.¹²³ However, Article 6(2) of the Directive provides that Member States may provide that 'the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.' This means that member states can choose to exempt the use by occupational schemes of age distinctions governing admission or entitlement to retirement or invalidity benefits and the use of age criteria in actuarial calculations under such schemes.

¹²⁰ UK DTI, *Equality and Diversity: Age Matters* (London: DTI, 2003) para. 5.2-5.3.

¹²¹ See the discussion in P. Skidmore, 'The European Employment Strategy and Labour Law: A German Case Study' [2004] 29 (1) *European Law Review* 52-73, also cited above.

¹²² E.g. in Estonia, the Law on State Pension Insurance provides different levels of disability pension for various age groups.

¹²³ See *Fisscher v Voorhuis Hengelo BV* (C128/93) [1994] ECR I-4583.

This was done to allow occupational insurers and pension-providers to continue to use age-based criteria in offering entry terms, regulating costs across different age groups and in assessing premiums.¹²⁴ The exception must be given a restrictive wording and member states must actively invoke the exception. Many have done so, including the Netherlands in Article 8 of its Age Discrimination Act. If a state does not do so, then the use of age-based criteria must be objectively justified as with any other form of occupation-linked age distinction.

It should also be noted that the use of age distinctions in occupational schemes can still be challenged on the basis of sex discrimination, even if a member state has taken advantage of the exception. Given that the use of age-based criteria for admission and entitlement to benefits and of age-based actuarial criteria may give rise to serious issues of indirect gender discrimination, Article 6(2) provides at best a limited shelter from the scope of anti-discrimination law. In particular, it is likely that many age-based criteria will require justification as they will have an indirectly discriminatory effect on either men or women.

Experience and seniority-based practices

Employment practices that indirectly discriminate on the grounds of age will also require objective justification, as discussed in Part II.¹²⁵ This may particularly impact upon distinctions based on seniority (length of time of service), such as 'last in first out' redundancy selection and pay scales which vary according to length of service. Such distinctions may be indirectly discriminatory, as they will often disadvantage younger workers, unless they can be objectively justified. In a less than clear manner, Article 6(1) (b) appears to include differences of treatment based on minimum conditions of seniority as an example of the type of direct discrimination practice permitted under the Directive. Irrespective of whether they are classified as potentially direct or indirect discrimination, seniority-based practices will have to be objectively justified.

The ECJ has already had to adjudicate on the justifiability of seniority in respect of gender discrimination and its jurisprudence in this respect provides helpful guidance. In *Danfoss*¹²⁶, the ECJ held that it is generally permissible to give pay increments on the basis of length of service without the need to show its relevance to the performance of the specific duties concerned, on the basis that seniority often goes hand in hand with relevant and useful experience. A more stringent approach towards seniority was however taken in *Nimz v Freie und Hansestadt Hamburg*¹²⁷, where the ECJ held that rewarding seniority may amount to indirect sex discrimination because women tend to have different work patterns from men. Therefore, variations on the ground of seniority must be objectively justified by reference to the specific experience gained by actual work in the job in question. A similar approach in the context of age discrimination can be expected.

¹²⁴ Similarly, Australian State and Territory anti-discrimination legislation exempts age distinctions in insurance, provided reliable actuarial or statistical data support the differentiation. Section 37 of the federal Age Discrimination Act provides that as long as the supporting actuarial or statistical data is reasonable, conditions that discriminate on grounds of age are permitted in respect of policies' terms and conditions. Where there is no data (and it cannot be easily obtained) reasonable discriminatory terms and conditions may be offered "having regard to any other relevant factors". The recent Belgian legislation that extends to the provision of goods and services has no similar explicit exemption, and has attracted some criticism as a result, with some insurance companies concerned that the general justification defence contained in the legislation offers insufficient legal certainty in this area.

¹²⁵ M. Rubinstein "Golden Threads amongst the Silver – Principles for Age Discrimination Law", 2002 ELA Annual Lecture.

¹²⁶ C 109/88, *Handels – og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* (acting for *Danfoss*) [1990] ECR I-3979

¹²⁷ Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297

There are good reasons for maintaining the ability to make distinctions upon the grounds of seniority.¹²⁸ Rewarding loyalty and encouraging experienced employees to stay with an employer may be justifiable if they are required for good business reasons. Article 6(1)(b) specifically refers to the acceptability of justification of minimum conditions of professional experience or seniority in service for access to employment or employment-related advantages. However, where distinctions based on seniority are not based upon these legitimate economic aims, but reflect an unquestioned administrative assumption that longer service should be matched by greater rewards, they may well fail the justification defence. The use of experience as a criterion will also only be justifiable if it is genuinely related to the needs of the job in question, or is necessary in the particular circumstances, and its use is proportional. Some jobs require very little or no experience, and often it will not be proportionate or necessary to link economic incentives and rewards to a person's level of experience.

The use of seniority to encourage and reward loyalty is referred to in the UK consultation paper, which proposes to 'make specific provision for employers to be able to justify seniority conditions by reference to the aims...[of] encouraging and rewarding loyalty.'¹²⁹ Similarly, it stresses that length of service can be a justifiable factor in calculating redundancy payments on the basis that such payments do not reward seniority alone but also 'past commitment' to the employers in question.¹³⁰ Other states have been content to assume that seniority distinctions are inherently justifiable, irrespective of the exact legitimate aim sought. The Irish Equality Act 2004 now allows an employer to fix differential rates of severance payment based on seniority, and there are also specific exceptions for differences based on seniority in relation to remuneration or to conditions of employment. Several other member states have equivalent provisions. In the Netherlands, the 'last in first out' principle may be used in redundancy decisions, which works to the advantage of older workers (and indirectly discriminates against younger workers).¹³¹ The Explanatory Memorandum to the Age Discrimination Act explicitly says that the use of this principle may be objectively justified under the Act.¹³²

However, in the Irish case of *McGarr v Dept of Finance*,¹³³ the Equality Officer held that the express seniority exception in the Irish legislation must be strictly interpreted and could not be extended to permitting seniority requirements for promotion and for special payments which were not objectively justified. Similarly, in the Dutch case 2004/141 of 29 October 2004, a pension regulation which paid out on the basis of a length of service requirement was held to constitute unjustified indirect discrimination.

These initial cases clearly demonstrate that seniority-based distinctions may not survive challenge unless they are clearly designed to achieve an objective legitimate aim such as encouraging employee loyalty. As well as fulfilling legitimate aims, seniority distinctions will need to satisfy the proportionality requirement. An excessive emphasis

¹²⁸ UK DTI, *Equality and Diversity: Age Matters* (London: DTI, 2003), para. 9.3-9.5. Note that there was strong support among all social partners for the retention of seniority-based pay benefits.

¹²⁹ UK DTI, *Equality and Diversity: Age Matters* (London: DTI, 2003), para. 9.5.

¹³⁰ UK DTI, *Equality and Diversity: Age Matters* (London: DTI, 2003) paras. 6.12-6.13.

¹³¹ E.g. In Cyprus, the Termination of Employment Laws 1967-1994 which govern issues relating to redundancy do not provide for seniority or age to be taken into account in selecting workers for redundancy. However, there is extensive case law evidencing that the principle of "first in-last out" is accepted by the Courts and is used as a criterion for determining whether the right worker or workers have been selected for redundancy, although on other instances the Court has ruled that seniority *alone* cannot justify the selection of a worker for redundancy. See *Charalambous v. Famagusta General Agency Ltd*, 490/95.

¹³² See M. Gijzen, the Dutch Baseline Report for the European Network of Legal Experts in the Non-discrimination Field, *Transposition of the Racial Equality Directive (Directive 2000/43) and the Framework Employment Directive (Directive 2000/78) into Dutch Law* (Netherlands: human european consultancy and Brussels: Migration Policy Group, December 2004).

¹³³ *McGarr v Dept of Finance*, DEC-E2003-036

on rewarding loyalty, such as making length of service a precondition for promotion or giving automatic preference on the basis of seniority irrespective of the merits of different candidates, is very likely to be considered to be disproportionate. This means that member states that fail to rigorously re-assess when and how seniority/experience distinctions can be utilised may run the risk of encouraging considerable legal uncertainty and seeing well-established favourable treatment for seniority giving rise to findings of age discrimination.

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Part IV

Conclusion

Differences of treatment between different individuals or groups on the grounds of age are often based on generalised assumptions or casual stereotypes. When individuals are subject to discrimination as a result of these demeaning stereotypes, their fundamental right to respect for their human dignity is violated, as they are denied equality of treatment and respect. Such discrimination also prevents disadvantaged age groups from participating fully in the labour market. The Framework Equality Directive introduces a general prohibition on age discrimination in employment, while also recognising that certain age-based distinctions may serve valuable social and economic objectives, and often are designed to benefit or protect particular age groups.

In transposing the Directive, member states need to give due consideration to how appropriate comparators are to be identified in establishing direct and indirect discrimination and what their role in the legal analysis should be; how and when age will constitute a material factor in a decision and thereby indicate that the decision constitutes direct age discrimination; and when will the presence of age bias be inferred from the practices of employers. Serious consideration also needs to be given to when age discrimination can be justified, whether on the basis that it constitutes a genuine occupational qualification, direct discrimination or indirect discrimination. The use of age as a proxy for other characteristics will often be highly questionable, as will the use of age limits where individual assessment is possible, and the denial of employment rights to older and younger workers. The use of age distinctions to protect or benefit vulnerable groups will often be less problematic, but seniority distinctions and the use of mandatory retirement ages by employers and member states may give rise to a number of serious issues and concerns.

Therefore, in implementing the age discrimination provisions of Framework Equality Directive, member states need to take the challenges they present seriously. The considerations set out in this report point towards the need for member states to be prepared to carry out the necessary comprehensive overhaul of their policies and legislation that has to accompany the effective transposition of the Directive into their national legal systems.

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