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Age and Employment

European Network of Legal Experts in the non-discrimination field

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Frederik | 1937

Executive summary

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

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

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

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

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

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

Considerable flexibility exists in the use of special measures to promote integration of, and to protect, older and younger workers and those with caring responsibilities. Details of the measures that exist in each reporting State are set out in chapter 5 of the report. Positive measures in connection with younger workers tend to focus on protection of development, morals and health and safety. Only a few experts report that their States have introduced measures such as a reduced minimum wage to encourage employers to recruit young people. By contrast, measures relating to older workers are aimed primarily at vocational integration; for example, subsidies for employers who recruit older workers, or incentives for older employees to remain in work for a longer period. It is arguable that some of the measures which are intended to protect older workers (e.g. prohibiting them from particular types of strenuous or dangerous employment) could violate the Directive, depending on the justification put forward for the age limit. Most countries make some provision to protect the employment of workers who care for others, although the extent to which this goes beyond protection for a mother during pregnancy/maternity leave varies widely. Provisions of this nature have the potential to amount to indirect age discrimination if not justified.

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

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

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

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

The extent to which those who have reached retirement age are permitted to continue to have employment rights and rights against dismissal reveals a spread of practices which show in several states that the elderly are to be permitted only to have legally or economically more precarious rights. Although only a small minority of States explicitly allow employers unilaterally to set their own internal retirement age (or even a contractual or collectively-agreed retirement age), a significant number permit employers to dismiss at a nationally-set age, and/or withdraw unfair dismissal protection at such an age. Most of these latter types of provision do not appear to have been challenged.

¹ [2010] 2 CMLR 33.

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

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

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

Conclusion

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

David | 1988

Introduction

This report examines some practical aspects of the introduction of the prohibition of discrimination as regards age in relation to Article 19 TFEU and Directive 2000/78 on Employment Equality ('the Directive'). It considers in detail the way in which the prohibition has been implemented by reporting States,⁴ concentrating on the exceptions to the principle of equal treatment which are unique to age discrimination.

The information provided by reporting States is analysed in chapters dealing with States' approach to general justification of direct age discrimination; the 'occupational pension scheme' exception in Article 6(2) of the Directive; the specific examples given in the Directive of the areas in which direct discrimination may be justified; retirement and redundancy.

This analysis enables the authors to consider the way in which the wording of the Directive (which gives non-exhaustive examples of situations in which age discrimination may be justified in some areas, and closed lists in others) affects the relation between EU and national competences. It also illustrates the degree of divergence between reporting States' implementation of the prohibition and the various exceptions. The authors conclude by considering the overall pan-European 'picture' of age discrimination legislation, ten years on from the Directive.

The information on which this report is based is primarily derived from Country Reports produced by the European Network of independent legal experts in the non-discrimination field with a cut-off date of 31 December 2009.

⁴ Namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, FYR of Macedonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and UK. Turkey, which also provided information, has not implemented the Directive and its responses have not therefore been included in this report.

Jane | 1948

Part I

Outline of age and discrimination law

The age discrimination provisions of Directive 2000/78 on Employment Equality are somewhat different in nature to the provisions relating to discrimination on other prohibited grounds. This chapter provides a short explanation of the main concepts contained within the Directive.

Direct age discrimination: The claimant (“C”) needs to show that he/she was treated less favourably than another person in the same situation (a real or hypothetical comparator) was, is or would have been treated.⁵

Indirect age discrimination: C must show that an apparently neutral provision criterion or practice puts or would put persons having a particular age at a particular disadvantage compared with other persons.

Burden of proof principle: Where C considers him/herself wronged because the principle of equal treatment has not been applied to him/her and he/she establishes facts from which it may be presumed that there has been (in)direct discrimination, it is for the Respondent to prove that there has been no breach of the principle of equal treatment.⁶ C must establish a prima facie case that age was a material causal factor in the less favourable treatment. C can establish those facts from direct or indirect (secondary) evidence.

1.1 Justification

Direct discrimination: Article 6(1) of the Directive says that Member States (“the 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. The Directive gives a non-exhaustive list of examples of differences of treatment that may be justified.

Indirect discrimination: C’s claim will fail if the Respondent can objectively justify the provision criterion or practice by a legitimate aim and if the means of achieving that aim are appropriate and necessary.⁷ In addition such disadvantage may be justified under Article 6.

If a requirement is a genuine and determining occupational requirement (“GOR”), it will not constitute discrimination.⁸

Both domestic courts and the CJEU have emphasised difficulties in dealing with age discrimination cases: “It is ... a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators are more clearly defined”⁹ Differentiating on this ground is socially and economically useful (see Advocate General Mazak in *Age Concern England*¹⁰).

The State has a wide discretion in identifying the means to achieve its social policy aims and also in the definition of the aims themselves.¹¹ The justifiable nature of direct age discrimination makes criticism of implementation

⁵ Article 2 Directive 2000/78.

⁶ By Article 10 Member states must take such measures as are necessary in accordance with their national judicial systems to ensure this result, or introduce rules which are more favourable to C (save in criminal cases or proceedings in which it is for the court or competent body to investigate the facts of the case).

⁷ Article 2(2)(b)(i).

⁸ See Article 4 Directive.

⁹ C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

¹⁰ C-388/07, *The Incorporated Trustees of the National Council on Ageing v Secretary of State for Business, Enterprise and Regulatory Reform (Age Concern England)* [2009] ECR I-1569, para 74.

¹¹ See *Age Concern England*, AG Mazak’s opinion para 85-87, citing *Palacios*.

difficult. The CJEU has stated that it is not for the States to *define* age discrimination. They may¹² construct a scheme of derogation from the principle of equal treatment.

Some of the cases have given rise to important constitutional issues concerning the relationship between the courts of the States and the CJEU.¹³ *Kucukdeveci* makes clear that in cases between individuals the Directive may be deployed to disapply contrary national law without the need for a preliminary ruling from the CJEU. The optional nature of such a reference is not affected by the conditions of national law under which a court may disapply a national provision which it considers to be contrary to the constitution.¹⁴

The interpretation of the Directive by the CJEU may be regarded as divergent from the European Commission's original intention for the protection of age in "*Proposal for a Council Directive Establishing A General Framework For Equal Treatment In Employment And Occupation*".¹⁵ Article 6 has been interpreted as allowing a very wide range of behaviour which differentiates on the ground of age

The need to draw a clear distinction between acceptable and unacceptable treatment is plain in Recital 25 to the Directive. Article 1 lays down the purpose of the Directive – a general framework for combating discrimination on grounds including age. Article 2 defines the concept of discrimination both direct and indirect. Article 6 provides for justification of differences of treatment on grounds of age.

The Commission's submission in *Age Concern England*¹⁶ was that any infringement of the principle of non-discrimination on grounds of age, which is a fundamental principle of EU law, must be justified by a public interest/ social policy level objective. Article 6(1), interpreted using recital 25, provides a limited form of exception to that fundamental principle, justified by reference to particular social policy considerations prevailing in a given State.

The language used in the Article appeared to be different from that used in relation to the justification of indirect discrimination, but the argument that the difference in language indicated a difference in the standard for justification was rejected by the CJEU in *Age Concern England*,¹⁷ holding there was no practical difference between the two justification tests. Those drafting Directives should consider the implications of including unnecessary words in Directives.¹⁸ Differential age treatment can be justified if the use of age is a proportionate means of achieving a legitimate aim. States do not need to have a list of differences of treatment in their legislation.

Justification of direct age discrimination now does not appear to be exceptional in any way as indirect discrimination justification must be sufficiently flexible to justify mundane provisions, criteria and practices which disadvantage groups. Some national courts have stated that a higher degree of proof of the proportionality of treating the

¹² As a result of Article 6.

¹³ C-144/04 *Mangold v Helm* [2005] ECR I-9981 and C-555/07 *Kucukdeveci v Swedex GmbH & Co KG* [2010] 2 CMLR 33; see Asterios Pliako and Georgios Anagnostaras, "Who is the Ultimate Arbiter? The battle over judicial supremacy in EU law", *European Law Review* (E.L. Rev.) 2011, 36(1), 109-123.

¹⁴ Paragraph 55, C-555/07 *Kucukdeveci*.

¹⁵ Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS).

¹⁶ C-388/07 [2009] ECR I-1569.

¹⁷ *Ibid.*

¹⁸ See Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions: principle 1.1. the drafting must be simple, concise, containing no unnecessary elements. It should be possible to foresee how the law will be applied.

individual less favourably explicitly on the grounds of his or her age is required in cases of direct discrimination.¹⁹ This does not require a different test to be applied.²⁰ However, it mitigates against consistency between States. Divergence may emerge as a result of the way in which proportionality is approached in different States in this context.

This broad interpretation of Article 6(1) means that it would be difficult for national implementation provisions not to be considered effective.

¹⁹ The UK Employment Appeal Tribunal in *Seldon v Clarkson Wright and Jakes* [2009] IRLR 267, without succumbing to the allures of an explicitly higher standard of proof for direct age discrimination, stated that 'the overall discriminatory effect of a measure will necessarily be greater when there is direct as opposed to indirect discrimination'. It therefore held that, although the test did not differ, the application of the concept of justification 'may vary with the form which the discrimination takes'. This point was not dealt with by the Court of Appeal in *Seldon*.

²⁰ *R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336 (Admin); [2010] 1 Common Market Law Review (CMLR) 21.

Raphaël | 1991

Part II

Justification of direct discrimination

The reporting States have adopted a variety of different systems to interpret Article 6(1) of the Directive. These range from entirely open-ended justification provisions, to systems which exempt only differential treatment based on a GOR.

2.1 GOR based

Hungary: the differentiation must be proportionate, justified by the characteristics or nature of the job and based on all relevant and legitimate terms and conditions that may be taken into consideration in the course of recruitment.²¹

2.2 Open-ended

Here the state permits any act of less favourable treatment on the grounds of age to be justified. The state may separately have specific exceptions to the principle of equal treatment.

- **Latvia:** general 'objective and substantiated precondition' test²²;
- **Luxembourg**²³ and **Portugal**²⁴ use the language of Article 6 but without the exemptions mentioned in Article 6;
- **Sweden**²⁵
- **UK**²⁶
- **Netherlands**²⁷

2.3 Verbatim transposition of the Directive

- **Austria**²⁸
- **Cyprus**²⁹
- **Greece**³⁰
- **Lithuania**³¹

²¹ Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 22(1).

²² Article 29(2) of the Labour Law.

²³ Article L.252-2 of the Labour Code, introduced by Article 18 of the general discrimination law of 28 November 2006.

²⁴ Article 25(2)(3) of the Labour Code (Law 7/2009).

²⁵ Chapter 2 Section 2 Points 3 and 4 of the Discrimination Act. The travaux préparatoires for its legislation describe the scope of justification as being quite wide. The law does not however provide a presumption that collective agreements (and in particular, it seems, age limits in such agreements) are compatible with the Directive. Two examples from the travaux préparatoires of conditions which will fulfil a legitimate aim and which will normally be appropriate and necessary are: (a) better conditions regarding paid vacation for older workers because they need more rest than younger workers in order to be able to work until they retire (the most common age at which the maximum vacation period is reached in collective agreements is 40, and the country reporter(s) had doubts as to whether this is a wholly objective (i.e. justified) age limit); (b) better conditions regarding periods of notice for older workers as an aid to help them work until retirement.

²⁶ Regulation 3 of the Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006.

²⁷ Article 7(1)(c) ADA.

²⁸ The Equal Treatment Act and the Federal Equal Treatment Act came into force in 2004 (implementing various related Directives).

²⁹ Law 58(1)/2004 transposing the Employment Equality Directive; however the law setting out the mandate of the Equality Body does not include the Article 6 exceptions.

³⁰ Articles 5, 9 and 11 of the Law 3304/2005 in force on 27 January 2005 (implementing Directive 2000/78/EC).

³¹ The Law on Equal Treatment.

2.4 Open with examples

Here the differences of treatment or aims contained in the State's list are examples, explicitly, rather than the only instances of potentially justified treatment.

- **Belgium**³²
- **Estonia**³³
- **Finland**³⁴ ('if it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or *some other comparable justified objective*, ...'³⁵)
- **France**³⁶
- **Germany**³⁷
- **Italy**³⁸
- **Slovenia**³⁹
- **Malta**⁴⁰

³² Federal State. *Article 12 of the General Anti-discrimination Federal Act Regions and Communities*. The Flemish Decree of 10 July 2008 (Art. 23), the Decree of the Walloon Region (Art. 11), the Decree of the French-speaking Community of 12 December 2008 (Art.12), the Ordinance of Brussels-Capital (Employment) of 4 September 2008 (Art. 13), the Decree of the German-speaking Community of 2004 (Art. 19) and the Decree of the *Cocof* of 2007 (Art. 8) have all made use of the option to allow proportionate different treatment provided by Article 6(1).

³³ The Law on Equal Treatment (Article 9 (2)).

³⁴ Section 7(1) Non-Discrimination Act.

³⁵ The aims selected for justification therefore need to be comparable to those set out.

³⁶ Difference of treatment based on the age of the individual may not now be considered discrimination if they are objectively and reasonably justified by a legitimate aim such as those specified in the law (health requirements and workers' safety, professional integration, maintaining employment, and reclassification or compensation in case of loss of employment) and if the means used to achieve that aim are necessary and appropriate (Articles L. 1133-1 and L. 1133-2 of the Labour Code).

³⁷ Sec. 10 AGG. Germany has a very wide range of legitimate aims, currently including entrepreneurial interests (see Federal Labour Court (Bundesarbeitsgericht), 22 January 2009, 8 AzR 906/07). The country report's author anticipated that of the country report CJEU case law might force a change in this respect.

³⁸ Law of June 6, 2008, n. 101, converting into law, with modifications, legislative decree of April 8, 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European Communities, published in Official Journal n. 132 of June 7, 2008 (*Legge 6 giugno 2008, n. 101, "Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee"* pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008). As many countries do, Italy appears to incorporate a test akin to the genuine occupational requirement in the form of a "work suitability test".

³⁹ Article 2.a, §1 of the Act Implementing the Principle of Equal Treatment. The test is 'if treatment is objectively and reasonably justified with a legitimate objective, including the legitimate goals of the active employment policy, labour market and vocation training, and if means to achieve objectives are appropriate and necessary'.

⁴⁰ Regulation 5 of Legal Notice 461 of 2004 reflects the provisions of Article 6 of Directive 2000/78. The experts say that the aims which are deemed legitimate are those set out in regulation 5 of the Equal Treatment Regulations. This suggests that other aims may not be deemed legitimate in practice, despite the fact that a non-exclusive form of wording is used in all parts of regulation 5.

2.5 Closed

The state prescribes which aims can be used or which less favourable treatment is justified. Otherwise direct age discrimination cannot be justified.

- **Bulgaria**⁴¹
- **Croatia**⁴²
- **Czech Republic**⁴³
- **Denmark**⁴⁴
- **Ireland**⁴⁵
- **Poland**⁴⁶
- **Spain**⁴⁷
- **Slovakia**⁴⁸

The regime is unclear in **Romania**. In **FYR of Macedonia** the law does not provide any specific exceptions regarding discrimination on the ground of age under the wording of Article 6 of the Directive. However a general exception in national law that could permit justification apparently exists. Article 26 of the national Labour Law also seems to

⁴¹ Protection from Discrimination Act. Where the Act makes an exception for differential age-related treatment the difference of treatment is subjected to a proportionality test and must not exceed what is necessary for the achievement of a legitimate aim. The exceptions permitted by the Act are (a) the fixing of requirements for minimum age, professional experience or length of service for recruitment or access to certain advantages in employment (art 7 (1.5)), and (b) the fixing of minimum and maximum ages for access to training or education (art 7 (1.11)). The Act also permits requirements for age and length of service in relation to retirement, which do not need to be justified.

⁴² Article 9 Anti-Discrimination Act.

⁴³ Only two exceptions are identified in Sec. 6, para 1 and 2 of the Anti-Discrimination Law: (i) imposition of a condition of minimum age, period of vocational training or previous employment, which is necessary for proper performance or access to specific rights and duties to perform the relevant employment or occupation and (ii) where the vocational training required for proper performance of occupational duties is disproportionate in comparison to the date at which the person applying for the job will reach pensionable age. There is a constitutional general principle of justification: Constitutional Court No. Pl. ÚS 9/95.

⁴⁴ Anti-Discrimination Act. Direct age discrimination is only justified in a few situations mentioned explicitly in the law; see Ius Laboris report on Age Discrimination in Europe: <http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf>.

⁴⁵ Employment Equality Act 1998-2008 section 6.

⁴⁶ The Labour Code introduced (in the 2008 amendment) four exceptions to the principle of equal treatment; three of which (GORs; changing of conditions in respect of working time and protecting parents and those with disabilities) apply generally. The fourth: that length of service may be used as a criterion in setting terms of employment, dismissal, remuneration and promotion and access to vocational training, applies only to age.

⁴⁷ The Constitution (6 December 1978) prohibits all forms of discrimination. Art 17 of the Workers' Statute of 24 March 1995 prohibits such discrimination in employment. Implementing Law 62/2003 of 30 December 2003 allows differences of treatment based on age for the specific activities within the material scope of Directive 2000/78 which must be objectively justified based on a legitimate aim. The constitutional principle suggests that there are broader possibilities for the justification of any kind of discrimination.

⁴⁸ Section 8, paragraph 3 of the Anti-discrimination Act appears to give a closed list of exceptions based on the examples in the Directive. Objective justification of age-differential treatment which is provided for by specific regulation is allowed. However, the Slovakian experts note that section 8 para 3 may be treated as giving a general context to the exceptions. Such an approach may be developed by the Slovakian courts. See the judgment of the District Court Banská Bystrica 20/11/07 for an example of the closed list operation. The law does not distinguish between specific forms of discrimination in relation to the exception and hence includes justification of direct, indirect discrimination, harassment, instructions to discriminate, incitement to discriminate and victimisation, contrary to the requirements of the Directive.

incorporate a type of Genuine Occupational Requirement provision.⁴⁹ In April 2010 a new anti-discrimination law was passed, which provides for two age-specific exceptions to the principle of equal treatment: (a) minimum ages in relation to professional requirements and career advancement (arts 14/8 and 14/9) (b) maximum ages in relation to employment selection, or the need for rational time limitations connected to retirement and stipulated by law.⁵⁰

Conclusion

Given social attitudes to age, the absence of a justification test may cause judicial reluctance to find less favourable treatment in comparable circumstances. If the test mirrors the wording of the Directive, there remains a question of whether the typical aims referred to in those provisions must be construed as excluding the private aims which would be available to an employer in seeking to justify indirect discrimination without reference to Article 6. Where there is a test that names other aims, which are of a private nature (such as the entrepreneurial interests of the employer), we may question whether justification of differential treatment in such circumstances is compatible with the Directive.

⁴⁹ It states “at the conclusion of the contract of employment the applicant is obliged to submit to the employer evidence for fulfilling the asked conditions for carrying out work”.

⁵⁰ Article 3 Law on Prevention and Protection against Discrimination (LPPD), in force, 31/12/10. There are also now some non-age-specific exceptions to the principle of equal treatment, namely measures aimed at stimulating employment (art 15/2); measures intended to protect the distinguishing characteristics of ethnic, religious and linguistic minorities (art 15/8); and positive action measures for disadvantaged persons and groups. Art 5/8 of the LPPD states that these aims are not in contradiction to the Constitution and to the norms of international treaties, and are appropriate to the real needs, defined in advance and proportionate to the effects to be achieved. This suggests that the new law introduces an open system of justification.

Lisanne | 1993

Part III

Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

A number of countries permit differential treatment based on age in respect of the following types of activity:

- a. Retirement;
- b. Recruitment;
- c. Training;
- d. Dismissal;
- e. Promotion;
- f. Occupational Pensions.

Details of the general test permitting justification of differential treatment in each reporting State are given above in chapter 2, and details of specific types of differential treatment based on age authorised in the legislation of each reporting State are set out in chapters 4 – 8 below.

Many country experts remarked that there were many such differences of treatment and a comprehensive survey of these should be conducted. A number of countries are conducting a review of legislation and regulations to this end, one example being Belgium. Until a country audits its rules it is difficult for it to tell which rules offend against equal treatment on age grounds. Further, even once this exercise has been conducted, unless content is given to the idea of proving legitimate aims to a high standard, a state can simply assert the exceptions it wishes to use, and refer them to its employment policy and, subject to obvious points about internal consistency of those aims,⁵¹ this will be sufficient to comply with Article 6(1).

⁵¹ See C 88/08 *David Hütter vs. Technische Universität Graz* [2009] ECR I-5325.

Danny | 1975

Part IV

Does national legislation provide for exceptions to the principle of equal treatment for occupational pension schemes, as permitted by Article 6(2)?

Article 6(2) of the Directive provides an exception to the principle of equal treatment as follows:

“...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.”

In the following countries age requirements in pensions are permitted and those requirements do not need to be justified:

- **Austria**⁵²
- **Belgium**⁵³
- **Bulgaria**⁵⁴
- In **Cyprus** the law amending the pensions laws of 1997-2001⁵⁵ bases payments of a lump sum to public servants on retirement on the attainment of certain ages and the completion of a certain term of service.⁵⁶ Cypriot pension schemes are governed by collective agreements or private employment contracts. Otherwise the law on provident funds⁵⁷ appears to permit age-related factors to be taken into account. The Cypriot law is subject to Law 58(i)/2004 transposing the Directive.
- **Germany**⁵⁸
- **Estonia**⁵⁹
- **Finland**⁶⁰
- **France**⁶¹
- **Greece**
- **Ireland**⁶²
- **Netherlands**⁶³
- **Poland**⁶⁴

⁵² §§ 13b (3)-(5) of the Federal-Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*) and in and in §§ 20 (3)-(5) of the Equal Treatment Act (*Gleichbehandlungsgesetz*). Austrian law copies Article 6(2) of the Directive.

⁵³ The legislation is said by the country reporter(s) to be extremely complex and no citations are provided.

⁵⁴ Protection Against Discrimination Act Art 7(1.8) allows age preconditions for pensions in general, including occupational ones, without those requirements requiring justification.

⁵⁵ N59(I) 2005.

⁵⁶ In Decision Reference AKI63/2008 the Equality Body took the view that pension benefits could be paid on the basis of completion of a certain length of service irrespective of age and still achieve the aim of the pensions law.

⁵⁷ 1981-2005, N44/81.

⁵⁸ Germany's AGG, section 10. No 4.

⁵⁹ The Law on Funded Pensions *Kogumispensionide seadus*, RT I 2004, 37, 252.

⁶⁰ Employees Pension Act (395/2006).

⁶¹ Article 2, Law on Equal Opportunities of 31 March 2006.

⁶² Section 34 of the Employment Equality Act 1998 – 2007 sets out exceptions for occupational benefits schemes in line with Article 6(2), and a further exception for the provision of different rates of severance payments in such schemes based on the period between the age at which an employee leaves employment and the age of compulsory retirement. However, the definition of ‘occupational benefits scheme’ does not include occupational pension schemes. According to the *Ius Laboris* report ‘Age Discrimination in Europe’ (<http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf>), the Pensions Act 1990, whilst prohibiting age discrimination in respect of pension scheme rules, permits such discrimination in relation to access to scheme membership and the level of contributions or benefits.

⁶³ Article 8 of the Anti-Discrimination Act.

⁶⁴ Article 24 and 27 Act on Retirement. Miners, railway workers, teachers, regular soldiers, police officers and officers of other state enforcement agencies, judges and prosecutors have achieved special preferences in relation to retirement.

- **Portugal**⁶⁵
- **Spain**⁶⁶
- **Sweden**
- **United Kingdom**⁶⁷
- In **Hungary**, pension funds may not fix admission. Employees may not have a pension from private pension funds before pensionable age.⁶⁸

In certain countries the situation is not clear:

- **Croatia** reported that the Anti-Discrimination Act allows fixing of a retirement age, and the prescription of a particular age as a condition for acquiring the right to retirement.
- **Czech Republic** reports that there is no system of occupational pensions.
- **FYR of Macedonia's** Law on Pension and Disability Insurance ("Official gazette" of the Republic of Macedonia, No.80/93 and its amendments in 2000) appears to establish a general age for retirement, but it is not clear whether the law mandates dates for receipt of the occupational pension or whether this is based on years of pensionable service only.)
- In **Italy** the question of pension reform has been a harshly debated political question, but no explicit use of the possibility under Article 6(2) of the Directive was reported.
- **Latvia, Lithuania, Luxembourg, Malta** and **Romania** reported that they had no specific provision in this area.

Conclusion

There appears to be greater uniformity in the way in which reporting States have dealt with the exceptions permitted by Article 6(2) than in relation to other parts of Article 6. In the authors' view, this is likely to be because the Article 6(2) exceptions are specific and circumscribed.

⁶⁵ Schemes can fix ages for admission or entitlement if these are justified under the conditions of the specific pension scheme.

⁶⁶ Art. 161.2 of the General Social Security Law: RDL 1/1994 of 20 June.

⁶⁷ Schedule 2 para 7 Employment Equality (Age) Regulations 2006. The participants suggest that the UK government believes that these provisions fall within art 6(2) of the Directive along with permitting minimum and maximum ages for joining; specifying a normal retirement date; paying early and late pensions; paying ill-health early retirement pensions without reduction/with enhancement; paying early retirement pensions on redundancy without reduction/with enhancement; linking benefits to service in defined benefit schemes; closing schemes to new entrants and paying differential increases to pensioners of different ages. Those which do not satisfy Art 6(2) will require objective justification.

⁶⁸ Article 30 of the Private Pensions Act.

Gerhard | 1950

Part V

Special conditions for young people, older workers and persons with caring responsibilities

The Directive sets out certain indicative examples of the types of differential treatment which may be justified under Article 6(1). These are:

- a. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities, in order to promote their vocational integration or ensure their protection;
- b. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- c. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

The first ‘example exemption’, dealing with vocational integration and protection of certain types of workers, is considered in this chapter. Minimum and maximum age requirements are dealt with in chapter 6, which follows.

The country reports demonstrate that most states have introduced, or retained, a plethora of laws differentiating on the ground of age within these broad areas – and some which arguably go beyond what is ostensibly permitted by the Directive.

5.1 Special conditions for young people

These measures generally protect in terms of development, morals and health and safety. Some countries also have measures aimed at bringing young persons into the work place (e.g. by means of making their employment cheaper for the employer either by subsidy or by depressing the minimum salary payable for employees between certain ages), although such provisions appear to be less common. Most countries also have a minimum age of access to employment, which is considered in chapter 6 below.

5.1.1 Measures to protect young persons in the workplace

Council Directive 94/33/EC of 22 June 1994 sets out a number of provisions intended to protect young persons at work. In particular, employers are required to take additional steps to protect the health and safety of children (under 15s and those still subject to compulsory schooling) and adolescents (individuals aged 15 – 18 who are no longer subject to compulsory schooling) in the workplace. There are also limits on night work and hours, and provisions relating to rest breaks and holidays. Many of the protective measures reported by individual States are clearly intended to ensure compliance with Directive 94/33/EC.

- **Bulgaria:** Special conditions⁶⁹ surround the employment of 15 and 16 year olds. Employment must not hamper regular schooling or vocational training.⁷⁰ No-one under 18 may undertake work which is beyond their capabilities, or harmful, or involves risks which it is assumed they will be unable to understand or to avoid due to immaturity.⁷¹ The employer must warn the minor and the minor’s parents of the risks involved in a job.
- **Czech Republic:** There is a set length of working day and certain working conditions for those under 18: the Labour Code prohibits night work and work exceeding normal working hours, and in certain circumstances requires employers to secure medical examination of those under 18.

⁶⁹ Under the Labour Code Art. 294 (6).

⁷⁰ Art. 301 Labour Code.

⁷¹ Art. 304 Labour Code.

- **Estonia:** Minors are granted extended annual holiday.⁷²
- **Finland:** Employers must ensure that the work carried out by under 18s is not detrimental to their physical or mental health; maximum working times are set and young employees are given the necessary guidance with a view to ensuring occupational health and safety.⁷³
- **FYR of Macedonia:** Specific protective measures for those under 18,⁷⁴ cover working time, night work, work in special conditions and supplementary vacation.
- **Hungary:** There are numerous protective provisions in the Labour Code for the employment and working conditions of under 18s: young employees may not be employed on night shifts⁷⁵ and have an entitlement to an extra 5 days' holiday per year.⁷⁶
- **Ireland:** There are health and safety requirements for employers of children (under 16s) and young persons (16 – 18s).⁷⁷
- **Lithuania:** under 18s are prevented from night working, may choose their vacation time and are entitled to 30 days' holiday (the norm is 28).⁷⁸
- **Luxembourg:** under 18s have special provision for their working conditions.⁷⁹ There are strict conditions on the employment of teenagers (e.g. working hours, etc.).
- **Poland:** there are special requirements relating to the employment and training of younger workers, especially those aged under 18. An employer is obliged to allow employees under the age of 18 to attend classes (education to 18 is compulsory) and to grant leave from work for this purpose; working hours are limited to 6 hours per day (under 16s) and 8 hours per day (under 18s), including time spent in compulsory classes at school; no night shifts or 22.00-06.00 work for young persons, and young people are prohibited from doing certain jobs.⁸⁰
- **Portugal:** the Labour Code provides detailed rules for young workers.⁸¹ All workers still in high school or university receive a credit of up to 6 paid hours per week for study,⁸² and are exempt from overtime.⁸³ Employers cannot ask them to work more than the normal agreed hours.

⁷² Law on Employment Contracts Articles 56 to 57.

⁷³ Act on Young Employees, sections 9 and 10.

⁷⁴ Charter XIII protection of workers under 18 years, Labour law (revised), "Official gazette" of the Republic of Macedonia, No. 16/2010.

⁷⁵ Article 129/A Labour Code.

⁷⁶ Article 132 Labour Code.

⁷⁷ See the Protection of Young Persons (Employment) Act 1996 and the Safety, Health and Welfare at Work (Children and Young Persons) Regulations 1998.

⁷⁸ Under the Labour Code.

⁷⁹ Law of 23 March 2001 concerning the protection of young workers, Art. 7.

⁸⁰ See Article 190-204 Labour Code.

⁸¹ Articles 66–83 of the Labour Code.

⁸² Articles 69(3) and 90(3)(d) of the Labour Code.

⁸³ Article 73 Labour Code.

- **Romania:** the Labour Code contains specific protective measures for under 18s who have a work program of six hours/day and 30 hours/week,⁸⁴ cannot work supplementary hours⁸⁵ or during the night shift,⁸⁶ must have a lunch break of at least 30 minutes,⁸⁷ and must be given a supplementary vacation of three days.⁸⁸
- **Slovakia:** employers must create favourable conditions for the overall development of the physical and mental capabilities of under 18s,⁸⁹ and must cooperate with the employee's legal guardians, who must be notified of all significant events such as notice of termination or termination without notice. Juveniles may only be assigned jobs appropriate to their physical and mental development, and which do not jeopardise their morality. There is an enhanced duty to the employee at work and they may not undertake night work (save, exceptionally, in the case of juveniles over 16, and then only up to 1 hour if necessary for their vocational training). The law prohibits certain kinds of work and workplaces for juvenile employees.⁹⁰
- **Slovenia:** Several provisions of the Employment Relationships Act are intended to protect workers who have not yet reached 18. They may not be exposed to certain kinds of working conditions, (working underground or under water, exposure to increased health risks due to exceptional cold, heat, noise or vibrations, and conditions which present a greater risk of accidents). Under 18s may not work for more than 40 hours per week, or at night between 22.00 and 06.00 the next day, and have the right to seven extra days of paid holiday.
- **UK:** Employers of children and young people have additional health and safety obligations.

5.1.2 Financial incentives to employers who employ young people, or young people seeking employment

A significant minority of reporting States have adopted provisions of this type, which appear to fall squarely within the wording of Article 6(1)(a) of the Directive. The precise incentives adopted, and the groups to which they apply, vary widely according to the individual circumstances of the States.

- **Belgium:** a 30% salary depression is permissible for workers aged between 15 and 16. Between 16 and 18, 20% is permitted.
- **Bulgaria:** The Employment Encouragement Act provides that employers who employ someone under 29 will be reimbursed the first year's salary.⁹¹ A form of stimulation for apprenticeships or internships exists for those under 29 by which their salaries are reimbursed by the State for six months.⁹²
- **Denmark:** allows collective agreements regarding special rules on payment, etc. for under 18s.⁹³

⁸⁴ Article 109 Labour Code.

⁸⁵ Article 121 Labour Code.

⁸⁶ Article 125 Labour Code.

⁸⁷ Article 130 Labour Code.

⁸⁸ Article 142 Labour Code.

⁸⁹ Sections 11-3 and 40(3) of the Labour Code.

⁹⁰ Nariadenie vlády č. 286/2004 Z.z. ktorým sa ustanovuje zoznam prác a pracovísk, ktoré sú zakázané mladistvým zamestnancom, a ktorým sa ustanovujú niektoré povinnosti zamestnávateľom pri zamestnávaní mladistvých zamestnancov [Government Regulation No. 286/2004 Coll. regulating the list of work and workplaces forbidden for juvenile employees and setting certain duties of employers regarding the employment of juvenile employees].

⁹¹ Art. 36 Employment Encouragement Act.

⁹² Art. 41 Employment Encouragement Act.

⁹³ Cf. section 5(a)(5) Act on Prohibition against Differential Treatment in the Labour Market.

- **Finland:** There are special provisions for support for unemployed jobseekers aged under 25.⁹⁴
- **France:** There are professionalization contracts for unemployed under 20s, carrying a hiring premium of 1000 Euros.⁹⁵ Those between 16 - 25 who leave school without recognised diplomas (or sufficient qualifications for the lowest civil service level) may combine formal training with internships and so gain entry to the civil service.
- **Hungary:** Those disadvantaged in the labour market, which includes persons under 25, receive funding for training.⁹⁶
- **Romania:** Employers can receive fiscal incentives if they hire students during the vacation or hire recent graduates.⁹⁷
- **Spain:** many employment policy programmes exist in the National Employment Plans with participant age limits, normally favouring young people (under 25) and older workers. For both groups there are measures to support training and employment in the form of partially subsidised contracts. For under 25s, there are work experience, job-training and subsidised (indefinite duration) contracts.
- **UK:** the national minimum wage is paid at three different rates based on the age of the worker.⁹⁸ Employers may pay employees aged 22 and over more than those under 21 even where they are doing the same job. Employees aged between 18 and 21 can be paid more than those under 18, where all are being paid at the relevant minimum wage rate. Employers must pay the same rate to those in the same age category.

5.1.3 Exceptions from employment protection for young people

In **Denmark**, the discrimination prohibition does not apply to the employment, conditions of pay and dismissal of under 15s. Their employment is not regulated by a collective agreement.⁹⁹ In **Finland**, the law permits differences of treatment based on age in the case of employment of those under 18.¹⁰⁰ The wording of the country reports suggests that both countries have adopted a blanket exclusion of protection for age discrimination in the relevant age groups. It is arguable that such an exclusion contravenes the Directive.

⁹⁴ Public Workforce Service (1295/2002).

⁹⁵ Decree no 2009-694 of 15/06/09.

⁹⁶ Articles 2 and 14 of the Act IV of 1991 on Promotion of Employment. Act CXXIII of 2004 on the Employment of Career Beginners, Employees over 50 and Persons with Caring Responsibilities and on Internships contains further schemes aimed at the promotion of employment for these categories (e.g. reduction in social security contributions to be paid by the employer).

⁹⁷ Article 80 of Law 76/2002 on the system of funds for unemployment and encouraging occupation provides that employers who hire young graduates for at least three years, are exempted from paying fiscal contributions for the unemployment public fund in respect of those graduates for 12 months, and also receive a monthly contribution from the state which can be the minimum average income or higher depending on the education of the employee.

⁹⁸ The rates from 1 October 2009 were - ages 16-17 £3.57 per hour (3.96 euros); 18-21 £4.83 per hour (5.36 euros) and workers 22 and over £5.80 per hour (6.44 euros). The adult rate is applicable to 21 year olds from October 2010.

⁹⁹ According to section 5(a)(6) Prohibition against Differential Treatment in the Labour Market.

¹⁰⁰ Act on Young Employees.

Rianne | 1991

5.1.4 Additional protection against dismissal for young people

By way of contrast, in **Greece** students and employed students are protected from dismissal. However further details of the particular measures that relate to specific categories are not provided in the country reports. In **Lithuania**, certain guarantees (not specified in the report) are given to employees who are attending educational institutions. These provisions are unlikely directly to discriminate on grounds of age, but may amount to indirect discrimination; however, as such, they are more likely to be justified.

5.2 Special provisions for older workers

These measures tend primarily to be directed towards encouraging older workers to remain in the workplace, and encouraging employers to recruit and retain older workers; i.e. the vocational integration aspect of Article 6(1)(a) of the Directive, rather than the ‘protection’ aspect. It could be argued that some of the ‘protective’ provisions (such as the prohibition on individuals working as a firefighter beyond the age of 45 in Hungary, for example) may violate the Directive, if they are not supported by clear objective evidence.

5.2.1 Incentives for employers to recruit/retain older workers and for older workers to remain in the workforce

As in the case of younger workers, there are a number of widely varying national incentives to encourage employment of older workers.

- **Belgium:** the Federal Act of 23 December 2005 aims as part of the solidarity pact between generations to raise the level of economic activity amongst older workers. There is a system of competence validation intended to address the belief amongst employers that older workers are less efficient. Belgium encourages recruitment of older workers with subsidies for remuneration and rewards for investments encouraging the improvement of their working conditions.¹⁰¹ Early departure from employment is discouraged, and the normal age for early retirement was increased in 2008 from 58 to 60. Further, special measures have been introduced to make it easier for workers of 55 or over to reduce their working time by 20%.
- **Bulgaria:** the Employment Encouragement Act provides for reimbursement of the first year’s salary where an employer employs someone over 50.¹⁰²
- **Denmark:** there are provisions permitting positive action with regard to senior workers with a view to promoting the employment of elderly people.¹⁰³
- **France** has a National Action Plan for the employment of older workers, which imposes a minimum quota of employees who are over 50, subject to pecuniary sanctions.¹⁰⁴
- **Hungary:** employers are subsidised to offer jobs to disadvantaged workers including the over 50s.

¹⁰¹ Executive Regulation of 30 January 2003 establishing the criteria, conditions and procedures for granting a subsidy for supporting actions relating to the promotion of good quality working conditions for older workers and fixing the amount of that subsidy), *Moniteur belge*, 7 February 2003.

¹⁰² Art. 36 Employment Encouragement Act.

¹⁰³ Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market, and following.

¹⁰⁴ No 2009-560 of 20/5/09.

- **Malta:** there is a fiscal incentive scheme¹⁰⁵ for employers who create jobs for, employ and train those over 40.
- **Romania:** employers employing persons older than 45 can receive tax incentives in the form of exemptions from contributions to the public unemployment fund, provided that the employment lasts two years.¹⁰⁶
- **Slovenia:** workers over 55 (men) or 51 (women) years of age may conclude an employment contract for shorter working hours if they partially retire.¹⁰⁷
- **Spain:** the National Employment Plans set out measures to support training and employment in the form of partially subsidised contracts for older workers, who also have access to subsidised (indefinite duration) contracts (for those aged 45 to 55 in some cases, and over 52 in others).

5.2.2 Special assistance for older workers in obtaining work

- **Belgium:** Some measures in the Federal Act of 23 December 2005 encourage continued vocational training and retraining of older workers. There are incentives in the social security system for older unemployed workers taking up employment (for example, pension income is increased if individuals continue to work between the ages of 60 and 65, and tax rates are cut on complimentary pensions where the person has worked until age 65).
- **Malta:** the Employment and Training Corporation provides training courses specifically directed at registered unemployed persons over 40.
- **Slovenia:** Age is one of the criteria for inclusion of an unemployed person in the active employment policy program.¹⁰⁸
- **Spain:** There is a job-seeker's allowance programme for older workers at a particular disadvantage on the labour market. The unemployment benefit system permits those aged over 52 who have used up their contributory unemployment benefit to receive the allowance until retirement age. Those over 45 with family responsibilities who have used up their contributory unemployment benefit are entitled to a variable allowance. "Active job-seeking income" is granted to those over 45 satisfying certain conditions.
- **UK:** the implementing regulations provide for positive action exceptions whereby persons of a particular age receive special access to training facilities to help them take on particular work, or are allowed to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age.¹⁰⁹

5.2.3 Preferential treatment of older workers in redundancy/dismissal situations

Whilst there are very few instances of preferential treatment for young people in redundancy/dismissal situations, a significant minority of countries make it harder for employers to dismiss older workers (see further Chapter

¹⁰⁵ Created under the Business Promotion Act Regulations 2000.

¹⁰⁶ Article 85 Law 76/2002.

¹⁰⁷ Employment Relations Act.

¹⁰⁸ 1998 Act Amending the Employment and Unemployment Insurance Act.

¹⁰⁹ Regulation 29 Employment Equality (Age) Regulations 2006.

8 below). Such provisions are likely to pursue a legitimate aim, in that it can be difficult for long-serving, older employees to find new employment.

- **Belgium:** There are outplacement payments for those aged 45 or over who are made redundant, and it is more expensive to make such individuals redundant.
- **Bulgaria:** If an employee is dismissed after retirement age then regardless of the reason for dismissal they are entitled to two months' salary or, if they have worked with the employer for ten years, six months' salary.¹¹⁰ Those under 60 who are made redundant are entitled to no more than one month's salary.
- **Hungary:** employers can terminate the employment of those within 5 years of pensionable age only in particularly justified cases. Such workers are entitled to higher severance pay.¹¹¹
- **Latvia:** Persons who have less than five years left until reaching the age of retirement (along with certain other groups) have priority to remain employed in case of redundancy.¹¹² This exception pre-dates the Directive.
- **Lithuania:** workers who have 5 years or less to retirement age must be notified 4 months in advance of any organisational restructuring (other employees are notified 2 months in advance).¹¹³ Those with 3 years to pensionable age receive job security priority in an organisational restructuring.

5.2.4 Protective measures (health and safety)

Provisions intended to protect the health and safety of older workers by limiting the type of employment they may undertake, or the way in which they undertake it, require careful scrutiny and supporting evidence to ensure that they do not go beyond what is necessary to achieve legitimate objectives.¹¹⁴

- **Estonia:** Incapacity pensioners are granted extended annual holiday.¹¹⁵
- **FYR of Macedonia** has legislation providing that workers older than 57 (women) or 59 (men) may have special protective measures applied to them, including restriction of overtime and night work.¹¹⁶
- **Hungary** has particular provisions to protect the health and safety of older workers by limiting their employment: 'In the course of examining and assessing labour suitability it shall be taken into consideration that older employees are not or only conditionally suitable for work entailing health risk or dangerous encumbrances and enumerated under Annex 8'.¹¹⁷ These include e.g. a prohibition on employing individuals over 45 for heavy physical work in heat exposure, so they may not work as firefighters.
- In **Slovenia** employers may not require workers aged over 55 (men) or 51 (women) to work overtime or at night.

¹¹⁰ Labour Code, Art 222(3).

¹¹¹ Articles 89(7) and 95(5) of the Labour Code.

¹¹² Art. 108 of the Labour Law.

¹¹³ Under the Lithuanian Labour Code.

¹¹⁴ See *Wolf v Stadt Frankfurt am Main* (Case C-229/08) [2010] CMLR 32.

¹¹⁵ Articles 56 and 57, Law on Employment Contracts.

¹¹⁶ Articles 179 and 180, Labour Law.

¹¹⁷ Decree 33/1998 of the Ministry of Welfare on the Medical Examination and Assessment of Labour, Professional and Personal Hygienic Suitability.

5.3 Special provisions for carers

Most countries make some provision to protect the employment of individuals who need to care for others, although the extent to which this goes beyond protection for a mother during pregnancy/ maternity leave varies widely. Provisions of this nature have the potential to amount to indirect age discrimination if not justified, but are likely to be considered to pursue a legitimate aim.

- **Belgium:** an executive regulation¹¹⁸ provides for career interruptions of private sector workers assisting or providing care to a family member or a member of the household who is seriously ill. In the case of a worker living alone with one or more children under their care the career gap period permitted is doubled.
- **Bulgaria:** encourages hiring of single parents or adopted parents, mothers or adopted mothers of children no older than five. Employers receive a subsidy for such employment for up to a year.¹¹⁹ There are special provisions for women nursing babies, who may refuse specified health threatening work,¹²⁰ are entitled to adjusted working (or alternative safe work) and may not be sent on business trips without written consent.¹²¹ Female employees may work from home until their child is 6 and then return to their former post (or if redundant, to an appropriate post).¹²² If the mother cannot exercise these rights, the father may.¹²³
- **Czech Republic:** special protection is provided for parents of children under 10 years of age, in order to enable them to organise their caring responsibilities around their economic activity.¹²⁴
- **Denmark:** the burden of proof is reversed when a person is dismissed during pregnancy or maternity leave;¹²⁵ the employer must prove that the dismissal was not motivated by these factors.
- **Estonia:** special conditions for pregnancy and birth, taking care of minor children and disabled adult children and parents are not taken as discrimination.¹²⁶
- **France:** additional vacation days for working mothers under 21 years of age.¹²⁷
- **Finland:** the Employment Contracts Act contains special provisions with regard to maternity, paternity and parental leave (chapter 4, section 1), work during maternity or parental allowance terms (chapter 4, section 2),

¹¹⁸ Royal Decree of 15 July 2005.

¹¹⁹ The Employment Encouragement Act Art 53-53a.

¹²⁰ Art. 307 (2) and (3), Labour Code.

¹²¹ Art. 310, Labour Code.

¹²² Art. 312, Labour Code.

¹²³ Art. 313 Labour Code. Clearly questions may be asked about the gender implications of this approach, but it is likely that the majority of the conditions save home working to the child's age of 6, amount to special provisions surrounding pregnancy and child birth.

¹²⁴ Law No. 54/1956 Coll., on Sickness Insurance for Employees (does not apply to self employment).

¹²⁵ Section 16(4) in Act (no.734 of 28th June 2006) on Equal Treatment of Men and Women regarding occupation, etc. According to section 16(5), a person dismissed during pregnancy or maternity leave has the right to receive a written and thorough explanation of the reasons for the dismissal.

¹²⁶ Law on Equal Treatment (Article 9 (2)) introduced provisions almost identical to the first sentence of Article 6 (1) of the Directive 2000/78.

¹²⁷ Art. 31471-9, Labour Code. Following investigation by HALDE concluding that there was apparent discrimination on the ground of sex and age, this has been extended to young men of the same age, but the age limit has been maintained as HALDE accepted the government's position that this was justified in view of the specific difficulties of integration on the labour market of very young parents (deliberation 2010-83, 1/3/10).

different kinds of child-care leaves (chapter 4, sections 3-6) and absence for compelling family reasons (chapter 4, section 7). However no further details are given of these in the country reports.

- **FYR of Macedonia** restrictions on overtime and night time working apply to persons with caring responsibilities for children not older than 7.¹²⁸ There is provision for the special protection of single parents.¹²⁹ Such measures are not treated as discrimination under domestic law.
- **Greece:** women during pregnancy, women when breast feeding their children, and employees with family responsibilities are protected from dismissal; however further details of the particular measures that relate to specific categories are not provided in the country reports.
- **Hungary** has protection against dismissal for those with caring responsibilities e.g. during periods after giving birth or looking after a sick child.¹³⁰ Employers are subsidised to offer jobs to disabled or disadvantaged workers, including single parents with at least one child under 18.
- **Ireland:** the law prohibits discrimination on the grounds of a person's family status.¹³¹ There is unpaid leave for full time care for a dependant.¹³² Ireland has several initiatives relating to care.¹³³
- **Latvia:** In cases of redundancy, those raising a child (up to 14 years old), a disabled child (up to 16 years old), or who have at least two dependant persons have priority to remain employed (amongst other groups). This exception pre-dates the Directive.¹³⁴
- **Lithuania:** Those with caring responsibilities receive job security priority in organisational restructures.
- **Luxembourg:** the law¹³⁵ gives the right to special family leave for parents of a child who is less than 16 years old, in case of grave illness, accident or other grave health problem, not exceeding 2 days per year.
- **Poland:** maternity leave,¹³⁶ parental leave,¹³⁷ care allowance,¹³⁸ some provisions for people caring for disabled people (e.g. free transportation as the accompanying carer of a disabled person).

¹²⁸ Art. 164, Labour law (revised), "Official gazette" of the Republic of Macedonia, No. 16/2010

¹²⁹ Art. 15/7 Anti-Discrimination law.

¹³⁰ Art. 90 of the Labour Code.

¹³¹ The definition includes a parent or a person in loco parentis to a person who has yet to attain the age of 18, it also includes a resident primary carer to a person who has a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.

¹³² Carer's Leave Act 2001: maximum leave 65 weeks; minimum 13 weeks. Carer's Benefit is payable up to 65 weeks for a carer who gives up work.

¹³³ For more information <http://www.worklifebalance.ie/> The Special Initiative on Care includes issues such as childcare, care for the people with disabilities and the elderly. The Equality Authority has published a number of documents in respect of carers see particularly: *Implementing Equality for Carers* which highlights the difficulties for carers in Irish society and makes a number of recommendations for change.

¹³⁴ Art. 108 of the Labour Law.

¹³⁵ Loi du 12 février 1999 portant création d'un congé parental et d'un congé pour raisons familiales, Mémorial du 23/02/1999 (013/1999), [Law of 12 February 1999 creating a parental leave and a leave for family reasons] <http://www.legilux.public.lu/leg/a/archives/1999/0132302/1999A02096.html>.

¹³⁶ Article 180 Labour Code and Chapter 6 Act on Pecuniary Indemnity from Social Insurance in Case of Disease or Maternity of 25 July 1999 [henceforth: Act on Indemnity in Case of Disease] (Dz.U. 1999.60.636).

¹³⁷ Article 186 Labour Code.

¹³⁸ Chapter 7 Act on Indemnity in Case of Disease.

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- **Portugal:** maternity or paternity leave of up to 120 days¹³⁹ including for adoptive parent(s);¹⁴⁰ reduced working hours for the parent or guardian of a minor with a disability or chronic disease;¹⁴¹ medical consultations and the right to feed a baby.¹⁴² Grandparents have the right to leave of absence to take care of their grandchildren in certain circumstances.¹⁴³ There are special working conditions for persons with caring responsibilities, such as parental leave of three months, part-time work and flexible hours.¹⁴⁴
- **Romania:** employers who hire (for at least 2 years) unemployed persons who have caring responsibilities as a sole parent are exempted from making contributions to the public unemployment fund.¹⁴⁵
- **Slovakia:** Labour Code protects employees caring for a next of kin with a serious disability. Apart from the prohibition of immediate dismissal, rescheduling of working hours is permissible only upon agreement with the employee concerned.
- **Slovenia:** the Employment Relations Act protects workers in respect of pregnancy and parenthood.¹⁴⁶ The employer must enable workers easily to reconcile family and employment responsibilities. A worker caring for a child under 3 may only be required to work overtime or at night with written consent. A similar provision applies in circumstances where one of the employed parents of a child who is under seven, or severely ill, or has a severe physical or mental disability, is living alone with and caring for the child.
- **Sweden:** a number of rights relating to parenting exist.¹⁴⁷ For example, parents are granted a total of 480 days of paid parental leave between them, of which 60 are allocated specifically to each parent. Adoptive parents are entitled to 1.5 years of leave.¹⁴⁸
- **UK:** people with responsibilities caring for children under 16 (or under 18 if disabled) may request a change in their terms and conditions of employment in relation to hours, time of work or working partly or wholly from home. It is not automatically granted. The employer must consider these requests and if refusing, must give reasons; the employee can appeal. There is a parallel entitlement where the care responsibilities relate to an older person who also requires a high level of care. Comparable provisions exist in **Northern Ireland** under the Employment Rights (NI) Order 1996.

5.4 General provisions permitting the encouragement of economic integration/protection of age groups

Some country reporters noted that their country had general legislative exceptions to the prohibition of age discrimination along the lines set out in Article 6(1)(a) of the Directive, but provided little further detail. In some cases, the exemptions were too extensive to list.

¹³⁹ Article 40(1) of the Labour Code.

¹⁴⁰ Articles 44 and 40(1) of the Labour Code.

¹⁴¹ Articles 53 and 54 of the Labour Code.

¹⁴² Articles 46 - 48, Labour Code.

¹⁴³ Article 50, Labour Code.

¹⁴⁴ Articles 49 - 65, Labour Code.

¹⁴⁵ Article 85, Law 76/2002.

¹⁴⁶ Article 187 Employment Relations Act.

¹⁴⁷ See (1995:584) Parental Leave Act in particular.

¹⁴⁸ <http://www.sweden.se/eng/Home/Society/Equality/Facts/Gender-equality-in-Sweden/>.

- **Austria:** there is a wide range of different governmental policies, e.g. tax advantages for single parent educators and special programmes to promote the employment of younger or older workers. The country report does not give any details. Each needs to be justified save as exempted by s 13b(3)-(5) under the Federal Equal Treatment Act and 20(3)-(5) of the Equal Treatment Act.
- **Croatia:** the Anti-Discrimination Act gives privileges to pregnant women, children, young people, older persons, persons with caring responsibilities who regularly fulfil their caring duties and disabled persons with a view to their protection, when such conduct is based on provisions of law, subordinate regulations or programmes, and such measures are deemed not to be discrimination.¹⁴⁹
- The **Netherlands:** there are no special conditions. There is a general provision¹⁵⁰ which permits discrimination if it is based on employment or labour market policy promoting employment in certain age categories.
- **Germany:** there are various measures aiming to integrate older and younger workers,¹⁵¹ provisions which protect persons with caring responsibilities and it is possible to have preferential treatment of these persons if objectively justified.¹⁵² Some measures have been challenged in German case law.¹⁵³
- **Italy:** there are many rules to promote employment and vocational training of young people, some of which allow less favourable treatment (e.g. reduced salaries/lesser guarantees). There are also many rules providing protection for people with caring responsibilities e.g. maternity leave. However no further detail is provided in the country report.
- **Sweden:** there are rules in labour market policy regulations expressly referring to age, to promote the vocational integration of young and old, respectively.

Conclusion

Special measures are evidently widespread. There is substantial work to be done (perhaps along the lines of the audits which have been carried out in the Netherlands, where each government department has been required to make a report giving an inventory of age criteria in its legislation, and providing reasons why they exist) to establish:

- (a) the precise extent of their use; and
- (b) the extent to which they create greater equality in reality.

¹⁴⁹ Article 9(2)(2) of the Anti-discrimination Act.

¹⁵⁰ Article 78(1)(a) of the Anti-discrimination Act.

¹⁵¹ The provisions under scrutiny in the *Mangold* case are an example of this. Recent amendment to German law lowered the age to 52 permanently and added the qualification that the fixed term contract with the formerly unemployed person is of up to 5 years of duration.

¹⁵² Under Sec. 10.1 of the the General Anti-Discrimination Act.

¹⁵³ Lower Saxony Land Labour Court (Landesarbeitsgericht Niedersachsen), 28 May 2004, 10 Sa 2180/03: higher level of protection by social security systems for employees older than 55 (e.g. as regards unemployment benefits) constitutes an objective reason for simplified redundancy procedures; Administrative Court Gelsenkirchen (*Verwaltungsgericht Gelsenkirchen*), 29 November 2006, 4 K 1462/06: student fees for students above the age of 60 objectively justified as to Directive 2000/78/EC and Sec. 10 AGG; Regional Labour Court Düsseldorf (*Landesarbeitsgericht Düsseldorf*), 4 January, 10 Sa 1315/05: no fixed-term contracts for persons older than 40 in science violation of Directive 2000/78/EC. In case C-555/07 *Kücükdeveci* (CJEU), the rule whereby job tenure before the age of 25 does not count in calculating the cancellation period of work contracts (in contrast to job tenure from the age of 25) was held incompatible with the requirements of the Directive.

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Part VI

Age requirements

All states appear to have some minimum and maximum age requirements in relation to access to public or private employment. There are also some restrictions on training. Some such age restrictions have been successfully challenged.

Some indication of the breadth of the use of permitted differences is given in this chapter; however, the full extent of these exceptions is not yet clear. Countries are obliged to ensure that all rules that offend against the principle of equal treatment are abolished (art 16 Directive), but this is a difficult task in respect of the use of age rules, as so many of them are used in employment. The authors recommend that a proper audit of these rules be carried out. Without such an audit as has been carried out in Belgium for example, the Commission will not be in a position to ascertain whether an excessively large exception is being created to the principle of equal treatment as it applies to age.

This chapter deals only with the type of minimum and maximum age requirements referred to in Article 6(1)(b) and (c) of the Directive. Retirement ages, including those for particular professions, are considered in chapter 7.

6.1 Countries which have general provisions for the fixing of maximum and minimum ages

These countries have generally applicable provisions allowing employers and/or trainers to fix minimum and maximum ages. Most require such fixed ages to be justified, but, on the face of the country reports, some do not. Whilst a State may well be able to justify specified age minima and maxima in certain situations, a general unfettered discretion granted to employers to set age minima and maxima as they wish, without the need to justify their use, would not, in the authors' view, comply with the Directive.

- **Austria** (in the precise terms of Article 6(1)(b) and (c) of the Directive)¹⁵⁴
- **Bulgaria**: permits the fixing of requirements for minimum age, professional experience or length of service for recruitment or for access to certain advantages linked to employment, provided that it is in effect¹⁵⁵ objectively justified by a legitimate aim and the means to accomplish it do not exceed what is necessary. It allows fixing maximum age requirements for recruitment linked to training requirements of the post in question, or the need for a reasonable period of employment before retirement,¹⁵⁶ subject to the same justification test.¹⁵⁷
- **Croatia**: provides for exceptions permitting minimum age requirements in relation to access to employment or to acquiring other benefits based on employment.¹⁵⁸ It also provides for exceptions permitting maximum age requirements in relation to access to employment/termination of employment.
- **Cyprus**: generally, use of age maxima and minima requires justification.

¹⁵⁴ Paras 13b (3)-(4) of the Federal-Equal Treatment Act and paras 20 (3)-(4) of the Equal Treatment Act.

¹⁵⁵ The Protection Against Discrimination Act, Art. 7 (1.5). While this language is literally deficient from the standpoint of Art. 6 (1) of Directive 2000/78, which refers to differences in treatment being objectively *and reasonably* justified, if the means are *appropriate and necessary*, it arguably complies with the requisite standard. If the test for *objective* justification is met, it is hard to see how a *reasonableness* test would not be. Similarly, if *necessity* is established, i.e. the lack of any better alternatives to achieve the aim pursued, it is difficult to imagine that the only means could be *inappropriate* (as long as the aim is legitimate).

¹⁵⁶ Within the meaning of Article 6, para 1, subpara (c) of the Framework Directive (2000/78/EC) – an employer's need to use an employee long enough before this employee retires and leaves the employer.

¹⁵⁷ Art. 7 (1.6), Protection Against Discrimination Act.

¹⁵⁸ See the Anti-Discrimination Act.

- **France:** it is not lawful to make an offer of employment containing an age limitation that would not otherwise be imposed by law.¹⁵⁹ Maximum age requirements are allowed “for recruiting, based on the required training for the function or the requirement of pursuing a reasonable period of employment before retirement.”¹⁶⁰
- **FYR Macedonia:** minimum ages in relation to professional requirements and career advancement as well maximum ages in relation to employment selection are exceptions to the discrimination rule “(...)for the need of rational time limitations connected to retirement and stipulated by law (...)”.¹⁶¹
- **Hungary:** the Constitutional Court has considered the legitimacy of defining an age minimum or maximum with regard to certain positions and occupations.¹⁶² It said “differentiation based on age is permitted, if it pertains to each person in the given category and is not arbitrary, i.e. it is reasonable and necessary for the aim to be achieved”.
- **Ireland:** prohibits age discrimination over 16,¹⁶³ but a minimum recruitment age (18 or under) may be set in employment contracts. Employers may also set a maximum age for recruitment which takes account of (a) any cost or period of time involved in training a recruit to an effective standard for the job and (b) the need for a reasonable period of time pre-retirement during which the recruit will be effective in that job.
- **Italy:** the law¹⁶⁴ permits exceptions for “the determination of minimum levels of age, professional experience or seniority in employment for access to employment or to certain benefits linked to employment”, and “the determination of a maximum age for recruitment, based on the conditions of the training required for the specific employment or on the need of a reasonable period of work before retirement”.
- **Netherlands:** any minimum or maximum age requirements must be justified under the general test for objective justification in Article 7(1) (a) or 7(1) (c) of the Anti-discrimination Act.
- **Sweden:** there are no exceptions, and the general justification test of proportionality applies to such minima and maxima.
- **Slovakia:** apart from specific exceptions, general rules of justification of direct age discrimination are applied to minima and maxima.¹⁶⁵
- **UK:** Subject to specific exceptions described above, minimum or maximum age requirements have to be objectively justified under the general justification test.

¹⁵⁹ Article L5331-2, Labour Code.

¹⁶⁰ Article L1133-1, para. 2°, Labour Code.

¹⁶¹ Articles 14/8 and 14/9, Anti-Discrimination Law.

¹⁶² Decision No. 857/B/1994.

¹⁶³ Employment Equality Act 1998-2007.

¹⁶⁴ Law of June 6, 2008, n. 101, converting into law, with modifications, legislative decree of April 8, 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European Communities, published in Official Journal n. 132 of June 7, 2008 (*Legge 6 giugno 2008, n. 101, “Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l’attuazione di obblighi comunitari e l’esecuzione di sentenze della Corte di giustizia delle Comunità europee” pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008*).

¹⁶⁵ Section 8, paragraph 3(a) of the Anti-Discrimination Act.

6.2 General minimum ages for employment

As set out above, most countries adopt a minimum age for employment (as indeed is required by Directive 94/33/EC).

- The minimum age for employment is **fifteen** in the Czech Republic,¹⁶⁶ Finland,¹⁶⁷ FYR Macedonia,¹⁶⁸ Slovakia,¹⁶⁹ and Slovenia.¹⁷⁰
- The minimum age is **sixteen** in Bulgaria,¹⁷¹ France,¹⁷² Hungary,¹⁷³ Lithuania,¹⁷⁴ Malta,¹⁷⁵ Portugal,¹⁷⁶ Romania,¹⁷⁷ Spain,¹⁷⁸ and the UK.¹⁷⁹
- The minimum unrestricted age is **eighteen** according to municipal regulations in Luxembourg¹⁸⁰ (but seventeen for some professions) and Poland.¹⁸¹

¹⁶⁶ See the Labour Code. There are exceptions permitting employment of younger children in the case of artistic, cultural, advertising or sporting activities regulated by conditions established by the Law on Employment. Some professions have a higher minimum age requirement, which is often 18, and is generally dependant on achieving some material condition or performing the work.

¹⁶⁷ If compulsory education has been completed: Act on Young Employees [*Jaki nuorista työntekijöistä* (998/1993)] section 3. A 14 year old may be employed subject to certain conditions. Younger children may be employed with specific permission from the pertinent authorities and only for specific purposes, e.g. as a child actor in a film.

¹⁶⁸ Article 250 Labour law, with exceptions for recording films, preparing and performing arts, stage and other similar works.

¹⁶⁹ Subject to completion of compulsory schooling: section 11 of the Labour Code.

¹⁷⁰ 16 on a ship.

¹⁷¹ Subject to the exceptions described in chapter 5 above.

¹⁷² Article L4153-1 of the Labour Code, without prejudice to specific regimes such as qualification and apprenticeship contracts: L6325-1 LC et s. at 15 Law 2003-775 of August 21, 2003. It is possible for juveniles to take summer employment after 14.

¹⁷³ Article 72 of the Labour Code. In school holidays, those at elementary/ vocational/secondary school may also have employment. Under 15s can be employed for the purposes of performance in artistic, sports, modelling or advertising activities upon prior authorization by the competent guardianship authority.

¹⁷⁴ The Labour Code. Persons under 16 may only work in artistic, cultural, advertisement or sporting activities under the conditions established by the Labour Code. For specific professions, the age of competency differs, with the minimum age often set at 18 and usually dependent on some material condition relating to carrying out the work in question.

¹⁷⁵ Under Art. 48(3) of the Employment and Industrial Relations Act 2002.

¹⁷⁶ Article 68(2) of the Labour Code. Under 16s may work if they have already finished compulsory education, and the tasks set are simple: Article 68(3) of the Labour Code. The General Labour Inspectorate must be informed: Articles 55 (4) and 56(3) of the Labour Code. Those under 18 may not undertake work "which, by its nature or the circumstances in which they are provided, are harmful to physical, mental and moral development of minors": Article 72(3) of the Labour Code.

¹⁷⁷ 15 with the approval of the parents or of the guardians, 'if health and professional development are not jeopardised': Article 13 of the Labour Code. Employment of children under 15 is prohibited: Romania/ Codul Muncii [Labour Code] (24.01.2003).

¹⁷⁸ Art. 6, Workers' Statute.

¹⁷⁹ There are national laws and local by-laws (and Northern Irish legislation) regulating the employment of children (up to minimum school leaving age (16)) consistent with EC Directive 94/33/EC.

¹⁸⁰ Municipalities have local regulations which provide that applicants for employment must be 18, when provisionally appointed. There are certain exceptions to the general rule: work in technical and professional schools when the purpose is education and domestic assistance given by children in a family, if it is occasional. Article 7 also forbids any work for money in the cultural, artistic, sportive, publicity or fashion fields.

¹⁸¹ Individuals aged over 16 may be employed if they have graduated from the gymnasium, and have medical approval for the specific work to be undertaken (and in respect of the necessary qualifications).

In **Ireland**, children aged under 13 are prohibited from working without a licence.¹⁸² There are limitations on employment between 16 – 18 and also under 16s.

Some countries also adopt a minimum age for self-employment. The minimum age is 18 in the Czech Republic and Lithuania (both with specified exceptions) and a permit to run an entrepreneur's business may only be obtained from age 18 in Slovakia.¹⁸³

6.3 Maximum/minimum ages for particular professions

The following countries impose minimum or maximum ages for particular professions. In all but a very few cases, the workers covered are public servants. This occurs most often in the armed forces and police. Some countries appear to have minimum or maximum ages within the private sector, but these seem to arise from municipal regulations (e.g. in Luxembourg) or collective agreements (as in Greece). Details are also given where a country has in the past imposed minima or maxima, but has ceased to do so.

- **Cyprus** has an Armed Forces exception disapplying the principle of non-discrimination on the grounds of age to the extent that the fixing of an age limit is justified by the nature and the duty of the work.
- **Estonia**: a minimum age for higher and senior officials of 21;¹⁸⁴ other officials must be 18 or older.¹⁸⁵ Minimum requirements exist for several important public positions¹⁸⁶ and for posts such as military servicemen, policemen and prison officers.
- **Finland**: Civil servants must be at least 18¹⁸⁷ but 15 year olds who have completed compulsory schooling can be assigned a post as civil servants if appropriate in light of the functions of the particular position.
- **France**: the previous age limitations on access to public service were eliminated by Article 1 of Executive Order 2005-901, save in the case of agents in active armed service subject to early retirement (army, police, etc); conditions related to minimum age requirements in view of the experience called for by the function, and entry exam conditions for admission to a specialised school to follow an education programme of 2 years or more and financed by the state (the age limit for this is now 15 years from retirement).
- **Greece**: in the public sector, public entities, local administration organisations and entities established in private law but operating in the public sector maximum age limits have been abolished¹⁸⁸ for both 'ordinary' personnel and compulsorily placed persons (disabled persons, subject to provisions of Law 2643/1998). There has not been any formal discussion of whether the minimum and maximum age requirements applied in the private sector are compliant with Directive 2000/78 and Law 3304/2005.
- **Hungary**: there are minimum age requirements only with regard to a very limited circle of positions¹⁸⁹ but maximum age recruitment requirements for members of armed organisations such as the police (35) and armed forces (47).

¹⁸² Protection of Young Persons (Employment) Act 1996.

¹⁸³ Section 6 of Act No. 455/1991 Coll on Licensed Trades (Small Business Act) as amended.

¹⁸⁴ Law on Employment Contracts.

¹⁸⁵ Article 14 of the Law on Public Service.

¹⁸⁶ E.g. the President of the Republic under Article 79 (3) of the Constitution.

¹⁸⁷ Section 8 of the Act on civil servants [*virkamieslaki* (750/1994)].

¹⁸⁸ Laws 3051/2002, 3144/2003 and 3174/2003.

¹⁸⁹ Members of the Constitutional Courts shall be at least 45 years old for example.

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- **Latvia:** the maximum age limits for professional military service range from 36-60 years depending on seniority in active service and from 55-65 in reserve (limited extensions are possible). A person can be admitted to professional military service if able to serve at least five years before reaching the prescribed age limit. Recruits to the police force must be between 18 and 35.¹⁹⁰ State civil service law does not provide for a minimum age, but has a higher education requirement.
- **Lithuania:** the Law on the Courts establishes 25 as the minimum age for judges.
- **Luxembourg:** for a concierge, the minimum age of recruitment is 25. For firefighters the maximum is 28.
- **Poland:** the Law on the Organisation of the Judiciary stipulates that, in order to become a judge of the first instance court, a person must be more than 29 years old (the normal age at which the necessary education and training is complete);¹⁹¹ for regional administrative courts 35 or older;¹⁹² for the Head Administrative Court, 40 or older (unless the person has been a judge of the regional administrative court for at least 3 years);¹⁹³ For the regional administrative court, an assistant judge¹⁹⁴ must be at least 30. To be a prosecutor¹⁹⁵ or notary the candidate must be at least 26.¹⁹⁶
- **Portugal:** for the army or the police, there is a recruitment age limit. The normal minimum age requirement for public servants is 18.
- **Slovakia:** several laws stipulate minima or maxima.¹⁹⁷ A work assistant for a disabled person must be at least 18;¹⁹⁸ a prosecutor at least 25,¹⁹⁹ and the general prosecutor at least 40.²⁰⁰ Judges must be at least 30,²⁰¹ civil servants at least 18.

¹⁹⁰ The Law on Police, 4 June 1991, as amended.

¹⁹¹ Article 61.1 point 5 Act of 27 July 2001 Law on the Organisation of the Judiciary (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*).

¹⁹² Article 6.1 point 5 Act of 25 July 2002 Law on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych*).

¹⁹³ Article 7.1 Law on the Organisation of the Administrative Judiciary.

¹⁹⁴ Article 26.1 point 2 Law on the Organisation of the Administrative Judiciary.

¹⁹⁵ Article 14.1 point 5 Act of 20 June 1985 on Public Prosecutor's Office (*Ustawa z dnia 20 czerwca 1985r. o prokuraturze*).

¹⁹⁶ Article 11 point 7 Act of 14 February 1991 Law on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*).

¹⁹⁷ The Constitution of the Slovak Republic regulates the requirements applicable to the holders of high public positions, including their age. This applies to the President of the State, who must be at least 40, to judges, judges of the Constitutional Court, the ombudsperson and the members of the Parliament (the National Council of the Slovak Republic): Articles 74, 103, 134, 145 and 151a of the Constitution of the Slovak Republic.

¹⁹⁸ Section 59 paragraph 3 of the Act No 5/2004 Coll. on Employment Services.

¹⁹⁹ § 6 zákona č. 154/2001 Z. z. o prokurátoroch a právnych čakateloch prokuratúry v znení neskorších predpisov [Section 6 of the Act No. 154/2001 Coll. on prosecutors and prosecutors candidates as amended].

²⁰⁰ § 7 zákona č. 153/2001 Z. z. o prokuratúre v znení neskorších predpisov [Section 7 of the Act No. 153/2001 on prosecution as amended].

²⁰¹ § 5 ods. 1 písm. a) zákona č. 385/2000 Z. z. o sudcoch a prísediach a o zmene a doplnení niektorých zákonov v znení neskorších predpisov [Section 11 of the Act No. 385/2000 Coll. on judges and lay judges and on amending and supplementing certain other acts]. Further the President, after a recommendation of the Judicial Council, may remove a judge of 65 or older.

- **Slovenia:** for judges, the minimum is 30.²⁰² In some professions there are maximum age entry conditions. The Defense Act²⁰³ sets a maximum recruitment age of 25 for ordinary military service or 30 for officers²⁰⁴ but Defense adverts state candidates must be no more than 25.
- **UK:** trades and professions set minimum ages for trainees. A maximum age for entry to the Civil Service was held to be unlawful indirect discrimination on grounds of sex.²⁰⁵

Some countries have extremely long lists of age minima and maxima, which their experts were unable to detail in full.

- **Belgium:** the list of exceptions in which such age requirements are imposed for employment is a very long one.²⁰⁶ Challenges have been brought to the rules concerning the retirement ages of football referees.²⁰⁷ These and other cases appear to suggest that age should not be used as a cipher for physical fitness; instead an analysis of physical fitness should be the mechanism for differentiation. In November 2006 the Minister of Labour in Belgium informed the social partners of the need to remove references to age in the determination of salary. The social partners agreed that the deadline for such elimination should be the beginning of 2009. Belgium has put in place via an executive regulation a Commissioner for experts to analyse proposals made by social partners for the purpose of relying on criteria other than age. It was not clear from the reports of the experts how many countries were conducting such a review and it was not a question which was expressly asked in respect of age.
- **Germany:** has the most comprehensive list of requirements set by law in the national expert's report.²⁰⁸

6.4 Minimum and maximum ages for education or training

Most minima and maxima in this area relate to access to vocational training. There is only one instance of age-limited access to education.

- **Bulgaria:** the Students and Doctoral Students Crediting Act²⁰⁹ permits a maximum age for eligibility for doctoral credits, which is not subject to proportionality requirements.
- **France:** there are age limits for access to the Ecole Nationale d'Administration (the school for the higher civil service): minimum 28 years old and maximum 40²¹⁰, based on (at the minimum) the level of responsibility undertaken by graduates of the school and (at the maximum) the number of years of service left before retirement.

²⁰² Judicial Service Act *Zakon o sodniški službi* [Judicial Service Act], Official Journal of the Republic of Slovenia, No. 16/1994, 8/1996, 24/1998, 45/1999, 101/1999, 48/2001, 67/2002, 105/2002, 2/2004, 71/2004.

²⁰³ *Zakon o obrambi* [The Defence Act], Official Journal of the Republic of Slovenia, No. 82/1994, 44/1997, 87/1997, 87/2001, 47/2002 (67/2002 – corr.).

²⁰⁴ Paragraph 3 of Article 88 states that anyone who wants to professionally engage in military service has to fulfil specific requirements, including that he is physically and mentally capable of professionally performing military service.

²⁰⁵ Price –v- Civil Service Commission [1977] IRLR 291.

²⁰⁶ The titles occupy some 40 pages.

²⁰⁷ *Barbry Geert v. Vzw Koninklijke Belgische Voetbalbond*, Ref. No. 087518.

²⁰⁸ Foot note 137 of the Germany country report.

²⁰⁹ Article 3 (1.1).

²¹⁰ Decree no 2005-1722 (30/12/05).

- **Ireland:** there are maximum age requirements for access to certain types of training, particularly access to the Garda Síochána and the defence forces.²¹¹
- **Latvia:** certain training programs, for example, for the military or police, use age restrictions. Military service law²¹² uses age limits of 27, 35 or 40 years depending on seniority for admission to military education establishments
- **Spain:** the minimum age for access to vocational training is 16.

Conclusion

As will be apparent from the above detail, there is huge variation between the reporting states as to (a) the spheres in which minimum and maximum ages for access to employment are permitted (if, indeed, there are any) and (b) whether each profession has to justify those age limits individually, or, alternatively, they are stated in legislation to be automatically justified. We recommend that an audit be conducted into the extent to which these vastly differing provisions create unequal access to employment for younger and older workers throughout Europe.

²¹¹ Among those upper age limits are: Army and Air Corps must be under 25, and Naval Service under 27, at the time of enlistment; Air Corp Apprenticeship under 19 at the time of apprenticeship, and An Garda Síochána under 35 to commence training.

²¹² Militārā dienesta likums, adopted on 30.05.2002.

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Part VII

Retirement

Retirement has been the single most litigated aspect of the Directive before the CJEU.

7.1 The effect of state pension age

The data from each reporting state is set out in the table below. Where there is a universal state pension age, it is given at the start of the text in brackets. Gender differences still abound in state pension ages. The existence of an adequate pension has been seen as a significant factor in the justification of default retirement ages in the CJEU.

Country	The effect of state pension age
Austria	In the private sector, pensionable age for men is 65 and 60 for women; in the public sector, 61.5. These periods will be harmonised prior to 2024, when a general age of 65 will apply. If unemployed for more than a year and aged 62 or more, the worker must take the state pension. Workers with sufficient contributions can claim and work.
Belgium	Men may take pension at 65, and women at 64 (if the pension begins between 1 January 2006 and 31 December 2008) or 65 (after 1 January 2009). Other age limits apply in specific sectors, such as employees in civil aviation (55 years, even less under certain conditions of seniority), in the commercial navy (60 years), underground mining (55 years) or surface mining (60 years). In addition, after <i>age 60</i> , workers may be pensioned provided they have a minimum of 35 years of employment, with at least 1/3 occupation for each year.
Bulgaria	Age is not the only criterion for entitlement to pension. The number of years of service is taken into account too. ²¹³ The relevant ages are different for women and men. ²¹⁴ An individual can continue their employment after becoming entitled to a pension and collect the pension. There is no need to defer receipt.
Croatia	At state pension age, a person must collect their state pension. Subsequent work must be on a piece-work agreement and not employment, enabling persons collecting a pension to continue working. The prescribed state pension ages are different for women and men. The Constitutional court found this to be sex discrimination but prolonged the validity of the law until 2018.
Cyprus	The Social Insurance Scheme pension (based on social insurance contributions) begins at age 63.
Czech Republic	There is no compulsory retirement age, but state pension age is 60 for men; ²¹⁵ for women it depends on the number of children they have raised. ²¹⁶ It is possible to work and claim pension. However the Law on Pensions requires such work to be subject to a fixed term contract. ²¹⁷

²¹³ Social Security Code, Art. 68.

²¹⁴ *Ibid*: 60.5 for men, and 55.5 for women, if the sum of the length of service and age is no less than 98 for men and 88 for women. From December 31, 2000, the age required increases by 6 months on the first day of each calendar year for both men and women, until it reaches 63 for men and 60 for women, and the required sum of the length of service and age will increase by 1 year until it reaches 100 for men and 90 for women. From December 31, 2004, the sum of the length of service and age for women will increase by 1 year on the first day of each calendar year until it reaches 94. If the sum of the length of service and age is less than is set out above, the right to a pension is acquired after 15 years of service, including 12 years of actual working experience, and at 65, for both men and women.

²¹⁵ Law no. 155/1995 Coll., on Pension Insurance. After 31 December 2012, the pensionable age will be 63 years for men, and it will be reduced for women depending on the number of children they have raised.

²¹⁶ A male cannot benefit from this provision even if he has brought up children as a lone parent, whereas a female lone parent would benefit. In October 2007, the Constitutional court held that this distinction between lone parents is legitimate and not discriminatory: *Nález ze dne 16. října 2007, sp. zn. Pl. ÚS 53/04 (počet vychovaných dětí)*, publikováno pod č. 341/2007 Sb.

²¹⁷ Sec. 37 para 1 *Zákon č. 155/1995 Sb. o důchodovém pojištění* [Law no. 155/1995 Coll., on Pension Insurance (Collection of Laws 1995, no.41 p.1986)].

Country	The effect of state pension age
Denmark	(65) The retirement pension is an age-determined pension payable to persons aged 65. ²¹⁸ The pensioner can work and claim, but the pension will be reduced by that income. Postponement of payment until after 65 is possible if retirement is postponed. Persons who are aged 60 or more and who do not qualify for social pensions due to the eligibility rules are offered a special rate of social assistance corresponding to the amount payable to a married old-age pensioner. ²¹⁹
Estonia	(63) Entitlement is also based on having a pension qualifying period earned in excess of 15 years. ²²⁰ A person may work and claim pension. Survivor's pension and national pension ²²¹ are not paid to employed persons. Early-retirement pension ²²² is not payable to a working pensioner before pensionable age. ²²³
Finland	The earnings-based pensions, linked to past employment can be claimed at some point between age 63 and 68. There is also a national pensions system which is linked to residence in Finland. Different laws apply to different places of, and types of, employment, public/private employment and self-employment. ²²⁴ Minimum pension security to pensioners with insufficient or no earnings-related pension starts at 65. ²²⁵ Other benefits including other pensions are offset against it. A person is entitled to reduced-rate state old-age pension after turning 62 and may postpone the pension in return for an increase in the amount. A person may work and claim old-age pension.
France	(60-65), but at 60 the amount will relate to the worker's number of years of contribution. ²²⁶ After 65, the pension is fully payable independent of contributions. ²²⁷ There are early retirement rights for women and men with 3 or more children. People can work and receive state pension. A public sector salaried worker must resign from employment to receive a pension, but they can thereafter find alternative employment in the private sector.
FYR of Macedonia	64 (men) and 62 (women) with 20 years covered by pension insurance; ²²⁸ 65 (men) and 63 (women) with 15 years' pension insurance. ²²⁹ Pensioners cannot collect their pension and work at the same time, save for full professors in retirement. ²³⁰ The retirement age provisions are inconsistent with ages referred to in Article 104 of the Labour Law. ²³¹ There are special privileges in relation to the retirement age for police officers. ²³²

²¹⁸ See the Act on Social Pension, Lov nr. 484 of 29. May 2007.

²¹⁹ Section 27 of the Act on an Active Social Policy.

²²⁰ Law on State Pension Insurance (Article 7) (it is the same for men and women). There is a transition period for women born between 1944 and 1952. Old-age pensions with favourable conditions can be received by people with a certain type of disability, people who have raised disabled children or three or four children (Article 10).

²²¹ A national pension is paid to a person of pensionable age, a disabled person, etc., with an insufficient pension qualifying period (Law on State Pension Insurance, Article 22 (1)).

²²² "A person who has worked for the pension qualifying period ... for grant of an old-age pension has the right to receive an early-retirement pension up to three years before attaining the pensionable age" (Law on State Pension Insurance, Article 9 (1)).

²²³ Article 43(1) Law on State Pension Insurance.

²²⁴ These are: Employees' Pensions Act (TyEL), Seamen's Pensions Act (MEL), Farmers' Pensions Act (MYEL), Self-Employed Persons' Pensions Act (YEL), State's Pension Act (VaEL), Local Government Pensions Act (KuEL) and Evangelical Lutheran Church's Pension Act (KiEL).

²²⁵ Kansaneläkelaki (347/1956).

²²⁶ Law No. 2003-775 21/8/03.

²²⁷ Article 351-8 of the Social Security Code.

²²⁸ Law on Pension and Disability Insurance "Official gazette" of the Republic of Macedonia, No.80/93 and its amendments in 2000.

²²⁹ Article 17, Law on Pension and Disability Insurance.

²³⁰ See Article 15, Law on Pension and Disability Insurance and Art 147, Law on University Graduate Education.

²³¹ As amended; see Official Gazette of the Republic of Macedonia no. 16/2010.

²³² 12 months of service count as 16 for the purposes of pension entitlement: article 102 of the Law on Pension and Social Insurance.

Country	The effect of state pension age
Germany	67 for those born in 1964 or later. For those born between 1947 and 1963 a graduated rise of State pension age is envisaged. Employees are entitled to a reduced pension from the age of 63 if they stop working after 35 years or more of work. They may work at the same time as receiving State pension after 67. Before that age there is a limit on how much they can earn. ²³³ Occupational pensions can mirror State pension regulation. This has in the past resulted in unequal treatment of men and women. ²³⁴
Greece	55-65 (dependent on completing between 25 and 35 years of work). It is not clear from the country report whether the pension schemes in question are state or private, or whether an individual can continue to work and receive the state pension.
Hungary	62 ²³⁵ with 20 years in service. There are some differential provisions for those with disability and police/army officers. ²³⁶
Ireland	(65) A non-means tested State Pension (Transition) is paid if the person has retired and made enough social insurance contributions. They are not permitted to work. At 66, individuals transfer to the State Pension (Contributory), at which point they can work without limits on earnings and get a pension.
Italy	The age required for collection of a basic state pension is 65 for men and 60 for women, although women can choose to retire at the same age as men. Collecting a state pension assumes retirement. An employee cannot receive the state pension, but the self-employed can start collecting pension and work.
Latvia	(62). ²³⁷ It is not obligatory and a person can work and receive full state pension. ²³⁸
Lithuania	(60 for women and 62.5 for men). ²³⁹ No link between state pension age and the forcing of retirement as this is unconstitutional. ²⁴⁰
Luxembourg	(Public ²⁴¹ and private sector: 65). The worker may decide to stay in activity until he reaches the age of 68. A person may not collect a pension and continue to work as a regular employee.

²³³ Section 34.2 Social Code VI.

²³⁴ Federal Constitutional Court 19 January 2001 AZ1BvR2130/00. See also Federal Labour Court 18 March 1997 AZ3AZR759/95 ruling that the Barber (C262/88) ruling is only applicable in relation to time worked after 1990.

²³⁵ Article 18 of Act LXXXI on State Pensions.

²³⁶ Members of the armed organisations become eligible for a full old age pension five years prior to men's pensionable age.

²³⁷ According to Art. 11 of the Law on State Pensions, Likums "Par valsts pensijām", adopted 02.11.1995.

²³⁸ Prior to the judgment of the Constitutional Court invalidating the relevant norm, a person who continued to work could only receive part (around 100 Euros at that time) of her pension.

²³⁹ There has been discussion about raising the pension age since February 2010; the Ministry of Social Affairs and Labour proposes to unify the current pension age at 65 for both men and women. No law had been adopted at the date of the report in 2010.

²⁴⁰ Acquiring one constitutional right cannot deprive a person of another: Lietuvos Respublikos Konstitucinio teismo 2002 m. lapkričio mėn. 25 d. nutarimas Dėl Lietuvos Respublikos diplomatinės tarnybos įstatymo 69 straipsnio 2 dalies, Lietuvos Respublikos valstybinio socialinio draudimo įstatymo 4 straipsnio (2000 m. kovo 16 d. redakcija) 1 dalies 9 punkto ir Lietuvos Respublikos valstybinių socialinio draudimo pensijų įstatymo 2 straipsnio (1999 m. gruodžio 16 d. redakcija) 1 dalies 5 punkto bei 23 straipsnio (1994 m. gruodžio 21 d., 2000 m. gruodžio 21 d., 2001 m. gegužės 8 d. redakcijos) atitikties Lietuvos Respublikos Konstitucijai // Valstybės žinios, 2002. Nr. 113-5057.

²⁴¹ Texte coordonné de la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l'Etat, Mémorial A, n°4, du 20 janvier 2004, [coordinated text of the amended law of 26 May 1954 ruling the pensions of the state civil servants] <http://www.legilux.public.lu/leg/a/archives/2005/0042001/0042001.pdf>.

Country	The effect of state pension age
Malta	(65 is being phased in). Persons born earlier than 1961 have various differing pension ages. ²⁴² Employees can work between 61 and 65 without prejudicing pension rights, subject to an earnings ceiling. The ceiling is removed at 65, any earnings may be received and no social security contributions are deducted.
Netherlands	(65), regardless of whether the recipient has or has had a job. ²⁴³
Poland	(60 for women, 65 for men) Employees can work beyond that age but their state pension will be suspended if they continue working for the same employer at the employee's discretion. ²⁴⁴
Portugal	Public servants must start receiving their pension at 70, which is also the mandatory retirement age, although they may seek authorisation to continue to work and receive pension (with remuneration at a third of the usual level). There is no specific pension age in the private sector. Pension can be received whilst working but at this point, the contract is converted to one for a fixed term of 6 months on a renewable basis, subject to termination with 60 days' notice. ²⁴⁵
Romania	(moving towards 60 for women, and 65 for men). Still in transition from the previous 57 for women and 62 for men, and aiming to have an age of 65 for all employees by 2030. An individual who has reached pension age can collect both a pension and their salary.
Spain	(65), provided the other requirements provided in the law are met, for both contributory and non-contributory pensions. ²⁴⁶ It may be lowered by the government for "those groups or professional activities whose work is of an exceptionally strenuous, toxic, dangerous or unhealthy nature, and which have high levels of disease or mortality," or in the case of "disabled people with a degree of disability equal to or greater than 65 per cent." Early retirement may be taken from age 61 provided that certain requirements are met. ²⁴⁷
Sweden	(61-65) There is part-time or full-time retirement from age 61. Individuals may postpone retirement and add to their pension benefits as the scheme is based on the principle of lifelong earnings. However the right to the basic pension scheme (guaranteed pension) requires the beneficiary to be 65. Individuals can collect a pension and continue to work (as pensions and earnings are taxable).
Slovenia	Men must be aged 63 and have 40 years of pension insurance; women must be 61 and have 38 years of pension insurance. ²⁴⁸ A higher pension can be obtained by working longer; a reduced pension by working for a shorter period/having insufficient years of contribution (the reduction presently only applies to men but a female reduction is being phased in). Individuals can defer their pensions, but cannot both work and receive a pension.
Slovakia	(62), ²⁴⁹ by 2014. A person can work and claim pension. Under special circumstances an individual can start to collect an early pension ²⁵⁰ and this does not limit the person from working.
United Kingdom	(60 for women and 65 for men), the ages to be equalised at 65 and increased to 68 by 2046. Pensions can be deferred.

²⁴² The Social Security Act, Act X of 1987. Chapter 318 of the Laws of Malta (as amended in 2006) provides that the "pension age" applicable to both men and women in Malta is 65; subject to the following transitional provisions: pension age for persons born on or before 31st December 1951 is 61; for those born between 1952 and 1955, 62; for those born between 1956 and 1958; 63 and for persons born between 1959 and 1961, 64. The pension age for women born before 1952 is 60.

²⁴³ General Old Age Pensions Act (AOW).

²⁴⁴ Articles 24 and 27 of the Act on Retirement.

²⁴⁵ In accordance with Article 348 of the Labour Code.

²⁴⁶ General Social Security Law, Article 161.

²⁴⁷ The conditions, which are the same for men and women, are in the General Social Security Law (Art. 161)

²⁴⁸ Article 36 Pension and Disability Insurance Act read with Article 52 of the same Act.

²⁴⁹ Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov [Act No 461/2003 Coll. on Social Insurance, as amended].

²⁵⁰ Section 67 of the Social Insurance Act. One of the conditions is that an individual was insured for at least 15 years.

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7.2 Rules relating to occupational pension schemes

This table sets out the rules (if any) in each reporting state relating to the normal age for receipt of occupational pensions, and whether it is possible to defer the pension beyond that age, or to work and claim pension at the same time. Significant differences can be seen between the member states who do permit a person to work and claim an occupational pension and those that do not. As the population of the EU grows older such differences will lead to significantly different life experiences for citizens of different member states as a result of age.

Country	What is the normal age for OPS payment? Is it possible to defer? Is it possible to work and claim?
Austria	65 (male) and 60 (female) in the private sector. Civil servants 61.5. By 2024 the general retirement age will be 65 years.
Belgium	No fixed normal age. Working and claiming is possible, within certain limits. The Federal Act of 23 December 2005 on the Solidarity Pact between generations relaxed these limits to encourage workers receiving a pension to maintain a certain level of economic activity.
Bulgaria	(60). ²⁵¹ Certain collective agreements permit occupational pensions to be enjoyed five years earlier than this. ²⁵² Working and claiming is possible.
Croatia	(50) By law ²⁵³ this is the minimum age at which payments from voluntary pension schemes can be received.
Cyprus	No fixed normal age. Working and claiming is possible.
Czech Republic	There are no occupational pension schemes or employer funded pension arrangements.
Denmark	Not regulated by law; they are either a part of collective agreements or individual arrangements.
Germany	Same age as for state pensions. ²⁵⁴ It is constitutional to regulate occupational pension schemes according to the state pension regulation. Women and men are treated unequally in this context. ²⁵⁵ However, this was only considered acceptable for a transitional period. ²⁵⁶
Estonia	Law on funded pensions ²⁵⁷ sets out the conditions and procedure for contributory pension schemes. Receipt of such pensions appears to be at 63, the pensionable age. ²⁵⁸ A person can work and claim from an occupational pension scheme.
Finland	At any point between 63-68. Those who are 62 years of age are entitled to early old-age pension, where the amount of pension is somewhat reduced. The old-age pension for state and local government employees can begin – in some cases - before the age of 63. A voluntary supplementary pension arranged by the employer may also include the possibility of retiring on an old-age pension before the age of 63. Old-age pension does not start automatically, but must be applied for. Workers do not need to start collecting old-age pension even at 68; deferral increases the amount of pension they will receive later on.

²⁵¹ Social Security Code, Article 243 (4).

²⁵² Social Security Code, Article 243 (6).

²⁵³ The Act on Statutory and Voluntary Pension Funds, Official Gazette 49/1999 with amendments.

²⁵⁴ Sections 2, 6 Law on Work Pensions.

²⁵⁵ Federal Constitutional Court (*Bundesverfassungsgericht*), 19 January, 2001, Az: 1 BvR 2130/00, *Neue Zeitschrift für Sozialrecht* (2001), 357.

²⁵⁶ Federal Labour Court (*Bundesarbeitsgericht*), 18 March, 1997, Az: 3 AZR 759/95; *Bundesarbeitsgericht*, 3 June, 1997, Az: 3 AZR 910/95, both ruling that ex-Article 119 EC and CJEU, C-262/88 Barber ruling is only applicable as far as time worked after 1990 is concerned.

²⁵⁷ Art. 1 RTI 2004, 37, 252.

²⁵⁸ Pensionable age means 63.

Country	What is the normal age for OPS payment? Is it possible to defer? Is it possible to work and claim?
France	(60) as long as the worker has contributed for 42 years. ²⁵⁹ There are some differential provisions for those who started work earlier, ²⁶⁰ disabled employees and those caring for disabled children. ²⁶¹
FYR of Macedonia	Not possible to collect both pension and the salary received for professional activity. Pension will stop while the pensioner is an employee or is doing some activity in the Republic or abroad. ²⁶² Full professors in retirement can perform postgraduate work on research projects as specified by the statute of the university, or of another independent higher education institution. ²⁶³
Greece	(57): for all sectors and for both men and women.
Hungary	(62 or later). Working and claiming is possible but there appear to be some restrictions.
Ireland	65. Occupational pension schemes are private agreements and they are completely dependent on the individual agreement.
Italy	(61 from 2013) People can start collecting their occupational pension (<i>pensione di anzianità</i>) from an age determined on the basis of a complex system based on the sum of the age of the person concerned and the number of years in which the person paid social security contributions. Special rules apply to specific professions. The pension can be deferred until compulsory retirement age is reached. Only the self-employed can start collecting their pensions and still work.
Latvia	Occupational pension schemes are a limited phenomenon in Latvia. There is no information on actual arrangements. Receipt age cannot be less than 55, ²⁶⁴ with the exception of certain professions as decided by the Cabinet of Ministers. The person must choose whether to receive the pension or to continue membership in the plan. These two possibilities seem to be mutually exclusive. Working and claiming is not possible.
Lithuania	In general the occupational pension system is not established in practice yet (law introduced in 2006).
Luxembourg	No normal age to begin receiving occupational pension payments. ²⁶⁵
Malta	No normal age.
The Netherlands	Receipt age depends on the conditions under which such schemes are contractually agreed.

²⁵⁹ This may vary depending on the scheme in question.

²⁶⁰ People who began to work before 15 years of age can claim rights to retirement at 56 if they have contributed for 42 years.

²⁶¹ Decree n° 2005-1774 of 30 December, 2005 Journal officiel, n° 304, 31/12/2005, p. 20856.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524551D>; Decree n° 2005-1761 of December 29, 2005 Journal officiel, n° 303, 30/12/2005, p. 20444.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524152D> Article 24 of the Law no 2003-775 of 21 August, 2003 has lowered retirement age giving right to full pension from 60 to 55 years of age in the private sector for disabled persons with a recognized disability rate of 80%. On 27 June, 2006, Law no 2006-737 was adopted increasing retirement benefits for disabled public agents, and decree no 2006-1687 was adopted on 12 December, 2006 to increase retirement benefits of 30% for each year of disability during service and lowering retirement age accordingly.

²⁶² Art. 15, Law on Pension and Disability Insurance, "Official gazette" of the Republic of Macedonia, No.80/93.

²⁶³ Art. 147, Law on university graduate education, "Official gazette" of the Republic of Macedonia, No. 35/08.

²⁶⁴ Art. 11(5) of the Law on Private Pension.

²⁶⁵ *Loi du 8 juin 1999 relative aux régimes complémentaires de pension et portant modification a) de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, b) de la loi modifiée du 24 mai 1989 sur le contrat de travail, c) de la loi modifiée du 18 mai 1979 portant réforme des délégations du personnel et d) de la loi modifiée du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes*, MEMORIAL A 074 du 17.06.1999, p.1644 ; Law on occupational pension schemes modifying different previous laws.

Country	What is the normal age for OPS payment? Is it possible to defer? Is it possible to work and claim?
Poland	Employees receive pensions from Employees' Pension Programmes (voluntary collection) at different times under different rules: (1) on a decision by the individual at 60; (2) on presentation of a decision granting the right to a state pension at 55; (3) at 70 if they have not previously applied to receive payments and if their employment has been terminated by the employer running the Employees' Pension Programme. ²⁶⁶
Portugal	No one normal age. In the private sector, payments can be deferred or a person can collect a pension and still work, subject to agreement between the parties. The normal age range is between 60 and 65.
Romania	Private pension schemes (compulsory since 2007) ²⁶⁷ have the same age as is used for the social security pension, although retirement can be requested 5 years earlier if the participant has reached the full contribution period. There are also voluntary schemes, ²⁶⁸ participants in which can retire at 60 after contributions of at least 90 months.
Spain	Average age is 63. There have been no recent changes in the regulations on retirement age, but the policies that used to promote early retirement are being progressively rolled back. The conditions are the same for women and men.
Sweden	Occupational pension schemes generally contain flexible rules on pensionable age, and receipt can normally be deferred if the individual wishes to work longer. It is also possible to draw pension and continue to work.
Slovenia	Occupational pension schemes are organized as voluntary pension insurance. Insured persons are entitled to occupational pension under the same conditions as the old-age (state) pension.
Slovakia	There is no information in the country report about the operation of occupational pension schemes.
United Kingdom	Occupational pensions are arranged individually. Thus arrangements may vary. Individuals can often defer receipt in return for higher payments. Occupational pensions will be paid when the scheme rules determine. Many scheme rules are exempted. ²⁶⁹ Occupational pension schemes may have minimum and maximum ages for joining and specify a normal retirement date.

7.3 Is there a state-imposed (general or sectoral) mandatory retirement age(s)?

A *mandatory retirement age* is a specific age at which, no matter what the parties to the employment relationship may want, the employee must retire and the employment relationship comes to an end as a result. Closely related are situations in which the employer can, by law, terminate the employment without the employee's consent at a particular age, which are dealt with in section 7.4 below.

²⁶⁶ Article 42 Para 1 and 2, Act of 20 April 2004 on Employees' Pension Programmes (*Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych*).

²⁶⁷ Law 411/2004 on private (universal) pension schemes. Any worker under the age of 35 should become a contributor to a private pension fund. The contributions are optional for the active workers between the ages 36-45.

²⁶⁸ A voluntary system of contributions is established by law known as facultative pension schemes Romania/Law 204/2006 on Facultative Pensions Schemes (22.05.2006).

²⁶⁹ Defined in a complex set of provisions in Schedule 2, parts 2 and 3 of the GB Regulations (Sch. 1 of the NI Regs.).

Directive 2000/78 specifically states, at recital (14), that it is without prejudice to national provisions laying down retirement age. The broad discretion apparently granted to States by recital (14) has given rise to much litigation, both in the domestic courts of individual States, and before the CJEU.²⁷⁰

Country	Any laws which imposed a mandatory retirement age?	Any sectoral provision?	Any recent or planned changes?
Austria	None in the private sector.	Civil servants (61.5 if there are important official reasons). ²⁷¹	In 2003, compulsory retirement for civil servants was ruled unconstitutional
Belgium	None in the private sector.	Public servants automatically retire at 65	None, but Belgium is screening legislation for potential age based discrimination.
Bulgaria	No general provision.	Professional army, ²⁷² and the police. ²⁷³	Minor recent changes in the maximum ages for the army.
Croatia	65 ²⁷⁴ but can be extended by agreement.	None	None
Cyprus	None in the private sector.	63 for both the governmental as well as the semi-governmental sector ²⁷⁵ (except teachers in public education, for whom the age is 60 ²⁷⁶)	None
Czech Republic	None	Judges' and state attorneys', offices are terminated ex lege at the end of person's 70 th year. ²⁷⁷ C-411/05, <i>Félix Palacios de la Villa v Cortefiel Servicios SA</i> [2007] ECR. I-8531; C 388/07 R (<i>on the application of Age UK v Secretary of State for Business, Innovation and Skills</i> [2009] EWHC 2336 (Admin); [2010] 1 Common Market Law Review (CMLR) 21. Mandatory age for soldiers.	None

²⁷⁰ C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR. I-8531; C 388/07 R (*on the application of Age UK v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336 (Admin); [2010] 1 Common Market Law Review (CMLR) 21.

²⁷¹ No laws were identified in the country report.

²⁷² Defence and Armed Forces of the Republic of Bulgaria Act, art. 160 (1). For soldiers, the limit is 49 years; that limit is raised for each higher rank, with 60 years as the limit for the highest ranking officers (ibid.).

²⁷³ Ministry of Interior Act, art. 245 (1). The limit is 60 years.

²⁷⁴ According to the Labour Act employment ends when employee has 65 years of age and 15 years of pensionable service, but the employer and employee can prolong employment if they wish to do so.

²⁷⁵ Ο περί Συντάξεων (Τροποποιητικός) Νόμος Ν. 69(Ι)/2005 and Ο περί Δημόσιας Υπηρεσίας (Τροποποιητικός) Νόμος Ν. 68(Ι)/2005.

²⁷⁶ In Supreme Court decision dated 12.03.2010., the court confirmed that the law transposing Directive 2000/78 does not apply to retirement age and that the fact that teachers in public education were not allowed to extend their retirement age as other civil servants were did not amount to discrimination.

²⁷⁷ Law on Courts and Judges; intended to guarantee that tasks required by the most important functions of the state are properly carried out.

Country	Any laws which imposed a mandatory retirement age?	Any sectoral provision?	Any recent or planned changes?
Denmark	None in the private sector. ²⁷⁸	Certain professions via collective agreements; public servants (70)	Proposal to abolish the 70 year rule was being discussed. ²⁷⁹
Estonia	None	Mandatory age for some categories of military and law-enforcement.	None
Finland	The employment relationship ends at the end of the month when the employee turns 68 unless the employer and employee agree otherwise. ²⁸⁰	Mandatory age (67) for some public servants (e.g. university professors, judges).	None
France	None in the private sector. ²⁸¹	Mandatory age (65) for public sector (subject to some derogations). ²⁸²	Industry collective agreements could fix the age for retirement between 60 and 65 until rendered invalid from 23 December 2006. Such compulsory retirements were valid until 31 December 2008 but only if the employee could claim a full state pension.
FYR of Macedonia	65	None	None

²⁷⁸ From 1 January 2008, the retirement age in the Danish Anti-Discrimination Act was raised from 65 to 70. Individual employment contracts with a compulsory retirement age below 70 are unenforceable whenever agreed. It is not possible to justify a compulsory retirement age below 70 in individual employment contracts. However a retirement age below 70 in collective bargaining agreements entered into between 29 December 2004 and 1 January 2008, is effective until the collective bargaining agreement can be terminated. Compulsory retirement ages stipulated in collective bargaining agreements concluded before 28 December 2004 apply if they satisfy the objective justification test.

²⁷⁹ See bill L 175, act amending the Act on public servants, etc., Forslag til lov om ændring af lov om tjenestemænd og forskellige andre love (ophævelse af den generelle pligtige afgangsalder på 70 år m.v.).

²⁸⁰ Act on Employment Contracts, section 6:1(a).

²⁸¹ However articles L1237-5-1 and 1237-8 LC permit employers to put an end to the employment contract on the basis of rights to retirement with respect where individuals have acquired rights to the full retirement pension according to article L351-1 of the Social security Code, and are 70 years of age.

²⁸² Article 1, Law no 84-834 of 13 September, 1984.

Country	Any laws which imposed a mandatory retirement age?	Any sectoral provision?	Any recent or planned changes?
Germany	None	Many professions have specific retirement ages in law.	The retirement age of 68 for physicians, dentists and psychotherapists (for their licence for the public health system) was abolished in 2008. ²⁸³
Greece	None	Mandatory age (67) for some public servants (e.g. university professors, judges).	None
Hungary	None	Mandatory retirement for some public servants: civil servants, ²⁸⁴ judges, ²⁸⁵ and public notaries (70), ²⁸⁶ the professional personnel in armed organisations (57). ²⁸⁷	None
Ireland	None	Public servants: 65 for pre-April 2004 recruits; for post-2004 recruits, 65 minimum (they can continue to work subject to health requirements). Gardaí, fire-fighters (55, minimum, Gardaí maximum 60) and the Defence Forces (age not specified). Judiciary (70 but some may remain until 72). Medical general practitioners (70). ²⁸⁸	None
Italy	In the public and private sector, male (65), female (60), although women can ask to postpone retirement until 65.	Specific sectors, e.g. university professors, and judges have specific regimes (unspecified).	None

²⁸³ The abrogation came into force retroactively by 1 October 2008, cf. Art. 1 Nr. 1 i. and Art. 7 Abs. 3 *Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung (GKV-OrgWG)*, 15.12.2008, Bundesgesetzblatt 2008, Teil I, S. 2426 (2427f. and 2444). A preliminary reference on the same provision made before it was abrogated was decided upon after the cut-off date of this report, CJEU, C-341/08, 12 January 2010 (*Petersen*). The submitting court (Dortmund Social Court (*Sozialgericht Dortmund*)), 25 June 2008, S 16 KR 117/07 argued that an unjustified discrimination might be assumed since the provision does not take into account individual differences in deterioration of performance because of age. The CJEU held that if the sole aim of the respective regulation is to protect the health of patients, it would be in breach of European law since the age limit does not apply to dentists outside the public health system; if the aim was to share employment opportunities among the generations, it would be reconcilable.

²⁸⁴ Article 15 paragraph (1) (f) of the Civil Servants Act.

²⁸⁵ Under Article 57 paragraph (1) (i) of Act LXVII of 1997 on the Status of Judges, if prior to turning 70 but after reaching pensionable age the judge requests his/her retirement, or if he/she reaches 70, his/her employment ceases. Under Article 127, lay judges' appointments cease at the age of 70.

²⁸⁶ Article 22 of Act XLI of 1991 on Public Notaries.

²⁸⁷ Article 59 paragraph (1) (a) of the Armed Organisations Act.

²⁸⁸ An employer may offer a fixed term contract to a person over the compulsory retirement age; Employment Equality Acts 1998 – 2007, section 6(3)(c). In the light of *Mangold* such a provision would need careful justification as proportionate. However as *Petersen* demonstrates, the need for intergenerational fairness within a profession may provide justification for provisions of this kind e.g. in the health service.

Country	Any laws which imposed a mandatory retirement age?	Any sectoral provision?	Any recent or planned changes?
Latvia	None	Mandatory retirement for civil servants on reaching pension age unless their superior decides otherwise. ²⁸⁹ Mandatory age of 50 years which can be extended till 60 for firefighters and fire safety workers. ²⁹⁰	None
Lithuania	None	Upper age limit for civil servants (62.5); for public prosecutors, ²⁹¹ and for judges (65). ²⁹² Work in public administration, and as a doctor, ²⁹³ terminates at age 62.5.	None
Luxembourg	68	Police can retire between the ages of 55 and 60 (60). Ministers of religion do not have an age limit.	None
Malta	65, although the employer and employee may reach agreement that the employment will continue after this age.	None	None
The Netherlands	None	Some professions which have age limitations regulated by law or by the professional association, or by a collective labour agreement. Under review by the Equal Treatment Commission. ²⁹⁴	None
Poland	None	None	None

²⁸⁹ This provision of the State Civil Service Law was challenged in the Constitutional court which, however, held that it did not violate the prohibition of differential treatment; December 18 2003 decision in case no. 2003-12-01, available electronically at [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/12-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/12-01(03).htm).

²⁹⁰ Article 35 of the Law on Fire Safety and Fire Fighting. This rule is similar to those that used to govern retirement from the post of university professor or associated professor, as well as the highest administrative positions in universities and scientific institutions at 65. These rules also permitted continued work after the 'minimum' retirement age, on the basis of an individual contract to be concluded at the discretion of the university rector. Alternatively individuals could receive the status of professor emeritus. However this was invalidated as discriminatory by the 20 May 2003 Constitutional Court decision in case No. 2002-21-01, available electronically at [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/21-01\(02\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/21-01(02).htm). and the age limit no longer applies.

²⁹¹ Law on the Prosecutor's Office.

²⁹² Law on Courts.

²⁹³ Law on the Health Protection System.

²⁹⁴ In the Equal Treatment Commission Opinion 2005-49, a GP aged 80 contested an age-based exclusion by an insurance company. The ETC felt that there were solid methods available to test whether elderly GPs are still able to do their jobs properly. Professional Committees and Associations applied the methods to the claimant and there was no objective justification for his exclusion. In the ETC cases (25 March and 21 July 2005) (concerning doctors and psychiatrists who are over 65 and not being given contracts with medical insurance companies) the ETC took the view that it can (in general) be accepted that people over 65 will sometimes have trouble in performing their medical profession accurately; however whether this needs to be tested in every individual case depends on whether there are valid methods available to carry out such testing. This appears to be a pragmatic rule amounting to the following: a blanket age may be justified if it is impractical to test each individual. A similar conclusion has been drawn by the highest Social Security Court.

Country	Any laws which imposed a mandatory retirement age?	Any sectoral provision?	Any recent or planned changes?
Portugal	None	Civil servants (70) (if authorised they can continue at 1/3 of salary).	None
Romania	None	Undergraduate teaching personnel with extraordinary professional competencies can be maintained on a tenure track for up to 3 years past retirement age, with the approval of the council of teachers. Academics with a PhD can stay on until 65, and sometimes can be approved to continue annually until age 70. Army, national security and police (currently retire at 55 but this is being raised to 60).	none
Spain	None ²⁹⁵	Public Servants: 65, judges: 72, publicly employed university professors 70.	None
Sweden	None	None	None
Slovenia	None	Defence workers: 45. ²⁹⁶	None
Slovakia	None ²⁹⁷	Retirement ages for special categories of state employees are stipulated in special Acts, namely: armed forces members (55); police (55, and the employee is entitled to draw pension benefits); judges (65) public prosecutors (65), university teachers (70, but with the possibility of agreed extensions beyond that age), and fire and rescue workers (55, and must be entitled to draw pension). ²⁹⁸	None
United Kingdom	None	Some public sector employments have national laws specifying a retirement age e.g. the judiciary, ²⁹⁹ the police and some civil servants.	None

7.4 Facilitating employer compelled retirement and loss of protection against dismissal and other employment protection

The issue of the extent to which the Directive leaves employers free to impose an internal retirement age upon their employees, and the extent to which States should provide protection against dismissal in such circumstances, is complicated by the fact that dismissal is a form of less favourable treatment. Many countries apply a general objective justification test to all forms of less favourable treatment on the grounds of age so any particular dismissal

²⁹⁵ The provision of the Workers’ Statute which set a maximum age of 69 was declared unconstitutional by the Constitutional Court in 1981.

²⁹⁶ The Ministry of Defense states as a condition in its advertisements that candidates must be a maximum of 25 years old and that the contract will be ended when the individual is 45 years old, but the employer has to reallocate the employee to a different position, or help the employee qualify for another position (Article 93 of the Defense Act).

²⁹⁷ Slovakia abolished the mandatory retirement age of 65 in the civil service under Act No. 400/2009, from 1/11/09.

²⁹⁸ Ius Laboris report ‘Age Discrimination in Europe’; <http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf>, p. 39 Q6.

²⁹⁹ But see *Hampton -v- Lord Chancellor* [2008] IRLR 258, where the justification submitted for a compulsory retirement age of 65 for such judges was rejected. Not proved that it was reasonably necessary to achieve the aim of ensuring reasonable through-put of appointments in order to have a sufficient pool of candidates for the full time judiciary.

may be a proportionate means of achieving a legitimate aim in all the countries in which (a) there is a general justification test; and (b) the constitution or some extraneous legal principle does not prohibit such justification. The general law may render such a dismissal relatively easy to justify.³⁰⁰

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Austria	No ³⁰¹	None	Not lost
Belgium	No	Justified unilateral termination possible.	Not lost. ³⁰²
Bulgaria	No ³⁰³ but can dismiss once the applicable pension age is reached.	Unilateral at pension age.	Protection against dismissal for age is lost. ³⁰⁴ During employment the over age worker has full rights in all other respects.
Croatia	No, but the state-imposed retirement age is 65 (can be extended by agreement.)	The parties can set higher ages than those provided by law.	Age and length of service are taken into account as factors where dismissal due to business reasons/abilities or characteristics is being considered. ³⁰⁵
Cyprus	No	Justified unilateral termination possible	At pensionable age protection against dismissal is lost. ³⁰⁶
Czech Republic	No ³⁰⁷	Notice of dismissal only lawful for reasons stipulated in the Labour Code: employee's age is not one.	No.

³⁰⁰ Thus in Austria it is thought that a challenge to a dismissal by an employee who has already reached retirement age has little prospect of success as the law allows for reductions in salary in connection with dismissal particularly in cases of retirement (a reduction of income of e.g. 20% would not lead to the dismissal being assessed as unfair on social grounds); source Ius Laboris: <http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf>, page 8/50 question 7.

³⁰¹ If an employee is dismissed because they have reached the official retirement age, the employer needs to produce objective justification. An employer dismissing someone over retirement age for this reason will point to the fact that the employee has enough years of contributing service to receive full pension payments. He or she will have difficulty contesting the dismissal as even if it can be shown that the dismissal impinges on fundamental interests, the employer may still prove that the dismissal is justified, either for reasons relating to the individual employee or for business reasons.

³⁰² An employer may dismiss a worker without giving a reason for termination, provided that he or she gives notice or pays the compensation prescribed by law. However, in the event of a contested termination of employment, it is for the employer to prove that the dismissal is not unfair. However Belgian law permits shorter notice periods to be given to those over 65 (source Ius Laboris (ibid) p10 Q7); to this extent the rights of the person over 65 to employment protection are at least impaired if not lost.

³⁰³ The Social Security Code Art. 68: age varies from person to person because it is calculated by reference to age but also to length of service.

³⁰⁴ Labour Code, Article 328.10.

³⁰⁵ Article 107(3) of the Labour Act.

³⁰⁶ S4 Law on Termination of Employment. The Equality Body found this provision to be discriminatory in 2007 but no action has been taken to revoke it.

³⁰⁷ Except in circumstances where health and safety require a mandatory retirement age to be used (e.g. in the case of airline pilots who must stop flying on reaching 65).

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Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Denmark	National law sets 70 as the retirement age.	Maintains existing collective agreements setting age requirements for certain professions if the age requirement is objectively justified. ³⁰⁸ Collective agreements that prescribe the termination of employment at 70 remain valid if the provisions meet the proportionality test. ³⁰⁹ From 70, such direct discrimination does not need to meet the proportionality test.	Rights are retained whilst in employment.
Estonia	No	Justified unilateral termination possible. ³¹⁰ Unlikely to be justified.	Dismissal rights not lost. ³¹¹ Employment contracts law amended in 2006 removing dismissal solely on the grounds of age as lawful method of dismissal. Supreme Court held a law on public officials which permitted an official to be made redundant due to age unconstitutional. ³¹²
Finland	Yes	Retirement age terminations can be sanctioned by the employment or collective contract. Retirement ages can be included in an employment contract that is for 'an indefinite term'. ³¹³ These will be invalid if unreasonable. ³¹⁴ No unilateral termination is possible otherwise on age grounds. Contracts often adopt an employer's internal rules and so the employee agrees to an age termination provision. ³¹⁵	The law applies to all dismissals, but termination of contract on reaching 68 is not regarded as a 'dismissal'.

³⁰⁸ Subsection 3 and 4 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market, etc.

³⁰⁹ In other words, direct discrimination due to age before the age of 70 (in existing collective agreements) can be maintained if the proportionality test is met.

³¹⁰ Law on Equal Treatment Art 9(a).

³¹¹ Law on Equal Treatment, Law on Employment Contracts and Law on Public Service.

³¹² Decision of the Civil Law Chamber of the Supreme Court of 1 October 2007 RTIII2007, 34, 274.

³¹³ HE 185/2004.

³¹⁴ Within the meaning of section 10:2 of the Employment Contracts Act.

³¹⁵ E.g. an agreement to terminate at a particular age may be linked to a voluntary pension scheme arrangement.

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
France	Yes; ³¹⁶ in the public sector the employer compelled retirement age is 65 ³¹⁷	By agreement (65-69); unilaterally (70); Provisions in collective agreements and contracts which provide for the automatic interruption of employment because of the employee's age or entitlement to a retirement pension are null and void. ³¹⁸	Not lost.
FYR of Macedonia	65 is the state imposed age. After pension age if the worker has sufficient pension contributions for the state scheme, the employer can dismiss unilaterally.	Employment contract or collective agreement may determine more favourable rights than those provided under the law. ³¹⁹	Dismissal rights lost. If in employment protection applies to the employee, regardless of age.

³¹⁶ An employer can propose retirement to the employee at 65 and each year thereafter. The employee can defer such retirement until the age of 70 (arts L1237-5-1 and 1237-8 LC). In the public sector, the compulsory retirement age is 65, subject to some derogation (Art 1, Law 84-834 of 13/9/84). In these circumstances an employer does not have to justify a decision to retire an employee. From 1st July 2010 Article 93 of Law no.2008-1330 of December 17 2008, public agents subjected to a statutory age limit of 65 may request authorisation to prolong their service beyond 65 (implemented by Application Decree 2009-1744 of 30/12/09). If a request is made, and the public service fails to reply to it, it is deemed to be granted.

³¹⁷ Art. 1, Law 84-834 of 13/9/84.

³¹⁸ Article L1237-5-1, Labour Code.

³¹⁹ Article 12, Labour Law.

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Germany	No exemption exists.	<p>Employment contracts may be ended at specific ages by individual or collective agreements, but there must be an objective reason for the respective agreements to be valid.³²⁰</p> <p>No objective reason is needed if the employee is older than 51.³²¹</p> <p>Objective reasons include entitlement to a state pension and consequent social security. Decreased performance typical of an age such as 65 may also be sufficient. The need for intergenerational planning of the workforce has been considered sufficient.³²²</p> <p>Justified unilateral termination possible. Ability to claim State pension does not constitute a reason for dismissal by an employer.³²³ Older employees may legitimately be retained in preference to others³²⁴ in social ground dismissals. In particular the employer seeking to use entrepreneurial reasons cannot justify the dismissal if they do not take sufficient account of the age of the person concerned. Entitlement to State pension is a factor within the social choice concept which spares from dismissal. The interest of an employer in maintaining age balance amongst employees has been held reasonable.³²⁵</p> <p>An agreement that provides for the termination of an employment relationship without dismissal at the time when the employee is entitled to apply for pension on the ground of age, notwithstanding certain regulations³²⁶ is not treated as discriminatory.</p>	German laws on protection against dismissal apply to all ages with certain exceptions.

³²⁰ Section 14.1 Law on Part-Time Work and Fixed Term Contracts.

³²¹ Section 14.3 Law on Part-Time Work and Fixed Term Contracts.

³²² Federal Labour Court October 20 1993 AZ7AZR135/93; Federal Labour Court 1 December 1993 7AZR428/93 and Federal Labour Court 19 November 2003 7AZR296/03.

³²³ Section 41 Social Code VI.

³²⁴ Section 1.3, sentence 1 Law on Protection Against Dismissal.

³²⁵ Federal Labour Court 23 November 23 2000, AZ:2AZR533/99.

³²⁶ See Sec. 41 Social Code VI (Sozialgesetzbuch VI), Sec. 10 No 5: Social Code Book VI, Section 41.

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Greece	No	Collective agreements contain terms permitting employers to retire employees. ³²⁷ Different treatment based on a characteristic related to age does not constitute discrimination if: (i) by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, (ii) such a characteristic constitutes a genuine and determining occupational requirement, provided that (a) the objective is legitimate and (b) the requirement proportionate. ³²⁸	Not lost.
Hungary	No	An employee may agree retirement up to 5 years before usual age. Employer must cover the difference between the old age and early retirement pensions. Unilateral imposition of early retirement not permitted.	After pension age, dismissal rights are lost. Employers do not have to give reasons for the dismissal (art 89(6) Labour Code). ³²⁹ Employers exempted from severance payments.
Ireland	Employers can fix different ages for compelled retirement ³³⁰	Unilateral termination is permissible. Normally the retirement age is contractual. If the practice in the particular employment is for people to retire at 65 then it may be assumed that employees will in the normal course of events retire at this age. ³³¹ It is not discrimination to fix different retirement ages for different employees or groups of employees, provided no discrimination on the grounds of gender occurs as a result.	Dismissal rights are lost at normal retirement age for the employment in question.

³²⁷ Law 3304/2005 came into force on 27 January 2005 and renders these agreements void.

³²⁸ Articles 5, 9 and 11 of Law 3304/2005 (<http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf> page 19/50) and <http://www.non-discrimination.net/content/main-principles-and-definitions-6>.

³²⁹ Article 89(6) of the Labour Code.

³³⁰ Section 34(4) Employment Equality Act 1998-2004, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory. The fixing of employment ages in contracts was challenged as discriminatory in *Eileen McEvoy v Mount Temple School*, where the claimant was forced to retire on her 65th birthday. She argued that as legislation in 2004 enabled civil servants to continue working beyond 65, she should have been allowed to re-apply for her position, but her claim failed. The Irish expert raises the concern that clauses such as this may be unlawful in the light of *Palacios De La Villa*. Such mandatory retirement ages need not be individually justified under Irish national law.

³³¹ Such implication must, in the view of the authors of this report, be subject to the point that the aim of the Directive is not to entrench previous behaviour in respect of compulsory retirement but to require such compulsory retirement to be objectively justified. Thus the retirement implication mentioned here will only take place where it would be justified objectively to have a retirement age for the employment contract in question.

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Italy	Can be compelled at 65. ³³² The employer cannot set its own retirement age.	Unilateral termination is permitted.	Dismissal rights are lost when the conditions for pension are met (including reaching 65). In employment the rights of each employee are the same.
Latvia	None	Provisions of collective agreements, working procedure regulations, and employment contracts and orders of an employer eroding the employee's legal status can be declared void by courts of general jurisdiction. ³³³ Applies to any compelled/mandatory retirement age. Justified unilateral termination possible ("objective and substantiated precondition" test ³³⁴).	Protection continues after retirement age.
Lithuania	Compelled retirement is not facilitated by law.	Justified unilateral termination possible.	Not lost.
Luxembourg	State mandatory retirement at 68 ³³⁵ without intervention by the employer.	Justified unilateral termination possible. ³³⁶	Not lost.
Malta	State mandatory age 65.	Employers cannot unilaterally set retirement ages in any manner whatsoever. ³³⁷	Rights lost at 65. If employed thereafter, employee retains other rights.

³³² Dismissal cannot occur until the conditions (including age) required for collecting a pension are met.

³³³ Art. 6 of the Labour Law.

³³⁴ Contained in Art. 29(2) of the Labour Law. Ius laboris's report agrees that "There is no specific justification laid down in the Labour law for age discrimination. The employer can justify direct age discrimination if it can show that the treatment is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. This is not limited to any defined aims." <http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf> p25/50 Q4. It is not clear whether the Ius Laboris report bases its comment on the fact that the employer would be able to require the Labour law test to be construed so as to give effect to Article 6(1) of the Directive. Such an argument would fail because it is open to member states to introduce provisions more favourable to the principle of equal treatment on the grounds of age than are contained in the Directive (see Article 8.2 Directive 2000/78).

³³⁵ Ius laboris's report states on this point: "The retirement age is 65. At 65, if the employee is entitled to a retirement pension, the employment contract will automatically end (note that employees may retire before 65 if they have accumulated enough months of compulsory contributions). Nevertheless, after retirement age, the employee may continue to work, but a new employment contract must be made, as the old one automatically ends on the employee's 65th birthday if he or she is entitled to a pension. In fact, employees may work at any age, even with an early retirement or old-age pension. The law nonetheless provides for specific thresholds of remuneration in order to avoid accumulation of both a full retirement pension and significant remuneration". (ibid p 27/50 Q6).

³³⁶ Art. L. 252-2 of the Labour Code.

³³⁷ On 3 January 2008, the Civil Court, First Hall, in its Constitutional Jurisdiction dealt with an application wherein the applicant claimed age discrimination in relation to the loss of a licence to act as a stevedore upon the attainment of pensionable age for persons who are self employed. The self-employed applicant claimed that the imposition of this new condition in his licence was discriminatory on the basis of age. The case is still pending a final decision from the court.

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Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
The Netherlands	Yes ³³⁸	Automatic termination if the facts/circumstances show that the parties intended to terminate at (65 (pensionable age)). ³³⁹ Dismissal at 65 is objectively justified. Such dismissals are in circumstances in which the person has state pension (and potentially occupational pension) income. The social partners can agree an age older than 65 to which the individual can work. Justified unilateral termination possible. ³⁴⁰	Rights are not lost, whilst the person is an employee regardless of age.
Poland	No	Supreme Court has held the termination of an employment contract cannot be justified solely by reason of the fact that the employee has reached retirement age and become entitled to a pension. ³⁴¹	Rights not lost. If there is an additional reason behind the need to dismiss (e.g. redundancy) early selection of people who have a right to the pension in the first place is acceptable.
Portugal	No. At 70+ the contract becomes 6 monthly renewable, subject to 60 days' notice. ³⁴²	Justified unilateral termination possible (see art 25(2)(3) of the Labour Code ³⁴³).	Rights on dismissal modified, although applicable. Over 70s are in a less stable economic position than younger workers.
Romania	Yes if the employee fulfils the retirement age and contribution conditions for the retirement insurance public system and has not submitted an application for retirement. ³⁴⁴	A national collective contract allows for reduction of the pensionable age in some sectors taking into account difficult conditions, according to special laws and special collective contracts. Individual contracts cannot contain lesser rights than those in the national collective contracts. ³⁴⁵ The standard pension age cannot be raised by collective contracts. ³⁴⁶	Labour Code protection against dismissal applies to all employees, although in effect there is no protection after pensionable age.

³³⁸ Article 7(1) sub (b), Anti-discrimination Act.

³³⁹ Employment agreements and/or collective bargains that stipulate in writing that the agreement terminates when pensionable age is reached are still common (and valid).

³⁴⁰ Article 7(1)(b).

³⁴¹ The Supreme Court of Poland in sygn. II PZP13/08.

³⁴² Article 348 of the Labour Code.

³⁴³ Law 7/2009 25(4) provides that legal rules or collective agreements falling within art 25(3) must be periodically evaluated and modified if they are no longer justifiable.

³⁴⁴ Romanian Labour Code art 61(e). Law no. 19/2000 gave the standard retirement age as 58 (women) and 63 (men) and this will rise to 60 (women) and 65 (men) in 2015.

³⁴⁵ Art. 238, Labour Code.

³⁴⁶ As a result of Art. 38 of the Labour Code: "the employees cannot give up on the rights recognised by law. Any transaction having as its purpose the renouncement of rights provided for employees in the law is null and void".

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
Spain	Yes ³⁴⁷	Collective agreements can stipulate the termination of contracts at the ordinary retirement age.	Such termination is deemed not to be a dismissal, (but is clearly a detrimental term of employment ³⁴⁸). Whilst in employment, laws protecting employment rights apply regardless of age.
Sweden	Yes at 67 ³⁴⁹ regardless of parties' agreement.	A collective agreement may not stipulate a younger age than 67.	Dismissal rights are lost at 67 but if at the employee is not retired at this precise moment, just cause is required for termination. The employee is only given a 1 month notice period and there is no right to re-employment. ³⁵⁰
Slovenia	No	Justified unilateral termination possible (Article 2.a, §1 of the Act Implementing the Principle of Equal Treatment or Article 2.a, §2, indent 3, of that Act).	Dismissal rights not lost. Other rights remain.
Slovakia	No ³⁵¹	Age is not a listed reason for dismissal in the Labour Code. Justified unilateral termination not possible.	Rights are not lost.

³⁴⁷ Law 14/2005, collectively agreed compulsory retirement is valid if:

- i. the measure is connected to coherent objectives with respect to the employment policy of the collective agreement (such as improvement of stability in employment, conversion of temporary contracts into permanent ones, maintenance of employment, recruitment of new workers or any other objectives aimed at enhancing quality of employment); and
- ii. the employee has covered the minimum contribution period and meets the other requirements specified by Social Security legislation for entitlement to a contributory retirement pension.

³⁴⁸ And see *Palacios*.

³⁴⁹ Swedish Employment Protection Act (1982:80). The employer can end the employment contract at the end of the month in which the employee reaches the age of 67. That age does not need to appear in the contract. The employer must give the employee at least one month's advance written notice. Termination according to this procedure will not amount to age discrimination. If the employee is kept beyond 67, the employer must thereafter be able to show just cause for terminating the employment.

³⁵⁰ Some cases challenging these provisions have been dismissed by the Equality Ombudsman in 2009, relying on a non-specific reference to the case law of the CJEU.

³⁵¹ However exceptions to this for special categories of state employees are stipulated in special Acts; see above.

Country	Is the employer permitted to set an age for/act on an employer compelled retirement?	Permitted method	Loss of protection from dismissal/employment rights, and if so when these rights are lost
United Kingdom	Yes. ³⁵² Default retirement age of 65 ³⁵³	Justified unilateral termination possible for retirement dismissal below 65. Collective agreements are relevant factors in justification.	Dismissal rights are lost post 65 and not protected from discrimination in the hiring process. If employer dismisses a person at or over 65 without following procedure, the dismissal is unfair and age discrimination. If the employee is dismissed on other grounds, unfair dismissal can be claimed. All other rights apply to such employees.

It is clear from the information summarised above that attitudes towards mandatory retirement ages and employer-compelled retirement vary greatly between reporting States. It also appears, however, that the high level of CJEU litigation in this area has resulted in changes in the law in certain States, such as Greece, France, Spain and the UK. It remains to be seen whether the clarification provided by the CJEU decisions will result in similar changes in other States.

The CJEU has appeared to uphold state retirement ages by reference to the wide margin or appreciation of the states. In those circumstances domestic litigation has been the key to legislative change.

³⁵² Regulation 30 of Employment Equality (Age) Regulations 2006.

³⁵³ Currently the law allows employers to rely on a default retirement age of 65 which does not need to be in the contract of employment. Dismissing employees at 65 or older is not age discrimination, provided a complex procedure is followed. Retirement before 65, must be justified objectively (regulation 3 of the 2006 Regulations) and if it cannot be is direct age discrimination. In the light of the case of R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills [2009] EWHC 2336 (Admin), the default retirement age of 65 will be abolished from October 2011, after which an employer wishing to use any retirement age will need to justify it to avoid age discrimination. The relevant legislation is now section 13 of the Equality Act 2010.

Jeremy | 1989

Part VIII

Redundancy

The table below sets out the extent to which the reporting States allow age or length of service to be taken into account in redundancy selection or compensation. Traditionally redundancy payments exist to facilitate the search for alternative employment. They have also been seen as a means of rewarding loyalty to the employer. Most countries reflect this approach in permitting length of service to increase the amount of the redundancy compensation that must be paid. Length of service is also regularly taken into account in selection for redundancy.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Austria	Length of service (“LOS”) not protected. Age might be taken into account as there is a special provision declaring “socially unfair” dismissals illegitimate. ³⁵⁴ This favours older workers with long service in a company.	No, usually all forms of compensation refer to seniority but not to age.
Belgium	Age is indirectly relevant to the selection of workers for redundancy. ³⁵⁵ A redundancy plan must indicate the number of workers concerned, divided inter alia by age and giving selection reasons. Impact on older workers is discussed with workers’ representatives. Age and/or seniority: justified use is possible: Article 12 § 1 of the General Anti-discrimination Federal Act on a case-to-case examination.	Special compensation is paid by the employer to workers affected by redundancy for a period normally of four months following layoff. This compensation ³⁵⁶ is 50% of the difference between their previous remuneration and the unemployment benefit of the laid off workers. Older workers probably are more expensive to dismiss. Their level of remuneration will normally be higher.
Bulgaria	The only criteria for selection for redundancy are lesser qualifications and worse work performance. ³⁵⁷ Once employees become entitled to retire, they can be dismissed, even if there is no redundancy. ³⁵⁸ Seniority cannot be taken into account in redundancy selection.	-

³⁵⁴ 105 (3) fig. 2 Labour Constitution Law [Arbeitsverfassungsgesetz] provides that a dismissal can only be challenged in court if it is socially unfair and if the worker has been employed at the company for at least six months. A dismissal is socially unfair when the substantial interests of the worker are impaired by it, unless the employer can produce evidence that the dismissal was based on one or more of a number of factors. The factors are (a) circumstances relating to the person of the worker which negatively affect the company’s interests; or (b) operational requirements of the company which are contrary to further employment. If the works council [Betriebsrat] has entered an objection against a dismissal which purports to be due to the operational requirements of the company, the dismissal will be socially unfair where there is a bigger social hardship for the affected worker than for other workers of the same company and the same field of occupation, if it is possible for the dismissed worker to do their work and the dismissed worker wishes to do so. In the case of an older worker the test of social unfairness and the comparison of social aspects must take into consideration the fact of longstanding staff-membership (seniority) and the complications the dismissed worker has to face in trying to reintegrate into the labour process because of greater age. Circumstances under heading (a) based on the higher age of a worker who has been employed in the company for many years can only be used to justify the dismissal where further employment of the dismissed employee would massively negatively affect the company’s interests.

³⁵⁵ Redundancy procedures are regulated in Belgian law by Collective Agreement (*Convention collective du travail*) no. 10 of 8 May 1973 on collective layoffs, Collective Agreement no. 24 of 2 October 1975 on informing and consulting workers’ representatives in collective layoffs; the Executive Regulation (*Arrêté royal*) of 24 May 1976 on collective layoffs; the Act of 13 February 1998 containing provisions promoting employment, and the Executive Regulation (*Arrêté royal*) of 30 March 1998 implementing Articles 63 and 66 § 2 of chap. VII, Collective Layoffs, of the Act of 13 February 1998. Account should be taken of Directive 98/59/EEC of 20 July 1998 when interpreting these provisions.

³⁵⁶ As defined by Collective Agreement no. 10 of 8 May 1973 on collective layoffs, Collective Agreement no. 24 of 2 October 1975.

³⁵⁷ Art. 329 (1).

³⁵⁸ Labour Code, Article 328.10.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Croatia	National law specifies that the employer must take age into account when selecting workers for redundancy, but it does not specify in what way age should influence his decision. ³⁵⁹	Compensation for redundancy is not affected by age but by the length of the employment ³⁶⁰ (seniority).
Cyprus	Cypriot Termination of Employment law governing redundancy does not provide for either seniority or age to be taken into account in selecting for redundancy. ³⁶¹ However “last in first out” (“LIFO”) is accepted by the courts as an appropriate criterion. ³⁶² Seniority alone cannot prevent selection of a worker for redundancy. ³⁶³	Redundancy compensation based on LOS with the same employer ³⁶⁴ and whether the period of employment was before 01.01.1964, as no compensation is payable for work before that date. ³⁶⁵ There is no compensation if the worker made redundant was of retirement age on the date of termination. ³⁶⁶
Czech Republic	No. ³⁶⁷	Age indirectly affects redundancy compensation due to the higher wages of senior employees. Compensation is paid at three times the employee’s average monthly salary. ³⁶⁸
Denmark	Not a lawful selection factor. ³⁶⁹ Exceptions in Article 5(a) ³⁷⁰ of the Act mean that if a collective agreement contains a provision allowing for LOS to be taken into account in selecting for redundancy this will be valid. Not clear if the collective agreement can generally introduce age as a factor. Special considerations are required to justify a redundancy where the employee’s length of service exceeds 25 years. ³⁷¹	Compensation can be awarded according to national law in the case of an illegal redundancy. Age does not influence the amount.

³⁵⁹ Article 107(3) of the Labour Act.

³⁶⁰ Article 119 of the Labour Act.

³⁶¹ Termination of Employment Laws 1967-1994.

³⁶² Chrysostomos Stavrou v. Redundancy Fund, 328/92.

³⁶³ Charalambous v. Famagusta General Agency Ltd, 490/95.

³⁶⁴ Termination of Employment Law, Table IV, Section 1.

³⁶⁵ Termination of Employment Law, Table IV, Section 2.

³⁶⁶ Article 19(1) of the Termination of Employment Law. Also, in accordance with Article 19(2) of the same law, when a worker’s employment is terminated within twelve months prior to his/her retirement age, the amount of compensation payable is reduced by one twelfth for every completed month of age during this 12-month period.

³⁶⁷ In practice seniority might be taken into account in the practical process of selection for redundancy, because senior workers are paid higher salaries than younger ones. Because dependent labour in the Czech Republic is subject to high taxation, this criterion might be decisive in certain circumstances, especially when the employer is encountering economic difficulties.

³⁶⁸ See Sec. 67 of Law no. 262/2006 Coll., the Labour Code.

³⁶⁹ Act on Prohibition against Differential Treatment in the Labour Market.

³⁷⁰ According to section 5(a) (3) the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements. It is presumed that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary.

³⁷¹ The Dismissal Board [Afskedigelsesnævnet] has developed this 25-year rule in its case law. The principle is that an employer must, if possible, refrain from dismissing a person who has been employed for 25 years or longer. If such a person is dismissed, the burden of proof shifts to the employer to prove that there were strong reasons for dismissing this particular person. There is no case law indicating that the age of the worker has an influence on the size of the compensation awarded.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Estonia	In public service LOS is a tiebreaker in cases of equal performance in selection for redundancy. ³⁷² In the private sector an employer must consider equal treatment principles when making redundancies. ³⁷³ If the employee has a child aged 3 or less they are given preferential treatment in the redundancy selection. ³⁷⁴	Compensation in cases of redundancy does not depend on the age of the worker. Compensation in cases of redundancy of public officials depends only on LOS. ³⁷⁵ Compensation paid by an employer for redundancy is one month in all cases. ³⁷⁶
Finland	Laying off/dismissal of employees may be based only on "appropriate and weighty reasons" ³⁷⁷ which may not discriminate. The refusal of an employer to take LOS into account when laying off/dismissing employees cannot be successfully challenged on the ground that it should have been considered. ³⁷⁸	The age of the employee/prospects of finding new suitable employment are factors in determining the award for redundancy which breaches the Employment Contracts Act (e.g. because the dismissal was discriminatory or lacked genuine redundancy grounds). ³⁷⁹
France	Age is taken into account in redundancy cases as a limiting factor in selection. ³⁸⁰ Employers with 50+ employees are subject to limitations on the right to dismiss employees of over 50, and the conditions under which such employees are dismissed, in cases of redundancy.	Workers over 57 are entitled to special indemnities until retirement age if they are dismissed. ³⁸¹
FYR of Macedonia	There is no legislative provision requiring them to be taken into account, but in practice they are. Age and seniority are not defined as preventive criteria. ³⁸²	There are no provisions on different levels of compensation for redundancy dependent on the age of the worker in labour legislation.

³⁷² Article 116(2) of the Law on Public Service.

³⁷³ Article 89(4) Law on Employment Contracts (1 July 2009).

³⁷⁴ Article 89(5).

³⁷⁵ Article 131 (1) of the Law on Public Service.

³⁷⁶ Article 100 Law on Employment Contracts (valid from 1 July 2009).

³⁷⁷ Section 7:1 of the Employment Contracts Act [*työsopimuslaki* (55/2001), as amended].

³⁷⁸ Supreme Court 1998:130 (KKO 1998:130).

³⁷⁹ Chapter 12, section 2(2) Employment Contracts Act.

³⁸⁰ Article L1233-61 LC. Article L1233-5 LC forces the employer to take into account age and disability as protecting factors in establishing the list of targeted employees in case of economic redundancy and article L1233-61 LC requires the employer to establish a plan to organise in priority the reclassification and reemployment of older workers.

³⁸¹ Article R5123-9 and following, Labour Code.

³⁸² Since age and seniority are not expressly defined as criteria in preventing selection of such workers for redundancy either in the Labour Law or in the National Collective Agreements, in practice it is senior workers who are selected for redundancy. In such a case, the Supreme Court of the Republic of Macedonia, in its Verdict Rev. No. 820/2005 of 17.01.2007, stressed that the only duty on the employer is to abide with the terms of the Collective Agreement. This means that if on the list of redundancy there are more workers with same points out of the given criteria, the only additional priority is education - those with higher education should be kept.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Germany	Age can play a role in social plans for dismissal. Older employees may legitimately be retained in preference to others. ³⁸³ Entitlement to state pension, and therefore indirectly the age of an employee, can count as a consideration within social choice facilitating privileged dismissal. Before pension age, age might have a similar effect within redundancy selection. There is conflicting case law. ³⁸⁴ The interest of the employer in maintaining an age balance among employees has also been held to be reasonable. ³⁸⁵ It appears however that there must be no schematic preferential treatment of age groups. ³⁸⁶	Age can play a role in the social plans for redundancy but it is not clear whether the law provides for compensation for redundancy as such or the role that age or seniority may play in it if it does. Employment periods under 25 are not taken into account when determining notice period. ³⁸⁷
Greece	Age and LOS must be taken into account when an employee is selected for redundancy. ³⁸⁸	Compensation for redundancy affected by LOS for the employer.
Hungary	No, but if someone has passed the retirement age, dismissal is possible without reasons.	If a person is dismissed after pensionable age (and has the necessary service time), they are not entitled to compensation. If they are dismissed due to redundancy, they are entitled to compensation, and the amount of the compensation is dependent on LOS with the company. If the employee is dismissed within the five years before retirement age, they are entitled to an additional compensation amounting to three times their monthly salary. ³⁸⁹

³⁸³ See Sec. 1.3 sentence 1 Law on Protection against Dismissal (*Kündigungsschutzgesetz*). In case of dismissal due to urgent entrepreneurial reasons, the dismissal is – among others – not justified if the employer does not take or does not take sufficiently account of the age of the person concerned. On case law, cf. 0.3 of the Country report 2008 for the European network of legal experts in the non-discrimination field.

³⁸⁴ See Land Labour Court, Lower Saxony (*Landesarbeitsgericht Niedersachsen*), 28 May, 2004, Az: 10 Sa 2180/03, arguing that a guideline according to which employees older than 55 can be more easily dismissed does not violate Directive 2000/78 because these employees can live more easily with a higher risk of unemployment due to social security. See Land Labour Court, Düsseldorf (*Landesarbeitsgericht Düsseldorf*) 21 January 2004, Az: 12 Sa 1188/03: Proximity to the pension age no reason for choosing older employee for dismissal.

³⁸⁵ Federal Labour Court (*Bundesarbeitsgericht*), 23 November 23, 2000, Az: 2 AZR 533/99: employee working in a kindergarten.

³⁸⁶ Cf. Brors, Däubler/Bertzbach, AGG, § 10 para 100.

³⁸⁷ 622.2 sentence 2 Civil Code (*BürgerlichesGesetzbuch*). However this has been the subject of the *Kucukdeveci* Case C555/07.

³⁸⁸ Criteria of age and seniority were established by the Greek Supreme Court (*Αρείος Πάγος*) in a way which the expert views as not to be compliant with the Directive. According to this jurisprudence age and seniority must be taken into account by the employer when he makes an employee redundant for a redundancy not to be generally considered to be abusive (Supreme Court Judgments no. 668/2000, 279/1996 and 744/1992).

³⁸⁹ Article 95 of the Labour Code.



Wim | 1992

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Ireland	No. If there is a redundancy, the employer must use fair criteria for selecting employees. A number of different approaches are taken. They can include: LIFO; use of a selection process or processes which have been used before; trade or occupational custom; contractually stipulated process; combining single skilled posts and requiring multiskilled employees to do them. The employer may not select a person for redundancy on any of the discriminatory grounds prohibited by the Equality Acts including age. LIFO selection requires the employer to justify what may amount to indirect discrimination.	To be eligible for a payment under the Redundancy Acts, ³⁹⁰ a number of conditions must be met. The employee must be (i) over 16 years of age; (ii) in insurable employment under the Social Welfare Acts (iii) continuously employed for the employer for at least 104 weeks prior to the redundancy. There is no upper limit for the claim. The amount of the redundancy payment involves a calculation of LOS for the employer. The greater the LOS, the greater the redundancy payment. ³⁹¹
Italy	There is no legislation allowing employers to take into account age/seniority in selecting for redundancy, although they can become a relevant factor when employers negotiate dismissals with the trade unions.	The social security system provides a “mobility compensation” for workers who are dismissed for redundancy. The system applies to workers who are dismissed after having previously enjoyed the social security benefits granted to workers in enterprises in difficulty. The length of the period for which mobility compensation is granted increases with the age of the worker. ³⁹²
Latvia	Yes. Where performance results and qualifications do not substantially differ LOS and having less than 5 years until the retirement age may be taken into account. ³⁹³ There are also 8 other priorities and all are of equal value.	LOS is a factor in determining the amount of compensation, which ranges from 1-4 months’ salary. Age is not a factor.
Lithuania	Yes, although the law does not permit the use of age as a ground for selecting workers for redundancy in all circumstances. Priority must be given to persons who have only three years remaining before they reach pension age ³⁹⁴ when a redundancy selection is made. Workers with 10 years’ LOS are given priority for job security in organisational restructures.	LOS determines redundancy compensation. It does not appear that age itself is taken into account.
Luxembourg	No criterion is provided by the law. ³⁹⁵	The age of the worker does not affect compensation for redundancy.

³⁹⁰ Redundancy Act 1967-2007.

³⁹¹ <http://www.redcalc.entemp.ie/> Online redundancy calculator.

³⁹² It is not clear whether this rule has been considered in the light of whether it is objectively justified/proportionate. However redundancy payments based on years of service or multipliers for age bands provided for by collective agreements for executives are permitted, provided in every case that the measure is reasonably justified by legitimate aims (source: <http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf> p 24/50 Q9).

³⁹³ Art. 108 of the Labour Law sets the 10 criteria to determine selection when the results of selection using performance and qualification criteria are substantially the same. The 10 equally significant criteria are thus used to break the tie.

³⁹⁴ As a result of Art. 135 of the Labour Code.

³⁹⁵ The report concludes that it is unlawful therefore to select any worker for redundancy on the basis of age or seniority. It is not clear however why it is not possible for an employer to rely on Article 18 of the general discrimination law of 28 November 2006, introducing article L.252-2 of the Labour Code which appears to permit differential age treatment if it can be justified according to the test. Further it is not clear why the use of seniority as a selection criterion would be unlawful a priori. It might give rise to a question of indirect discrimination, but the employer may be able to justify the use of seniority.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Malta	A LIFO system ³⁹⁶ save where the last person employed is related to the employer (as long as the employer is not a limited liability partnership or statutory body) by blood or marriage. ³⁹⁷	LOS affects calculation. Age does not.
The Netherlands	Yes. LIFO has been accepted in case law and may be objectively justified. ³⁹⁸	Compensation is calculated on the basis of the so-called 'cantonal courts formula' $a \times b \times c$. ³⁹⁹ $a = \text{LOS}$; $b = \text{a remuneration component (monthly gross salary)}$ and $c = \text{'correction factor', dependent on the individual circumstances of the case.}$ ⁴⁰⁰ In practice, the formula is still being used in individual cases of dismissal despite problems identified in mass redundancy cases. ⁴⁰¹

³⁹⁶ Within the category of workers affected by the redundancy situation.

³⁹⁷ Employment and Industrial Relations Act (art 36(4)). The social policy behind this provision appears to be to try to prevent problems within families or through marriage in a small society.

³⁹⁸ The Explanatory Memorandum to the ADA explicitly says that the use of this principle may be "objectively justified" under Article 7(1) (c) of the Act. However the principle is currently subject to an uncompleted political debate. On 18 December 2003 the Second Chamber of Parliament accepted a Motion (Motion Verburg, Weekers, Bakker and Noorman den Uyl) which begged the Government to reconsider the usage of the 'last in, first out' principle in cases of dismissal for reasons related to the economic situation of a company. See Tweede Kamer, 2003-2004, 29 200, XV, nr. 48. See also the recent Note on Reconsideration of the Last In First Out Principle in cases of dismissal for reasons related to the economic situation of a company, available at www.szw.nl.

³⁹⁹ See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer 2003, p. 179.

⁴⁰⁰ In 2009, the formula was changed and made more unfavourable for younger workers. From then on, for workers from 35- 45 years old, every full year of service counts for 1, between 45-55 years old it counts for 1.5, and, from 55 years old it counts for 2. Below the age of 35, a (dismissed) employee gets a 0.5 a-factor.

⁴⁰¹ In 2005 the Cantonal Court of Sneek decided that a 'Social Plan' under which the Trade Unions and the Management of a Company, in a case of a large scale reorganisation, agreed to make an age distinction whereby this 'cantonal courts formula' was 'neutralised' (correction factor $c = 1$) only for employees under the age of 57 (while for the employees over 57 there was a general wage compensation scheme in place) amounted to unlawful age discrimination. The case came down to the question of whether a person over the age of 57 years old needs to use the special arrangement for older workers in the Social Plan or whether he is free to choose to be made redundant in the normal way (termination of the employment contract and normal application of the so-called cantonal judges formula), which would be more profitable. The court ruled that the special rules for the redundancy payment of older people were not objectively justified (not meeting the criterion of proportionality) (Cantonal Court Sneek, 31 May 2005, LJN AT7230).

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Poland	Using LOS to select for redundancy is one of the exhaustive list of situations in which an employer is allowed to differentiate and which are not treated as either direct or indirect discrimination provided that the actions are proportionate to employer's legitimate aims. ⁴⁰² The employer cannot terminate the employment contract of an employee who has less than four years to go before retirement age, unless such a person is being granted a pension on the grounds of incapacity to work. ⁴⁰³	If an employee is made redundant in the protected 4 year pre-retirement period, there is a right to special compensation available in the event of a collective redundancy. The person has the right to be re-employed or compensated. The amount of severance pay due to redundant employees depends on LOS. ⁴⁰⁴
Portugal	Age is not taken into account, but seniority is referred to in Article 368(2) of the Labour Code as one of the criteria for selection for redundancy and collective dismissals. Workers with less seniority are generally selected in collective dismissals. ⁴⁰⁵	LOS but not age influences. Redundant employees are entitled to a severance payment of one month's basic salary together with a seniority allowance ("diuturnidade") for each completed year of service. ⁴⁰⁶
Romania	Age or LOS are not permitted expressly to be taken into consideration in redundancy selection. The concept of pensionable age is referred to in legislation relating to redundancy selection. ⁴⁰⁷ Selection of those with a pension and a salary in preference to others, then those of retirement age who have made necessary pension contributions ⁴⁰⁸ is supported.	There are no age dependent laws. It is not clear whether LOS plays a role.
Spain	Spanish law allows no distinctions on the grounds of age in the case of redundancy. LOS affects redundancies in companies. LIFO can be used. Because the eldest have access to early retirement schemes, they are frequently selected. The principle of general justification in Spanish law is that exceptions to the principle prohibiting age discrimination have to be laid down in provisions of national law. ⁴⁰⁹	Redundancy payments are not conditioned by age, but by LOS with the dismissing company. ⁴¹⁰

⁴⁰² See: <http://iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf>, Q9 p. 36/50.

⁴⁰³ Articles 39 and 40, Labour Code. More generally during the 4 years before an employee reaches retirement age, an employer cannot terminate his or her employment agreement unless extraordinary circumstances occur (e.g. disciplinary matters or the liquidation of the employer) (source <http://iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf>, p. 34/50 Q7).

⁴⁰⁴ Source <http://iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf>, p. 34/50 Q8.

⁴⁰⁵ Collective bargaining agreements may make special payments based on seniority. Compensation may vary depending on seniority. <http://iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf> p. 36/50.

⁴⁰⁶ <http://iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf.pdf>, p. 36/50.

⁴⁰⁷ Article 81 of the National Collective Contract.

⁴⁰⁸ The scheme selects by the individual work contracts of those having two or more positions as well as of those collecting both a pension and a salary; those who fulfil the standard requirements of age and period of contribution for retirement but who did not requested to be retired; individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement, upon their request.

⁴⁰⁹ Spanish legislation does not permit general direct discrimination on the ground of age but the legislation permits differences of treatment based on age for some activities within the material scope of Directive 2000/78. These exceptions must be "objectively and reasonably justified by a legitimate aim". In Spain therefore it appears that there is a limited set of matters which may be justified.

Country	Does national law permit age or seniority (LOS) to be taken into account in selecting workers for redundancy?	If national law provides compensation for redundancy, is this affected by the age of the worker?
Sweden	Yes, LOS and age may be used. Employers must use LIFO. ⁴¹¹ In the event of equal periods of employment, senior age priority applies directly. ⁴¹²	There are no national legal provisions on redundancy payment. Central collective agreements often provide structures to support dismissed persons. Redundancy payment can be a part of such systems. They be topped up by the employer e.g. in a local collective trade union agreement. Such arrangements must be justified. ⁴¹³
Slovenia	The primary criteria for selecting workers for redundancy are: professional education, work qualification, additional knowledge and abilities required. ⁴¹⁴ Age or seniority discrimination in this respect is generally not permitted. ⁴¹⁵ LOS, performance at work, years of active employment, health and social circumstances are factors taken into account against redundancy and must be justified. Men of 55+ or women of 51+ cannot be dismissed without their consent. ⁴¹⁶ This protective measure has led to harassment on the basis of age, as a result of which workers resign and lose unemployment indemnity payments.	Age is not a factor; LOS is in redundancy calculations.
Slovakia	Age is not a legitimate factor in redundancy selection.	Payment does not depend on age. Calculations of redundancy payments are based on the average wage of an employee and whether the employment relationship lasted less than or at least 5 years. ⁴¹⁷ Only to that extent does LOS enter into the calculation.
United Kingdom	Provided the criteria do not discriminate and are within a band of decisions which a reasonable employer might take, the employer may use any criteria. In the case of age or LOS as a criteria for redundancy selection the employer would have to be able to justify the less favourable treatment of the employee objectively.	Statutory or enhanced redundancy payments based on LOS and/or multipliers for age bands 18-21, 22-40 and 41-65 are permitted. ⁴¹⁸ Thus age and LOS affect redundancy payments.

⁴¹⁰ Workers' Statute (Title 1, Chapter III, Section IV).

⁴¹¹ Swedish Employment Protection Act 1982.

⁴¹² In all cases the notice provision is linked to length of service with the employer.

⁴¹³ Chapter 2 Section 2 Point 4 of the Discrimination Act.

⁴¹⁴ Art 100 of the Employment Relationship Act.

⁴¹⁵ Judgment of Higher Labour and Social Court, No. Pdp 402/2007 of 19 March 2008. The Court held that, where an employer had decided to terminate the contract of an employee due to her upcoming retirement, this amounted to discrimination, as it placed the claimant in an unequal position due to her age. The Court relied not on the Directive, but on Art 6 of the Employment Relationship Act.

⁴¹⁶ Under Art. 236 of the Employment Relationship Act.

⁴¹⁷ Section 63, par. 1(b) and Section 76 of the Labour Code.

Conclusion

The information provided by reporting States suggests that very few have altered their laws relating to redundancy selection and compensation as a result of the Directive. Most countries do not explicitly allow age per se to be taken into account in selecting or compensating for redundancy; however they may permit objective justification of its use as a selection factor, and in a small minority of states, age is treated as a protective factor. In contrast, length of service is commonly taken into account in both areas and this appears neither to have changed or to have been subjected to significant challenge in most countries (some isolated exceptions being the Netherlands and the UK⁴¹⁹). However, where age itself has been taken into account in redundancy selection, certain State courts have ruled this unlawful (e.g. Slovenia).

⁴¹⁸ Section 135 Employment Rights Act 1996 and regulation 33 Employment Equality (Age) Regulations 2006 (<http://www.iuslaboris.com/Files/Age-Discrimination-in-Europe.pdf>, p 50/50).

⁴¹⁹ See e.g. *Rolls Royce Plc v Unite* [2009] EWCA Civ 387; [2010] 1 WLR 318, where the challenge was unsuccessful.

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Conclusions

There is an ambiguity at the heart of legislation prohibiting age discrimination. Justification of direct age discrimination was to be exceptional. The exceptions to the principle of equal treatment on grounds of age which appear in the Directive embody our societal perception that some direct age discrimination is socially and economically necessary. Perhaps unsurprisingly, the information analysed in this report appears to show that the extent to which the Directive has altered the reporting States' existing positions on age discrimination is, at least to some degree, dependent on the way in which the prohibition and, more importantly, the exceptions to the prohibition are framed.

Where the Directive has been taken to provide for open-ended justification with an exemplar list of situations in which direct discrimination may be justified, there is wide divergence between the legislation maintained by reporting States. These are the areas covered by Article 6(1), such as provisions to assist older or younger workers, and minimum and maximum ages. Some States have continued to operate on the basis that such discriminatory provisions will necessarily be justified; a few have begun to conduct audits, and others require justification of all such differential treatment. It may be argued that the inclusion of these exemplar exceptions has led to more litigation than might have been produced by an open-ended justification provision.

A similar problem emerged in connection with retirement ages due to the interpretation of recital (14). Some States initially took recital (14) to mean that mandatory retirement ages were not within the scope of the Directive at all. This position changed following clarification from the CJEU in *Palacios*.

By contrast, where a closed list of exceptions to the principle of equal treatment has been adopted, for example, in Article 6(2), dealing with occupational pension schemes, the legislation of individual States tends towards the uniform, and there appear to have been fewer challenges in the national courts or the CJEU.

The experience of the reporting States raises important questions about the best way in which to delineate exceptions to the principle of equal treatment. In the authors' view, the information analysed above suggests that if the justification of direct age discrimination was to be exceptional in nature a closed list creates a clearer picture for States than the halfway house of an open-ended list with examples. The current directive appears to create a general test using an exemplar list. Eventually the jurisprudence surrounding the application of that test will settle down. However in our opinion because the breadth of the examples used encompasses a very large number of factual and legal situations, this process of clarification may be protracted.

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Annex: National case law

Justification

Austria: (Case C-88/08) *Hütter v Technische Universität Graz*.

Austria: *Melanie O v Johann H* 7/2/08, Supreme Court. Different basic salary and calculation of overtime hours for apprentices over and under 18 found to be justified by legitimate aims of educational policy and necessary protection of youth.

Belgium: *Vercruyse v The Federal Council of Ministers*, Constitutional Court 7/11/07, Judgment No. 137/2007. Those over 62 could not be First President of a Court. There was no violation of equal treatment as the objective (the need for a management plan submitted by the candidate and the need for the candidate to stay in position long enough to achieve it) was legitimate and exclusion was proportionate.

Belgium: *Barbry Geert v VZW Koninklijke Belgische Voetbalbond*, 29/2/08, Labour Appeal Court of Brussels. A football referee was not permitted to train as a referee in the 1st division at 38. This was unjustified. No genuine and determining occupational requirement justification was argued.

Bulgaria: *Georgiev v Tehnicheski Universitet - Sofia, Filial Plovdiv* (C-250/09) 18/11/10.

Cyprus Equality Body *A.K.I. 63/2008; A.K.I. 1/2009 – 4/6/09*: differential provision for early retirement for those over and under 45 (taking early retirement pre-45, results in losing the pension) discouraged scientific staff from leaving public service. Legitimate aim: maximum utilisation of the knowledge and experience of public servants acquired at the cost of the state. This was not in the Directive's pensions exception and was not proportionate. It covered non-scientific as well as scientific staff. Shortages in scientific personnel had already been covered. It produced excessive restriction on free movement of labour. Alternative means were available.

Czech Republic: Supreme Administrative Court decision *4 Ans 9/2007*: the minimum age of 30 to become a judge was not applied proportionately and was thus unlawful in the particular case. The requirement of such an age was not discriminatory if proportionate. It did not exclude the candidate completely as the case would be with a maximal age limit.⁴²⁰ However, the age limit was arbitrarily applied. It could form part of decision making, as a part of the personal qualifications of the applicant, but the reasons should target the individual conditions of the applicant, and there should not be a blanket ban.

Denmark: *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen -v- Region Syddanmark*, C-499/08.⁴²¹

France: *Avenir Navigant*, Conseil d'Etat, 25/4/06. Decree limiting flight service of plane service personnel to age of 55, alleged to be age discrimination. However the underlying elements of expertise filed before the Court justified age limitations on the basis of the specific job description and its fitness requirements.

⁴²⁰ The difficulty with such reasoning is that it fails to notice the nature of discrimination. It is because the claimant currently belongs to a group that discrimination occurs, not because they will always belong to that group or that they will inevitably move from that group. It would be no argument in a gender discrimination case to say that, because a woman will not always be capable of bearing children, discrimination which occurs to her because (at the moment) she is capable of bearing children is in some way less serious; or in a disability discrimination case to say that because a person is disabled temporarily (e.g. by depression which will depart), discrimination against him/her for that reason is any less serious. Similarly the prohibition on age discrimination seeks to prohibit discrimination which relates to a group out of which a person may move (or into which they may move and then depart). In each case the recipient of the less favourable treatment has no choice about occupying the category which is less favourably treated.

⁴²¹ [2011], not yet reported in the ECR.

France: *Syndicat parisien des administrations centrales économiques et financiers*. Ref 268130, Conseil d'Etat, 1/3/06. A challenge to the age limit for access to the internal recruitment competition for the National School of Administration. The age limitation met the requirements of the Art 6 exception to ensure training is followed by sufficient years of service and career perspectives in senior functions requiring sufficient experience.

Germany: Decision of Federal Administrative Court, 19/2/09 – BverwG 2 C 54.07. A recruitment maximum of 35 for entry into civil service did not violate German constitutional law or anti-discrimination legislation. The less favourable treatment could be justified under Art 6(1). Legitimate aim: keeping a reasonable relation between the period of employment and later pension entitlement, and a balanced age structure in the service. Proportionality: the provisions allowed a wide discretion for the administration to decide whether an exception is granted or not.⁴²²

Germany: *Mangold v Helm*,⁴²³ Case C-555/07 *Küçükdeveci v. Swedex GmbH & Co Kg*;⁴²⁴ Case C-341/08 *Petersen v. Berufungsausschuss Für Zahnärzte Für Den Bezirk Westfalen-Lippe*.⁴²⁵

Germany: Decision of Bavarian Higher Administrative Court, Munich, 28/1/09 22 BV 08.1413. Maximum of 68 for official experts and a one-time extension for 3 years does not violate German or European law. They could continue working as a non-official expert. Legitimate aims: reservation of the qualification associated with the appointment to those who are physically and mentally capable to comply with its demands, catering for public trust in the experts and their opinions; avoiding dangers for the client and public. The age was suitable for these aims. The average professional's ability to perform decreases over 70. Individual examination of ability after that age would create further administrative burdens. The court was also influenced by the possibility of an extension.⁴²⁶

Germany: Federal Labour Court 1 AZR 198/08: A redundancy programme provided that all below 59 received compensation. A redundancy programme providing for compensation differentiating according to age or time of employment was permissible – social plans are allowed to differentiate between employees of different age groups according to the economic risks these persons face when they lose their employment. The risk can increase with age until a point is reached when the risk decreases owing to special social security programs, including pension schemes.

Hungary: Equal Treatment Authority 234/2009: differential treatment of individual who continued working after retirement (lower salary) violated principle of equal treatment.

Latvia: Case No. 2002-21-01, Constitutional Court, 20/5/03: age limit of 65 for occupying the post of professor/ associated professor, as well as other senior administrative posts in universities and scientific institutions was invalidated as discriminatory under the non-discrimination Article and the Article on right to work. Constitutional Court held that the restrictions were not proportionate, as the evidence showed they were not suitable for achieving the aim sought, which was to attract young people to academia. Determined on the basis of the right to work rather than the non-discrimination Article.

⁴²² The court ruled that the plaintiff (who had not been permitted to become a civil servant in view of his age) had the right to demand a new decision about his application, it appears because the exceptions had not been properly considered. The Court ruled that the reasonableness of any new regulation on age limits depended partly on the scope of exceptions provided for.

⁴²³ [2005] ECR I-9981, para 74- 75.

⁴²⁴ [2010], not yet reported in the ECR.

⁴²⁵ [2010], not yet reported in the ECR.

⁴²⁶ However see the UK case concerning the maximum age (36) for air traffic controllers *Baker v National Air Traffic Services Ltd ET/2203501/2007*, 24/2/09 (see <http://business.timesonline.co.uk/tol/business/law/article5815852.ece>). There was already a system of individual appraisal or competence monitoring.

Latvia: Case no. 2003-12-01: Constitutional Court 18/12/03. Challenge to Civil Service Law that person must retire at the pension age unless their superior decides otherwise. Regulation of civil service relationships may differ from that of employment relationships. The restrictions were proportionate, and necessary to ensure good administration and age equilibrium. Restricting the right to work of persons who have a pension, broadens the possibilities for persons who can only earn their living by work. Only about 1 in 7 of persons affected were actually dismissed.

Netherlands: *Kingdom of the Netherlands v National Federation of Dutch Trade Unions and the Youth Organisation of the National Federation of Christian Trade Unions*, 10/11/06, Supreme Court: there was no minimum wage for 13 – 14 year old children, whilst there was a minimum wage for 15 year olds. SC held that must be objective and reasonable justification to treat the two ages differently. Here, generally, education deserves priority over regular employment of young children.

Netherlands: Equal Treatment Commission, Opinions 2005-49 and 2005-50 and 2005-135: 25/3/2005 and 21/7/2005. Age discrimination in liberal professions – doctors and psychiatrists only get paid for work by medical insurance companies when have service contract with one of those companies. ETC said that, in general, it is arguable that persons over 65 may have trouble performing the medical profession accurately. Whether this needs to be tested in every case depends on whether there are valid methods to carry out such testing.⁴²⁷

Netherlands: Equal Treatment Commission, 27/8/07 and 4/9/07, Opinion 2007-158 and 2007-162. Local government was able to justify indirect discrimination on ground of age by demanding a certain work experience for a ‘prospective policy advisor’ – nature of work activities demanded an applicant who was not over-qualified.

Netherlands: Equal Treatment Commission: 2/8/07 [*Anon*] v *Contactorgaan Nederlandse orkestern, The National Federation of Dutch Trade Unions and others*. Opinion 2007-148. Demotion of a professional oboist at 60 in an orchestra, in accordance with a collective agreement, was unlawful. The generic measure was said to safeguard the orchestra’s quality as musicians lose some of their skills around 60 and showed deference to the musician’s artistic feelings. ETC said there should be an individual assessment.

Spain: *AENA* (9/3/04) – Supreme Court. Collective agreement clauses forcing retirement at 65 annulled. There was no national provision permitting such compulsory retirement. It was discriminatory on grounds of age to force workers to retire at 65 if there was no provision justifying differences of treatment based on age by legitimate employment policy or labour market and vocational training objectives.

Slovenia: Higher Labour and Social Court, Judgment No. Pdp 402/2007 of 19 March 2008. Found that termination of an employee’s contract in a redundancy situation because of her upcoming retirement was discrimination.

UK: *Martin & Ors v Professional Game Match Officials Ltd* (ET 2802438/2009) assistant referees required to retire at 48. The test for justification is not identical to that which applies to indirect discrimination. The employer must show a legitimate aim which relates to public or social policy. The primary aim, to ensure the continuing availability of match officials to officiate in matches at the highest level, was purely private to the business and did not meet any social policy requirement. Another aim (making a career route available from the bottom to the top of the game) had a social policy element in (sharing out employment opportunities among generations). The means were disproportionate. The aims could be achieved in a less discriminatory way. Retaining excellence could be pursued by performance and fitness tests alone. Ensuring turn-over could be done by natural wastage and demotion of the lowest on a merits assessments.

⁴²⁷ Cf CJEU, C-341/08, 12 January 2010 (*Petersen*). It depends on the evidence before the national court or decision maker. The Equal Treatment Commission decision correctly places the emphasis on the validity and robustness of the method of testing.

UK: *Baker v National Air Traffic Services Ltd ET/2203501/2007*: Application to be an air traffic controller was rejected as the Claimant was 50. Before the tribunal NATS argued that the age bar, of 36 or older, was objectively justified by legitimate aims to:

- achieve a high success rate in training;
- provide an adequate pool of ATCOs for the business;
- secure a reasonable period of service post validation;
- ensure that safety was not compromised.

The age condition had no exceptions and was not a proportionate means of achieving them. Training success could not be predicted by age; the rule excluded many who could succeed, and seemed to be a hindrance to achieving an adequate pool staff. Those over 36 had qualified in the past, so it was irrational. The evidence did not link the rule to the reasonable period of service after validation and did not suggest that safety was compromised by older recruits. Safety was secured by proper training, appropriate testing and monitoring in respect of those under 36 and anyone over that age would be subject to the same rigorous safety checks.

Minimum and maximum ages

The cases listed above and:

Cyprus: *Vasos Constantinou v The Republic of Cyprus and Androula Stavrou v The Republic of Cyprus*: Supreme Court of Cyprus 1/6/07. Considered whether differential pension ages according to date of birth were discriminatory. Employees who had to retire earlier argued that later dates for others were discriminatory. Note that it was argued by Counsel for the Republic that the Directive expressly excludes from its scope the setting of retirement ages, leaving it to be regulated by national governments. The Court decided it did not have power to extend any legislative provision, or change it to the extent that there would be a new law. Only the legislative branch of state could do that.

Cyprus Equality Body AKI 13/2005 11/4/07: Equality Body found that Article 4 of Termination of Employment Law which entitles employers to dismiss employees aged 65 or over without compensation amounts to discrimination on the ground of age. Ministry of Labour argued that measure encourages employers to keep people on after retirement, and protection of majority of persons of 65 plus is secured through pension and provident fund benefits. Equality body found that mere invocation of Art 6 not sufficient – legitimate aim must be sufficiently explained and the necessity of differential treatment as the necessary means of achieving this aim must emerge clearly. Referred to A-G to amend law, but this has not happened.

Cyprus: Supreme Court decision 12/3/10 – confirmed that law transposing directive 2000/78 does not apply to retirement age and the fact that teachers in public education are not allowed to extend their retirement age as other civil servants may does not amount to discrimination. The Court appears to have taken view that the Directive does not apply to retirement ages.

Greece: 22/2/08 – National Equality Body, complaint 16814/2006. Age limit of 35 set for 2 posts for scientific personnel in government departments. Greek Ombudsman addressed the Departments and noted that the possible provision of an age limit in such processes should be expressly justified so that it is made clear that age is an essentially important factor determining the ability to execute specific professional duties. Lack of such a justification constitutes violation of the principle of equal treatment on the grounds of age. Ombudsman decided to publish its report and ask the Ministry to abolish the provision of the age limit or fully to justify it.

Poland: Supreme Court 21/1/09 – ‘legal question’ lodged by Commissioner for Civil Right Protection – whether reaching retirement age and entitlement for pension can be the sole reason for termination of a labour contract. Supreme Court concluded that may not be the sole cause of termination of the contract (by reference to the Labour Code) – constitutes discrimination on grounds of age. However the case appears to envisage that age may be one of the reasons, partly due to the nature of the question asked. The proper approach to the extent of the causal role played by the discriminatory factor under the Directive is that it should be, not necessarily the main cause, but an operative cause in the less favourable treatment.

Genuine occupational requirements (GORs)

There appears to be one national report of the attempted use of GORs.⁴²⁸ *Wolf*⁴²⁹ will probably create a rise in the attempted use of them. We recommend that guidance should be developed on the proper use of GORs and on the evidence that is needed to establish them particularly in the area of age discrimination. Employers rely on stereotypes and assumptions, particularly about the characteristics which are related to age. Trans-nationally it is possible to identify objectively what characteristics are in fact related to the age of a person, so guidance should be developed at EU level rather than at member state level. The cultures and traditions of the member states do not require deference to be exhibited to the extent of ignoring developments in scientific evidence.

⁴²⁸ Hungary: Equal Treatment Authority, ref 1054/2009 physical endurance in bar tending and being a nice kind person were not GORs.

⁴²⁹ C- 229/08, *Wolf*, not yet reported in the European Court reports.

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