

DISCUSSION PAPER

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# Fighting Discrimination on the Ground of Age

*Fighting Discrimination on the Ground of Age* is published by Equinet, European Network of Equality Bodies.

**Equinet** brings together 49 organisations from 36 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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## Executive Summary

Discrimination on the ground of age is widespread in European societies and it can affect people at all stages of life, in employment as well as in other spheres<sup>1</sup>. In the field of employment the highest number of cases in this Paper concern minimum or maximum age limits and dismissals or refusals to hire upon reaching retirement age. The Paper also features cases in the field of goods and services with particular attention to the banking and insurance sector. We dedicated a separate chapter to issues in the field of housing and in the field of health and family issues.

Age discrimination is often seen and portrayed as a ‘less severe’ form of discrimination when compared to, for example, racial discrimination<sup>2</sup>. Age is not a ‘binary’ ground but reflects a continuum with every human being of a certain, constantly evolving, age and this raises important questions about the right comparator in age discrimination cases. However, this can only partially explain the relative invisibility of age discrimination and its image as a relatively ‘light’ form of discrimination.

Equality bodies report that the lack of legislative provisions at the EU level prohibiting age discrimination outside the field of employment and requiring the setting up of equality bodies with a mandate covering age discrimination also contribute to this, rendering the legal protection incomplete unless countries go beyond the minimum requirements of EU law.

Age discrimination is exacerbated by the widespread stereotypes and perceptions about certain age cohorts that are hard to overcome. An important finding of this Discussion Paper is that this societal phenomenon is also present in courts that are often reluctant to require an individualised approach and seem ready to accept the use of certain generalisations and common perceptions connected with age, for example concerning physical or intellectual abilities. Interestingly, we see signs of a change in the banking sector, where equality bodies and courts require financial institutions more and more to obtain information about the financial situation of the customers and prohibit the refusal of a contract solely on the basis of age. This is an important development towards taking into account individual situations and all circumstances of the case. Similar developments are also reflected in the featured cases on the right to adoption.

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<sup>1</sup> See 2015 Special Eurobarometer report cited above (<http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2077>)

<sup>2</sup> See for example in Tackling Ageism and Discrimination, Equinet, 2011, p. 7 and 13 ([http://www.equineteurope.org/IMG/pdf/age\\_perspective\\_merged\\_-\\_equinet\\_en.pdf](http://www.equineteurope.org/IMG/pdf/age_perspective_merged_-_equinet_en.pdf))

In other fields, such an individualised approach is rarely required by the courts which are also relatively open in their interpretation and approval of legitimate aims even if, importantly, they typically refuse to accept a simple reference to social policy or public safety objectives without any supporting evidence. Under these circumstances the emphasis often falls on the proportionality test, with the courts analysing whether the policy or practice is appropriate and necessary. A finding of age discrimination can typically result from the absence of statistical or other data backing up an assertion; inappropriate use of stereotyping; or establishing that the means deployed were not the least discriminatory way of achieving the legitimate aim.

Age discrimination is often stipulated in legislation or public policies, reflecting the reality of deeply ingrained stereotypes linked to age and providing an easy way to group people. Some of these provisions and policies have started to be challenged with mixed results. However, it is noteworthy that in certain cases, a finding of age discrimination has resulted merely in a slight increase or decrease of a strict cut-off age, with no consideration given to a more individualised approach.

It is important to flag some new developments and future issues. For one, issues of intersectional discrimination have started to emerge in case law, underlining the diverse experiences of individuals and groups as a result of their multiple identities. Age discrimination is often seen to intersect with discrimination on the basis of one's sex, sexual orientation, religion or belief, race or ethnic origin or disability. Finally, experts in the field of equality law will have to follow developments and respond to the growing use and potential abuse of algorithms and automated decision making that can result in age discrimination in practically every field of life, demonstrated by an example from the financial sector in this Paper.

## Introduction

In 2018, Equinet's working group on Equality Law analysed the topic of age discrimination and prepared the ensuing discussion paper. It follows the efforts of the Policy Formation working group that previously issued two documents concerning discrimination on the ground of age: *Opening up the Issue. Equality bodies combating discrimination against and promoting equality for young people* (2016)<sup>3</sup> and *Tackling Ageism and Discrimination* (2011)<sup>4</sup>. This time Equinet analyses age discrimination from a legal standpoint, looking at discrimination on the basis of age at different stages in life.

The 2015 Eurobarometer reports that being 55 years old or older is perceived as the most significant barrier in access to employment, with over half of respondents (56%) saying it is likely to lead to disadvantage.<sup>5</sup> At a general level, looking at all fields of life, both being over 55 and under 30 are perceived to lead to disadvantage (by 42% and 19%, respectively). Perceptions are confirmed by real life experiences, where 5 % of the respondents personally felt discriminated against in the past year because of being over 55 years old, making this the most frequent type of discrimination reported. The experience of equality bodies in dealing with complaints also shows the magnitude of the problem, necessitating a closer look at the main issues and gaps in legislation and the jurisprudence.

The topic of age discrimination is also in the spotlight in terms of policy debates and developments. In 2010 the UN General Assembly established an open-ended working group (OEWG) on ageing for the purpose of strengthening the protection of the human rights of older persons. The OEWG is reviewing the existing international framework of the human rights of older persons and it is considering the feasibility of further instruments and measures, including the possibility to draft a new international convention on the rights of older persons.<sup>6</sup> The principle of non-discrimination is at the heart of the discussions and the working group delegations asserted that developing a specific protection regime for the rights of older persons at the international level would provide coherence to an otherwise fragmented, uneven and incomplete landscape of legal norms.

At the EU level, the European Union Agency for Fundamental Rights (FRA) dedicated the focus chapter of its latest annual report to the rights of older people and called on EU legislators to

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[http://www.equineteurope.org/IMG/pdf/perspective\\_ebs\\_combating\\_discrimination\\_against\\_young\\_people.pdf](http://www.equineteurope.org/IMG/pdf/perspective_ebs_combating_discrimination_against_young_people.pdf)

<sup>4</sup> [http://www.equineteurope.org/IMG/pdf/age\\_perspective\\_merged\\_-\\_equinet\\_en.pdf](http://www.equineteurope.org/IMG/pdf/age_perspective_merged_-_equinet_en.pdf)

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<http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2077>

<sup>6</sup> <https://social.un.org/ageing-working-group/index.shtml>

adopt, alongside other relevant instruments, the Horizontal Directive that would extend the protection against age discrimination.<sup>7</sup> According to FRA it is also necessary to promote a rights-based approach to ageing: that means a shift in the perception of older people – from retired former workers or homogeneous vulnerable group into ‘persons’ with rights, who deserve equal treatment and recognition of their potential.

The objective of our Discussion Paper is to provide the readers with a general legal overview on the topic of age discrimination including the European legal framework (developed by European Union and Council of Europe), international case law and work of national equality bodies. We identified several issues that are common in various jurisdictions across European countries. The document is intended for equality bodies, lawyers, national authorities, NGOs and academia. It cannot aspire to be a comprehensive analysis of all issues in the field of age discrimination but we hope that it will contribute to the discussions and will trigger further analyses.

At the beginning we introduce the legal framework for protection against age discrimination. We also present the trends and themes which have emerged from the national cases described in the equality bodies’ submissions. The opening chapter is followed by the field-specific parts that tackle the issue of age discrimination regarding employment (Chapter 2), provision of goods and services (Chapter 3), housing (Chapter 4) and health and family issues (Chapter 5). An annex to the discussion paper (available on the Equinet website) collects all the case law on age discrimination submitted by equality bodies.

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<sup>7</sup> <https://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>



## Chapter 1: Legal framework and key issues

This chapter takes a thematic view of the national submissions on age discrimination. There are similarities, differences and trends to be found, but there is one clear conclusion: that age discrimination is pervasive. This is evidenced by the numerous surveys e.g. from **Belgium, Hungary, Norway, Great Britain and Serbia** which identify older age groups as being at the highest risk of discrimination. A report from **Sweden** found that workers in their early 40s are already affected by age discrimination in many occupations. A report from **Great Britain** found that a quarter of men and a third of women have not worked in five or more years leading up to state pension age. The context of improved health outcomes, an ageing population and workforce, a rise in mature students and higher retirement ages collectively paints a picture of a sense of inevitability. These factors lead to greater competition in access to employment and education and pressure on resources such as housing and services, so progress in combating age discrimination could be weighed down by the perception that it is inescapable and part of the cycle of life. It is famously described as “an aspect of ordinariness”.<sup>8</sup>

Part one of this chapter provides an overview of the legal framework for tackling age discrimination, outlining key sources of equality protection in EU law and from the Council of Europe.

Part two introduces the following sector-specific chapters by observing the trends and themes which have emerged from the national cases, regardless of sector or country. The structure follows that of Directive 2000/78/EC by reflecting on the recital, provisions and case law relevant for the study of age discrimination as a starting point.

### 1.1 Overview of key sources of age discrimination law in Europe

#### European Union

The general principle of equality before the law is embodied in the Charter of Fundamental Rights of the European Union (Article 20). The Charter takes a broad and inclusive approach to the non-discrimination principle, prohibiting any discrimination in the implementation of EU law, based on characteristics in a non-exhaustive list including age (Article 21). Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52 (1)).

Directive 2000/78/EC (“the Directive”) gives concrete expression to the general prohibition on age discrimination in the European Union. The scope of the Directive is in some respects broad

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<sup>8</sup> *Stingel v The Queen* (1990) 171 CLR 312 at 330, High Court of Australia.

as it covers the private and public sectors and extends to conditions for access to employment, to self-employment or to occupation. It spans from selection/recruitment through to pay, promotion and dismissal. It also covers vocational training and practical experience and membership/involvement in organisations for workers, employers or for members of a particular profession.

However, the Directive is limited to the world of work. It is therefore unsurprising that most of the national cases submitted on age discrimination fell within the employment chapter, with some cases on goods and services, housing and health and family issues. This is in spite of the acute impact of discrimination on any grounds in housing, where the consequences can lead to homelessness, deprivation and socio-economic exclusion. In 2008, the European Commission proposed legislation which would go some way to harmonising equality protection (the so-called *Horizontal Directive*). This directive would cover the ground of age (alongside religion or belief, disability and sexual orientation) in public and private sectors in respect of social protection, social advantage, education and access to goods and services. However, progress on the Horizontal Directive has stalled. Equinet has argued for the importance and necessity of this Directive and has called for the finalization and adoption of this legal instrument, so that the practices and competences of European equality bodies can be harmonized.<sup>9</sup>

This is one of the factors which currently results in uneven protection against age discrimination in Europe. Some Member States do go beyond the minimum requirements and extend protection against age discrimination to sectors beyond work and/or their equality bodies' mandate to the ground of age. However, this is not the case everywhere, leading to a lack of protection against age discrimination outside the field of employment and/or the inability of the national equality body to deal with complaints or conduct other work on age discrimination<sup>10</sup>.

In addition, equality bodies have different powers to tackle discrimination. Some are quasi-judicial, deciding complaints on the merits, while others provide other types of assistance to victims of discrimination or have a range of legal powers. However, despite the recent adoption of clear standards for equality bodies by the Council of Europe and the European Commission<sup>11</sup>, not all equality bodies have the required powers to tackle age discrimination through litigation/interventions or to decide cases in a legally binding manner.<sup>12</sup> This variation

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<sup>9</sup> <http://www.equineteurope.org/Time-to-adopt-the-Equal-Treatment-Directive>

<sup>10</sup> For further information about the mandate of equality bodies see Fig. 1 below. Further detailed information is available in the European Directory of Equality Bodies (<http://www.equineteurope.org/-Members-Directory->)

<sup>11</sup> [ECRI General Policy Recommendation No.2: Equality bodies to combat racism and intolerance at national level](#); [European Commission Recommendation on Standards for Equality Bodies](#)

<sup>12</sup> For a list of national equality bodies and their mandate and powers see: <http://www.equineteurope.org/-Equinet-Members->

in mandates and powers has inevitably had an impact on the geographical spread of cases in this report.



Figure 1: Equinet members and the grounds they cover per country

## Council of Europe

There is no specific 'age' protection within the European Convention on Human Rights (ECHR). Article 14 provides that the rights and freedoms protected within the Convention shall be protected without discrimination on any ground, including a non-exhaustive list which does not specifically list "age." However, the European Court of Human Rights (ECtHR) has accepted that age discrimination can fall within "other status."<sup>13</sup> This means that there is potential for age discrimination cases in a range of sectors to be argued at ECtHR level as long as they fall within the ambit of another article of the Convention. In addition, Protocol No. 12 provides for a general prohibition of discrimination, without the requirement of having to establish this link to enjoyment of another protected right. Protocol 12 has been ratified by 20 states (including 10 EU Member States).<sup>14</sup> So far there have been no age discrimination cases determined under this provision.

The European Social Charter (as revised) contains some protection against age discrimination.<sup>15</sup> It contains provisions which protect children and young people in the context of employment (Article 7). Elderly people are secured the right to social protection (Article 23). Whilst enforcement mechanisms are limited,<sup>16</sup> Part V, Article E contains a general non-discrimination provision which has been successfully used by the Norwegian United Seamen's Union to argue that a compulsory retirement age of 62 was discriminatory.<sup>17</sup>

### **1.2 Detailed provisions on age discrimination**

A rich source of age discrimination law lies in Council Directive 2000/78/EC - the general framework directive for equal treatment in employment and occupation. This forms the starting point for analysis of the emerging thematic issues, before considering the interpretive flesh which has been added to this skeleton by case law of the Court of Justice of the European Union (CJEU), the ECtHR as well as developments through national cases. Collation of these national cases is a unique contribution of the Equality Law working group, so consideration of the national cases is highlighted in the text boxes.

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<sup>13</sup> *Schwizgebel v Switzerland* 25762/07.

<sup>14</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>

<sup>15</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>

<sup>16</sup> 43 of the 47 Member States of the Council of Europe have ratified either the Charter or the revised Charter. The European Committee of Social Rights cannot consider individual complaints. However, the additional protocol provides a system of collective complaints. Only fifteen Member States have ratified this (Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden).

<sup>17</sup> *Fellesforbundet for Sjøfolk v Norway complaint* 74/2011.

### 1.2.1. Age discrimination's unique status

Recital 25 of the Directive makes specific reference to the essential part played by the prohibition of age discrimination in encouraging diversity in the workforce. The Recital emphasises the important distinction between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited. It is this scope for justification which significantly limits the potential for a finding of age discrimination in the courts.

Consequently, age discrimination has sometimes been viewed as neutral, factual and not a “suspect ground” of discrimination, in the same way as sex or race. According to Advocate General Mazak: *“it should be borne in mind the prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of a discrimination on grounds of age than for example in the case of discrimination on the grounds of sex, where the comparators involved are more clearly defined.”*<sup>18</sup> This is also the position of the ECtHR which *“has not, to date, suggested that discrimination on grounds of age should be equated with other “suspect” grounds of discrimination.”*<sup>19</sup>

This special status of ‘age’ is reflected in the national cases as age is viewed as a shifting protected characteristic which carries an inevitability for all of us. Lady Hale at the **UK** Supreme Court reflected that: *“age is not “binary” in nature (man or woman, black or white, gay or straight) but a continuum which changes over time.... younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age.”*<sup>20</sup>

### 1.2.2. Burden of Proof

Para 31 of the recital and Article 10 of the Directive emphasises that whilst it is not for the respondent to prove that a person is of a particular age, the burden of proof should shift where there is a prima facie case of discrimination. This ‘shift’ is also referenced in the case law of the ECtHR under Article 14, as the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified.<sup>21</sup>

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<sup>18</sup> Opinion of Advocate General Mazak in *Palacios de la Villa* 15<sup>th</sup> February 2007, para 61.

<sup>19</sup> *British Gurkha Welfare Society v UK* 44818/11, para 88.

<sup>20</sup> *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16, para 4.

<sup>21</sup> *Khamtokhu v Russia* 60367/08, para 65.



According to **Czech** law the principle of shared burden of proof does not apply in cases of age discrimination outside of employment. It is up to the claimant to prove that he/she has been discriminated against. It is not clear whether this principle is applicable in cases of other forms of discrimination, i.e. harassment, instruction or victimization. This practice would be incompatible with EU law, should the proposed Horizontal Directive be adopted. Similarly, in **Albania** the burden shifts in administrative and employment cases but not for other civil cases.

A recent case from **Northern Ireland**<sup>22</sup> demonstrated the shifting burden of proof in action as well as the importance of obtaining records from the recruitment process. The Claimant successfully argued that the employer had verbally stated they were “looking for a younger person”. The Tribunal considered records from the recruitment process and recording of the actual ages of applicants and switched the burden to the employer, which the employer was unable to discharge.

### 1.2.3. Direct discrimination – less favourable treatment

Direct discrimination is prohibited by Article 2 of the Directive. The CJEU case law provides examples of less favourable treatment which include: termination of employment at pension age,<sup>23</sup> maximum age of recruitment to fire service<sup>24</sup> and for police officers,<sup>25</sup> default retirement ages<sup>26</sup> and the use of zero hours contracts for under 25s.<sup>27</sup>

There are relatively few ECtHR cases which provide examples of less favourable treatment on the grounds of age outside the world of work, e.g.: maximum age limits for adoption,<sup>28</sup> differentiation on the grounds of age in criminal sentencing,<sup>29</sup> and attitudinal differences towards the physical and psychological importance of a sex-life for women over 50.<sup>30</sup>

Analysis of the rich crop of cases amongst those submitted by the equality bodies from a ‘stage of life’ point of view demonstrates that less favourable treatment follows us as we progress through life’s natural stages. Justification for some of these examples will be considered in section 1.2.4.

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<sup>22</sup> *Matier v Spring & Airbrake Ireland Ltd* [2018] IT/5465/18.

<sup>23</sup> *Palacios de la Villa v Cortefiel Servicios SA* C-411/05.

<sup>24</sup> *Wolf* C-229/08.

<sup>25</sup> *Vital Perez* C-416/13.

<sup>26</sup> *Hornfeldt v Posten Meddelande AB*, C-141/11.

<sup>27</sup> *Abercrombie and Fitch Italia Srl v Bordonaro* C-143/16.

<sup>28</sup> Art 14 with Art 8: *Schwizgebel v. Switzerland* 25762/07.

<sup>29</sup> Art 14 with Art 5: *Khamtokhu and Aksenchik v Russia* 60367/08 and 961/11.

<sup>30</sup> Art 14 with Art 8: *Carvalho Pinto De Sousa Morais v Portugal* 17484/15.

As an infant in the arms of our parents, we may be excluded from a restaurant. School age children under 18 may benefit from free school education but may be asked to leave their bags in the lobby of a supermarket or prohibited from using library machines. Under 25s may access cheaper glasses and other services but may face high pitched sounds designed to disperse them from public places and their 'young voices' may put off an employer.

People in their 30s may be treated as too old for some accommodation options, training schemes and student discounts or even dating services, but too young for some free breast cancer screening programmes. Under 35s may not be able to access abortion services on equal terms as older women. Workers in their 40s may begin to face attitudinal discrimination and stereotypes in some occupations, or specific age caps for certain 'active' professions such as nurses and for roles involved in protecting public safety. Women in their 40s may face upper age caps of 45, 49 or 50 for assisted reproduction. There is some evidence that a pre-existing trend of disproportionate selection of older workers for collective redundancy has begun to affect workers in their 40s or even their 30s and that "older" workers may experience more difficulties in finding alternative employment.

Once in our 50s we may be considered too old to present TV programmes to younger audiences,<sup>31</sup> to train as a doctor, to access a student loan and other financial products, to adopt<sup>32</sup> or to access surrogacy, to work in airport security. 55 may be the cut off for access to funding for further education, for some disability insurance products, or premiums may dramatically rise.

Aged 60 – 65 we may expect to experience less favourable treatment in the work place as we navigate compulsory retirement ages, pension arrangements, loss of opportunity e.g. to serve on a Board or even being asked for our views in surveys, whilst being excluded from car rentals and bank loans. By the age 70 we may be excluded from employment as a taxi driver transporting disabled children or even from accessing car insurance.

#### 1.2.4. Indirect discrimination: neutral provisions, criterion or practices

Indirect discrimination is also prohibited by Article 2 of the Directive but indirect discrimination cases from the CJEU and ECtHR are less common. Examples include the effect

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<sup>31</sup> *Miriam O'Reilly v BBC and Bristol Magazines Ltd*, Judgment of the Employment Tribunal, Case number 2200423/2010.

<sup>32</sup> See also *Schwizgebel v Switzerland* above.

of transitional arrangements for new pay systems<sup>33</sup> and changes to entitlement to a pension for British Gurkha soldiers.<sup>34</sup>

The examples of direct discrimination highlighted above show that age can be used as a proxy for physical capacity.<sup>35</sup> So it is perhaps surprising that in the equality bodies' submissions there were no examples where physical capacity requirements have indirectly put people over a certain age at a particular disadvantage. One possibility is that employers and others with equality duties in national legislation are emboldened by the opportunity to justify direct discrimination. This theory is borne out in the stark examples taken from advertising e.g. '*young professional wanted,*' '*over 45s need not apply,*' '*salsa classes not suitable for over 65s*' etc.

Positive action is permitted under Article 7 of the Directive in some circumstances. There was no evidence that the provision is regularly used in practice. However, in **Cyprus** positive action provisions were used to justify a scheme for the provision of equal opportunities for unemployed law graduates with an age limit of 29.

Some examples of indirect discrimination can be examined from the point of view that positive action, or at least well-intentioned measures, have backfired. Three contrasting examples in the employment context showed how contractual benefits based on length of service can put people of different ages, younger and older, at a particular disadvantage. Tapering provisions to pension reform aimed to assist those closest to retirement disproportionately disadvantaged younger judges and fire fighters. A housing allocation policy aimed to incentivise tenants to work put older people, who were beyond working age, at a particular disadvantage.

### 1.2.5. Objective justification

Discrimination on the grounds of age can be justified in the context of direct discrimination (Article 6), indirect discrimination (Article 2 (2) (b)) as well as in relation to occupational requirements (Article 4). However, it is clear from the case law of the CJEU<sup>36</sup> that Article 6 (1) is a limited derogation from the general principle of equal treatment to be read narrowly. Although there are minor differences in definition, it is clear that there is "no particular significance" in any difference in terminology relating to objective justification of indirect

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<sup>33</sup> *Hennigs* C-298/10.

<sup>34</sup> Art 14 with A1P1: *British Gurkha Welfare Society v UK* 44818/11.

<sup>35</sup> See also *Prigge and Others* C-447/09.

<sup>36</sup> *Mangold v Helm* C-144/04, para 75.



discrimination generally and in relation to the justification for age discrimination specifically provided in Article 6.<sup>37</sup>

In the next part of this chapter, we will approach objective justification collectively by assessing 18 examples from the country submissions, regardless of sector, which address the questions of (i) what could be a legitimate aim or (ii) whether the means of achieving that aim are appropriate and necessary.

#### Objective Justification: legitimate aim

The language of Article 6 (2) already provides illustrative and generalised guidance of what could be legitimate social policy aims in the context of work; legitimate employment policy, labour market and vocational training objectives. According to the CJEU, legitimate aims have to be social policy objectives of a public interest nature, as opposed to purely individual reasons specific to the employer's situation such as cost reduction or improvement of competitiveness<sup>38</sup>. The CJEU has accepted legitimate aims including; air traffic safety,<sup>39</sup> promotion of employment of older workers<sup>40</sup> and fostering entry of young people to the workforce.<sup>41</sup> The ECtHR has not given as much attention to this issue but has broadly accepted the need for a cut-off point in pension changes<sup>42</sup> and the need to promote the principles of justice and humanity which required that the sentencing policy take into account the age and "physiological characteristics" of various categories of offenders.<sup>43</sup>

An example of the CJEU rejecting an aim can be found in *Hennigs*.<sup>44</sup> The Court did not accept 'social environment issues' as a legitimate aim on the basis that a young employee could have significant family burdens whilst an older employee could be single without dependent children.

The aims which were accepted as legitimate at national level fell into the general categories of:

- Financial: e.g. predict repayment potential of loans, reduced likelihood of damage, need to recoup training expenses;
- Public policy: e.g. air safety, building safety, disabled passenger safety, incentivise tenants to work/ reward those in work;

<sup>37</sup> *Age Concern* C-388/07 para 57- 63: the distinction is that state has to establish justification in Article 6 (1) whereas the employer has to establish justification in Article 2 (2).

<sup>38</sup> *Age Concern* C-388/07.

<sup>39</sup> *Prigge and Others* C-447/09.

<sup>40</sup> *Mangold v Helm* C-144/04.

<sup>41</sup> *Abercrombie and Fitch Italia Srl v Bordonaro* C-143/16.

<sup>42</sup> *British Gurkha Welfare Society v UK* 44818/11.

<sup>43</sup> *Khamtokhu v Russia* 60367/08.

<sup>44</sup> C-298/10.

- Intergenerational fairness and protection, retention and reward for long term employees;
- Health, dignity and financial protection of older people.

In the national cases there were three examples submitted, two from the **Czech Republic** and one from **Great Britain**, where a court or body analysed an aim and questioned its legitimacy. All three cases were connected to pensions. This trend suggests perhaps that Courts are taking a permissive approach and reserving judgement for consideration of the means of achieving the aim.

In a recent update in the long-running pensions case in the English Court of Appeal (**Great Britain**)<sup>45</sup>, the Court emphasised that *“the fact that a particular aim was capable of being a legitimate aim is only the beginning of the story. It was still necessary to enquire whether it was in fact the aim being pursued. Then it had to be asked whether the aim being pursued was legitimate in the particular circumstances of the employment concerned.”* The case also highlighted the need to bring robust evidence in support of justification.

#### Objective Justification: appropriate and necessary

In terms of the Directive and associated case law, in choosing the means capable of achieving a social policy objective, Member States have a broad discretion. However, that discretion cannot be exercised to frustrate the implementation of the principle of non-discrimination on the grounds of age.<sup>46</sup> The ECtHR has also stated that contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.<sup>47</sup>

#### **Appropriate and necessary**

Eight of the examples at national level were accepted as both appropriate and necessary. Some of the evidence which supported this conclusion involved medical evidence of the effects of ageing, robust statistical evidence, and a lower bar being set in times of economic uncertainty and high unemployment.<sup>48</sup>

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<sup>45</sup> Lord Chancellor v McCloud and Sargeant v London Fire and Emergency Planning Authority [2018] EWCA Civ 2844

<sup>46</sup> *Age Concern* C-388/07, para 51.

<sup>47</sup> *Carvalho Pinto De Sousa Morais v Portugal* 17484/15.

<sup>48</sup> Similar conditions regarding a persistent economic crisis and poor growth in Italy were accepted as an aspect of justification in *Abercrombie and Fitch Italia Srl v Bordonaro* C-143/16.

### **Appropriate but not necessary**

Only one case submitted expressly found that the means deployed was appropriate but not necessary. The case involved the use of standardised mortgage calculations for applicants over 60. The **Swedish** equality body concluded that the purpose of the bank's standard calculations, namely, to predict clients' possibilities to pay back on their loans, had a legitimate aim. The equality body considered the means of reaching that legitimate aim appropriate. However, the bank's standardised assessment was not necessary, as an individual assessment of the client's financial situation would have the same effect and be a less far-reaching and a non-discriminatory alternative.

### **Neither appropriate nor necessary**

Six of the examples found the necessity test was not met. Logically, once the means of achieving an aim have been deemed not to be appropriate, they cannot then be deemed necessary, but the two tests were often dealt with collectively. On the limited basis of these examples, it appears that the key to establishing discrimination lies in the necessity element, which can fall into one of three avenues of challenge;

1. the absence of statistical or other data to back up an assertion;
2. inappropriate use of stereotyping, or;
3. establishing that the means deployed is not the least discriminatory way of achieving the aim.

### Evidence v stereotypes and assumptions

Given the nature of the examples of "less favourable treatment" collated at section 1.2.2, the influence of stereotypes and assumptions requires some further analysis. The CJEU has accepted statistics and medical evidence as sufficient to back up what could otherwise be considered stereotyping in some cases. In *Fries*, the Court accepted that it is essential that airline pilots possess sufficient physical capabilities, in so far as physical defects may have significant consequences for that profession, it is undeniable that those capabilities diminish with age.<sup>49</sup> The Court rejected Mr Fries arguments that deterioration of physical and mental capabilities does not begin at a particular age, but depends on factors unique to each individual.

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<sup>49</sup> *Fries* C-190/16 at para 45. See also *Prigge and Others*, C-447/09, para 67.

In *Gorka Salaberria Sorondo*<sup>50</sup> the Court focussed not on the fitness of Mr Solondo or other recruits applying to the police force of the Autonomous Community of the Basque Country but on the projected fitness of officers who reach the age of 55 who “*can no longer be considered to be in full possession of the capabilities necessary for the proper performance of (their) duties, without any risk to himself and to third parties.*” The objective was to ensure the proper functioning of the police service with a view to establishing a satisfactory age pyramid. Accordingly, physical capacities can be assessed prospectively and dynamically rather than statically at the time of recruitment.

Overall, the Court does not go as far as to require an individualised approach, assessing each individual on his or her merits, and this may pose a challenge for people wishing to overcome common perceptions based on age.

The Court has also shown willingness to accept assumptions about older workers who are not responsible for the safety of others. In *Rosenblatt*, the Court did not challenge the German Government’s submission that “*The rights of older workers are adequately protected as most of them wish to stop working as soon as they are able to retire, and the pension they receive serves as a replacement income once they lose their salary. The automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age.*”<sup>51</sup>

Examples of stereotypes which arose in the cases discussed in national submissions serve as a reminder of the barriers faced by people at all stages of life. The following examples are extracted from cases, research, campaigns and adverts and include views that:

- Young people lack experience and discipline, are arrogant, less loyal, noisy, lazy and unable to behave appropriately;
- Middle-aged women are unable to conceive, and middle-aged couples are too old to adopt;
- There is an advantage in recruiting “fresh blood” without private/family obligations;
- Older people have difficulty adapting, are slow learners, have health problems, are unfit, less flexible, have difficulties using software and social media, complain about noise, are unable to live independently and cause more car crashes.

However, there is some evidence from the cases considered that national bodies and courts may be taking a firmer approach to use of stereotypes and assumptions than strictly

<sup>50</sup> *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, C-258/15.

<sup>51</sup> *Rosenblatt v Oellerking Gebäudereinigungsges. MbH*, C-45/09, para 43.

required by the CJEU. Such examples included: challenging the assumption that candidates older than 30 cannot be flexible and aware of social media (**Netherlands**) and challenging assumptions about older students and trainees (**UK and Greece**). In **Romania**, age caps on loans were found to be discriminatory on the basis that they restrict access to loans based solely on the criterion of age, without further analysis of income, financial situation or other warranties which the applicant could provide.

The **Swedish** equality body specifically stated in a national newspaper that they were well aware of the case law of the CJEU, but suggested that the reasons behind the 67-year rule – that employees should be given a worthy end to a long working life and to make it possible for the younger generation to enter the labour market – are based on assumptions that are not correct.<sup>52</sup>

### 1.3 Article 6 (2): intersectional discrimination

Article 6 (2) of the Directive envisages and acts against the potential for intersectional discrimination on the grounds of age and sex in the context of occupational social security schemes. Recital 3 reiterates the Community commitment to promoting equality between men and women, especially since women are often the victim of multiple discrimination.

The potential for intersectional discrimination relating to other characteristics has not been explicitly narrated. *Parris v Trinity College Dublin and others*<sup>53</sup> concerned the refusal by Trinity College Dublin to grant Mr Parris's civil partner, on Mr Parris's death, the survivor's pension provided for by the occupational benefit scheme of which Mr Parris was a member. The third question in the preliminary ruling asked whether it would constitute discrimination if the limitations to the scheme arose from the combined effect of the age and sexual orientation of a member of the scheme. The Court answered briefly that the Directive must be interpreted as meaning that the national rule is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

A landmark decision from the ECtHR held that age and sex were decisive factors in the decision to lower the amount of compensation paid to a 50-year-old woman whose sex life had been

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<sup>52</sup> <https://www.di.se/debatt/agneta-broberg-67-arsregeln-ar-diskriminerande/>.

<sup>53</sup> C-443/15.

impacted by errors in a surgical procedure.<sup>54</sup> In doing so, they criticised the decision of the national court as judgemental and based on assumptions.

Unsurprisingly, the most commonly reported examples of intersectional discrimination at national level were where age intersected with sex for example in different retirement ages (**Romania**) or age caps for fertility treatment between men and women (**Greece**) and adverts for “young female workers” or “young male photographer” (**Great Britain**). In **Romania** age and sex were also a factor for restriction of provision of loans to women (capped at age 63) and men (capped at age 65).

Other intersecting protected characteristics cited included age with ethnicity in retirement (**Bulgaria**), age with family and marital status in contractual terms (**Croatia**), and one example of multiple discrimination on the grounds of gender, first language, age and place of residence (**Finland**).

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<sup>54</sup> *Carvalho Pinto de Sousa Morais v Portugal* 17484/15. See also *Khamtokhu v Russia* 60367/08.

## Chapter 2: Employment

### 2.1 Introduction

The EU Employment Framework Directive establishes a general framework for equal treatment in employment and occupation and bans discrimination on the basis of age in employment and occupation. Age discrimination is unlawful in any phase of employment including job postings, job descriptions, interviews, hiring above a certain age, salaries, job assignments, merit increases, performance management and evaluation, training, disciplinary actions, promotions, benefits, employment termination, retirement age, higher taxation for pensioners, etc. Based on the national submissions from the Equality Law working group, this chapter will focus on the most common issues which have been identified as related to age discrimination in employment.

In 2012, the Equality Ombudsman of **Sweden** issued a report on age discrimination in working life. The aim of the report was to identify how age discrimination in workplaces is expressed and what processes have the greatest impact in the employees' experience of age discrimination. The study showed that both younger and older employees are discriminated against when enquiring about or applying for work. The report also indicated that older employees have fewer possibilities for skills development and training than younger employees.

A recent report on the effect of age and gender on the labour demand in **Sweden** was carried out by the Swedish Institute for Evaluation of Labour Market and Education Policy (IFAU). The IFAU conducted a field experiment on age and gender differences by investigating whether employers use information about a job applicant's age and gender in their hiring decisions. According to the findings of the report, workers are affected already in their early 40s in many occupations. The results suggest that employers tend to have stereotypes about three worker characteristics: Ability to learn new tasks, flexibility/adaptability and ambition. The report shows that differential treatment on the basis of age occurs in the labour market and concludes that age discrimination may be one of the factors explaining this phenomenon.

Unia, the equality body of **Belgium** has commissioned a study to be carried out about equal opportunities in the field of employment. The result is the 'Diversity Barometer Employment', a measuring instrument that shows the current situation of diversity in Belgium, and in a wider context the attitude towards persons who are characterized by their age, origin, sexual orientation or disability. Age discrimination was the most striking finding from this study:

- A significant risk of discrimination in the first selection stages of persons over 45 years (7 to 8 percentage points more likely to have a 'discrimination disadvantage' in comparison to a candidate of 35 years at the time of the invitation for a job interview);

- Almost half of the HR managers say that the age of a candidate has an impact on the initial selection;
- 15% of the head of selection confirms that older candidates have more to prove than younger candidates;
- 12% of the surveyed workers during the last 2 years have witnessed discrimination on grounds of age and 6% says they have been victims;
- Only 1 out of 3 organizations invest in the training of persons older than 45 years;
- 1 out of 3 Belgians finds that a company that employs only “older” employees will perform less (Flash Eurobarometer 2009).<sup>55</sup>

## 2.2 National case law

### 2.2.1 Maximum age limits

Maximum age limits in recruitment are widespread in Europe, as demonstrated also by the case law of the CJEU. National level case law suggests that such age limits are still often put in place without any attempt at justification and these are typically not accepted by the courts and equality bodies. Provisions and practices invoking a legitimate aim, such as safety concerns, will also only be accepted if they pass a rigorous proportionality test. However, as the case below from Germany demonstrates, if a maximum age limit is not explicit but only surmised, the complainant might face important evidentiary difficulties.

In a case from **Hungary** concerning a vacancy notice for applications for a position of office administrator at a government agency for persons under 40, the Hungarian Equal Treatment Authority launched *ex officio* proceedings. The government agency invoked that the reference to a maximum age had only been included in the vacancy notice as a result of an administrative error, but in actuality not a single applicant had been rejected because of his/her age. It stated that 87 CVs had been submitted in response to the notice, and 18 applicants were over the age of 40. The Authority did not accept the agency’s reference to an administrative mistake because as it was published, the vacancy notice had likely dissuaded several potential applicants over 40 from applying for this position, regardless of the fact that others might not have been deterred by the clause when they were considering whether to apply. The Hungarian equality body found that there was an act of discrimination in this case and as a sanction, the equality body ordered the publication of its decision for a duration of 30 days and barred the government agency from future infringements.

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<sup>55</sup> The equality body also prepared the brochure on how to deal with age discrimination (<https://www.unia.be/fr/publications-et-statistiques/publications/discrimination-fondee-sur-lage-de-quoi-sagit-il-et-comment-y-reagir>) and launched a campaign called “Too young? Too old?” against age prejudice and stereotyping (<https://www.unia.be/fr/sensibilisation-et-prevention/campagnes/trop-jeune-trop-vieux>).



In the **Netherlands**, the equality body was faced with a case where a man had applied for a traineeship at a postal company and was declined. In the rejection, the company stated that the position is meant for young higher professional education and university graduates with maximum one year of working experience. According to the equality body, the postal company discriminated against the man on the ground of age. The company did not prove they declined the man based on substantial reasons and there was no objective justification. This generalisation is based on biases about age and the postal company excluded candidates in advance based on their age while they would be able to contribute very well to the continuity of the company and corporate culture.<sup>56</sup>

In **Germany**, a 50-year-old applicant had in addition to his own job application submitted a fictitious application of a supposedly 32-year-old man. Only the fictional younger candidate was invited to the job interview. The State Labour Court decided there was no discrimination in this case.<sup>57</sup> The court reasoned that age difference between two candidates is not in itself evidence that shows less favourable treatment. If, apart from the discriminatory feature, there is room for another subjective selection decision of the employer on the basis of particular facts, it cannot be assumed without further evidence that the general life experience gives rise to an overwhelming probability of discrimination.

A discriminatory requirement can also be in collective agreements as in a court case from **Norway** where it contained a provision stating that helicopter pilots over the age of 60 could not hold commercial pilot licenses. The Court referred specifically to the *Prigge*<sup>58</sup> case and decided that a retirement age of 60 years for helicopter pilots laid down in a collective agreement could not be objectively justified and was invalid.

### 2.2.2. Retirement Age

There is a clear link between maximum age limits and statutory retirement age. Despite an ageing society in Europe, older workers often still find it difficult to remain in employment beyond the statutory retirement age. In *Age Concern* the CJEU accepted that a default retirement age might be lawful under EU law. However, a case of intersectional discrimination, *Kleist* demonstrates that different statutory retirement age for women and men may not be accepted as a justification for terminating employment. While terminating permanent employment without justification upon reaching a certain age has been accepted by the CJEU,

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<sup>56</sup> College voor de Rechten van de Mens, 17 april 2018, oordeel 2018-36, <https://www.mensenrechten.nl/nl/oordeel/2018-36>.

<sup>57</sup> State Labour Court – Kiel, Judgment of 09.04.2014 - 3 Sa 401/13.

<sup>58</sup> Reinhard Prigge and Others v Deutsche Lufthansa AG (C-447/09)

a Swedish case demonstrates that this cannot be understood to enable employers to uphold maximum age limits also for fixed-term employment.

The equality body in **Bulgaria** examined a complaint where the employment relationship of a police officer was terminated due to reaching the retirement age of 41. The equality body established discrimination arguing that the complainant and a particular age group of employees (those over 41 years old) were disadvantaged compared to younger employees<sup>59</sup>. This case is illustrative of a trend as the equality body has dealt with a number of similar complaints.

In **France**, an age limit of 57 for air navigation control engineers led to an automatic retirement without possibility of postponement. Importantly, this contrasts with the rules for airline pilots who can perform their duties until 65 years of age. The French equality body considered that the age limit went beyond what was necessary to achieve the objective of aviation safety and submitted their observations to the Council of State, that however rejected the complaint by stating that the age limit was proportionate (appropriate and necessary) to achieve the objective of aviation safety. The Council of State notably considered that ageing affects physical capacities.

Under Swedish law, an employer may lawfully dismiss a person from permanent employment without due cause at the time when the person turns 67. This so-called 67-year rule has been deemed a legitimate exception<sup>60</sup> from the prohibition against discrimination on grounds of age by the CJEU. Because of the rule, Swedish employers considered it lawful to uphold maximum age limits also for fixed-term employment. A major bus operator thus practiced a 70-year age limit for bus drivers applying for fixed term (one year) employment. Even though drivers could show through rigorous annual health checks that they were fit to drive, they were excluded from fixed term employment possibilities after having turned 70. The Equality Ombudsman of **Sweden** brought a case to the Swedish Labour Court (a court of last instance) concerning early retirement of bus drivers and their right to work after the retirement age. The Court held that the exception to age discrimination provided for in the 67-year rule did not apply to fixed term employment and that the age limit prescribed by the bus operator was discriminatory on the ground of age and could not be justified by occupational demands. This case has had significant impact in Sweden by providing fixed term employment possibilities to persons above the age of 67<sup>61</sup>.

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<sup>59</sup> Commission for Protection against Discrimination, decision 474/2014 in case file 126/2012

<sup>60</sup> Hörnfeldt vs. Posten meddelande AB, C-141/11, EU:C:2012:421.

<sup>61</sup> Equality Ombudsman v Keolis Sverige AB, (Swedish Labour Court, A 73/15, A 75/15 and A 76/15), <http://www.do.se/globalassets/diskrimineringsarenen/arbetsdomstol/dom-arbetsdomstol-keolis-anm-2014-592-600-6012.pdf>

A case from **Austria** regarding repetitive extensions of the employment contract ended with a settlement. Just before her 60th birthday, a woman faced the termination of her employment with reference to soon reaching the statutory retirement age for women. As the woman wanted to continue working until the retirement age for men (65 years), she negotiated with her employer, but was still only granted temporary extensions of her contract. The woman felt discriminated because of her age and gender and contacted the Ombud for Equal Treatment who filed a complaint to the Equal Treatment Commission. Furthermore, she brought the case to court and requested to state, that her employment contract was still valid.

The Ombud for Equal Treatment referred to the CJEU's ruling in the Kleist case<sup>62</sup>, where the reference to the different statutory retirement age for women and men as a justification for terminating an employment was found incompatible with European law. Based on the repetitive extension of the contract after reaching the statutory retirement age for women, the equality body concluded that she was discriminated in relation to her male colleagues. Both proceedings ended with a settlement agreement and a financial compensation.

The equality body in the **Netherlands** was confronted with a case concerning a man above 65 years of age, already entitled to a pension, who worked as a fireguard at a shipyard with the help of an employment agency. After two years, the HR manager of the shipyard notified the man by e-mail that they would end his temporary placement, because they did not want to keep employees older than the state pension age. The man felt discriminated on the ground of age and started proceedings. The equality body concluded that the e-mail led to the assumption that the shipyard ended his temporary placement because he was older than the state pension age. Thus, the company had to present an objective justification. The shipyard argued that a fireguard must walk well and be able to carry out checks on the ships and move quickly in case of fire, and a fireguard older than the state pension age becomes less suitable for the job. These arguments were not objective justifications according to the equality body that concluded that this was a case of age discrimination. The shipyard established a general link between suitability for the function and age which preserves biases about people of a certain age. The company should assess the physical suitability of fireguards instead of using assumptions based on age.

In a case from **Great Britain** concerning compulsory retirement, the equality body intervened after the High Court referred five questions to the CJEU and received a preliminary ruling. The charity Age Concern and Help the Aged (Age UK) sought a judicial review of the Act which transposes the Directive by arguing that the Age Regulations had improperly implemented the Directive by including a national default retirement age applicable to all UK workers. The CJEU clarified that the Directive allows differences of treatment on the grounds of age when they

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<sup>62</sup> Pensionsversicherungsanstalt v Christine Kleist, Case C-356/09

are objectively and reasonably justified, in particular by legitimate employment policy, labour market and vocational training objectives. The means of achieving that aim must be appropriate and necessary. The list of authorized derogations in Article 6 (1) is not limitative so states can rely on other aims as long as they are social policy aims of a public interest nature, as opposed to the individual business interests such as cost reduction. The judge decided that the Default Retirement Age was lawful when it was first introduced. The Government brought forward a review and the Default Retirement Age was abolished in 2011.

### 2.2.3. Other types of cases

While the bulk of case law submitted by equality bodies relates to maximum age limits and retirement age, other important issues have also been identified.

These include discriminatory measures against younger employees reported in **Germany** where the Federal Labour Court has ruled that it is inadmissible to reduce the regular weekly working hours for older people in a way that penalizes younger employees in a similar situation<sup>63</sup> or to calculate the number of days of annual leave in a way that gives employees under 50 years of age three days less than for those who have already reached the age of 50<sup>64</sup>. At the same time the same court accepted the differentiation of the notice period according to the length of service, stipulated in the law. While it was identified as an indirect discrimination of younger employees, the court accepted the legitimate aim of providing longer-term and thus more loyal, typically older employees with longer notice periods as an improved protection against dismissal and found that the statutory graduation was appropriate and necessary<sup>65</sup>.

Equality bodies submitted several examples of age-related dismissal, discrimination and harassment at the workplace. In **France**, the equality body investigated a case of harassment and dismissal based on the employee's age, health and family status<sup>66</sup>. In **Romania** the equality body applied an administrative fine against a company for dismissing a female employee aged 49 without any reasonable justification<sup>67</sup>. In **Great Britain** the equality body provided funding for a case of multiple discrimination, challenging the exam for promotion that the Home Office required employees to pass. It was discovered that Black and Minority Ethnic (BME) candidates and older candidates had lower pass rates than white candidates and younger candidates. The Supreme Court decided that where there is a provision that might be

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<sup>63</sup> BAG, Urteil vom 22.10.2015 - 8 AZR 168/14

<sup>64</sup> BAG, Urteil vom 12.04.2016 - 9 AZR 659/14

<sup>65</sup> BAG, Urteil vom 18.09.2014 – 6 AZR 636/13

<sup>66</sup> Defender of rights, n° MLD-2014-20, 11 February 2014

[https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=8108](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=8108)

<sup>67</sup> National Council for Combatting Discrimination, case no. 67/2016

indirectly discriminatory (such as this exam), there is no need for a claimant with a protected characteristic to show why they are at a disadvantage<sup>68</sup>.

Finally, older people also face the risk of disproportionate selection for collective redundancy. In **Croatia**, a company had to undergo restructuring due to business reasons. Over 1000 employees were identified for potential collective redundancy, an overwhelming majority of them above 40 years old. The company did not provide objective justification for such a high percentage of employees belonging to a certain age group being negatively affected by the restructuring process. The equality body established discrimination on the ground of age and recommended the revision of the lists of employees proclaimed as collective redundancy along with measures for a more transparent process of establishing such a list of employees. A similar case in **Bulgaria** resulted in the highest ever amount of administrative fine imposed by the equality body<sup>69</sup>. In the **Czech Republic**, due to an insufficient budget, a court decided to lay off all working pensioners arguing that it is better than dismissing working mothers with minor children due to their vulnerable position in the labour market. However, as the Czech Anti-Discrimination Act does not allow employers to make the decision to lay off employees based on the fact that they receive an old-age pension, even if such procedure would favour female employees with minor children, the equality body concluded that the court discriminated against the complainants on the ground of age<sup>70</sup>.

## 2.3 Conclusion

Research both at the European and national level shows that age discrimination is most widespread in the field of employment, mostly affecting older people. Although legal protection against age discrimination is strongest in this field, notably with the EU Employment Framework Directive, Member States and employers still have fairly broad possibilities to justify their conduct.

The chapter brought examples for discrimination against younger employees, dismissals, discrimination and harassment at the workplace as well as the risk of disproportionate selection of older workers for collective redundancy.

Both European and national case law shows that perhaps the most challenging legal questions in this field are minimum or maximum age limits and dismissals or refusals to hire when reaching retirement age. There is an agreement on the need to demonstrate a legitimate aim

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<sup>68</sup> *Essop v Secretary of State for the Home Department* [2017] UKSC 27

<https://www.supremecourt.uk/cases/docs/uksc-2015-0161-judgment.pdf>

<sup>69</sup> Decision No. 15/2011 on Case File No 206/2009 of the Commission for Protection against Discrimination

<sup>70</sup> Report on inquiry in a case of discrimination on grounds of age upon termination of employment by notice (laying off employees), 26 January 2016, 8024/2014/VOP, available in English at:

[https://www.ochrance.cz/fileadmin/user\\_upload/ESO/8024\\_2014\\_VOP\\_eng.pdf](https://www.ochrance.cz/fileadmin/user_upload/ESO/8024_2014_VOP_eng.pdf).

for any such practice and both the CJEU and the national courts tend to accept aims that are sufficiently linked to social policy objectives (as a specificity for age discrimination) or safety and security concerns (as for all other grounds). Therefore, the key question remains the application of the proportionality test and in this, we can observe some important fault lines, especially when it comes to the balance between requiring individual assessments or accepting the use of generalisations and statistical data concerning a certain age cohort.

## Chapter 3: Goods and Services

### 3.1 Introduction

This chapter will focus on age-related discrimination in the field of goods and services. The first important observation is that not all equality bodies have the mandate to deal with age-based discrimination in this area<sup>71</sup>.

The equality bodies that do have this mandate, analyse the complaints and cases submitted to them in light of the general principles of anti-discrimination law: a distinction on grounds of age in the provision of goods and services is only possible if the treatment is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are proportionate, necessary and effective.

Some countries, such as **Sweden**, **Great Britain** and **Norway**, foresee specific legal exception to the general principle of non-discrimination on the ground of age in this area. In **Sweden**, the prohibition of discrimination associated with age does not prevent the application of lower age limits for admission to establishments where alcoholic beverages, which the business operator is licensed to serve, are served on a commercial basis. An exemption is also provided for the provision of insurance services. A comparable exception is also foreseen in **Great Britain** where there is a general exception from the service provision relating to age as they apply to financial services such as mortgages, annuities, current accounts, savings accounts etc. In **Norway**, favourable pricing to certain age groups is allowed. However, higher prices for certain age groups in order to make the goods and/or services less attractive to these age groups or to make the goods and services unavailable to them is prohibited.

A specific issue highlighted by the **Polish** equality body, the Commissioner for Human Rights is the abuse of precarious situation of older people in the field of financial services. The Commissioner for Human Rights commissioned a study on the situation of the elderly in the financial services market. It shows that bank employees and sellers of other goods or services often try to take advantage of older people, counting on their perceived lack of awareness and knowledge of financial products, concluding unfavourable banking contracts or transactions, primarily to invest in funds or to take out loans. The irresponsible conduct of banks and other financial institutions, including hiding important information about the costs and possible risks of the investment can lead to a credit spiral and/or very high financial transaction costs.<sup>72</sup>

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<sup>71</sup> See Chapter 1 for more information.

<sup>72</sup> [https://www.rpo.gov.pl/sites/default/files/Osoby%20starsze%20na%20rynku%20us%C5%82ug%20finansowy\\_ch.%20Analiza%20i%20zalecenia\\_0.pdf](https://www.rpo.gov.pl/sites/default/files/Osoby%20starsze%20na%20rynku%20us%C5%82ug%20finansowy_ch.%20Analiza%20i%20zalecenia_0.pdf)

### 3.2 National case law

Based on the national submissions, we have identified that the use of age criteria in financial services and (non-medical) insurance are the most common issues (medical insurance will be discussed in the chapter about health and family issues).

This does not imply that age discrimination cannot occur at the supply of other goods and services. The practical experience of equality bodies illustrates this clearly. Examples include the refusal of access to restaurants, campsites or hotels because of the presence of children (**Bulgaria, Germany, Czech Republic**), restrictions for older singles for registration on dating sites (**Lithuania**) or the refusal of car rental based on the age of customers (**Belgium**).

The Equal Opportunities Ombudsperson of **Lithuania** ruled that offering higher discounts for the purchase of eyeglasses to younger customers on the basis of the formula “100%-age = percentage of the discount” entails direct discrimination on grounds of age. The optician was requested to withdraw this practice, which he did.

The cases about the refusal of access to some services due to the presence of children are argued as a discrimination by association against parents on the ground of the age of the children (**Germany, Bulgaria**) or as an age discrimination of the children and gender (maternity, paternity) discrimination of the parent (**Czech Republic**). We notice differences in the legal outcome of these cases. In **Germany**, the refusal to allow children in a hotel was not found discriminatory on the ground of age. The Hannover district court stated that a hotel operator may freely decide on the composition of its customers, as it is a part of its private autonomy and an important part of the freedom to conduct a business.<sup>73</sup> The opposite conclusion was reached by the **Bulgarian** Commission for the Protection against Discrimination and the **Czech Republic’s** Supreme Administrative Court in similar cases. The **Bulgarian** case involved a citizen who was not allowed to visit a restaurant in a hotel, because of the presence of his six-month-old baby in a pushchair<sup>74</sup>. The case from the **Czech Republic** concerned a restaurant that forbade entry to children 6 years old or younger.<sup>75</sup>

Other examples of discriminatory measures towards younger persons are illustrated by the equality bodies of **Great Britain** and **Finland**. They refer to measures that have been taken in their countries to collectively punish young people, sometimes on the basis of prior incidents: In **Scotland**, three out of four of the 32 local authority areas use Mosquito devices with the

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<sup>73</sup> LG Hannover, judgment, 23.01.2013, 6 O 115/12.

<sup>74</sup> Decision no. 370/2017 in case file 10/2014.

<sup>75</sup> [http://www.nssoud.cz/files/SOUDNI\\_VYKON/2014/0001\\_4As\\_1400028\\_20141107085515\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0001_4As_1400028_20141107085515_prevedeno.pdf)



purpose to deter young people from gathering, making them feel unwelcome, discriminated against and marginalised. Mosquito devices are devices which emit a high-pitched noise which is only audible to people under the age of 25. It has been argued that they are ageist. The Scottish Government is opposed to their use and has written to the local authorities. The Scottish Youth Parliament has campaigned for them to be banned.<sup>76</sup>

A comparable phenomenon sometimes occurs in **Finland**: a local municipality decided to bar anyone under 16 from accessing the local public self-service library, as some young people had caused problems; a supermarket required all schoolchildren to leave their bags in the lobby as some kids had been caught shoplifting; and some gas stations have barred young people under 16 or 18 from hanging out in their premises on their own in the evening.

### 3.2.1 Banking sector

Denying access to certain financial services to (usually elderly) customers remains a problem in many EU countries. Examples of these financial services are all kinds of loans (such as student loans, mortgage loans, consumer credits ...), credit cards, etc. If there is no refusal, older customers are still being disadvantaged, because they are subject to additional stricter conditions (such as a premium surcharge), compared to younger customers.

This is not only confirmed by case law, but also based on objective studies carried out in some European countries. For example, the **Czech** equality body conducted research consisting of a questionnaire, situation testing and legal analysis.<sup>77</sup> In addition to the findings about insurance, which will be discussed below, the research also indicated that two out of thirteen entities restrict credit card provision based on the client's age without examining any other circumstances. Consumer loans were denied solely on grounds of age by two out of fifteen tested entities. The results of the questionnaire indicate that the least accessible services to elderly people include life assurance, accident insurance and payment protection insurance.

When extending credit, the creditworthiness and the repayment capacity of the consumer are essential. The creditor may refuse to grant credit to a consumer if he has good reasons to suspect that this consumer will not be able to pay back the borrowed amounts.

The legal analysis in light of the anti-discrimination legislation of a refusal due to the age of the consumer is not obvious, given the nature of the offered (financial) product: age can be a

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<sup>76</sup>[http://www.heraldscotland.com/news/16083456.New\\_call\\_for\\_Scotland-wide\\_ban\\_on\\_ageist\\_mosquito\\_devices\\_to\\_disperse\\_youths/](http://www.heraldscotland.com/news/16083456.New_call_for_Scotland-wide_ban_on_ageist_mosquito_devices_to_disperse_youths/).

<sup>77</sup>[https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Survey\\_Financial-services\\_2013.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Financial-services_2013.pdf)

risk factor making it legitimate to take it into consideration in certain situations. That is why in some countries, as stated before, a fairly broad exception is foreseen for financial services in relation to age discrimination. For example, in **Great Britain** the Equality Act 2010 provides certain conditions for the exception linked to age. Providers can only rely on the financial services exception if the risk assessment information relating to age comes from a source on which it is reasonable to rely.

This does not mean that the age criteria cannot be challenged. An example is the policy of the Student Awards Agency in **Scotland** not to award loans to people aged over 55, which has been successfully challenged in court. Due to the legal exception relating to age in the Equality Act 2010, the case was argued on the ground of Article 14 (prohibition of discrimination) and Protocol 1 Article 2 (right to education) of the ECHR. The Court found that this policy breaches Article 14 and Protocol 1 Article 2 ECHR because it unfairly restricted the benefits of finance for higher education to people under the age of 55. The Court also found that Scottish Ministers had breached their duty under the Equality Act to review the policy's equality implications when other changes were made. It concluded that the policy had a 'stark age cut-off' which was clearly discriminatory. The new regulations were laid on 9 September 2016 and raised the age limit for a maintenance loan from 55 to 60. It remains to be seen whether there will be any future challenges to this higher age limit as the retirement age progressively rises.

The Equality Ombudsman of **Sweden** and the National Council for Combating Discrimination of **Romania** also concluded that the refusal to grant a loan due to the higher age of the applicants (older than 60) is a direct discrimination on the ground of age. There is after all a less far-reaching and a non-discriminatory alternative. This may include an individual assessment of the client's financial situation, which must take into account the analysis of income, financial situation or other warranties that the applicant could provide.

In the same spirit, the Commissioner for the Protection of Equality of **Serbia** concluded, on the basis of several complaints received about commercial banks who refused to provide financial services to older clients, that banks do not examine sufficiently the creditworthiness of elderly customers and the refusal to grant financial services is not based on comparable and objective criteria.

It is also important to examine the use of apparently neutral criteria, such as statistical scoring algorithms, on their discriminatory impact. For example the **Finnish** Non-Discrimination Ombudsman requested the National Non-Discrimination and Equality Tribunal to investigate whether a credit institution company was guilty of discrimination having refused to grant credit to a client for an online purchase, on the basis of a statistical scoring algorithm that uses grounds of discrimination, such as gender, age, language and their combined effect, without

assessing the individual income and debts of the client. The Tribunal ruled that this practice constitutes direct multiple discrimination.

In general, based on the submission from equality bodies we can say that the creditor or the credit intermediary is obliged to obtain information on the financial situation of the consumer, his income, his charges, etc. The individual situation of the consumer must be investigated. It is in principle not allowed to refuse a credit application solely on the basis of age.

However, when a creditor can prove on the basis of accurate, recent and relevant data that the risk of non-repayment within a certain age range is considerably higher, than it is allowed to impose additional conditions (for example, an additional premium). In this way, it should still be possible to grant the financial service provided that the conditions for using this segmentation are extremely strict and firmly substantiated.

### 3.2.2 Insurance

The principle that lies at the basis of insurance, which is covering a risk, interferes with the principles of the anti-discrimination law, when this risk is inter alia determined on the basis of a protected criterion, namely age. “To insure” means that the insurer covers certain risks of a policyholder that pays a premium for this purpose. But for certain types of personal insurance (such as care and travel insurance), insurers agree that this risk is directly related to the age of the policyholder. Equality bodies observe the same problem occurring as with financial services: insurance products (mainly car insurance and travel insurance) are refused on the basis of (stereotypical) assumptions about the (older) age of the applicant and without individual analysis.

The research of the **Czech** equality body referred to in part 3.2.1 gives important information about the attitude of insurance companies towards older clients: one third of the surveyed entities set age limits for providing travel insurance and mortgage loans. The results of the survey indicate that the least accessible services to elderly people include life insurance, accident insurance and payment protection insurance. As regard to travel insurance, no case of denial on the ground of age was ascertained. However, a higher age is a factor which significantly increases the cost of purchasing a product (on average by 106 %).

There are plenty of examples from different countries to illustrate this conclusion. The equality bodies of **Latvia**, **Germany** and **Belgium** have been confronted with comparable cases: travel or car insurance that is refused simply because of the age of the applicant and without taking into account the individual situation of the applicant.

The reason why insurance companies refuse certain services to older clients can partly be explained by the fact that they use the technique of segmentation. This means that the insurer makes the premium and possibly also the coverage dependent on a number of specific characteristics of the risk that is insured. The intention is to come to the premium that is proportional to the average damage that the policyholder may suffer and for which the insurer will have to intervene.

When an insurer applies segmentation on the basis of age, it does not automatically imply that the practice is discriminatory. Such age distinction is legally authorized if the insurer can justify it. For instance in **Norway**, different insurance premiums based on age are allowed if age is a risk factor and the premium level is based on relevant and accurate actuarial data.

Based on the experience of equality bodies, as a general rule segmentation is allowed when:

- Age is the decisive factor for the assessment of the risk. The insurer must therefore be able to demonstrate that age leads to a significantly higher risk;
- The data on which the insurer is relying is accurate, recent and relevant;
- The age discrimination has a legitimate purpose and the means to achieve that aim are appropriate and necessary. This implies that the insurer must look for alternatives that affect as little as possible the principle of equal treatment.

### 3.3 Conclusion

It is striking that equality bodies face similar problems, namely the refusal of certain (often financial) services because of the age of the applicants and that the majority of such age discrimination affects older service users. Regarding loans and insurance, it cannot be denied that the higher age of the applicant can represent a higher risk. However, practical experience shows that the (higher) age criterion that is used as an exclusion is applied on the basis of assumptions about older customers that usually are based on prejudices and stereotypes, without an individual assessment of the situation of the applicant.

In both situations, the basic rules according to the experience of equality bodies are that:

- 1) there must be objective data available that is accurate, recent and relevant to show that age leads to a higher risk;
- 2) individual assessment should be done of the situation of the applicant and a possible refusal must not solely be based on the age of the applicant;
- 3) the principle of proportionality must always be taken into account: are there less far-reaching measures that affect as little as possible the principle of equal treatment?

## Chapter 4: Housing

### 4.1 Introduction

This chapter deals with age discrimination in relation to housing. Housing includes the use of apartments based on rental agreements as well as residential property.

European anti-discrimination directives do not contain age discrimination provisions for the housing market. Thus, equality bodies often have no mandate to deal with age discrimination in the housing sector. This is probably the reason why only a low number of national cases of age-related disadvantage in relation to housing were reported by the members of the Equality Law working group.

However, age discrimination is an existing issue in the housing market and affected victims need protection and support. The home offers shelter and has an important effect on a person's quality of life. The housing situation also influences access to other crucial needs, for example access to work, education and health care.

### 4.2 Challenges faced by older people and younger people

A study from **Germany** in 2011 found that about 90 percent of all elderly households face barriers related to their housing situation. Three-quarters of senior citizens must overcome certain practical challenges in using their home. For instance, bathrooms are too narrow or not age appropriate and other rooms, such as the kitchen, hallway and bedroom are often not suitable to master everyday life with a wheelchair, walker or with a caregiver.<sup>78</sup>

In addition to the equipment and furniture of a household, the location of the apartment plays a crucial role since older people tend to need easy access to public transport, shopping and medical care. Older people are often perceived by landlords as less attractive tenants due to reduced levels of income after retirement. In **Germany**, it could be difficult for older people who receive a pension to find an affordable apartment, because of their lower income and rising rents<sup>79</sup>. Prejudice from landlords towards older people can also make renting a home more difficult. In a request for advice to the German equality body it was reported that a landlord did not want to rent an apartment to an old woman. The landlord feared that she could not maintain the apartment due to her frailty. In addition, they had to expect that the tenancy would be terminated with the death of the tenant, which could complicate the settlement, as the landlord might have to pay for the eviction of the tenant's belongings. Moreover, as a buyer of an apartment, older people often have difficulty financing the

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<sup>78</sup> [https://www.rehadat-statistik.de/de/barrierefreiheit/Bauen\\_Wohnen/BM\\_Verkehr/index.html](https://www.rehadat-statistik.de/de/barrierefreiheit/Bauen_Wohnen/BM_Verkehr/index.html).

<sup>79</sup> Wohnen der Altersgruppe 65plus, Pestel Institut, on behalf of Bundesverband Deutscher Baustoff-Fachhandel e.V., Hannover, 2018; <https://www.bdb-bfh.de/downloads.html>

purchase of a home. The purchase price for houses is seldom paid in full immediately. Rather, a home purchase is usually at least partially funded by a loan. This involves long, multi-year maturities for a loan, as it involves larger sums of money. As a result, older borrowers retire while repaying the loan and reduce their income. This increased risk of not being able to repay the loan or passing away before the full repayment results in banks rejecting a credit agreement with older people.

Younger people also face difficulties in the housing market. Adults could feel disturbed by children playing and the restlessness associated with them<sup>80</sup>. Therefore families with children could face challenges when renting apartments. This also applies when families with children book hotel rooms<sup>81</sup>.

Because of their low income and the risk of terminating their contract due to a job offer in another city, people who still study also experience challenges in the housing sector.

### 4.3 Purpose-built housing

Particular issues arise in relation to purpose-built housing. Student dormitories are built to give students a furnished apartment for a few terms but such apartments are limited in the housing market. On the other hand retirement homes are built in a barrier-free way and ensure that care services can be integrated. These types of apartments are aimed at a specific target group (students, seniors) and they might not be made available to others. Students only need temporary accommodation for study purposes and seniors may need help which is not available to them at their home.

Student housing with upper age limits and senior housing with lower age limits are not uncommon in **Norway** and **Germany**, but these age limits have not been tested in view of existing anti-discrimination law. In Norway it is stated in the preparatory works of the Equality and Anti-discrimination Act that lower age limits for senior housing can be valid if the housing units are specifically adapted and designed for elderly inhabitants. Age limits based on age in housing specified in laws or regulations do not breach the prohibition of age discrimination. Discrimination against other home seekers outside the target group is justified because it is a positive measure and as the apartments were built for a specific purpose.

### 4.4 National case law

In the city of Hasselt in **Belgium**, a tower with apartments, studios and duplexes was built. Since the tower was built in a student neighbourhood with many dorms, the city and project

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<sup>80</sup> BGH, judgment of 22/08/2017, VIII ZR 226/16, available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=VIII%20ZR%20226/16&nr=79494>

<sup>81</sup> See for instance: LG Hannover, judgment, 23.01.2013, 6 O 115/12.

developer wanted to avoid older residents complaining about loud noise. In addition, the city of Hasselt and the project developer wanted to give the opportunity to young graduates to continue to live and work in the city centre. Thus, in 2017 an age limit for residents was applied: maximum 31 years old. Owners/buyers could be older, but would not be able to live there. According to the equality body, the age limit was discriminatory and not necessary for the project to reach the young target group. After negotiations, the city and the private project developer withdrew the age limit.

Protection against discrimination in relation to disposal of premises e.g. landlord and tenant matters, does not apply to the protected characteristic of age in **Great Britain**. However, age (over 18 -years old) is included in the protection from discrimination in the context of services and public functions and there are some age discrimination cases on public functions, such as housing allocation policies which have been argued under this part of the legislation. In one case, a local Council decided that 20% of all available lettings would be removed from the general pool and would be reserved for working households and model tenants. The aim was to incentivise tenants to work and encourage good tenant behaviour. The scheme was challenged by a number of claimants one of whom was a family comprising two grandparents, their daughter and her baby none of whom were able to work. The equality impact assessment to the new rules said the proposed change would have no impact on protected groups. The court held that the rules indirectly discriminated against disabled persons, the elderly and women and found that there was a breach of the Public Sector Equality Duty on the part of the Council. However, as the Council are to review their housing allocation criteria, the Court of Appeal did not quash the scheme.

In Great Britain, in order to address the shortage of cases on discrimination in housing, the equality body provided funding to a homelessness charity “Shelter” in Scotland to publish a short book and online training program on equality and human rights law in housing. The book/course is aimed at legal practitioners and addresses potential areas of confusion in the law including the distinction between taking cases under the services and the premises parts of the act.<sup>82</sup>

## 4.5 Conclusion

Equality bodies often have no or insufficient mandate to deal with age discrimination in the housing market even though it is clear that there is a need for further actions in this sector. Older and younger people experience discrimination in the field of housing due to their age particularly in the context of access to housing. While such discrimination can sometimes be justified as positive action measures or due to the purpose-built nature of the housing units, these justifications need to be carefully assessed for their equality impact in order to avoid

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<sup>82</sup> <https://store.scotland.shelter.org.uk/catalog?pagename=15278443451R3uh>.

unwanted consequences. As the cases featured in this chapter demonstrate, a simple reference to social policy objectives does not necessarily pass the proportionality test. Finally, linking to the previous chapter and banking services, it is important to underline that the difficult access to financing constitutes a major hurdle for access to housing for older people in particular.



## Chapter 5: Health and Family issues

### 5.1 Introduction

This chapter analyses age-related discrimination cases in health care and family rights situations.

Viewed as a component of “the physical and psychological integrity of a person”, health-related rights are protected by Article 8 of the ECHR, following well-established case law of the ECtHR<sup>83</sup>. Thus, any discrimination (including on the ground of age<sup>84</sup>) in this field can be assessed from the standpoint of Article 14 of the ECHR, as was recently confirmed by the ECtHR in the case *Carvalho Pinto de Sousa Morais v. Portugal*. In this case, it was established that the reduction by the national Supreme Administrative Court of the amount of compensation awarded for non-pecuniary damage to a 50-year old woman who, due to gynaecological complications resulting from a medical error, suffered from intense pain, incontinence and had difficulties in having sexual relations, amounted to discrimination on the ground of age and sex in breach of Article 14 in conjunction with Article 8 of the ECHR. The applicant’s age and sex were found to be decisive factors in the national courts’ final decision not only to lower the compensation awarded for physical and mental suffering but also for the services of a domestic helper.

At EU level, Article 35 of the Charter of Fundamental Rights provides for the right “*of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices*” and Article 21 prohibits discrimination based inter alia on the ground of age.

Within the field of health care, age-related discrimination claims throughout Europe are reported in relation to medical insurance and medical screening. In Serbia, according to research commissioned by the equality body, elderly people rate their health as “neither good nor bad” (46%) and 30% of respondents assess their health as poor.<sup>85</sup> Elderly women in Serbia pointed to several problems they face when exercising the right to health care, such as discrimination in using the ambulance service, long waiting times for specialist services, unkind and disrespectful behaviour of doctors and specialists, referral from state health care institutions to private health care places in which doctors work, and high prices of medicines.

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<sup>83</sup> See i.a. ECtHR Judgments in *G.B. and R.B. v. the Republic of Moldova* and *Erdoğan Kurt and Others v. Turkey*.

<sup>84</sup> See for example ECtHR Judgment in case *Schwizgebel v. Switzerland*.

<sup>85</sup> Commissioner for Protection of Equality of the Republics of Serbia. 2017. Survey “Aging in cities – challenges in the modern society” (support of the UNFPA). Survey of the position of elderly women in Serbia (support UN Entity for Gender Equality), <http://ravnopravnost.gov.rs/wp-content/uploads/2018/07/Abridged-Version-of-2017-RAR-of-the-CPE.pdf>.

More specific controversies arise in the context of reproductive rights (i.e. right to assisted reproduction or abortion), and adoption of children. The latter, although it is not related to health care, is likely to affect the same group of people as those affected by age limits in assisted reproduction. It was therefore considered appropriate to include relevant information in this chapter.

## 5.2 National case law

### 5.2.1 Medical insurance

As mentioned in Chapter 3, the principle that lies at the basis of insurance, which is covering a risk, may interfere with the principles of the anti-discrimination law, when this risk is *inter alia* assessed on the basis of a protected criterion, such as age. This is especially the case in medical insurance, where segmentation on the basis of age is largely applied by the insurer. Again, such segmentation does not infringe anti-discrimination law if the insurer can demonstrate that health related risks rise significantly with age on the basis of accurate, recent and relevant data.

Two cases from **Belgium** illustrate this rule: The first case concerns an insurer that was asked by the equality body to review the age limit of 55 years set out for disability insurance. The insurer tried to justify this age limit by referring to data published in France about disability insurance. However, the published data were not found to be specifically linked to age, nor was there a connection between the data and disability as such. In a different case, the equality body examined the reasons set out in an insurance for persons affected by cancer (specifically types of cancer affecting women). As a condition for the insurance, the insurer stipulates that: the candidates must never have had cancer (initially, now this criterion is reduced to being 10 years cancer free) and must not have reached the age of 50. Once subscribed, the candidates remain insured for a lifetime. The equality body asked the insurer to provide material from which this risk can be proven, and scientific literature and statistical material showed that there is a strongly increased risk above the age limit of 50 years old. Thus, the equality body did not find age discrimination in this case but agreed with the insurer to periodically evaluate this age requirement.

### 5.2.2 Medical screening

The object of medical screening is to identify diseases in their preclinical and hopefully still curable phase. Among the aims which such policies seek to pursue is that the economic balance i.e. the cost of case-finding (including diagnosis and treatment of patients diagnosed) should be economically balanced in relation to possible expenditure on medical care as a

whole.<sup>86</sup> Age-based segmentation often also applies to medical screening programs and, inevitably, raises questions as to its compatibility with anti-discrimination legal frameworks.

Such a case was reported in **Slovakia**, where the equality body recommended the reform of a normative regulation which limited the right to free annual breast cancer screening through a preventive mammogram examination to women from 40 to 69 years of age. The equality body based its recommendations to extend the age cohorts entitled to the screening on the fact that the incidence of breast cancer increases in all age groups and culminates in the age of 75-79 years. The equality body further noted that the mammography diagnoses approximately 75% of breast cancer tumours in the 5th decade of age and 90% of malignancies in women in the 6th and 7th decades.

### 5.2.3 Reproductive rights

Reproductive rights relate to certain human rights that are already recognized in national laws, international human rights frameworks and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.<sup>87</sup> Implementing these principles becomes a challenge for national courts and equality bodies mostly when it comes to medically assisted reproduction in its various forms or to abortion, since it is often the case that criteria which are protected under anti-discrimination law, such as age, are referred to as preconditions for the exercise of those rights. This conclusion is justified by numerous cases reported by the members of the Equality Law working group.

In an example from **Bulgaria**, the equality body asked the Ministry of Health to repeal a discriminatory provision with an upper limit of 45 years for women who intend to undergo insemination with processed spermatozoa by their spouse. The equality body also instructed the Public Council on Patients' Rights to analyse the norms and application of the medical standard with a view to protecting the right of women to equal treatment and the exercise of reproductive rights without discrimination.

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<sup>86</sup> See *“Principles and practices for screening of disease”*, World Health Organization, Geneva 1968, p. 7 and 27 Available at: [http://www.who.int/ionizing\\_radiation/medical\\_radiation\\_exposure/munich-WHO-1968-Screening-Disease.pdf](http://www.who.int/ionizing_radiation/medical_radiation_exposure/munich-WHO-1968-Screening-Disease.pdf).

<sup>87</sup> See International Conference on Population and Development (ICPD), Program of Action, UN Doc. A/CONF.171/13 1994, chapter 7.3. Available at: [https://www.unfpa.org/sites/default/files/event-pdf/PoA\\_en.pdf](https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf)

Similarly, the **Czech** equality body established that a woman's age is not always significant to her ability to give birth to a healthy child. On this ground, the equality body asked the public health insurance authority to allow exceptions from the age limit of 39 years for the procedure of artificial insemination to those women who have passed this limit but are in a good state of health. On the other hand, the same equality body found it justifiable that artificial insemination is available only to women up to the age of 49, because the age limit relates to the actual age when women in general lose fertility. The same reasoning was adopted by a Court of Appeal in **Greece**<sup>88</sup>, which also found the age limit of 50 years for women who intend to undergo assisted reproduction through in vitro fertilization justifiable. Furthermore, since the fixed age limit applies only to women, the Court went on to accept that the difference of treatment between men and women is compatible with the principle of sex equality, on the ground that the duration of natural ability for reproduction differs between men and women.

However, the situation might be different when it comes to assisted reproduction through surrogacy arrangement. This was confirmed by a Court of First Instance in **Greece**<sup>89</sup>, which granted permission for such an arrangement despite the fact that the intended commissioning mother was older than the age limit of 50 years prescribed by law. The Court stated that the risks which age limit is supposed to avoid in relation to the health status of the pregnant woman and of the child are not relevant for the commissioning mother. Moreover, the Court noticed that, in that particular case, the egg was taken from the commissioning mother at the age of 42. It is noteworthy to underline that the Court reached its decision by considering the right to reproduction as an integral part of the right of free development of personality, which is protected under the Greek Constitution.

Age-related criteria may also affect women who are faced with unwanted pregnancy. This was reported in the **Czech Republic**, where women under the age of 35 cannot have an abortion within six months from a previous abortion, whereas such limitations do not apply for women above the age of 35. The equality body concluded that if there is no medical reason for such differentiation, it could be potentially stigmatizing (health of women over 35 is not as important as of younger women).

#### 5.2.4 Family rights – Right to adoption

For this topic, Article 9 of the European Convention on the Adoption of Children is of particular interest<sup>90</sup>: *“1. A child may be adopted only if the adopter has attained the minimum age prescribed by law for this purpose, this minimum age being neither less than 18 nor more than 30 years. There shall be an appropriate age difference between the adopter and the child,*

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<sup>88</sup> Court of Appeal of Pireus Judgment 275/2016, available at the electronic legal data base NOMOS.

<sup>89</sup> Court of First Instance of Patra, Judgment 248/2016, available at the electronic legal data base NOMOS.

<sup>90</sup> Council of Europe. Revised European Convention on the Adoption of Children. 2008. Available at: <https://rm.coe.int/1680084823>.

*having regard to the best interests of the child, preferably a difference of at least 16 years. 2. The law may, however, permit the requirement as to the minimum age or the age difference to be waived in the best interests of the child: a. when the adopter is the spouse or registered partner of the child's father or mother; or b. by reason of exceptional circumstances”.*

By using Article 9 as a legal basis, two different **Greek** Courts ruled that the maximum age difference between the adopter and the child<sup>91</sup>, and the upper age limit of the adopter<sup>92</sup> laid down by the Greek Civil Code (50 and 60 years respectively) should be interpreted as factors to be taken into consideration and not as excluding requirements. In both cases, the Courts emphasized that the European Convention on the Adoption of Children stipulates that the best interests of the child shall always be the paramount consideration and, furthermore, lays down only minimum age difference between the adopter and the child.

The age of the adopted child might also be relevant for the exercise of other rights of the adoptive parents. This was illustrated in **Bulgaria**, where an adoptive mother submitted a complaint concerning provisions of the Labour Code and the Social Security Code which regulate the right to leave and to compensation when adopting a child aged from 2 to 5 years old. According to the mother, these provisions disadvantaged adoptive parents of a child under the age of 2 and over the age of 5. The equality body upheld the allegations submitted by the adoptive mother and argued that the provisions regulating the right to leave and to compensation for adoptive parents of a child under the age of 2 years constituted indirect discrimination on the ground of age. On the other hand, it was concluded that the upper age limit of 5 years did not constitute discrimination. As a result of this decision, legislative amendments have been introduced so the situation of all adopters of children under 5 years of age are equalized.

### 5.3 Conclusion

In the absence of European-level legislation specifically covering healthcare and family issues, the shaping of rules regulating access to health care and family rights is left largely to the discretion of the Member States. However, the above mentioned cases show that some equality bodies and national courts assess (either explicitly or implicitly) age-related criteria from the point of view of anti-discrimination law in these fields as well. This is particularly true

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<sup>91</sup> Judgment of the Greek Supreme Court («Arios Pagos») 1632/2014, available at the electronic legal data base NOMOS.

<sup>92</sup> Athens Court of Appeal Judgment 7138/2014, available at the electronic legal data base NOMOS.

for the area of medical insurance, medical screenings, reproductive rights and the right to adoption.

It seems reasonable to suppose that this common trend could be in part a predictable response to significant developments which have identically affected modern societies in recent decades, such as the progression of science and the consequent rise of life expectancy, which have great implications in family planning.

States should consider evaluating the effect of age discrimination to health care systems and offer health care services on an equal basis, as well as combating multiple discrimination. For age-related requirements set in the law to be in compliance with non-discrimination legal frameworks in the medical care or family rights context, they should be justifiable on the basis of accurate, recent and relevant data. They have to be periodically re-evaluated (taking into consideration multiple discrimination possibilities – age and gender) and in certain cases they may have to leave room for individual assessment, being only one of the factors to be taken into consideration.

# Equinet Member Equality Bodies

## ALBANIA

Commissioner for the Protection from Discrimination  
[www.kmd.al](http://www.kmd.al)

## AUSTRIA

Austrian Disability Ombudsman  
[www.behindertenanwalt.gv.at](http://www.behindertenanwalt.gv.at)

## AUSTRIA

Ombud for Equal Treatment  
[www.gleichbehandlungsanwaltschaft.at](http://www.gleichbehandlungsanwaltschaft.at)

## BELGIUM

Institute for the Equality of Women and Men  
[www.igvm-iefh.belgium.be](http://www.igvm-iefh.belgium.be)

## BELGIUM

Unia (Interfederal Centre for Equal Opportunities)  
[www.unia.be](http://www.unia.be)

## BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina  
[www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba)

## BULGARIA

Commission for Protection against Discrimination  
[www.kzd-nondiscrimination.com](http://www.kzd-nondiscrimination.com)

## CROATIA

Office of the Ombudsman  
[www.ombudsman.hr](http://www.ombudsman.hr)

## CROATIA

Ombudsperson for Gender Equality  
[www.prs.hr](http://www.prs.hr)

## CROATIA

Ombudswoman for Persons with Disabilities  
[www.posi.hr](http://www.posi.hr)

## CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

Public Defender of Rights  
[www.ochrance.cz](http://www.ochrance.cz)

## DENMARK

Board of Equal Treatment  
[www.ast.dk](http://www.ast.dk)

## DENMARK

Danish Institute for Human Rights  
[www.humanrights.dk](http://www.humanrights.dk)

## ESTONIA

Gender Equality and Equal Treatment Commissioner  
[www.volinik.ee](http://www.volinik.ee)

## FINLAND

Non-Discrimination Ombudsman  
[www.syrjinta.fi](http://www.syrjinta.fi)

## FINLAND

Ombudsman for Equality  
[www.tasa-arvo.fi](http://www.tasa-arvo.fi)

## FRANCE

Defender of Rights  
[www.defenseurdesdroits.fr](http://www.defenseurdesdroits.fr)

## GEORGIA

Public Defender of Georgia (Ombudsman)  
[www.ombudsman.ge](http://www.ombudsman.ge)

## GERMANY

Federal Anti-Discrimination Agency  
[www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)

## GREECE

Greek Ombudsman  
[www.synigoros.gr](http://www.synigoros.gr)

## HUNGARY

Equal Treatment Authority  
[www.egyenlobanasmod.hu](http://www.egyenlobanasmod.hu)

## HUNGARY

Office of the Commissioner for Fundamental Rights  
[www.ajbh.hu](http://www.ajbh.hu)

## IRELAND

Irish Human Rights and Equality Commission  
[www.ihrec.ie](http://www.ihrec.ie)

## ITALY

National Equality Councillor  
[www.lavoro.gov.it/ConsiglieraNazionale](http://www.lavoro.gov.it/ConsiglieraNazionale)

## ITALY

National Office against Racial Discrimination - UNAR  
[www.unar.it](http://www.unar.it)

## LATVIA

Office of the Ombudsman  
[www.tiesibsargs.lv](http://www.tiesibsargs.lv)

## LITHUANIA

Office of the Equal Opportunities Ombudsperson  
[www.lygybe.lt](http://www.lygybe.lt)

## LUXEMBURG

Centre for Equal Treatment  
[www.cet.lu](http://www.cet.lu)

## (FYRO) MACEDONIA

Commission for the Protection against Discrimination  
[www.kzd.mk](http://www.kzd.mk)

## MALTA

Commission for the Rights of Persons with Disability  
[www.crpdc.org.mt](http://www.crpdc.org.mt)

## MALTA

National Commission for the Promotion of Equality  
[www.equality.gov.mt](http://www.equality.gov.mt)

## MOLDOVA

Council on Preventing and Eliminating Discrimination and Ensuring Equality  
[www.egalitate.md](http://www.egalitate.md)

## MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)  
[www.ombudsman.co.me](http://www.ombudsman.co.me)

## NETHERLANDS

Netherlands Institute for Human Rights  
[www.mensenrechten.nl](http://www.mensenrechten.nl)

## NORWAY

Equality and Anti-Discrimination Ombud  
[www.ldo.no](http://www.ldo.no)

## POLAND

Commissioner for Human Rights  
[www.rpo.gov.pl](http://www.rpo.gov.pl)

## PORTUGAL

Commission for Citizenship and Gender Equality  
[www.cig.gov.pt](http://www.cig.gov.pt)

## PORTUGAL

Commission for Equality in Labour and Employment  
[www.cite.gov.pt](http://www.cite.gov.pt)

## PORTUGAL

High Commission for Migration  
[www.acm.gov.pt](http://www.acm.gov.pt)

## ROMANIA

National Council for Combating Discrimination  
[www.cncd.org.ro](http://www.cncd.org.ro)

## SERBIA

Commissioner for Protection of Equality  
[www.ravnopravnost.gov.rs](http://www.ravnopravnost.gov.rs)

## SLOVAKIA

National Centre for Human Rights  
[www.snslp.sk](http://www.snslp.sk)

## SLOVENIA

Advocate of the Principle of Equality  
[www.zagovornik.gov.si](http://www.zagovornik.gov.si)

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadynodiscriminacion.msssi.es](http://www.igualdadynodiscriminacion.msssi.es)

## SPAIN

Institute of Women and for Equal Opportunities  
[www.inmujer.es](http://www.inmujer.es)

## SWEDEN

Equality Ombudsman  
[www.do.se](http://www.do.se)

## UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland  
[www.equalityni.org](http://www.equalityni.org)

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