



Brussels, 17.1.2014
SWD(2014) 5 final

COMMISSION STAFF WORKING DOCUMENT

Annexes to the Joint Report on the application of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC)

Accompanying the document

Joint Report

on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing the general framework for equal treatment in employment and occupation ('Employment Equality Directive')

{COM(2014) 2 final}

This guidance informs victims of discrimination of their rights under the EU anti-discrimination directives and explains how they can assert their rights in discrimination cases.¹

The prohibition of discrimination is one of the fundamental principles of the European Union. However, the EU can adopt legislation against discrimination only on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

As EU law provides only a minimum level of protection, most Member States provide wider protection against discrimination under their national legislation. Please check your rights under national law (see ‘Useful links’ below). However, neither EU law nor national law provides legal protection against every possible form of discrimination.

On grounds of racial or ethnic origin, EU law: <i>- prohibits discrimination in a wide area covering employment, education, social protection (including social security and healthcare), social advantages and access to and supply of goods and services available to the public (including housing);</i> <i>- requires the Member States to set up national equality bodies to assist victims of discrimination.</i>	On grounds of religion or belief, disability, age and sexual orientation, EU law: <i>- prohibits discrimination only in the field of employment, occupation and vocational training;</i> <i>- requires employers to provide reasonable accommodation to disabled persons;</i> <i>- allows differential treatment on certain grounds (age and religion or belief) but only on certain strict conditions.</i>
Both the Racial Equality and Employment Equality Directives: <i>- prohibit various forms of discrimination: direct and indirect discrimination, harassment, instruction to discriminate and victimisation;</i> <i>- ensure that when victims of discrimination have established in court facts on the basis of which it may be deemed that there has been discrimination, it is then for the other party to prove that there has been no discrimination;</i> <i>- require Member States to provide effective sanctions and remedies against discrimination;</i> <i>- require Member States to provide information to victims of discrimination on their rights under these directives.</i>	

1. Which grounds of discrimination are prohibited under the EU’s anti-discrimination legislation?

Racial or ethnic origin: the Racial Equality Directive prohibits discrimination on grounds of racial or ethnic origin.

¹ This guidance is partially based on a comprehensive guide, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, July 2011, prepared for the Commission by Lilla Farkas from the European Network of Legal Experts in the Non-discrimination Field, available at: http://ec.europa.eu/justice/discrimination/document/index_en.htm.

Religion or belief, disability, age or sexual orientation: the Employment Equality Directive prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation.

Sex: Discrimination on grounds of sex is prohibited under Equal Treatment Directives 2004/113/EC and 2006/54/EC in employment and access to goods and services.

Nationality: EU citizens and their family members are protected from discrimination on grounds of nationality under the EU Treaties and within the scope of EU law, in areas such as the free movement of persons and services. Rights to equal treatment of certain categories of third-country nationals are protected on specific conditions under Directive 2003/109/EC (Long-term residents) and a number of other Directives.

2. What if I am discriminated against on other grounds?

You may still be protected from discrimination under national law, so please check whether your national law offers protection in your particular case. Many Member States provide protection from discrimination on other grounds such as political opinion, marital status, birth, social origin, property, health or physical characteristics.

Article 21 of the Charter of Fundamental Rights of the European Union also prohibits discrimination on grounds such as social origin, language, political or other opinion, property and birth. However, while the Charter is binding on EU institutions, it applies to Member States only when they are implementing EU law.

3. In which areas of life am I protected from discrimination under the EU's anti-discrimination directives?

You are protected from racial or ethnic discrimination in employment, occupation and vocational training, social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing or financial services.

Discrimination based on religion or belief, disability, age or sexual orientation is only prohibited in respect of employment, occupation and vocational training.

Under the EU equal treatment directives, you are also protected from discrimination on grounds of sex in employment, occupation and vocational training as well as in access to and supply of goods and services.

Please check the protection provided under your national law, which is sometimes wider than that provided under EU law. Many Member States also ban discrimination on the grounds of religion or belief, disability, age or sexual orientation outside the area of employment.

Know your rights — in employment

Discrimination is prohibited in all areas of employment, starting at the job application stage. Job advertising must not give the impression that certain groups may be excluded because of their age, racial origin or other protected characteristics. You are entitled to equal treatment in areas such as recruitment, working conditions, promotion, pay, access

to vocational training and dismissal.

Know your rights — in services

Discrimination on grounds of racial or ethnic origin is prohibited in services available to the public, whether in the public or private sector. You can't be refused access to a restaurant, bar, fitness club, hotel, etc. on the basis of your racial or ethnic origin (e.g. you are Roma or black).

Note that certain actions by the public authorities (e.g. the police) are not 'services' under EU law and so do not fall under the Racial Equality Directive. Other services not made 'available to the public' are also exempt (e.g. an elderly lady wishing to rent out a room in her own house is not obliged to advertise in a newspaper, but may look for a tenant in the limited circle of her family and acquaintances).

4. What type of discrimination is prohibited?

Both directives prohibit discrimination in different forms, including direct and indirect discrimination, harassment, instructions to discriminate and victimisation.

Direct discrimination is when a person is treated less favourably than others on any of the grounds covered by EU law. For example, a refusal to recruit you because you are Muslim, Jewish, black or are over 35 years old; a refusal to admit your child to a school because you are Roma; dismissal when an employer in economic difficulties needs to reduce staff and chooses only those aged over 50, or an estate agent's refusal to rent to you because of your skin colour.

Indirect discrimination occurs where a seemingly neutral provision, criterion or practice still puts you at a particular disadvantage compared to others because you are, for example, older, disabled or homosexual. This concerns measures which may look neutral and unproblematic at first sight but nevertheless have a discriminatory effect on a particular group of people. An employer's refusal to hire persons who cover their head or face may appear neutral, but it will mainly affect Muslims and may therefore qualify as indirect discrimination based on religion or belief. It does not matter whether the discrimination was intentional or not. Often statistical information is useful to demonstrate indirect discrimination: for example when considering whether rules that are unfavourable for part-time workers indirectly discriminate against women, the fact that most part-time workers are women must be borne in mind.

Indirect discrimination may be justified in some situations if it has a legitimate aim and the means of achieving that aim are appropriate and necessary. This needs to be assessed on a case-by-case basis.

Harassment is unwanted conduct violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. For example, you are homosexual and your boss and colleagues regularly tell homophobic jokes and exchange homophobic e-mails.

Instruction to discriminate is also a form of discrimination. For example, a nightclub owner who instructs his staff to refuse entrance to people of a particular racial or ethnic group or an employer who asks a temporary work agency only to send workers aged under 40.

Victimisation occurs if you suffer negative consequences in reaction to your complaint about discrimination. For example, you are dismissed or refused promotion because you have filed a discrimination complaint against your boss or have testified as a witness in a discrimination case.

Know your rights — prohibition of indirect discrimination:

Many seemingly neutral requirements or measures may be indirect discrimination if they affect specific groups such as older or disabled workers or persons of a particular religion. A requirement that workers carry out a job by bicycle would exclude many disabled applicants, and unrealistic language skill requirements or unjustified dress codes might exclude many applicants from ethnic minorities.

5. Are there situations in which different treatment on the basis of the protected grounds is allowed?

Yes, EU law allows for certain exceptions to the general prohibition.

There is a general exception in employment where a specific requirement is indispensable for a certain professional activity. For example a casting director may seek for an actor of a particular racial origin for a role in a film. Likewise, priests can legitimately be required to adhere to the faith of their religious communities. However, this exception does not cover employees of churches or other religious organisations (such as cleaners or gardeners) whose religion or belief is not directly relevant to their activities.

Member States may also allow different treatment on grounds of age if this is appropriate and necessary to achieve legitimate employment and labour market objectives. For example, under certain conditions, Member States may specify a certain age at which employees have to retire in order to promote intergenerational solidarity and facilitate access to the labour market for younger workers.

EU law specifically allows (but does not oblige) Member States to prevent or compensate for disadvantages faced by a specific group under any of the protected grounds. This is known as ‘positive action’; your country may, for example, have decided to set targets for public sector employers to employ persons with disabilities.

Most Member States have taken up the option under EU law of creating special rules for the armed forces to allow different treatment on grounds of age and disability.

6. Does everyone in the EU have to respect the prohibition of discrimination?

Yes, the prohibition is binding on everyone, i.e. individuals, legal persons and large and small organisations and companies in both the public and private sectors.

7. Is everyone in the EU protected from discrimination?

Yes, in principle, the anti-discrimination directives protect everyone in the EU and not only EU citizens. However, the protection of non-EU citizens only covers discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (and sex under the gender equality directives). It does not cover differences of treatment resulting from the fact that a person is not an EU citizen.

Immigrants from an African country, for example, must not be discriminated against in their workplace on grounds of race, age or sexual orientation. However, any lack of entitlement to social housing or to other benefits because they are not EU citizens does not qualify as discrimination under the anti-discrimination directives.

8. Am I protected only on the basis of my own characteristics?

No, the protection from discrimination is wider.

You are also protected from discrimination by association, a situation in which you are treated unfavourably because of someone else's characteristics, e.g. if you are discriminated against and harassed in the workplace because you need extra time off to care for your disabled child.

Discrimination on the basis of assumptions or perceptions is also prohibited, even if these assumptions are wrong. For example, if you are not employed because the employer mistakenly thinks that you are homosexual or Muslim.

9. What if I am disabled and need some adjustments in the workplace to be able to work?

If you are disabled, your employer or future employer is required to provide 'reasonable accommodation' for you in the workplace. 'Reasonable' means that such measures should not impose a disproportionate burden on employers, such as high financial costs relative to the size of their business, or be in breach of workplace health and safety rules.

You should first discuss your needs with your employer, who may not be aware of his obligation to provide reasonable accommodation. The decision on what adjustments are reasonable for employers can only be made on a case-by-case basis. You may also wish to consult an organisation for the rights of the disabled in your country.

Know your rights — right to reasonable accommodation in employment

Reasonable adjustments in the workplace to suit your needs as a disabled worker may include providing you with a reserved parking space, an accessible workspace and specially adapted equipment.

Your job application cannot be refused on the grounds that the employer would have to make reasonable adjustments to allow you to carry out the job.

10. Who can help me if I am discriminated against?

If you know, or suspect, that you have been discriminated against, seek advice and assistance from agencies such as specialised equality bodies, trade unions or non-governmental organisations before taking legal action.

Member States are responsible for implementing EU law in national laws and enforcing it correctly. They must guarantee your rights under EU law at national level. EU law requires Member States to set up **national equality bodies**, which provide independent assistance to victims of discrimination. Although the EU obligation only extends to the grounds of racial or ethnic origin and sex, the remit of the national equality body in most Member States also covers religion or belief, disability, age and sexual orientation and in many cases nationality, language or political opinion too.

The forms of assistance which the national equality bodies are required to provide to victims of discrimination are not specified in EU law and vary across Member States. Depending on their competences and resources, some national bodies may only provide you with useful information, whereas others may help you pursue your complaint in national proceedings or may examine your case themselves.

You can consult the website of your own national equality body under ‘Useful links’ below for further information, including details of its competences and the assistance it can offer.

In many Member States, **trade unions** (in employment issues) and human rights and other **non-governmental organisations** provide information and assistance to victims of discrimination. The EU’s anti-discrimination law provides such organisations with a right to engage in discrimination proceedings either on behalf or in support of the complainant.

11. Should I report discrimination?

Yes. You can only obtain a remedy (e.g. reinstatement in your job or compensation) if you complain. Filing a complaint will also help others by enhancing awareness of discrimination and changing attitudes. Real change often requires a critical mass of cases.

12. Who deals with my complaint?

National law identifies who is responsible for dealing with complaints about individual situations. You should turn to national advice services (see Question 10) for more information about the complaints process.

If you complain to the Commission about a Member State’s failure to comply with EU law, the Commission will examine whether your complaint reveals incorrect transposition or application of EU law. Should the Commission find a Member State to be in breach of EU law, it can decide to launch infringement proceedings against it.

The Commission cannot intervene in individual cases between victims of discrimination and their employers, service providers or public authorities. In particular, it cannot order a Member State (or a company or individual in a Member State) to provide any particular remedy to you, such as reinstatement in your job or compensation. A complaint to the

Commission can never substitute for enforcing your rights through national authorities and courts.

13. What do I need to do to prove that I have been discriminated against?

Do you have reason to believe that you would have been treated differently were it not for your disability, age, ethnic or racial origin, religion or belief, sexual orientation or sex?

If so, you should collect all the evidence (documents, statistical evidence and witness statements) you can find to support your claim. Check how you can access the necessary documents (e.g. documents held by your employer). Your national equality body may be able to help you gain access or you may be able to obtain an administrative or court order.

Seek advice from relevant sources (national equality body, trade union or non-governmental organisation) on how to prove your case.

By shifting the burden of proof, the EU anti-discrimination directives make it easier for victims of discrimination to enforce their rights. As a victim claiming compensation or reinstatement in your job, you only need to establish facts from which it may be presumed that there has been discrimination. It is then for the other party to prove that no discrimination occurred.

14. If I detect discrimination, can I complain even if it does not affect me directly?

If you complain to the Commission about a Member State's failure to comply with EU law, you do not have to demonstrate an individual interest or show that you are directly concerned by the problem.

If you complain about your own individual situation, you should file your complaint at national level in line with national requirements.

15. What methods are available for seeking remedies?

Member States decide whether discrimination cases should be dealt with in criminal, civil or administrative proceedings. Some Member States provide the option for mediation (for example, a negotiated solution between you and your employer). If different options are available, you need to decide on the best one for you. If you would rather not wait for the outcome of potentially lengthy and expensive court proceedings, you may decide to opt for mediation (if available under your national law), which is usually quicker and less costly.

16. What are the remedies? Can I receive compensation? Can I have my job back if I have been dismissed for discriminatory reasons?

Rather than harmonising sanctions and remedies in cases of discrimination, the anti-discrimination directives require the Member States to have effective, proportionate and dissuasive sanctions in place and to ensure that judicial procedures are available for the enforcement of obligations under EU law. You should check what remedies are available under your national legislation.

Typical remedies are compensation to the victim, reinstatement in a job or orders requiring the discriminating party to take specific action (for example, an order for an employer to change its discriminatory recruitment policy).

17. How much will I have to pay for proceedings?

For national proceedings, this will depend on your national law. Enquire early on about your entitlement to free legal aid, which may also be available from equality bodies, trade unions or non-governmental organisations.

Useful links:

European Commission, DG Justice, on ‘Tackling discrimination’:

http://ec.europa.eu/justice/discrimination/index_en.htm

European Commission, DG Justice, on ‘Gender equality’:

http://ec.europa.eu/justice/gender-equality/index_en.htm

European Commission, DG Justice, on ‘Fundamental rights’:

http://ec.europa.eu/justice/fundamental-rights/index_en.htm

European Commission, Secretariat-General, on ‘Application of EU law’:

http://ec.europa.eu/eu_law/index_en.htm

European Network of Equality Bodies (Equinet): <http://www.equineteurope.org/>

European Court of Human Rights on application to the Court:

http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1365511865464_pointer

European Commission, DG Home, on status of non-EU nationals who are long-term residents, including on their right to equal treatment with nationals in certain key areas:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/long-term-residents/index_en.htm

National equality bodies:

Austria: Ombud for Equal Treatment: www.gleichbehandlungsanwaltschaft.at

Belgium:

Centre for Equal Opportunities and Opposition to Racism: <http://www.diversite.be/?>

Institute for the Equality of Women and Men: <http://igvm-iefh.belgium.be/>

Bulgaria: Commission for Protection Against Discrimination (CPD)

www.kzd-nondiscrimination.com

Croatia: Office for the Ombudsman: www.ombudsman.hr

Cyprus: Office for the Commissioner for Administration (Ombudsman)

www.no-discrimination.gov.cy

Czech Republic: Office for the Public Defender of Rights: www.ochrance.cz

Denmark:

Danish Institute for Human Rights: www.humanrights.dk

Board of Equal Treatment: <http://www.ligebehandlingsnaevnet.dk/>

Estonia: Gender Equality and Equal Treatment Commissioner: <http://www.svv.ee/>

Finland:

Ombudsman for Minorities: <http://www.ofm.fi/>

Ombudsman for Equality: www.tasa-arvo.fi

France: Defender of Rights: www.defenseurdesdroits.fr

Germany: Federal Anti-Discrimination Agency (FADA):

www.antidiskriminierungsstelle.de or www.federal-anti-discrimination-agency.com

Greece: Greek Ombudsman: www.synigoros.gr

Hungary:

Equal Treatment Authority: www.egyenlobanasmod.hu

Office of the Commissioner for Fundamental Rights: www.ajbh.hu

Ireland: Equality Authority: www.equality.ie

Italy: National Office against Racial Discrimination (UNAR): www.unar.it

Latvia: Office of the Ombudsman: <http://www.tiesibsargs.lv/eng/>

Lithuania: Office of the Equal Opportunities Ombudsperson: www.lygybe.lt

Luxembourg: Centre for Equal Treatment: www.cet.lu

Malta: National Commission for the Promotion of Equality (NCPE): www.equality.gov.mt

Netherlands: Netherlands Institute for Human Rights: <http://www.mensenrechten.nl/>

Poland: Human Rights Defender: www.rpo.gov.pl

Portugal:

[Commission for Immigration and Intercultural Dialogue – ACIDI: www.acidi.gov.pt](http://www.acidi.gov.pt)

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

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

Romania: National Council for Combating Discrimination (CNCD): www.cncd.org.ro

Slovakia: National Centre for Human Rights: <http://www.snslp.sk>

Slovenia: Advocate of the Principle of Equality: www.zagovornik.net

Spain: Race and Ethnic Equality Council: www.igualdadynodiscriminacion.org

Sweden: Equality Ombudsman: www.do.se

United Kingdom:

Great Britain: Equality and Human Rights Commission (EHRC):

www.equalityhumanrights.com

Northern Ireland: Equality Commission for Northern Ireland: www.equalityni.org

Annex II : Summary of case-law

1. Introduction

This Annex provides a summary of the case-law of the Court of Justice of the European Union (the 'CJEU' or the 'Court') on Directives 2000/43/EC and 2000/78/EC. It does not aim to give an exhaustive account of all aspects of the case-law but rather to summarise the most important aspects². It will also mention a few cases of the European Court of Human Rights ('ECtHR') which concern its interpretation of the provisions on the prohibition of discrimination in the European Convention of Human Rights, where that appears to be of particular interest in the context of the interpretation of EU law³. Reference will be made to some judgments of national courts, as a way to illustrate the manner in which the national legislation transposing the two Directives has been applied.

There have been more cases decided by the CJEU concerning Directive 2000/78/EC than Directive 2000/43/EC, and of those most are about discrimination on the ground of age. In particular the cases concern the interpretation of Article 6(1) of Directive 2000/78/EC, which provides that differences of treatment based on age may be justified if they have a legitimate aim and the means used to achieve that aim are appropriate and necessary. The judgments of the CJEU concerned mainly discrimination against older workers, for example, rules providing for the termination of an employment contract when workers reach pensionable age. Some cases also dealt with specific measures unfavourable to younger workers.

Case-law on the grounds of racial or ethnic origin, disability or sexual orientation is still less developed. In such cases the CJEU has dealt with basic issues such as, for example, public statements by an employer that he will discriminate in recruitment, the definition of disability and the concept of reasonable accommodation, and the exclusion of same-sex partners from work-related benefits. The CJEU has not yet had an opportunity to deal with a case concerning discrimination based on religion or belief under Directive 2000/78/EC.

2. General issues

a) The application of the Directives *ratione temporis*

The first case regarding the application of the two anti-discrimination Directives was *Mangold*, which concerned a rule of a German law of 2002 providing for the possibility to conclude freely fixed-term contracts with workers over the age of 52 (where otherwise the admissibility of such fixed-term contracts was subject to certain conditions). The plaintiff, who was 56 years old when he concluded an employment contract with a lawyer, claimed that the rule constituted unjustified age discrimination contrary to Article 6(1) of Directive 2000/78/EC. The CJEU agreed that the rule was discriminatory on the basis of age.

The fact that, at the time when the plaintiff's employment contract took effect (July 2003), the Directive had not yet been transposed in Germany (the relevant deadline was December 2006)

² For a more detailed analysis of the case-law, see the report prepared to the Commission by Colm O'Cinneide from the European Network of Legal Experts in the non-discrimination field: "The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC", November 2012, available at: <http://ec.europa.eu/justice/discrimination/document/#h2-7>

³ See also the report prepared to the Commission by Olivier de Schutter from the European Network of Legal Experts in the non-discrimination field: "The Prohibition of Discrimination under European Human Rights Law. Relevance for the EU non-discrimination directives – an update", available at: http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011_en.pdf

was not an obstacle for the Court to rule the Directive having certain legal effects. The Court recalled that during the period prescribed for transposition of a directive Member States must refrain from taking any measures liable to seriously compromise the attainment of the result it prescribes.⁴

Moreover, the Court added that the principle of non-discrimination on grounds of age is a general principle of European Union law, its source being in various international instruments and the constitutional traditions of the Member States. Therefore, where national rules fall within the scope of European Union law, which was the case at hand since the German law in question was deemed to implement Directive 1999/70 on fixed-term work, the Court must answer a preliminary ruling request. The Court concluded that the national court was responsible for providing the legal protection which individuals derive from EU law rules and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.⁵

In latter cases the Court developed and clarified its jurisprudence in this respect. In *Bartsch*, the Court ruled that national courts must not apply the prohibition of discrimination based on age when the situation under examination has no link with European Union law. In contrast to *Mangold*, no such link existed in *Bartsch*, since the case concerned a period of time preceding the deadline to transpose the Directive and the measure in question was not implementing an EU Directive or any other instrument of EU law.⁶

But in *Kücükdeveci*, the deadline to transpose the Directive had already expired and thus the Directive was considered applicable. Moreover, the CJEU ruled that national courts were obliged to disapply national legislation if it was incompatible with the principle of equal treatment, and could even do that on their own initiative. This obligation applied notwithstanding the fact that the situation at hand concerned a relation between two private parties.⁷

b) The Charter of Fundamental Rights of the European Union

The Court has stated that the principle of non-discrimination is proclaimed in Article 21 of the Charter and is given specific expression in the Directives.⁸

Therefore, the Court has ruled that the interpretation of the Directives must take into consideration the rights protected by the Charter – such as the right to engage in work⁹ and the right to negotiate and conclude collective agreements¹⁰ laid down in its articles 15 and 28, respectively.

c) Personal scope - Discrimination by association or based on perception

⁴ Case C-144/04, *Mangold* [2005] ECR I-9981, paragraphs 66-68.

⁵ *Idem*, paragraphs 74-78.

⁶ Case C-427/06, *Bartsch* [2008] ECR I-7245, paragraphs 16 and 17. See also Case C-147/08, *Römer* [2011] ECR I-3591, paragraphs 63 and 64.

⁷ Case C-555/07, *Kücükdeveci* [2010] ECR I-365, paragraphs 23 - 25.

⁸ Joined Cases C-297/10 and C-298/10, *Hennigs* [2011] ECR I-7965, paragraph 78.

⁹ Cases C-159/10 and C-160/10, *Fuchs and Köhler* [2011] ECR I-6919, paragraph 62, and Case C-141/11, *Hörnfeldt*, judgment of 5 July 2012, nyr, paragraph 37.

¹⁰ Joined Cases C-297/10 and C-298/10, *Hennigs*, paragraph 78.

In *Coleman*,¹¹ the Court clarified that the prohibition of discrimination on the grounds of disability could, under certain circumstances, include discrimination based on the association to a disabled person. However, the Court only recognised this possibility regarding direct discrimination and harassment.

Ms Coleman was a legal secretary in a firm of solicitors in London. Her young son was a disabled child whose health required special care. Ms Coleman claimed that she had been discriminated because she was the primary carer of a disabled child, since her colleagues, who were parents of non-disabled children, had been treated more favourably in similar circumstances. She complained, for example, that her employer refused to allow her to go back to her previous job when she returned from maternity leave, refused her flexible working hours and she was subject to insulting comments about her and her child.

The Court ruled that, since its objective is to “combat all forms of discrimination in employment and occupation”, the Directive “applies not to a particular category of person but by reference to the grounds mentioned in Article 1” – including disability and therefore protects persons who are discriminated against due to someone else’s disability as the mother in this case. Otherwise, i.e. accepting a restrictive interpretation which limited the protection to persons with disabilities only, would deprive the Directive of its effectiveness and would reduce the protection it is meant to ensure.¹² The Court therefore concluded that Ms Coleman, the worker who was mother of a disabled child, was protected by the Directive under the circumstances of the case.

The same reasoning would appear to apply, *mutatis mutandis*, to all other grounds of discrimination protected under the two Directives.

National courts

In a UK case¹³, an employee alleged that he had been subjected by colleagues at work to sexual innuendo suggesting that he was homosexual, in consequence of which he left his job. He was in fact a heterosexual married man and it was accepted that the perpetrators of this conduct had known that he was not gay. The UK Court of Appeal held that it did not matter whether the employee in these circumstances was gay or not. What was required was that an employee’s sexual orientation – whether real or supposed – was the basis of the harassment. This was held to be the case, not only in the event of harassment of a person who was thought to be gay but was not, but also where a person harassed who was being treated as though he were gay although it was known that he was not. It followed that there had been harassment on grounds of sexual orientation.

d) Defence of rights - Principles of equivalence and effectiveness

In *Bulicke*,¹⁴ the Court interpreted Article 9(3) of Directive 2000/78/EC, providing that national law governs time limits for bringing actions to court for the enforcement of obligations under the Directive.¹⁵ The case related to Article 15(4) of the German General Law on Equal Treatment, which provides that a complaint of discrimination in employment

¹¹ Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603.

¹² *Idem*, paragraphs 50-51.

¹³ *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421.

¹⁴ Case C 246/09, *Bulicke* [2010] ECR I-7003.

¹⁵ This provision is identical to Article 7(3) of Directive 2000/43/EC.

has to be introduced within a time limit of two months. In the case of a job application such period starts at the receipt of the rejection.

Ms Bulicke, who was aged 41, had applied for a job advertised as being for people “between 18-35 years of age”. Her application was rejected with an explanation that all posts had been filled, but two people aged 20 and 22 were recruited. When she complained about discrimination, the competent court dismissed her action since she had submitted it a few days after the two-month limit had expired.

The CJEU recalled its case-law on the matter, according to which procedural rules to enforce EU law must be the same as for similar procedures for the enforcement of purely national law (principle of equivalence) and can’t render practically impossible or excessively difficult the exercise of the EU right (principle of effectiveness).¹⁶ The Court noted that under German law workers also had to bring cases to court within short time-limits in some other situations.¹⁷ Moreover, it also considered that, in principle, the two-month period did not make impossible or excessively difficult the exercise of rights conferred by EU law – notably in the light of the possibility that a teleological interpretation of the provision in discussion would allow to count the period only from the moment when the worker has knowledge of the discrimination. However, the CJEU left it for the national court to decide if the principles of equivalence and effectiveness were actually respected in the case.¹⁸

e) Burden of proof - access to information in recruitment procedures

In *Meister*¹⁹ the Court interpreted the rule on the sharing of the burden of proof of Article 8(1) of Directive 2000/43/EC and Article 10(1) of Directive 2000/78/EC.²⁰

Ms Meister was a Russian national, 45 years old at the time of the relevant facts, whose application for a job was rejected twice without any explanation. She claimed in court that she fulfilled the requirements of the job advertisement and that she had been discriminated on the basis of her sex, age and ethnic origin. She asked for the concerned employer to produce the recruitment file, so that she could prove that she had better qualifications than the person selected.

The Court refused to read in the abovementioned provisions such a right to access to information. However, the Court stated that the refusal by the employer to grant any access to information may be taken into account by the national court when examining whether or not there was a *prima facie* case of discrimination.²¹

National courts

A Swedish case²² demonstrates the use of situation testing as evidence of discrimination. In this case a group of young men conducted a test one evening to determine whether certain selected restaurants discriminated against persons of non-Swedish origin. Before they proceeded to the entrance, the men split up into several smaller groups. In some groups, all

¹⁶ Case C 246/09, *Bulicke*, paragraphs 25-26.

¹⁷ In case of wrongful dismissals and actions to declare a fixed-term contract invalid. *Idem*, paragraph 31.

¹⁸ Case C 246/09, *Bulicke*, paragraphs 37- 42.

¹⁹ Case C-415/10, *Meister*, judgment of 19 April 2012, nyr.

²⁰ The Court also ruled on Article 19(1) of Directive 2006/54/3C on equal treatment of men and women in employment and occupation, which is identical to the abovementioned provisions of the anti-discrimination Directives.

²¹ Case C-415/10, *Meister*, paragraphs 46-47.

²² Judgment of the Supreme Court of 1 October 2008 in Case No T 2224-07 NJA 2008, p. 915 (Ombudsman against Ethnic Discrimination v Escape Bar & Restaurang AB).

were of foreign appearance, in other groups all had fair complexions. The light-skinned persons were admitted to the restaurant, whereas the darker-skinned persons were stopped on the grounds that they did not have a VIP card or were not on the guest list. The sequence of events was documented by hidden microphones and video cameras. The Swedish courts found that the men of non-Swedish origin had been subjected to racial discrimination and ordered the restaurant to pay compensation to each of them.

3. Racial and ethnic origin

The most important case decided by the CJEU on racial and ethnic origin discrimination was *Firma Feryn*.²³

It concerned a procedure initiated by the Belgian *Centre for equal opportunities and combating racism* against *Firma Feryn*, a company specialising in the installation of garage doors. The director of that company made public statements declaring that he wanted to recruit installers but could not take on employees of a particular ethnic origin ('immigrants') since the company's customers were reluctant to give such persons access to their homes during the installation work. Under Belgian law the *Centre* could bring legal proceedings on discrimination, even in the absence of an identifiable complainant. The *Centre* claimed in the national procedure that *Firma Feryn* had applied a discriminatory recruitment policy.

The Court declared that, the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination within the meaning of Directive 2000/43/EC. The Court emphasised that such statements are likely to strongly dissuade certain candidates from submitting their candidature and, therefore, to hinder their access to the labour market. Pointing to the objective of the Directive, the Court considered that the absence of an identifiable complainant is not an obstacle for the finding of direct discrimination.

Concerning the application of the rule on the burden of proof of Article 8(1) of Directive 2000/43/EC, the Court declared that this type of statements by an employer, by which it makes clear that it will not recruit any employees of a certain ethnic or racial origin, are sufficient for a presumption of the existence of a directly discriminatory recruitment policy. It is then for that employer to prove that its actual recruitment practice does not correspond to those statements.

Finally, on what sanctions were appropriate for recruitment discrimination in the present case, the Court stated that the Directive requires the Member States to provide effective, proportionate and dissuasive sanctions, even where there is no identifiable victim.

The Court dealt with the scope of Directive 2000/43/EC in two cases.²⁴

²³ Case C-54/07, *Firma Feryn NV* [2008] ECR I-5187.

²⁴ Another case regarding racial and ethnic origin discrimination was *Belov*, case C-394/11, judgment of 31 January 2013. It concerned the practice in two districts of the Bulgarian city of Montana, of attaching electricity meters to electricity poles at a height of 7 m, whilst elsewhere electricity meters are installed at a maximum height of 1.70m, such that they are accessible for consumers. The districts in question are inhabited primarily by people belonging to the Roma community and the question therefore arose on whether this practice constituted indirect discrimination based on ethnic origin. Advocate General suggested that there was a *prima facie* case of indirect discrimination, although the measure could eventually be justified, under certain conditions, if it prevented fraud and abuse and contributed to ensuring the quality of the electricity supply in the interest of all consumers. However, the CJEU ruled that the Bulgarian Commission for Protection against Discrimination, which had referred the case to the CJEU, was not a 'court or tribunal' within the meaning of Article 267 TFEU and that therefore the case was inadmissible.

In *Runevič-Vardyn* it interpreted the concept of “services” within the meaning of Article 3(1)(h) of the Directive, which prohibits discrimination, inter alia, regarding “access to and supply of goods and services which are available to the public”. The case regarded Lithuanian rules requiring that the surnames and forenames of natural persons be entered on certificates of civil status only in a form complying with the spelling rules of the Lithuanian language. The complainants, of Polish origin, were interested in having their names spelt in the Polish language. The Court ruled that - although the Directive’s scope cannot be interpreted restrictively - such national rules do not come within the concept of a ‘service’ within the meaning of that provision.²⁵

In *Kamberaj* the Court dealt with the exclusion clause of the Directive provided for in its Article 3(2). This states that differences of treatment based on nationality, concerning entry into and residence of third-country nationals or stateless persons in the European Union, and arising from their legal status, are not covered by the Directive.

The case related to Italian legislation providing for housing benefit for low income tenants, which differentiated between Italian nationals and legally resident third-country nationals. The plaintiff, an Albanian national, whose application for that benefit had been rejected, complained of discrimination contrary to Directive 2000/43/EC and to Directive 2003/109/EC on the status of third-country nationals who are long-term residents.²⁶ The Court noted that he complained of discrimination based on his status as a third-country national and pointed to the text of Article 3(2) of Directive 2000/43/EC. It concluded that the discrimination claimed by the applicant, although it could potentially be contrary to Directive 2003/109/EC, does not fall within the scope of Directive 2000/43/EC.²⁷

- *The European Court of Human Rights*

It is also worth noting that the European Court of Human Rights (‘ECtHR’) has ruled on several cases regarding discrimination based on racial and ethnic origin. When interpreting the European Convention of Human Rights, the ECtHR has made reference to the provisions of Directive 2000/43/EC.

In 2005, in *Timishev* the Court interpreted the concepts of race and ethnicity for the purposes of Article 14 of the European Convention of Human Rights, which provides that the rights protected by the Convention “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The Court stated that:

“Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality,

²⁵ Case C-391/09, *Runevič-Vardyn* [2011] ECR I- 3787, paragraphs 45, 47 and 48. The Court noted that, in the preparatory work relating to Directive 2000/43/EC, the Council did not accept an amendment proposed by the European Parliament which would extend the scope of the Directive to ‘the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions’ - *idem*, paragraph 46.

²⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, of 23.1.2004, p. 44.

²⁷ Case C-571/10, *Kamberaj*, judgment of 24 April 2012, nyr, paragraphs 48-50 and 93.

tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.”²⁸

In 2008, in the landmark case *D.H. and others v the Czech Republic*²⁹ the European Court of Human Rights dealt with a complaint by a group of Czech nationals of Roma origin. The applicants had been placed in special schools for children with learning difficulties, who were unable to follow the ordinary school curriculum. Their placement was based on a psychological test to measure the child’s intellectual capacity. They claimed that, as a result of their Roma origin, they had suffered discrimination in the enjoyment of their right to education. The case was brought to the ECtHR notably because at the time of the relevant facts (between 1996 and 1999) the Czech Republic had not yet acceded to the European Union.

In its ruling, the ECtHR noted that the rules governing children’s placement in special schools did not refer to the pupils’ ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children. However, the number of Roma children in special schools was disproportionately high and Roma pupils formed a majority of the pupils in special schools. The evidence submitted in this regard was sufficient in the view of the Court to give rise to a strong presumption of indirect discrimination. As a consequence, the burden of proof shifted to the Government. The latter had to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

Examining whether there was an objective and reasonable justification to the situation at hand, the Court noted that the psychological tests were conceived for the majority population and did not take Roma specifics into consideration. Therefore, the results of these tests could not serve as justification for the difference in treatment. The ECtHR also dismissed the relevance of the parental consent given to the placement of the children in the concerned schools. It considered that the parents of the Roma children were often poorly educated and thus incapable of realising the consequences of their consent and that, in any event, the right to racial equality could not be waived.

The ECtHR recognised the efforts made by the Czech authorities to ensure that Roma children receive schooling and its difficulties in attaining that objective. It also acknowledged that new legislation has abolished the special schools.

However, the Court noted that the applicants had been placed in schools for children with mental disabilities, where a more basic curriculum was followed and where they were isolated from pupils from the wider population. As a result, their social integration and their future job prospects were at risk.

Therefore, the Court was not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that the means used were proportional to the aim pursued.

The Court concluded that since the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, there had been a

²⁸ Judgment of the ECtHR of 13 December 2005, in case *Timishev v. Russia*, applications 55762/00 and 55974/00, paragraph 55. Since Directive 2000/43/EC does not provide any definition of “racial and ethnic origin”, the definitions of the ECtHR can serve as a point of reference for the interpretation of the Directive.

²⁹ Judgment of the Grand Chamber of the European Court of Human Rights of 13 November 2007 in case *D.H. and Others v. the Czech Republic*, application 57325/00.

violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights read in conjunction with Article 2 of its Protocol No. 1 (right to education).³⁰

In its reasoning to reach this conclusion, the ECtHR referred to the provisions of Directive 2000/43/EC on indirect discrimination and sharing of the burden of proof and to the related case-law of the CJEU decided in the context of EU law on gender equality and free movement of workers.³¹

National courts

Instruction to discriminate

In a Dutch case,³² three branch managers and a personnel officer of a supermarket chain were convicted under the Dutch Criminal Code of intentionally discriminating against people of Moroccan descent on account of their race. The branch managers had informed the personnel officer of the chain by email that they did not want any more applicants of Moroccan descent to fill vacancies. The personnel officer complied with the branch managers' request and did not send any more applicants of Moroccan descent to the branches in question.

Education

The legislation transposing Directive 2000/43/EC into national law has given rise to many cases in national courts. These cases indicate that, although these courts did not make many preliminary references to the CJEU on racial and ethnic discrimination cases, they do apply regularly the national rules implementing Directive 2000/43/EC. Some judgments are interesting to note.

In June 2011 the Hungarian Supreme Court examined the decision of a local council to rent part of the building of the municipal school to a private foundation for a symbolic fee. The foundation was established to launch a private school, to which the local council provided significant financial support. Since the private school required a tuition fee, most of the Roma pupils stayed in the local school, while most of the other students enrolled in the private school.

The Hungarian Supreme Court found the existence of segregation based on the fact that the local council was the owner of the building in which both the local public school and the private school operated. By renting out part of the local school building to the private foundation, the local council contributed to maintain the segregation between Roma and non-Roma pupils. The Supreme Court concluded that the equal treatment rules of the Hungarian Equal Treatment Law had been violated and obliged the local council to refrain from any future violation.³³

³⁰ Idem, paragraphs 196-210. The Court also found a discrimination contrary to Article 14 of the Convention combined with Article 2 of its Protocol No.1 in other cases regarding the education of Roma children, such as: *Sampanis and Others v. Greece*, application 32526/05, judgment of 5 June 2008 (see in particular paragraphs 77-97 with an analysis similar to the judgment in *D.H. and Others v Czech Republic*); *Oršuš and Others v. Croatia*, application 15766/03, judgment of 16 March 2010; *Sampani and Others v. Greece*, application 59608/09, judgment of 11 December 2012; *Horváth and Kiss v. Hungary*, application 11146/11, judgment of 29 January 2013, concerning the complaints of two young Roma that their education in schools for the mentally disabled was the result of misplacement and discriminatory, the Court used again an analysis similar to that of *D.H. and Others v Czech Republic* and found that the applicants had been isolated and had received an education which made their social integration difficult), paragraphs 109-129; and *Lavida and Others v Greece*, application 7973/10, judgment of 28 May 2013.

³¹ Idem, paragraphs 81-91, and 187.

³² The Hague District Court 11 October 2010, LJN: BN9971; BN9983; BO0019; BO0022.

³³ National court decision no. Pfv.IV.20.037/2011/4, delivered on 29 June 2011.

More recently, in Slovakia, in October 2012, the Regional Court in Prešov confirmed a decision of a first instance court ruling that an elementary school violated the principle of equal treatment by putting Roma children into separate classrooms and thus discriminated them on the ground of their ethnicity. The courts also ordered the school to rectify the illegal situation by placing Romani children into classrooms together with children who are not of Roma origin.

The school claimed that the separate classes allowed teachers to have a more individualised approach when teaching Roma children since they came from socially disadvantaged backgrounds. Moreover, the children separation helped Roma children not feeling handicapped since they would realise that other children were doing better at school. Both the first and second instance courts rejected these arguments. The Regional Court emphasised that segregation is unacceptable and explained the importance of an inclusive education.³⁴

Employment and occupation

In a Latvian case³⁵ a female Roma job applicant was not given the job of a shop assistant “due to her accent”. The Latvian Jelgava Court found that the true reason for the refusal to employ her was her ethnicity. The Court concluded that for a position of shop assistant the requirement to speak Latvian accent-free was not objectively substantiated, as an accent does not impede good communication with customers. Consequently, the Court found that the plaintiff had been indirectly discriminated on the basis of her ethnic origin and ordered the defendant to pay compensation.

A Romanian case³⁶ is an example of apparently neutral measures that were found to involve indirect discrimination on the grounds of ethnic origin in self-employed activities. In this case, members of the Association of Florists of Romania in Bucharest were found to have been indirectly discriminated by the Mayor of the town as a result of his order to eliminate all the sites for flower retail following new rules with regard to street trade (the measures affected a group of florists within the Roma community). The Court found that the Mayor treated similarly both people who met the conditions of site authorisation for flower retail and people who failed to meet these conditions. The Court concluded that the decisions should have been taken individually in each and every case. Since they were not, they were indirectly discriminatory.

Access to services

In a Swedish case³⁷ two Roma women and their children were denied service at a restaurant. The restaurant staff alleged that the restaurant had previously had Roma customers who had engaged in inadmissible behaviour, and that they therefore no longer permitted Roma customers to eat there. The District Court found that the women had been subjected to racial discrimination and awarded them SEK 15 000 each in damages.

4. Religion or belief

The Court of Justice of the European Union has not yet dealt with a case related to discrimination based on religion or belief.

³⁴ Decision of the District Court in Prešov of 5 December 2011 (ref. No 25C 133/10-229), and decision of the Regional Court in Prešov of 30 October 2012 (ref. No 20Co 125/2012, 20Co 126/2012).

³⁵ Judgment of the Jelgava Court of 25 May 2006 in case No C15066406.

³⁶ Civil Decision No 6363/02.11.2011 by the Court of Appeal of Bucharest, Division 8 for Administrative and Fiscal Cases.

³⁷ Judgment of Gävle District Court of 16 June 2006 in Case No T 2285-05, Ombudsman against Ethnic Discrimination v Tahsin Akmesé [Lilla Kungshallen restaurant].

In contrast, the European Court of Human Rights has dealt with many cases regarding the right to freedom of thought, conscience and religion, inscribed in Article 9 of the European Convention of Human Rights. Only some of these cases concern discrimination based on religion in situations regarding employment and occupation and therefore could potentially be covered under the remit of Directive 2000/78/EC.

A recent judgment illustrates the approach of the ECtHR to finding the balance between the right to religious freedom and other competing human rights, as well as other legitimate public interests.

In *Eweida and Others v The United Kingdom*³⁸ the ECtHR dealt with complaints presented by British citizens working for different employers, who were all practising Christians. Ms Eweida, a British Airways' employee, and Ms Chaplin, a geriatrics nurse, complained that their employers put restrictions in the workplace on visibly wearing Christian crosses around their necks. Ms Ladele, who was a Registrar of Births, Deaths and Marriages, had been dismissed for refusing to accept as part of her duties the obligation to celebrate civil partnerships between same-sex couples. She believed that same-sex partnerships are contrary to God's law and that it was incompatible with her beliefs to do anything to condone homosexuality.

In the case of Ms Eweida the ECtHR explained that, on the one hand there was Ms Eweida's wish to manifest her religious belief, while on the other hand there was the employer's concern about its corporate image. The Court ruled that the domestic courts, by rejecting the plaintiff's complaints, had accorded too much weight to the employer's concern. The Court noted, first, that Ms Eweida's cross was discreet and could not have detracted from her professional appearance; secondly, there was no evidence that the wearing of other items of religious clothing (which were previously authorised) had had any detriment to British Airways' image and, finally, the fact that the company meanwhile had amended its uniform code to allow for the wearing of religious symbolic jewellery demonstrated that the earlier prohibition was not crucial. In conclusion, the Court ruled that there had been a violation of Article 9 of the Convention on the right to freedom of religion in her respect.

On the contrary, regarding Ms Chaplin, the nurse, the Court decided that the protection of health and safety on a hospital ward, which was the reason for asking her to remove the cross, was more important than in Ms Eweida's case and that hospital managers were well placed to make decisions about clinical safety. Similarly, in the case of Ms Ladele, the Court accepted that the national courts did strike a fair balance when they confirmed the employers' decisions to bring disciplinary proceedings against her. The Court noted in particular that the employer was pursuing a policy of non-discrimination against service-users, and the right not to be discriminated against on grounds of sexual orientation was also protected under the Convention. Therefore, regarding both Ms Chaplin and Ms Ladele, the ECtHR found no violation of Article 9 of the Convention, or of its Article 14 on prohibition of discrimination.³⁹

Quite interestingly, in its judgment, under the section on "Relevant Domestic Law", the ECtHR quotes Article 2(2)(b) of Directive 2000/78/EC – which prohibits and defines indirect discrimination.⁴⁰

National courts

The concept of "belief" was interpreted by the Austrian Supreme Court of Justice⁴¹ when it decided that disciplinary measures against a high ranking civil servant at the Federal Asylum

³⁸ *Eweida and Others v. The United Kingdom*, applications 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

³⁹ *Idem*, paragraphs 89-106.

⁴⁰ *Idem*, paragraph 43.

Service did not violate the prohibition of discrimination based on “belief”. The Court found that his views about asylum seekers and the government’s asylum policy, expressed in a book he published, did not constitute a “belief” for that purpose.

This is in line with the Commission's reading. The concept of "belief" should be read in the context of "religion or belief". It refers to a belief or a philosophical conviction (like those of atheists or agnostics, for example), which does not need to be of a religious nature, but it doesn't cover political opinion. If the legislator had wanted to cover political opinion, it would have stated so and referred to "political opinion" separately, as in Article 21 of the Charter of Fundamental Rights of the European Union.⁴²

5. Disability

The Court interpreted the concept of disability for the purposes of the protection granted by Directive 2000/78/EC in two cases.

In *Chacón Navas*, the Court distinguished illness from disability. It ruled that a worker who had been dismissed by his employer solely on account of sickness is not protected by the Directive.⁴³ Since the scope of the Directive cannot be extended by analogy, sickness cannot be regarded as a ground of discrimination in addition to those already explicitly included in Directive 2000/78/EC.⁴⁴

The Court stated that concept of ‘disability’ – not specifically defined in the Directive - must be given an autonomous and uniform interpretation throughout the European Union. That concept refers to “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” Since the Directive is concerned with the participation of persons with disabilities in professional life over a long period of time, it must be probable that the limitation of the person will last for a long time.⁴⁵

In *Ring and Werge* the Court further developed its interpretation and accepted that the concept of disability includes a condition caused by an illness where that illness entails a long-term limitation such as the one defined in *Chacón Navas*.⁴⁶ In this context, the state of health of a person with a disability who is fit to work, albeit only part-time, is thus capable of being covered by the concept of ‘disability’.⁴⁷

The Court reached this conclusion after recalling that, since the European Union has approved the United Nations Convention on the Rights of Persons with Disabilities,⁴⁸

⁴¹ Judgment of 24.2.2009 (90bA 122/07t).

⁴² As mentioned before, there is no case-law of the Court of Justice of the European Union on religion or belief, but the case-law of the European Court of Human Rights as regards Article 9 of the European Convention of Human Rights tends to confirm that “belief” is meant to refer to belief of spiritual or philosophical nature. See, for example, the judgments of the Court in *Campbell and Cosans v. United Kingdom* (applications 7511/76 and 7743/76, judgment of 25 February 1982, paragraph 36); *Metropolitan Church of Bessarabia and Others v. Moldova* (45701/99, of 13 December 2001, paragraph 114) and *Moscow Branch of the Salvation Army v. Russia* (72881/01, of 5 October 2006, paragraphs 57-58).

⁴³ Case C-13/05, *Chacón Navas* [2006] ECR I-6467, paragraphs 44-47.

⁴⁴ *Idem*, paragraphs 54-57.

⁴⁵ *Ibidem*, paragraphs 39-45.

⁴⁶ Joined Cases C-335/11 and C-337/11, *Ring and Werge*, judgment of 11 April 2013, nyr, paragraphs 36-47.

⁴⁷ *Idem*, paragraph 44.

⁴⁸ The UN Convention was signed by the then European Community on 30 March 2007. The Council adopted the decision for conclusion of the Convention on 26 November 2009 (Council Decision

Directive 2000/78/EC had to be interpreted according to the Convention. The Court pointed out the open definition of disability provided by Article 1 of the Convention, according to which:

«Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.»⁴⁹

The Court also clarified that the nature of the measures to be taken by the employer is not decisive for considering whether a person's state of health is covered by that concept, since the measures are the consequence of and not the constituent element of the disability.⁵⁰

A very important provision of the Directive regarding persons with disabilities is the obligation to provide reasonable accommodation to persons with disabilities, inscribed in Article 5 of Directive 2000/78/EC. The remit and content of this obligation was also clarified by the Court.

In *Commission v Italy* the Court ruled that the obligation implies that all employers adopt effective and practical measures, where needed in a particular case, in favour of all persons with disabilities and regarding the various aspects of employment and occupation, so that these people have access to, participate in, or advance in employment, or to undergo training. The general clause that these measures cannot impose a disproportionate burden is always applicable. Since the Italian legislation, although providing for specific measures to be ensured by some employers in favour of some persons with disabilities in certain circumstances, nevertheless did not provide for such a general obligation, the Court ruled that Italy had failed to fulfil its obligation to completely and correctly transpose Article 5 of the Directive.⁵¹

In *Ring and Werge* the Court decided that a reduction in working hours may constitute a form of reasonable accommodation required by the same provision. The Danish legislation at stake allowed an employer to dismiss a worker with a shorter period of notice if he had been absent because of illness during 120 days in the previous 12 months. The Court stated that such legislation was incompatible with the Directive, in case the worker's absences were due to the fact that the employer failed to provide reasonable accommodation to the worker with disabilities. However, the Court also ruled that the legislation could be compatible with the Directive if, when applied to a worker who was absent because his disability, the legislation pursued a legitimate aim and did not go beyond what was necessary for that purpose. The CJEU left the issue to be decided by the national court.⁵²

Finally, in *Odar* the Court analysed a potential case of indirect discrimination based on disability. A redundancy plan in Germany granted to workers older than 54 years of age a lower amount of compensation as compared to other workers. That amount decreased progressively from that age on the basis of how close they were to obtain their pension – including a severe disability pension. The plan was neutral by making the calculation of the compensation on the basis of the pensionable age of the worker. But severely disabled workers were at a particular disadvantage because, since they are entitled to a pension at the age of 60 instead of 63 for other workers, they received less compensation when they were dismissed.

2010/48/EC, OJ L 23 of 27/1/2010, p.35) and the European Union became a Party to it on 22 January 2011.

⁴⁹ Joined Cases C-335/11 and C-337/11, *Ring and Werge*, paragraph 37.

⁵⁰ Idem, paragraph 45.

⁵¹ Case C-312/11, *Commission v Italy*, judgment of 4 July 2013, nyr, paragraphs 61-68.

⁵² Joined Cases C-335/11 and C-337/11, *Ring and Werge*, paragraph 68 and 92.

The Court accepted that the plan had the legitimate aim of making a fair distribution of limited financial resources, avoiding that the compensation be claimed by persons that are not seeking a new employment. However, it considered that the plan had an excessive adverse effect on the legitimate interests of severely disabled workers. The plan did not take into account factors affecting in particular persons with disabilities, such as their greater difficulties to find new jobs and the fact that their financial needs, resulting from their disability, may increase with age. The Court ruled that the plan went beyond what was necessary to achieve its objective and was therefore indirectly discriminatory.⁵³

National courts

In a Swedish case⁵⁴ an employer learned that a business administrator on his staff had been diagnosed as suffering from Asperger's syndrome. The Swedish Court had to decide whether the employee was subsequently subjected to discrimination on grounds of disability *inter alia* by the fact that the employer suspended his development programme, downgraded his terms of employment and subjected him to harassment. The Court found that discrimination had occurred and awarded the employee compensation for discrimination.

6. Sexual orientation

*Tadao Maruko*⁵⁵ was the first case in which the Court interpreted the rules of Directive 2000/78/EC prohibiting discrimination based on sexual orientation.

Mr Maruko had concluded a registered life partnership with another man, who was a designer of theatrical costumes and affiliated to an occupational pension scheme for theatrical professionals in Germany, which included old-age insurance and the related survivors' benefits. When his partner died, Mr Maruko applied for a widower's pension. His request was denied since the relevant rules restricted the pension to surviving spouses only.

The Directive does not cover social security and social protection schemes.⁵⁶ However, under the occupational pension scheme in question, the survivor's pension derived from the employment relationship of the deceased partner. Therefore, the Court classified the pension as "pay", which is within the scope of the Directive.⁵⁷

The German court asked if the refusal to pay the survivor's pension to the registered life partner constituted discrimination on grounds of sexual orientation. The plaintiff and the Commission claimed that such refusal constituted indirect discrimination.

The CJEU noted that German law reserved marriage only to persons of different sex, while it established a separate regime for persons of the same sex, the life partnership, which had gradually been made equivalent to marriage. Since the rules of the pension scheme restricted the survivor's pensions to surviving spouses and denied it to life partners, the Court considered that the latter were treated less favourably than surviving spouses.

⁵³ Case C 152/11, *Odar*, judgment of 6 December 2012, nyr, paragraphs 65-72.

⁵⁴ Attunda District Court T 2705-11 (Swedish Association of Graduates in Business Administration and Economics (Civilekonomernas Riksförbund) and J.T. v OptoSweden Aktiebolag.

⁵⁵ Case C-267/06, *Tadao Maruko* [2008] ECR I-175.

⁵⁶ Article 3(3) and recital 13.

⁵⁷ Case C-267/06, *Tadao Maruko*, paragraphs 56-57 and 61. As to recital 22 of Directive 2000/78/EC, which states that the latter "is without prejudice to national laws on marital status and the benefits dependent thereon", the Court pointed out that, as "pay", the pension was covered by the scope of the Directive and although civil status and related benefits are Member States' competence, in the exercise of that competence they must comply with EU law, including the principle of non-discrimination, *idem*, paragraphs 59-60.

Therefore, the Court ruled that this less favourable treatment constituted, in principle, direct discrimination on grounds of sexual orientation. However, the CJEU left it for the national court to determine whether or not surviving spouses and surviving life partners are in a comparable situation as regards that pension.⁵⁸

In *Römer*⁵⁹ the Court applied the same basic reasoning to a case regarding a retirement pension for civil servants of the *Land* of Hamburg – which was higher for married pensioners, as compared to those living in a life partnership.

The CJEU explained how the national court should carry out the comparability test, i.e. how it should analyse whether life partners are in a legal and factual situation comparable to that of a married person as regards that pension. The national court should focus on the rights and obligations of spouses and life partners, according to the applicable law, and consider both the purpose of and the conditions to obtain the specific benefit in discussion.⁶⁰

In *Dittrich*⁶¹ the Court interpreted further the concept of “pay” for the purposes of the prohibition of discrimination based on sexual orientation. The case concerned the assistance granted to federal public servants in Germany in the event of illness, which reimburses a considerable part (50% to 80%) of health care expenses incurred by the public servant or some of his relatives. Each one of the plaintiffs had concluded a life partnership and had requested reimbursement of medical expenses incurred by the respective partner. The applicable law listed spouses, but not partners, among the family relatives who were eligible for assistance. Therefore, their requests were rejected by the administration.

The Court found that the assistance was paid to the civil servant as part of her or his employment. Consequently, the Court concluded that such assistance could, in principle, be considered as “pay” and thus covered by Directive 2000/78/EC. However, it left for the German court to determine whether the assistance in question was indeed financed by the State administration acting as an employer, or instead by the social security budget.⁶²

Finally, in *ACCEPT*⁶³ the Court interpreted the rule on the sharing of the burden of proof of Article 10(1) of Directive 2000/78/EC, as applied to the prohibition of discrimination based on sexual orientation.⁶⁴ The case concerned the statements of Mr Becali, who presented himself as being the ‘patron’ of ‘FC Steaua’, a professional football club based in Bucharest.⁶⁵ In an interview on the possible transfer of a professional football player, Mr Becali stated in essence that he would never hire a homosexual player.

ACCEPT, an association promoting and protecting lesbian, gay, bisexual and transsexual rights in Romania, complained against ‘FC Steaua’ and Mr Becali before the *National Council for Combatting Discrimination* (“CNCD”)⁶⁶, claiming that the principle of equal treatment had been violated in recruitment matters.

⁵⁸ Case C-267/06, *Tadao Maruko*, paragraphs 67-73.

⁵⁹ Case C-147/08, *Römer*.

⁶⁰ *Idem*, paragraph 52.

⁶¹ Joined Cases C-124/11, C-125/11 and C-143/11, *Dittrich, Klinke and Müller*, judgment of 6 December 2012, nyr.

⁶² *Idem*, paragraphs 36-42.

⁶³ Case C-81/12, *Asociația ACCEPT (“Becali”)*, judgment of 25 April 2013, nyr.

⁶⁴ This provision is substantially identical to Article 8(1) of Directive 2000/43/EC.

⁶⁵ Mr Becali made his statements on 13 February 2010 and he had sold his shares in the club on 8 February 2010, although he only registered that sale on 23 February 2010.

⁶⁶ The *Consiliul Național pentru Combaterea Discriminării* (National Council for Combatting Discrimination) is the Race Equality Body for the purposes of Article 13 of Directive 2000/43/EC, but its competences include also other grounds of discrimination prohibited under Romania law such as sexual orientation.

The CNCD decided that Mr Becali's statements could not be considered as originating from an employer or a person responsible for recruitment. However, they could be considered harassment and the CNCD gave Mr Becali a warning. Since more than six months passed after the facts took place, that sanction was the only one possible under Romanian law. ACCEPT decided to bring an action against the decision of the CNCD before the Court of Appeal of Bucharest, which asked for a preliminary ruling to the CJEU.

The Court considered that the Directive applied to the situation under discussion, since it involved statements concerning the "conditions for access to employment... including ...recruitment conditions", as provided for in Article 3(1)a) of Directive 2000/78/EC.

Mr Becali claimed and appeared to play an important role in the club's management, but he was not able to legally bind the football club in recruitment matters. For the Court this was not an obstacle for his statements to be considered able to establish a *prima facie* presumption of discrimination, according to Article 10(1) of the Directive. The Court added that, in order to rebut a presumption of discrimination the football club, as an employer, was not required to prove he had recruited persons with a particular sexual orientation. This would interfere with the right to privacy. However, the club could refer, for example, to equality provisions regarding its recruitment policy, or to an eventual reaction clearly distancing itself from Mr Becali's statements.

Finally, the Court interpreted Article 17 of Directive 2000/78/EC, which establishes that Member States must adopt rules imposing sanctions for discriminatory behaviour, and that those sanctions must be effective, proportionate and dissuasive. The Court had to rule whether or not the Directive is incompatible with national legislation providing that, in case of a finding of discrimination based on sexual orientation, which occurs more than six months after the facts occurred, the only possible sanction is a 'warning'. The CJEU left for the national court to determine whether or not such a sanction was effective, proportionate and dissuasive.⁶⁷

7. Age

As mentioned above, most judgments of the CJEU on the two anti-discrimination Directives related to Directive 2000/78/EC and concerned age related cases. This is to some extent the logical consequence of the flexible nature of the applicable provisions of Directive 2000/78/EC, in particular its Article 6(1) which allows for the justification of differences of treatment based on age.

The challenge faced by the CJEU has been that of striking a fine balance: acknowledging the margin of manoeuvre of Member States to exercise their competences in matters of social and employment policy, while not depriving the prohibition of discrimination based on age of its substance.

7.1 General

a) Material scope – retirement age and termination of the employment contracts

In defining the material scope of the Directive, the Court ruled that it applies also to the termination of employment contracts when workers reach a certain age.

In *Palacios*, a regional collective agreement took advantage of the possibility authorized by the Spanish law and provided that, under certain conditions, an employment contract could be

⁶⁷ Case C-81/12, *Asociația ACCEPT*, paragraph 72.

automatically terminated once the worker reached the age of 65 – which was the normal retirement age giving right to a pension. The Court recalled that the Article 3(1)(c) of the Directive prohibits discrimination “in relation to employment and working conditions, including dismissal and pay”. Recital 14 of the Directive states that the latter is “without prejudice to national provisions laying down retirement ages”, but the Court considered that the recital only meant that the Directive did not affect the competence of Member State to define the retirement age of their workers. It concluded that the automatic termination of employment “affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.”⁶⁸ In this manner the Court distinguished the definition of retirement age for the purposes of being entitled to a pension, which is a national competence, from the termination of a contract of employment, which is within the material scope of the Directive.

b) Article 2(5) of Directive 2000/78/EC – public security and mandatory retirement

Measures setting a maximum age to exercise a profession, such as dentist or airline pilot, can, in principle, fall within the scope of application of Article 2(5).

Petersen concerned a German rule setting a maximum age of 68 for practice as panel dentist in Germany, whose work can be reimbursed under the framework of the national social security system. The Court accepted that objectives such as the protection of health of patients, regarding the competence of doctors, or the financial balance of the public health care system, could be covered by Article 2(5). However, since it was possible for the dentists to work in private practice beyond the age of 68, the Court considered that the rule in question was not necessary for the first objective, the health of patients, while it left for the national court to examine whether it was for the second, the financial balance of the public health care system.⁶⁹

In *Prigge*, the Court ruled that the objective of air traffic safety was covered by the concept of “public security” under Article 2(5). The case concerned a rule, set by a collective agreement for Lufthansa, prescribing the automatic termination of employment for airline pilots when they reach the age of 60. However, since national and international legislation fixes that age at 65 years only, the Court decided that the rule was not necessary to achieve that objective.⁷⁰ The Court declared that, as an exception to the principle of equality, Article 2(5) has to be interpreted restrictively.⁷¹

c) Article 4(1) of Directive 2000/78/EC - occupational requirements based on age

Maximum age limits to exercise certain professions can be a genuine and determining occupational requirement within the meaning of Article 4(1).

In *Wolf* there was a maximum age of 30 years to be recruited to an intermediate career in the fire service, a career entailing not management but physical activities such as fighting fires, rescuing persons and dealing with dangerous animals. On the basis, notably, of scientific reports explaining that capacity and endurance diminishes with age, the Court recognised that the full physical capacity to carry out the profession of fire service is related to the age of the

⁶⁸ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, paragraphs 42 – 47, confirmed, for example, in Case C-388/07, *Age Concern England* [2009] ECR I-1569, paragraph 25.

⁶⁹ Case 341/08, *Petersen* [2010] ECR I-47, paragraphs 62-64.

⁷⁰ Case C-447/09, *Prigge* [2011] ECR I- 8003, paragraph 64.

⁷¹ Case C-447/09, *Prigge*, paragraph 56. See also *Petersen*, paragraph 60.

person. Therefore, it accepted that the age limit was justified under Article 4(1) and considered it proportionate.⁷²

Likewise, in *Prigge*, mentioned above, the Court accepted that possessing particular physical capabilities can be considered a genuine and determining occupational requirement for airline pilots and that guaranteeing air traffic safety was a legitimate aim within the meaning of Article 4(1). However, since no reason was put forward to justify why the retirement age of airline pilots should be at 60 for Lufthansa pilots according to their collective agreement, instead of 65 according to national and international law, the Court ruled that such a requirement was disproportionate. The Court stated that as an exception to the principle of equality, Article 4(1) should also be interpreted narrowly.⁷³

National courts

In a UK case,⁷⁴ a TV presenter claimed that she had been removed from a TV programme due to the combination of her age and her sex. The Employment Tribunal found that a particular characteristic need not have been the sole or even the principal reason why a person suffers detrimental treatment, as long as it significantly influenced the reason for treatment. The Tribunal concluded that, had the claimant been 10 to 15 years younger she would have been given proper consideration to remain as a presenter. The Tribunal stated that the discrimination was not justified: the wish to appeal to a primetime audience, including younger viewers, was a legitimate aim; but it had not been established that choosing younger presenters was required to appeal to such an audience. The Tribunal concluded that the removal of the claimant was discriminatory based on age (finding only age discrimination).

7.2. Article 6(1) – the objective and reasonable justification

Under Article 6(1) of Directive 2000/78/EC, a difference of treatment based on age must (i) be justified by a legitimate aim and (ii) use means that are appropriate and necessary to achieve that aim.

The Court has been very accommodating with Member States regarding the aims accepted as legitimate for this purpose. This fits with the general wording and with the purpose of Article 6(1). By contrast, the Court has been stricter in its scrutiny of the proportionality of the measures used to reach those stated aims. As a result, most differential treatment measures considered by the Court have been accepted as compatible with the Directive, with some (notable) exceptions.

a) Legitimate aims – a broad discretion

The Court has consistently made it clear that Member States enjoy broad discretion in their choice of measures for the attainment of their social and employment policy objectives.⁷⁵ This discretion is not only for the choice of a particular aim, but also for the means of achieving it. It applies equally to national social partners when they have regulatory powers.⁷⁶ In this context, the choices made at national level may be based on political, economic, social,

⁷² Case C-229/08, *Wolf* [2010] ECR I-1, paragraphs 41 and 44.

⁷³ Case C-447/09, *Prigge*, paragraphs 69 to 76.

⁷⁴ *Miriam O'Reilly v BBC and Bristol Magazines Ltd*, Judgment of the Employment Tribunal, Case number 2200423/2010.

⁷⁵ Case C-144/04, *Mangold*, paragraph 63.

⁷⁶ Case C-411/05, *Palacios de la Villa*, paragraph 68.

demographic and/or budgetary considerations and having regard to the actual labour market situation.⁷⁷

Moreover, it is not necessary that the measure under examination explains or refers explicitly to the legitimate objective that it pursues. It is sufficient that other elements, derived from the general context of the measure, allow for the identification of its underlying aim, so that the courts are in a position to review its legitimacy and to consider whether the means used are appropriate and necessary.⁷⁸ Therefore, the Court has often examined the objectives of a measure on the basis of the explanations made by the relevant public authorities after its adoption.⁷⁹

Member States are not obliged to draw up a specific list of the differences in treatment which may be justified by a legitimate aim. They may simply provide in their legislation that a difference of treatment based on age is not unlawful if it constitutes a proportionate means to achieve a legitimate aim.⁸⁰ Member States are also free to include in their legislation examples of differences of treatment and aims that are different from those that are expressly listed in Article 6(1) - such as the automatic termination of employment contracts when workers reach a certain age.⁸¹

Moreover, the coexistence of a number of aims does not preclude the existence of a legitimate aim.⁸² Public authorities may also change the instruments used to attain their objectives, for example to adapt them to a changing employment market, without this questioning the ability of such objectives to justify differences of treatment based on age. Accordingly, in *Palacios*, the fact that the possibility of a compulsory retirement procedure was reintroduced in Spain after being repealed for several years was considered of no relevance for this purpose, since it was for national authorities to find the right balance between the different interests involved.⁸³

On the other hand, the Court has also imposed some basic limits. Generally, it has often emphasised that Member State discretion on social objectives cannot obstruct the implementation of the principle of equality on the grounds of age.⁸⁴

A simple reference to a legitimate aim is not sufficient to guarantee that it will be accepted as such by the Court. It has emphasised that mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.⁸⁵

In any case, 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 – like cost reduction or improvement of competitiveness. However, in the pursuit of those legitimate aims, the law may recognise “a certain degree of flexibility for employers”⁸⁶ such as, for

⁷⁷ Case C-411/05, *Palacios de la Villa*, paragraph 69.

⁷⁸ Case C-411/05, *Palacios de la Villa*, paragraph 57, Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 39, Case C-141/11, *Hörnfeldt*, paragraph 24, and Case C-286/12 *Commission v. Hungary*, paragraph 58.

⁷⁹ See, for example, Joined Cases C-250/09 and C-268/09, *Georgiev* [2010] ECR I-11869 paragraphs 43 and 44.

⁸⁰ Case C-388/07, *Age Concern*, paragraphs 34 and 43.

⁸¹ Case C-45/09, *Rosenbladt* [2010] ECR I-9391, paragraph 40.

⁸² Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 44.

⁸³ Case C-411/05, *Palacios de la Villa*, paragraphs 70 and 71.

⁸⁴ Case C-388/07, *Age Concern*, paragraph 51.

⁸⁵ *Idem*.

⁸⁶ Case C-388/07, *Age Concern*, paragraph 46.

example, greater flexibility in personnel management by easing the dismissal of young workers.⁸⁷

The acceptable aims

In line with the principles set out above, one of the recurrent aims accepted by the Court is the promotion of employment for certain categories of workers, who have difficulties in finding work.⁸⁸

This may concern potentially all older workers⁸⁹ or all younger workers⁹⁰ but it may also concern only a limited category of those workers. In *Hütter* an Austrian law on contractual civil servants excluded periods of employment completed before the age of 18 from being taken into account for the purpose of determining their salary. The Court accepted that promoting the integration into the labour market of young people who have pursued a general education, instead of a vocational training, could be a legitimate aim.⁹¹ In the same line, the promotion of employment can also concern a specific occupation, like, for example, the profession of panel dentist,⁹² university professor,⁹³ judge, prosecutor or notary.⁹⁴

Often, the promotion of employment for younger workers may be put in the more general context of solidarity between generations in the distribution of employment opportunities. In the case-law of the Court, this is certainly the single most important legitimate aim justifying differences of treatment based on age. It essentially means that older workers may have their employment contract terminated (in particular if they are entitled to a pension) and therefore be obliged to leave their jobs to make room for younger workers. Employment being a scarce resource, Member States are in principle free to decide how they manage access to it, for example by regulating the duration of the working life.

As early as in *Palacios*, the Court recognised the legitimacy of the promotion of better access to employment, by means of a better distribution of work between generations.⁹⁵ The same basic idea was regularly used in cases where legislation or collective agreements provided for the compulsory retirement or termination of employment when a worker reaches a certain age.⁹⁶

The Court pointed out that the automatic termination of the employment contracts of workers who become entitled to a pension has existed for a long time in many Member States, such a mechanism being based on a balance struck by public authorities between different considerations and on the choice between prolonging people's working lives or providing for their early retirement.⁹⁷

⁸⁷ Case C-555/07, *Küçükdeveci*, paragraph 39.

⁸⁸ Case C-411/05, *Palacios de la Villa*, paragraph 65.

⁸⁹ Case C-144/04, *Mangold*, paragraph 59.

⁹⁰ Case C-141/11, *Hörnfeldt*, paragraph 29.

⁹¹ Case C-88/08, *Hütter* [2009] ECR I-5325, paragraphs 40-43.

⁹² Case C-341/08, *Petersen*, paragraph 68.

⁹³ Joined Cases C-250/09 and C-268/09, *Georgiev*, paragraph 45.

⁹⁴ Case C-286/12 *Commission v. Hungary*, paragraph 62 and, concerning prosecutors, Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 49.

⁹⁵ Case C-411/05, *Palacios de la Villa*, paragraph 53.

⁹⁶ Case C-411/05, *Palacios de la Villa*, paragraph 69; Case C-341/08, *Petersen*, paragraph 65; Case C-45/09, *Rosenbladt*, paragraph 44; Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 50; Case C-141/11, *Hörnfeldt*, paragraph 28, and Case C-286/12, *Commission v. Hungary*, paragraphs 62-63.

⁹⁷ Case C-411/05, *Palacios de la Villa*, paragraph 69; Case C-45/09, *Rosenbladt*, paragraph 44; and Case C-141/11, *Hörnfeldt*, paragraph 28.

In *Rosenbladt* the Court explained its reasoning in more detail. It declared that the lawfulness of that automatic termination of employment contracts was based on a long lasting political and social consensus, which was based primarily on the notion of sharing employment between the generations.

The automatic termination of employment contracts for workers entitled to a pension is advantageous for both younger and older workers. Obviously, it makes it easier for younger workers to find work, particularly in times of chronic unemployment. But older workers also benefit from such a measure. First, most of them want to stop working as soon as they are able to retire and the pension they receive replaces their salary. Moreover, the automatic termination of employment contracts at a certain age has the advantage of avoiding the dismissal of old workers if they are no longer capable of working, which may be humiliating.⁹⁸

The mix of different generations of employees can also contribute to the quality of the activities carried out, inter alia by promoting the exchange of experience and innovation.⁹⁹ Therefore, establishing an age structure that balances young and older workers in order, inter alia, to encourage the recruitment and promotion of young people, improve personnel management and providing a high-quality service, can constitute a legitimate aim of employment and labour market policy.¹⁰⁰

However, a sign that the discretion for Member States in this respect as recognised by the Court is not unlimited can be found in *Georgiev*. The case concerned Bulgarian legislation providing for the compulsory retirement of university professors when they reach the age of 68 and allowing them to continue working beyond the age of 65 only by means of fixed-term one-year contracts. The plaintiff argued that the alleged aim of encouraging the recruitment of young people was an abstract assertion and the legislation was not aligned with the reality of the labour market concerned, notably because young people were not interested in a career as a professor. The CJEU left for the national court to examine whether the aims asserted by the University and the Bulgarian government did “correspond to the facts”.¹⁰¹

Meanwhile, other social objectives were also accepted by the Court as legitimate aims. Some relate to the general interests of employers, and one relates to the interests of employees.

Rewarding experience that enables a worker to perform his duties better was considered a legitimate aim of pay policy.¹⁰²

In *Andersen* the Court ruled that, since a severance allowance is meant to facilitate it for older employees with many years of service to move to new jobs, the non-payment of that allowance to workers who are entitled to an old-age pension could have the legitimate aim of ensuring that employers do not end up paying a double compensation to long-serving

⁹⁸ Case C-45/09, *Rosenbladt*, paragraphs 43-45. See also Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 50 and Case C-286/12, *Commission v. Hungary*, paragraphs 62-63.

⁹⁹ Joined Cases C-250/09 and C-268/09, *Georgiev*, paragraph 46 and Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 49.

¹⁰⁰ Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 50 and Case C-286/12, *Commission v. Hungary*, paragraphs 62-63.

¹⁰¹ Joined Cases C-250/09 and C-268/09, *Georgiev*, paragraphs 47, 48 and 53. See also, in the context of the examination of the proportionality of the measure, Case C-388/07, *Age Concern*, paragraph 52 and Joined cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraphs 76 to 83.

¹⁰² Case C-88/08, *Hütter*, paragraph 47 and Joined Cases C-297/10 and C-298/10, *Hennigs*, paragraph 72.

employees who have been dismissed (in the form of the allowance and of the pension to which the employer has contributed).¹⁰³

In *Commission v Hungary*, the Court accepted that the lowering of the compulsory retirement age of judges, prosecutors and notaries could have the legitimate aim of equalising the compulsory retirement age of the different professions within the civil service, provided all persons in a specific sector were treated equally.¹⁰⁴ However, in this case, the Court ruled that the measure at stake was neither appropriate nor necessary, since there was no evidence that a less abrupt transition could not achieve the aim of equalisation of retirement ages within the civil service (see below).

Protecting workers' established rights may also be a legitimate aim. This was ruled in *Hennigs*, in the context of a transitional arrangement which replaced an old civil servants' regional pay system, which had been based on age, with a new system based on objective criteria without having regard to age. The result was that the workers who had previously their salaries based on age maintained those salaries, while the new system applied for the future.¹⁰⁵

Finally, in a few cases the Court did not accept that the alleged objectives could be considered a legitimate aim for the purposes of Article 6(1) of Directive 2000/78/EC.

In *Prigge* the Court ruled that the objective of air traffic safety could not justify a different treatment based on age under Article 6(1), but was covered instead by the concept of "public security" under the derogation clause provided by Article 2(5) of the Directive.¹⁰⁶

In *Hennigs* the Court also rejected the argument that higher pay for older employees could be justified by their greater social needs in connection with their social environment. The Court failed to find a direct correlation between the age of employees and their financial needs and even pointed out that, for example, "a young employee may have substantial family burdens to bear while an older employee may be unmarried without dependant children."¹⁰⁷

b) Proportional measures - appropriate and necessary

Article 6(1) requires that the means of achieving the legitimate aims be (i) appropriate and (ii) necessary. The measure in question only complies with the proportionality principle if both conditions are fulfilled. The Court has progressively developed its interpretation of the concept of proportionality. As will be explained below, in its more recent cases the difference between the appropriateness and the necessity of a measure has become clearer.

The Court immediately applied this requirement in *Mangold*, which, as mentioned above, concerned a rule of a German law of 2002 providing for the possibility to conclude freely¹⁰⁸ fixed-term contracts with workers over the age of 52. The Court agreed that the rule had the

¹⁰³ Case C-499/08, *Andersen* [2010] ECR I-9343, paragraphs 27-29. Likewise, in *Odar* (Case C-152/11, paragraph 44), preventing compensation on termination of employment from being claimed by persons who are not seeking new employment, but will receive an old-age pension, was also considered a legitimate aim. The case concerned a redundancy plan which granted to workers older than 54 years of age a smaller amount of compensation as compared to other workers, that amount decreasing progressively on the basis of how close they were to obtaining their retirement pension. This case concerned also indirect discrimination based on disability, see above, section 5.

¹⁰⁴ Case C-286/12, *Commission v. Hungary*, paragraphs 59 and 61.

¹⁰⁵ Joined Cases C-297/10 and C-298/10, *Hennigs*, paragraphs 90 to 92.

¹⁰⁶ Case C-447/09, *Prigge*, paragraphs 58 and 82.

¹⁰⁷ Joined Cases C-297/10 and C-298/10, *Hennigs*, paragraph 70.

¹⁰⁸ Unless there was a close connection with a previous contract of employment of an indefinite duration with the same employer, Case C-144/04, *Mangold*, paragraph 14.

legitimate aim of promoting the employment of older workers, but considered that it was not appropriate and necessary for that purpose.

The Court pointed out that the rule was applicable only on the basis of the workers' age, "regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned" – such as whether or not they were unemployed before the fixed-term contract was concluded and what was the duration of their unemployment. The end result was that a significant group of workers was in danger, during a substantial part of their working life, of being excluded from stable employment. The Court ruled that it had not been shown that the measure was objectively necessary to attain the objective of integration of unemployed older workers.

The Court declared that the "observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued."¹⁰⁹

By the same token, in a later case the Court stated that if a certain measure unduly prejudices the legitimate interests of workers in a given situation, it goes beyond what is necessary to attain the social policy aims pursued by that provision.¹¹⁰ In *Rosenbladt*, the Court specified that in order to examine if that was the case, the measure at issue must be viewed against its legislative background and account must be taken both of the hardship it may cause to the persons concerned and of the benefits derived from it by society in general and the individuals who make up society.¹¹¹

By contrast to *Mangold*, in *Palacios* the Court accepted that a Spanish measure was proportionate and did not unduly prejudice the legitimate claims of workers. The case concerned a rule of a collective agreement providing for the automatic termination of an unemployment contract (i) once the worker reached the normal retirement age giving right to a pension, 65 years, and (ii) provided the worker was then entitled to a full pension. Moreover, the collective agreement had been concluded at regional and sectorial level. The Court considered that the rule at stake was not based on a specific age only but also took into account other elements. It noted also that the social partners could consider the general employment situation and the specific features of the job in question.¹¹²

In *Hütter* the Court developed the concept of an appropriate measure, this time in a situation regarding young workers. As mentioned above, according to the Austrian law in question, periods of employment completed before the age of 18 were not considered when fixing the salaries of contractual civil servants. The Court accepted that the law could have the legitimate aim of encouraging students to pursue a general secondary education rather than vocational education (by not putting the former when they are recruited after completing their studies at an older age at a disadvantage as compared with the latter who complete their studies younger) and also of promoting the recruitment of persons who have had a vocational education rather than of persons with a general education (by avoiding to make apprenticeship more costly for the public sector). However, the Court considered the two aims contradictory, since the legislation could not, "simultaneously, be of advantage to each of those two groups at the expense of the other." The Court concluded that a law containing such a contradiction in terms as to its stated rationale was not appropriate within the meaning of Article 6(1).¹¹³

¹⁰⁹ Case C-144/04, *Mangold*, paragraphs 59-65.

¹¹⁰ Case C-499/08, *Andersen*, paragraph 47.

¹¹¹ Case C-45/09, *Rosenbladt*, paragraph 73 and Case C-286/12, *Commission v. Hungary*, paragraph 66.

¹¹² Case C-411/05, *Palacios de la Villa*, paragraphs 73-75.

¹¹³ Case C-88/08, *Hütter*, paragraphs 44-50.

Later, the Court further refined the concept of appropriateness and ruled that, in order for a measure to be appropriate to attain the objective pursued, it must genuinely reflect a concern to attain it in a consistent and systematic manner.¹¹⁴ In this context, exceptions to a provision of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective that it pursues.¹¹⁵

In *Andersen* the Court distinguished between an appropriate and a necessary measure. The Danish legislation in question provided that employees who worked in the same company for 12 years were entitled to a severance allowance unless they were old enough to obtain a pension. The Court accepted that the rule was appropriate to provide workers with increased protection when they have difficulties to find a new employment and to ensure that employers do not pay a double compensation to employees who have been dismissed. However, if older workers wanted to continue to work, they could not waive their right to a pension and receive the severe allowance. Consequently, those workers could be forced to accept a lower pension than the one they would obtain if they could work longer. Therefore, the Court ruled that the Danish legislation in question unduly prejudiced the legitimate interests of those workers and went beyond what was necessary to reach its own objectives.¹¹⁶ The measure was appropriate, but not necessary.

In *Commission v Hungary*, the Court ruled that the measure at stake was neither appropriate, nor necessary. The case concerned the sudden lowering of the compulsory retirement age of judges, prosecutors and notaries from 70 to 62 years within the period of one year. The Court considered that the measure was not necessary, since there was no evidence that a less abrupt transition could not achieve the aim of equalisation of retirement ages within the civil service. In particular the Court noted that, while the measure in question was applied within the period of one year only, meanwhile the government had enacted legislation raising the retirement age for civil servants in general from 62 to 65 years over a period of 8 years.¹¹⁷ Moreover, the measure was not appropriate to achieve the objective of establishing a more balanced age structure and facilitating the access of young lawyers to the judicial system. In fact, the new retirement age vacated posts for them in the short-term, but, in comparison, decreased their chances of getting a job there in the medium and long term.¹¹⁸

The examples above illustrate how the Court interpreted and applied the requirement of proportionality inscribed in Article 6(1). However, it should be noted that in many cases the Court has accepted that the measures in discussion were proportionate, being appropriate and necessary within the meaning of that provision. In some cases the Court left it for the national court to determine whether or not that was the case.¹¹⁹

8. Conclusion

¹¹⁴ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 85. See also Case C-341/08, *Petersen*, paragraph 53, regarding Article 2(5) of the Directive.

¹¹⁵ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, paragraph 86. See also Case C-341/08, *Petersen*, paragraph 61.

¹¹⁶ Case C-499/08, *Andersen*, paragraphs 45-47.

¹¹⁷ Case C-286/12, *Commission v. Hungary*, paragraphs 69-74.

¹¹⁸ *Idem*, paragraphs 76-79.

¹¹⁹ See, for example, Case C-388/07, *Age Concern*, Case 341/08, *Petersen* and Joined Cases C-250/09 and C-268/09, *Georgiev*.

The case-law of the Court of Justice of the European Union on the two anti-discrimination Directives is relatively recent. However, it has already made an essential contribution to the interpretation and clarification of the Directives' provisions.

The Court has provided guidelines on how to interpret crucial aspects of the Directives, such as: when is discrimination based on association prohibited; the very concept of disability; and the circumstances in which differences of treatment based on age are acceptable.

This importance of the Court's case-law will no doubt increase in the future when it comes to consider issues such as the role of the EU Charter of Fundamental Rights in the interpretation of the Directives, discrimination based on racial and ethnic origin or religion and concepts such as indirect discrimination.

An illustration of the potential for further development of the Court's case-law is the pending case *Kaltoft*,¹²⁰ which discusses whether and under what conditions obesity can eventually be considered a disability for the purposes of the protection afforded under Directive 2000/78/EC.

¹²⁰ Case C-354/13, FOA, acting on behalf of Karsten Kaltoft v Billund Kommune.

Annex III: Provisions on age discrimination in employment and occupation in the Member States

I. Introduction

This annex provides an overview of the most important provisions in the national laws of Member States on age discrimination in employment and occupation. Article 6 of the Directive explicitly allows for justifications of different treatment on grounds of age. Age as a ground of discrimination differs from other protected grounds in the Directive insofar as people all go through different ages during their lifetime and their needs, expectations and circumstances as well as experience and physical and intellectual capabilities change with their age. A certain degree of differentiation based on a person's age – including age limits – is sometimes necessary to reflect the transition from one phase to another (e.g. from work to retirement) or for the protection of certain age groups that are more vulnerable than others. Every person might need the Directive's protection against age discrimination in employment or occupation at a certain point in their life. Therefore it is essential to distinguish between, on the one hand, differences in treatment which are justified on the basis that the measure is a proportionate means to attain a legitimate aim and, on the other hand, discrimination which is unlawful.

The annex¹²¹ is based on: Member States' and stakeholders' replies to Commission's consultation in 2012 and on the Report by the European Network of Legal Experts in the non-discrimination field on "*Age and Employment*", published by the Commission in July 2011.¹²²

II. The general impact of the prohibition of age discrimination in the Member States

In its contribution, AGE Platform Europe underlines that the adoption of the Directive 2000/78/EC in its view has triggered a change of attitude towards older people. An increasing number of employers are bringing retired staff back into the workplace (for instance retired doctors). AGE Platform has found that an increasing number of employees would like to continue working past their normal retirement age. Also, according to their findings, following the adoption of the Directive the general situation of older workers has improved. The concept of age discrimination in employment and occupation was new to the Member States and in many Member States it meant a change in the way employers approached age issues around older and younger workers. For instance, more attention is paid to avoiding stereotype 'age requirements' (like looking for a '*young and dynamic*' colleague) in job vacancy notes.¹²³ In line with discussions about sustainable pension schemes, the Directive triggered debates around extending working life and postponing retirement. Some Member States have abolished mandatory retirement age in this context and encourage working longer. Moreover, some Member States have changed their legislation in order to allow workers receiving pension to earn some income on top without losing part of their pension entitlement.¹²⁴ Age discrimination plays a role in national case-law and also has yielded a large number of cases before the Court of Justice of the European Union.

¹²¹ This annex presents Member States' provisions as reported by Member States without providing a legal assessment of their compliance with the Directive. In case the Commission comes to the conclusion that such a provision is not in line with the Directive it will take appropriate measures.

¹²² Prepared for the Commission by Declan O'Dempsey and Anna Beale from the European Network of Experts in the non-discrimination field, available at: http://ec.europa.eu/justice/discrimination/files/age_and_employment_en.pdf

¹²³ This was also underlined by AGE in its contribution of 5 February 2013, referred to as the 'Report on Age and Employment' available under www.age-platform.eu

¹²⁴ For instance BE and MT.

1. Exceptions under Article 6(1)(a) of the Directive: specific conditions for younger or older workers as regards access to employment and occupation¹²⁵

All Member States introduced specific provisions or measures for younger and/or older workers. As regards younger workers, some Member States provide for special assistance to young job-seekers (IE, HU, FI), some provide for financial incentives for employers (BG, ES, IT, RO) or have introduced special legal measures increasing the level of protection (HU, LT). Moreover, Member States have decided to adopt legal measures aimed at facilitating access to the labour market through a lower degree of protection ranging from the admissibility of lower wages to a total exemption from anti-discrimination rules (BE, DK, IT and UK).

As regards older workers, some Member States provide for financial incentives for employers (ES, IT, MT, RO), or other measures, as for instance additional leave (BE, BG, DE, EE), options for part-time work (BE, SI) or rules on termination of employment (HU).

The Directive, in Article 6(1)(a), allows for differences of treatment with regard to, among others, special conditions for young people and older workers, if these differences are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.¹²⁶

a) Younger workers:

Younger workers enjoy the special protection of Council Directive 94/33/EC of 22 June 1994 on the protection of health and safety of young people at work as regards, in substance, working time, rest periods and night work.¹²⁷ Many measures reported by Member States in their contributions are measures to ensure compliance with Council Directive 94/33/EC and will therefore not be mentioned here.¹²⁸

Apart from the protection provided by Directive 94/33/EC, Member States have transposed Article 6(1) of Directive 2000/78/EC by introducing a justification clause for different treatment on grounds of age. In addition, some Member States have adopted special measures to help integrate younger people in the employment market.

Among others, a lower salary is permissible in **Belgium** for workers between 15 and 18 years.

In **Bulgaria**, employers are reimbursed by the State for the salary costs of employees under the age of 29 for the first year (and for six months in case of an internship or apprenticeship).

Denmark gives the right to impose special rules on remuneration for workers under the age of 18 years to partners of collective and other agreements in order to support the integration of younger workers in the labour market. It exempts younger people under 15 years of age from

¹²⁵ As regards caring responsibilities: Some Member States ensure that workers with caring responsibilities enjoy special protection (Ireland protects carers with a set of special provisions, Poland ensures special protection to parenthood, Rumania grants special financial benefits to employers employing single parents and Slovakia provides for special protection as regards remuneration and dismissal of persons with carer responsibilities).

¹²⁶ As regards difference of treatment with regard to Article 6(1) (b) and (c), these will be treated under point 7 of this annex.

¹²⁷ The aim of this Directive is to lay down minimum requirements for the protection of young people at work. The directive gives legal definitions for the terms "child", "adolescent", "young person", "light work", "working time" and "rest period" and obliges Member States to take the necessary measures to prohibit child labour.

¹²⁸ See more details in this respect on Member State's measures in the Report 'Age and Employment', page 32-34.

the prohibition of age discrimination if the employment is not regulated by collective agreement.

Spain has measures to support the training and employment for people under 25 years in the form of partially subsidised contracts, for example on job-training and for contracts of indefinite duration.

Ireland has a training program for early school-leavers in order to improve their employability.

Italy provides for a financial incentive for the employer in case of employment of young workers between 18 and 29 years who are unemployed for at least 6 months or have no school degree. Moreover, in **Italy**, labour law provides an extensive number of legal exceptions to in order to promote the employment and vocational training of young people. Not all of these rules provide for more favourable treatment but instead allow a reduction in salaries or a lower degree of protection as a policy to increase youth employment.

Lithuania provides that for people under 18 years no probation work period can be set.

Hungary reports that young workers under 18 years benefit from an additional holiday entitlement of 5 days and training is funded for disadvantaged people under 25 years.

Romania has a financial stimulus program for young graduates and unemployed people who are single-parents.

Slovakia has special conditions in place for access to employment, remuneration and dismissal of persons under 18 years, such as, for instance, the obligation on the employer to create a favourable work environment for the professional development of the young employee.

Finland has adopted a special set of targeted measures, particularly a measure called 'Youth Guarantee' ensuring that everyone under the age of 25 as well as recent graduates under the age of 30 years will be offered work, education or rehabilitation measures. For school-leavers there is a place guaranteed in further education.

The United Kingdom reports of specific pay structures for workers under 21 years. For instance, the national minimum wage is paid at three different levels based on the respective age of the worker. As a consequence, employers may have to pay employees aged 22 a higher minimum wage than those under 21 years even where they are doing the same job.

b) Older workers:

Belgium encourages recruitment of older workers by providing pay subsidies in specific cases. In addition, for workers over 55 it is easier to reduce working hours.

Bulgaria provides for the employer to be reimbursed the first year's salary when he or she hires a person over 50.

Germany provides for an additional day's leave for public sector workers over 55, by way of the Collective Agreement in Public Service.

Estonia grants extended annual leave to older workers.

Spain has put in place measures to support training and employment for older workers by subsidising pay.

France in 2009 adopted a National Action Plan requiring, among others, the setting of a minimum quota for employees over 50 in the context of collective agreements. Failure to comply with that quota can be subject to pecuniary sanctions.

Croatia has a general rule providing that special privileges granted to older workers are not deemed to constitute discrimination.

Italy provides for a financial incentive for the employer by reducing his social security contributions by 50% in case he employs a worker not younger than 50 years and unemployed for at least 12 months.

Hungary provides for restrictions on employers' ability to terminate employment contracts of workers within the 5 years preceding their retirement. In addition, heavy physical work for workers over 45 is prohibited. Employers who offer jobs to workers over 50 years are subsidised.

Malta has set financial incentives for employers hiring those over 40 and it offers special training courses for unemployed over 40 years of age.

Poland, in 2012, repealed provisions which obliged or allowed an employer to terminate employment only on the grounds of an employee reaching pensionable age.

Romania provides financial support for employers (tax incentives) hiring unemployed workers over 45.

Slovenia provides special protection for workers over 55, for example, an option to work part-time and no obligation to work nights. Also, the law provides for special protection of workers over 55 (men) or 51 (women), with regard to the length of working hours.

2. Exceptions under Article 6(2) of the Directive as regards age requirements in occupational social security schemes

21 Member States have introduced a general exception clause in occupational social security schemes allowing for a difference in treatment based on age.¹²⁹ Of those, 8 Member States explicitly report on age being used as a criterion for actuarial calculations in occupational social security schemes.¹³⁰

Article 6(2) of the Directive allows for a difference of treatment on grounds of age in occupational social security schemes in terms of the fixing of ages for admission or entitlement to benefits and the use of age criteria in actuarial calculations, if this does not result in discrimination on grounds of sex.

5 Member States have no exception clause in place, namely France, Lithuania, Malta, Portugal and Slovenia.¹³¹

21 Member States have reported that they have a general exception clause in their national laws for difference in treatment on grounds of age in occupational social security schemes, corresponding with Article 6(2) of the Directive. Not all of those Member States have given further details as to the content of these exceptions.¹³² Of those, 8 Member States have

¹²⁹ BE, BG, CZ, DK, DE, IE, EL, ES, HR, IT, CY, LV, LU, NL, AT, PL, RO, SK, FI, SE and UK.

¹³⁰ BE, DK, IE, HR, IT, CY, LU, NL.

¹³¹ Hungary's answer is not clear in this respect.

¹³² Only BE, BG, CZ, DK, DE, IE, EL, ES, HR, CY, LV, LU, NL, AT, PL, RO, SK, FI, SE and UK.

reported that they explicitly allow for the use of actuarial factors in occupational social security schemes.¹³³

Bulgaria reports of different age requirements regarding access to social insurance schemes for some groups of civil servants. **Estonia** reported that it has no occupational social security schemes in place.

3. Particular difficulties in implementing Article 6 of the Directive

In general, most Member States did not report any particular difficulties in implementing or applying Article 6 of the Directive. However, many Member States report that national case-law is evolving around age issues.

Denmark, Germany and **Ireland** observed that in general the most problematic cases concerning Directive 2000/78/CE at national level deal with questions of age, Germany particularly referring to age-differentiated amounts of severance pay and insolvency-proof entitlements to an occupational pension.

In **the United Kingdom**, the national default retirement age allowing employers to force an employee to retire was challenged before the Court of Justice,¹³⁴ which resulted in the abolition of a default retirement age as of April 2011.

4. Comprehensive screening of laws or collective agreements in order to detect potential age discrimination in areas covered by the Directive

6 Member States carried out such screenings or report of special procedures to follow up on possible age discrimination.¹³⁵ In **Germany**, pension schemes and collective agreements are checked regularly. 15 Member States did not carry out any comprehensive screenings.¹³⁶ 5 Member States did not reply to the question.¹³⁷

In **Denmark**, in connection with the implementation of the Directive, a review of the applicable legislation was carried out in the Government in order to ensure compliance with the prohibition of age discrimination. As a result, a law providing for higher compensation in case of the unreasonable dismissal for people over the age of 30 years was identified as needing further assessment.

Germany has not carried out a survey but reports that pension schemes and collective agreements are checked regarding compliance with Directive 2000/78/EC whenever the occasion arises, for example in the context of court actions.

Ireland refers to an assessment carried out before adapting its laws in order to ensure compliance with Directive 2000/78/EC.

In **Estonia**, a study on the situation of older workers in the employment market was commissioned and carried out by the University of Tartu¹³⁸ providing for advice as to how to keep older workers in the employment market.

¹³³ BE, DK, IE, HR, CY, LU and NL.

¹³⁴ Case C-388/07, Age Concern.

¹³⁵ DK, EE, IE, NL, PL and SE.

¹³⁶ BE, BG, CZ, ES, HR, LT, LU, MT, AT, PT, RO, SK, SL, FI and UK.

¹³⁷ EL, IT, HU, LV and CY.

¹³⁸ 'The elderly in the labour market', 2012, direct link (executive summary in English on page 69): http://www.sm.ee/fileadmin/meedia/Dokumendid/Toovaldkond/uuringud/Vanemaaelised_t%C3%B6%C3%B6turul_l%C3%B5ppraport.pdf.

France regularly presents measures linked to age in its annual report about collective agreement negotiations. It reported that in order to receive the necessary agreement from the responsible Ministry a collective agreement has to provide, among other things, for a numerical target as regards maintaining posts for or recruitment of older persons.

The **Netherlands** published a comprehensive report¹³⁹ by all ministries concerned in order to have an overview about all age limits applying in their respective areas. In case age limits applied, a short explanation to justify the measure was included in the report.

Poland refers to a survey of laws carried out in 2012 in the context of adapting pensionable age in social security pensions and the intention to raise and also to equalise the pensionable age of women and men by 2040.

Sweden reported that it had carried out a detailed review of age limits in labour law legislation before adopting new laws in order to ensure compliance with the prohibition of age discrimination in Directive 2000/78/EC. The Government came to the conclusion that statutory age limits should not be considered age discrimination.

5. Non-mandatory and mandatory retirement age

18 Member States have abolished mandatory retirement ages in the context of transposing the Directive or had done so already before.¹⁴⁰ 8 Member States have a mandatory retirement age in place.¹⁴¹ The mandatory retirement age as well as pensionable age in Member States that have abolished mandatory retirement varies between 60 and 70 years. 2 Member States have not replied to this question.¹⁴²

General remarks:

Mandatory retirement¹⁴³ applies where a worker, after having reached a certain age, is not any more allowed to work. There is a general tendency among Member States to raise mandatory retirement ages where they exists or to encourage working longer by incentives as regards special pension increases (Italy). The age of 65 years seems to be the general guideline for Member States, some of them going beyond. This tendency to retire around 65 years of age can also be seen in the Member States which do not have a mandatory retirement age in place.

Non-mandatory retirement/pensionable age:

Some of the **18 Member States that have abolished mandatory retirement** age (see above) have in place a general pensionable age which is linked to the right to receive statutory pension entitlements.

In the **Czech Republic**, the current pensionable age is 60 for men and between 53 and 57 years of age for women depending on how many children they have had.

In **Denmark**, pensionable age is set at 67.

In **Ireland**, pensionable age is set at 65.

¹³⁹ <https://zoek.officielebekendmakingen.nl/dossier/28170/kst-28170-28-b1?resultIndex=48&sorttype=1&sortorder=4>
(in Dutch).

¹⁴⁰ BG, CZ, DK, EE, IE, EL, ES, FR, IT, LV, LU, NL, PL, SL, SK, FI, SE and UK.

¹⁴¹ DE, HR, HU, LT, AT, PT, RO and SE.

¹⁴² BE and CY

¹⁴³ Part 5 of this annex concerns statutory pension only.

In **Greece**, general pensionable age is currently set at 62 provided that that person has spent 40 years in employment; otherwise it rises accordingly up to 67.

As of 2012, in **Spain**, the mandatory retirement clauses provided for in many collective agreements in the past have been declared legally null and void in the context of reforming the labour market.

In **France**, the general pensionable age is between 65 and 69. At the age of 70 years, an employer may dismiss an employee on grounds of age without this being considered unlawful age discrimination.

In **Latvia**, general pensionable age is currently 62 but will be raised gradually until it reaches 65 in 2025.

In **Luxembourg**, the general pensionable age is 65. However, the worker may decide to stay in his or her post until the age of 68. Employment contracts are allowed to provide for automatic termination at the (pensionable) age of 65.

In **Slovakia**, workers have a general right to retire at the age of 62.

In **Sweden**, the right to the basic pension scheme – “guaranteed pension” – requires the beneficiary to be 65.

In some Member States, pensionable age is different for men and women, which is allowed in statutory pension schemes pursuant to Directive 79/7/EEC.¹⁴⁴ In this sense, **gender-differentiated general pensionable ages** in statutory pension schemes are in place currently in **Italy, Poland, Slovenia, Slovakia and UK**.

In **Italy**, the pensionable age for men and women is currently being gradually equalised: in 2018 men and women will be able to retire at 66 (but may continue to work until 70).

In **Poland**, the general pensionable age is 60 for women and 65 for men.

In **Slovenia**, the general pensionable age is 65 and in some specific circumstances it is 63 for men and 61 for women.

In **Slovakia**, pensionable age is rising from 53 to 57 for women and from 60 to 62 for men. In 2014, it will be set at 62 years for both women and men.

Finland has a flexible pensionable age of between 63 and 68 for both sexes.

In the **United Kingdom**, state pension is payable at 60 for women and 65 for men, although this will be equalised at 65 by November 2018 (and gradually increased to 68 by 2046).

Mandatory retirement age in detail:

In **Germany**, statutory pension schemes are based on a standard retirement age at 65 which as of 2012 is rising to 67 depending on birthdates.

In **Ireland**, the statutory mandatory retirement age is 65. However, individual employment contracts may provide for a lower age of retirement. Also, for positions established by law (i.e. public servants) a mandatory retirement age (normally 65) is often set.

¹⁴⁴

Council Directive 79/7/EEC of 19 December 1979 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

In **Croatia**, there is a mandatory retirement age of 65. However, under certain conditions employment can be extended.

Hungary provides for a mandatory retirement age in statutory social security pension schemes, which is currently 62 and will rise to 65 by 2022.

Malta's mandatory retirement age is currently 60 and will increase to 65 by 2026.

In **Portugal**, the mandatory retirement age is 70.¹⁴⁵

Some Member States provide for **gender-differentiated mandatory retirement ages** allowed under Directive 79/7/EEC. These are in place in Lithuania, Austria and Romania. However, Lithuania and Austria have adopted legislation to equalise pensionable age for women and men in statutory pension schemes

In **Lithuania**, currently the mandatory retirement age is 60 for women and 62 for men. As of 2026, the general mandatory retirement age will be 65.

In **Austria**, currently the mandatory statutory retirement age is 60 for women and 65 for men. This age will be equalised by 2033, when the pensionable age will be 65 for both sexes.

Romania currently provides for a gender-differentiated statutory retirement age of 59 for women and of 63 for men, which will be gradually increased to 63 for women by 2030 and to 65 for men by 2015.

6. Mandatory retirement age for specific professions (predominantly civil servants)

23 Member States have a set of mandatory retirement rules in place for specific professions, mostly for the civil service. However, **Denmark, Luxembourg, Malta and Sweden** have not adopted additional rules for the mandatory retirement age for specific professions. In **Spain**, civil servants are obliged to retire at the age of 65, but may request an extension until the age of 70.

Many Member States provide for a mandatory retirement age for public servants. The highest mandatory retirement age for civil servants is currently in place in **Italy and Portugal** where it is set at 70.

In **Germany and Greece**, retirement for civil servants is obligatory at the age of 67.¹⁴⁶

The majority of Member States which have a mandatory retirement age in place have set it around 65 for the general civil service and at an earlier age for certain particularly challenging positions (e.g. police, prison officers, etc).

In **Belgium, Ireland**,¹⁴⁷ **France**,¹⁴⁸ and **Austria** there is a mandatory retirement age of 65 for civil servants. In addition **Ireland** sets an earlier mandatory retirement age of 60 for the national police.

¹⁴⁵ In PT, the retirement age is 65 with the option to increase pension benefits by working up unto the age of 70 years.

¹⁴⁶ In DE, for police officers under certain conditions retirement age is 62. In Greece, retirement is obligatory at 67 but can be taken earlier with reduced benefits after having been in service a certain amount of years. In Greece there are some further exceptions for special professions.

¹⁴⁷ Some exceptions apply to police, pilots (between 60 and 65) and judges (between 70 and 72) or fire-fighters.

¹⁴⁸ In FR, it will in general slowly be prolonged to 67 years. However, it is 55 years and will be prolonged to 57 years for non-sedentary categories of workers.

Bulgaria has a mandatory retirement age of 60 for certain positions in the civil service and of 65 for judges and prosecutors.

In the **Czech Republic**, there is a mandatory retirement age for judges and public prosecutors, whose office is terminated 'ex lege' at the end of the year in which they reach 70 years of age.

In **Denmark** contracts and collective agreements can set a mandatory retirement age. However, Denmark has no register of the relevant legal provisions and collective agreements in this respect and underlines that in public administration there is in general no mandatory retirement age.¹⁴⁹

In **Estonia** police officers have to retire between the ages of 55 and 60 and prison officers have to retire between the ages of 58 and 60.

In **Spain**, civil servants are required to retire at the age of 65 but may request to continue working in which case they may continue until the age of 70. Judges, prosecutors, notaries, bailiffs or university professors may continue working until the age of 70.

In **Croatia**, the mandatory retirement age for judges and public prosecutors (including their deputies) is 70.

In **Italy**, retirement is mandatory for civil servants at the age of 70.¹⁵⁰

Cyprus provides for a mandatory retirement age of 63 for civil servants and of 60 for teachers.

In **Latvia**, which otherwise has no general mandatory retirement age, and in **Lithuania**, judges have a mandatory retirement age of 70 and 65 respectively which in Lithuania also applies to diplomats, bailiffs and prosecutors.¹⁵¹

In **Luxembourg**, there are some exceptions from the general pensionable age of 65 for the public sector, in that staff may retire early. In general, civil servants may retire at the age of 60 years after 30 years of service or at 57 years after 40 years of service. In addition, members of the police force may retire between the age of 55 and 60.

In **Hungary**, there is currently a mandatory retirement age for civil servants of 62 which will gradually increase to 65 by 2022. However, a civil servant may request to continue working beyond this age and the employer may agree to that request if it is in the official interest until that civil servant reaches the age of 70.

The **Netherlands** has, among others, a specific retirement age of 56 for pilots,¹⁵² of 65 for notaries and a lot of detailed regulations for retirement ages for specific professions.¹⁵³

In **Poland**, border guards have a specific retirement age of between 55 and 60 which is calculated according to grade.

¹⁴⁹ For instance, mandatory retirement for teachers at the age of 70 has been abolished.

¹⁵⁰ IT reports however that for judges, priests, rural deans and bishops the mandatory retirement age is 70 and is 60 years for air traffic controllers and fire ambulance staff in some cities.

¹⁵¹ Similar rules also apply to other state officials, particular professions (pilots, ship captains, etc.) as well as the head of administrations of universities and other educational or scientific institutions.

¹⁵² 60 years in the event of reduced working hours.

¹⁵³ The survey with detailed information is publicly accessible (in NL):

<https://zoek.officielebekendmakingen.nl/dossier/28170/kst-28170-28-b1?resultIndex=48&sorttype=1&sortorder=4>.

Romania has a mandatory retirement age of 65 for physicians, nurses, midwives, teachers, male lawyers and research staff.¹⁵⁴ Female lawyers have to retire at 60 years of age.

Slovenia has regulated mandatory retirement age in sectorial laws, like for example the Judicial Service Act setting the retirement age for judges at 70.

In **Slovakia**, university teachers have a mandatory retirement age of 70, whereas for judges and prosecutors it is 65 and for police officers it is 55.

Finland¹⁵⁵ has a mandatory retirement age of 65 for some groups of public servants, for example judges and university professors.

The **United Kingdom** has set a specific mandatory retirement age for national air traffic staff of 60, for fire fighters of 65, for judges of 70 years and for the police of 55.

7. Minimum/maximum entry ages for certain professions

27 Member States have provisions in place specifying a minimum or maximum entry age for special professions, mostly in the public service, or for allowing for the adoption of such provisions (Italy). There is a large diversity between Member States as to the prevalence of such requirements. Member States, in their replies to the questionnaire, often mentioned some examples. **Malta** has no such provisions in place at all.

Article 6 (1) (b) and (c) of the Directive allows for maximum and minimum conditions of age for recruitment. For maximum recruitment ages this is allowed on condition that the provisions are based on training requirements of the post in question or the need for a reasonable period of employment before retirement. Below, some examples given by Member States are mentioned

Belgium has a lot of special provisions in place. As an example, Labour Court judges must be at least 25 years old, judges in the Labour Courts of Appeal and lay judges sitting in Commercial Courts must be at least 30 years old, '*juges de paix*' (lowest-level judges) and Police Tribunal judges must be at least 35 years old and Constitutional Court judges must be at least 40 years old when they take office.

Germany¹⁵⁶ has set a plethora of exceptions which includes a maximum entry age for federal police staff depending on the position (between 28 and 42 years). Furthermore, in general, for public service a candidate aged over 40 has to be approved by the Federal Ministry of Finance. A Federal judge must have a minimum entry age of 40. The Federal Ombudsman for data protection must have a minimum entry age 35.

In **Estonia**, a Chief Public Prosecutor has to be at least 21 years old. Otherwise, there are very few age-related requirements in place. For instance, for judges there is no minimum or maximum entry age.

In **Ireland**, several minimum and maximum entry ages apply. For the national police it is set at between 18 and 35 years.

¹⁵⁴ In some cases, it is possible to continue working, under certain conditions.

¹⁵⁵ FI has not replied to this question; information was taken from the employment report.

¹⁵⁶ Previously existing age limits for recruitment to the civil service were abolished in 2009.

In **Greece**, exceptions include a maximum entry age of 40 for court bailiffs and of 35 for staff of the Foreign Service.¹⁵⁷ Diplomats have to retire between 60 and 65 depending on years of effective service.

In **France**, aeroplane pilots and police force commissioners must be at least 35 when they start. For magistrates, the maximum entry age ranges between 31 and 48 years depending on prior professional experience and the form of competition taken for a specific post. Otherwise, France has repealed many of its age-related limitations to public service in recent years.

Croatia has a maximum age requirement of 30 for entry into the police and fire services.

In **Italy**, each public body in principle is free to provide a specific age limit by issuing a special decree. Currently, for judges and prosecutors there is a maximum entry age of 40 and a minimum of 21. For notaries the minimum entry age is 21 and the maximum is 50. For fire-fighters the minimum entry age is 18 years and the maximum is 30. For diplomats, an maximum entry age of 35 exists.

Latvia has set the minimum entry age for judges at 30 and for bailiffs, notaries and prosecutors at 25. It has minimum entry age of between 18 and 35 for the police service.

In **Lithuania** there is a minimum entry age for civil servants of 18, which is modified for the custom service to 21. There are other exceptions in place for ship captains, pilots and state services (judges, bailiffs, notary, members of parliament, members of municipal councils, etc.).

In **Luxembourg** there is a minimum entry age of 25 for judges, prosecutors and notaries. The maximum entry age for fire-fighters is 28.

In **Hungary** there is a minimum entry age for judges of 30; for judges of the Constitutional Court of 45; for the armed section of the police, the prison services and the customs service of 35.

In the **Netherlands** there is a maximum entry age of 35 for fire-fighters and a minimum entry age of 18.

In **Austria**, a professional fire fighter in Vienna needs to be at least 20 years of age to start working and can no longer be recruited in this profession after the age of 26.

In **Poland** there is a maximum entry age of 35 for border guards. For judges, there is a minimum entry age of between 29 and 40 (depending on the level of court). For prosecutors and notaries there is a minimum entry age of 26.

Portugal has set certain maximum entry limits for police staff.

Romania has set a minimum entry age of 18 for a security guard.

In **Slovenia** there is a minimum entry age of 30 for judges.

Slovakia has various exceptions including a minimum entry age of 30 for judges, of 25 for a prosecutor and of 40 for the general prosecutor.

Sweden has very few age requirements in place. Also, maximum age limits are few. But, for instance a pilot should not be older than 23 years old when he or she starts the training.

¹⁵⁷

In this respect, the Commission has opened an infringement case in the past. Also, for lawyers and bailiffs a maximum entry age of 35 years applies. In this respect the Commission has contacted the Member State.

In **the United Kingdom** there are various exceptions including minimum entry ages of 18 for pilots, fire-fighters, betting-office managers, bus drivers and croupiers; of 21 for train drivers and of 18-21 for flight attendants.

8. Derogations for armed forces

All Member States have made age-related derogations or special age-requirements for the armed forces, mostly as regards retirement age and specific entry age conditions. 11 Member States have reported that they have general exemptions from the ban on age-related discrimination for the armed forces,¹⁵⁸ some of them without giving further details as to any specific age requirements in that context.

The Directive, in Article 3 (4), allows Member States to provide for a general exemption on the ground of age in the armed forces. In addition, Article 6 (1) (b) and (c) of the Directive allows for minimum and maximum ages for recruitment and in relation to the latter this is expressly allowed in order to fulfil the need for a reasonable period of employment before retirement.

The **Czech Republic, Denmark, Cyprus, the Netherlands, Slovakia and the United Kingdom** allow for a general exemption from the ban on age-related discrimination for the armed forces without having given further details as to any specific age requirements in this context.

Belgium has set a general maximum entry age for the armed forces of 34.

Bulgaria has set maximum entry age limits of between 32 and 40, depending on the grade, and mandatory retirement between 45 and 60, again depending on the grade.

Germany has made a general exemption from the ban on age-related discrimination for the armed forces in order to set specific age-requirements for its military staff.

Estonia has set a mandatory retirement age of between 50 and 60 for its armed forces and a minimum entry age for higher and senior officials of 21 (for instance a maximum entry age of 30 for military court secretaries).

Ireland has made an explicit derogation as to age discrimination for the armed forces. There are maximum entry ages set for the Army and Air Corps of 25, for the Naval Service of 27 and for the Air Corp Apprenticeship of 19. There is a mandatory retirement age of between 50 to 56 depending on grade.

Greece has in place a general derogation and applies, for example, a maximum entry age of 27 to 35 for military judges and of 30 for military court secretaries.

In **Spain** the maximum entry age varies between 20 and 36, depending on the grade of the position sought and the qualifications required.

France applies, depending on grade, a mandatory retirement age of between 55 and 62 to its military staff.

In **Croatia**, a general exemption applies. A person can be admitted to active service as a soldier if not older than 27.

¹⁵⁸

CZ, DK, IE, EL, FR, HR, CY, MT, NL, SK and UK.

In **Italy**, the Decree transposing the Directive does not affect the validity of special rules presently in force for the armed forces in relation to age. Italy has set an entry age for military schools of between 15-17 for general education and of 17 -26 years for marshals.

Latvia applies a mandatory retirement age of between 45 and 60 for military staff in active service and of 65 for reserve staff and maximum entry ages of 27, 35 or 40 years depending on the seniority for admission to military education establishments.

In **Lithuania**, reserve and active military service ends at the age of 55. There are also maximum entry ages in place depending on the grade.

In **Luxembourg** there is a maximum entry age of 24 for an army soldier.

Hungary applies a maximum entry age of 47 to its military service.

Malta has adopted a general exemption from the prohibition of age discrimination in its armed forces. It has set maximum entry ages for the armed forces of between 25 and 30.

In the **Netherlands** a general exception clause applies as regards age discrimination in the armed forces.

In **Poland** the mandatory retirement age for professional soldiers is 60 and under certain conditions is 63.

In **Portugal** the mandatory retirement age for military staff is 65. The maximum entry age is between 24 and 30 for contract staff and permanent officers. For the navy or air force the maximum entry age is set at 32 and 33 respectively.

Romania has set a maximum entry age of 35 for active military sub-officers and of 28 for entrance exams leading to vocational military training.

Slovenia has set maximum entry ages of between 25 and 30 depending on the position sought.

In **Finland**, although there is no derogation from the provisions of the national anti-discrimination law in place, age-related differential treatment is not expressly prohibited for military staff.

Sweden has not provided for any exemptions to the applicability of the age-related anti-discrimination laws but has special age-requirements in place.

III. Conclusions

The Directive has led to changes in the Member States as regards awareness around issues of age discrimination. A growing body of national case-law and of case-law of the Court of Justice of the European Union has clarified various issues.

As regards national legislation, most of the age-related changes in recent years have taken place around retirement age and around specially targeted measures for younger and older workers.

The vast majority of the Member States have decided to abolish mandatory retirement ages in order to improve the sustainability of their social security systems. This might also help to

change stereotypes as regards the performance of older workers and to make the best use of their skills.

High unemployment among younger and older workers together with the economic crisis, longer life expectancy and demographic changes [have led to special protection and] have made it necessary to provide for special measures to keep or reintegrate these workers in the employment market and to encourage longer working lives.

Recent research on the work performance of older employees shows that employers are generally reticent to employ older workers although their performance can increase with age, particularly where work requires specialist knowledge¹⁵⁹ and their productivity and reliability is generally better than younger workers.¹⁶⁰

Therefore, in the area of age discrimination the Directive and the national implementation measures can be used to further assist the removal of remaining prejudices and discrimination. Together with developing national and EU case-law and awareness-raising initiatives this will help to further clarify the circumstances in which difference of treatment based on age may be justified.

¹⁵⁹ <http://www.securex.be/fr/detail-page/Presse-Les-travailleurs-plus-gs-sont-ils-dpasss-/>

¹⁶⁰ <http://www.themenportal.de/unternehmen/jung-und-alt-im-vergleich-wer-zeigt-die-zuverlaessigeren-leistungen-94917>