

Conference:

The Fight against discrimination: the race and employment directives

Background information for the presentation on age discrimination
“Prohibition of Age Discrimination: Issues Arising in Practice”

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Handout age discrimination

(Reasons to combat age discrimination: human rights)



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(picture from a UK action against age discrimination)

(Reasons to combat age discrimination: economic)

Labour participation and age in the Netherlands, 1998

Age	% of male working population that works	% of female working population that works	Whole working population
15 - 19	22	18	20
20 - 24	62	60	61
25 - 29	89	74	82
30 - 34	93	63	78
35 - 39	92	57	75
40 - 44	92	57	74
45 - 49	89	53	72
50 - 54	86	43	65
55 - 59	63	24	44
59 - 64	19	6	12
Total	75	49	62

(These are percentages of all people in that age category)

The percentage of 55+ people who are working in other countries show similar figures.

EU-Lisbon summit: labour participation of older workers (55 – 64 year old) within EU should be 50% in 2010. At present only Sweden, Portugal, Denmark and UK have reached this target.

“Anti-discrimination history” of EU

- 1957 Treaty of Rome – article 119 (equal pay of men and women)
- 1971 Defrenne vs Sabena: Belgium Court asks preliminary ruling at ECJ
- 1976 ECJ states : article 119 had direct vertical effect!
 Since then: many cases, and: direct and indirect discrimination under article 119
- 1975 First directive on sex discrimination: equal pay men and women.
 (scope beyond article 119 and: legal framework required)

Since then: 10 more directives and also revision of existing directives

- 1997 Treaty of Amsterdam, article 13 (race, religion or belief, sexual orientation, age, disability)
- 2000 directive on race (2000/43)
 directive on employment (2000/78)
- 2004 concept-directive on gender (goods and services)

History of European Union – enlargement process

- 1957 France, Germany, Italy, Belgium, Netherlands, Luxemburg
- 1973 Ireland, UK, Denmark
- 1981 Greece
- 1986 Portugal and Spain
- 1995 Austria, Finland, Sweden
- 2004 Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia
- 2007 Bulgaria and Romania (and Croatia ?)
- ?? Turkey

Legal provisions to combat age discrimination
(other than Directive 2000/78)

Article 26 International Convention on Civil and Political Rights (since 1976)

"All Persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status."

Article 1 of the 12th protocol of the European Convention on Human Rights (into force since 1-4-2005)

General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Principles of equality and non-discrimination clauses in national constitutions

Non legal provisions

Charter of fundamental rights of the European Union
(a solemn proclamation, december 2000, now part of European concept-Constitution)

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion of belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

**Member States with legislation against age discrimination
before the directive (2000) (Information on EU 15 only)**

Within EU

Ireland – Employment Equality Act (1998)

Belgium – no maximum age for recruiting personnel

Some countries had proposals for legislation (Belgium 1999, The Netherlands 1997)

Many countries had anti-discrimination provisions in their Constitutions
e.g. The Netherlands, Sweden, Greece, Portugal, Spain,

Many member states had special measures for older employees

- protection at business related redundancies
- bonuses for hiring 50+ (or 55+) workers
- health insurance coverage for over 55

Outside EU

Specific Age discrimination legislation in

USA, Ontario (Canada), some states in Australia, New Zealand.

Proposals in: South Korea (employment) and Australia (goods and services)

Impact of Directive 2000/78 on age

Age treated differently than belief and sexual orientation

- 3 years extra for member states (article 18) – also for disability
- direct discrimination can be justified (article 6)
- armed forces (article 3.4)
- national legislation for public safety etc (article 2.5)

Application: all persons, both public and private sectors including public bodies. Big AND small enterprises. Colleagues.

Definition: age is not defined.

Why is this an issue?

1. this means it is not about elder people (but the Directive is partly argued by that e.g. see Recital 6) but about everybody with an age
2. No under or upper limit allowed?
3. is there a difference between calendar-age or cohort-age? E.g. Age related to life expectancy/pension age or age related to stereotypes?
4. what is "age difference"??? 2 years? 6 years? 8 years? 10 years?

Scope: employment "from A to Z"

What is forbidden? direct discrimination, indirect discrimination, harassment and instruction to discriminate

Article 6: justification of differences of treatment on the ground of age

(...) Member States may provide that differences of treatment on the ground of age shall not constitute discrimination when they are objectively and reasonably justified by a legitimate aim (this can be employment policy, labour market objectives, vocational training objectives) and if the means of achieving that aim are appropriate and necessary.

Examples of this mentioned, but they still have to be tested!

Three elements to undo the forbidden character of an age limit:

1. legitimate aim (if not: age discrimination!)
2. means are appropriate (if not: age discrimination!)
3. means are necessary (if not: age discrimination!)

Other exceptions on age:

Article 4: genuine occupational requirement

Article 3.4: armed forces

Article 6.2: social security schemes – ages of admission and entitlement

Also very interesting: article 16!

"Member States take measures to ensure that any law, regulations (...) contrary to the principle of equal treatment are abolished"

Article 18: direct vertical effect from 3-12-2003 onwards?

To put your mind at ease:

Recital 17: nobody has to employ incompetent workers!

Transposition of Directive to national law: choices for member states

- scope of ban on age discrimination – employment of beyond? (e.g. also goods and services) Directive is minimum! (preliminary remark 28)
- relation to existing anti-discrimination law. Same protection level for age? Integration of discrimination ground age into existing law? Or separate law for age?
- exceptions: open or closed system?
- provision for positive action for age? (article 7 enables this)
- equal treatment commission for age? (not required by Directive)
- which type of law (labour, anti discrimination, penal)
- exception for armed forces?
- symmetrical or a-symmetrical definition (is already decided)

How is the transposition coming on? (November 2005)

21 Member States have transposed	4 Member states that are in the process of legislating
Belgium, Ireland, France, Italy, Czech Republic, Hungary, Slovenia, Denmark, The Netherlands, Portugal, Spain, Estonia, Austria, Lithuania, Malta, (Finland (island), Greece, Cyprus, Latvia, Poland, Slovakia.	Luxemburg, Germany, Sweden, UK

But, is the legislation in line with the Directive?

Burden of Proof?

Class actions?

Victimization?

Effective and persuasive countries?

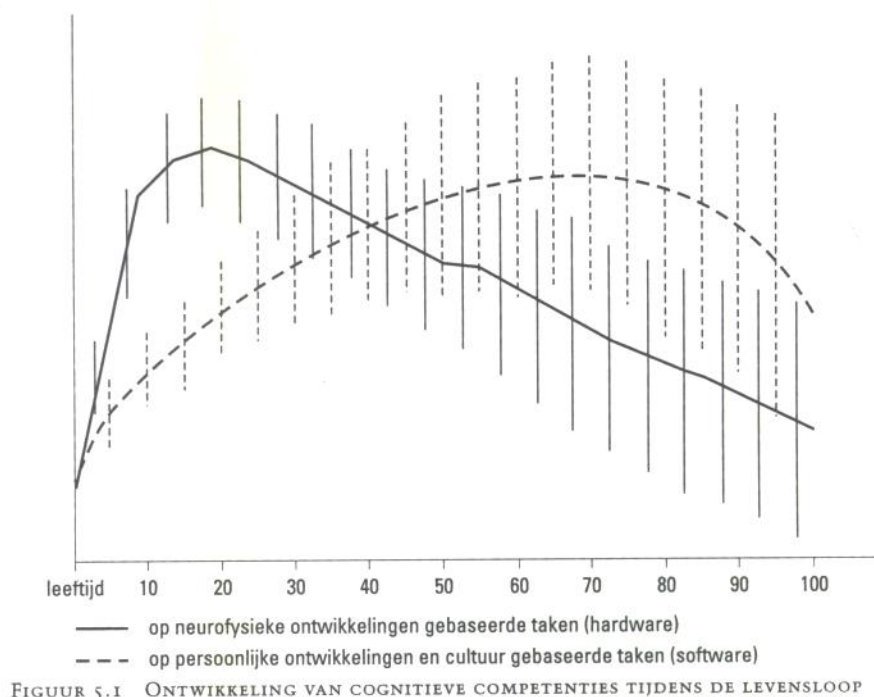
Judging a case of age discrimination

How to make room within the objective justification?

How to judge the height of an age limit?

And: be aware of notions about age!

On an individual basis calendar-age does not have predictive value. You can investigate how e.g. the relationship between capabilities and age is in averages, but the differences within age groups are enormous. See scheme below:



uninterrupted line is human hardware

interrupted line is human software

Scheme by dr P.J.J. Houben, in: Levensloopbeleid, Elsevier, Maarsse, 2002

Some notions that can be encountered in employment:

"Elder people are not dynamic"; "Elder people are physically weak";
"Elder people are always sick"; "Elder people have difficulty learning";
"Elder people want to stop working as soon as possible"; "Young people are flexible";

Ask for proof that this is true for this individual!

Be cautious with the "dead man's shoe"-argument!

Some discussion points on age discrimination

Indirect discrimination in language and images in recruitment advertisements?
(See the 2 examples on sheet)

What constitutes age discrimination: which age difference is enough?
A 40 year old worker is declined, and the firm hires a 35 year old with the exact same qualifications. Is this age discrimination? What if the firm hires a 32 year old?

Direct effect of Directive 2000/78 since December 2nd, 2003? Reading the directive into general non-discrimination clauses?

Genuine occupational requirement (article 4)
Can you mention some examples of jobs that require an employee of a certain age?

Article 16 and the role of the judge: can an individual make a complaint about an age limit in a law on the basis of article 16?

Are loyalty based benefits a form of indirect age discrimination?

12th protocol at the European Convention on Human Rights as a basis for a claim on age discrimination?

Further reading....

Interesting reports:

Developing Anti-discrimination law in Europe, the 25 Member States compared, November 2005, European network of legal experts in the non-discrimination field – to be found at site of DG 5 (see below)

Age discrimination and European Law, Colm O’Cinneide for the European network of legal experts in the non-discrimination field, July 2005 – to be found at site of DG 5 (see below)

Age barriers: older people’s experience of age discrimination in acces to goods, facilities and services, AGE Platform, december 2004 – to be found at site of age platform (see below)

Adressing age barriers, International comparison of legislation against age discrimination in the field of goods, facilities and services in 5 countries, November 2004. – to be found at www.leeftijd.nl

Equality, Diversity and Enlargement, report on measures to combat discrimination in acceding and candidate countries, September 2003, European Commission, to be found at site of DG 5

Report on Member States’ legal provisions to combat discrimination, 2000, European Commission

Interesting sites:

http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

Site of DG 5. Lots of interesting reports on the Directives. Also the interesting report on age discrimination “Age discrimination and European Law” (July 2005) can be found here (under publications).

www.aarp.org Site of very powerful US interest group for elderly, over 45 million members! Site covers many topic, very US-related.

www.stop-discrimination.info. Site of EU campaign against discrimination, with information in all EU languages.

www.age-platform.org – Platform of European Elderly organisations (lots of policy documents)

www.leeftijd.nl – Dutch Expertisecentre age and lifecourse (mainly information on Dutch situation, section in English)

Interesting book:

Age as an equality issue, legal and policy perspectives, Sandra Fredman and Sarah Spencer (ed). 2003