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Introduction

As with any story there are a number of points where a very different road could have been taken and so it is for the short history of the fight against age discrimination in the European Union (EU).¹ One of the most important dates is 1997 when the Treaty of Amsterdam was adopted. This Treaty revolutionised the fight against discrimination and the quest for equality in the EU. It inserted Article 13 into the EC Treaty, the founding and governing Treaty of the European Community (EC). Until that point the EU could take action against two forms of discrimination only sex discrimination in employment and discrimination on grounds of nationality. Article 13 allowed the EU institutions to adopt law to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, both inside and outside employment.

So far the EU has adopted three Directives under Article 13. In 2000 it adopted two Directives, the Race Directive² outlawing discrimination on grounds of racial or ethnic origin in employment, occupation and training, goods and services and the Employment Framework Directive³ outlawing discrimination on grounds of religion or belief, disability, age or sexual orientation employment, training and occupation only. In 2004 the Council adopted a Directive on equal treatment between men and women in the access to and supply of goods and services.⁴ However, while this brought sex discrimination closer to the high level of protection enjoyed by race discrimination its scope is far narrower as it does not include media, advertising or education.⁵

The wonder of it all is that age could quite easily have been left out of Article 13 and more easily still left out of the Employment Framework Directive. The Race Directive became a priority due to a background of racial violence within the EU and the rise of an extreme right political party in one EU Member State.⁶ The inclusion of sex was logical given that existing provisions only covered employment including pay and the general acknowledgement at EU level that women are often victims of multiple discrimination.⁷ Disability was on the European Commission's agenda even before the Amsterdam Treaty was drafted. By 1996 the European Commission had already issued a Communication on equal opportunities in relation to disability in which it

¹ It is worth noting that despite a lack of hard law at national level in most EU Member States before this Treaty, some had already experienced campaigns for the introduction of age discrimination laws. For example, in the United Kingdom a private member's *Age Discrimination Bill*, Bill 127 was introduced by George Foulkes in 1982-1983 and was followed by many more attempts.

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² Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L180/22.

³ Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L303/16.

⁴ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁵ Article 3.3.

⁶ Referring to Jörg Haider's Freedom Party entry into the Austria government.

⁷ Note recital (3) of the Employment Directive, recital (14) of the Race Directive.

proposed to mainstream disability in its policy and law making processes.⁸ This was built on and received formal acknowledgement when a Declaration regarding persons with disabilities was attached to the Amsterdam Treaty. This declaration notes the agreement that the legislative institutions (not just the Commission) of the EU would take account of the needs of persons with disabilities in drawing up harmonising measures for the functioning of the internal market.⁹ Given that this is still a dream for age, religion or belief and sexual orientation,¹⁰ disability can, with some caution be said to have nudged just slightly ahead of its fellow grounds in the Employment Directive. While the grounds of religion or belief can overlap with race, the European Commission had always proposed religion for inclusion in the provision expanding of the anti-discrimination grounds in the EC Treaty, that would become Article 13 EC.¹¹ The need for anti-discrimination law for sexual orientation was highlighted by the case law of the European Court of Justice. The ECJ chose not to expand the ground of sex to cover sexual orientation stating this could only be done by the legislature.¹² It had the benefit at that precise moment of knowing that the Amsterdam Treaty would provide the legislature with the power to do so.

At present the EU does not have a broad general principle of non-discrimination or equal treatment that could embrace various grounds (beyond each one contained in the EC Treaty and the Article 13 Directives) and the ECJ has so far displayed a reluctance to declare one. However, the EU's legislature and its Member States have taken a considered and measured approach, which has resulted in the addition of the Article 13 family of grounds to the EC Treaty and three Directives so far. Given that Article 13 requires unanimous approval for the adoption of legislation and that the EU Member States have differing traditions and philosophies in respect of some of these grounds the fact that a good deal of progress has been made so far is remarkable. However, the incredible benefit of having age, included in the Employment Directive and the balancing and compromise exercise required to achieve the necessary unanimous acceptance by all Member States may yet be shown to be at some cost. These factors have contributed to possibly the most vague and permissive provision in the entire galaxy of European equality legislation, Article 6 of the Employment Directive. However, we shall see below that the ECJ has already proven itself quite robust in dismantling national rules that conflict with Article 6. Thus proving that this provision which remains open to considerable criticism is technically workable.

Age Discrimination in Profile

⁸ Communication on Equality of Opportunity for People with Disabilities – a New European Community Disability Strategy, Brussels, COM (96) 406, final, 30.07.1996.

⁹ Declaration 22.

¹⁰ This situation will change if and when the Treaty establishing a Constitution for Europe is ratified by all EU Member States. Article III-118 of this instrument provides “In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

¹¹ Commission's White Paper *European Social Policy – a way forward for the Union*, 1994.

¹² *Grant v Southwest Trains*, Case C-249/96.

There are two distinct and occasionally overlapping spheres under consideration from an EU perspective; age discrimination in all its guises and ageing policy, which is more, constrained. While the EU has undertaken a broad range of non-binding measures as part of its ageing policy it has almost no law-making competence for this issue.¹³ In the EU the earliest Europe-wide research into age discrimination is probably attributable to Elisabeth Drury who carried out an 11-country study of age discrimination against older people in the European Community on behalf of Eurolink Age. This study focused on employment and revealed five areas of age discrimination against older people: 1) premature loss of employment. This was regarded as the most serious form due to the bleak prospects for older workers finding new jobs before retirement age. 2) Discrimination in recruitment, which was found to start at 40 in most countries with maximum ages for recruitment usually set between the ages of 32 and 40 and the use of age limits in job advertisements. 3) Discrimination against unemployed older workers who were excluded altogether from programmes for the unemployed in three of the eleven countries and only received targeted help in one country. In general people over 55 were removed from unemployment statistics. 4) Exclusion from training: some EU countries set age limits below retirement age for training schemes, which completely barred older. The study found that no EU country provided targeted training for older unemployed people. 5) Finally discrimination at retirement age: this generally concerned the loss of protection from unfair dismissal or mandatory retirement at retirement age and revealed a great variety of approaches among the participating countries. Of particular interest are Dutch laws that deny the minimum wage and certain benefits to workers over 65 as they still exist today.¹⁴

The Eurolink Age study was swiftly followed by an eighteen-country study, which covered the then twelve European Union member countries plus Austria, Cyprus, Finland, Malta, Norway and Sweden.¹⁵ The object of this study was to examine the extent to which all these countries had legal provisions or collective agreements protecting older workers from age discrimination. At that time there was no specific constitutional provision for age discrimination or the protection of older workers. This study focused on three areas only: recruitment, treatment within employment and dismissal. The only clear examples of law against age discrimination in recruitment were found in France (although apparently ignored) and in Sweden which outlawed age limits in job advertisements. Although Irish equality officers and the Irish Labour Court had ruled that a maximum age limit could be indirect sex discrimination against married women. While Spain had a law prohibiting discrimination against workers in applying for a job. Only three countries, Finland, Germany and Spain had labour laws banning age discrimination within employment.

¹³ See the Commission's *Ageing Policy* available at http://ec.europa.eu/employment_social/soc-prot/ageing/intro_en.htm

¹⁴ E. Smolenaars, *65 Jaar als uiterste houdbaarheidsdatum* (LBL, Utrecht, 2005) at pp. 164-165, which argues that the age limit in certain acts for benefits and entitlements is not justifiable.

¹⁵ Age Discrimination in Europe, *European Industrial Relations Review* 247, August 1994, pp. 13 to 16.

Only two countries tackled discrimination in dismissals. In Ireland a dismissal was deemed unfair under legislation adopted in 1993 if it was based wholly or partly on the age of the employee.¹⁶ A ruling of the Italian Constitutional Court deemed dismissals or redundancies on grounds of age unfair. The study found that six countries made it more difficult or expensive to lay off older workers. One may question whether this approach may have had a knock-on effect on some employers deterring them from hiring older workers. Thus in respect of the first two categories less than 25 per cent of the countries had any measures whether legislative or judicial in source, against age discrimination and there was very little overlap between the countries in each category. The third category fared better largely by countries making it more difficult to fire older people compared with a single country, Ireland which had a clear law against discrimination in dismissals, taking both forms together this represented 50 per cent of the countries in the study. Thus age discrimination in dismissal in the early 1990s received the most attention whether by direct or indirect means. However, this study was also important for drawing useful conclusions from the existing literature concerning common stereotypes of older workers. The two most relevant for our purposes are that 1) “age related declines in productivity, mental efficiency and reaction time are small and many of these losses can be and are compensated for by experience”. And 2) “there is considerable individual variation in age-related performance losses. It is more meaningful to look at differences between individuals, which are far greater than differences between groups”.

Recent surveys help to give a picture of how discrimination, including age discrimination are experienced in the EU. They also expand the focus beyond employment. The Eurobarometer survey 2003 sought perceptions of people in employment, education, housing and accessing services across the then 15 EU Member States.¹⁷ Few of those questioned reported that they had experienced discrimination on the grounds in question: ethnicity, religion, disability, age and sexual orientation. Age was the most frequently cited ground of discrimination experienced across the survey but that was still at a low level of 5 per cent, followed by race or ethnicity at 3 per cent. Religion or belief, physical disability, learning difficulties or mental illness all at 2 per cent.¹⁸ A fascinating finding was that those aged 15-24 were five times more likely to report age discrimination than those aged 65 and over, scoring highly both in relation to employment and in accessing services.¹⁹ More people reported witnessing rather than experiencing discrimination with race or ethnicity was the most often witnessed form.²⁰ The survey found that people with learning difficulties or a mental illness were believed to be the most disadvantaged in the looking for work, followed by those with a physical disability, older applicants and applicants from ethnic minorities. Importantly, the survey revealed a widespread opposition to discrimination on all the

¹⁶ Unfair Dismissals Act 1977 as amended by the Unfair Dismissals (Amendment) Act 1993.

¹⁷ This survey published by the European Commission in 2003 is based on a report by Alan Marsh and Melahat Sahin-Dikmen *Discrimination in Europe (Report B)* (Policy Studies Institute, London, 2002) and involved 16,000 European citizens.

¹⁸ P. 11.

¹⁹ p. 15.

²⁰ p. 23.

grounds.²¹ This survey though important could and ought to be usefully updated in two respects 1) to take account of enlargement from 15 to 25 EU Member States and 2) to include non-EU nationals, however Eurobarometer surveys only interview EU citizens.²²

A Concrete Focus on Goods and Services

The need for anti-discrimination legislation in goods and services at European level has attracted increasing attention since EU enlargement. 81 per cent of all respondents to the European Commission's Green Paper on anti-discrimination and equal treatment, which opened on 1 May 2004, selected this field as the main area where the EU should concentrate its activities.²³ In December that same year AGE published its report *Age Barriers: Older people's experience of discrimination in access to goods, facilities and services*, which surveyed its members in 17 Member States. This report highlighted many examples of age discrimination at ground level across 13 areas,²⁴ which greatly assists in making this issue real and helps to demonstrate the scale of the problem. Abuse of older people is included; this issue is gaining increased attention at national level in the EU and also reflects its emergence as an important elder rights issue on the international plane and in other jurisdictions.²⁵ Importantly, the list also includes examples of positive action, which address or compensate for disadvantages.²⁶ The vast and serious range of examples of age discrimination given across so many Member States would tend to suggest that age discrimination outside the field of employment and training, may well already fulfil the 'subsidiarity' requirements for legislation to be adopted at EU level.²⁷ This argument would be strengthened further by examples from the 8 Member States that are not covered in this report. It is also good to remember that interesting age discrimination cases are emerging in those EU countries which already have legislation covering goods and services.

Ireland: an early comprehensive approach to discrimination

Prior to the adoption of the Amsterdam Treaty in 1997 one country started to emerge as a strong front-runner for combating discrimination on multiple grounds in the EU and within the continent of Europe as a whole: Ireland. This

²¹ p. 30.

²² P. 6.

²³ Response statistics for Green paper on anti-discrimination and equal treatment at p. 5.

²⁴ They are Education and training, Health care services, Social security, Insurance, Financial services, Volunteering and community activities, Housing, Special offers, marketing and the media, Access to public spaces, transport and modern technologies, Measurement in statistics and monitoring information, Participation in political life of older people and consultation with organisations of older people and Taxation.

²⁵ Note for example the scale of the problem in the UK, see 'Half a million elderly people are abused in the UK', available at http://www.paramedic.org.uk/news_archive/2004/04/News_Item.2004-04-20.2831/view

²⁶ At p. 17 to 18.

²⁷ Article 5 EC Treaty "... In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community..."

resulted in an Equality Bill being laid before the Dáil (Parliament) on 27 November 1997, which was enacted as the Employment Equality Act 1998. It is now well-known that this act outlawed discrimination on nine grounds in employment and provided for a wide range of approaches to achieving equality such as equality clauses and permitting positive action. Moreover, the remedies available includes (depending on the forum) compensation, mediation, reinstatement, re-engagement. The Equality Authority which is charged with promoting equality across all grounds is also empowered to order a business of a certain size, to carry out an equality review or prepare an equality action plan or can take this action itself. Prior to its enactment the EEA was described as the most comprehensive piece of age discrimination legislation in the European Community.²⁸ The EEA protected people from age discrimination between the ages of 18 and 65, allowed positive action for the over 50s, persons with disabilities and members of the traveller community. It also exempted certain actions covered by law from age and disability discrimination, concerning air transport, merchant shipping and transport.²⁹ As is also well known shortly afterwards it would become the principal model for the Employment Directive. It is perhaps less well known that the Irish Equality Authority reviewed this legislation in 2002 in the context of drawing up an equality strategy for older people, which crucially it did in partnership with older people.³⁰

It recommended that “equality strategies for older people must take account in their design and implementation of different groups of older people be they men or women, heterosexual or homosexual, Traveller or settled and so on; and equality strategies for other groups covered..... must take into account the specific situation, experience and identity of older people within that group”. This recommendation is crucial for tackling age discrimination and trying to achieve age equality. I will attempt to demonstrate below that age discrimination cannot be tackled by a single sector approach and must be viewed through a multiple discrimination or intersectional lens.

The Equality Authority’s report also urged the removal of the age limits for protection from age discrimination and could find no objective justification for exempting actions under certain Acts from age discrimination. It considered that the rationale behind this provision was “based on the assumption that older people (in this case older people who are under the age of 65) are not medically capable of performing the relevant jobs”.³¹ It also pointed out that as the EEA already contained exceptions for people who are not able to carry out functions these exceptions were unnecessary.³² The Equality Act 2004 removed the upper age limit of 65 and decreased the lower age limit of 18 to 16.³³ It expanded the concept of discrimination to protect persons to whom a particular ground is imputed and a person who is treated less favourably

²⁸ ‘Employment Equality Bill Bars discrimination on nine grounds’, EIRR 273 October 1996 at p. 22.

²⁹ Article 17 EEA, 1998.

³⁰ Equality Authority *Implementing Equality for Older People*, (Equality Authority, 2002).

³¹ *Ibid* at p.13.

³² In the Employment Directive an equivalent provision is contained in Recital 17 in the Preamble.

³³ See S. 6(3)(a) EEA as amended.

because he is associated with another person.³⁴ Finally, it expanded the permissive positive action provision to prevent or compensate for disadvantages linked to any of the grounds apart from gender.³⁵ A further well known feature of the Irish equality regime is that discrimination in goods, facilities and services has been outlawed on the same nine grounds since adoption of the Equal Status Act 2000 (ESA). This Act has never contained an upper age limit and has also been amended to include discrimination by association with another person and discrimination on the basis of a ground that is imputed to a person.³⁶ These various changes to the two Acts can be said to represent a certain maturing of equality law and an effort to achieve greater workability of these laws in Ireland.

Age under the Employment Directive

The Employment Directive achieved a number of important things. It was responsible for introducing age anti-discrimination law in many EU Member States for the first time thereby leading to greater coherence across the EU and it increased the scope of protection even in those few Member States that had some legislation in place already. Importantly it gave age a place alongside other worthy grounds in the EU's anti-discrimination and equality agenda.³⁷ Under the Directive Member States must outlaw four forms of discrimination: direct discrimination, indirect discrimination, harassment and instructions to discriminate. The Directive also requires Member States to prohibit victimisation. This Directive establishes minimum requirements that is a common floor of protection allowing Member States to provide greater protection if they wish.³⁸ It also permits genuine occupational requirements though with a caveat that this possibility may be justified only "In very limited circumstances".³⁹ Reasonable accommodation is only required of employers for the ground of disability. This has attracted a good deal of comment on the basis that it ought to be applied to age or even to all underrepresented groups.⁴⁰

Positive action is permitted for any of the grounds but age has an additional arguably lesser possibility for positive action under Article 6. Under this provision Member States may set special conditions on access to employment and vocational training for young people, older workers and persons with caring responsibilities "in order to promote their vocational integration or ensure their protection".⁴¹ This provision contrasts with that for

³⁴ S.6(1) EEA as amended.

³⁵ S. 33 EEA as amended.

³⁶ S.3 ESA as amended.

³⁷ For an early analysis of the age strand of the Employment Directive see H. Meenan 'Age Equality after the Employment Directive', 10 *Maastricht Journal of European and Comparative Law*, 1 (2003) 1-30.

³⁸ Article 8.

³⁹ Recital (23).

⁴⁰ See respectively, Gerard Quinn's paper 'Non-discrimination in the context of age and disability sometimes requires reasonable accommodation to the difference', European Conference on Independent Living of Older Persons and Persons with Disabilities, Helsinki, 6-7 October 1999. Marie-Ange Moreau's paper at the Stockholm Regional European Congress on Labour Law, 2002.

⁴¹ Article 6 .1.(a).

all the grounds, which aims at “ensuring full equality in practice”.⁴² Thus although age is included among the grounds, Member States have an alternative possibility to maintain or adopt positive action for young people and older workers that may fall shorter than this standard. That is because the example given relates to the promotion of their vocational integration or their protection, the latter hinting at age limits, rather than the broader aim of “ensuring full equality in practice”. Member States must ensure judicial or administrative procedures for “all persons who consider themselves wronged” and must provide rules on sanctions, which may include compensation.⁴³ The Directive requires the Member States to promote social dialogue among the social partners with the aim of fostering equal treatment through “the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practice”.⁴⁴ It also obliges Member States to encourage dialogue with appropriate non-governmental organisations with “a legitimate interest in contributing to the fight against discrimination on any of the grounds ...with a view to promoting the principle of equal treatment”.⁴⁵ There seems to be little evidence in AGE’s report, 2005 of Member States fulfilling their obligations under these provisions.⁴⁶ This could provide a logical focus for AGE to campaign for compliance beyond the technical legal minimum of the Directive. Moreover, AGE reports that there is little evidence of genuine commitment by social partners from either side of industry to combating age discrimination.⁴⁷

Article 16 on compliance is increasingly under the spotlight now that most Member States have transposed the Directive for all grounds. Under this provision the Member States must ensure that “any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished”. They must also ensure that “any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers’ and employers’ organisations are, or may be, declared null and void or are amended”. Thus Member States are very clearly put in charge of cleaning any discriminatory elements in their internal rules and those of all their employers as well as a wide variety of professional and other organisations. The Member States were required to communicate to the Commission in December 2005 and every five years after that all the necessary information for the Commission to report to the European Parliament and Council on the application of the Directive. This first of these five yearly reports is awaited during 2006.

Article 6: unique to age

Beyond a common core of provisions the Directive contains some provisions that are tailor-made to one or two grounds. There are a number of areas

⁴² Article 7.

⁴³ Article 9 and 17.

⁴⁴ Article 13.

⁴⁵ Article 14.

⁴⁶ At pp. 7-9.

⁴⁷ 2005 Report at p. 14.

exempted from the Directive's coverage for age discrimination and others that can be at the choice of the Member States.⁴⁸ However, potentially the most far-reaching provision is contained in Article 6. It contains a fairly open-ended possibility to justify direct discrimination on one ground only, age. Article 6.1 allows Member States 1) to justify certain differences in treatment on grounds of age if 'within the context of national law', 2) they are 'objectively and reasonably justified by a legitimate aim'. It gives three examples of a legitimate aim: legitimate employment policy, labour market and vocational training objectives. 3) The means used to achieve the aim in question must be appropriate and necessary. The Directive also gives examples of three differences in treatment that may be justifiable in this way. They are

- a) Setting special conditions on access to employment and training for "young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection". This is occasionally referred to in terms of being a permissive positive action provision for age.⁴⁹ However, others find it equally capable of imposing less favourable conditions on these groups.⁵⁰
- b) "The fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment".
- c) "The fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

It must be acknowledged that some exceptions to direct age discrimination were insisted upon by individual Member States as part of the negotiation process leading to adoption of the Employment Directive.⁵¹ Thus Article 6 and the other relevant provisions performed a positive function of enabling age to be included at the same time as the other grounds. The damage to age if it were excluded at that time would have been incalculable and would have made no sense against the vivid background of European-wide population ageing and the impact of multiple discrimination resulting in particular from the unique combination of age and gender for example.

⁴⁸ Article 3.3 provides that the Directive does not apply to payments made by state schemes including social security or social protection. This was foretold by Recital 13 which confirms that the Directive does not apply to social security or social protection schemes nor to state payments concerning access to employment or maintaining employment. Recital 14 states that the Directive is without prejudice to national provisions laying down retirement ages. Recital 19 states that in order to "continue to safeguard the combat effectiveness of their armed forces" Member States may opt not to apply the disability and age provisions of the directive to all or part of their armed forces. This is also contained in Article 3.4. Article 6.2 permits Member States to provide that the fixing of ages in occupational social security schemes for admission or entitlement to retirement or invalidity benefits and the use of actuarial calculations for does not constitute age discrimination. That is as long as this does not amount to discrimination on grounds of sex.

⁴⁹ Sandra Fredman 'The Age of equality', in Fredman and spencer Eds. above at p. 57 and B. Hepple above at p. 86 and 88.

⁵⁰ Paul Skidmore 'The European Employment Strategy and labour Law: A German Case Study', *European Law review* 2004, 29(1), 52-73 at 61 and Clare McGlynn above at p.290.

⁵¹ For example, the writer understands that the UK sought to have age dropped from the draft Directive at one stage and influenced the inclusion of recitals 13 and 14.

Against this considerable gain there may well have been some cost to age.

Theoretically the range of possible legitimate aims is at worst unlimited or at best not exhaustive. The same can be said for the possible differences in treatment. Article 6.1 is also quite vague, in that the boundaries of what constitutes a legitimate employment policy for example are not necessarily clear. The uncertainty and expansiveness that thread through this provision may have already and may continue to contribute to Member States making bad law that infringes this Article. As Burrows and Prechal noted in 1990, long prior to Article 13 EC “in order to have bad and vague legislation further clarified, it is indispensable to have, as a rule, cases brought by private individuals. The costs of the compromise are shifted to the courts and, indirectly, to the individual”. The European Court of Justice has already heard its first case on the age strand of the Directive, which has found that German rules on employing older workers infringe Article 6.1. Its judgement in the Mangold case sheds much light on age discrimination in the EU and very importantly shows that the three-step process outlined in Article 6.1 is workable.⁵² It was the final step in this process that brought down the German Rules, that is the requirement that the means used to achieve the aim must be appropriate and necessary. However, it might have been better for older German workers, not just Werner Mangold had this law not been adopted in the first place.

Emerging EU case law: Mangold

Mr. Mangold a 56 year old man contested the validity of German rules allowing unlimited use of fixed term contracts for older workers which had the aim of encouraging the employment of older persons. The age at which FTCs could be given to older workers was progressively reduced from 60 in 1996 to 52 in 2002. The ECJ found that the rule was compatible with the Fixed Term Contract Directive and that the objective of the rule was legitimate and was objectively and reasonably justified under Article 6.1. However, the Court asked whether “the means used to achieve that legitimate aim are ‘appropriate and necessary’”.⁵³ It observed that the rule applied to all workers over the age of 52 who without any distinction as to their employment situation “may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times”. It continued,

*“This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members’ working life of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers”.*⁵⁴

It appears the Court was clearly struck by the blanket application of this rule to each German worker over 52 without exception and without regard to any

⁵² Case C-144/04 Werner Mangold v Rudiger Helm Judgment 22 November 2005, not yet reported.

⁵³ Paras. 59 to 62.

⁵⁴ Para. 64.

criteria other than age. In other words the treatment of this sector of the population as an entirely homogenous group, from the perspective of their employment situation. It was also struck by the impact of this rule on what may be termed the quality of employment of those workers and decided that the rule exceeded what was appropriate and necessary to achieve the vocational integration of older workers under Article 6.1. Perhaps one of the key parts of the judgement is where the Court refers to the failure to show that the fixing of the age threshold (of 52) as the sole criterion for awarding FTCs is objectively necessary to achieve the objective of the legislation.⁵⁵ That is no support was given for the selected age. Indeed, the Court here may well be sending a clear message to all comers that especially where age is the sole criterion, the chosen age must be objectively supported by evidence. I would argue that this could be very difficult to do given the great diversity of all persons above any given age or in a given age group. Here the Court was focused on the employment status of these workers. But if a logically wider focus were applied to encompass other relevant statuses of the individuals making up the age group then it would seem even more difficult to make the necessary proofs. A pertinent issue for consideration here is the great functional variation between workers even of the same age, which would tend to detract from a blanket age limit and to suggest that individualised approaches are necessary for older workers.⁵⁶

One of the most significant features of this case was the Court's declaration that "The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law". But the Court stated that the source of the general principle underlying the prohibition of all forms of discrimination in the Employment Directive was "in various international instruments and the constitutional traditions common to the Member States" and was not the Directive.⁵⁷ This part of the judgement may well have enormous potential for achieving age equality in access to goods, facilities and services. The question arises whether all EU Member States have concluded an international agreement, which contains the principle of non-discrimination on grounds of age that embraces non-work life as well. Alternatively is this broader principle common to the constitutional traditions of (a number of) EU Member States. Both questions are worth exploring as an argument can be made that this principle could be developed judicially by the Court of Justice when an appropriate case arises in advance of any possible future legislation. There is also the question whether the sources relied on by the Court in Mangold referred solely to the sphere of employment or indeed were broader than that. It may be helpful that some Member States such as Hungary and Ireland have already prohibited discrimination on grounds of age in goods and services as well as employment.

⁵⁵ Para. 65.

⁵⁶ See for example, Cliff Oswick and patrice Rosenthal in Mike Noon and Emmanuel Ogbonna (Eds.), *Equality, Diversity and Disadvantage in Employment* (Palgrave, 2001) at p. 9 and Stein, Rocco and Goldenetz 'Age and the University Workplace: A case Study of Remining, Retiring or returning Older Workers', *Human Resource Development Quarterly*, Vol. 11. No. 1, Spring 2000, p. 61 at p. 79. I have developed these arguments more fully in my chapter on age discrimination in, H. Meenan (Ed.) *Equality Law for an Enlarged Europe...* upcoming in 2006.

⁵⁷ Para. 74.

State of implementation of the age provisions across the EU

Three reports are now available which provide a window into the state of transposition of the Employment Directive and the age strand, in particular. They are 1) a report from the European Commission on implementation of the age and disability provisions,⁵⁸ 2) a report commissioned by the European Commission on Age Discrimination and European Law⁵⁹ and 3) AGE's most recent annual report on transposition of the Employment Directive.⁶⁰ Article 18 of the Directive allowed the Member States to seek an additional three years to implement the age and disability requirements; the rationale for this provision is stated "In order to take account of particular conditions". The Commission's age and disability report appears to spell out what those conditions are when it states "Of all the grounds of discrimination, age and disability are particularly difficult to transpose.... primarily because of the potential impact on the labour market Prohibiting discrimination on grounds of age and disability also challenges long-held assumptions about people's abilities and their place in society".⁶¹ In the end five EU Member States Sweden, the UK (including Gibraltar), Belgium and the Netherlands notified the Commission that they wished to have an additional three years to implement age, while Denmark requested one additional year for age. Austria was refused an extension of time for four of its Lander, on the basis that its request came after the original implementation date in 2003 and did not describe why it needed extra time.⁶² It is notable that none of the ten new EU Member States requested extra time to implement the provisions on either age or disability.⁶³

Colm O'Conneide's report for the European Commission focuses on the content of the Directive and the various legal and procedural challenges faced by Member States in trying to transpose the age ground. In it he advises the Member States to provide appropriate guidance on when age discrimination is justifiable on the basis of a genuine occupational qualification, direct discrimination or indirect discrimination.⁶⁴ He warns that the use of general age limits will be problematic where individual assessment is possible⁶⁵ and that requiring employees to retire at a particular age may constitute less favourable treatment and require justification under Article 6.1.⁶⁶ Prior to adoption of a default retirement age in the UK, Bob Hepple QC expressed this

⁵⁸ Available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/agehan_en.pdf

⁵⁹ Colm O'Conneide *Age discrimination and European Law*, (European Commission, 2005).

⁶⁰ AGE – the Older People's Platform *Analysis of the state of transposition of the Employment Directive*, (Brussels, 2005).

⁶¹ At p. 4.

⁶² P. 1.

⁶³ Idem.

⁶⁴ P.6.

⁶⁵ At p. 39.

⁶⁶ P. 7.

view in relation to that jurisdiction.⁶⁷ A number of other commentators have expressed a variety of opinions on the meaning of Recital 14 of the Directive, with some even seeing it as a form of exemption.⁶⁸ Probably the full scope of this provision will be confirmed through the case law of the ECJ or (less likely) a Communication from the European Commission, should retirement ages become a vexed issue in light of the Employment Directive. O’Cinneide’s report is very useful and skilful in highlighting (and occasionally disbanding) potential pitfalls. However, I have elsewhere and with much respect, contested one of his key points that there are issues that arise for age that do not arise for other grounds.⁶⁹ For instance the fact that there are no fixed characteristics that define particular age groups and that individuals do not remain fixed within particular age groups. I have argued that a person’s chronological age is a fixed characteristic at a given moment in time certainly for legal, social and employment purposes. Moreover, that other grounds too may lack a fixed characteristic or may be fluid for instance, a person’s sexual orientation, religion or belief, physical, mental and psychological disabilities may change over time.⁷⁰

AGE’s Analysis of the State of Transposition of the Employment Directive, published in 2005, reported both increased transposition of the age ground across the EU and that some though far too few Member States are looking at age discrimination against the background of an ageing society.⁷¹ This report recommends that a thorough evaluation takes place of all existing legislation against Article 16 of the Directive, which requires Member States to abolish any discriminatory measures⁷² and to ensure that discriminatory provisions in contracts, collective agreements and internal rules of firms are nullified or amended.⁷³ This builds on the finding from AGE’s analysis report in 2004 that no Member State had announced such an overhaul.⁷⁴ This recommendation is particularly important. Without a comprehensive review of existing national laws, which could well lead to some being justified as legitimate direct age discrimination under Article 6.1, the burden will fall on the individual to seek justice usually through the channel of litigation, which is frequently a long and lonely process. Arguably, a Member State is technically not compliant with the Directive if it has ignored its duties under Article 16. Moreover, this provision

⁶⁷ Bob Hepple ‘Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC’, in Fredman and Spencer Eds. *Age as an Equality Issue*, (Sweet and Maxwell, 2003) at p. 89.

⁶⁸ See respectively Paul Skidmore, ‘EC Framework Directive on Equal treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?’ (2001) *Industrial Law Journal*, pp.126-132 at p.130, Colm O’Cinneide in Fredman and Spencer supra at p. 15 and Clare McGlynn ‘EC Legislation Prohibiting Age Discrimination:”Towards a Europe for All Ages?” 3 *Cambridge Yearbook of European Legal Studies*, (2000), p. 279 to 299 at p. 290.

⁶⁹ Referring to O’Cinneide’s 2005 report for the European Commission above at p. 5. Note the discussion of this point in Helen Meenan ‘Age Discrimination – Of Cinderella and *The Golden Bough*’, in Helen Meenan Ed. *Equality Law for an Enlarged Europe – Towards a greater understanding of the Article 13 Directives*, to be published by Cambridge University Press, Autumn/Winter 2006.

⁷⁰ *Idem*.

⁷¹ See for instance some Lander Governments in Germany, at p. 10 of the AGE Annual Analysis ... Report 2005.

⁷² In respect of all grounds.

⁷³ P. 12.

⁷⁴ p. 8.

is one of the strengths of the Directive. By encouraging Member States to audit their existing rules it ideally ought to reduce to some extent the need for individual litigation arising from measures that existed before the Directive.

A key message from the report is that that *“strategies to address age discrimination should be fully integrated into wider strategies to address demographic ageing and to promote the active contributions of people of all ages”*. And crucially that *“Strategies which have these objectives but which do not recognise and address barriers erected by cultural expectations and policy frameworks will not be successful”*.⁷⁵ Apart from the UK and Ireland few countries have either a comprehensive or integrated approach to ageing.⁷⁶ AGE’s message that age discrimination must be tackled in the context of demographic ageing gets to the heart of the matter. As a society we have not really begun to assess or understand, much less accept how widespread population ageing will affect us (especially outside the labour market) despite policy documents on the growing importance and relevance of ageing.⁷⁷ The implications of this phenomenon go well beyond the narrow emphasis given to the need to work till you drop and pensions’ debates in the English media for example.⁷⁸ In time there may well be a sound argument for including carers among the people to be protected from discrimination at national level at least. That is because population ageing will result in more people caring for an ageing spouse or family member than ever before.

A way forward

It is time for AGE, the EU and national governments to do two things 1) emphasise the need to view population ageing through the eyes of the individual as well as from the perspective of society. 2) To broaden the contexts, in which age discrimination is examined, integrated and understood well beyond the important context of demographic change.⁷⁹ What is badly needed first and foremost, is an approach that seeks to understand the crucial impact of other statuses on old and young people, starting with the impact of multiple grounds.⁸⁰ To take just one example, women’s life course appears to make them especially vulnerable to poverty particularly in old age.⁸¹ There also appears to be a particular interaction between age and sex that has resulted in the conceptualisation of “gendered ageism” in organisational culture and the idea that women are viewed as being older at a younger age

⁷⁵ At p. 13.

⁷⁶ P. 13 to 14.

⁷⁷ European Commission’s Green Paper ‘Confronting demographic change: a new solidarity between the generations’, COM(2005) 94 final, and its Communication ‘Increasing the Employment of Older Workers and delaying the exit from the labour market’, COM(2004) 146 final.

⁷⁸ See for example ‘It’s all work and no pay: three years more grind for an extra £3 a week’, The Times, London, Friday May 26, 2006 at p. 6-7 and ‘Under 46? Work until at least 66’, Evening Standard, London Thursday 25 May 2006 at pp. 8-9.

⁷⁹ These ideas are explored more fully in H. Meenan ‘Age Discrimination – Of Cinderella and the Golden Bough’, in H. Meenan Ed. above upcoming in 2006.

⁸⁰ AGE Analysis Report 2005 has found that multiple discrimination has yet to reach the fore in many national debates on equality and discrimination, p. 18.

⁸¹ Age Concern England (2003) One in Four – A quarter of single women pensioners live in poverty: this scandal must end, available at <http://www.ageconcern.org.uk>

than men are.⁸² These kind of issues have also received attention at the international level. The World Conference on Ageing held in Madrid in 2002 endorsed a life course approach to well being in old age which is especially important for women “as they face obstacles throughout life with a cumulative effect on their social, economic, physical and psychological well-being in their later years”.⁸³ It is clear that the impact of multiple grounds and multiple discrimination must be studied and tackled at both national and EU levels. On 6 May 2006 the European Commission issued a call for tender for a study to promote understanding of the causes and effects of multiple discrimination in the European discrimination.⁸⁴ This is a very welcome boost for the issue of multiple discrimination. The British Government has embarked on a major review of “the causes of persistent discrimination and inequality in British Society”.⁸⁵ It will be interesting to note the extent to which the British findings relate to multiple discrimination.

Achieving change: beyond legislation

The AGE Report, 2005 also emphasised that “the presence of a body to promote equality and diversity, to challenge discriminatory attitudes and behaviours and to provide support and advice to victims and those responsible for complying with the law is critical”.⁸⁶ AGE has noted a correlation between the amount of case law and the dissemination of information by governments and/or where there is an equality body that can follow the transposed legislation. AGE members find that equality bodies make a “*significant difference to the quality of action on the various discrimination grounds in the Member States*”.⁸⁷ This finding lends considerable support to the frequently made argument that law alone will not change attitudes. In 2000, Bob Hepple and others, published an independent review of British anti-discrimination legislation, which incorporated a comparative examination of experiences in jurisdictions such as the USA, Canada and Northern Ireland.⁸⁸ The review found that positive action is crucial if significant change is to be achieved. In 2002, the Irish Equality Authority recommended positive action as a key strategy to change the situation of older people in society to address a past history of exclusion.⁸⁹ Importantly, it identified legislation and case law as a necessary first step

⁸² Julie McMullin, ‘Theorizing Age and Gender Relations,’ in S. Arber and J. Ginn (Eds.) *Connecting Gender and Ageing: A Sociological Approach* (Buckingham, Open University Press, 1995), at p. 34, Catherine Itzin and Chris Phillipson, ‘Gendered Ageism A double jeopardy for women in organizations’, in Itzin and Newman (Eds.) *Gender, Culture and Organizational Change*, (Routledge, London, 1995) at p. 82.

⁸³ *Report of the Second World Assembly on Ageing*, U.N. Doc. A/CONF.197/9, at 5 (U.N. Madrid, Spain, April 8-12, 2002).

⁸⁴ Invitation to tender VT/2006/010. This study will include recommendations on how best to tackle multiple discrimination.

⁸⁵ Joint DTI and cabinet Office Press Release ‘Review of Causes of Discrimination Announced’, 25 February 2005.

⁸⁶ P. 19.

⁸⁷ *Idem*.

⁸⁸ Hepple et al., Cambridge Centre for Public Law and Judge Institute of Management Studies, *Report of the Independent Review of the Enforcement of Anti-Discrimination Legislation, Equality: A New Framework*, published as Hepple et al., *Equality: A New Framework* (Hart Publishing, 2000).

⁸⁹ Equality Authority Report, *Implementing Equality for Older People*, at ii.

towards eliminating discrimination and achieving equality but said these must be part of a broader framework of action.⁹⁰

The European Community appears to share the view that law is not enough to achieve change and must be supported by other measures. The adoption of a Council Decision establishing a Community action programme to combat discrimination (2001-2006)⁹¹ as part of the original package of Article 13 anti-discrimination measures, is a clear example of this. This programme was intended to complement the Race and Employment Directives and to promote measures to prevent and combat discrimination on all their grounds. The European Commission is in the process of carrying out a feasibility study for publication in autumn, 2006 that will examine national provisions that go beyond Community minima and will assess the advantages and disadvantages of these measures.⁹² One of the focal points of this study is the situation of anti-discrimination measures on access to goods, facilities and services in the Member States and the Commission will make its own assessment based on the outcome of the study.⁹³ However, it has also indicated that this will not result in new legislation at this stage.⁹⁴ This study is taking place within the context of the Commission's Framework Strategy for non-discrimination and equal opportunities for all. The purpose of the Strategy is to ensure full implementation of the Directives and to support 'back up measures' on compliance with the anti-discrimination legislation. Thus the European Commission has moved into a distinct phase of anti-discrimination activity that is significantly broader than legislation. A clear hallmark of this phase is the European Year of Equal Opportunities for All planned for 2007. This event will be extremely important for raising awareness and departs from previous approaches where a year might be dedicated to a single sector of the European population. This approach captures a quiet shift away from a single ground perspective and will surely help to set the stage for future law-making activity when the time is right.

The role of NGOs

The call for action beyond legislation and the acknowledgement that more is needed to change attitudes, comes not just from academics and the EU but also NGO's and those who campaign for the rights of older people and others. For example, Richard Baker's paper 'Addressing Age Discrimination', at the Danish Government's European Conference on the Implementation of the Anti-discrimination Directives into National Law, November 2002, described a triangle of activity that was needed to ensure culture change. That is legislation, promotion and culture change activity and confidence and opportunity building amongst older people. This brings us back to Article 12 of the Directive, which requires Member States "to take care" that the provisions they adopt to implement the Directive and any relevant pre-existing provisions

⁹⁰ Ibid at p. 1.

⁹¹ Council Decision 2000/750/EC, OJ 2000 L303/23.

⁹² Commission Communication 'Non-discrimination and equal opportunities for all – A framework strategy', COM(2005) 224 final.

⁹³ Idem at p. 6.

⁹⁴ Idem at p. 6.

“are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory”. It also brings us full circle back to Article 14, which requires Member States to encourage dialogue with appropriate NGOs. AGE’s Report, 2005 indicates that there has been very poor attention given by the Member States to Articles 12 to 14.⁹⁵ Thus the Member States, by not adhering to those provisions are denying the Directive the chance to work and key players in promotional activity and awareness raising are lost. However, given the apparent success of equality bodies where they exist, AGE recommends that all remaining Member States must establish such a body.⁹⁶ It also recommends that promotional activities and awareness raising can best be achieved through them.⁹⁷ Despite great variations in the structure and powers of equality bodies (where they exist) in the EU, five Member States have been identified as having extensive equality machinery: Belgium, Lithuania, Finland, the Netherlands and Ireland.⁹⁸ These five bodies and others that are under development will provide many useful models for other EU Member States and possibly beyond.

It is hardly surprising that the AGE Report 2005 paints a very uneven picture of civic awareness of anti-discrimination and surrounding issues and rights. Media interest and public debate are generally low and tend to focus on negative aspects of ageing, except for Finland where a full national debate has already taken place on age discrimination, demographic ageing and the culture of early retirement.⁹⁹ The European Commission’s Eurobarometer Survey 2003,¹⁰⁰ reveals that things may not be quite as bleak as this picture might suggest. At least one third of those surveyed believed they knew their anti-discrimination rights, although apparently the Belgians, Austrians, East Germans and the Danish were the least likely to know their rights and the Finns were the most likely to do so.¹⁰¹ Approximately 7 out of 10 said they would complain if they experienced discrimination.

In light of the forthcoming European Year of Equal Opportunities for All, a gradual raising of the profile of multiple discrimination and the equality body approach of some Member States, it may well be wise to consider what may be achieved additionally in co-operation with groups representing other grounds. At national level, the UK provides an interesting example. A British age NGO¹⁰² initiated the establishment of the Equality and Diversity Forum in 2002.¹⁰³ The EDF is composed of representative bodies of all grounds protected from discrimination in the UK and aims primarily at ensuring that proposals for legislation on any ground honour the cross-cutting nature of equality issues. Its members jointly support certain ideas such as a single equality act for Great Britain, which has a vast array of equality legislation.

⁹⁵ At p. 8.

⁹⁶ See 2005 Report at p. 19.

⁹⁷ *Idem* at p. 20.

⁹⁸ P. 19. Note that a Commission for Equality and Human Rights, dealing with many grounds of discrimination including age, is due to come into operation in the UK in 2007.

⁹⁹ Pp. 16-17.

¹⁰⁰ Eurobarometer 57.0 *Discrimination in Europe* Executive summary.

¹⁰¹ *Idem* at p. 14.

¹⁰² The Third Age Employment Network.

¹⁰³ <http://www.edf.org.uk>

Perhaps something similar could be achieved at EU level especially for those other grounds,¹⁰⁴ which together with age find there is no requirement for a promotional body for them or a requirement to outlaw discrimination in access to goods and services.

Conclusion

Prior to adoption of the Employment Directive age discrimination received scant protection in the individual EU Member States with very few exceptions. The Directive has already achieved much in ensuring age anti-discrimination legislation throughout the whole EU of 25 Member States. It is disappointing that so little attention has been given to those provisions of the Directive concerning awareness-raising, social dialogue and the elimination of pre-existing discriminatory national rules and practices because these, if honoured, could achieve so much. While the Directive requires no promotional body for age or protection from discrimination in goods and services, in this age is not alone. However, what sets age apart is Article 6, a provision that promises much individual litigation and hardship despite any scope for favourable measures. It is difficult to predict what will ultimately happen with this provision though the Court of Justice has shown itself to be a strong gate-keeper in the *Mangold* case. It is Article 6 above all that gives age the air of a late-bloomer. The current period of reflection, study and emerging focus on multiple discrimination has the promise of great potential for age and the other grounds in the Employment Directive. It is to be hoped that age and those grounds will move forward as a cadre and age will not be left behind. This seems increasingly unlikely if a contextual and multi-discriminatory approach is taken to the individual grounds, especially age. In this World Cup season, it seems that age has everything to play for!