

Age discrimination of older persons
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Europeans are becoming older rapidly. The median age within the European Union has already risen from 35 years in 1990 to 41 currently and may reach 48 in 2060. 17 per cent of the population is now over 65 years' old and this percentage is projected to nearly double to 30 in 2060. For some individual countries, these figures will be significantly higher.

Therefore it is not surprising that Europeans have become more aware of age discrimination. According to the Special Eurobarometer in 2009, 58 % of Europeans felt that age discrimination was widespread – only discrimination on grounds of ethnic origin scored higher at 61 %. 6 % of the respondents said that they had actually been victims of age discrimination themselves.

However, when we look at most international and European human rights instruments, age is not usually included explicitly in their non-discrimination provisions. While this can be highlighted as one protection gap, it should be stressed that treaty bodies and regional courts interpret these human rights instruments in a way that does provide protection against age discrimination.

At the same time we should note that age as a discrimination ground may be any age – high and low – and therefore it does not concern older persons alone. We do not have a generally accepted definition of “older persons” either. In fact, older persons are a highly diverse group and we should avoid viewing them through well-rehearsed stereotypes. All older persons are holders of human rights which have to be respected.

In the European Convention on Human Rights, which is binding on the 47 member states of the Council of Europe, age is not specifically mentioned in its non-discrimination Article 14, nor in Protocol no. 12 on the general prohibition of discrimination. It is the European Court of Human Rights which through its judgments interprets these provisions as including age under the category of ‘other status’.

This was the case in the judgment *Schwizgebel v. Switzerland* from 2010 (Application no. 25762/07) where the Court assessed the refusal of an adoption application by a Swiss woman on the ground of her age which was 47 at the time of the application. The European Court did not find a violation as it considered that the age limit applied remained within the margin of appreciation of the respondent state: no clear position on maximum age limits regarding adoption had yet emerged among member states. However, the case demonstrates the relativity of what may be considered a high age in discrimination cases. It also underscores the influence of biological conceptions of ageing in determining age limits which may become problematic from the view point of gender equality and multiple discrimination as well.

Within the European Union and its 27 member states, the EU Charter of Fundamental Rights prohibits age discrimination explicitly in Article 21. But since the Charter only applies within the areas of competence of the EU its practical effect on age

discrimination is limited. There is another EU instrument, the 2000 Employment Equality Directive (2000/78/EC), which specifically prohibits age discrimination in employment and occupation: in this area EU does have competence.

With reference to the Directive and EU Treaties, the Court of Justice of the European Union has ruled that the prohibition of age discrimination is an integral part of equal treatment and therefore belongs to the general principles of the EU legal order. Accordingly, any justification for differential treatment based on age has to be tested rigorously. While the EU Court has upheld the right of member states or collective bargaining to set mandatory retirement ages, it has subjected them to vigorous scrutiny on the objectives pursued as well as their proportionality. Last year, in the case of *Reinhard Prigge and Others v Deutsche Lufthansa AG* (C-447/09), it ruled that collective agreements in Germany could not force airline pilots to retire automatically at the age of 60 when the general safety legislation allowed them to fly until the age of 65 under certain conditions.

The jurisprudence of the EU Court demonstrates that differential treatment based on age must be justified by the objectives pursued and be proportionate to those objectives. We need a questioning attitude for this. The detection of discrimination against older persons requires an open mind to uncover prejudice and discrimination in practices which may have been considered normal or understandable in the past. The current demographic change is provoking a rethink about the length of working lives and pension systems. More opportunities for longer careers will be offered which will enable us to profit from the professional skills, experience and dedication of older persons. Pensionable age is likely to be higher in most countries and rigid age limits for automatic retirement will be reconsidered.

Research carried out by Age Platform Europe, shared for this meeting, demonstrates that older people are often discriminated against in the field of financial services by banks and insurance companies. Age can become a barrier for contracting a loan or an insurance policy. Although the EU Court of Justice has not been able to rule on age discrimination in this area because of lack of specific EU competence, there is a judgment from last year on gender discrimination in contracting car insurance which is of interest to us.

In the case of *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* (C-236/09), the EU Court ruled that different insurance premiums for women and men were not compatible with the fundamental principle of gender equality in the EU legal order. Member states cannot derogate from the principle of equality between women and men in their national legislation on financial services. The actuarial factors and statistics applied to justify differential treatment could not override the fundamental principle of equality in this case.

Although there is a protection gap in EU law on the ground of age in this area, the principles applied appear quite relevant for differential treatment based on age in the field of financial services. The gender equality aspect itself is of course pertinent to older persons as well. Taking into account the rapid demographical change, any actuarial factors and statistics related to age should be subjected to change and must come under increased scrutiny as to their validity in justifying the differential treatment of older persons.

We face a protection gap in relation to age discrimination in the area of access to goods and services. Human rights instruments do not cover this field with sufficient clarity. In Europe, the revised Social Charter may be applied in certain cases related to social and health care but it is not enough to bridge the gap. In some European countries, national equal treatment legislation on the ground of age is already extended to cover access to goods and services and housing but there is no clear international obligation to do so. Certain national legal frameworks also make exclusionary exemptions in the field of financial services. We would need comprehensive non-discrimination legislation in every country which is not based on any hierarchy of grounds in their implementation.

Another gap can be found in the independent monitoring and promotion of equality on the ground of age. Unlike Article 33 of the Convention on the rights of persons with disabilities, there is no international obligation to set up national bodies to monitor and promote age equality. In Europe, and in particular within the EU, many states have set up so-called equality bodies to combat discrimination and promote equality. These bodies are independent, created by law, and they can have a wide variety of tasks to examine complaints of discrimination, to support employers, service providers and policy makers in developing effective equality policies, and to build a knowledge base about issues of discrimination. When a state has adopted comprehensive equal treatment legislation the mandate of such a body is likely to include age discrimination. A recent survey carried out by Equinet, the European Network of Equality Bodies, found that there were 14 equality bodies the mandate of which covered age discrimination in the fields of employment, occupation, provision of goods and services, housing, education and health care. In the case of four equality bodies this mandate was limited to employment discrimination alone.¹

The Convention on the rights of persons with disabilities (CRPD) can also inspire us in other areas of equality. Equality and non-discrimination is one of its core principles in Article 5 and combined with the principle of equality before the law in Article 12 creates a powerful platform for realising the effective equality of persons with disabilities. In addition, the CRPD addresses multiple discrimination. Not only does it reach towards women and children, it also has provisions on ageing related to access to justice (Article 13), abuse (Article 16), health (Article 25) and social protection (Article 28). As I have already stressed before with reference to gender, age discrimination is often combined with other discrimination grounds. The concept of reasonable accommodation or adjustments, which is stipulated in Articles 2 and 5 of the CRPD, should be further developed at the international level with older persons in mind. In fact, Article 13 of the CRPD already refers to “age-appropriate accommodations” for accessing justice.

The CRPD’s vision of effective and active equality of persons with disabilities provides a useful guideline for assessing the gaps in the protection of older persons from discrimination on the ground of age and multiple grounds. When combined with a questioning mind to uncover prejudice and discrimination in current practices of differential treatment, we should be able to take decisive steps towards the full and effective participation of older persons in society in all the diversity they represent.

¹ Equinet, Tackling Ageism and Discrimination, September 2011. The Council of Europe Commissioner for Human Rights has recommended the establishment of equality bodies with comprehensive mandates in his Opinion on national structures for promoting equality, CommDH(2011)2, 21 March 2011.