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# Age Discrimination in Pension Schemes

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# The European Employment Directive (27 November 2000)

- Promotes “a general framework for equal treatment in employment and occupation”
- Combats discrimination on the grounds of religion or belief, disability, age or sexual orientation in the employment context



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## The requirements of the European Employment Directive

- Member States must put into effect the principle of equal treatment
- There must be no direct or indirect discrimination on the grounds of age in the employment context
- Protection is not confined to older employees – it applies to younger employees as well

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## Direct discrimination

- Where a person is treated less favourably than another on the grounds of age
- It is permitted only if it falls within a specific exception in the relevant Directive

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## Indirect discrimination

- An apparently neutral provision, criterion or practice which would put persons of a particular age at a disadvantage
- Subject to a general defence that it is *"objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*

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## Article 6 of the Directive

- Article 6(1) allows Member States to provide under national law that differences of treatment on grounds of age will not constitute discrimination:

*"if, within the context of national law, they 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"*

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## Article 6(2)

- "Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex"*

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## Timing for implementation

- Member States must adopt laws on age discrimination by 2 December 2006
- UK Government intends to implement with effect from 1 October 2006

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## Government proposals for UK legislation (*Age Matters: 2003*)

- DTI consultation paper - *Age Matters*
- Consultation closed October 2003
- Contractual retirement ages – suggests that employers may impose an age 70 contractual retirement age without having to justify their decision
- State Pension Age will not be changed (once equalised at age 65 for men and women in 2020)

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## Government proposals for UK legislation (*Age Matters: 2003*)

- In relation to pensions, the Government will use the facility provided by Article 6.2:

*"We shall take advantage of the Directive's provisions that allow occupational pension schemes to set ages for admission or entitlement to retirement benefits. A normal pension age - that is, the date from which full scheme benefits are payable without actuarial reduction or enhancement - is necessary for the operation of defined benefit schemes. It is not the same as a mandatory retirement age"*

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## Government proposals for UK legislation (*Age Matters: 2003*)

- In relation to non-pay benefits:

*"We propose that legislation should allow employers to provide pay and non-pay benefits based on length of service or experience, which might otherwise amount to unlawful direct or indirect discrimination, if they can justify doing so"*

*Regulations "will make specific provision for employers to be able to justify seniority conditions by reference to the aims... of encouraging and rewarding loyalty"*

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## Government proposals for UK legislation

In summary, the *Age Matters* consultation paper suggests that:

- regulations will expressly allow schemes to prescribe admission ages and normal retirement ages (without the need for evidence to justify them)
- regulations will allow unequal treatment based on seniority if it can be justified on the grounds of encouraging and rewarding loyalty or for other objectively justifiable reasons
- the continued use of age-related actuarial factors has not yet been addressed
- other forms of indirect discrimination may be capable of being objectively justified for reasons such as "legitimate employment policy" but may not be covered expressly by regulations

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## The 14 December 2004 statement on contractual issues

Patricia Hewitt, the then Secretary of State for Trade and Industry, and Alan Johnson, the then Secretary of State for Work and Pensions, proposed:

- a default contractual retirement age of 65
- future monitoring of the retirement age provisions
- allowing employers to justify objectively earlier contractual retirement ages if they can show that they are appropriate and necessary

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## Next stage

- Consultation on draft Regulations and other proposals: summer 2005

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To whom does the Directive apply?

- *It covers "people who are working, whether or not they are directly employed, or working under another type of contract, such as agency workers and some self-employed people"*

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Potentially discriminatory features of UK pension schemes

Features in respect of which UK regulations have (arguably) been promised

- Normal retirement age
- Minimum admission ages
- Waiting periods for admission to the scheme
- Maximum admission ages
- Service-related employer contributions to DC schemes

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Features which require UK regulatory dispensation – and where regulations have not yet been promised

- Age-related employer (or compulsory member) contributions to DC schemes
- Age-related member contributions to DB schemes
- Age-related accrual of benefits on a differential basis
- Setting the age by reference to which actuarial reductions or enhancements for early or late retirement are calculated
- Age-related consent and qualification requirements for early retirement
- Pension increases for older pensioners
- Young spouse's reduction

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## Features which will probably need to be justified objectively

- Service-related benefits
- Benefit accrual ceasing after a certain period of service
- Employee contributions ceasing after a certain period of service
- Benefit accrual ceasing at a certain age
- Closing a scheme to new entrants
- Different provision for senior executives
- Survivors' benefits

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## Features which are unlikely to be considered discriminatory

- Identical employer contributions to DC schemes for members of different ages (with consequential differences in the resulting pensions)
- Age-related assumptions in calculating employers' contributions to DB schemes
- Buying annuities for DC members

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## The US experience

- ERISA outlaws age discrimination but protects only older employees (age 40 and over)
- Cash balance plans: Cooper –v- IBM
  - the benefit accruing to a younger participant was greater than the benefit accruing to an older participant (reflecting the time value of money)
  - ERISA: "a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service"
  - "Accrued benefit" under a DB plan - "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age"
  - IBM decision turned on the technical requirements of ERISA and has been doubted in subsequent cases
- US DC plans:
  - Focus with a DC plan is on the allocations to the account
  - US DC plan: discriminatory contribution rates are permitted if they discriminate against younger (but not older) employees

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## The position in Germany and the Netherlands

### Germany

- Delays caused by autumn federal elections
- Main discriminatory features of German plans:
  - minimum retirement ages of 60/63/65
  - age and service-related vesting (5 years' service and age 30 or over)
  - Maximum admission ages of 65

### The Netherlands

- Legislation already introduced
- Normal retirement age of 65
- Minimum admission age of 25 (but may reduce to 18)
- DC contributions at either:
  - flat rate or
  - age-related rates

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## Update on other discrimination issues

### ▪ European Employment Directive:

- Disability Discrimination Act 1995 (Amendment) Regulations 2003
- Equal Pay Act 1970 (Amendment) Regulations 2003
- Race Relations Act 1976 (Amendment) Regulations 2003
- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Religion or Belief) Regulations 2003

- Civil Partnership Act 2004
- Gender Recognition Act 2004

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