UNIO - *EU Law Journal*. Vol. 8, No. 1, December 2022, pp 97-113.

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"In delay there lies no plenty"*: overcoming the age-based obstacles, omissions and inconsistencies in the 2008 Proposed Council Directive on Equal Treatment

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ABSTRACT: The focus of this article is on the Proposed Council Directive on Equal Treatment which has been in the pipeline since 2008 but has been plagued by concerns over subsidiarity and legal certainty. The delay in implementing this proposal is having a detrimental impact on the protection of non-discrimination in the EU. The article is concerned primarily with the age ground and the particular obstacles, omissions and inconsistencies in the proposal which may hamper its eventual implementation. Analysis is made of obstacles in the context of financial services (including insurance and banking), omissions with respect to multiple and intersectional discrimination, exclusions and artificial intelligence and inconsistencies such as justifying only preferential differences in treatment on grounds of age, a departure from other anti-discrimination law within the EU. Identifying solutions to these impasses, this article hopes to play a small role in overcoming these challenges and carving a clear path for the implementation of the proposed Directive.

KEYWORDS: Non-discrimination – age discrimination – EU law – equal treatment.

* William Shakespeare, Roger Warren, and Stanley Wells, *Twelfth Night*, or, *What You Will*, Oxford World's Classics. The Oxford Shakespeare (Oxford, New York: Oxford University Press, 2008), Act II, Scene III.

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1. Introduction

In many of William Shakespeare's plays, delay is often negatively associated with indecision, procrastination and hesitation. Characters, like the infamous Hamlet,[1] who delayed in making key decisions or were indecisive in their goals often met less then sympathetic ends. While it is unlikely the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[2] (hereinafter referred to as the 'proposed Directive') will meet such a tragic fate, the significant delays experienced in implementing it will have substantial impacts on those subjected to such discrimination. Certain aspects of the proposed Directive namely (a) subsidiarity, (b) implementation costs and (c) legal clarity, have been identified as the main reasons for the delay.[3] To overcome these and achieve the unanimity required by Article 19 TFEU (the legal basis of the proposed Directive), it is believed that there is "*clearly a need for further extensive work*".[4] However, in the age context there is more consensus than conflict and in light of the 2021 Green Paper on Ageing[5] even more impetus to activate these principles of non-discrimination on grounds of age in fields such as social protection, healthcare, education, housing, and the provision of goods and services.

This paper has three central aims: (1) to identify any existing obstacles to the proposed Directive and how these can be overcome so as to ensure swifter implementation of the new non-discrimination principles within the EU, (2) to identify gaps in protection which should now also be included as part of the proposed Directive and (3) to highlight inconsistencies in approach between the new proposed Directive and existing anti-discrimination law. This would ensure that the entire suite of non-discrimination laws could play a very "*significant supporting role*"[6] in ensuring that the life-cycle approach adopted by the EU Green Paper on Ageing can be successfully implemented. The need for the proposed Directive and its extension to a variety of fields of activity cannot be overestimated. If the EU proposes to lay solid foundations for healthy and active ageing, to ensure individuals make the most of their working lives, create new opportunities and overcome challenges faced in retirement as well as meet the increasingly diverse needs of ageing populations, solid action in the realm of non-discrimination is essential.

[1] William Shakespeare and G. R. Hibbard, *Hamlet*, Oxford World's Classics (Oxford [England], New York: Oxford University Press, 2008).

[2] Council of the European Union, "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation", {SEC(2008) 2180} {SEC(2008) 2181}, COM/2008/0426 Final, n.d.

[3] Council of the European Union, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report", 23 November 2021, 2008/0140(CNS), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14046_2021_INIT&from=EN.

[4] Ibid, 7.

[5] European Commission, "Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations", COM(2021) 50 Final, 27 January 2021.

[6] European Commission, "Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations", 4.

2. Overcoming obstacles: the case of banking, insurance and other financial services

A new compromise text to the proposed Directive was introduced by the Slovenian Presidency in May 2021 to enable further discussion and analysis. In the age context, a significant stumbling block has been the argument over the use of age proxies in banking, insurance and financial services (which are currently not in breach of EU law but could possibly be made so by the proposed Directive). The current text provides in Articles 2(7) and 2(7a) that differences in treatment based on age may be permitted in the provision of insurance, banking and other financial services in case they are objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary, and only to the extent the assessment of risks is based on accurate, recent and relevant actuarial or statistical data and takes account of the individual situation of the applicant for the insurance, banking or other financial services. Article 2(7a) extends this to include differences in individuals' premiums and benefits within the scope of the proposal. The text therefore clearly advocates an individual assessment in access to and provision of such services as opposed to a blanket application of age proxies.

There is no doubt that a provision of this nature is needed in the proposed Directive. The case law emanating from Member States indicates an urgent need for harmonised action in this area.[7] The most common source of complaint at a national level relates to age-based premium increases, product denial or limited access to services, mainly arising from poor administrative practices which lead to discriminatory outcomes. The case of *Shanahan*[8] which arose in Ireland is illustrative of the types of situations currently prevalent in Member States. In this case a complainant, aged over 65 years, was denied access to a travel insurance product because there was no way to facilitate an online or telephone quotation for persons over the age of 65 years. This was an administrative error for which an apology was issued and compensation was ordered by the Workplace Relations Commission. In banking, similar situations have given rise to cases in other Member States involving loan or credit eligibility, or the extension of financial services.[9] The commonality of the issue across Member States indicates the increasing need for protection in this area.

Current laws in Member States are varied in scale with respect to their treatment of age proxies in these industries.[10] On one end of the scale are those Member States which provide no protection against the use of such proxies in the provision of financial, banking or insurance services. In such countries, almost 26%

[7] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020* (LU: Publications Office, 2020), Age discrimination law outside the employment field - Publications Office of the EU (europa.eu).

[8] Equal Status Acts '*Enda Shanahan v Laya Healthcare Ltd*, 23 November 2016, DEC-S2016-071, n.d., DEC-S2016-071 - Workplace Relations Commission.

[9] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020*, 107–8.

[10] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020*, 88.

of Member States,[11] a claim for age discrimination based on limitation of access or differential benefits will not be actionable. There is, however, a growing number of Member States (approximately 45%)[12] which operate a "default test", *i.e*, "*a default level of protection consisting of a legitimate objective and proportionality test (the general justification test for direct or indirect discrimination)*"[13] or a limited form of this.[14] This may be set out in law or may operate by virtue of a lack of an express exemption for these financial sectors. There is some measure of protection inherent in this system but there are still some potential obstacles preventing claimants from accessing justice: (1) the lack of access to statistical and actuarial data, and (2) the lack of a requirement that statistical and actuarial data relied upon is reasonable, accurate and up-to-date. Recognising this detrimental impact on claimants, there are a small number of Member States (11%)[15] who require that only actuarial or statistical data which is obtained from a source upon which it is reasonable to rely can be utilised by financial service providers. The highest level of protection then is seen in those Member States which require (a) that statistical and actuarial evidence must be provided to support differential treatment based on age and (b) that this differential treatment must have a legitimate objective and be proportionate in the sense that it is both appropriate and necessary. In addition, any statistical or actuarial data relied upon is required to be accurate, recent and relevant.[16]

This latter more stringent test is remarkably the one which is currently adopted by the recent compromise text of the proposed Directive. Given that almost two thirds of Member States already adopt something similar or at least something approaching this model, it does not seem unreasonable that the proposed Directive should adopt such an approach. It is also consistent with other provisions in non-discrimination law such as the Gender[17] and Race Directives,[18] albeit that it does not go as far as these Directives with respect to the review role of Member States and ensuring that claimants can access the data to determine if their experienced differential treatment is justified. The proposal also meets the main requirements advised by the Equinet Working Group on Equality Law[19] and recommended by the European Equality Law Network Report[20] that reliance should only be placed on accurate, recent and relevant statistical data available, that there should be individualised assessments

[11] Spain, Slovenia, Croatia, Slovakia, Sweden, Lithuania and Poland.
[12] Hungary, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Italy, Latvia, Luxembourg, Malta and Romania.
[13] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020*, 89.
[14] For example, in Bulgaria the Students and Doctoral Loans Act and Protection against Discrimination Act, Article 7.
[15] Ireland, Germany and Portugal.
[16] See Belgium and Czechia.
[17] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, n.d.
[18] 'Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, n.d.
[19] Equinet Working Group on Equality Law, "Discussion Paper – fighting discrimination on the grounds of age", Equinet, European Network of Equality Bodies, 2018, 36, Age-Discrimination_updated-electronic.pdf (equineteurope.org).
[20] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020*, 124.

carried out in the provision of financial services and that account should be taken of the principle of proportionality.

Despite what appears to be a consensus on what should or could be included in the proposed Directive, this particular provision still seems to constitute a stumbling block. In the most recent discussions, while several delegations evidently support the current text, they do so merely as a "*basis for further discussion, subject to any necessary fine-tuning and clarifications*".[21] The real reason for the hesitancy of Member States lies in the firm belief of certain delegations that taking age into account in calculating, for example premiums, is still a legitimate consideration. These delegations also stressed the importance of ensuring the objective and reasonable nature of differences in treatment. Despite the relative success of the active ageing agenda and the movement towards more individualised assessments, the conception still persists that age-based classifications are acceptable,[22] sometimes even beneficial or essential.[23] In the banking, insurance and financial services sectors, these age-based classifications have been utilised for many years due to their simplistic nature, saving businesses large costs in administration, time and actuarial calculation. However, they have also during this time been a source of much discriminatory treatment which has impacted negatively on older persons particularly and further entrenched stereotypes which in a cyclical way further perpetuates the discrimination through the development, use and re-use of out-of-date and biased statistical and actuarial data. Such treatment has the effect of undermining equality and entrenching discrimination.

For these delegations who are still sceptical of the move to more individualised and objective assessments in these sectors, perhaps a reminder that almost two-thirds of Member States already legislate for equal treatment on grounds of age in these sectors already and that this has not led to any serious impacts, will help in guiding them to make similar choices. Also there is no suggestion that age cannot constitute a legitimate ground for calculation purposes. Rather the suggestion here is that age assessments must be based on accurate and up-to-date data and statistics and should be a justifiable, appropriate and necessary part of the assessment. Many financial service providers have also adopted such models voluntarily to reflect more ethical and fair business practices. The change itself will arguably have less impact than the discrimination which is flourishing as a result of the lack of action in this area.

3. Shoring up omissions: the case for closing the gaps

There are very few objections to the proposed Directive in the age context and this should be viewed as a very positive step forward. However, as the proposed Directive was introduced almost 14 years ago, it is unsurprising that societal developments have overtaken the original provisions. Three specific issues require consideration in this respect: multiple and intersectional discrimination, exclusions

[21] Directive on equal treatment (Article 19), Progress report, 14046/21.

[22] Judgment of the Court *Maria-Luise Lindorfer v Council of the European Union*, 11 September 2007, Case C-227/04, ECLI:EU:C:2007:490, n.d.; Opinion of Advocate General Jacobs, Case C-227/04 P, ECLI:EU:C:2005:656, para. 85.

[23] Judgment of the Court *Reinhard Prigge and Others v Deutsche Lufthansa AG*, 13 September 2011, Case C-447/09, ECLI:EU:C:2011:573', n.d.; Opinion of Advocate General Cruz Villalón, Case C-447/09, ECLI:EU:C:2011:321, para. 34.

and artificial intelligence,. In all cases, there are either no provisions covering these areas or the provisions include omissions which render them less effective than they could be. Simple adjustments would ensure a more effective and forward-thinking non-discrimination law.

3.1 Multiple and intersectional discrimination

The proposed Directive does include protections against multiple discrimination in Article 2(3) which provides that discrimination under the proposed Directive will include "*discrimination based on a combination of the grounds of discrimination set out in Article 1, as well as a combination of one or more of those grounds and any of the grounds of discrimination protected under Directive 2000/43/EC and/or Directive 2004/113/EC*". This essentially means that any combination or additive form of discrimination (a traditional understanding of multiple discrimination) based on age, disability, sexual orientation, religion or belief, gender or race which can lead to cumulative disadvantage would be actionable under the proposed Directive. Multiple discrimination is defined in the Directive as discrimination which occurs "*on the basis of any combination of two or more…grounds*".[24] Recital 12(ab) only refers to the four grounds protected by the proposed Directive namely, age, disability, religion or belief and sexual orientation, due to the fact that previous incarnations of the proposal had considered limiting the protection of multiple discrimination to the grounds covered in the proposed Directive. This has now thankfully been rectified and all protected grounds under EU law will be included within the provision.

However, the proposed Directive does omit provisions to protect against intersectional discrimination which arises when several grounds of discrimination operate and "*interact with each other so that it is not possible to determine which ground of discrimination is determinative in a given case*",[25] an approach promoted by the EU in their most recent Gender Equality Strategy.[26] Indeed one delegate at the most recent discussions on the proposed Directive specifically requested that intersectional discrimination be added to the proposed Directive.[27]

The need to include both multiple and intersectional discrimination is beyond question. Firstly, there have been cases where multiple grounds of discrimination are involved (particularly the age ground) which due to the lack of a multiple discrimination provision have been argued on one ground only (namely the strongest ground) and considered as single-issue discrimination at a national and regional level (*Cadman*[28] and *Kleist*[29]). The Advocate Generals and the CJEU in these cases have been alive to the potential additional age discrimination elements.

[24] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Recital 12(ab).

[25] Lynn Roseberry, "Multiple Discrimination", in *Age Discrimination and Diversity*, ed. Malcolm Sargeant (Cambridge: Cambridge University Press, 2011), 16–41.

[26] Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Union of Equality: Gender Equality Strategy 2020-2025, COM/2020/152 Final, Brussels, 5.3.2020, n.d., EUR-Lex - 52020DC0152 - EN - EUR-Lex (europa.eu).

[27] Directive on equal treatment (Article 19), Progress report, 14046/21.

[28] Judgment of the Court *B. F. Cadman v Health & Safety Executive*, 3 October 2006, Case C-17/05, ECLI:EU:C:2006:633, n.d.

[29] Judgment of the Court *Pensionsversicherungsanstalt v Christine Kleist*, 18 November 2010, Case C-356/09, ECLI:EU:C:2010:703, n.d.

However, the lack of referral from the national court on the question of age meant that any such analysis of the age element of the claim would not be useful in the case at hand and given the stringencies of the age provisions in Directive 2000/78EC[30] would likely, on a singular analysis, have been unsuccessful in any case. However, had a multiple discrimination provision been available at a national level and regional level, the result might have been different. It would potentially give the national courts, and the CJEU where appropriate, an opportunity to analyse any cumulative or additive disadvantage suffered by the claimant. Xenidis notes that the lack of such provisions "*encourages litigators to strategically select the most 'intuitive' (or perhaps 'favourable') ground, thus limiting access to justice for the victims of multiple discrimination*".[31] Therefore, the case for a provision on multiple discrimination is sufficiently strong.

Recent case law indicates that there is also a need for protection against intersectional discrimination in EU law and that individuals are unprotected by the lack of such provisions. There also appears to be some confusion as to the concepts of multiple and intersectional discrimination which specific legislative provisions could help rectify.[32] The case of *Parris*[33] clearly illustrates a case of intersectional discrimination but is viewed and determined on the basis of single-issue discrimination with a nod to multiple discrimination. It involved a case of discrimination on grounds of both sexual orientation and age, both of which were argued in the case, although it was rather the combined effect of the difference in treatment on both grounds (which was in some ways inseparable) which caused the disadvantage to the claimant. Mr. Parris's employer had refused to grant Mr. Parris's civil partner, on Mr. Parris's death, a survivor's pension provided for by the occupational benefit scheme of which Mr. Parris was a member. The reason for the refusal lay in the fact that the scheme expressly stated that payments of survivors' benefit was excluded if the marriage or civil partnership occurred after the member reached the age of 60. Mr. Parris argued that as Irish law did not allow him to enter into a civil partnership until after he had already turned 60, this was discrimination on the grounds of both sexual orientation and age (or in reality an inseparable interaction of the two grounds). The case proceeded by examining sexual orientation discrimination alone and age discrimination alone with the CJEU concluding that no discrimination on either ground could be established yet the link between the two grounds was clear. There was no sexual orientation discrimination because the age limit of 60 applied essentially to all persons regardless of sexual orientation, and no indirect discrimination arose either and there was no age discrimination as the age of 60 was merely fixing an age for an entitlement to a benefit which was excluded from the scope of Directive 2000/78/EC by virtue of Article 6(2) albeit that it was legally impossible for Mr. Parris to comply with this requirement as the law did not allow him to enter into a civil partnership in advance of this age. Advocate General Kokott, applying a much stricter interpretation of Article 6, and

[30] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22, n.d.

[31] Raphaele Xenidis, "Multiple discrimination in EU anti-discrimination law towards redressing complex inequality?", in *EU Anti-discrimination law beyond gender*, eds. Uladzislau Belavusau and Kristin Henrard (Oxford, Portland: Hart Publishing, 2018), 41–74.

[32] Ann Numhauser-Henning, "Elder Law and Its Subject: The Contextualised Ageing Individual", *Ageing and Society* 41, no. 3 (n.d.): 526. DOI: https://doi.org/10.1017/S0144686X19001284.

[33] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, 24 November 2016, Case C-443/15, ECLI:EU:C:2016:897.

a wider interpretation of indirect discrimination, was of the opinion that there was both age and sexual orientation discrimination in this case.

While no discrimination was established on either of the grounds, the CJEU was asked by the national court to consider whether Directive 2000/78/EC could recognise discrimination which arises as a result of the "*combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation*",[34] essentially a multiple discrimination claim. The CJEU did recognise that while discrimination could be based on several grounds, there was "*no new category of discrimination resulting from the combination of more than one of those grounds…that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established*".[35] This was essentially a very literal and strict interpretive reading of Directive 2000/78/EC. Advocate General Kokott in her opinion, however, was more alive to the injustice which would arise should this combined form of discrimination be allowed to continue. She stated that "[*t]he Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation. In addition, it will be necessary to take into account the fact that the contested requirement to enter into a marriage or civil partnership before the age of 60 has proved to be an insurmountable obstacle for an entire community in Ireland*"[36]. She went on to note that the absence of an express provision in Directive 2000/78/EC should not preclude the court from finding that such treatment could fall within the scope of the Directive.[37] She argued that it would be inconsistent with the very purpose of the Directive to exclude the possibility of a claim based on a combination of grounds. Her solution was to use the indirect discrimination provisions in Article 2(2)(b) and to assess "*whether the measure in question puts the persons concerned at a particular disadvantage specifically on account of a combination of two or more grounds for a difference of treatment*".[38] In her considered opinion, the provision of national law (the 60-year age limit) "*systematically excludes homosexual employees born before 1951 in particular – unlike all other categories of employee – from a survivor's pension of this kind because those employees would never have been able to satisfy the aforementioned condition even if they had wanted to*"[39] and is additionally, disproportionate.

The approach of Advocate General Kokott in the *Parris* case to the issue of intersectional discrimination is refreshing, even if it was not followed by the CJEU. The decision of the CJEU has been criticised for being a "*lost opportunity*"[40] and for rendering a decision which was ultimately "*not convincing*".[41] Many very

[34] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 79.
[35] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 80.
[36] Judgment of the Court *David L. Parris v Trinity College Dublin and Others,* para. 4. Opinion of Advocate General Kokott.
[37] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 152; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[38] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 154; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[39] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 156; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[40] Shreya Atrey, "Illuminating the CJEU's blind spot of intersectional discrimination in *Parris v Trinity College Dublin",* Industrial Law Journal 47, no. 2 (n.d.): 278. DOI: https://doi.org/10.1093/indlaw/dwy007.
[41] Dagmar Schiek, "On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)", *International Journal of Discrimination and the Law* 18, no. 2–3 (n.d.): 91, DOI: https://doi.org/10.1177/1358229118799232.

cogent and convincing arguments have been made, not least by Advocate General Kokott herself in *Parris*, that existing EU law can, with some creative functional interpretation of the existing anti-discrimination Directives, be interpreted so as to encompass both multiple and intersectional discrimination.[42] However, in *Parris*, and in other cases after it, the CJEU has categorically confirmed that intersectional and multiple discrimination will not be truly recognised unless and until there is a specific legislative mandate to do so. Achieving this in the context of multiple discrimination should not cause too many difficulties as a recent report indicates that there is a consensus within Member States that this form of discrimination should be included within the proposed Directive and indeed many Member States already litigate cases involving multiple discrimination.[43] Only one delegate in the recent discussions suggested the inclusion of intersectional discrimination but this may arise from a lack of understanding of the concepts rather than from any actual difficulty with the inclusion of such a form of discrimination. The *Parris* case is just one example of the variety of forms of intersectional discrimination which can arise and the injustices which can arise as a result. The proposed Directive should strive to include protections against both multiple and intersectional discrimination in order to ensure the fullest protection for everyone.

3.2 Exclusions

Article 3(2) of the proposed Directive attempts to reflect Article 6(2) of Directive 2000/78/EC. Both provide for the exclusion of certain age-specific measures from the scope of the legislation or proposed legislation. In the context of Directive 2000/78/EC this refers specifically to the fixing of ages of admission for occupational social security schemes 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. The proposed Directive in Article 3(2) attempts to provide almost mirror exclusions by expressly excluding the conditions of eligibility for social protection benefits and services, such as, for example, age limits for certain benefits, as well as conditions of eligibility for educational systems such as age limits for schools, scholarships and courses.

The fixing or setting of ages for access to certain benefits as an exception to the non-discrimination provisions have operated under Directive 2000/78/EC for many years and have engendered a variety of case law due to the complex nature of occupational pension and retirement benefits and the conditions with respect to eligibility. The overwhelming response of the CJEU in these cases has been to interpret any exceptions and exclusions to the anti-discrimination law provisions very strictly and literally so as to ensure the greatest protection for individuals against discrimination.[44] It should be assumed that a very similar approach will be adopted in the context of the exclusions in the proposed Directive.

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[42] Dagmar Schiek, "On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)", 90.

[43] European Commission, Directorate General for Justice and Consumers and European network of legal experts in gender equality and non-discrimination, *Age Discrimination Law Outside the Employment Field: 2020*, 120-122.

[44] Judgment of the Court *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S,* 26 September 2013, Case C-476/11, ECLI:EU:C:2013:590, para. 46.

In the case of *Dansk Jurist*,[45] for example, the CJEU gave a very literal interpretation to the meaning of Article 6(2) to ensure that it applied only in the cases exhaustively listed. Having established in that case that availability pay fell within the scope of the Directive 2000/78/EC and that it had caused a difference in treatment, the Member State had sought to argue that there was no discrimination as the availability pay fell within the exception outlined in Article 6(2). The CJEU held that Article 6(2) was only intended to apply to the cases exhaustively listed therein.[46] Referring to the purpose and general scope of the Directive, the fact that the principle of non-discrimination on grounds of age was a general principle of EU law and also protected by Article 21CFR, any exceptions to this principle must be interpreted strictly.[47] In this case then availability pay was not held to fall within the exception outlined in Article 6(2). Similar reasoning was employed in *Lesar*[48] albeit with the opposite effect for the claimant. The case involved a refusal by an employer to take account, for the purposes of calculating pension credits, of periods of apprenticeship and of work undertaken prior to the age of 18. The Austrian Government submitted that the scheme fixed the age from which members begin to pay contributions to the civil service pension scheme and acquire the right to receive a full retirement pension, and therefore would fall four-square within the exclusions of Article 6(2). The court agreed and noted that Article 6(2) was an "*expression of the freedom enjoyed by the Member States*"[49] to fix such ages.

Applying a similar rationale then the CJEU would likely be very resistant to include anything other than conditions of eligibility for social benefits or services and access to educational systems. However, this is rather widely drawn and could run into the difficulties experienced in the *Parris* case. Article 6(2) as a potential justification for a difference in treatment on grounds of age was also discussed in the case of *Parris* involving the exclusion of a civil partner from survivors benefit under an occupational pension scheme where such civil partnership occurred after the age of 60 years. Advocate General Kokott was adamant that Article 6(2) should not apply either directly or by analogy. Her view was that Article 6(2) only permits three types of independent derogations: (a) the fixing of age limits as a condition of membership of an occupational social security scheme; (b) the fixing of age limits for entitlement to retirement or invalidity benefits; and (c) the use of age limits in actuarial calculations.[50] The age limit at issue in these proceedings, therefore, could not fall under any of these categories directly. She admitted that a more generous reading of Article 6(2) could be adopted whereby the 60-year age limit could be viewed as a condition of membership or entitlement especially as it constituted a condition to be met to extend the benefit to the surviving civil partner, although

[45] Judgment of the Court *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, 26 September 2013, Case C-546/11, ECLI:EU:C:2013:603.
[46] Judgment of the Court *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, para. 39.
[47] Judgment of the Court *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, para. 41.
[48] Judgment of the Court *Franz Lesar v Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt*, 16 June 2016, Case C-159/15, ECLI:EU:C:2016:451.
[49] Judgment of the Court *Franz Lesar v Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt*, para. 44.
[50] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 123; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.

she found this "*unconvincing*".[51] This was due to the fact that as an exception to the non-discrimination provisions, Article 6(2) should be interpreted strictly and exhaustively and should not therefore be extended in this way by analogy.[52] Also an extension would not serve the purpose of the exception which is to ensure that a "*balance is struck between the probable life expectancy of the beneficiary (and thus the expected duration of the entitlement to benefits), on the one hand, and the contributions paid, on the other*".[53] The age limit here did not serve such a purpose. The decision of the CJEU, however, did not follow Advocate General Kokott in such a strict interpretation and held that the provision did apply by analogy to the situation at hand. It held, without much discussion, that by making the acquisition of the right to receive a survivor's benefit subject to the condition that the member marries or enters into a civil partnership before the age of 60, the measure lays down an age limit for entitlement to that benefit. Establishing this the CJEU could then conclude that the national rule "*fixes an age for access to the survivor's benefit*" and therefore falls under the exception provided in Article 6(2).[54]

The analogous extension of Article 6(2) appears to jar with the strict and literal interpretive approach previously adopted by the CJEU in these cases and opens up potential avenues for further extension of the provision to other analogous situations. A matter of concern in the proposed Directive is that Article 3(2) is drafted in wide terms with age limits being added as an example (rather than as an exhaustive list) of conditions which may be imposed in the context of conditions of eligibility to access certain social benefits and services or educational systems opening up the possibility of situations being included within the terms of the provision which may not have been in the contemplation of the drafters. The purpose of the provision is most likely to ensure that certain social benefits or services, e.g. access to a state pension or access to certain educational institutions, can be limited to certain age groups and that the public purse is not unnecessarily overburdened as a result. Taking a strict and purposive approach to the interpretation of Article 3(2), as Advocate General Kokott advocated in *Parris*, would ensure that only measures which meet these objectives will fall within Article 3(2). However, even with a strict and purposive interpretation of these provisions, the difficulties which have arisen in the context of Article 6(2) of Directive 2000/78/EC are likely to permeate the application of Article 3(2) and potentially be more prolific due to the wide drafting of the provisions. Therefore, in further drafting, to avoid uncertainty, it would be preferable to ensure that any exceptions or exclusions are listed exhaustively and that detailed consideration as to the necessity of their exclusion should be performed.

3.3 Artificial Intelligence

During the discussions held by the Slovenian Presidency on the proposed Directive, one delegation stressed the need to address the use of artificial intelligence

[51] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 129; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[52] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 130; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[53] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, para. 131; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.
[54] Judgment of the Court *David L. Parris v Trinity College Dublin and Others*, paras. 71-78; Opinion of Advocate General Kokott, ECLI:EU:C:2010:532.

(AI) in decision-making, particularly by service providers.[55] While the use of AI within many facets of life is not new, the accelerated pace of the infiltration of forms of AI in our everyday interactions is concerning given that the Fundamental Rights Agency have identified the very real potential for discrimination to occur during both its design and use.[56] Age discrimination arising from the use of AI is difficult to identify[57] and even more difficult to challenge given the complexity of its design and deployment.[58] Even under current EU law, namely Directive 2000/78/EC, challenging age discrimination in the context of AI raises a number of difficulties including the limited personal and material scopes of the existing laws,[59] establishing direct and indirect discrimination claims[60] and interpreting statistical data.[61] In addition, the unique formulation of age discrimination laws which allow for justification of both direct and indirect discrimination potentially gives a great deal of leeway to the those who use AI products in the age context.

As a demonstration of these difficulties, the CJEU recently considered a case involving recruitment in the employment context which had a hidden AI element. In *Kratzer*[62] the claimant was an unemployed lawyer, three years post qualification, who had recently returned from abroad to take up work in Germany. Struggling to obtain employment he applied for a trainee role with an insurance company only to be denied an interview by virtue of an AI system which was programmed only to proceed with applications from individuals who were essentially newly qualified or were soon to be qualified. Kratzer at that point sought compensation for age discrimination (and sex discrimination as the candidates ultimately appointed were all female). There was an assumption in the lower courts and in the referring courts that this was potentially a non-genuine applicant seeking compensation and the question for reference specifically focused on the scope of Directive 2000/78 and whether a person who in making an application for a post does not seek to obtain that post but only seeks the formal status of applicant with the sole purpose of seeking compensation falls within the definition of 'access to employment, to self-employment or to occupation' as required by Article 1. The CJEU held that they did not and more significantly, such behaviour may, if the conditions under EU law are met, be considered to be an abuse of rights.[63] These conditions include that: (a) it must be apparent from a combination of objective circumstances that, despite

[55] Directive on equal treatment (Article 19), Progress report, 14046/21.
[56] European Union Agency for Fundamental Rights, *#BigData: discrimination in data-supported decision making* (Luxembourg: Publications Office, 2018). DOI: https://data.europa.eu/doi/10.2811/343905.
[57] Ljupcho Grozdanovski, "In search of effectiveness and fairness in proving algorithmic discrimination in EU Law", *Common Market Law Review*, vol. 58, no. 1 (2021): 99–136. DOI: https://doi.org/10.54648/cola2021005.
[58] Sandra Wachter, Brent Mittelstadt, and Chris Russell, "Why fairness cannot be automated: bridging the gap between EU non-discrimination law and AI", *SSRN Electronic Journal* (2020). DOI: https://doi.org/10.2139/ssrn.3547922.
[59] Raphaële Xenidis, "Tuning EU equality law to algorithmic discrimination: three pathways to resilience", *Maastricht Journal of European and Comparative Law* 27, no. 6 (December 2020): 736–58. DOI: https://doi.org/10.1177/1023263X20982173.
[60] Grozdanovski, "In search of effectiveness and fairness in proving algorithmic discrimination in EU law".
[61] Wachter, Mittelstadt, and Russell, "Why fairness cannot be automated".
[62] Judgment of the Court *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, 28 July 2016, Case C-423/15, ECLI:EU:C:2016:604, n.d.
[63] Judgment of the Court *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, para. 44.

formal observance of the conditions laid down by EU rules, the purpose of such rules has not been achieved,[64] (b) it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage,[65] and (c) in determining (b) consideration is given to the purely artificial nature of the transactions concerned.[66]

Given the restrictive nature of the question for reference, not much can be made of the decision of the CJEU with respect to the use of AI in discrimination law cases. However, the treatment of the case on return at a national level is interesting in that it identifies some of the specific challenges that a lack of AI regulation can incur. In the national court (Hessisches Landesarbeitsgericht),[67] specific attention was paid to the burden of proof in such cases (lying firmly on the person raising the objection) and the requirement of objective circumstances from which it can be safely assumed that the applicant was seeking only the formal status of a job applicant. Examining the personal circumstances of Kratzer, the job advertisement and AI process involved, the national court came to the conclusion that he was a genuine job applicant and awarded him €14,000 in compensation including material damages. The national court noted that the firm specifically advertised for younger employees, essentially putting older people at a disadvantage. The words used, "*without significant experience*" in the advertisement, was indirectly discriminatory on grounds of age.[68] However, the question arises as to whether the same conclusion would have been reached in the absence of the discriminatory language used in the advertisement. If the advertisement had been silent as to the profile of applicants required but the AI system had still excluded applicants with more than a certain level of experience, age discrimination would still have existed but it may have been less obvious to both the applicant and the court. The case raises the spectre of the challenges that can arise in such cases.

The European Commission has proposed to regulate the use of AI in future legislation[69] and has reiterated the importance of anti-discrimination law with specific requirements that aim to minimise the risk of algorithmic discrimination.[70] Particular references to the importance of high quality data, protecting against bias and availability of information where there is a risk of discrimination are mentioned in the Recital but there is no specific provision in the regulation addressing non-discrimination. European Digital Rights has already warned that the proposed regulation will require major change if it is to effectively prevent against discrimination.[71] The principles identified in the proposed Regulation are a

[64] Judgment of the Court *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, para. 39.
[65] Judgment of the Court *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, para. 40.
[66] Judgment of the Court *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, para. 41.
[67] 'Urteil Vom 18.06.2018 – 7 Sa 851/17', n.d.
[68] Antidiskiminierungsstelle Des Bundes, „Ausgewählte Entscheidungen Deutscher Gerichte Zum Antidiskriminierungsrecht", n.d., 147, Ausgewählte Entscheidungen deutscher Gerichte zum Antidiskriminierungsrecht (antidiskriminierungsstelle.de).
[69] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artifical Intelligence (Artifical Intelligence Act) and amending certain Union legislative acts, {SEC(2021) 167 Final} - {SWD(2021) 84 Final} - {SWD(2021) 85 Final}, n.d.
[70] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artifical Intelligence (Artifical Intelligence Act) and amending certain Union legislative acts, sec. 1.2.
[71] EDRi, "EU's AI Law needs major changes to prevent discrimination and mass surveillance", 28 April 2021, EU's AI law needs major changes to prevent discrimination and mass surveillance -

good start though. A more consistent and effective approach, however, would be to include express protections within the proposed Directive on non-discrimination as this would be ensure that the principles are interpreted harmoniously with non-discrimination law and that they would be understood as belonging specifically to the corpus of non-discrimination law.[72]

4. Overcoming inconsistencies: the strange case of justifying direct age discrimination

An inconsistency which has emerged in the most recent drafts of the proposed Directive is the provision with respect to differences in treatment on the basis of age in Article 2(6). The previous versions of the proposed Directive understandably mirrored the unique provisions of Article 6(1) of Directive 2000/78/EC to the effect that even where a measure may constitute a difference in treatment on grounds of age, this shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Rather unsurprisingly, Article 6(1) of Directive 2000/78/EC has been one of the most litigated provisions before the CJEU with the court building up a rather large body of precedent with respect to its application and interpretation. It was then unsurprising that the proposed Directive would mirror this approach for the purposes of consistency.

However, in the most recent draft of the proposed Directive, an additional word has been added into the general justificatory provision in Article 2(6). More specifically, it states that "***preferential*** [Author's bold] *treatment based on age or disability may be permitted if it is […] objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary*". The main difference between Article 6 of Directive 2000/78/EC and the proposed Article 2(6) is the use of the term "*preferential*". This may mean that any difference in treatment which is not considered preferential would fall foul of the provisions of Article 2(6) and could not be justifiable under the proposed Directive. This would potentially be a major departure from the justificatory provision in Article 6 of Directive 2000/78/EC. The inconsistency between the two provisions is rather curious, if not adding an additional uncertainty to the anti-discrimination law on grounds of age.

The next question which arises then is what exactly is meant by "*preferential treatment*". The proposed Directive itself does not define what is meant by the term but Article 2(6-a) also refers to preferential treatment in the context of ensuring "*inclusion, integration or participation in society on an equal basis with others*" and gives some of examples of the form this may take including "*free access, reduced tariffs or preferential access for the protected groups*". It states that preferential treatment may be permitted as a "*justified, appropriate and necessary treatment*". This would suggest that the term "*preferential treatment*" is seeking to ensure that measures can be adopted which favour disadvantaged groups (such as older or younger persons) such as free public transport for retired persons to account for their reduced earnings. The Fundamental Rights Agency (FRA) have argued that such an approach allows

European Digital Rights (EDRi).

[72] The specifics of these provisions are beyond the scope of this article but should include, as a minimum, provisions not only on the use of such AI but also on its development and design.

for a collective approach to non-discrimination,[73] a fact that is supported in the context of age by Article 25 CFR. It warns though that such measures also should be strictly interpreted (as exceptions to non-discrimination protections) as "*a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination, by favouring members of a disadvantaged group*".[74] However, in EU law such terms have normally been associated with positive action for which separate provision is made in the proposed Directive (Article 5). This makes it unlikely then that this term was meant as a substitute for this. Additionally, the insertion of the word "*preferential*" into the original provision which did not include this term makes it more likely that Article 2(6) is still meant as a parallel exception to Article 6 of Directive 2000/78/EC albeit it with a slight, but not insignificant, difference in wording

If this is the interpretation to be given to Article 2(6) and if the purpose of this provision is to provide an exception to the non-discrimination provisions for "*preferential treatment*", what becomes of treatment which is not classified as such? This could mean that all other forms of differential treatment will be inconsistent with the proposed Directive. When preferential treatment is used there is normally a beneficiary (the favoured group) and a victim (the disadvantaged group). From a beneficiary's perspective, Article 2(6) provides a means to protecting their preferential treatment by allowing it to be justified by a legitimate aim and by demonstrating that it is proportionate, in the sense of being appropriate and necessary. From a victim's perspective, Article 2(6) provides a means of challenging such preferential treatment as not having a legitimate objective or as not being proportionate.

Recent cases under Article 6 of Directive 2000/78/EC provide an interesting lens through which to view this assessment, although it must be clarified that Directive 2000/78/EC only applies to the employment field. The *GN*[75] case before the CJEU involved the imposition of an age limit of 50 years for access to the profession of a notary (a matter which falls clearly within the scope of Directive 2000/78/EC). If Article 6 had a similar reference to preferential treatment, how would such a decision be determined? At first glance this does not appear to amount to preferential treatment. On the contrary, it appears that it would be disadvantageous to older workers as a form of direct discrimination on grounds of age. However, the favoured group here may be classified as those workers who are under 50 who may benefit from preferential access to the profession. Therefore, older workers would be arguing that such a measure is discriminatory and the younger workers would be defending it as a permissible exception to the non-discrimination provisions.

Difficulties, of course, may arise in trying to identify a legitimate aim for the preferential treatment, namely in this case preferring younger persons in the profession of notary. In the *GN* case, the Italian government argued that the age limit was imposed to ensure that the profession of notary was practiced in a

[73] Council of Europe, European Court of Human Rights, European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law: 2018 edition* (Luxembourg: Publications Office of the European Union, 2019), 70. DOI: https://data.europa.eu/doi/10.2811/792676

[74] Council of Europe, European Court of Human Rights, European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law: 2018 edition*, 71.

[75] Judgment of the Court *Ministero della Giustizia v GN*, 3 June 2021, Case C-914/19, ECLI:EU:C:2021:430, n.d.

stable manner for a significant period of time before retirement, so as to preserve the viability of the social welfare system. Additionally, it safeguarded the proper functioning of the notarial privileges, which entail a high degree of professionalism and finally, it facilitated the natural turnover and rejuvenation of the profession.[76] The question under Article 2(6) would be whether these objectives are legitimate. As the CJEU determined in the *GN* case itself, only the final objective could be considered a legitimate aim by ensuring operational capacity and age balance within the profession. The CJEU has always been very sensitive to such arguments explaining in *GN* that a balanced age structure can be beneficial as a means of encouraging recruitment, promoting access to the profession and promotion of young people, as well as improving personnel management and preventing disputes regarding fitness to work beyond a certain age.[77] In *GN*, the CJEU, however, found the measure (a maximum age for recruitment to the profession) to be disproportionate as there was no evidence to suggest there was high competition between the age groups which would warrant the imposition of an age limit. On the contrary, the evidence in fact suggested that age limits did not promote the access of young lawyers to the profession.[78] Even if wording akin to Article 2(6) was included in Article 6, it is likely the same decision would have been made especially if a strict and purposive interpretation is applied.

It appears then that the main difference between the provisions may not be too wide in practice albeit that the number and types of justifications which could be put forward by a Member State may be more limited and the assessment of appropriateness and necessity would be focused on how such measures might lead to advantages for the preferential group. However, inconsistencies in law are rarely positive and can lead to lack of uniformity in practice and more difficulties for claimants. For this reason, it is suggested that the original provisions of the proposed Directive should be restored with references to "*preferential treatment*" being removed, with such treatment being sufficiently covered by Article 5 on positive action. There is after all beauty in clarity.

5. Conclusions

This article started out discussing delay and the negative impact delay can have on individuals, particularly in the non-discrimination context. Throughout the article, attempts have been made to identify obstacles, omissions and inconsistencies which might further delay or hamper the implementation of the proposed Directive. With respect to obstacles, the article focuses on the current impasse over provisions relating to banking, insurance and financial service provision. It argues that the main challenge appears to come from delegations who still view age as a legitimate consideration in financial services and are struggling to understand or conceive how these once accepted norms of practice may now fall foul of the non-discrimination provisions. Understanding how the provisions will work, how it will impact individual lives in a positive way and also recognising the long-standing protections which exist in many Member States, and which many businesses have already adopted in a voluntary capacity, may prompt these delegations to think

[76] Judgment of the Court *Ministero della Giustizia v GN*, para. 31.
[77] Judgment of the Court *Ministero della Giustizia v GN*, para. 38.
[78] Judgment of the Court *Ministero della Giustizia v GN,* para. 39.

more carefully about the reasons for their opposition to this important provision. With respect to omissions, the article focuses on the need for inclusion of certain provisions to meet the needs of society namely intersectional discrimination, provisions on artificial intelligence and more specific provisions on exclusions from the scope of the Directive. These suggestions are made with a view to creating a proposed Directive which meets the needs of society, which is proactive in combatting discrimination and which is clear and certain in its terms. This latter aim is also the focus of the final section of the article which looks at a rather unusual inconsistency which has arisen in the most recent draft of the proposed Directive with respect to "*preferential treatment*" in Article 2(6). This provision was initially meant to mirror the existing exception to differential treatment on grounds of age in Directive 2000/78/EC but it has emerged as something more. Not positive action, (as this is covered by Article 5 of the proposed Directive), not a complete exception from non-discrimination law but rather a justification for certain forms of preferential treatment (which is also undefined). Additionally, the use of the term preferential suggests that treatments which are not preferential will fall foul of the proposed Directive, a major departure from established non-discrimination law on grounds of age.

Fourteen years on from the publication of the proposed Directive, a lot of work has been done to gain the unanimity needed to bring the Directive into the corpus of EU non-discrimination law. There is apparently though a lot more to do. It is hoped that this article goes some way to identifying where the challenges may lie and how these may be resolved. The sooner this can be achieved the better. In the interim, and this applies to all the grounds covered by the proposal, individuals are suffering unnecessary discrimination often with no, or very limited, recourse to justice. It is the delay in the adoption of this proposed Directive that is causing this injustice. Solutions can be found to the current impasses, but this requires better understanding of the impact of discrimination and courage. "*Discrimination law is controversial. It could not fail to be, given that it seldom keeps in step with society but often ends up one step ahead*".[79] It is time to take that step.

[79] Tarunabh Khaitan, *A theory of discrimination law* (Oxford, United Kingdom: Oxford University Press, 2015), 1.